STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills
and Subordinate Legislation Committee)

Scrutiny Report

9 DECEMBER 2003

Report 41

Terms of reference

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

(a) 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):

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

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

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

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

(b) 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

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

  (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(d) 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.

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

Legal Adviser: Mr Peter Bayne
Secretary: Mr Tom Duncan
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

Role of the 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.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment on them.

Public Sector Management Amendment Bill 2003

This Bill would amend the *Public Sector Management Act 1994* to provide for the transfer of Totalcare staff to the ACT Public Service.

Bills - Comment

The Committee has examined the following Bills and offers these comments on them.

First Home Owner Grant Amendment Bill 2003

This Bill would amend the *First Home Owner Grant Act 2000* to restrict the circumstances in which the First Home Owner Grant may be paid to applicants who are under 18 years of age, and to introduce a six-month residency period which applicants must satisfy for entitlement to the grant.

Para 2(c)(i) – undue trespass on rights and liberties

Retrospective operation of the law

So far as concerns the circumstances in which the Grant may be paid to applicants who are under 18 years, the Explanatory Statement notes that

> that this change to the … Act [will] be made retrospective to 14 October 2003; the day the [Commonwealth] Treasurer announced the Government's intention to impose an age limit. This means that the age limit will apply to any application lodged on or after 14 October 2003. If the grant has been paid under such applications to a person under the age of 18 years old, a repayment of that grant will not be sought because of a failure to meet the age limit.

The Committee notes that it is common for laws having financial effects to be made retrospective on this basis.

The Committee advises the Assembly that there is no undue trespass on rights.

Para 2(c)(iii) - review of administrative decisions

Review of administrative decisions by the Commissioner

The Committee notes that several provisions in the Bill would confer administrative discretion on the Commissioner for ACT Revenue.

It notes that there is no provision for review of these discretions. The Committee also notes however that the provisions of the Act regarding appeals would appear to permit an appeal to the Administrative Appeals Tribunal against significant decisions of the Commissioner.

The Committee advises the Assembly that there is no undue trespass on rights.

Parentage Bill 2003

This Bill would repeal the *Artificial Conception Act 1985,* the *Birth (Equality of Status) Act 1988* and the *Substitute Parent Agreements Act 1994* and largely re-state their provisions in the bill. The amendments made (together with amendment of the *Adoption Act 1993*) are directed towards facilitating persons in same-sex relationships becoming parents of a child.

Para 2(c)(i) – undue trespass on rights and liberties

Parentage orders and their consequences

The law as stated in this Act, when read with cognate laws such as the *Adoption Act 1993* and the *Legislation Act 2001*, is very complex. Questions such as - who are my parents?, or who are my children? - will in some circumstances be very difficult to answer. These complexities result from changing perceptions of who may constitute a family, and the availability of medical procedures that enable children to be born other than through a man and a woman having sexual relations.

The Committee has not attempted a rights analysis of this Bill as a whole. Much of it is based on existing law, and in any event the Committee does not have the time or resources to make a full study of the provisions of the Bill.

It does, however, draw attention to two particular aspects of the Bill in respect of which there appears to be a question whether its provisions might be an undue trespass on personal rights.

Existing provisions of the *Artificial Conception Act 1985* deal with the parentage of children who are conceived as a result of some procedure that does not involve the genetic male ancestor having had sexual relations with the genetic female ancestor. One of their effects is to give legal recognition to the social, rather than to the biological parents of the child thus born. This has consequences in terms of the child and of those connected socially with the child (the social parents) in respect of who can make medical decisions concerning the child, and in respect of how various laws operate (such as those dealing with inheritance and maintenance).

The present law operates only to recognise as a parent the woman who gives birth to the child and her male partner (if any). The law does not recognise same sex relationships in the same way as it recognises opposite sex relationships; see generally, *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT* (2002), 17-19.

Provisions of the Bill address this issue. For example, where woman A, who is in a domestic partnership with woman B, undergoes, with the consent of B, a procedure that involved the use of semen from man X, (and which led to the birth of child C),

- the effect of subclause 11(4) of the Bill would be that B was conclusively presumed to be a parent of C, and

- the effect of subclause 11(5) of the Bill would be that X was conclusively presumed **not** to be a parent of C.

Similarly, if the ovum used in the procedure was produced by another woman (say Q), Q is conclusively presumed **not** to be the mother of any child born as a result of the pregnancy: subclause 11(3).

In these examples, the 'social parents' A and B are conclusively presumed to be parents, (and it should be noted that by clause 14, a child cannot have more than 2 parents at any one time). On the other hand, those (X and/or Q) who are the 'genetic parents' of C cannot be her or his parents.

The Committee raises for consideration the issue of whether in addressing the interests of the social parents, there has been a failure to pay sufficient attention to the interests of the child. The rights of the child that are implicated here are noted below. There seem to be at least two contexts in which this could be a live issue.

As a preliminary, it is to be noted that under clause 15, a person, whether or not they are still a child, may apply to the Supreme Court for a parentage declaration that a particular person is a parent. It is, however, apparent from the examples just given that in some circumstances the child could not nominate as the relevant parent a person to whom they are genetically related. (In the above examples, C could not nominate X and/or Q.)

Lack of a mechanism whereby the child may obtain information about their genetic ancestors

The Committee may not have understood how this bill will interact with the *Adoption Act 1993*, but it appears to it that it does not provide a mechanism whereby the child may obtain information about their genetic ancestors. The comments below rest on this assumption.

This issue has been addressed recently by an English court which applied provisions of the *European Convention on Human Rights*. In *Rose v Secretary of State for Health* [2002] EWHC 1593 (Admin), the applicant sought information about the man who had donated the sperm that was fertilised in the body of her mother. She had no information of any kind about this man. She described the importance of the information to her in the following terms:

> "I feel that these genetic connections are very important to me, socially, emotionally, medically, and even spiritually. I believe it to be no exaggeration that non-identifying information will assist me in forming a fuller sense of self or identity and answer questions that I have been asking for a long time. I am angry that it has been assumed that this would not be the case, and can see no responsible

> logic for this (given the usual pre-eminence accorded to the rights and welfare of the child), unless it is believed that if we are created artificially we will not have the natural need to know to whom we are related. I feel intense grief and loss, for the fact that I do not know my genetic father and his family. There is no closure for me, as I assume these people are not dead. In addition there is no comfort for this, as there is little social recognition of this significance or grief. I live with the uncertainty of a reunion being possible, though unlikely, and of even unknowingly passing my biological father or siblings in the street. I wonder if we would recognise each other. I wonder if they think of me, and if they do how and where they would communicate this.
>
> Lack of knowledge and openness also forces me into unhappy or inappropriate pigeon holes. I have been using my social father's medical history as a child (even though it has no conceivable relevance to me), and, if it were not for my parents' honesty, I would have been led to do so for the rest of my life. I am fortunate that my parents were as honest with me as they were, even if what they told was very traumatic for me. I feel that this lack of information is potentially very dangerous. Someone who is conceived through donor insemination should, I believe, live their life according to accurate genetic information about themselves (e.g. about genetic propensity to certain illnesses, heart disease, birth defects in children conceived with certain genetic characteristics etc). This information needs to be provided throughout the course of their life and should be regularly updated as new information is discovered. Such dangerous mis-information is re-enforced by birth certificates which do not reflect someone's true genetic identity.
>
> With the revelation of my donor conception I am now unable to complete medical history forms whenever I have to complete them. I do not know about half of my ethnicity or racial identity. In addition this will not just affect me. If I have children then I will only have half of my genetic and hereditary roots to pass on to my offspring. Clearly the establishment of a retrospective register, and the safe keeping of my records, is something that I am compelled to seek.".

The judge described the case as one where the claimant was trying to obtain information about her biological father, something that went to the very heart of her identity, and to her make-up as a person (above, para [33]). The claim was based on Article 8 of the *European Convention on Human Rights*, which states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

The claim was that the state authorities **were obliged**, in order to discharge positive duties under Article 8:

i) to collect and make available to A.I.D. offspring and their parents certain non-identifying information about the donor including blood type, medical history, social and family background, religion, skills and interests, occupation, reasons for donation, willingness to be approached for identification and willingness to provide updating information; and

ii) to establish a voluntary mechanism to facilitate the exchange of information and contact between willing A.I.D. offspring and willing donors, such as a voluntary contact register.

The judge considered various precedent cases, and concluded:

What therefore are the principles to be drawn from the authorities that are relevant to this case? They seem to me to be these.

- Private and family life is a flexible and elastic concept incapable of precise definition.
- Respect for private and family life can involve positive obligations on the state as well as protecting the individual against arbitrary interference by a public authority.
- Respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.
- Respect for private and family life comprises to a certain degree the right to establish and develop relationships with other human beings.
- The fact that there is no existing relationship beyond an unidentified biological connection does not prevent Article 8 from biting.

These principles lead me to the following conclusions. Article 8 is engaged both with regard to identifying and non-identifying information, albeit in this case the identity of the donors is not directly sought. What is wanted is non-identifying information and a voluntary contact register. I do emphasise, lest there be any doubt about it, that the fact that Article 8 is engaged is far from saying that there is a breach of it. That question, which may fall to be decided on a further occasion, involves consideration of other matters and may depend on any future action taken by the Secretary of State.

It is to my mind entirely understandable that A.I.D. children should wish to know about their origins and in particular to learn what they can about their biological father or, in the case of egg donation, their biological mother. The extent to which this matters will vary from individual to individual. In some instances, as in the case of the Claimant Joanna Rose, the information will be of massive importance. I do not find this at all surprising bearing in mind the lessons that have been learnt from adoption. A human being is a human being whatever the circumstances of his conception and an A.I.D. child is entitled to establish a picture of his identity as much as anyone else. We live in a much more open society than even 20 years ago. Secrecy nowadays has to be justified where previously it did not. The

> distinction between identifying and non-identifying information is not relevant at the engagement stage of Article 8, but it is likely to become very relevant when one comes to the important balancing exercise of the other considerations in Article 8(2).
>
> Respect for private and family life has been interpreted by the European Court to incorporate the concept of personal identity (see *Gaskin*). Everyone should be able to establish details of his identity as a human being (*Johnston v Ireland* (1987) 9 EHRR 303 para 55). That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child. There is in my judgment no great leap in construing Article 8 in this way. It seems to me to fall naturally into line with the existing jurisprudence of the European Court.

Denial to the child of power to control their parentage

Secondly, the provisions in clause 11 of the Bill might be seen a violative of the rights of the child to some control over who the law should regard as their parents. More particularly, the inability to nominate a genetic ancestor as a parent might operate to deprive them of benefits that would flow from their being so regarded.

Such a right might be seen to derive from the right to respect for the private and family life of the person (see Article 8 of the European Convention, and its elaboration in the *Rose* case). In this connection, regard should also be had to certain rights stated in the *Convention on the Rights of the Child*, which provides in part:

> Article 4
>
> States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. …
>
> Article 6
>
> 1. States Parties recognize that every child has the inherent right to life.
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> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child
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> Article 8
>
> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Clause 15 of the Bill might also be seen to raise a rights issue. Should a person making an application under clause 15 be required to notify the child? Should the Supreme Court be required to satisfy itself that the child is informed?

The Committee notes that the concerns that have been raised about the rights of the child born through a medical procedure may, and it can be confidently assumed, will arise in relation to many other children. These may be children who are adopted, or whose parents have taken themselves out of the lives of their children. Thus, what may be required in the way of a legislative response to meet the positive obligation of the state will need to address the interests of all children. (It is of course a matter for the Assembly whether it does recognise that the state has such a positive obligation.)

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

Same-sex couple adoptions

The object and effect of amendments to the *Adoption Act 1993* in Part 1.2 of the Schedule to the bill are summarised in the Explanatory Statement:

> Section 18 is altered to remove references not inclusive of same sex couples. The section sets out which people may apply to the Supreme Court for an order for adoption of a child. Previously it contained a provision that restricted the Court to considering applications only from opposite sex couples but the bill removes that provision. In this way the discriminatory restriction that prevented same sex couples applying to the Court for an adoption order is removed. No other substantive change has been made. The Supreme Court will still have to decide, using the existing criteria set out in section 19 of the *Adoption Act 1993*, whether the applicants will be suitable parents for the child and whether the welfare and interests of the child will be promoted by the making of the order.

There has been considerable public debate about these amendments. In this debate, there have been assertions that the amendments violate the rights of the child, and, on the other hand, that they promote the rights of the adopting parents. The Committee will not traverse that ground.

It may, however, assist the Legislative Assembly to appreciate that constitutional courts have taken different views on the question whether a law such as the amendments proposed to s 18 is required in order to ensure that there is equality of treatment before the law. The two cases noted below show that it is possible to take opposing viewpoints on this issue.

Re K 23 Ontario Reports (3d) 679 is a Canadian case. Four lesbian couples made a series of joint applications for adoption. In each case, one member of the couple was the natural parent of the child or children sought to be adopted. The *Child and Family Services Act* permitted applications for adoption by individuals, regardless of their sexual orientation. It also permits joint applications by spouses. The definition of "spouse" in s 136(1) of the Act defined "spouses" as persons of the opposite sex. The applicants challenged the constitutionality of s 136 of the Act, arguing that it violated s 15(1) of the *Canadian Charter of Rights and Freedoms* and was not saved under s 1 of the Charter.

These sections provide:

> **1** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject [**35] only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **15(1)** Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The court held that the definition of "spouse" in s 136 was unconstitutional. The headnote summarised the elements of the holding:

> The effect of the definition of "spouse" in s. 136(1) of the Act is to deny to gay or lesbian people the right to apply, as a couple, to adopt a child. The right to adopt is a "benefit of the law", and the denial is based on a personal characteristic of the applicants, their homosexuality. The distinction in s. 136 is based on the personal characteristic of sexual orientation and not on the state of being a "spouse" in the traditional sense of a member of a heterosexual couple. Sexual orientation is an analogous ground of discrimination under s. 15(1) of the Charter. The differential treatment under s. 136 has the effect of imposing a disadvantage not imposed on others or of withholding or limiting access to opportunities, benefits and advantages available to others. Adoption is a unique conglomerate of rights and privileges that cannot be replicated through any other combination of orders or processes. Homosexual couples living in a conjugal relationship are denied opportunities, benefits and advantages that are not only available to the rest of the population, but are available to individual homosexual persons, that is, the right to apply for adoption and have their application considered in the context of whether it would be in the best interests of the child. Because of s. 136, the applicants are denied their "day in court" for no other reason than the fact that they are homosexual. It is difficult to imagine a more blatant example of discrimination. The definition of "spouse" in s. 136 infringes s. 15(1) of the Charter.
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> The paramount and overriding objective of the Act is to promote the best interests, protection and well-being of children. In particular, the objective of Part VII of the Act is to promote the best interests and well-being of children by ensuring that they will be cared for, raised and nurtured in a stable, secure, loving and committed family environment, legalized by an adoption order. The overall goal of the legislation is the promotion of the best interests of children within the family. There is no rational connection whatsoever between the goals of the legislation and a provision in that legislation that contains an absolute prohibition against adoption by homosexual couples. There is no cogent evidence that homosexual couples are unable to provide the very type of family environment that the legislation attempts to foster, protect and encourage. There is no evidence at all that families in which both parents are of the same sex are any more unstable or dysfunctional than families with heterosexual parents. There is no evidence that children raised by homosexual parents are any more likely to develop gender roles or identities inconsistent with their biological sex than children raised by heterosexual parents. There is no evidence at all that children raised by homosexual parents will be significantly any different than children raised by

> heterosexual parents in all areas of their psychological development. There is also no evidence that children raised by homosexual parents will be exposed to any greater degree of social stigma than that to which children of heterosexual parents are exposed because of race or any number of other characteristics. In short, there is no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than families with homosexual parents.
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> …
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> Even if there was a rational connection between the objectives of the legislation and the restriction on applications to adopt by homosexual persons, the objectives of the legislation could still be achieved without any denial of Charter rights with the process and safeguards that are already in place. Finally, the effects of the provision in question are disproportionate to the objective of the legislation. The infringement of s. 15(1) is not justified under s. 1 of the Charter.

It is useful to note aspects of the way the court approached the application of the Charter. There is a marked contrast between this approach and that of the Federal Court of the USA in the *Lofton* case (above). (This points to the choices available to judges in how they interpret a charter or bill of rights.)

After setting out sections 1 and 15 of the Canadian Charter, the court said:

> *The Three-step Analysis under s. 15*
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> [There is a] three-step process that should be undertaken to determine whether a right has been infringed under s. 15(1) of the Charter. Step 1 is a determination whether there is a distinction in the context of s. 15; step 2 is a determination whether the distinction is discriminatory; and step 3 determines whether the distinction, if discriminatory, is justified.
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> Considering first of all the objectives of s. 15, McIntyre J. commented at p. 171:
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> > "It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."
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> (a) Steps 1 and 2: A Distinction Which is Discriminatory
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> … as a prerequisite to deciding whether or not a particular piece of legislation offends the s. 15 rights of an individual or group, one must first determine whether there is:
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> (a) a distinction in the law, based on the personal characteristics of the individual or group, in the context of the enumerated grounds in s. 15(1) or grounds analogous to them; and,
>
> (b) a distinction that is discriminatory.

(b) Step 3: Justification under s. 1

The third and final step in this process, in the event that it is decided there has been discrimination in the context of the enumerated grounds in s. 15 amounting to an infringement of an equality right, is to consider whether that denial of rights is a reasonable limit that can be "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

…

An inquiry under s. 1 therefore requires (i) consideration of the objectives of the legislation, and then (ii) a decision whether the means chosen to achieve this objective are reasonable, or proportional to the effect of the legislation on the group or individual's Charter rights.

(i) "Pressing and Substantial" Objective

Regarding the first prong of this inquiry, Chief Justice Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 138, 19 C.R.R. 308, stated:

> "The standard must be high in order to ensure that objectives that are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. [Italics starts]It is necessary, at a minimum, that an objective relate to concerns that are pressing and substantial[Italics ends] in a free and democratic society before it can be characterized as sufficiently important."

(ii) The proportionality test

The second half of an inquiry under s. 1 involves the "proportionality test", a process that in turn necessitates a three-step analysis, as set out in *Oakes* (per Dickson C.J.C. at p. 139):

> "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: …. Third, there must be a proportionality between the effects of the measures that are responsible for limiting the Charter right or freedoms, and the objective that has been identified as of "sufficient importance"."

It was against that background of approach to the Charter that the court held that the definition of spouse in s 136 of the Act was unconstitutional.

In contrast is *Lofton v Kearney* 157 F Supp 2d 1372, a case decided by a federal District Court in the USA. In part, the issue before the Court was whether a Florida law which prohibited adoptions by homosexuals violated the Due Process Clause as well as the Equal Protection Clause of the Constitution of the United States of America. (Much of the text of what follows is taken from the judgment in this case.)

The Equal Protection Clause of the Fourteenth Amendment to the Constitution proclaims that "no State shall … deny to any person within its jurisdiction the equal protection of laws." However, classifications are not necessarily forbidden by the Equal Protection Clause. Instead, governmental decision makers are prohibited from treating differently individuals who are alike in all relevant respects. When legislation or government policy discriminates between classes or deprives a group of a particular right, the level of scrutiny applied under an equal protection challenge turns on the nature of the group allegedly discriminated against.

As a general rule, the governmental action in question will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. Under this rational basis test, the statute is granted a strong presumption that it is reasonably related to a legitimate government interest, and, therefore, valid under equal protection analysis.

Where a statute targets a quasi-suspect class, namely those based upon gender or illegitimacy, a heightened level of scrutiny applies. Under this intermediate scrutiny test, the statute is presumed invalid unless it is substantially related to a sufficiently important governmental interest.

Where a statute targets a suspect class, including race, alienage, or national origin or burdens a fundamental right, the statute in question will only be sustained if it is narrowly tailored to serve a compelling state interest.

Following precedent, the District Court held that homosexuals did not constitute a suspect or quasi-suspect class for the purpose of equal protection analysis. Thus, "government action classifying individuals on the basis of homosexuality or homosexual conduct must be analyzed under the rational basis test". And, accordingly, "the homosexual adoption provision shall be granted the presumption that it is rationally related to a legitimate state interest and the burden shall be on Plaintiffs to negate every conceivable basis which might support it."

The court noted that the State argued

> that the homosexual adoption provision serves two legitimate purposes. The first is that it reflects the State's moral disapproval of homosexuality consistent with the legislatures right to legislate public morality. According to Defendants, homosexuality has been long disfavored in the law based on beliefs firmly rooted in Judeo-Christian moral and ethical standards for a millennia. Defendants assert that the legislature is obligated to require adoptive parents to educate children regarding their religious heritage and promote this cultural and moral heritage by actively practicing it. However, this Court finds that public morality alone is insufficient to justify the homosexual adoption provision. Enacting a classification to express society's disapproval of a group burdened by the law is precisely what the Equal Protection Clause does not allow. That is not to say that the government

> cannot legislate to achieve things which it believes is morally good, …; it is to say that the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them. Thus, the Court cannot accept that moral disapproval of homosexuals or homosexuality serves a legitimate state interest.

The court continued:

> The second interest asserted by Defendants is that the homosexual adoption provision serves the best interest of Florida's children. According to Defendants, a child's best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father. … According to Defendants, married heterosexual family units provide adopted children with proper gender role modeling and minimize social stigmatization.
>
> Plaintiffs concede that categorically barring homosexuals from adoption in the best interest of Florida's children is on its face a legitimate purpose. However, they suggest that this stated interest is merely a pretext for discrimination against homosexuals. Plaintiffs wish to prove at trial that animus towards homosexuals underlie the State's true purpose in preventing homosexuals from adopting. However, as a matter of law, it is unnecessary and improper for this Court to determine whether the conceived reason for the challenged distinction actually motivated the legislature. It is enough for the legislation to be supported by plausible or hypothesized reasons. Whether this reasoning in fact underlay the legislative decision is irrelevant.
>
> …
>
> It is unnecessary for this Court to evaluate whether Defendants' statements are correct. Under the rational basis test, the government has no obligation to produce evidence to sustain the rationality of a statutory classification. Even if the assumptions underlying the rationales are erroneous, "the very fact that they are 'arguable' is sufficient, on rational basis review, to 'immunize' the congressional choice from constitutional challenge. At the least, it is "arguable" that placing children in married homes is in the best interest of Florida's children for the reasons stated by Defendants. Thus, because Plaintiffs have neither satisfied their burden of negating the reasons offered by Defendants to justify the homosexual adoption provision nor raised material issues of fact with respect to Defendants' asserted legitimate interest and the fact that the homosexual adoption provision is granted the presumption of constitutionality, the Court must find Defendants' purported legitimate interest in excluding homosexuals from adopting - namely, placing adopted children in married homes - to be valid.

Revenue Legislation Amendment Bill 2003 (No 3)

This Bill would amend the *Rates and Land Tax Act 1926* (to clarify the operation of provisions relating to the assessment of land tax on units), and the *Taxation Administration Act 1999* (to protect information provided by a taxpayer and to ensure their privacy and confidentiality).

Para 2(c)(i) – undue trespass on rights and liberties

Retrospective operation of the law

The Explanatory Statement notes that the amendment to the *Rates and Land Tax Act 1926* is retrospective to 1 August 1991. However, the Committee notes the assurance given that the amendment "will not impose any additional tax burden on the taxpayer or the community".

The Committee advises the Assembly that there is no undue trespass on rights.

Freedom of information

The object of the amendment to the *Taxation Administration Act 1999* is designed to reverse a decision of the Administrative Appeals Tribunal in relation to the scope of the right to access to documents as that right is expressed in the *Freedom of Information Act 1989*.

It would appear, however, that the amendment is in accord with the objective of the latter Act.

The Committee advises the Assembly that there is no undue trespass on rights.

Validation of Fees (Cemeteries) Bill 2003

This is a Bill for an Act to validate the fees charged for cemetery and crematoria services from 1 July 2002 to 14 November 2003.

Para 2(c)(i) – undue trespass on rights and liberties

Retrospective operation of the law

The Explanatory Statement for this Bill explains that administrative oversight resulted in the charging of fees that were in excess of the amounts authorised by the determination that was in force at the relevant times. The Act would then operate retrospectively to provide a legal basis for the fees.

The Committee notes that the Presentation Speech argues, and the Committee accepts, that there have been such cases in the past, and that the approach taken has been that where a service has been provided for a fee, there should be later validation of the making of that charge.

The Committee advises the Assembly that there is no undue trespass on rights on the basis that

- those who paid the fee probably did so in the belief that they were legally obliged to do so, and
- the fees charged are in substance amounts that are properly related to the services that were provided.

Sexuality Discrimination Legislation Amendment Bill 2003

This Bill would amend a number of laws to remove discrimination relating to sexuality and relationship status. It would also amend (1) the *Discrimination Act 1991* to provide additional protection from discrimination on the grounds of sexuality; (2) the *Crimes Act 1900* to address the issue of the availability of the defence of provocation in the case of a non-violent sexual advance; and (3) the *Disability Services Act 1991* to recognise sexuality as an area where a person with a disability might face additional disadvantage for the purposes of the design and administration of programs and services under that Act.

Para 2(c)(i) – undue trespass on rights and liberties

Amendment of the law relating to provocation

The provision that warrants comment by the Committee is the amendment proposed to section 13 of the *Crimes Act 1900* in Schedule 2, Part 2.1 of the Bill. The Explanatory Statement records that "[t]he intention of the amendment is to remove the availability of the defence of provocation where the provoking act was a non-violent sexual advance by the deceased towards the person accused of murder".

As noted in the paper *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT* (2002), at 30:

> [t]he rationale for this defence is based on the view that there is a difference between intentional killing in "cold blood" and killing in an extreme state of lost self-control. The defendant may intend to kill the victim, however the quality of his or her intention is diminished by the fact that his or her free will was impeded to the extent that they were provoked into acting as they did.

The defence is one that may be raised where the accused is charged with murder. Successful reliance on the defence has the effect that the accused may be convicted only of manslaughter (and not of murder).

There is a question about whether the defence should be retained at all. However, the amendment proposed by the Bill seeks only to remove the defence in a very limited set of circumstances.

The rights issues

Issues about whether this law would be an undue trespass on personal rights arise in two ways.

First, there is the principle that the law should apply equally to all those whose circumstances are substantially similar. The effect of the amendment would be that an accused to whom is made a non-violent sexual advance, and who as a matter of fact has thus been provoked to kill the person who made the advance, would be less able to rely on the defence than a person who for some other reason, (such as having been the target of grossly insulting words or gestures), was as a matter of fact provoked to kill the relevant person.

The question is whether there is an adequate basis on which to make this distinction. If there is not, then the principle of equality before the law appears to be breached.

There is a more particular issue here. The amendment will operate in such a way that some accused to whom a non-violent sexual advance was made may still rely on the defence, while others to whom such an advance was made may not. Again, the question is whether this difference in operation is rationally based.

Secondly, there is the principle that the criminal law should be expressed with a degree of clarity that makes its operation fair in the sense that it can be applied, both by the trial judge and the jury, in a sensible way. There may be a point where the complexity of the law is such that its application will be so difficult that a jury not understand what it is to do.

The law as it stands and the proposed amendment

As it stands, section 13 provides:

13 Trial for murder—provocation

(1) If, on a trial for murder—

(a) it appears that the act or omission causing death occurred under provocation; and

(b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder;

the jury shall acquit the accused of murder and find him or her guilty of manslaughter.

(2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if—

(a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control—

(i) as to have formed an intent to kill the deceased; or

(ii) as to be recklessly indifferent to the probability of causing the deceased's death;

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

By Schedule 2, Part 2.1 of the Bill, it is proposed to insert a new subsection (2A):

> (2A) However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—
>
> (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) applies; but
>
> (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.

It is important to appreciate just what might be the effect of this reform.

The amendment does not address paragraph 13(2)(a). The jury must find that "the act or omission [of the accused killing the victim] was the result of the accused's loss of self-control induced by any conduct of the deceased". The accused will no doubt adduce evidence that it was, and this evidence may include evidence of non-violent sexual advance(s) made by V towards D. (See *Green v The Queen* (1997) 72 ALJR 19 at 28, 37.) This means that the jury will hear the evidence of the sexual advance as that evidence is alleged to be by the accused. By the amendment, the task of the trial judge will be to instruct the jury that while the evidence is relevant to the application of paragraph 13(2)(a), it is not relevant to paragraph 13(2)(b). This will be difficult, and, when added to the sheer complexity of the test in paragraph 13(2)(b), it may be seen that the jury will not easily comprehend what it is to do.

The effect of the amendment on the application of paragraph 13(2)(b) is also not easy to grasp. It is necessary here to refer to the existing law.

The correct approach to the application of paragraph 13(2)(b) as it stands was considered in *Green v The Queen* (1997) 72 ALJR 19. In brief, D, a male, had killed V, a male, after V had got into the bed in which D was lying and had made advances to D, including some degree of physical touching. D argued that he had a particular sensitivity to matters of sexual assault as a result of his father having sexually assaulted D's sisters. D's evidence was that he had looked up to and trusted V.

After posing the question: "What … do the words "in the position of the accused" in par (b) mean?", McHugh J rejected an argument that the 'ordinary person' must effectively be given all the characteristics of the accused: above at 37. He held that

> the phrase "an ordinary person in the position of the accused" means an ordinary person who suffered the provocation which the accused suffered as the result of the conduct of the deceased. The standard against which the loss of self-control is judged is that of a hypothetical ordinary person. That person is unaffected by the accused's idiosyncrasies, personal attributes or past history, save and except that the words "in the position of the accused" require that the hypothetical person be an ordinary person who has been provoked to the same degree of severity and for the same reasons as the accused. In the present case, this translates to a person with the minimum powers of self-control of an ordinary person who is subjected to a sexual advance that is aggravated because of the accused's special sensitivity to a history of violence and sexual assault within his family: above at 37.

He said that "[a]ll of the accused's attendant circumstances and sensitivities are relevant in determining the effect of the provocation on "an ordinary person in the position of the accused". He quoted a statement from an earlier case that "any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant."

It will be evident that even as the law stands, the trial judge will have great difficulty in explaining the law to the jury, and the jury, who are unacquainted with the law, will have greater difficulty in making sense of what they are told.

The effect of the insertion of proposed new subclause 13(2A) into section 13 of the *Crimes Act 1900* would seem to be that evidence of a non-violent sexual advance made by the deceased victim may be relevant to the application of paragraph 13(2)(b) only where it is to be taken into account with other conduct of the deceased. That is, unless it is to be linked in that way to such other evidence, the evidence of a non-violent sexual advance is not admissible.

The limitations of this reform should be noted. The reasoning of McHugh J in *Green* suggests that the reform might have made no difference to the outcome in that case.

First, McHugh J questioned the claim that V had made a non-violent sexual advance. He said: "the advance, although initiated in a non-violent manner, soon became quite rough and aggressive" (above at 38). This points to the difficulty, which it may be expected will arise in many cases, of determining whether the particular sexual advance is in fact "non-violent". If this is a jury question, (and it looks like it), this means that quite often the jury will hear the evidence of the sexual advance as that evidence is alleged to be by the accused. The judge will also need to direct the jury on what may constitute 'violence'. A jury that wishes to sympathise with the accused who alleges a sexual advance was made by the deceased can do so by simply finding that the advance was not "non-violent". Once the accused adduces some evidence to support this claim, the prosecution will bear the burden of showing beyond reasonable doubt that the conduct was "non-violent". (There will also be questions about what constitutes a "sexual advance", as against some other kind of conduct of the deceased that the accused argues provoked their killing of the victim.)

Secondly, the scope of the qualification in paragraph 13(2A)(b) may be wider that the Explanatory Statement indicates. The statement says:

> This provision is intended to preserve the availability of provocation where the non-violent sexual advance is an act that follows from a previous history of other provoking conduct. It is not intended to exclude the availability of the defence in cases where, for example, the accused may claim a previous history of violence from the deceased, but the ‘final straw’ incident that provoked the accused to kill the deceased consisted only of a non-violent sexual advance.

The facts in *Green* indicate another case where the evidence of the non-violent sexual advance may be linked with other conduct of the deceased. McHugh J noted:

> the fact that the advance was of a homosexual nature was only one factor in the case. What was more important from the accused's point of view was that a sexual advance, accompanied with some force, was made by a person whom the accused looked up to and trusted.

It could be argued that paragraph 13(2A)(b) would have applied because here there was other conduct of the deceased - that is, the conduct that led the accused to look up to and trust the deceased.

Issues for the Assembly

To return now to the right issues as posed above, the first question for the Assembly is whether this amendment, when read with the existing law, produces the result that the law is expressed with that degree of clarity that makes its operation fair in the sense that it can be applied, both by the trial judge and the jury, in a sensible way.

The second question is whether the principle of equality before the law has been breached.

This is arguably the case, at least in relation to that class of accused who rely on the deceased having made a sexual advance, and where that fact is a component of the facts that justify the accused claiming that they were as a matter of fact provoked to kill. That is,

- there will be cases where an accused can adduce evidence of a sexual advance because there is just enough evidence that the advance was not non-violent that the trial judge must let the evidence of the sexual advance go to the jury, and/or

- there will be cases where although the sexual advance was clearly non-violent, there happens to be basis for linking that evidence to some other conduct of the deceased.

There is also the broader question about why it is that there should be circumstances in which a person with a particular sensitivity about a sexual advance cannot adduce evidence of that fact as evidence that would support a claim that paragraph 13(2)(b) of the *Crimes Act 1900* has been satisfied.

What makes it different from say a racial slur? That conduct is a basis for "justifiable indignation". It is arguable, as was argued by McHugh J in the High Court in *Green*, above, at 38, that "any unwanted sexual advance is a basis for "justifiable indignation", especially when it is coupled with aggression. Such an unwanted advance may lay the foundation for a successful defence of provocation". (The lack of evidence of aggression would make it more difficult to make out the defence.)

The Committee notes that the issues raised by this proposed amendment have generated considerable debate among scholars. Justice McHugh cited an article the thesis of which was that "a special rule precluding the use of the provocation defense in homosexual advance (or, more generally, sexual advance) cases is too tenuous to withstand scrutiny" (see Dressler, 'When "heterosexual" men kill "homosexual" men: reflections on provocation law, sexual advances, and the "reasonable man" standard' (1995) 85 J. Crim. L. & Criminology 726). This article was itself a rejoinder to one in which the contrary thesis as advanced; that is, that a non-violent homosexual advance should not in and of itself constitute sufficient provocation; see Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 Cal. L. Rev. 133.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them:

Subordinate Law SL2003-36 being the Magistrates Court (Charitable Collections Infringement Notices) Regulations 2003 made under the *Magistrates Court Act 1930* **provides for infringement notices for certain offences against the** *Charitable Collections Act 2003***.**

Subordinate Law SL2003-37 being the Magistrates Court (Hawkers Infringement Notices) Regulations 2003 made under the *Magistrates Court Act 1930* **provides for infringement notices for certain offences against the** *Hawkers Act 2003***.**

Subordinate Law SL2003-38 being the Agents Regulations 2003 made under the *Agents Act 2003* **sets out the qualifications required for eligibility for a real estate, stock and station and business agent's licence.**

Subordinate Law SL2003-39 being the Magistrates Court (Agents Infringement Notices) Regulations 2003 made under the *Magistrates Court Act 1930* **provides for infringement notices for certain offences against the** *Agents Act 2003***.**

Subordinate Law SL2003-40 being the Supreme Court (Corporations) Rules 2003 made under the *Corporations Act 2001 (Cwlth)* **repeal the** *Corporations Rules 2001 (ACT)* **and repeat the former rules with a new decimal renumbering system, making them consistent with the uniform corporations rules.**

Subordinate Law SL2003-41 being the Supreme Court Amendment Rules 2003 (No 3) made under section 36 of the *Supreme Court Act 1933* **provide for minor consequential amendments to achieve consistency with the** *Supreme Court (Corporations) Rules 2003* (ACT)**.**

Subordinate Law SL2003-42 being the Road Transport (Offences) Amendment Regulations 2003 (No 2) made under the *Road Transport (General) Act 1999* **reinstates the corporate level of penalties for camera detected infringement notices.**

Subordinate Law SL2003-43 being the Road Transport (Public Passenger Services) Amendment Regulations 2003 (No 1) made under the *Road Transport (Public Passenger Services) Act 2001* **exempts operators of tour and charter bus services from being accredited in the ACT.**

Subordinate Law SL2003-44 being the Supreme Court (Remuneration) Amendment Regulations 2003 (No 1) made under the *Supreme Court Act 1933* **changes the remuneration for acting judges.**

Subordinate Law SL2003-45 being the Liquor Amendment Regulations 2003 (No 1) made under the *Liquor Act 1975* **declares areas as prescribed public places for the purposes of Summernats 2004.**

Disallowable Instrument DI2003-247 being the Radiation (Fees) Determination 2003 (No 1) made under section 77 of the R*adiation Act 1983* **revokes Disallowable Instrument DI2003-247 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2003-271 being the Independent Competition and Regulatory Commission (Reference for Investigation) 2003 (No 3) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **allows for the reference of ACT taxi fares to the Independent Competition and Regulatory Commission for investigation.**

Disallowable Instrument DI2003-276 being the Tree Protection (Interim Scheme) Appointment 2003 made under section 21(1) of the *Tree Protection (Interim Scheme) Act 2001* **appoints a specified person to advise the Conservator of Flora and Fauna**.

Disallowable Instrument DI2003-281 being the Road Transport (General) Declaration that the road transport legislation does not apply to certain roads and road related areas 2003 (No. 8) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to the ACT roads and road related areas used when vehicles are competing in the ACT timed special stages of the "Transbell Signs & Shirts Safari Rally".**

Disallowable Instrument DI2003-283 being the Victims of Crime – Appointment to Victims Assistance Board 2003 (No 2) made under the *Victims of Crime Act 1994* **and section 8(1)(f) of the** *Victims of Crime Regulations 2000* **appoints a specified person to the Victims Assistance Board.**

Disallowable Instrument DI2003-284 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2003 (No. 2) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes Disallowable Instrument DI2003-36 and determines the rules for sports bookmaking**.

Disallowable Instrument DI2003-285 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2003 (No 3) made under section 21 of the *Race and Sports Bookmaking Act 2001* r**evokes Disallowable Instrument DI2003-73.**

Disallowable Instrument DI2003-286 being the Public Sector Management (Commissioner for Public Administration) Appointment 2003 made under section 18 of the *Public Sector Management Act 1994* **appoints a specified person as Commissioner for Public Administration.**

Disallowable Instrument DI2003-287 being the Public Place Names 2003, No. 22 (Street Nomenclature – Gungahlin) made under section 3 of the *Public Place Names Act 1989* **determines the name, origin and significance of the new street name in the Division of Gungahlin.**

Disallowable Instrument DI2003-288 being the Road Transport (General) (Parking Ticket Fees) Determination 2003 (No 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes Disallowable Instrument DI2003-68 and determines parking ticket fees.**

Disallowable Instrument DI2003-289 being the Tertiary Accreditation and Registration Council Appointments 2003 (No 1) made under section 12 (3) of the *Tertiary Accreditation and Registration Act 2003* **appoints specified persons to the Tertiary Accreditation and Registration Council.**

Disallowable Instrument DI2003-290 being the Attorney General (Determination of Fees and Charges for 2003/2004) Amendment 2003 (No 3) made under section 176 of the *Agents Act 2003* **and section 465 (1) of the** *Cooperatives Act 2003* **amends Disallowable Instrument DI2003-90 (as amended).**

Disallowable Instrument DI2003-292 being the Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2003 (No 4) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **revokes Disallowable Instrument DI2003-182 and determines the terms of reference to investigate and provide advice on the benefit to the community of the introduction of contestable electricity infrastructure works in the electricity distribution network.**

Disallowable Instrument DI2003-293 being the Public Place Names 2003, No. 16 – Street Nomenclature in the Division of McKellar made under section 3 of the *Public Place Names Act 1989* **determines the names, origins and significance of the new street names in the division of McKellar.**

Disallowable Instrument DI2003-295 being the Tertiary Accreditation and Registration Council Appointments 2003 (No 2) made under section 12 (3) of the *Tertiary Accreditation and Registration Act 2003* **appoints specified persons to the Tertiary Accreditation and Registration Council.**

Disallowable Instrument DI2003-297 being the Cemeteries and Crematoria (Fees for 2003/2004) Determination 2003 made under section 49 (1) of the *Cemeteries and Crematoria Act 2003* **determines the fees payable for cemeteries and crematoria services.**

Disallowable Instrument DI2003-298 being the Road Transport (Public Passenger Services) Approval of Taxi Network Performance Standards 2003 (No 1) made under the *Road Transport (Public Passenger Services) Act 2001* **and regulation 81 (1) of the** *Road Transport (Public Passenger Services) Regulations 2002* **revokes Disallowable Instrument DI2002-12 and amends the periods to which peak performance measures apply to standard taxis and wheelchair accessible taxis.**

Disallowable Instrument DI2003-299 being the Vocational Education and Training Authority Appointments 2003 (No 1) made under section 12 (2) of the *Vocational Education and Training Act 2003* **appoints specified persons to the Vocational Education and Training Authority.**

Disallowable Instrument DI2003-300 being the Vocational Education and Training Authority Appointments 2003 (No 2) made under section 12 (2) of the *Vocational Education and Training Act 2003* **appoints specified persons to the Vocational Education and Training Authority.**

Disallowable Instrument DI2003-301 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2003 (No. 9) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislations does not apply when vehicles are competing in the ACT timed special stages of the Brindabella Motor Sport Club 2003 Truss Me National Capital Rally on 22 November 2003 and a media promotional stage on 21 November 2003.**

Disallowable Instrument DI2003-302 being the Workers Compensation (Fees) Determination 2003 made under section 221 of the *Workers Compensation Act 1951* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2003-303 being the Occupational Health and Safety Council Appointment 2003 (No 4) made under section 13 (1) (b) of the *Occupational Health and Safety Act 1989* **appoints a specified person as a member of the Occupational Health and Safety Council.**

Disallowable Instrument DI2003-305 being the Public Place Names 2003, No. 26 (Street Nomenclature – Lyons) made under section 3 of the *Public Place Names Act 1989* **details the name, origin and significance of the new street name in the Division of Lyons.**

Disallowable Instrument DI2003-306 being the Unit titles (Fees) Determination 2003 (No 2) made under section 179 of the *Unit Titles Act 2001* **revokes Disallowable Instrument DI2003-156 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2003-307 being the Surveyors (Fees) Determination 2003 (No 2) made under section 46 of the *Surveyors Act 2001* **revokes Disallowable Instrument DI2003-157 and determines the fees payable for services provided under the Act.**

Disallowable Instrument DI2003-308 being the Architects (Fees) Revocation and Determination 2003 (No 2) made under section 40 of the *Architects Act 1959* **revokes Disallowable Instrument DI2003-163 and determines fees for services provided under the Act.**

Disallowable Instrument DI2003-309 being the Land (Planning and Environment) Exemption 2003 (No 2) made under section 226 (1) of the *Land (Planning and Environment) Act 1991* **revokes Disallowable Instrument DI2003-252 and determines those developments that are exempt from the requirement to provide a survey certificate with an application.**

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Retrospectivity
Error in explanatory statement

Disallowable Instrument DI2003-278 being the Road Transport (General) Exemption of Person & Vehicle from Road Transport Legislation (No 2) 2003 made under section 13(1) of the *Road Transport (General) Act 1999* **allows interstate hire cars to operate within the ACT during the United States Presidential visit.**

Disallowable Instrument DI2003-280 being the Road Transport (General) Exemption of Person & Vehicle from Road Transport Legislation 2003 (No 3) made under section 13(1) of the *Road Transport (General) Act 1999* **allows interstate hire cars to operate within the ACT during the United States Presidential visit.**

Disallowable Instrument DI2003-282 being the Road Transport (General) Exemption of Person & Vehicle from Road Transport Legislation 2003 (No 4) made under section 13(1) of the *Road Transport (General) Act 1999* **allows interstate hire cars to operate within the ACT during the United States Presidential visit.**

Subordinate Law SL2003-34 being the Road Transport (Driver Licensing) Amendment Regulations 2003 (No 1) made under the *Road Transport (Driver Licensing) Act 1999* **amend the** *Road Transport (Driver Licensing) Regulations 2000* **and facilitate the introduction of the revised driver licence medical guidelines, "Assessing Fitness to Drive 2003".**

The Committee notes that each of the above instruments state that the exemptions commence on a specified date, however, the instruments were not notified on the Legislation Register until after the period of exemption had commenced.

The Committee also notes that the title of Subordinate Law SL2003-34 is "Road Transport (Driver Licensing) Amendment Regulations 2003 (No 1), whereas the title on the explanatory statement is "Road Transport (Driver Licensing) Amendment Regulations 2003". The Committee considers that this discrepancy could cause confusion to both Members and the public when tracking legislation.

What is the effect of the period from the instruments taking effect until notification?

The effect of the period between these instruments taking effect and their notification in the Legislation Register needs to be considered.

There is no mention in the explanatory statements of the possible effect of section 76 of the *Legislation Act 2001* on any occurrences decided during the relevant period of retrospectivity.

The possible effect of section 76 of the *Legislation Act 2001* appears to be of particular relevance to this instrument. It provides as follows:

"76 Non–prejudicial provision may commence retrospectively (SLA s 7)

(1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.

(2) This section applies to a non-prejudicial provision of a statutory instrument only if the instrument clearly indicates that the provision is to commence retrospectively.

Example

the instrument provides that a non-prejudicial provision is 'taken to have commenced' at an earlier date or time

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

(3) This section is a determinative provision.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

(4) In this section:

non-prejudicial provision means a provision that does not operate to the disadvantage of a person (other than the Territory or a Territory authority or instrumentality) by—

(a)adversely affecting the person's rights; or

(b)imposing liabilities on the person.".

Confirmation is sought that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

Reference to non-existent provision

Subordinate Law SL2003-35 being the Land (Planning and Environment) Amendment Regulations 2003 (No 1) made under the *Land (Planning and Environment) Act 1991* **amends the** *Land (Planning and Environment) Regulations 1992* **by including the direct grant of rural leases as exempt under Schedule 1 of the Regulations**.

The Committee notes that page 2 of the explanatory statement makes reference to section 222(3) of the Land (Planning and Environment) Act. A check on the Legislation Register of the Act reveals that this section does not exist. Perhaps the correct reference should be to section 223(1).

Is this instrument disallowable?

Disallowable Instrument DI2003-296 being the Liquor Licensing Board Appointment 2003 (No 1) made under the *Liquor Act 1975* **appoints a specified person to be a member of the Liquor Licensing Board.**

The Committee notes that the explanatory statement gives no indication as to whether or not the person appointed to the relevant committee is a public servant. An instrument appointing a public servant is not a disallowable instrument under section 227(2) of the *Legislation Act 2001*.

No consultation with relevant Committee
Is this instrument disallowable?
Reference to non-existent provision

Disallowable Instrument DI2003-279 being the Supervised Injecting Place Trial Advisory Committee Appointments 2003 (No 1) made under section 20(3) of the *Supervised Injecting Place Trial Act 1999* **appoints specified persons as members of the Supervised Drug Injection Trial Advisory Committee**.

The Committee notes that no indication has been given in the explanatory statement as to whether the required consultation, in relation to this appointment, has taken place with the relevant Committee in accordance with section 228 of the *Legislation Act 2001*.

The Committee also notes that the explanatory statement gives no indication as to whether or not the persons appointed to the Supervised Injecting Place Trial Advisory Committee are public servants. An instrument appointing a public servant is not a disallowable instrument under section 227(2)(a) of the *Legislation Act 2001*.

Paragraph 4 of the Explanatory Statement refers to section 299 of the *Legislation Act 2001*. A check on the Legislation Register reveals that section 299 does not exist. Perhaps the correct reference should be to section 229 – Appointment is disallowable instrument.

Error in explanatory statement
Minor drafting error

Disallowable Instrument DI2003-277 being the Attorney General (Determination of Fees and Charges for 2003/2004) Amendment 2003 (No 2) *Consumer and Trader Tribunal Act 2003* **amends Disallowable Instrument DI2002-90 – Attorney General (Determination of Fees and Charges for 2003/2004) – 2003 (No 1).**

The Committee notes that the title of the instrument is "Attorney General (Determination of Fees and Charges for 2003/2004) Amendment 2003 (No 2). However, in paragraph 1 – Name – the instrument is referred to as "Attorney General (Determination of Fees and Charges for 2003/2004 (Amendment No 2) 2003. The Committee considers that this discrepancy could cause confusion to both Members and the public when tracking legislation.

The Committee also notes that the title of the instrument includes an asterisk, but there is no footnote on the instrument that indicates the reason for the asterisk.

Error in Title of Instrument?

Disallowable Instrument DI2003-291 being the Public Place Names (Street Nomenclature Belconnen) made under section 3 of the *Public Place Names Act 1989* **determines the name, origin and significance of the new street name in the Division of Belconnen.**

The Committee notes that the title of the instrument is "Public Place Names (Street Nomenclature Belconnen)", whereas in the explanatory statement the instrument is referred to as "Public Place Names (Street Nomenclature – Belconnen) (No 14)". The Committee considers that this discrepancy could cause confusion to both Members and the public when tracking legislation.

Number of instrument being amended
Title of instrument being amended

Disallowable Instrument DI2003-294 made under Land (Planning and Environment) Determination of Matters to be Taken into Consideration – Grant of a Further Rural Lease (No 2) 2003 Amendment Determination (No 1) made under section 171A(2) of the *Land (Planning and Environment) Act 1991* **amends Disallowable Instrument DI2003-254**.

The Committee notes that the number of the instrument being amended does not appear in either the disallowable instrument or the explanatory statement. It assists both the public and Members, when tracking legislation, to know exactly what instrument is being amended.

The Committee also notes that the explanatory statement makes no mention of the title of the instrument being amended.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments from:

- The Chief Minister, dated 19 November 2003, in response to the Committee's letter of 3 September 2003 regarding the application of the *Administration (Interstate Agreements) Act 1997*.
- The Minister for Urban Services, dated 24 November 2003, in relation to comments in Scrutiny Report No 38 regarding Disallowable Instrument DI2003-148 being the Road Transport (General) Declaration that the road transport legislation does not apply to certain roads and road related areas 2003 (No 5).

- The Minister for Urban Services, dated 4 December 2003, in relation to comments in Scrutiny Report No 39 regarding Disallowable Instrument DI2003-270 being the Road Transport (Public Passenger Services) Exemption 2003.
- The Minister for Police and Emergency Services, dated 9 December 2003, in relation to comments in Scrutiny Report No 39 relating to the Australian Crime Commission Bill (ACT) Bill 2003. *Due to the late receipt of this response, the Committee may wish to comment further at a later date.*

The Committee thanks the Chief Minister, the Minister for Police and Emergency Services and the Minister for Urban Services for their helpful responses.

Bill Stefaniak MLA
Chair

December 2003

LEGAL AFFAIRS – STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
REPORTS – 2001-2003	
Report No. 1, dated 12 December 2001	
Nil	
Report No. 2, dated 19 February 2002	
Crimes Amendment Bill 2001 (No. 2) **(PMB)**	
Act citation: Crimes Amendment Act 2002 **(Passed 5.3.02)**…….	**No. 5**
Crimes (Abolition of Offence of Abortion) Bill 2001 **(PMB)**……..	
Health Regulation (Maternal Health Information) Repeal Bill 2001 **(PMB)**……	
Land (Planning and Environment) Legislation Amendment Bill 2001 **(PMB)**……	
Supreme Court Amendment Bill 2001 (No. 2) **(PMB)**……..	
Subordinate Law No 40 –Building Regulations Amendment…….	**No. 8**
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001……	
Subordinate Law No 42 – Crimes Regulations 2001……..	
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Jon Stanhope MLA

CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly

Dear Mr Stefaniak

Thank you for your letter of 3 September 2003 regarding the application of the *Administration (Interstate Agreements) Act 1997* (the Act).

You have sought the Government's view in relation to the application of Section 7 of the Act, regarding consultation on interstate agreements with Assembly Committees. The Government agrees that the effect of the Section is that all relevant Interstate Agreements, as defined by section 4, and subject to specific qualifications in the Act (sections 5 and 10), should be sent to the Legal Affairs Committee, in its capacity as the committee responsible for scrutiny of bills, as well as other relevant policy committees.

However, you should be aware that under the Act, not all Interstate Agreements are required to be submitted to the Legal Affairs Committee. As defined under Part 1, section 4, Interstate Agreements to which the Act applies are:

> "any agreement, including a proposed agreement, between governments, whether negotiated at an official forum or otherwise, the implementation of which could reasonably be expected to require legislation to be passed by the Legislative Assembly."

Thus the Committee does not receive notification of all Intergovernmental Agreements.

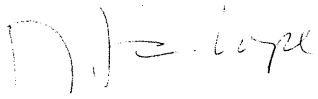
Nonetheless, the Cabinet Office will write to all ACT Government agencies to remind them of their obligations under the Act, so as to ensure that in future all relevant Interstate Agreements are referred to the Standing Committee on Legal Affairs.

You also suggest that section 7(3)(b) of the legislation be amended to update the current reference to the Standing Committee on Justice and Community Safety.

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

It should be noted that section 165 of the *Legislation Act 2001* operates to ensure that the objective of section 7(3)(b) can still effectively be met. Section 165 provides that "a reference (whether by name or description) to a committee of the Legislative Assembly that no longer exists is a reference to the committee of the Assembly nominated by the Speaker either generally or for the provision containing the reference." In this context, it can be argued that there is no immediate need to amend the legislation. However, an amendment to the Act will be considered as part of the Government's technical amendments program.

Yours sincerely



Jon Stanhope MLA
Chief Minister

19 NOV 2003

Bill Wood MLA

MINISTER FOR URBAN SERVICES MINISTER FOR THE ARTS AND HERITAGE
MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 38 of 20 October 2003. I offer the following response in relation to the matters raised by your Committee.

Disallowable Instrument DI 2003-148 – Road Transport (General) Declaration the road transport legislation does not apply to certain roads and road related areas 2003 (No 5)

Incorrect title and incorrect text in explanatory statement.

I note the comments by the Committee. The explanatory statement was incorrect and identical to the explanatory statement for DI 2003-151.

The incorrect version of the Explanatory Statement was notified and subsequently presented to the Legislative Assembly. In the opinion of the parliamentary counsel, the errors noted in the Committee's report do not prevent the original notification and presentation from being effective.

I apologise for any confusion this may have caused.

Yours sincerely

Bill Wood MLA
Minister for Urban Services

24 November 2003

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Mr Bill Stefaniak MLA
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Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 39 of 12 November 2003. I offer the following response in relation to the matters raised by your Committee.

Disallowable Instrument DI 2003-270 – Road Transport (Public Passenger Services) Exemption 2003

Minor Drafting Errors

I note the comments by the Committee that the title of the instrument includes an asterisk however no reference to the asterisk was made in a footnote. The disallowable instrument provided to Parliamentary Counsels Office did include the footnote. This footnote was also included in the instrument notified on the ACT Legislation Register. It appears that the reference to the footnote was inadvertently omitted in the copies tabled in the ACT Legislative Assembly.

Disallowable Instrument DI 2003-268 – Cemeteries and Crematoria Code of Practice in the ACT 2003

Errors in Explanatory Statements

The committee's comments are noted. I have been assured that future explanatory statements will be numbered which will avoid confusion.

Yours sincerely

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Dear Mr Stefaniak

Thank you for the comments raised by the Committee in Scrutiny Report No. 39 of 12 November 2003, relating to the Australian Crime Commission Bill (ACT) 2003 (the Bill).

As the Committee is aware, this Bill is part of a national uniform scheme to complement the Commonwealth government's *Australian Crime Commission Act 2002* (the ACC Act) which was agreed to by heads of Australian governments in 2002. The Bill was modelled on a Western Australian Bill (that was largely based on the ACC Act) and was drafted by a National Parliamentary Counsel's Committee. With the Commonwealth ACC Act as the "centrepiece" of the scheme, the model Bill was drafted in a way to ensure that there were no legislative gaps in State and Territory legislation that would impede the investigation and pursuit of serious organised crime across jurisdictions. The provisions that the Committee has commented on therefore, reflect the agreed national position on these matters.

Legal Professional Privilege
Under clause 26(4) of the Bill a legal practitioner can refuse to disclose information or produce a document on the grounds of legal professional privilege. If a legal practitioner refuses to comply he or she is required to supply the name and address of the client on whose behalf the privilege is claimed. Although, the Bill does not specify the extent to which a client may refuse to disclose information that has been the subject of a confidential communication with their legal representative, it is the government's view that clause 26(9) would achieve this end by invoking the common law and any relevant statutory law relating to legal professional privilege. The law is clear that the privilege belongs to the client (not the lawyer) and is invoked to protect the interests of the client.

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The Committee seeks clarification on whether a person can claim legal professional privilege under the Bill. Clause 26 of the Bill was based on section 30 of the earlier *National Crime Authority Act 1984* of the Commonwealth (the NCA Act), which was subsequently amended by inserting subsection 30(9) (the equivalent of clause 26(9) of the Bill).

When the operations and powers of the then National Crime Authority (NCA) were evaluated in 1998, the Parliamentary Joint Committee on the National Crime Authority (PJC-NCA), identified that the application of client legal privilege (also known as legal professional privilege) required clarification in section 30 of the NCA Act. In discussing section 30(3) (equivalent of clause 26(4) of the Bill), of the NCA Act, which allows a legal practitioner to refuse to disclose information communicated by a client unless the client consents, it was noted that:

> [t]here is no indication in the Act that the same lawyer-client confidential information may not be required from the client. Instead, once the Authority has obtained the client's name and address, the Act is silent about the extent to which the client may refuse to disclose information that has been the subject of confidential communications with their legal representatives. [1]

The PJC-NCA concluded that the section should be amended to achieve the following ends:

- to clarify the issue of client legal privilege by stating the circumstances in which witnesses' communication with their legal representatives is or is not privileged;
- to provide the appropriate protection to ensure that witnesses are able to communicate fully and frankly with their legal advisers or advocates at an NCA hearing without fear of disclosure; and
- to be drafted in terms which recognise that the privilege is there to protect the client and not the lawyer.[2]

The Commonwealth amended the NCA Act to implement the government's response to the 3rd Evaluation of the NCA, including the insertion of section 30(9), (which was subsequently duplicated in the ACC Act), to clarify the application of legal professional privilege. The Commonwealth government's response stated that:

> Subsection 30(3) of the National Crime Authority Act, which preserves legal professional privilege in relation to questions or requests for documents made to a legal practitioner at a hearing, requires clarification in accordance with the law on legal professional privilege. It is unnecessary to establish expressly all the circumstances in which legal professional privilege applies. The provisions need only state that the provisions of the Act do not affect the law relating to legal professional privilege. [3]

In accordance with the recommendations of the PJC-NCA, and consistent with the Commonwealth government's position, it is intended that clause 26(9) of the Bill

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[1] 3rd Evaluation of the National Crime Authority; Parliamentary Joint Committee on the National Crime Authority (PJC-NCA); April 1998; Chapter 4 -Recommendation 9; p.125.
[2] Ibid.
[3] Government Response to the recommendations from the 3rd Evaluation of the National Crime Authority by the Parliamentary Joint Committee on the National Crime Authority, Senate *Hansard*; 7 December 2000, p. 21105.

preserves the law relating to legal professional privilege. Clause 26(9) makes it clear that the defence in clause 26(4) does not affect the law relating to legal professional privilege. As the privilege resides in the client, it follows that the client may also claim legal professional privilege in respect of communications and documents to which privilege would attach and that a person could refuse to answer a question or produce a document under clause 26(3) by claiming legal professional privilege. I am therefore satisfied that the terms of the explanatory statement are sufficient.

As the Committee also points out, in *The Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, there is a presumption that in general, a court will read a statute in a way that preserves the privilege if there is scope for it to do so. Section 171 of the *Legislation Act 2001* also makes it clear that an Act must be interpreted to preserve the common law privilege in relation to legal professional privilege. While the Bill does not expressly provide for a claim to be made for legal professional privilege by the client (as opposed to the legal practitioner), the inclusion of clause 26(9) of the Bill is intended to preserve the inherent common law right of the client to claim legal professional privilege and this Bill would in my view be interpreted to this effect.

I am advised that search warrants are normally taken to be subject to legal professional privilege in the absence of an express provision to the contrary. The usual practice during the execution of a search warrant is for sensitive documents to be identified, usually by the client, as subject to legal professional privilege. These are sealed and then discussed at a later date between the client, legal practitioners and examiners. Given that the law relating to legal professional privilege is not affected and there is no express provision to the contrary, in my view, clause 32 (Search Warrants) of the Bill would be read consistently with this rule.

The privilege against self incrimination

Section 26 compels a witness to make statements, provide documents or produce a thing as part of an investigation into organised crime; and grants immunity from use of that evidence in criminal proceedings or other proceedings for the imposition of a penalty. However, it fails to provide derivative use immunity. The Committee has asked in relation to clause 26 why there is a need to displace the privilege against self-incrimination in any respect; why there is no immunity in respect of a derivative use of information, documents and things; and why there is no grant of immunity at all where the person is subsequently subject to confiscation proceedings.

The first two questions are interrelated as the privilege against self incrimination is not being displaced, but being modified by the removal of derivative use immunity. Use immunity remains intact so that once a person claims privilege any evidence that the person gives at a hearing cannot be used directly against the person in criminal proceedings.

The Committee has already set out the policy and justification given by the Commonwealth Attorney-General for removing derivative use immunity from the equivalent Commonwealth provision. The need to modify the privilege against self incrimination by removing derivative use immunity goes back to the fundamental reason for the Australian Crime Commission's (ACC) existence, and that of the NCA

before it. It is part of the package of coercive powers available in relation to special operations/investigations.

However, there are safeguards and the ACC may only exercise its coercive powers within strict parameters. First, the ACC board must make a determination that an investigation is a special operation or special investigation. But before making a determination the board must consider if ordinary methods of collection of criminal information and intelligence, or police methods of investigation into the matters will be ineffective (see subclauses 11(3) and (5) of the Bill). The powers can only be applied in relation to serious and organised crime.

Derivative use immunity existed under the previous NCA Act until 2001 when it was removed because it was found to be seriously abused to frustrate the NCA's work. In the Second Reading speech for the NCA Legislation Amendment Bill 2000 (the NCALA Bill) (which amended the NCA Act to remove derivative use immunity) it was stated as follows:

> The National Crime Authority does not deal with simple street level crime , but with the web of complex criminal activity engaged in by highly skilled and resourceful criminal syndicates.
>
> It is therefore essential that the Authority has sufficient powers to enable it to perform its functions without being hindered or hampered by those whose very conduct the Authority is trying to investigate.[4]

It was found that the Authority's task in investigating organised crime was made particularly difficult because of the way persons under investigation had manipulated existing legal rules and procedures to defeat the investigation.[5] The NCALA Bill was referred to the PJC-NCA for further consideration of the issues and it reported in March 2001.[6] The NCA in its submission to the PJC-NCA referred to the removal of derivative use immunity and its replacement with use immunity provisions in the then Australian Securities Commission Act in 1992 and the reasoning behind this change in policy:

> It is also possible for persons to exploit, quite consciously, the immunity provisions by claiming that answers may tend to be self-incriminatory, then making a full confession, thereby ensuring that no evidence will be admissible against them in criminal proceedings.
>
> Another problem arising ..... is that complex cases often involve the admission into evidence of hundreds, even thousands, of documents, all or many of which may be challenged by the defence on the grounds of derivative use immunity. This has the potential to make cases extremely lengthy and costly. ...[7]

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[4] Senator Campbell, Second Reading Speech, Senate *Hansard*, 7 December 2000, p. 21028
[5] Ibid; and Senator Bolkus Second Reading Debate, Senate *Hansard*, 8 August 2001, p 25834.
[6] National Crime Authority Legislation Amendment Bill 2000 – A Report by the Parliamentary Joint Committee on the National Crime Authority; March 2001.
[7] Submission from the National Crime Authority to the Parliamentary Joint Committee on the National Crime Authority – National Crime Authority Legislation Amendment Bill 2000, p.4

The NCA went on to say that retaining derivative use immunity in the NCA Act would be a retrograde step and such a provision "severely compromises the effectiveness of the NCA"[8].

The PJC-NCA gave particular weight to comments by the Commonwealth Director of Public Prosecutions (Commonwealth DPP) and the comments of Chief Justice Mason in the High Court case of *Hamilton v Oades* (1989) 85 ALR 1. The Commonwealth DPP supported the removal of derivative use immunity because:

> [t]he DPP's experience is that it is easy for a person to claim that evidence was derived in some way from an answer given at the investigation stage. It is very difficult to show that there was no such connection. In a criminal investigation the material gathered by investigators is pooled and shared. It is rarely possible to track with precision the use that was made of every piece of information or to show what led the investigators to pursue a particular line of inquiry.
>
> The practical result is that it is rarely possible to prosecute a person who has been questioned under use/derivative use protection. In most cases the effect of giving a person an undertaking under section 30(5) of the NCA Act is to rule them out as a potential defendant. [9]

In *Hamilton v Oades* the High Court held that excluding derivative use immunity is only a relatively minor inroad into the privilege against self-incrimination and can be justified on public policy grounds. Chief Justice Mason justified this by explaining that the 'principal matter' to which the privilege against self-incrimination is directed does not extend to providing derivative use immunity. The principal matter to which the privilege is directed is:

> ...guarding against the possibility that the witness will convict himself out of his own mouth....Thus the legislative resolution of the competition between public and private interest is to provide for a compulsory examination and to give specific protection in relation to the principal matter covered by the privilege but not otherwise [10]

I thank the Committee for setting out the opposing views of the Law Council of Australia which I note did not persuade the PJC-NCA or alter the Commonwealth's policy on this issue. As stated in the Second Reading speech for the NCALA Bill, the removal of derivative use immunity was "not a hasty or knee jerk response – it is a well thought through and considered approach to a most pernicious evil, and the product of a wide and lengthy consultation."[11] In light of the thorough consideration of the issues in the Commonwealth sphere, I accept that the removal of derivative use immunity is justified in the broader public interest of fighting organised crime. I endorse the Committee's comments in that it would not be practicable for the ACT to depart from the national template and alter these provisions and risk jeopardising the effectiveness of the national scheme.

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[8] Ibid, p.5.
[9] National Crime Authority Legislation Amendment Bill 2000 – A Report by the Parliamentary Joint Committee on the National Crime Authority; March 2001, p.6.
[10] *Hamilton v Oades* (1989) 85 ALR 1, 6-7.
[11] Senator Campbell, Second Reading Speech, Senate *Hansard*, 7 December 2000, p. 21029.

The privilege against self-incrimination does not apply to confiscation proceedings because such proceedings are not criminal proceedings. They are proceedings for the recovery of proceeds of crime. 'Confiscation proceedings' are defined in the ACC Act (and imported into the ACT Bill by clause 6 of the Bill) as:

> ***confiscation proceeding*** means a proceeding under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*, or under a corresponding law within the meaning of either of those Acts, but does not include a criminal prosecution for an offence under either of those Acts or a corresponding law.

Essentially, confiscation proceedings are civil proceedings to deprive an offender of unlawfully acquired property. They are not a penalty and so do not come within the scope of the rule against self-incrimination as it has traditionally been formulated. A person can therefore be compelled to answer questions or provide documents or things for the purposes of recovery proceedings.

Human rights issues

The Committee has also canvassed human rights implications with respect to the question of whether section 26 of the Bill infringes the right to silence and privilege against self-incrimination enshrined in article 14.3 (g) of the International Covenant on Civil and Political Rights (ICCPR). The purpose of article 14.3 (g) of the ICCPR (which is restated in subparagraph 22(2)(i) of the Human Rights Bill 2003) is to protect a person from being compelled or otherwise coerced to speak against oneself, reduce the risk of abuse of power and to reduce the risk of unreliable testimony.

Under the future Human Rights Act, the issue will be whether admissibility of derived evidence is an infringement of subparagraph 22(2)(i) or a reasonable limitation on the privilege against self-incrimination permitted by section 28. As the purpose of this Bill is to combat serious and organised crime the government is of the view that the provision is a reasonable limitation.

Finally, I would like to draw the Committee's attention to clause 61A of the ACC Act. This provision requires a review of the Act as soon as practicable after 1 January 2006. If particular provisions of the Act are found to be operating in an adverse way, the opportunity will be there to revisit the issues and for the Act to be modified if necessary. State and Territory legislation can also be amended if the review finds this necessary.

I trust this is of assistance to the Committee.

Yours sincerely

B Wood

Bill Wood MLA
Minister for Police and Emergency Services
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