Legislative Assembly for the Australian Capital Territory

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Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 12 OF 1998

24 November 1998

TERMS OF REFERENCE

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(2) The Committee will consider whether:

(a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:

(i) meet the objectives of the Act under which it is made;

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

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

(iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.

(b) the explanatory statement meets the technical or stylistic standards expected by the Committee.

(c) clauses of bills introduced in the Assembly:

(i) do not unduly trespass on personal rights and liberties;

(ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) do not 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) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four members.

(4) 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 and circulation.

(5) The Committee be provided with the necessary additional staff, facilities and resources.

(6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and Subordinate Legislation): Ms Celia Harsdorf

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.

Bushfire (Amendment) Bill 1998

This Bill would amend the *Bushfires Act 1936* in two respects. First, the power now vested in the Minister by section 7A to declare a total fire ban would instead be vested in the Chief Fire Officer. Secondly, a new section 7B would vest in the Chief Fire Officer a discretion to grant to a person a permit to light and maintain a fire, in a public place, on a day affected by a total fire ban. The discretion is broad, but some factors are specified.

Debits Tax (Amendment) Bill 1998

This Bill would amend the *Debits Tax Act 1997* to accommodate changes made to the *Cheques and Payment Orders Act 1986* (Cth) of the Commonwealth. The primary effect of the amendments is to ensure that cheque accounts provided in the ACT by building societies, credit unions, and like bodies are subject in the same way to the *Debits Tax Act 1997* as are bank cheque accounts.

Electoral (Amendment) Bill 1998

This Bill would amend section 37 of the *Electoral Act 1992* to the effect that a redistribution of electoral boundaries shall commence after the third Saturday in October two years before the next due date for an election, rather than after the third Saturday in February two years and eight months before the next election.

Motor Traffic (Alcohol and Drugs) (Amendment) Bill 1998

This Bill would repeal section 10A of the *Motor Traffic (Alcohol and Drugs) Act 1977*.

Land (Planning and Environment) (Amendment) Bill 1998

This Bill would amend sections 184B and 187B of the *Land (Planning and Environment) Act 1991* for the purpose of altering the time from which will commence to operate changes to the Change of Use Charge which have been made by previous amendment to the Act

Prisoners (International Transfer) Bill 1998

This Bill is designed to enable the operation in the Territory of the scheme for the international transfer of prisoners, which scheme has been created by the *International Transfer of Prisoners Act 1997* (Cth) of the Commonwealth. The Bill is based on a draft model Bill for complementary legislation by the States and Territories which was developed through the Standing Committee of Attorneys-General

Transplantation and Anatomy (Amendment) Bill 1998

This Bill would amend the *Transplantation and Anatomy Act 1978* to allow non-medical practitioners to enucleate eyes for forwarding to the Eye Bank.

Bills - Comment

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

Health Regulation (Maternal Health Information) Bill 1998

This Bill would attach certain legal obligations to the performance of an abortion on a woman. Clause 3 states, however, that neither compliance nor non-compliance with these legal obligations should affect the lawfulness or the unlawfulness of an abortion in terms of sections 40 to 45 of the *Crimes Act 1900*.

The main legal obligations are :

> that an abortion must be performed by a medical practitioner in an approved medical facility (clause 5);
>
> that an abortion may not be performed on a woman unless a certificate relating to her has been lodged under clause 8 (clause 6);
>
> that a medical practitioner who is unrelated to an approved medical facility must (i) provide certain information to the woman in respect of whom it is proposed to perform an abortion (clause 7(1)), and (ii) provide the woman with pamphlets which have been approved under clause 15 (clause 7(2));
>
> a medical practitioner who has provided the relevant information under clause 7 in respect of a woman may lodge a certificate to that effect with the responsible officer of an approved medical facility;
>
> a person shall not perform an abortion on a woman unless there has been obtained in writing the consent of the woman, and, where the woman is under the age of 18 years, "a parent of the child", or, where relevant, the Director of Children's Services; and
>
> clause 10(1) provides: "A medical practitioner shall not perform an abortion unless the certificate required under section 6 and any consents required under section 9 were obtained more than 72 hours previously".

In a "medical emergency" (as defined), clauses 6 and 10 do not apply. Nor does clause 9(1) to the extent that it requires consents in relation to a woman under the age of 18 years. In a case where an abortion is performed in a medical emergency, the person who performs the abortion must lodge a report under clause 11. Clause 15 provides for the approval by an Advisory Panel of the pamphlets which must be provided under clause 7(2). An approved facility must lodge annual reports to the Minister (clause 16). There are provisions governing discipline of a medical practitioner, and the protection of the privacy of a woman on whom an abortion has been performed (clauses 14 and 16(2)).

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

General considerations

Laws governing abortions necessarily involve debates about the scope of the "right to life". Such a right is stated in all international conventions on rights. In Article 6.1 of the ICCPR it is stated:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

There is of course debate as to whether Article 6.1 applies at all to unborn children. If it does, there is then debate as to whether that right is subject to certain limitations. One such limitation often suggested is that the right of the unborn child must give way to the right to life of the mother. There is then debate as to the circumstances in which the right of the mother may be said to be relevant - is it only in medical emergencies, or does her 'life' embrace wider concerns?

Laws governing abortions may also involve debates about the scope of the "right to privacy". In Article 17.1 of the ICCPR it is stated:

> No one shall be subjected to arbitrary or unlawful interference with his privacy[, or]family ...

Some argue that the right of a woman to her privacy includes an unqualified right to decide whether she will terminate her pregnancy.

The statement in Article 17.1 that a person shall not be subject to arbitrary or unlawful interference with her or his family brings other interests into focus. The woman may claim that any limitation on her ability to decide whether to terminate her pregnancy is an interference with her family. On the other hand, the father of the unborn child may claim that he has an interest in whether there should be a termination. The claim of the man may amount to a claim of a veto, or it may be put as a claim to participate in some way in the making of the decision. A parent of a woman may also claim to have a right under Article 17.1 similar to the scope of the claim which may be made by the father of the unborn child.

These claims by women, fathers and parents based on Article 17.1 may also be based on or supported by Article 23.1, which states that

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Committee does not offer a view as to how a rights analysis would or would not support any of the provisions of this Bill. This is a matter for the Assembly.

<u>Clause 9</u>

There is a problem in understanding just what clause 9(1)(b) means when it says, in relation to a woman who "is a child under the age of 18", that "a parent of the child" must consent in writing to the performance of an abortion on the woman.

There may, of course, be more than one living parent of the woman. Given the definition of "parent" in clause 4, there may be more than two parents. This definition includes "a step-parent, adopting parent or guardian of the child and a person who is by law liable to maintain the child".

One reading of clause 9 is that it is sufficient if one parent gives consent, and this may have been what was intended. The clause is, however, capable of being read to mean that every parent (or, at least, every natural parent), must consent, and Articles 17 and 23 of the ICCPR could be said to support such a view).

But if the consent of one parent only is required, what is to occur if another parent makes an objection? (This conflict could be between the natural parents of the woman under 18, or it could involve non-natural parents too).

These matters may require some clarification.

Drafting points

1. It appears that clauses 5 and 7 apply where the abortion is performed in a medical emergency. The Committee asks whether this was intended.

2. Clause 10 is not perfectly clear. It appears to be intended that the 72 hour cooling off period runs from the time from which the consents under clause 9 and the certificate required under clause 6 have been given or made. These actions are unlikely to occur simultaneously, so it is the later of the two times which will be the starting point. A problem lies in the concept that a certificate required under clause 6 has been "obtained". Clause 8 speaks of the unrelated medical practitioner lodging a certificate, and not of anyone obtaining it. It might of course be said that the certificate has been obtained by the woman as soon as the unrelated medical practitioner makes the certificate, and this would in many cases be at an earlier time that the certificate is lodged. It is not clear what was intended in this respect.

3. While the definition of "woman" in clause 4 provides that it includes "a girl who has not attained the age of eighteen years", clause 9(1)(b) refers to a woman who is "a child under the age of 18". The words "of a child" in the latter appear to be unnecessary, and their presence might give rise to an argument that there is intended to be drawn a distinction between a "girl" and a "child".

4. Clause 16(1) requires the responsible officer of an approved facility to provide in an annual report to the Minister details of both the number of abortions performed at the facility during the relevant year, and, in addition, "(e) the number of women who had previously had an abortion performed at that facility". It is not clear how extensive will be the scope of the obligation imposed by paragraph (e). Will it include details of numbers of women who had abortions at any time in the past?

Motor Traffic (Amendment) Bill (No. 4) 1998

This Bill would amend the *Motor Traffic Act 1936* to the purpose of regulating certain activities involving the use of motor vehicles upon a public street. The Bill would repeal section 119 of the Act and insert in its stead new sections 119 and 119A.

New section 119 provides that a driver of a motor vehicle shall not engage in certain actions unless he or she holds a permit granted under proposed new subsection 139H(1). These actions include racing, attempting to break speed records, competing in trials, and, in paragraph 119(c), trialing the speed of a motor vehicle.

New subsection 119AA(1) provides that a person shall not knowingly "burnout" a motor vehicle, and new subsection 119AA(2) provides for an additional penalty "where any petrol, oil, diesel fuel or other inflammable liquid has been placed on the street" beneath or near the tyres of the vehicle. The term "burnout" is defined in clause 4. New section 119AA will not apply where the person has obtained a permit under proposed new subsection 139H(1).

A proposed new Part VIIIA of the Act would, in Division 2, create a scheme for the approval of certain kinds of events conducted upon a public street, and, in Division 3, for permits to be granted to persons to engage in those events.

The events for which approval is required are motor vehicle races, attempts to break speed records, trials of the speed of a motor vehicle, burnouts of a motor vehicle, and competitive trials of the skills of drivers or of the condition of a motor vehicle (proposed new subsection 139B). The chief police officer is vested with the power to grant a permit, and the primary factor to be addressed is whether the grant of the approval would be "without danger to the public" (proposed new subsection 139D(1)).

Under proposed new section 139F, a person shall not upon a public street drive or operate a motor vehicle in an approved event unless the person holds a permit. The chief police officer is vested with the power to grant a permit, and the primary factor to be addressed is whether the grant of the approval would be "without danger to the public" (proposed new subsection 139H(1)).

Proposed new Division 4 provides for enforcement of the prohibitions in the scheme. There are provisions concerning disqualification of the licence of an offender, seizure by a police officer of a motor vehicle, the impounding and forfeiture of a motor vehicle, the release of vehicles by the chief police officer and by a court, and legal immunity for police officers.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations

The Committee notes that there is no provision for the review of an exercise of the power of the chief police officer to refuse to grant a permit under proposed new sections 139D and 139H.

Drafting points

1. In the definition of "burnout" in clause 4, the word "to" should probably be inserted between the words "means" and "operate".

2. The concept of the "trial of a motor vehicle" (used in various of the proposed new sections of the Act) appears to be very broad, and might include the activities of motor mechanics testing vehicles after repairs.

3. The approvals and permits to be granted under, respectively, proposed new sections 139D and 139H, may be expressed to exempt the event approved from a specified provision of the Act relating to the affixing of silencers, the rules of the road, or the speed of vehicles (see proposed new subsections 139D(5) and 139H(5)). There are a number of drafting problems with these provisions:

> if, as appears to be the appropriate reading, these provisions are read as an exhaustive statement of what provisions of the Act may be the subject of an exemption, there is no reference in them to proposed new section 119AA, relating to burnouts;
>
> it may be that proposed new section 139H(5) should provide that the permit should exempt the permit-holder - rather than "the event" - from the provisions of the Act; and
>
> it is not clear whether the power of the Minister to give directions to the chief police officer in respect of the latter's powers under proposed subsections 139D(5) and 139H(5) is a power which may be exercised in relation to particular exercises of the power, or, on the other hand, is confined to the giving of general directions.

Rates and Land Tax (Amendment) (No. 2) Bill 1998

This Bill would amend the *Rates and Land Tax Act 1926* in various respects which are related primarily to the scheme for the payment of residential land tax. The main features of the Bill are:

> provision to deal with the situation where a property is rented for only part of a quarter of the relevant taxing year (clause 5);

provisions to give to the Commissioner for Australian Capital Territory Revenue, and to authorised officers, greater powers to obtain information to enforce the obligations of taxpayers under the Act (clauses 8 to 12);

provisions governing the manner in which residential land tax will apply to land held under a multi-purpose lease (clause 14);

provision to enable a person who is given an assessment of land tax to lodge with the Commissioner an objection in writing to the assessment on the ground that, on the relevant date, the land was not rented (clause 13); and

provision to enable the Commissioner to delegate to a public employee a power or function conferred on the Commissioner by the Act (except the power to delegate) (clause 15).

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The Committee has noted that the provisions of clauses 8 to 12 would confer on the Commissioner and authorised officers extensive powers (i) to require persons to provide information, and (ii) to enter business premises. Such premises may be entered during business hours, without (a) the need to obtain a warrant, and (b) without the need to obtain the permission of the occupier of those premises, even if the occupier is not then present. Entry may be made outside business hours if the occupier is then present. The Commissioner or an authorised officer must have an identity card, which must be produced on request by the occupier.

The Committee draws these provisions to the attention of the Legislative Assembly, and offers the comment that the restrictions on the use of the power of entry are such as to conclude that there is here no undue trespass on personal rights and liberties.

The Committee has noted that the provisions of clauses 8 to 12 would also confer on the Commissioner and authorised officers extensive powers to (i) collect information and make inspections, and (ii) require the occupier to produce documents and answer questions. The occupier and other persons are subject to penalties for non-compliance or obstruction in relation to the exercise of these powers.

The Committee draws these provisions to the attention of the Legislative Assembly, and offers the comment that the availability of a defence, on the ground that the person charged may argue that he or she had “reasonable excuse”, is such as to conclude that there is here no undue trespass on personal rights and liberties.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations

The Committee notes that the Bill would make provision to enable a person who is given an assessment of land tax to lodge with the Commissioner an objection in writing to the assessment on the ground that, on the relevant date, the land was not rented (clause 13, which would amend section 22GE by the insertion of subsection 22GE(1A)). Under proposed subsection 22GE(3)(ba), the Commissioner would be obliged to decide the objection.

It does not appear, however, that an objector dissatisfied with the decision of the Commissioner would have any right of review by the Administrative Appeals Tribunal. Section 22GF makes provision for such review in respect of most of the other decision-making powers of the Commissioner upon an objection (see subsection 22GE(3)).

There is no justification offered for the lack of a right of review by the Administrative Appeals Tribunal, and, on the face of it, such a right would appear to be justified. The omission of any amendment to section 22GF may be an oversight, for the Committee notes that the Explanatory Memorandum states (in the Summary) that the amendments would "provide the right of appeal against a decision that a residential property is 'rented' and liable for tax".

Supreme Court (Amendment) Bill (No. 3) 1998

This Bill would amend the *Supreme Court Act 1933* in four main ways. First, any resident judge of the Supreme Court who is appointed while another resident judge holds a commission as a Federal Court judge will be entitled to the same remuneration, allowances and entitlements to which a judge of the Federal Court is entitled. In this respect, the Bill would make some consequential amendments to the *Remuneration Tribunal Act 1995*.

Secondly, the terms and conditions of an acting judge of the Supreme Court will be as prescribed (by regulation made under the Act), but that judge "shall receive the same entitlements, other than in relation to leave or pension, as a resident Judge" (proposed subsection 37G(2)).

Thirdly, proposed subsection 37I(2) provides that "The public money of the Territory is appropriated to the extent necessary for payment of Judges of remuneration and allowances".

Fourthly, the Bill would insert in the Act a new section 67A, which would give to the Supreme Court a power to declare a person to be a vexatious litigant. The declaration may be made on the application of the Attorney-General, and the consequence is that the person may not institute or continue proceedings in any court or tribunal without the leave of the Supreme Court. The declaration may be limited to certain types of proceedings, and may be subject to conditions.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

A power to declare a person to be a vexatious litigant is one which, on its face, raises a rights issue. The courts have always been astute to safeguard their jurisdiction, and provisions of legislation which restrict jurisdiction are usually read narrowly. This policy is stated in Article 14.1 of the ICCPR:

> All persons shall be equal before the courts and tribunals.

As the Attorney-General's Presentation Speech notes, however, provisions such as the proposed section 67A are commonly conferred on Supreme Courts, and the Committee accepts that the power will be employed judicially and sparingly. It is thus of the view that the proposed section 67A is <u>not</u> an undue trespass on personal rights and liberties.

Subordinate Legislation - No Comment

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

Subordinate Law No. 33 of 1998 being the Financial Institutions Duty Regulations made under section 28 of the *Financial Institutions Duty Act 1987* inserts a new regulation 2A into the *Financial Institutions Duty Regulations* to make provision for exempting a receipt of money by a financial institution that holds an exchange settlement account with the Reserve Bank of Australia.

Determination No. 235 of 1998 made under subsections 3(1), 5(1) and 26(1) of the *Subsidies (Liquor and Diesel) Act 1998* revokes Determination No. 187 of 1998 and determines the rate of subsidy for the supply of low-alcohol liquor and diesel fuel in the Australian Capital Territory.

Determination No. 242 of 1998 made under paragraph 204(a) of the *Land (Planning and Environment) Act 1991* is an approval of the Plan of Management for Woden and Weston Creek's Urban Parks and Sportsgrounds and of the Plan of Management for Belconnen's Urban Parks and Sportsgrounds and Lake Ginninderra.

Management Standard No. 3 of 1998 made by the Commissioner for Public Administration with the approval of the Chief Minister under section 251 of the *Public Sector Management Act 1994* is an amendment to Management Standard No. 1 of 1994.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Minister for Urban Services in relation to the Committee's comments in Report No. 6 of 1998 concerning Determination Nos 83, 119, 126, 155, 176 and 177 of 1998
- the Minister for Education in relation to the Committee's comments in Report No. 8 of 1998 concerning Determination No 27 of 1998
- the Minister for Urban Services in relation to the Committee's comments in Report No. 9 of 1998 concerning the *Building (Amendment) Bill 1998* and the *Construction Practitioners Registration Bill 1998*
- the Minister for Health and Community Care in relation to the Committee's comments on the *Health (Amendment) Bill 1998*
- the Minister for Health and Community Care in relation to the Committee's comments in Report No. 8 of 1998 on Determination No 19 of 1998
- the Attorney-General in relation to the Committee's comments in Report No. 6 of 1998 on Subordinate Law Nos 43 of 1997 and 15 of 1998 and
- the Minister for Health and Community Care in relation to the Committee's comments in Report No. 9 of 1998 on Determinations Nos 210, 211 and 212.

The Committee thanks the Ministers for their responses. The Committee has noted some of the comments in the responses in relation to incorporation of legislation and access to legislation, and foreshadows that it will make a further report on these matters in due course.

The Committee has received a response from the Attorney-General on its report on the Domestic Violence (Amendment) Bill (No. 2) 1998 and offers the following comments on the response

Introduction

The Committee reiterates that it sees its function as one of drawing to the attention of the Assembly aspects of Bills which may be seen as raising the issue of whether there has been an "undue trespass on personal rights and liberties". It is for the Assembly to take a view on whether there has been any such 'trespass'.

Looking at laws from a rights perspective is not a straightforward task.

1. There is first the issue of just what rights are to be taken into account. To put this another way, what are the sources of these rights? There is a strong tradition of rights protection in Australian law, and the rights which our courts have protected are a source. (The obligation of decision-makers to give natural justice to persons affected by the exercise of administrative or judicial power is one such common law right.)

In recent years, the High Court of Australia has said that it will look to international law as a source of the rights of persons in Australia. In particular, it will look at those international conventions and treaties to which Australia is a party. The *International Covenant on Civil and Political Rights* (ICCPR) is regarded as of particular significance, for Australia is a party to the Optional Protocol to the ICCPR, which has the effect of enabling Australians to make a complaint to the Human Rights committee of the UN in respect of some law of an Australian legislature.

The terms of various provisions of the ICCPR are considered below. It should, however, be acknowledged that several other conventions could be regarded as sources of rights relevant to an assessment of a domestic violence law. (See, generally, R J Cook (ed), *Human Rights of Women* (1994).)

2. Even if one settles on some particular right as relevant in the particular context, it is often far from clear just what that right means. Rights have an open texture which permits different people to have very different views about the core of what is signified by the rights, as well as about what might be implied. (This will be apparent from the discussion below of Article 9.1 of the ICCPR.)

3. The difficulty is compounded by the fact that, in a particular context, more than one right will be regarded as relevant, and these rights will be in conflict. In other words, the rights will pull in different directions in relation to the issue of whether some law is or is not justified by a rights approach.

4. The open-texture of rights, and the fact that they are often in conflict, raises the question of how one can determine whether some law is or is not justified. There are two related points to be made here.

(a) When this debate arises in a legislative context, there will, generally, be no court which can answer that question. So far as concerns the direct application of the ICCPR, the only body which might give an answer is the Human Rights Committee of the United Nations, and that is not a court. (Of course, there are some contexts in which an Australian court can pass on the validity of a law from a rights standpoint, but these contexts are very limited.)

(b) Of more fundamental significance is that the questions raised by rights arguments are questions for politicians to answer. Speaking of the rights provisions of the Constitution of the USA, Judge Learned Hand, one of the most respected figures in USA legal history, said that "[t]he answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh" (*The Spirit of Liberty* (1963) at 161). It is, ultimately, "a choice between what will be gained and what will be lost" if the law in question is valid.

This is ultimately a question politicians must answer. The Committee passes on to the Legislative Assembly these comments on the Bill and on the Attorney-General's response in the spirit of assisting debate in the Assembly.

The rights involved in a consideration of a domestic violence law - the ICCPR context

In terms of the ICCPR, there are a number of rights which, it may be argued, will be protected or enhanced by a domestic violence law.

Perhaps the most fundamental of all rights is the right to life, expressed in Article 6.1 -

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

It may be argued that this right is directed not only at laws or administrative actions which deprive a person of her or his life. In addition, it imposes on the State an obligation to protect persons from actions which threaten life; (see document extracted in H Steiner and P Alston, *International Human Rights in Context* (1996) at 527). Read in this way, a domestic violence law finds justification in Article 6.1.

Moreover, the particular context in which domestic violence law laws have been enacted draws attention to two other Articles which impose an obligation on States to ensure that the laws apply equally to men and to women. This is stated explicitly in Article 3 -

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

It is also stated in a more general context in Article 26 -

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(The 'equal application of the law' approach is stressed in D Q Thomas and M E Beasley, "Domestic Violence as a Human Rights Issue" (1993) 15 *Human Rights Quarterly* 36.)

There are several other Articles of the ICCPR (such as Articles 17, 23, and 24) which may be said to provide justification for a domestic violence law. It is also arguable that the first sentence of Article 9.1 is relevant. This provides

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

(There may, however, be a question here as to whether the "security of person " to which Article 9 refers is tied to the rights of a person subject to pre-trial criminal processes. A clearer basis for an argument that the "security of person" is a right independent of these processes is Article 3 of the *Universal Declaration of Rights*, which provides simply that "Everyone has the right to life, liberty and security of person".)

There are, then, several lines of justification for a domestic violence law. This is not in question. But when attention is paid to the precise detail of a domestic violence law, and in particular to the ways in which such a law bears upon the respondent to an order made under such a law, other rights come into focus. And, so far as concerns the particular provisions of the *Domestic Violence (Amendment) Bill (No. 2) 1998*, there are some provisions which, it may be argued, are in conflict with Article 9.1 of the ICCPR. The most troubling provision is clause 19J(1) of the Bill.

By clause 19K of the Bill, an emergency protection order must be served personally on the respondent by a police officer "as soon as reasonably possible". Clause 19J permits the detention of the person against whom the order is sought in order, it appears, to facilitate this process.

Clause 19J(1) provides -

> "Where it is proposed to apply for an emergency protection order, a police officer may
>
> (a) where appropriate, remove the person to another place, and
> (b) detain the person until the application for the order has been dealt with and any order served on the person".

By clause 19J(2), a person shall not be detained under this section for longer than 4 hours".

It must be noted that the procedure for the making of an emergency protection order may be commenced even though there are no grounds to arrest the proposed respondent. The Presentation Speech makes clear that where a criminal offence has occurred, the appropriate response of the police is to arrest and charge the alleged offender.

<u>Article 9 of the ICCPR and clause 19J(1) of the Bill</u>

Looking at clause 19J(1) of the Bill through the lens of Article 9.1, a number of issues arise.

Is a power to detain a person in police custody which is divorced from pre-trial criminal process justified at all under the ICCPR?

The only explicit basis in the ICCPR for a power to detain a person is Article 9.1. (Such a power might also be justified under Article 4.1, but this applies only in times of public emergency.)

It is arguable that when Article 9.1 speaks of "arrest or detention", it is signifying that the detention of which it speaks is one allied to the pre-trial criminal process. (This is how it is viewed in the publication *Human Rights and Pre-trial Detention* (United Nations Centre for Human Rights, United Nations, New York and Geneva, 1994).) Other international rights documents take a broader view of when detention might be warranted, (such as in the *European Convention on Human Rights*, Article 5, in relation so persons with mental disabilities and the like), but these documents do not see a power to detain someone as free-standing.

On the face of it, Clause 19J(1) is not justified by Article 9.1.

Is a detention under Clause 19J(1) "arbitrary"?

A preliminary issue here is whether the second sentence of Article 9.1 :- "No one shall be subjected to arbitrary arrest or detention", governs the third sentence:- "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". This reading is sensible. That is, the "grounds ... established by law" must not be such as to justify an "arbitrary ... detention".

It might be suggested that the two sentences are independent, and that it is enough that some law specifies some grounds for a detention. This approach would, however, rob Article 9.1 of any substantive content. It would mean that any grounds for a detention would meet the requirements of Article 9.1. (This is subject to the qualification that some other provision of the ICCPR might make some ground an impermissible one, but it does mean that no limit can be spelt out of Article 9.1.)

It should be noted that in relation to the substantive grounds on which, under Article 9.1 a person may be detained, the Human Rights Committee of the UN has taken the view that the word "arbitrary" in Article

9.1 should be applied broadly. According to *Human Rights and Pre-trial Detention*, the HRC has said that the concept includes “elements of inappropriateness, injustice and lack of predicability” (at 9).

On the basis that the “grounds ... established by law” must not be such as to justify an “arbitrary ... detention”, the notion of “arbitrary” needs to be explored. The word has a number of possible meanings. In the context of a legal authority to detain, it most naturally conveys the notion that the power to detain must state on its face some principle or standard according to which the power must be exercised. This approach would reduce the element of choice involved in an exercise of the power and, moreover, give a court some basis on which to assess the legality of an exercise of the power. Indeed, other provisions of Article 9.1 which require that courts be able to review legality issues and award compensation will be meaningless unless the power to detain is limited by some principle or standard. And the greater the restriction on the power, the more scope there will be for judicial review.

Looking at clause 19J(1), the only express limitation is that someone - presumably an authorised police-officer - has proposed to apply for an emergency protection order in respect of a person (the respondent). But there is no statement of the basis on which such a proposal may be made.

As the Attorney notes, it may be argued that the proposal to detain must be for the purpose of facilitating the obtaining of and the service of the emergency protection order on the respondent. We respectfully agree with this.

But the point remains that on a matter as fundamental as the deprivation of personal liberty, the grounds should be stated. Only in this way can it be seen whether those grounds are appropriate. If the grounds are stated is there a desirable level of predicability. And if the grounds are stated, judicial review may be effective.

It is possible to read into Article 9.1 a much more substantial limitation. The Human Rights Committee of the UN gave as an example of an arbitrary arrest one in which the person was arrested without a charge being made; (*Human Rights and Pre-trial Detention* at 9). The same reasoning applies to a detention. Yet it is clear that the power in clause 19J(1) is intended to be used precisely when the respondent cannot be charged with a criminal offence.

There is then, much room to argue that a detention pursuant to clause 19J(1) is “arbitrary” within the meaning of Article 9.1.

Would a detention under Clause 19J(1) be in breach of Article 9.1 because it is not one made in accordance with a “procedure ... established by law”?

In a formal sense, there is a procedure established, because the Bill does provide for a framework by means of which a judicial officer may make an emergency protection order. But it is one which does not guarantee to the proposed respondent to the order any ability to be heard on the issue of whether the order should be made.

In this respect, Article 9.1 might be thought to be silent, (although the notion of an “arbitrary” detention might be said to encompass procedural limitations too). But there is no need here to resort to international convenants. It is a principle of Australian law that a power such as a power to deprive someone of their personal liberty must be exercised in accord with natural justice.

We appreciate that the Attorney has addressed this issue, and that he suggests that a judicial officer when making an emergency protection order would seek to hear from the proposed respondent if this were feasible. This may be accepted, but it is not clear why it is necessary to avoid any mention of the rights of proposed respondent in the law which empowers the judicial officer to make an emergency protection order. An obligation to accord natural justice could be made subject to the practicalities of hearing what the proposed respondent had to say.

Further issues

One response to these concerns about Clause 19J(1) and the procedure by which an emergency protection order may be made is to point to the temporary nature of a detention and then of an emergency protection order. A detention may be for only 4 hours, and an emergency protection order has only a short duration of some two days.

On the other hand, it must be borne in mind that a respondent to the processes of the *Domestic Violence Act* will be stigmatised by that reason alone, irrespective of the 'merits' of the particular situation. This is of particular relevance to an emergency protection order, which may be made without reference at all to the respondent.

The Attorney points out that under some other laws a person may be detained briefly. This is so, but detention in those cases is in aid of the regulatory or criminal law. Under this Bill, the detention is divorced from the criminal process.

The Attorney also argues that there is no need for a person detained to be given rights in respect of access to friends, or a lawyer, or in respect of questioning by the police. It is argued that the police will accord 'best practice' to a detainee.

We do not question the integrity of the police, and it is likely that a respondent detrained in a police van, or at the station, will probably be accorded the same rights as he or she would have if an arrest had been made. But there would appear to be no reason why this principle could not be stated in the Bill.

We also question, with respect, the Attorney's suggestion that it is not likely that the police will question a person in detention under Clause 19J(1) about whether he or she may have committed a crime. The Presentation Speech makes clear that where a criminal offence has occurred, the appropriate response of the police is to arrest and charge the alleged offender. Thus, one would expect a police officer who has detained a person under Clause 19J(1) to be careful at all times to ensure that a criminal offence has not occurred. For this purpose, it will be likely that the officer will question the respondent.

There is thus the possibility that a respondent in detention will make admissions which could be the basis for a criminal charge, in circumstances where none of the extensive protections in the *Crimes Act* 1914 apply. It is true, as the Attorney states, that the admissibility in court of these admissions will be assessed in terms of the requirements of the *Evidence Act* (see, in particular, sections 84,85, 90 and 138). But, in practice, it is the provisions of the *Crimes Act* 1914 which give real significance to the requirements of the *Evidence Act*. It is a breach of the *Crimes Act* 1914 which is often the occasion for the operation of the *Evidence Act*.

Paul Osborne, MLA
Chair

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