



Legislative Assembly for the ACT

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

Scrutiny Report

8 JUNE 2006

Report 27

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.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(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 comments on them:

EDUCATION AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Education Act 2004* to regulate the manner in which the Minister must consult with those school communities affected by closing or amalgamating a government school.

RATES AMENDMENT BILL 2006

This Bill would amend the *Rates Act 2004* to deal with the imposition of levies.

Bill—Comment

The Committee has examined the following Bill and offers these comments on it:

ADMINISTRATIVE (MISCELLANEOUS AMENDMENTS) BILL 2006
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This Bill would repeal some laws and amend others to carry into effect part of the Strategic and Financial Review. There would be extensive amendment of the *Emergencies Act 2004*, the *Financial Management Act 1996* and the *Fuels Act 1979*.

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

The right to privacy and/or the right to property

Proposed Division 9.6 of the *Financial Management Act 1996* is designed to facilitate the transfer of assets, rights and liabilities of, or held by, certain Territory authorities to other bodies. These provisions will affect an authority if it is prescribed by regulation to be an authority to which Division 9.6 applies. It is apparent that the authorities affected will be those who are abolished.

Such an authority may or in some circumstances must give to the Territory assistance in relation to the transfer of the authority's assets; see proposed sections 110 and 111 of the Act. The Territory and other persons and bodies of a governmental character "may use the information" (subsection 112(2)) or give it "to someone else" (subsection 112(3)) "for a purpose related to, or consequent on, the transfer of the authority's assets". Subsection 112(4) provides:

- (4) If a person gives information or uses information under this section—
 - (a) the giving of the information is not—

- (i) a breach of confidence; or
 - (ii) a breach of professional etiquette or ethics; or
 - (iii) a breach of a rule of professional conduct; and
- (b) the person does not incur civil liability only because of the giving or using of the information.

Privacy

Do the provisions permitting the transfer of information and displacing breach of confidence law derogate from the right to privacy stated in HRA paragraph 12(a), and, if so, are they justifiable under HRA section 28?

The protections that would be afforded by subsection 112(4) will no doubt find their rationale in the policy of facilitating the transfer of assets (see below), but the Committee must draw attention to their potential impact on the right to privacy stated in *Human Rights Act 2004* paragraph 12(a):

12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, ... interfered with unlawfully or arbitrarily;

In relation to provisions which derogate from the right to privacy in HRA section 12, the issue for the Assembly is whether the derogation is “arbitrary”. If it is not, there is no breach of section 12; if it is, it is hard to see how it could be justified under HRA section 28; see *Scrutiny Report No 2 of the Sixth Assembly*, concerning the Water Efficiency Labelling and Standards Bill 2004. Assessment of whether a derogation is “arbitrary” involves much the same analysis as involved in the application of HRA section 28; see generally *Scrutiny Report No 25 of the Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Measures) Bill 2006.

The protection afforded by the law concerning breach of confidence may, depending on the particular confidential information protected, be seen as a concrete expression of the right in HRA paragraph 12(a). This body of law is one of the major means available under the general law for the protection of privacy. Briefly, this body of law permits a person to obtain a remedy from a court in relation to the disclosure of information where that person disclosed the information to another, and

- that information was confidential in the sense of secret and not in the public domain;
- that it was imparted in circumstances where the recipient knew or should have known that it was to remain secret; and
- there has been or will be a misuse of that information.

Most commonly, there is a misuse of the information where it is disclosed to persons beyond the range of those to whom disclosure was contemplated by the express or implied undertaking of confidentiality.

Information of this kind that would clearly fall within HRA paragraph 12(a) would be information about a person's private life, or their medical condition. The Committee appreciates that such kinds of information may only rarely be within the kinds provided under proposed sections 110 and 111 of the *Financial Management Act 1996*. The issue must nevertheless be addressed. [The Committee has noticed that provisions such as proposed sections 112 and 113 have been included in other bills where the information might easily be of a kind that would fall within HRA paragraph 12(a), and a general comment here is appropriate.]

The simple point is that to remove the protection of the law concerning breach of confidence is a significant derogation of the right to privacy in HRA paragraph 12(a). The derogation may however be justifiable on the basis that it is not "arbitrary" and/or justifiable under HRA section 28.

In relation to proposed section 110, the Explanatory Statement says that it "avoids any concern that the authority is not acting in its own best interests in accordance with general governance requirements" (and similarly for section 111). Concerning subsection 112(4), it is said that

[the] provision will allow a free flow of information about assets and obligations to be transferred and will prevent the Territory from suffering disadvantage during the process.

What is not addressed is whether subsection 112(4) might operate to preclude some person other than a Territory body from seeking to protect their privacy interests through an action for breach of confidence. The Explanatory Statement makes no reference to the *Human Rights Act 2004*.

The Committee draws this matter to the attention of the Assembly.

Property

Do the provisions permitting the transfer of information and displacing breach of confidence law derogate from a right to property, and, if so, are they justifiable?

"Trade secrets" are merely one kind of information that may be protected by the law of breach of confidence. This kind of information might well be within the kinds provided under sections 110 and 111 of the *Financial Management Act 1996*. This brings the notion of a right to property into focus.

A right to property is recognised in Article 17 of the Universal Declaration of Human Rights:

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

In terms of Article 17, consideration of a countervailing public interest is probably justified by reason of the word "arbitrarily" in Article 17(2).

In the Territory, there is an additional dimension. Under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* "the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; ...". This right is, however, narrower than the broader right to property stated in Article 17 of the Universal Declaration. In relation to section 23, there is no balancing of a countervailing public interest.

Some writers trace the solicitude shown towards property by the law to the statement in *Magna Carta* 11297 25 Edw 1 c 29. R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) at 18.01 quote from clause 39: "No man shall be ... disseised of any tenement ... except by the lawful judgment of his peers or by the law of the land". This has relevance in the Territory given that *Magna Carta* is one of the laws of the United Kingdom that continues to apply in the Territory; see subsection 17(2) and Schedule 2 of the *Legislation Act 2001*.

Whether a right to property is engaged by this Bill turns on whether the concept of "property" extends to a piece of information that could be protected by the law of breach of confidence. Some case-law of the European Court of Human Rights suggests that it would. In *Tre Traktoror Aktiebolag v Sweden* (1989) 13 EHHR 309 at [53] that Court held that "established economic interests in connection with the running of a business attracted the protection of article 1 [of the First Protocol of the European Convention on Human Rights]": Lester and Pannick, *Human Rights Law and Practice* (2004) 4.19.4. (Article 1 states a property protection guarantee.)

All constitutional statements for the protection of property permit some measure of derogation of the right. For example, by providing that "No one shall be arbitrarily deprived of his property", Article 17(2) of the Universal Declaration allows for a deprivation that is not arbitrary. As stated above concerning HRA section 12, whether a derogation is "arbitrary" involves much the same analysis as involved in the application of HRA section 28. Under the First Protocol of the European Convention, "an interference with property must not only be in the public or general interest, but must also satisfy the requirement of proportionality, that is, that there is a reasonable relationship between the means employed and the aim sought to be realised": Lester and Pannick at 4.19.18.

The Explanatory Statement makes no reference to this general issue.

The Committee draws this matter to the attention of the Assembly.

Strict liability offence

Is the provision creating an offence of strict liability offence compatible with the presumption of innocence stated in HRA subsection 22(1), and, if not, is it justifiable under HRA section 28?

In respect of clause 1.63 of Schedule 1 of the Bill, the Explanatory Statement states:

Previous section 12 and 12A of the [*Fuels Control Act 1979*] are replaced with new sections 12 and 12A. The provisions have been redrafted to replace references to the ACT Emergency Services Authority with references to the ACT Emergency Services Commissioner. In addition the language of the provisions has been updated. No substantive change has been made to the provisions.

This is accurate, but the Committee must nevertheless draw attention to proposed subsections 12(3) and (4), which, in combination, create an offence of strict liability. These provisions engage the presumption of innocence stated in HRA subsection 22(1). What must be taken into account is that the *Human Rights Act 2004* has made a substantive change to Territory law.

No justification is offered in the Explanatory Statement, but it might be supposed that the object is to ensure a high degree of vigilance on the part of those who sell fuels. What appears less justifiable is the provision for a penalty of up to 6 months imprisonment as an alternative to the imposition of a fine of up to 50 penalty points. In *Scrutiny Report No 38 of the Fifth Assembly*, the Committee drew attention to the possibility that derogation of the presumption of innocence would not be justifiable by means of a strict liability offence where the potential punishment included imprisonment. In that report, it quoted the words of Lamer CJ of the Supreme Court of Canada in *R v Wholesale Travel Group Inc* [1991] 3 S.C.R. 154 at 184:

The rationale for elevating mens rea from a presumed element ... to a constitutionally required element, was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime.

The Committee draws this matter to the attention of the Assembly.

SUBORDINATE LEGISLATION

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

There is no matter for comment in this report.

Bill Stefaniak, MLA
Chair

June 2006