Legislative Assembly for the Australian Capital Territory

Standing Committee on Legal affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

scrutiny report no. 14

4 June 2002

Terms of reference

(1) 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 Celeste Italiano
(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 - Comment

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

Statute Law Amendment Bill 2002

This Bill would amend various laws of the Territory as part of the technical amendments program for laws of the Territory. Schedule 1 provides for amendments to the Evidence (Miscellaneous Provisions) Act 1991 and to the *Health and Community Care Services Act 1996*; Schedule 2 provides for non-controversial structural amendments of the *Legislation Act 2001*; Schedule 3 contains minor or technical amendments of legislation initiated by the Parliamentary Counsel's Office; and Schedule 4 provides for the repeal of redundant or obsolete Acts and regulations.

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

The right to cross-examine

The amendments to the *Evidence (Miscellaneous Provisions) Act 1991* extend the range of witnesses who may give evidence by way of closed-circuit television to include an adult on whose behalf an application is made under the *Protection Orders Act 2001* for a personal protection order if the application alleges the commission of a sexual offence.

A personal rights issue lies in the potential for such laws to qualify the practical effect of the principles stated in Article 14(3)(e) of the *International Covenant on Civil and Political Rights*. This reads:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him: …

Proceedings under the *Protection Orders Act 2001* are analogous to criminal proceedings.

It may assist the Assembly if a full explanation of the point of the amendment is provided. Part 1.1 of the *Statute Law Amendment Bill 2002* would amend paragraph 4(b) of the *Evidence (Miscellaneous Provisions) Act 1991*. The main point of the amendment is stated in the Note to Part 1.1:

> This amendment brings the language of the paragraph into line with current drafting practice and updates a cross-reference that was inadvertently missed when the Act was amended by the *Protection Orders (Consequential Amendments) Act 2001*. The amendment will ensure that the provisions of the *Evidence*

(Miscellaneous Provisions) Act 1991, part 2 (which is about the giving of evidence of sexual offences by children) apply to proceedings under the *Protection Orders Act 2001*.

[The Explanatory Memorandum states the position inaccurately when it says that the "The amendment corrects a cross-reference that was inadvertently missed when the *Protection Orders Act 2001* was enacted". The reference should have been to the *Protection Orders (Consequential Amendments) Act 2001*.]

1. Explanation of what is involved is best approached by starting with Part 2 of the *Evidence (Miscellaneous Provisions) Act 1991*. This is headed " Giving of evidence about sexual offences by children". (This however is somewhat misleading, in that many adult witnesses might be affected by this Part.)

The main provision in Part 2 of the Act is subsection 6(1):

6 Location of prescribed witness giving evidence

(1) If—

(a) a **prescribed witness** is to give evidence in **proceedings**; and

(b) the courtroom and a place other than the courtroom are equipped with, and linked by, a closed-circuit television system that is capable of allowing—

(i) persons in the courtroom to see and hear the persons at the other place; and

(ii) persons at the other place to hear, or to see and hear, persons in the courtroom;

the evidence of the witness shall be given from that other place by means of that system unless the court otherwise orders. (Emphasis added.)

(Subsection 6(2) gives the court a discretion to make an order contrary to what subsection 6(1) prescribes.)

A prescribed witness is defined in section 4:

For this part, the following witnesses are prescribed:

(a) a child;

(b) in relation to proceedings of a kind referred to in section 5 (a), (b) or (e) in respect of the alleged commission of a sexual offence—the complainant.

The **proceedings** to which section 6 applies are those stated in section 5. As it stands now, that is, after its amendment by the *Protection Orders (Consequential Amendments) Act 2001*, it reads:

5 Application of pt 2

This part applies in relation to—

(a) proceedings in the Supreme Court—

(i) for a trial on indictment in respect of the alleged commission of an offence against a law in force in the ACT; or

(ii) for the passing of sentence in respect of the commission of an offence against a law in force in the ACT; or

(iii) by way of an appeal from a conviction, order, sentence or other decision of the Magistrates Court in proceedings in relation to which this part applies; or

(b) proceedings in the Magistrates Court on an information in respect of the alleged commission, or commission, of an offence against a law in force in the ACT; or

(c) proceedings under the Protection Orders Act 2001; or

(d) proceedings under the Children and Young People Act 1999, part 7.3 (Care and protection orders and emergency action); or

(e) proceedings under the Victims of Crime (Financial Assistance) Act 1983; or

(f) proceedings by way of an inquest or inquiry in the Coroner's Court.

Thus, where the witness is a child, the proceeding, while it must be one of a kind described in section 5, need not be in relation to a sexual offence.

The concept of a **sexual offence** is relevant where the witness is not a child. From paragraph 4(b), it may be seen that section 6 will apply only to a witness who is not a child where

- The proceedings are of a kind stated in paragraphs 5 (a), (b) or (e);
- Where those proceedings are " in respect of the alleged commission of a sexual offence"; and
- The witness is the complainant in respect of that alleged offence.

The concept of **complainant** is defined in section 2. It means, for example, a person "(c) with whom the offender is alleged to have engaged in or attempted to engage in sexual intercourse".

The concept of a **sexual offence** is also defined in section 2, which in turn refers to certain kinds of offences under the *Crimes Act 1900.* (The definition picks up only a limited range of sexual offences.)

2. The amendment proposed by the *Statute Law Amendment Bill 2002* needs to be seen against the background of the amendments made to *Evidence (Miscellaneous Provisions) Act 1991* by the *Protection Orders (Consequential Amendments) Act 2001*. Prior to these amendments to section 4 (b) of the *Evidence, etc Act*, this provision referred to "section 5(a), (b), (e) or (f)". After amendment is read, as it does now, to "section 5 (a), (b) or (e)". Section 5 of the *Evidence, etc Act* was also amended so that in para 5(c) the reference was to "(c) proceedings under the *Protection Orders Act 2001".* At the same time, the amendment removed the then existing para 5(e) - which referred to "proceedings under the *Domestic Violence Act 1986*" - and replaced it with a reference to another kind of proceeding.

The result was that section 6 could not apply to a witness (who was not a child) where the proceeding was one under the under the *Protection Orders Act 2001*. This is because section 4 does not refer to para 5(c), (which is the paragraph of section 5 that refers to these kinds of proceedings).

3. To come now to the amendment proposed by the Part 1.1 of the *Statute Law Amendment Bill 2002*, if section 4 is amended so that it reads "section 5 (a), (b) or (c)", section 6 will apply where the proceeding is one under the *Protection Orders Act 2001* (so long as the proceeding is in respect of the alleged commission of a sexual offence as defined in section 2 of the *Evidence (Miscellaneous Provisions) Act 1991*).

4. In the first place, this would restore the policy of the *Evidence (Miscellaneous Provisions) Act 1991* as it stood prior to the *Protection Orders (Consequential Amendments) Act 2001*. This is so because the *Protection Orders Act* now deals with the kinds of proceedings that were governed by the *Domestic Violence Act 1986*. (The former Act refers to these proceedings as domestic violence orders.)

In the second place, it would extend the policy of the *Evidence (Miscellaneous Provisions) Act 1991* because the *Protection Orders Act* now deals with the kinds of proceedings that were governed by Part 10 of the *Magistrates Court Act 1930*. The *Protection Orders Act 2001* refers to these proceedings as personal protection orders. Prior to the amendment of the *Evidence (Miscellaneous Provisions) Act 1991* by the *Protection Orders (Consequential Amendments) Act 2001*, proceedings under Part 10 of the *Magistrates Court Act 1930* were not affected by the *Evidence etc Act 1991*.

This extension will occur because, by this Bill, section 4(b) will now refer to section 5(c), and after its amendment by the *Protection Orders (Consequential Amendments) Act 2001*, paragraph 5(c) now refers to " proceedings under the *Protection Orders Act 2001"*, and this will embrace both domestic violence orders and personal protection orders.

5. The *Protection Orders Act 2001* operates by reference to the concept of a "protection order", although its provisions do distinguish between a "domestic violence order" and a "personal protection order". It would perhaps be possible to draft section 5 of the *Evidence (Miscellaneous Provisions) Act 1991* so that it distinguished between these two kinds of orders, but amendment of the *Protection Orders Act 2001* might also be required.

Access to the law

Amendment of the *Health and Community Care Services Act 1996* would insert new subsections 32 (3) and (4) to provide for a determination of fees and charges to adopt the charges set out in agreements, as in force from time to time, with health benefits organisations. This approach removes the need for a determination to set out a voluminous number of charges that have been agreed with health benefits organisations and for the determination to be revised each time a charge is altered.

Note 1 to Part 1.2 of the Bill notes that "The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the *Legislation Act 2001*, s 47 (5) or (6) is not disapplied (see s 47 (7))."

The Committee notes and commends, that neither s 47 (5) or (6) have been disapplied; cf Report No 4 of 2002.

Comment on the Explanatory Memorandum

The Committee commends the clarity of the Explanatory Memorandum. In order to assist Members, and as a matter of general interest, it is useful to note two of the concepts used to explain the Bill.

Schedule 2 provides for non-controversial structural amendments of the *Legislation Act 2001* initiated by the Parliamentary Counsel's Office. The Explanatory Memorandum explains:

> Structural issues are particularly concerned with making the statute book more coherent and concise, and therefore more accessible. Strategies to achieve these objectives include such things as avoiding unnecessary duplication and the maximum degree of standardisation of legislative provisions consistent with policy requirements and operational needs.

Schedule 3 contains minor or technical amendments of legislation initiated by the Parliamentary Counsel's Office. The Explanatory Memorandum explains:

> These technical amendments include the correction of minor errors, updating language, improving syntax and other minor changes to update or improve the form of legislation.

Further comment

The substantive change that would be made by this Bill in the respect that it would amend the *Evidence (Miscellaneous Provisions) Act 1991* is to extend the facility of taking evidence by video-link to a case where, in conjunction with an application for a personal protection order under the *Protection Orders Act 2001* a witness (the complainant) alleges that the person against whom the order sought committed a sexual offence against the complainant. (What has just been said assumes that the *Protection Orders (Consequential Amendments) Act 2001* inadvertently disapplied the *Evidence (Miscellaneous Provisions) Act 1991* to such proceedings in connection with a domestic violence order under the *Protection Orders Act 2001*.)

In order to assist the Assembly to decide whether this substantive change is desirable from a rights perspective, the Committee draws attention to competing view points expressed in a decision of the Supreme Court of the USA. In this case the Court was addressing a case where the witness was a 13 year old and where she was the complainant in a sexual offence matter. This is of course different to the situation which would be covered by the substantive change that would be made by this Bill. Moreover, there is no doubt that the *Evidence (Miscellaneous Provisions) Act 1991* would apply to the situation dealt with by the Supreme Court. Nevertheless, the discussion of principle may assist the Assembly.

Coy v Iowa -- Supreme Court of the USA--1990

Appellant was charged with sexually assaulting two 13-year-old girls. At appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between appellant and the

girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The Supreme Court, by a majority, upheld appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be confronted with the witnesses against him."

Justice SCALIA delivered the opinion of the Court.

…
Appellant objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. He argued that, although the device might succeed in its apparent aim of making the complaining witnesses feel less uneasy in giving their testimony, the Confrontation Clause directly addressed this issue by giving criminal defendants a right to face-to-face confrontation. He also argued that his right to due process was violated, since the procedure would make him appear guilty and thus erode the presumption of innocence. ..

II
The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," California v. Green, 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. …

We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. …

[1] The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in Jay v. Boyd, 351 U.S. 345, 375-376, 76 S.Ct. 919, 935-936, 100 L.Ed. 1242 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face- to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss *1020 the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." Kentucky v. Stincer, supra, 482 U.S., at 736, 107 S.Ct., at 2662. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence

may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

III

[2] The remaining question is whether the right to confrontation was in fact violated in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. App. 10-11. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit--namely, the right to cross-examine, … the right to exclude out-of-court statements, see … and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself, …

The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

…

Justice O'CONNOR, with whom Justice WHITE joins, concurring.

I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that "[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only State authorizing the type of screen used in this case. … A full half of the States, however, have authorized the use of one- or two-way closed-circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 33 States (including 19 of the 25 authorizing closed-circuit television)

permit the use of videotaped testimony, which typically is taken in the defendant's presence. …

While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant. See, e.g., … (one-way closed-circuit television; defendant must be in same room as witness); … (two-way closed-circuit television); … Indeed, part of the statute involved here seems to fall into this category since in addition to authorizing a screen, Iowa Code § 910A.14 (1987) permits the use of one-way closed-circuit television with "parties" in the same room as the child witness.

*1024 Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. … the Court has time and again stated that the Clause "reflects a preference for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. … our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. …. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, … our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

The Sixth Amendment provides that a defendant in a criminal trial "shall enjoy the right ... to be confronted with the witnesses against him." In accordance with that language, this Court just recently has recognized once again that the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact:

" 'The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' …

Whether or not "there is something deep in human nature," ante, at 2801, that considers critical the ability of a witness to see the defendant while the witness is testifying, that was not a part of the common law's view of the confrontation requirement. …

The limited departure in this case from the type of "confrontation" that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest.

Indisputably, the state interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from 0.67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse. … The prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered. "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming." … Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioural disturbance in children." ….

Thus, the fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth- finding function of the trial itself. … Because of these effects, I agree with the concurring opinion, ante, at 2805, that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here--the "preference" for having the defendant within the witness' sight while the witness testifies.

GOVERNMENT RESPONSES

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

4 June 2002