STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE)

SCRUTINY REPORT 2

4 FEBRUARY 2013

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ROLE OF COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (a) is in accord with the general objects of the Act under which it is made;

  (b) unduly trespasses on rights previously established by law;

  (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

  (a) unduly trespass on personal rights and liberties;

  (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (d) inappropriately delegate legislative powers; or

  (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

BILLS—NO COMMENT

The Committee has examined the following bills and offers no comment on them:

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY AMENDMENT BILL 2012 (NO. 2)

This is a Bill for an Act to amend the *Aboriginal and Torres Strait Islander Elected Body Act (ACT) 2008* to bring the Act in line with the *Electoral Act 1992* and to allow declared candidates for positions on the Aboriginal and Torres Strait Islander Elected Body to effectively promote their candidature.

DISABILITY SERVICES AMENDMENT BILL 2012 (NO. 2)

This is a Bill for an Act to amend the *Disability Services Act 1991* to permit the relevant Minister to make (by approval) standards about the provision of services to people with disabilities, and to empower the Executive to make regulations for the Act and in particular in relation to any standards approved by the Minister. In addition, the *Human Rights Commission Act 2005* would be amended to permit a person to complain to the commission about a disability service if the person believes that the provider of the service has acted inconsistently with a standard.

FINANCIAL MANAGEMENT AMENDMENT BILL 2012 (NO. 2)

This is a Bill for an Act to amend the *Financial Management Act 1996* to require that any amendment of the performance criteria set out in a statement included in a proposed budget for a directorate, a prescribed territory authority or a prescribed territory-owned corporation for a financial year must be made jointly by the minister responsible by the agency and the Treasurer.

RACING AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Racing Act 1999* and the *Racing (Race Field Information) Regulation 2010* to provide (1) that the three bodies that control racing in the Territory (being primarily the thoroughbred racing, harness racing and greyhound racing clubs) have the ability to directly set and collect race field information charges from wagering operators; and (2) any such body has discretion to set the quantum of a race field information charge to be paid by a wagering operator.

BILLS—COMMENT

The Committee has examined the following bills and offers these comments on them:

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2012 (NO. 2)

This is a Bill for an Act to amend the *Children and Young People Act 2008* in ways that are of minor significance, including in relation to the use of force, and the conduct of strip and body searches, in relation to a young detainee.

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004* (HRA)

The amendments proposed concerning the use of force, and the conduct of strip and body searches, in relation to a young detainee would further restrict the lawful authority of youth detention officers, and in this way enhance the protection of HRA rights to liberty and security (section 18) and to the protection of children (section 11).

Comment on the Explanatory Statement

Brevity in explanation of the substance of a clause in the Bill is to be commended, but not to the extent of saying merely that the clause "sets a new provision" on some topic; (see the Explanatory Statement in relation to clauses 8 and 9). The substance of the provision should be carefully described. In relation to clause 4, the Explanatory Statement states that it "maintains current requirements around the use of force". The clause says nothing about the current requirements, for it simply adds to them in the way stated at the beginning of this explanation.

The Committee draws attention to the Committee's *Guide to writing an explanatory statement* which, for the present, can be found at http://www.parliament.act.gov.au/downloads/committee-business/Guide-to-writing.pdf.

CRIMES LEGISLATION AMENDMENT BILL 2012 (NO 2)

This is a Bill for an Act to amend the *Crimes Act 1900* and other legislation relating to the criminal law and sentencing to create some new offences, clarify the scope of existing offences, and to deal with matters concerning the administration of the criminal law and sentencing.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the HRA

Issues arising out of proposed sections 55A and 61A of the *Crimes Act 1900* (see clauses 9 and 10)

Lack of sufficient clarity in the statement of the offence

(For convenience sake, this comment deals only with proposed section 55A. The comments apply equally to proposed section 61A.)

At present, paragraph 67(1)(h) of the Crimes Act provides that:

> (1) For sections 54,[1] 55(3)(b), 60 and 61(3)(b) [of the Crimes Act] and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—
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> ...
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> (h) by the abuse by the other person of his or her position of authority over, or

[1] Subsection 54(1) provides that "[a] person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence ...".

professional or other trust in relation to, the person; ... .

It is critical to note that paragraph 67(1)(h) applies only where the prosecution proves beyond reasonable doubt that consent was given by reason of the abuse of the position of authority.

Proposed subsection 55A(1) of the Crimes Act would obviate the need for such proof by the prosecution in circumstances where (a) the defendant simply engages in sexual intercourse with a young person,[2] and (b) the young person is under the person's special care. That is, the prosecution would not need to prove beyond reasonable doubt that consent was given by reason of the abuse of the position of authority.

The Explanatory Statement outlines aspects of proposed section 55A and states a rationale for its introduction:

> This clause creates a new offence of sexual intercourse with a young person under special care. The purpose of this amendment is to make it an offence for adults who are in a position of authority in relation to 16-17 year olds to have sexual intercourse with those 16-17 year olds. Under section 20 of the Criminal Code 2002 the fault element for the physical element of 'the young person being in the adult's special care' is recklessness. This is the least restrictive measure available.
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> The new offence will provide a non-exhaustive list of 'position of authority' relationships. It will include: teacher in a school/student at that school; step-parent, foster parent or legal guardian/young person; religious instructor/young person; professional counsellor/young person; health professional/patient; police or prison officer/young person in care or custody; employer/employee; sports coach/young person.
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> While the age of consent is 16 years,[3] most young people aged 16-17 are at a much higher level of risk of being subject to harm than adults when they are in a relationship with adults in a position of authority due to the inherent power imbalance in such a relationship. Such a high level of risk of harm warrants the creation of a specific offence.

The Explanatory Statement also notes the scope for application of paragraph 67(1)(h) of the Crimes Act:

> Where a person cannot be said to be in a position of authority as captured by this offence but the person has nonetheless abused a position of trust or authority the consent rule at section 67(h) of the Crimes Act 1900 may apply. That is, where consent to sexual acts can be shown to be caused by the defendant's position of trust or authority that consent can be said to be negated and the defendant may be found guilty of sexual intercourse or acts of indecency without consent.

(The reference here (and at other places) to "a position of authority" is confusing. The concept employed in section 55A is that of a young person "under the [defendant's] special care".)

[2] For proposed section 55A, "young person" is defined to mean "a person who is at least 16 years old, but not yet an adult" (subsection 55(5)).

[3] This comment refers to subsection 55(2) of the Crimes Act, which provides: "A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years."

The Explanatory Statement (at pages 2-5) recognised that proposed section 55A engages certain rights stated in the HRA and that in some respects the limitation of those rights required justification under HRA section 28. The Committee refers Members of the Legislative Assembly to the Explanatory Statement, and adds the following.

Proposed section 55A may be seen to afford better protection for 16-17 year old young people from potential harm and thus give concrete expression to the HRA right of a child "to the protection needed by the child because of being a child" (HRA subsection 12(2)).

On the other hand, the Explanatory Statement appears to consider that proposed section 55A limits the right to protection by society of "the family" (HRA subsection 11(1)). This argument rests on a view that a consenting 16-17 year old and the person who has special care of the child constitute a "family". This is dubious, and the Committee suggests that the right limited by proposed section 55A is that found in HRA paragraph 12(a), this being the right of a person "not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily". Choice of sexual partner is generally accepted to be an aspect of a person's privacy.

Focussing on the right in HRA subsection 11(1), and also on the right to equality before the law stated in HRA subsection 8(3), the Explanatory Statement states a justification for its limitation that is based on HRA section 28.

Whether a limitation of a HRA right is justifiable is, ultimately, the question whether it is a reasonable limit "that can be demonstrably justified in a free and democratic society" (HRA subsection 28(1)). This is an open-ended test that requires the person making the assessment (such as a Member of the Assembly or a reviewing court) to make value judgements.[4] In the Territory, the person making the assessment must also take into account (but not as an exhaustive statement of relevant matters) the considerations stated in HRA subsection 28(2):

> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
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> (a) the nature of the right affected;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relationship between the limitation and its purpose;
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> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

[4] What this assessment involves is explained at length in *Scrutiny Report No 25* of the *6th Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. The Committee cited the words of Richardson J in *Ministry of Transport v Noort* [1992] NZLR 260 at 283) (adapting them to section 28) that the tests involved in the application of section 28 "necessarily involve public policy analysis and value judgements on the part of the Courts", and that "in principle [the inquiry] will properly involve consideration of all economic, administrative and social implications".

The Committee refers the Assembly to the points made at pages 2 to 5 of the Explanatory Statement. There is one aspect of this justification that warrants comment. The Explanatory Statement states that:

> [p]roviding a non-exhaustive list ensures that the court has discretion to determine further 'positions of authority' that are appropriately included within the definition but exclude positions where no authority, trust or special care relationship is created. This ensures that the principle of equality before the law is recognised and upheld. Principles of statutory interpretation provide that the list of 'positions of authority' is to give guidance to the courts and the community as to which people, by virtue of their position with respect to a young person, are prohibited from sexual relations with that young person and which people are not.

Proposed section 55A(1) employs the general concept of a young person under another person's special care. Proposed section 55A(2) then states that "without limiting subsection (1), that concept embraces 8 specific relationships. A court's "discretion" arises from the fact that it may find that some other relationship falls within the general concept of a young person under another person's special care.

This raises a rights issue in that a person who proposes to enter a consensual sexual relationship with a 16-17 year old will not be able to assess with much confidence whether he or she will commit an offence under proposed section 55A. Where the person did not fall within one of the 8 categories listed in subsection 55A(2), he or she would face the risk that a court might find that her or his relationship with the 16-17 year old fell within the undefined general concept of a young person under another person's special care. The relevant principles of statutory interpretation referred to by the Explanatory Statement may not be of much assistance in providing guidance.[5] With respect, that statement in the Explanatory Statement that "[s]pecifying certain roles as ones of 'special care' or a 'position of authority' sets a clear boundary" (page 5) is not correct. Apart from the eight listed categories, the boundary will be set on a case-by-case basis by the courts, and in many situations it will be difficult to make an informed guess as how a court will react.[6]

An alternative approach is to redraw subsection 55A(2) as an exhaustive statement by omitting the words "[w]ithout limiting subsection (1)". A defendant who did not fall within the eight listed categories but who was in a "position of authority over, or professional or other trust in relation to, the [16-17 year old]" might (with more difficulty) be prosecuted for a sexual offence as specified in subsection 67(1) of the Crimes Act. If it became apparent with experience that the eight listed categories are not adequate to serve the policy objective of proposed section 55A, the list may be modified by legislative amendment.

[5] The relevant principle referred to is probably that general words ("young person ... under the person's special care") in proposed subsection 55A(1)(b)) would be limited so as to apply only to persons of the same class (or genus) as those eight listed in subsection 55A(2). This is known as the *ejusdem generis* principle of interpretation. A problem with its application in this instance might lie in the difficulty in determining a class into which fall all of the eight listed categories. See generally, D Pearce and H Geddes, *Statutory Interpretation in* Australia (4th ed, 1996), at 100-102.

[6] It is also incorrect to refer to subsection 55A(2) as having specified some relationships as a "position of authority". This concept is not employed in the subsection.

In issue here is the principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[7] This principle is a dimension of the rule of law and might be based on the HRA right to liberty and security of the person (HRA subsection 18(1)). This principle does not contradict the policy objective of proposed section 55A, but has a bearing on how that objective can be achieved.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.

Burden of proof issues

Dealing with clause 9 (at page 10), the Explanatory Statement states that "[i]t will be a defence to the new offence if the offender[8] can prove on the balance of probabilities that he/she believed the victim was over 18 or if the defendant was not more than two years older than the young person at the time. This latter defence means that a young person cannot be found guilty or convicted of this offence. Marriage will also be a defence to the new offence".

This is not correct and runs together two quite different forms of defence. First, proposed subsection 55A(3) provides that the offence provision in subsection 55A(1) "does not apply" in two circumstances, being that the defendant was married to the 16-17 year old at the time of the alleged offence, or, alternatively, is not more than two years older than the 16-17 year old. By reason of section 58 of the Criminal Code, the defendant need discharge only an evidential burden of proof in respect of these matters; that is, he or she need only point to evidence which provides a reasonable basis for a conclusion that one or other of these factual circumstances exist. If the trial judge finds that this burden has been discharged, the prosecution must then prove beyond reasonable doubt that the factual circumstance relied on by the defendant does not exist. The defendant does not need to prove anything on the balance of probabilities.

In the second place, proposed subsection 55A(4) provides that "it is a defence" to a charge under the offence provision in subsection 55A(1) "if the defendant proves that the defendant believed on reasonable grounds that the young person was at least 18 years old". By reason of section 59 of the Criminal Code, the defendant must discharge a legal burden of proof in respect of these matters; that is, he or she must, prove on the balance of probabilities that the young person was at least 18 years old (at the time of the alleged offence presumably).

Both of these forms of defence limit the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law (HRA subsection 22(1)). There needs to be a demonstration by the Attorney-General that this limitation is justifiable under HRA section 28.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.

[7] See generally the discussion in *Report No 6* of *2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20* of the *5th Assembly*, concerning the Criminal Code 2002, and *Report No 20* of the *6th Assembly*, concerning the Casino Control Bill 2005. See too the Committee's comments in this report on the Public Unleased Land Bill 2012.

[8] The Committee notes that the more appropriate language would be "the defendant" inasmuch as it cannot be said that there is an "offender" in relation to a particular charge until there is a verdict of guilty. In this context, the Explanatory Statement is referring to a stage of the trial prior to verdict.

Clause 13 of the Bill: whether a penalty is so grossly disproportionate to the offence, that it may be found to be "cruel, inhuman or degrading"

The Explanatory Statement states that "[clause 13] will omit the destroying or damaging property offence at section 116(3) and will remake the offence at section 116A". As far as the Committee can see, the clause does not do this; rather, it proposes that the existing subsection 116(3) be replaced with the version set out in clause 13. There appears to be no proposal for a new section 116A.

The Committee accepts the statement in the Explanatory Statement that:

> [i]n the context of the imposition of maximum penalties by Government, the right at section 10(1)(b) [of the HRA] not to be treated or punished in a cruel, inhuman or degrading way may be engaged where the prescribed penalty is so grossly disproportionate to the offence, that it may be found to be 'cruel, inhuman or degrading'.

At pages 11-13, the Explanatory Statement offers a careful justification for the prescription of the penalty attached to proposed subsection 116(3), and the Committee refers Members to this discussion.

The Committee draws these matters to the attention of the Assembly.

Clause 23: whether the imposition of a legal burden of proof on a defendant amounting to disproof of an element of a crime is a justifiable limitation on the presumption of innocence (HRA subsection 22(1))

The offence stated in subsection 612(5) of the *Criminal Code 2002* contains three major elements, being:

(1) that a person possesses a commercial quantity of a controlled precursor (the opening words of subsection 612(5));

(2) with the intention of using any of it to manufacture a controlled drug (paragraph 612(5)(a)); and

(3) with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug (paragraph 612(5)(b)).

The maximum penalty prescribed where each of these elements exists is 1,500 penalty units, imprisonment for 15 years or both.

Ordinarily, in the case of such a serious offence, the prosecution would be required to prove beyond reasonable doubt to the fact-finder (a jury, or a judge-alone) that each element existed. This result gives effect to the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law (HRA subsection 22(1)).[9] The prosecution cannot simply allege that the defendant did something, or had a certain state of mind when doing something, and then leave it to the defendant to prove that he or she did not do that thing or had that state of mind.

[9] *Howe v The Queen* (1980) 55 ALJR 5 at 7 (High Court).

Where however a statute states that it is to be presumed, unless the contrary is proved, that the defendant did something, or had a certain state of mind when doing something, an allegation by the prosecution is enough to put the defendant to disproof (usually to the standard of the balance of probabilities) of what is alleged. This is what is proposed by clause 23 of the Bill, which proposes to insert a new section 612A in the Criminal Code. Its effect would be that where the prosecution proves that where the first two elements of the offence in subsection 612(5) of the Code are proved by the prosecution to exist, "[i]t is presumed, unless the contrary is proved", that the third element exists, that is, that "the defendant had the intention or belief about the sale of the drug required for the offence".

Thus, in relation to proof of the third element in subsection 612(5) of the Code, the right to be presumed innocent is not merely limited but completely displaced. It does not follow that the Supreme Court of the Territory would make a declaration under HRA section 32 that proposed section 612A was not consistent with the right in HRA subsection 22(1). To adapt the words of Crennan and Kiefel JJ in *Momcilovic v The Queen*:[10]

> [HRA section 28] is an acknowledgement that [HRA] rights are not absolute or always completely consistent with each other. ... . It would appear to follow that if a limitation or restriction effected by a statutory provision is demonstrably justified, a [HRA] right is to be read and understood as subject to such a limitation or restriction.

In relation to proposed section 612A, the court (and the Legislative Assembly) might require a strong demonstration of justification, given the heavy penalty prescribed and the complete displacement of the right.

At pages 17-22, the Explanatory Statement provides a lengthy justification that makes reference to the framework of HRA section 28. The Committee refers Members to this statement, and offers the following comments.

The primary justification offered is that reversal of the burden of proof will make it easier for the prosecution to obtain a conviction of the offence in subsection 612(5) of the Code. Reference is also made to the general purpose of section 615 in the scheme of Territory drug control laws. It is for the Assembly to consider what weight should be attached to these considerations.

The Explanatory Statement makes reference to the law in other Australian jurisdictions. When assessing this matter, regard must be taken of the absence in all Australia jurisdictions (except Victoria and to a more limited extent the Commonwealth) of a law such as the HRA. It is moreover difficult to make comparisons between the Territory and another jurisdiction without taking into account both the legal and social contexts in the two jurisdictions. That is, what may appear to be similar laws might operate quite differently when account is taken of these contexts.

It may also be thought insufficient to point to other Territory laws that are similar to the law under discussion, whether or not these laws were enacted before or after the HRA commenced to operate. It may well be that these other laws are also open to objection as limiting an HRA right, and a history of non-observance of the HRA cannot weaken the force of the protection it affords to the rights it states.

[10] [2011] HCA 34, para 571 (quoted at page 20 of the Explanatory Statement).

Noting the factor stated in HRA, paragraph 28(2)(e), the Explanatory Statement properly poses the question whether there are any less restrictive means reasonably available to achieve the purpose of proposed section 612A. That is, are there means that are less restrictive of the right to be presumed innocent?

The Committee has noted that reference to other Territory laws may not bear very much on this issue, and the fact that the penalty attached to subsection 615(5) is not as severe as is the case with other drug offences does not seem to have much bearing.

The more obvious question is whether the less restrictive measure of placing on a defendant only an evidential burden of proof in relation to the third element of the offence in subsection 615(5) would not go at least some way to serve the purpose of proposed section 612A and at the same time make little inroad on the right to be presumed innocent.

The Committee recommends that the Attorney-General respond to this specific question.

Whatever matters are thought to justify reversal of the burden of proof, in the end their force must be seen in comparison to the weight to be attached to the value expressed in the right to be presumed innocent.

The Committee draws these matters to the attention of the Assembly.

DIRECTORS LIABILITY LEGISLATION AMENDMENT BILL 2012

This is a Bill to amend a number of Territory laws to change the nature of the liability of directors and managers of corporations.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the HRA

Enhancement of the right to be presumed innocent in relation to various offences concerning directors and managers of corporate bodies: HRA subsection 22(1)

At page 1, the Explanatory Statement notes that under the general law a person (including a director or manager) can be prosecuted as an accessory to the commission of an offence by a corporation (accessorial liability). In addition, several laws impose liability directly on a director manager, and the Explanatory Statement identifies three types of such laws.

Type 1 "requires the prosecution to prove every element of the offence alleged to have been committed by the director or manager, including the element (the responsibility element) that he or she failed to take all reasonable steps to prevent or stop the commission of the offence by the corporation".

Type 2 "provides that the responsibility element is to be presumed without the need for further proof, unless the director or manager adduces or points to evidence that suggested a reasonable possibility that there was no such failure to take reasonable steps".

Type 3 "provides that the responsibility element is to be presumed without the need for further proof, and that the director or manager bears the burden of proving, on the balance of probabilities, that there was no such failure to take reasonable steps".

Types 2 and 3 clearly limit the right to be presumed innocent stated in HRA subsection 22(1). The main objective of this Bill is to amend a number of Territory laws that impose these kinds of criminal liability and restate them as type 1 offences.

The Committee raises no matter of concern with the Bill. It notes that the Explanatory Statement approached the HRA issue by consideration of HRA subsection 18(1) and reached the same general conclusion.

The Committee draws these matters to the attention of the Assembly.

PUBLIC UNLEASED LAND BILL 2012

This Bill would repeal the *Road and Public Places Act 1937* and in its place enact a regime that regulates the use of public land. In particular, it would provide for a permit and approval system for the use of public land, providing a broad framework which allows for administrative arrangements that can support and promote the object of the Bill which is facilitating the use of public unleased land while ensuring that the amenity and natural value of public spaces is not diminished.

Do some provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?—(term of reference (c)(ii))?
Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the HRA

In *Scrutiny Report No 47* of the *7th Assembly* the Committee of the 7th Assembly considered the Public Unleased Land Bill 2011, which is in nearly identical terms to this Bill, and drew attention to a number of matters. The Chief Minister responded to the Committee's report in a letter of 2 April 2012 (appended to *Scrutiny Report No 51* of the *7th Assembly*). The Committee will however state the substance of some of its concerns and the Minister's response. On the other hand, the Committee notes that in several respects the Bill now before the Assembly differs from the 2011 Bill by reason that the government has responded positively to points raised by the Committee. It is gratified that such close attention has been paid to its earlier recommendations.

Uncertainty concerning the scope concept of the "use" of public unleased land

The Committee pointed out that the definition of the term "use, public unleased land" was very wide. Subclause 41(1) states:

> a person uses public unleased land if the person carries on an activity on the public unleased land in a way that excludes some or all members of the public from the place.

Appended to subclause 41(1) is a note providing several examples of such a use, but they do not address more commonplace occurrences, such as the parking of a car on a nature strip outside a house. Whether such an activity is a use turns on the interpretation to be given to the words "carr[y] on an activity", "excludes" and "place". Is the fact that a member of the public cannot walk on the area of the nature strip occupied by the car sufficient to amount to a "use" by the car-owner?

The Chief Minister's response did not directly respond to a similar example posed by the Committee, but stated a general principle to guide interpretation. The response said that:

> [e]xclusivity in the right to occupy land indicates a level of control that is a question of fact. Most people utilising public unleased land will not be using it as defined in the bill; that is, they will not have control of the land in a way that excludes some or all members of the public.

With respect, it is hard to see how a "control" test can be built into the definition in subclause 41(1).[11] The issue is not whether a person has controlled the land, but whether he or she has "carried on an activity" on it "in a way that excludes" the public from a "place".

The Committee invites the Minister for Territory and Municipal Services to explain how the definition in subclause 41 would apply to the particular example posed above.

There is a critical rights issue at stake here. To adapt slightly what the Committee said in *Scrutiny Report No 20* of the *7th Assembly*, concerning the Crimes (Serious Organised Crime) Amendment Bill 2010:

> The vagueness of [an element of the crime] might lead to a conclusion that the offence provisions which turn in part on its application lack a sufficient degree of certainty. There are many precedent cases that state a principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[12] The principle was expressed long ago by the United States Supreme Court thus:
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> > [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[13]

This principle might be found to be an element of one or more rights stated in the HRA (such as the right to liberty and security of the person: HRA subsection 18(1)).

Another way to state the objection is to see it as a delegation of legislative power to a court called upon to interpret the vague term, or, at least, as requiring the court to make "political" or "value" judgements.[14]

In its report to the 7th Assembly, the Committee suggested that provision might be made for a statutory instrument to refine the scope of the definition. The Committee notes that subclause 41(3) of this 2012 Bill empowers the Minister to "declare that an activity on public unleased land is, or is not, ***use*** of the public unleased land for this part".

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[11] In another part of her response, the Chief Minister indicated that a relevant factor as whether the use of the land was "routine". Again, it is difficult to see how the application of subclause 41 can be limited in this way.

[12] See generally the discussion in *Report No 6* of *2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20* of the *5th Assembly*, concerning the Criminal Code 2002, and *Report No 20* of the *6th Assembly*, concerning the Casino Control Bill 2005.

[13] *Lanzetta v New Jersey* (1939) 306 US 451, quoting *Connally v General Construction Co*., 269 U.S. 385, 391.

[14] In *Taikato v R* [1996] HCA 28, the majority of the High Court said that "under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing".

The Committee commends the Government for responding positively to the Committee's suggestion, and it is for the Assembly to consider whether subclause 41(3) addresses sufficiently the point raised above. In her letter of 2 April 2012 the Chief Minister noted that "the Directorate, to support the legislative framework, is developing policy and guidelines to explain the concept of exclusivity to the public at large and when and where permits will be required". The Committee notes that greater certainty would be achieved were such guidelines to be made into law by Ministerial declaration.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister for Territory and Municipal Services inform the Assembly on the progress made towards developing guidelines.

Strict liability offences

The Bill would create a number of strict liability offences. The Committee agrees with the comments in the Explanatory Statement (at pages 3 and 5) on the compatibility of these provisions with the presumption of innocence stated in subsection 22(1) of the *Human Rights Act 2004*.

The Committee notes however that while these comments make reference to the availability of the defence of mistake of fact (*Criminal Code 2002*, section 36, and see paragraph 23(1)(b)) to a person charged with a strict liability offence, there is no reference to the availability of the defence of intervening conduct or event (*Criminal Code 2002*, section 39, and see paragraph 23(3)). As the Department of Justice and Community Services has noted, the defence in section 39 will cover situations not covered by section 36, and permit a variant of the defence of taking reasonable precautions. The defence in section 39 is a significant qualification to the derogation of the presumption of innocence that is brought about by the creation of a strict liability offence. The Committee's view is that the availability of this defence should be signalled in an Explanatory Statement.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Enforcement of the scheme of the Bill

Part 4 of the Bill provides the enforcement of the various offences proposed by the Bill. Again, the Committee agrees in general with the comments in the Explanatory Statement (at pages 4-5) on the compatibility of these provisions with the right to privacy (HRA paragraph 12(a).

There are some provisions that Members of the Assembly may wish to consider.

Subclause 92(2) requires a person to provide their name and address to a police officer where the latter believes on reasonable grounds that a person (a) has committed, is committing or is about to commit an offence against this Act; or may be able to assist in the investigation of an offence against this Act. At common law a person is not obliged to assist the police in this way. The Committee notes that such a power is now commonly conferred on police and that in this particular instance the relevant officer must believe (and not simply suspect) that a direction is warranted.

Clause 96 provides that in defined circumstances a police officer may direct a person to leave public unleased land. The Committee refers members to the Explanatory Statement comment (at pages 4-5) on this power and its compatibility with HRA section 13 (freedom of movement).

Paragraph 107(1)(f) provides that an authorised person may

> at any time, enter premises if the authorised person believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary.

A power vested in an official to conduct a warrantless search raises a question as to its compatibility with the right to privacy (HRA paragraph 12(a)) and should always be addressed specifically in an Explanatory Statement. This Explanatory Statement makes no reference to this power.

The Committee draws this last matter to the attention of the Assembly and recommends that the Minister respond.

PROPOSED GOVERNMENT AMENDMENTS—CRIMES LEGISLATION AMENDMENT BILL 2012 (NO. 2)

The Committee has examined amendments to clauses 5 and 8 of the Crimes Legislation Amendment Bill 2012 (No. 2) and has no comment to make in relation to them.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 16 January 2013, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2012-126, being the Attorney General (Fees) Amendment Determination 2012 (No. 3).
- The Minister for Health, dated 23 January 2013, in relation to comments made in Scrutiny Report 1 concerning the Health (National Health Funding Pool and Administration) Bill 2012 (No. 2).

The Committee wishes to thank the Attorney-General and the Minister for Health for their helpful responses.

COMMENT ON GOVERNMENT RESPONSE

By letter of 23 January 2013, the Minister for Health responded to the comments of the Committee in Scrutiny Report No. 1 about provisions in the Health (National Health Funding Pool and Administration) Bill 2012 (No 2). The Committee has further comment to make concerning clause 39 of this Bill, which provides:

> **39 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
>
> (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

Subclause 39(1) is a standard provision that raises no issue under any of the Committee's terms of reference. Subclause 39(2) is a "Henry VIII" clause inasmuch as it empowers the Executive, by a subordinate law (in this case, a regulation), to alter a statute passed by the Legislative Assembly. The Chief Minister's response offers a justification for subclause 39(2).[15]

The Committee has consistently raised concerns about a provision such as subclause 39(3). Among other effects, this clause purports to preclude the Assembly—at a time later than the date on which this Bill becomes law as an Act—from passing into law a provision that would qualify the regulation-making power of the Executive under subclause 39(2) of this Bill. Subclause 39(3) thus attempts to "entrench" a regulation made under subclause 39(2).

The Committee's concern is that (subject to an exception noted below) an Act passed by the Assembly cannot have the effect of limiting the legislative power of the Assembly in this way. The legislative power of the Assembly flows from and is limited by the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth). Subsection 22(1) of this Act provides that (subject to other provisions in the Act), "the Assembly has power to make laws for the peace, order and good government of the Territory". It follows that the Assembly cannot make a law that would in any respect limit its power to make a law within the scope of the concept of "peace, order and good government", for to do so would contradict the full scope of this power. As a matter of law, there is probably no practical limit to the range of subjects encompassed by this concept,[16] and it would certainly extend to the subject of transitional matters as employed in subclause 39(1).

This conclusion is reinforced by section 26 of the Self-Government Act, for it provides that a Territory law may be entrenched if it has been passed into law in accordance with the procedure stated in section 26. In brief, any such law (such as subclause 39(3)) has effect only if approved by means of a referendum by a majority of the electors of the Territory.

The Chief Minister's response is that "this type of provision is commonly used in legislative drafting to make it clear that any provision of the type foreshadowed {that is, a regulation made under subclause 39(2)} has the force of law and prevails over other Territory laws in the event of any inconsistency". The Committee hopes that its comments above make it clear that a regulation under subclause 39(2) cannot prevail over a provision of an Act (a later Act) passed into law after the commencement of any Act that results from the Health (National Health Funding Pool and Administration) Bill 2012 (No 2), or over any subordinate law made pursuant to a later Act.

[15] The Committee commented extensively on such clauses in *Scrutiny Report No. 4* of the *7th Assembly*, in relation to a clause in the First Home Owner Grant Amendment Bill 2009, and see too *Scrutiny Report No. 1 of the 7th Assembly*, in relation to the Development Application (Block 20 Section 23 Hume) Assessment facilitation Bill 2008.

[16] As Ann Twomey notes, "the orthodox view is that the reference to 'peace, welfare and good government' [in the *Constitution Act 1902* of NSW] does not place a limitation on the subject-matter upon which a State may enact laws": *The constitution of New South Wales* (2004) at 170.

The Committee adheres to its view that subclause 39(3) cannot take effect according to its terms, and is misleading.

Jeremy Hanson, CSC, MLA
Chair

4 February 201

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 1, dated 29 November 2012

Disallowable Instrument DI2012-232—Long Service Leave (Portable Schemes) Security Work Declaration 2012

Subordinate Law SL2012-36—Food (Nutritional Information) Amendment Regulation 2012 (No. 1)

Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Jeremy Hanson CSC MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Hanson

Thank you for your Committee's Scrutiny Report number 1, dated 29 November 2012. The report commented on the Attorney General (Fees) Amendment Determination 2012 (No 3).

The Committee sought my advice as to why it was necessary to amend the Attorney General (Fees) Determination 2012 so soon after it was made.

Following consultation with stakeholders when the fee determination was notified, I amended the fee determination to exempt not-for-profit corporations and small businesses from paying corporate court fees. It is not the Government's practice to consult on the detail of considerations of Budget Cabinet. Accordingly it was not possible to consult with stakeholders before the fee determination was notified. I listened to concerns raised and, while I am confident that the fee waiver policy could have addressed issues of genuine hardship for small businesses and not-for-profit organisations, this variation to the determination is simpler to administer and addresses the concerns raised.

The changes mean that not-for-profit corporations, and corporations with a turnover of less than $200,000 in the previous financial year, will be exempt from the corporate court fees. Instead, they will pay the same fees as individual litigants. This amendment was made before the fee determination came into effect on 1 July 2012.

Yours sincerely

Simon Corbell MLA
Attorney-General
16.1.13

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Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

Mr Jeremy Hanson CSC, MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Hanson

I am writing in response to the comments in the Scrutiny Report Number 1 of 29 November 2012 about provisions in the *Health (National Health Funding Pool and Administration) Bill 2012* (the Bill).

I note that the Committee has referred to the comments made previously by the Scrutiny of Bills Committee of the 7th Assembly in Scrutiny Report No 54 dated 6 August 2012. The Committee correctly points out that the previous Committee had considered a bill in very similar terms to this Bill, and had drawn attention to two matters:

(1) the omission to provide for natural justice (or procedural fairness) in relation to the suspending and ending of the appointment of the administrator of the national health funding pool (see clauses 9 and 10 of the Bill); and
(2) the limitation on the presumption of innocence (*Human Rights Act 2004* (the HRA) subsection 22(2)) and the right to reputation (HRA section 12) that arises where a suspension may be based merely on the fact that the administrator has been accused of an offence (see paragraph 9(2)(c)) of the Bill.

The Committee also notes that the Minister for Health responded to the previous Committee's report in a letter of 13 August 2012 (which is appended to Scrutiny Report No 55 of the 7th Assembly dated 20 August 2012). I have nothing further to add to that response in respect of the matters mentioned above.

The Committee, however, has made some additional comments relating to clause 39 of the Bill which do require a response. Clause 39 of the Bill makes provision for transitional regulations in a form commonly found in Territory statutes and which are often referred to as Henry VIII clauses.

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The Committee noted (a) that there should in every case be a justification offered for provision for the Executive to modify a statute by regulation, and (b) that a provision that such a regulation "has effect despite anything elsewhere in this Act or another territory law" (as found in subclause 39(3) of this Bill) was misleading in that a regulation could not have this effect. I offer the following response in relation to the Committee's comments regarding clause 39 of the Bill.

The power in clause 39 is limited to the extent that the regulation can only amend part 6 of the Bill (Transitional) and to the extent that it expires two years after commencement. This power is appropriate to enable the Executive to deal quickly with any unanticipated transitional issues that might arise as a consequence of enacting this legislation.

In regard to the Committee's comments regarding subclause 39(3), this type of provision is commonly used in legislative drafting to make it clear that any provision of the type foreshadowed has the force of law and prevails over other territory laws in the event of any inconsistency.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
23 JAN 2013