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

SCRUTINY REPORT 36

15 SEPTEMBER 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILL—NO COMMENT

The Committee has examined the following bill and offers no comment on it:

VICTIMS OF CRIME (VICTIMS SERVICES LEVY) AMENDMENT BILL 2015

This is a Bill to amend the *Victims of Crime Act 1994* to increase the victims services levy from $30 to $40.

BILLS—COMMENT

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

CORRECTIONS MANAGEMENT AMENDMENT BILL 2015

This is a Bill to amend the *Corrections Management Act 2007* and the *Children and Young People Act 2008* to reform provisions relating to random drug testing of detainees held in corrections centres, and clarify provisions concerning interstate leave permits

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference

Report under section 38 of the *Human Rights Act 2004*

The Explanatory Statement contains a thorough statement of relevant human rights considerations to which the Committee refers members of the Assembly.

This comment does not require a response from the Minister.

CRIMES (CHILD SEX OFFENDERS) AMENDMENT BILL 2015

This is a Bill to amend the *Crimes (Child Sex Offenders) Act 2005* and the *Crimes (Child Sex Offenders) Regulation 2005* for a number of purposes.

INTRODUCTION—THE APPLICATION OF THE HUMAN RIGHTS ACT, SECTION 28, IN TERMS OF THE PURPOSES OF THE PROPOSED AMENDMENTS

Main points

Material in the Explanatory Statement at pages 6 and 7 suggests that a child sex offenders scheme may have little effect by way of preventing future offending because there is a relatively low rate of re-offending. This material suggests that insofar as a provision of the Bill that limits a human right is said to achieve the purpose of preventing re-offending, there is a question whether it will achieve that purpose. To the extent that it might not, it might be argued that there is a weak relationship between the limitation and its purpose (a factor that must be considered in the application of section 28—see paragraph 28(2)(d)), and that in turn there is a question whether the limitation is justified. The Committee notes that this is not the only factor to be considered in the application of section 28.

The Explanatory Statement at pages 1 to 3 provides a concise guide to the scheme in the *Crimes (Child Sex Offenders) Act 2005* (the CSO Act) and to the six broad categories of amendments to the Act proposed in the Bill. At page 10, the Explanatory Statement indicates that these proposals engage and place limitations on a large number of the rights stated in the *Human Rights Act 2004* (HRA). In each case, the major question to be addressed is whether the limitation is justifiable in terms of HRA section 28.

The application of section 28 requires identification of the purpose of a limitation and then of whether in that light the limitation is justifiable in the terms of section 28. After this analysis is undertaken, a Member of the Legislative Assembly is better placed to consider whether the proposed limitation should be enacted. An identical exercise may be undertaken where a proposed law limits a common law right.

The purposes of the Act stated in section 6 are to reduce the likelihood that certain offenders who commit sexual offences against children will reoffend; to facilitate the investigation and prosecution of future offences that these offenders may commit; to prevent registrable offenders from working in child related employment; and to prohibit registrable offenders from engaging in conduct that poses a risk to the lives or sexual safety of children. In the context of this Bill, the first two of these purposes are significant.

The first stated purpose—to reduce the likelihood that certain offenders who commit sexual offences against children will reoffend—is placed at the forefront of several of the justifications for the amendments, and in some cases is the only stated purpose. There is, however, material in the Explanatory Statement that might suggest that this purpose may not be achieved by the amendments. At pages 4-5, it is stated that:

> the efficacy of the available tools to monitor sex offenders has recently been the subject of ongoing national discussion. At the Law, Crime and Community Safety Council meeting of 3 October 2014 Ministers agreed not to support a proposal to publish a national public register including the personal details of all convicted sex offenders. This is because available empirical evidence demonstrates that public registers are largely ineffective to prevent child sex offences and other sex offences.

At page 7, it is noted that

> criminological literature indicates that child sex offenders have low rates of recidivism compared with other types of offenders. Studies have shown that most serious violent and sexual criminals do not have previous convictions for violent or sexual offences and are not reconvicted for violent and sexual offending.
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> ...
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> However, the public and media often present child sex offenders as recidivists who will almost certainly reoffend. The research shows that the community overestimates the actual rate of recidivism for child sex offenders and indicates that generally child sex offenders are in fact less likely to reoffend than many other types of offenders.
>
> ...

> In an overwhelming majority of cases, victims of child sexual abuse are either family members or are known to their offender. As most sex offending against children occurs in families, the research also indicates that community notification laws fail to impact significantly on the problem of child abuse. The research indicates that community notification laws may prevent victims from reporting abuse, can have prejudicial impacts on criminal trials and can place burdens on courts by reducing guilty pleas.

This material suggests that insofar as a provision of the Bill that limits a human right is said to achieve the purpose of preventing re-offending, there is a question whether it will achieve that purpose. To the extent that it might not, it might be argued that there is a weak relationship between the limitation and its purpose (a factor that must be considered in the application of section 28—see paragraph 28(2)(d)), and that in turn there is a question whether the limitation is justified. The Committee notes that this is not the only factor to be considered in the application of section 28.

In addition, the weight to be attached to the points made in the Explanatory Statement concerning rate of recidivism cannot be assessed unless there is some quantification of what the rate is in relation to child sex offenders. It may be lower than in the case of other offenders, but it may not be a low rate. This needs to be clarified. This point applies as much to the discussion below concerning the potential application of HRA subsection 8(3).

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

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference

Report under section 38 of the *Human Rights Act 2004*

DOES THE SCHEME OF THE ACT AS IT WOULD BE AMENDED DEROGATE FROM THE RIGHT TO EQUALITY BEFORE THE LAW AND/OR THE EQUAL PROTECTION OF THE LAW?

Main points

The question addressed in this part is whether a scheme that applies only to one class of offenders justifiably limits the subsection 8(3) HRA right to equality before the law and/or to the equal protection of the law. The justification stated in the Explanatory Statement is based on minimising the risk of re-offending by registrable offenders. To the extent that this result will not be achieved, there is a question as to to whether it is appropriate to apply to this class of offenders a scheme for registration and associated limitations on human rights.

The material in the Explanatory Statement also supports an argument that the registration scheme as amended would reach the point that it might be considered to derogate from the rights stated in HRA subsection 8(3), which provides:

> Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. ...

The nub of the argument is that there is applied to one class of offenders—those convicted of certain child sex offences[1]—a body of rules that restrict their rights in various ways that do not apply to other offenders against the criminal law that are, as judged by the penalties which may be imposed, of at least an equal degree of seriousness. The Explanatory Statement recognises the argument in a different form when it notes that "limitations imposed by [certain] provisions apply only to registrable offenders and certain previous offenders, and therefore limit the right of that group of people to enjoy their human rights without distinction or discrimination".

The provisions identified by the Explanatory Statement are "[the] entry and search warrant provisions, amendments introducing the power to apply to register a certain previous offender and to issue a public notice, amendments to the fault element for failing to report annually, and the amendment to provide a power for a police officer to photograph an offender ...".

In the first place, the Explanatory Statement attempts to meet the arguments in two broadly stated ways. The first is by relying on a principle, said to be recognised in "human rights law", "that formal equality can lead to unequal outcomes, and that sometimes to achieve substantive equality differences in treatment may be necessary". No authority is cited to support this principle, and in any event there is no indication given as to how it is relevant to the provisions of the Bill.

The second broad argument is that "not every difference of treatment amounts to discrimination. Provided the distinction is reasonable and objective, and is **designed to achieve** a legitimate purpose, it will not infringe section 8" (emphasis added). This kind of justification for avoiding section 8 is often accepted, although it might be better put as an argument that the limitation of section 8 is justifiable under section 28.

The Explanatory Statement argues that "the limitations on the section 8 rights are important for the protection of children and minimising the incidence of reoffending by registrable offenders" (top, page 13). On this basis, the limitation of the rights in HRA section 8 might be difficult to justify under section 28, for the material in the Explanatory Statement noted above suggests that this purpose will not be achieved.

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

Following the order of the amendments as outlined in the Bill, this Report will now turn to the categories of amendments that raise issues for the Assembly to consider.

APPLICATION BY A YOUNG OFFENDER TO APPLY TO THE SENTENCING COURT TO NOT BE REGISTERED

Main points

There is a question whether it should be open to an offender who is not a young person to make an application to the sentencing court that he or she not be made a registrable offender. This process would promote the common law principle of individualised justice and avoid an argument that as it stands clause 7 limits the rights in HRA section 8.

[1] The classes of offences are defined in section 10 of the *Crimes (Child Sex Offenders) Act 2005*.

The Explanatory Statement notes that clause 7 "inserts a new section 9 (1A) of the CSO Act to include a further definition outlining when a person is not a registrable offender. This clause provides that a person is not a registrable offender if the person is a young person at the time that the registrable offence was committed, and the court considers, on application by the defence, that including the person on the register is inappropriate in the circumstances of the case" (pages 27-28). The Explanatory Statement at pages 28-29 outlines the nature of the court's discretion, and points to HRA rights that are promoted by clause 7.[2]

The Explanatory Statement argues that

> [this] amendment will ensure that registration is consistent with the intent of the legislative scheme, and is sensible and consistent with rights. When sentencing a young offender for an offence that deems them a registrable offender, the circumstances of the offending may indicate that an ongoing risk is non-existent. The purpose of this provision is to recognise that registration may not be appropriate in all circumstances.

At a later point, it is argued that

> [this] amendment aligns with the purposes for which a young offender may be sentenced in sections 7 and 133C of the Crimes (Sentencing) Act, highlighting the importance of promoting rehabilitation, and providing that in sentencing a young offender the court must have particular regard to the common law principle of individualised justice.

There is a question whether it should be open to an offender who is not a young person to make an application to the sentencing court that he or she not be made a registrable offender. This process would promote the common law principle of individualised justice and avoid an argument that as it stands clause 7 limits the rights in HRA section 8.

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

THE POWER OF THE MAGISTRATES COURT TO MAKE A CHILD SEX OFFENDER REGISTRATION ORDER IN RELATION TO A PREVIOUS OFFENDER

Main points

In this section of the report, the commentary is primarily devoted to pointing to places in the Explanatory Statement where there is some consideration of the human rights issues raised by various provisions of the Bill.

The Committee recommends that reference be made in the Explanatory Statement to a provision of the Bill that justifies an argument certain "limitations on freedom of movement ... demonstrate that there is a real risk of reoffending".

The Committee comments on the potential application of the HRA right in subsection 25(2), and to the common law principle against retrospective laws, but does not suggest that the right or the principle is limited by the Bill.

[2] The reference in the last paragraph at page 29 to HRA subsection 22(2) should instead be to subsection 22(3).

Clause 9 proposes to insert new division 2.2.3, containing new sections 18A to 18E, into the CSO Act. These provisions would empower a Magistrates Court to make a child sex offender registration order in relation to a previous offender. The Explanatory Statement at pages 30 to 32 describes some aspects of these sections. The Statement also acknowledges that the provision engages and limit HRA rights, and contains some analysis in justification. The Committee refers Members of the Assembly to this analysis, and to assist Members, will identify the relevant parts of the Statement. Some comment will be made on the adequacy of the justification.

Pages 13 and 14 make some reference to the right in HRA section 8 (recognition and equality before the law). The 2nd paragraph at page 13 refers only to the preliminary application by the chief officer and is unhelpful in assessing the power of the Magistrate. This is also so in relation to the reference in the 6th paragraph at page 13, and the statement here that this officer may apply only "where there is strong evidence that the person continues to pose a broad risk to children and should be subject to reporting obligations and ongoing monitoring" is not warranted by anything in proposed section 18B. Nor could this statement apply to the more significant power of the Magistrate stated in section 18C. There is very little at page 14 so far as concerns the critical question of whether there are less restrictive means to achieve the purpose of new division 2.2.3.

Pages 15 (2nd last paragraph) and 16 (1st paragraph) make some reference to the right in HRA section 11 (protection of the family and children). At page 15, it is acknowledged that "new division 2.2.3 may limit, in certain circumstances, the access of previous offenders to their families where a registration order is made". The justification offered is that "these amendments will, however, promote the protection of the family and children by reducing the contact between previous offenders and children where the previous offender poses an ongoing risk. This amendment is designed to protect children and their families and carers". The matter at page 16 is to the same effect. Otherwise, there is no analysis of the section 28 issues.

Pages 16 to 18 appear to deal solely with proposed new division 2.2.3 in relation to the right in HRA section 13 (freedom of movement), and all the elements of section 28 are addressed. The analysis seems to focus on existing provisions in the Act that restrict freedom of movement. These restrictions would apply to any person registered under division 2.2.3.

The Committee notes the statement at page 17 that "[a]ny limitations on freedom of movement must pursue legitimate aims, be necessary in a democratic society to achieve those aims and in the context of child sex offenders, demonstrate that there is **a real risk of reoffending**" (emphasis added).[3] **The Committee recommends that reference be made to those provisions of the Bill that justify this proposition.**

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

At page 32, and specifically in relation to division 2.2.3, the Explanatory Statement states that "[t]he engagement with the right to privacy is discussed in the human rights overview at the beginning of this explanatory statement". Pages 18 to 22 are a general treatment of the right in HRA section 12 (privacy and reputation) as it is limited by the Bill, but the Committee can see no specific reference to proposed new division 2.2.3. Some of the analysis would apply to elements of this division, such as the last

[3] The Explanatory Statement refers to *Labuta v Italy* 26772/95, April 6, 2000. A more complete reference is desirable, noting the relevant jurisdiction, court, and source.

paragraph at page 20. In the end, there is very little justification offered for the limitation of privacy rights that will follow from an exercise of the power of the Magistrates Court in proposed section 18C.

The only HRA right discussed specifically in relation to division 2.2.3 is that in HRA section 25 (retrospective criminal laws). Although it is not identified in the Explanatory Statement, the potential application of HRA section 25 arises from proposed new section 18A of the Act, which provides that "[f]or this division, a person is a previous offender if the person has been found guilty of a class 1 offence before the commencement of this Act". The Explanatory Statement (at page 32) argues however that section 25 is not engaged.

> Although section 25(2) of the HR Act states that a penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed, the European Court of Human Rights has found that retrospective registration is reasonable as registration is not a penalty. Rather, registration is considered to be a preventative measure separate from sentencing, which only applies after a person has been convicted.

This proposition is strongly supported by case-law of several common law jurisdictions.[4]

There is, however, a common law presumption against retrospective legislation, and it would be relevant for the Committee to raise this matter under paragraph (3)(a) of its terms of reference, and to call for a justification for its displacement. A law is retrospective in effect if it provides that rights and obligations are changed and the change takes place prior to the commencement of the law. But this may not be the correct way to characterise division 2.2.3. Rather, this should probably be seen as a case where the division is not retrospective because it only governs or prescribes future acts by taking into account antecedent facts or circumstances.[5]

Comment on Explanatory Statement

The discussion above has drawn attention to some inadequacies in the Explanatory Statement. In addition, there appears to be a lack of attention to detail that makes it hard to follow the Explanatory Statement. Briefly, in relation to clause 9, it is noted that (1) it is incompletely described at page 8 as providing for "a power for the CPO to apply for the registration of a certain previous offender". It does that, but the significant power is that conferred on the Magistrates Court to make the registration order; (2) with reference to the second full paragraph at Explanatory Statement page 32, the HRA rights in sections 11 and 13 are not discussed "below", but were discussed "above at pages 15 and 17 respectively"; and (3) the propositions of law in the first paragraph below the heading "Clause – New Division 2.2.3" at page 30 do not appear to be supported by the footnote reference to ss 15 and 16 of the Act.

A REVISED OFFENCE WHERE A REGISTRABLE SEX OFFENDER FAILS TO REPORT CERTAIN MATTERS ANNUALLY

Main points

Committee commentary here is directed to clause 10, which proposes that a new section 37 be substituted. The Committee raises a question about the purpose of inserting paragraph 37(2)(b). It calls for a justification for making an element of the proposed offence one of strict liability and, in particular, notes that affixing a penalty of imprisonment raises a substantial issue of compatibility with HRA subsection 22(1).

[4] See *WBM v Chief Commissioner of Police* [2012] VSCA 159, paragraph [126], per Warren CJ.

[5] Adapted from *WBM v Chief Commissioner of Police* [2012] VSCA 159, paragraph [64], per Warren CJ.

At present, section 37 of the CSO Act provides that a registrable offender commits an offence where he or she does not take reasonable steps to make particular reports annually. Clause 10 proposes that a new section 37 be substituted. Subsection 37(1) would state what the registrable offender must do by way of reporting. Subsections 37(2) and (3) would then provide as follows:

(2) A registrable offender commits an offence if the offender—

(a) is required to report under subsection (1); and

(b) is reckless as to whether the offender is required to report; and

(c) fails to report as required.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(3) Strict liability applies to subsection (2)(c).

It is not clear why paragraph 37(2)(b) is included. It is not generally required that a person be aware of the crime they are alleged to have committed. Subsection 12(2) of the Criminal Code provides as follows:

(2) However, unless the law creating the offence otherwise expressly provides, a person can be found guilty of committing the offence even though, when carrying out the conduct required for the offence, the person is mistaken about, or ignorant of, the existence or content of a law that creates the offence.

The conduct that is made criminal by subsection 37(2) is failing to report as required by subsection 37(1). If that is all it provided, the prosecution would need to prove that the accused failed to report and intended to so fail. The addition of subsection 37(3) would obviate the need for the prosecution to prove that the accused had any such intention; it would be necessary to prove only that they failed to report.

The insertion of paragraph 37(2)(b) appears to have the effect that the prosecution must prove that the accused recklessly failed to be aware that they had an obligation to report. This would bring the case within the opening words of subsection 12(2) of the Criminal Code. It might be difficult for the prosecution to meet this requirement.

Perhaps paragraph 37(2)(b) is included to offset the harshness of subsection 37(3). It is not unusual to find that a requirement that a person report some matter is made an offence of strict liability offence, but provision that an offender may be imprisoned is very rare. There should be a very strong justification for such a penalty. Provision for a strict liability offence limits the presumption of innocence stated in HRA subsection 22(1), and it is possible that the Supreme Court would find that imprisonment could never be justified. The Explanatory Statement makes no reference to this issue.

The imposition of strict liability should be justified in accordance with the standards stated in HRA section 28, and particular attention given to the level of penalty.

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

REVISED PROVISIONS FOR PHOTOGRAPHING A REGISTRABLE SEX OFFENDER

Main points

The Committee requests the Minister to clarify the basis for the Explanatory Statement claim that "photographs will only be taken ... if the registrable offender needs to report a changed tattoo or birth mark".

The section 18 HRA right to liberty and security of the person should be identified and a justification offered for its limitation.

Currently, section 78 of the Act provides that "[a] police officer receiving a report made in person by or for a registrable offender under this chapter may, with the offender's consent, arrange for the offender to be photographed". The amendments to the Act proposed by clause 16 reverse this position by eliminating a consent requirement and furthermore providing for the use of force to ensure that a non-consensual photograph may be taken. Clause 16 proposes to substitute existing section 78 with a revised section which does not contain any requirement that the consent is required, and this is buttressed by proposed section 78A, which provides for the use of force.

The Explanatory Statement justifies the elimination of a requirement of consent by reference to the importance of photographing registrable offenders for monitoring and potential future investigation. It is also stated that "photographs will only be taken at annual reports, and if the registrable offender needs to report a changed tattoo or birth mark". The first point appears to reflect the opening words of proposed section 78, but the Committee can see no warrant for the second point.

The Committee requests the Minister to clarify the basis for the second point.

There is no mention of proposed section 78A at this point in the Explanatory Statement, but it is important to note that force may be used only by order of a magistrate.

At least two significant human rights issues arise. The first is that the scheme for the use of force clearly engages and limits rights to "security of the person" stated in HRA subsection 18(1). This matter is not identified in the Explanatory Statement discussion of clause 16; nor is it identified in the general discussion of this right at Explanatory Statement pages 22 to 24. The matter should be identified and a section 28 justification offered.

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

The second issue is that the scheme in proposed sections 78 and 78A clearly engage the right to privacy stated in HRA section 12. The Committee refers the Assembly to the discussion of this issue in the Explanatory Statement.

Comment on the Explanatory Statement

The first paragraph in explanation of clause 16 is obscure and in a critical respect wrong. The first sentence reads: "This clause amends section 78 and inserts new section 78A to reflect the updated requirements introduced into the CSO Act relating to photographing registrable offenders". The clause does not propose the amendment of section 78 but its replacement and it is unclear how proposed section 78A "reflects" "updated requirements". If those requirements are what would be

inserted in the substituted section 78 was inserted, section 78A adds to them. It is wrong to state that "[t]he amendment makes it clear that section 78 relates to photographing a registrable offender with their consent". By comparing the existing section 78 to that proposed to be substituted, and also having regard to proposed section 78A, it may be concluded that the operation of section 78 is not dependent on the consent of the person.

PUBLIC NOTICES ISSUED BY THE CHIEF POLICE OFFICER CONCERNING A REGISTRABLE OFFENDER

Main points

In this section of the report, the commentary is primarily devoted to pointing to places in the Explanatory Statement where there is some consideration of the human rights issues raised by these provisions of the Bill. At some points, the Committee considers that a more detailed justification is required.

The Committee raises a question about whether provision that a public notice will not state that the person the subject of the notice is a registrable offender will in practice operate as a safeguard against damage to that person's privacy.

The Committee raises a question whether the exercise of the power should be exercisable only after the chief police officer makes an application, supported by evidence on oath or by affidavit, to a magistrate who must then take stated circumstances into consideration before making an order for issuing a public notice.

Clause 21 proposes to insert new parts 3.10 and 3.11 into the CSO Act. Part 3.10 contains only proposed section 116A, which would permit the chief police officer to issue a public notice in defined circumstances. These are that the officer is satisfied that in relation to an offender who is not a young person, that the offender has failed to comply with a reporting obligation under chapter 3 of the Act, and cannot be located, and the officer believes on reasonable grounds that the offender poses a risk to the lives or sexual safety of one or more people or of the community, and publishing the notice will reduce the risk.

The notice must include one or more of the offender's name, photograph and description; must state that the offender is required by police to answer questions; but must not state that the offender is a registrable offender.

The prohibition on stating that the offender is a registrable offender is argued in the Explanatory Statement to be a matter that mitigates the limitation of the HRA right to privacy involved in an exercise of this power. There might however be a question as to how realistic it is to suppose that public notices of this kind will not be taken by some members of the public to signify that the person concerned is a registrable child sex offender. It is possible that some in the community will publicise the fact that this power exists and describe its terms. If the name and/or photograph of the person is published, the impact on their privacy and reputation will be very significant, and it is not farfetched to think that in some cases their security of person and even of their life will be in jeopardy. There might be cases where the police identify a person who is not a registrable offender as someone they wish to question and that person will be taken by members of the public to be a registrable offender.

The Explanatory Statement acknowledges that proposed section 116A limits the HRA section 8 right to equality and the section 12 right to privacy. In the circumstances, it might be thought that a strong justification is required. There is no relevant discussion at Explanatory Statement page 36, where proposed section 116A is discussed. There is some discussion in the earlier parts of the Explanatory Statement.

At pages 11 to 14 there is some reference to the right in HRA section 8 (recognition and equality before the law). In the final paragraph at page 13, it is argued that the power in section 116A "will ensure that ACT Policing can effectively monitor registrable offender activities and ensure that a registrable offender who is not meeting their reporting obligations is located, maintaining the safety of children and the community". At mid-page 14, it is argued that "due to the privacy limitations on releasing offender details, if a registrable offender fails to report and cannot be located, ACT Policing cannot seek community assistance to locate the person. This poses a risk to the lives and sexual safety of children and restricts ACT Policing's monitoring and protection capabilities".

At the bottom of page 18, it is recognised that section 116A engages the right in HRA section 12 (privacy and reputation). Its purpose is described in the 2nd paragraph at page 20 as being "to protect the lives and sexual safety of children where there may be a risk posed to them by a registrable offender". To support an assertion that the amendment that includes section 116A "provide(s) a careful balance between the limitation and the right to privacy", it is said in relation to section 116A that "[i]n order to issue a public notice about a registrable offender the chief police officer or a deputy police officer must be satisfied of a number of things including that the offender poses a risk to the lives or sexual safety of one or more people or the community".

Otherwise, the justifications for section 116A are found in general statements that a number of provisions, including section 116A, are proportionate in various ways. The Committee considers that the potential impact of an exercise of section 116A is such that a more specific justification that addresses all the elements of HRA section 28 is necessary.

In particular, a question to be explored is whether, as in the case with many of the new powers proposed by the Bill, the exercise of the power should be exercisable only after the chief police officer makes an application, supported by evidence on oath or by affidavit, to a magistrate who must then take stated circumstances into consideration before authorising the requested activity. This might be thought to be a less restrictive means of achieving the purpose of section 116A.

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

ENTRY AND SEARCH WARRANTS

Main points

The entry and search powers may be employed in the investigation of criminal activity in general, and not only in respect of offences under the Act. There is a question as to why it is considered necessary to extend the usually applicable investigative powers of the police in the contexts governed in proposed part 3.11.

The detail of the scope of the powers authorised by a warrant is sketched in some detail. A number of questions and issues arise.

Why are these powers capable of being used to extend beyond the purposes of verifying the offender's personal details, or if the offender is subject to an order under chapter 5A (orders prohibiting offender conduct[6]), whether the offender has breached, or is likely to breach, the order?

Why do paragraphs 116H(1)(d) and (f) employ the word "believes", while (e) employs the broader term "suspects"?

Whether the Bill should provide that the police may not question a person detained under paragraph 116H(1)(i).

How does the power in proposed section 116K relate to paragraph 116H(1)(a), which in some respects appears to be less limited than the power in section 116K?

Why is an exercise of a power under proposed section 116P not limited to the purposes of a warrant as described in section 116B?

The Committee notes that proposed subsection 116Q(4) provides only a very limited immunity from compelled evidence being used in a later prosecution for an offence and calls for a justification for this provision that addresses the question whether a broader immunity (as outlined by the Committee) should apply.

Clause 21 proposes to insert new part 3.11 into the CSO Act, containing new sections 116B to 116Z. The Explanatory Statement introduces this part in these words:

> In the ACT, a registrable offender is required to report to police on an annual basis. The information (including personal details) that must be reported is set out in division 3.4.1 of the CSO Act. The amendments provide specific entry and search powers in relation to registrable offenders to verify this information.

It is apparent however that these powers are intended to be used for a much wider purpose that the verification of information. Section 116B defines an "entry and search warrant" as used in part 3.11 to mean a warrant authorising entry and search of the premises of a registrable offender for the purpose of verifying the offender's personal details; or if the offender is subject to an order under chapter 5A (orders prohibiting offender conduct[7]), whether the offender has breached, or is likely to breach, the order. However, these warrants may be employed for the purposes of a criminal investigation. This extension of the usual powers of investigation contained in part 1C of the *Crimes Act 1914* (Cwlth), in part 10 of the *Crimes Act 1900*, and other allied legislation of general application, poses the human rights issues more acutely.

[6] In essence, section 132D of the CSO Act empowers a magistrate to make an order prohibiting a person from engaging in conduct if satisfied of a number of matters and, in particular, that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. A non-exhaustive list of the kinds of conduct that may be prohibited is stated in section 132F.

[7] In essence, section 132D of the CSO Act empowers a magistrate to make an order prohibiting a person from engaging in conduct if satisfied of a number of matters and, in particular, that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. A non-exhaustive list of the kinds of conduct that may be prohibited is stated in section 132F.

At the outset, a basic question is raised: why is it considered necessary to extend the usually applicable investigative powers of the police in the contexts governed in proposed part 3.11?

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

The Committee has not the time nor the expertise to consider in detail how the provisions of part 1C of the *Crimes Act 1900* (Cwlth) inter-relate with the powers of investigation proposed by the Bill. It may be that a person subject to an exercise of these powers should be considered to be a "protected suspect" for the purposes of part 1C (see subsection 23B(2) of the Crimes Act). If so, there would then be a question whether the part 1C provisions would apply to the exercise of the investigation powers.

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

Each of the proposed sections of part 3.11 is described in the Explanatory Statement at page 37ff. Some of the critical aspects of the scheme are noted here:

Aspect 1

The Magistrates Court issues the warrant (section 116F).

Aspect 2

Section 116H states the scope of the powers of the police are authorised to exercise by a warrant. They are extensive, and their exercise will limit the human rights of persons significantly. The police may:

- enter premises (or a vehicle), by force if necessary;
- remain on the premises for up to 4 hours (see paragraph 116H(1)(a) and paragraph 116H(3)(a));
- search and seize kinds of material specified in the warrant "and anything else relevant to the purpose of the warrant" (paragraph 116H(1)(c));
- seize "other things" the police believe on reasonable grounds "to be connected to an offence punishable by imprisonment for 12 months or longer" (paragraph 116H(1)(d));
- conduct an ordinary search or a frisk search of a person if the police *suspect* on reasonable grounds that the person has any evidential material in relation to an offence or seizable items in the person's possession, and to seize things of that kind " (paragraph 116H(1)(e));
- seize other things found in the course of searching the person that the police *believe* on reasonable grounds to be connected to an offence punishable by imprisonment for 12 months or longer " (paragraph 116H(1)(f));
- seize a thing found while searching the person or premises that may be used as an offensive weapon, if the police *believe* on reasonable grounds that seizure of the thing is necessary to prevent an imminent risk of harm to a person or property (paragraph 116H(1)(g));
- take photographs of things found on a search (paragraph 116H(1)(h));
- stop and detain a person at the premises for up to 4 hours to assist the police to exercise any power authorised under the warrant (paragraph 116H(1)(i) read with paragraph 116H(3)(a)); and
- if a registrable offender has refused access to data on an electronic device under section 116Q— access the information for up to 8 hours to assist the executing officer or assisting officer to exercise any power authorised under the warrant (paragraph 116H(1)(j) read with paragraph 116H(3)(b)).

It is apparent that the extent of the police power authorised by a warrant extends well beyond the purpose of a warrant as described in section 116B. Why are these powers capable of being used to extend beyond the purposes of verifying the offender's personal details, or if the offender is subject to an order under chapter 5A (orders prohibiting offender conduct[8]), whether the offender has breached, or is likely to breach, the order? The Committee draws attention in particular to the powers stated in paragraphs 116H(1)(d), (e) and (f), noting the references to offences punishable by imprisonment for 12 months or longer or, (in (e)), simply to "an offence".

A particular issue is why paragraphs 116H(1)(d) and (f) employ the word "believes", while (e) employs the broader term "suspects"?

It is generally accepted that "'reasonable suspicion' is a lesser standard than 'reasonable belief'".[9]

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

The power of the police to detain a registrable offender for up to four hours

Paragraph 116H(1)(i) proposes to confer on the police a power to "stop and detain a person at the premises for as long as reasonably necessary (but not longer than 2 hours) to assist the executing officer or an assisting officer to exercise any power authorised under the warrant". Under subsection 116H(3), a magistrate may, at the point when a warrant is issued, extend this period to four hours if "satisfied that the warrant cannot be executed within 2 hours". In making this judgement, the magistrate would be dependent entirely on evidence provided by the police.

The proposal to confer this power on the police raises a human rights issue of considerable importance. An exercise of the power would clearly derogate from the person's right to liberty. It might well have spill-over effects that would derogate from other human rights of the person. Others might come to know that a detention has occurred, with consequent effects on the person's reputation. His or her social and/or business life might be disrupted, and significant loss result (such as loss of employment or business). Their freedom of movement would of course be prohibited for the period of the detention.

The common law has long recognised a strong right to liberty. In *Williams v The Queen*, Mason and Brennan JJ quoted Blackstone's *Commentaries on the Laws of England* for the proposition that personal liberty was "an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause'".[10] There are many judicial statements to the same effect. For just one example, in *Al-Kateb v Godwin*, which concerned a federal provision for administrative detention of unlawful non-citizens, Gleeson CJ said "personal liberty is the most basic" human right or freedom.[11] Subsection 18(1) of the *HRA* provides that "everyone has the right to liberty" (although it may be abridged if this is justified according to the standards stated in HRA section 28). The right is a critical dimension of international rights law.

[8] In essence, section 132D of the CSO Act empowers a magistrate to make an order prohibiting a person from engaging in conduct if satisfied of a number of matters and, in particular, that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. A non-exhaustive list of the kinds of conduct that may be prohibited is stated in section 132F.

[9] See *Review of Police Criminal Investigative Powers, Discussion paper* (September 2010), Department of Justice and Safety, at 87, and note the references at footnote 86.

[10] (1986) 161 CLR 278 at 292.

[11] [2004] HCA 37 [19].

Of particular relevance in an Australian context are the statements by High Court Justices that have considered that there are severe limitations on the extent to which the right may be limited where that involves detention. In *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*[12] a majority of the High Court held that it was

> beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

The exceptional cases noted were "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts", detention in cases of "mental illness or infectious disease", and detention in pursuance of the exclusion and deportation of aliens.[13]

There is some doubt as to whether the extent of the category of "exceptional cases" is closed, and this holding was made in the context of stating the extent of the judicial power of the Commonwealth.[14] The principle stated does however serve to underline the strength of the right to liberty, and of the need for a clear demonstration that in relation to a detention power, its limitation is justified, with particular attention paid to why less restrictive measures to achieve the purpose of the power could not be adopted.

This raises the question of whether the exercise of the detention power in paragraph 116H(1)(i) is accompanied by sufficient safeguards against its excessive use.

When the police exercise powers of detention under part 1C of the *Crimes Act 1914* (Cwlth)[15] they must comply with restraints concerning the manner of questioning designed to protect a person in a vulnerable situation, so as to ensure as far as feasible that the person does not make a confession or a more limited admission.[16] It may be that none of these protections would apply to a person detained under paragraph 116H(1)(i). For the purposes of this analysis, it has been assumed that they do not.

It should be noted that the reference in paragraph 116(1)(h) to "any power authorised under the warrant" would extend to the powers stated in paragraphs 116H(1)(d), (e) and (f). These powers under a warrant extend to gathering evidence in relation to offences generally. A person detained to "assist" the police under 116H(1)(h) "to exercise any power authorised under the warrant" might well be asked questions about any kind of criminal offence.

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[12] [1992] HCA 64 at [23] per Brennan, Deane and Dawson JJ, with whom Mason J agreed.

[13] Ibid at [24], and leaving aside what might be the case in wartime.

[14] As such, it is not directly applicable to ascertaining when a limitation of the HRA right to liberty may be limited.

[15] These provisions apply to investigation of criminal activity in the Territory; see section 23A(6) and section 187.

[16] There is a full review of these protections in *Review of Police Criminal Investigative Powers, Discussion paper* (September 2010), Department of Justice and Safety, at 23 – 56.

Yet that person is in the company of and under the control of the police, and who may, with or without any questioning by the police, make admissions that would assist in a prosecution for a criminal offence. It is not beyond possibility that the exercise of this power to detain might be abused, in the sense of gaining control of a suspect without having to make an arrest which would attract *Crimes Act 1914* protections.

Some of the safeguards that might be provided are

- an obligation on the police to caution the person in the same way as they are required to do once they arrest a person; and
- an obligation to inform the person that they may contact a lawyer, and then to refrain from any attempt to have the person assist them until after a lawyer arrives and can give advice.

Another safeguard would be provision for a timely and inexpensive procedure for the person to challenge the legality of the detention. Resort to Supreme Court review would be expensive and, given the shortness of the detention, probably impracticable.

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

Aspect 3

Proposed section 116K authorises the police use force in executing an entry and search warrant against people and things that is necessary and reasonable in the circumstances.

A question arising is how this power relates to paragraph 116H(1)(a), which in some respects appears to be less limited than the power in section 116K.

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

Aspect 4

Section 116O authorises the police to bring to the premises equipment reasonably necessary for the examination or processing of a thing found at the premises, to determine whether it is a thing that may be seized under an entry and search warrant.

Aspect 5

Section 116P authorises the police to operate electronic equipment at the premises to access data if the officer believes on reasonable grounds that the data may assist the officer in verifying the offender's personal details; or if the offender is subject to an order under chapter 5A, whether the offender has breached, or is likely to breach, the order. The section also authorises the copying of data, taking the device from the premises and seizure of equipment of and storage devices.

The Committee notes that in this case the exercise of these powers is limited to the purposes of a warrant as described in section 116B.

Aspect 6

Section 116Q authorises the police to apply to the Magistrates Court for an order requiring a registrable offender to provide access to electronic data, to copy the data onto a storage device or convert the data into documentary form. The court may make the order if satisfied on reasonable grounds that the registrable offender has failed to provide the information or assistance; or evidential material *in relation to an offence* is held in or accessible from the equipment and subject to subsection (4), it is likely that the material would be admissible in a criminal proceeding. The Committee notes that in this case the exercise of these powers is **not** limited to the purposes of a warrant as described in section 116B.

Why is an exercise of a power under proposed section 116Q not limited to the purposes of a warrant as described in section 116B (as is the case with section 116P)?

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

Subsection 116Q(3) provides that the relevant registrable offender commits an offence if he or she is reckless as to the requirement to provide information or assistance (paragraph 116Q(3)(b)) **and** fails to provide the information or assistance as ordered (paragraph 116Q(3)(c)). The second element is not made a matter of strict liability (compare to the proposal to insert a substituted section 37).

The Explanatory Statement misdescribes this offence when it states that "[t]he elements of this offence require that the offender fails to provide the information or assistance as ordered, **or** is reckless as to the nature of the order" (emphasis added). First, paragraphs 116Q(3)(b) and (c) are cumulative and not alternative. Secondly, the prosecution must prove that the accused was reckless as the requirement to provide the information, and not as the nature of the nature of the order made by the court.

The Committee commented on the effect of paragraph 116Q(3)(b) above. It should be noted in this instance that the prosecution must prove that the accused intended to fail to provide the assistance.

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

The Explanatory Statement accurately describes subsection 116Q(4) in these words: "[a]s the registrable offender is compelled to provide this information to police or otherwise face criminal sanctions, a provision has been included that any material obtained under this section is not admissible in a proceeding except for a proceeding under the CSO Act, or a proceeding under the Criminal Code 2002 (pt 3.4—False or misleading statement, information and documents)".

It is an overstatement however to state that "[t]his is consistent with similar provisions in ACT legislation that compel a person to provide information that leads to disclosure of other information or evidence". Some other laws make a similar provision, but others make provision that avoids the problem that this sort of provision limits the HRA right in paragraph 22(2)(i) "not to be compelled to testify against himself or herself or to confess guilt". That is, these other laws provide that the evidence gathered may not be employed directly or derivatively in a prosecution for any kind of offence except one of making a false statement when giving evidence.

This is not the case here. Subsection 116Q(4) provides for only a direct immunity (and the Explanatory Statement is in error to assert otherwise[17]), and this immunity does not extend to an offence under the CSO Act. There are some 33 offence provisions in this Act, and some of them create more than one offence. If it is the case that the possible offence the Magistrates Court has regard to under subsection 116Q(2) is one of these CSO offences, then the privilege against self-incrimination (either at common law or as stated in HRA paragraph 22(2)(i)) is removed entirely. This would raise a question as to its compatibility with the HRA.

The Committee notes the justification given at Explanatory Statement pages 24 and 25. The comments immediately above deal with the main points raised in this justification.

The Committee recommends that consideration be given to taking an approach that accords more substantial recognition to the privilege against self-incrimination by providing that the evidence gathered may not be employed directly or derivatively in a prosecution for any kind of offence except one of making a false statement when giving evidence.

This recommendation extends to proposed section 116Z, discussed immediately below.

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

Aspect 7

Proposed section 116Z is a general provision concerning the admissibility of material obtained under part 3.11 of the Act. It provides that such material is inadmissible in a proceeding, other than a proceeding (a) under this Act; or (b) in relation to a class 1 or class 2 offence; or (c) under the Criminal Code, part 3.4 (False or misleading statements, information and documents).

As just explained, this kind of provision affords only a direct immunity from the use of this material and then the exceptions are so wide that the point of granting even this limited immunity might be lost entirely. In this case, the inclusion of a class 1 or class 2 offence widens the reduction in the immunity.

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

Comment on Explanatory Statement

The content of the proposed section 116H, which states the scope of the powers the police are authorised by a warrant to exercise, is not adequately described. These powers are very wide and their exercise will limit the human rights of persons significantly. They should be fully outlined.

There are instances where the Explanatory Statement description uses a word that has a different legal meaning to that employed in the relevant provision. For example, while paragraph 116P(5)(b) speaks of "an offence", the Explanatory Statement uses the word "unlawful". Such variations are capable of misleading the reader of the Explanatory Statement. It may also mislead if words are added to what is in the provision. For example, in relation to proposed section 116Q, the Explanatory Statement states that a "registrable offender with knowledge of a particular computer system" may be subject to a particular order. Section 116Q does not use these qualifying words.

[17] See too at Explanatory Statement page 25 for a general statement of this kind.

AN ORDER FOR THE REMOVAL OF A REGISTRABLE OFFENDER FROM THE REGISTER

Main points

Should a registrable offender be permitted to make application for removal from the register directly to the court, or at least to request the chief police officer to make the application?

Clause 22 proposes to insert new sections 122A to 122C to permit the chief police officer to apply to the Magistrates Court for an order that a registrable offender be removed from the child sex offenders register. There is provision for notice to each victim of the offender.

A question arising is whether provision should be made for the offender to make the application directly to the court, or at least to request the chief police officer to make an application. The Committee notes that under section 96 of the Act the offender may apply to the Supreme Court for suspension of reporting obligations. Another question arising is why a suspension request is determined by the Supreme Court, whereas an application under proposed section 122A is determined by the Magistrates Court.

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

GENERAL COMMENT ON THE EXPLANATORY STATEMENT

A major problem is that in the Explanatory Statement consideration of human rights at pages 9 to 26 reference to a particular provision is not supported by a citation to the particular provision. An example is that at page 24, which states that "[t]he amendments which compel registrable offenders to provide personal details, access to their home and access to encrypted information engage section 22 of the HR Act". This is correct, but the reader—and in particular this Committee—cannot fully understand what is conveyed without reference to the particular provision of the Bill that provides for amendment. (It is, in respect of encrypted information, paragraph 116Q(1).) Provision of explicit reference to a source is standard legal writing.

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

CRIMES LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend a number of laws relating to the administrative of criminal justice.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference

Report under section 38 of the *Human Rights Act 2004*

THE AMENDMENTS TO THE CRIMES ACT 1900

The taking of identification material from persons under 18 years

Clause 7 of the Bill proposes the insertion of a substituted section 230 and a new section 230A into the Crimes Act to outline the procedures and legislative requirements for the taking of identification material for people at least 18 years of age (section 230) and people under 18 years of age

(section 230A). At pages 11 and 12 of the Explanatory Statement, there is a discussion of the human rights issues arising out of these provisions to which the Committee refers the Assembly.

Matter for clarification

The first chart at Explanatory Statement page 13 correctly identifies the circumstances where a Magistrates Court order is necessary for the taking of identification material. These are where the person is under 18 years old and not in police custody for an offence, or under 16 years old and in police custody for an offence (see subsection 230A(1), or where the person is between 16 and 18 years and in custody and in an impaired state (see paragraph 230A(2)(d)(ii).

Where the person is between 16 and 18 years and in custody, and *not* in an impaired state, subsection 230A(2) might be read as authorising a police officer to take identification material without obtaining a court order. This may have been intended, but the position is confused by the provisions of subsection 230A(4). This provides that a police officer may apply to a magistrate for an order allowing identification material to be taken from a person under 18 years old, dealing separately with the case where the person is in police custody and where they are not. The first case—where the person is in police custody—may be taken to cover both kinds of situation dealt with in subsection 230A(2)—that is, where the person is in an impaired state, and where they are not. This might be taken to mean that in both kinds of case the police must obtain a court order. This is perhaps not the most natural reading of these provisions, but given that the exercise of this power impacts on the privacy and bodily integrity of the 16 to 18 year old, a court might adopt the less natural reading so as to provide more protection to the person.[18] In this way, the intended operation of subsection 230A(2) might be defeated.

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

THE AMENDMENTS TO THE CRIMES (FORENSIC PROCEDURES) ACT 2000

Section 19 of the Crimes (Forensic Procedures) Act (the Act) provides that a person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. A suspect cannot be taken to have consented unless a police officer has complied with subsection 21(1). Paragraph 21(1)(c) requires the officer to give the suspect "the opportunity to communicate, or attempt to communicate, with a lawyer of the suspect's choice". Subsection 21(2) provides that the officer "must allow the suspect to communicate, or attempt to communicate, with the lawyer in private unless the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure". Section 24 states a range of matters the suspect must be informed of before giving consent.

Clause 20 proposes the insertion into the Act of a new section 24A to apply where the person is an Aboriginal or Torres Strait Islander person. In the Act (see the Dictionary), such a person is someone who is a descendant of an Aboriginal person or Torres Strait Islander person and identifies as such.[19]

[18] In *PJB v Melbourne Health Trustees Ltd* [2011] VSC 327 at [270], Bell J observed (citing authorities) that "the principle of legality is a strong presumption that legislative provisions are not intended to override or interfere with fundamental common law rights and freedoms and basic human rights. The presumption is displaced only by express language or necessary implication indicating unambiguously and unmistakeably that the legislation was intended to have this effect. The application of the presumption is not triggered by ambiguity in the meaning of the statutory language but by any substantial restricting or limiting impact by legislative provisions on such rights and freedoms".

[19] It is not clear what would occur were the police officer to doubt the descent of the person. Perhaps the officer would simply not comply with section 24A and leave the decision to be challenged by the suspect. In practical terms, it is likely that the officer would accept self-identification as sufficient.

The point of section 24A is to add some additional protections where the person is asked to consent to a procedure.

The Explanatory Statement identifies the requirement in subsection 24(3) as the primary protection. This provides that:

> [i]n addition addition to the matters mentioned in section 24, the police officer must—
>
> (a) inform the suspect that the Aboriginal legal service will be notified that the suspect will be asked to consent to a forensic procedure; and
>
> (b) as soon as practicable, notify the Aboriginal legal service.

This contrasts with the generally applicable obligation to give the suspect only the opportunity to communicate, or attempt to communicate, with a lawyer of the suspect's choice (paragraph 21(1)(c)). It remains a matter for the Aboriginal legal service to act on the notification. By subsection 24A(5), after notification, the police officer must allow the suspect to communicate, or attempt to communicate with the interview friend or lawyer in private, unless certain circumstances arise.

There is nothing provided as to what period of time must elapse before the police may assume that no lawyer will be involved. This is an issue that may need to be clarified. The Committee notes that by proposed subsection 24A(2), the police officer must not ask the suspect to consent to a forensic procedure unless an interview friend is present (unless the Aboriginal or Torres Strait Islander suspect has waived that right). There may be a case to make similar provision in respect of a lawyer.

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

The Committee appreciates that proposals which, on their face, are called additional rights to Aboriginal or Torres Strait Islander persons have been, on a regular basis, inserted into legislation dealing with the administration of criminal law as a result of the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody. The proposals in this Bill are similar to those found in part 1C of the *Crimes Act 1900* (Cwlth). It is understood that these kinds of provisions are designed to mitigate the vulnerable position in which Aboriginal or Torres Strait Islander persons are placed when dealing with the police.

These provisions engage and appear to limit the right to equality before the law and/or the equal protection of the law stated in HRA section subsection 8(3). At page 15, the Explanatory Statement does not identify HRA section 8 as a right engaged by the amendments to the Act, and in an apparent reference to section 24A states that the Bill "supports rights in criminal proceedings by ensuring that the Aboriginal Legal Service is notified when a police officer intends to ask an Aboriginal or Torres Strait Islander person to consent to a forensic procedure"; (these rights are stated to be those in HRA section 22). At pages 18 to 19, there is material that may recognise that there is a need to justify "special provision in relation to Aboriginal or Torres Strait Islander people". The Committee considers that there should be a more explicit reference to HRA section 8 and a section 28 justification for its apparent limitation.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-211 being the Tobacco (Compliance Testing Procedures) Revocation 2015 (No. 1) made under section 42D of the *Tobacco Act 1927* **revokes DI2011-194 the Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1).**

Disallowable Instrument DI2015-217 being the Board of Senior Secondary Studies Appointment 2015 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the Australian National University as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2015-218 being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2015 made under paragraph 16(1)(c)(iv) of the *Legal Aid Act 1977* **appoints a specified person, nominated by the executive committee of the ACT Council of Social Services, as a part-time commissioner of the Legal Aid Commission.**

Disallowable Instrument DI2015-219 being the Legal Aid (Commissioner—ACT Law Society Nominee) Appointment 2015 made under subsection 16(2) of the *Legal Aid Act 1977* **appoints a specified person, a nominee of the Council of the ACT Law Society, as a member of the Legal Aid Commission.**

Disallowable Instrument DI2015-220 being the Cemeteries and Crematoria (Perpetual Care Trust Percentage and Perpetual Care Trust Reserve Percentage) Determination 2015 made under section 11 of the *Cemeteries and Crematoria Act 2003* **revokes all previous determinations made under section 11 and determines the perpetual care trust amount and perpetual care trust reserve amount for the next planning period of five years.**

DISALLOWABLE INSTRUMENT—COMMENT

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

MINOR DRAFTING ISSUE

Disallowable Instrument DI2015-221 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2015 (No. 1) made under section 29 of the *Cemeteries and Crematoria Act 2003* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints specified persons as members of the ACT Public Cemeteries Authority governing board.**

This instrument appoints five specified persons to the ACT Public Cemeteries Authority Governing Board. The formal part of the instrument states that it is made under sections 29 and 29A of the *Cemeteries and Crematoria Act 2003* and sections 78 and 79 of the *Financial Management Act 1996*. Section 29 of the Cemeteries and Crematoria Act provides for the establishment of the governing board. Section 29A then provides:

29A Governing board members

(1) The governing board has at least 4, and not more than 12, members.

Note 1 The chairperson and deputy chairperson of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

Note 2 The chief executive officer is a member of the governing board (see *Financial Management Act 1996*, s 80 (4)).

(2) The governing board must include at least 4 members who, in the Minister's opinion, represent the general community and religious denominations.

Section 78 of the Financial Management Act makes general provision for the appointment of members of governing boards in the ACT. It provides:

78 Appointment of governing board members generally

(1) This section applies to the appointment of the members of the governing board of a territory authority, other than the CEO.

(2) The responsible Minister for the territory authority may appoint the members.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(3) The only criteria for deciding whether to appoint a person as a member are—

(a) the contribution the person can make to the goals and objectives of the governing board; and

(b) the criteria stated in applicable governmental policies (if any) relating to appointments.

(4) However, the establishing Act may prescribe other criteria for deciding whether to appoint a person as a member.

(5) Also, unless the establishing Act otherwise provides, a person must not be appointed as a member if—

(a) the person is a public servant; and

(b) if the governing board has a maximum of 6 members or less—the appointment would result in more than 1 public servant being a member of the board; and

(c) if the governing board has a maximum of more than 6 members—the appointment would result in more than 2 public servants being members of the board.

(6) Subsection (5) does not apply if—

(a) the Minister is satisfied that there are special circumstances justifying the appointment; and

(b) the Legislative Assembly approves, by resolution, the appointment.

(7) An appointment of a member—

(a) must not be for longer than 3 years, unless the establishing Act allows a longer period; and

(b) is an appointment under the provision of the establishing Act that establishes the governing board.

(8) The conditions of appointment of a member (other than a member required under the establishing Act to be a public servant or statutory office holder) are the conditions agreed between the Minister and the member, subject to any determination under the *Remuneration Tribunal Act 1995*.

Note The terms ***public servant*** and ***statutory office holder*** are defined in the Legislation Act, dict, pt 1.

Section 79 then specifically provides, generally, for the appointment of chairs and deputy chairs of governing boards (subject to contrary provisions in the relevant Act). It provides:

79 Appointment of chair and deputy chair

(1) The responsible Minister for a territory authority with a governing board may appoint a chair for the board and, unless the establishing Act otherwise provides, a deputy chair for the board.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) However, the responsible Minister must not appoint the CEO of the territory authority as chair or deputy chair.

(3) Also, the responsible Minister must not appoint a public servant as chair or deputy chair unless—

(a) there is no member of the board who—

(i) is not a public servant; and

(ii) is available to be appointed; and

(b) the Legislative Assembly approves, by resolution, the appointment.

(4) The responsible Minister must try to ensure that the governing board of a territory authority always has a chair and, unless the establishing Act otherwise provides, deputy chair.

The Committee notes that this instrument appoints five members of the Governing Board. It is therefore difficult to see why section 79 of the Financial Management Act is relied upon.

This comment does not require a response from the Minister.

NATIONAL REGULATIONS—COMMENT

NO EXPLANATORY STATEMENT / RETROSPECTIVITY

Rail Safety National Law National Regulations (Fees) Variation Regulations 2015 (2015 No. 317) made under the *Rail Safety National Law (South Australia) Act 2012***.**

Rail Safety National Law National Regulations Variation Regulations 2015 (2015 No. 318) made under the *Rail Safety National Law (South Australia) Act 2012***.**

These national regulations were tabled in the Legislative Assembly on 6 August 2015. The Committee notes that no explanatory statement was provided for the national regulations, nor was any tabling statement made by the Minister.

The national regulations state that they are made under the *Rail Safety National Law (South Australia) Act 2012*. Though no specific authority has been identified, it would appear that the national regulations are made under section 264 of the Rail Safety National Law set out in the South Australian Act mentioned in this National Regulation. It provides:

264—National regulations

(1) For the purposes of this section, the designated authority is the Governor of the State of South Australia, or other officer for the time being administering the Government of that State, acting with the advice and consent of the Executive Council of that State.

(2) The designated authority, on the unanimous recommendation of the responsible Ministers, may make regulations (***national regulations***) as contemplated by this Law, or as necessary or expedient for the purposes of this Law, including regulations that make provision for or in relation to any of the matters specified in *Schedule 1* to this Law.

(3) Where the national regulations refer to or incorporate a code, standard or other document prepared or published by a prescribed body—

(a) a copy of the code, standard or other document must be kept available for inspection by members of the public, without charge and during normal office hours, at the office or offices specified in the regulations; and

(b) in legal proceedings, evidence of the contents of the code, standard or other document may be given by production of a document purporting to be certified by or on behalf of the Regulator as a true copy of the code, standard or other document; and

(c) the code, standard or other document has effect as if it were a regulation made under this Law.

Section 265 of the Rail Safety National Law is also relevant. It provides:

265—Publication of national regulations

(1) The national regulations are to be published on the NSW legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.

(2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

According to each of these national regulations, they were published on 19 June 2015.

The Rail Safety National Law applies in the ACT as a result of section 6 of *the Rail Safety National Law (ACT) Act 2014*, which provides:

6 Application of Rail Safety National Law

The Rail Safety National Law set out in the schedule to the South Australian Act, as amended from time to time—

(a) applies as a territory law; and

(b) as so applying may be referred to as the *Rail Safety National Law (ACT)*; and

(c) so applies as if it were part of this Act.

It is important to note also section 7 of the *Rail Safety National Law (ACT) Act 2014*, which provides:

7 Exclusion of Legislation Act

(1) The Legislation Act does not apply to the Rail Safety National Law (ACT).

(2) However, the Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation as if—

(a) a reference to a subordinate law were a reference to a national regulation; and

(b) a reference to 'notification day' in the Legislation Act, section 64 (Presentation of subordinate laws and disallowable instruments) were a reference to 'published' as mentioned in the Rail Safety National Law (ACT), section 265 (1) (Publication of national regulations); and

(c) any other necessary changes were made.

It is also important to note that little of the information that is set out above has been provided to the Committee (or the Legislative Assembly). This is, of course, a necessary consequence of the failure to provide an explanatory statement or a tabling statement in relation to the national regulations. In the particular (complicated) circumstances of these national regulations, the Committee (and the Legislative Assembly) would have been greatly assisted by an explanation such as that set out above, rather than the Committee (and the Legislative Assembly) having to work out the mechanics of the operation (and presentation, and disallowance) of these national regulations for itself.

As the Committee has previously noted, there is no formal requirement that subordinate legislation (or disallowable instruments) be accompanied by an explanatory statement. However, the Committee has also noted, in its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps (available http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the value of explanatory statements to the Committee (and the Legislative Assembly):

Principle (b) [now principle (2)] of the Committee's terms of reference requires it to "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". Many of the issues identified below involve things that the Committee considers ought to be addressed in the explanatory statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

A further point is that addressing potential issues expressly in explanatory statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee's comments. Often, the explanation is something that could have been included in the explanatory statement for a piece of subordinate legislation. It may involve no more than a sentence (eg "this is not a public servant appointment", this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee's comments.

As the Committee noted in its *Scrutiny Report 15 of the 8th Assembly* (11 March 2014), in relation to national regulations made under the Heavy Vehicle National Law, these national regulations demonstrate one of the points that the Committee has consistently made about the value of explanatory statements, to the Committee and the Legislative Assembly. The absence of explanatory statements for these national regulations has required the Committee to undertake research and analysis in order to be satisfied that the national regulations in question are valid, etc. This would not have been necessary if explanatory statements had been provided that dealt with the issues that the Committee has discussed above.

There is a further issue with retrospectivity. Section 2 of each of these national regulations states that they commence on 1 July 2015 (noting that they were published on the NSW Legislation website on 19 June 2015 but not tabled in the Legislative Assembly until 6 August 2015). This means that they have a retrospective operation.

Unlike some other National laws, no authority is cited for that retrospective operation. Further, no explanation had been provided as to whether the retrospective operation of these national regulations has a "prejudicial" effect on persons other than the Territory, for the purposes of section 76 of the *Legislation Act 2001*. In making this observation, the Committee notes that subsection 7(1) of the *Rail Safety National Law (ACT) Act 2014* largely disapplies the Legislation Act. Nevertheless, retrospectivity remains an issue for the Committee, under principle (1)(b) of the Committee's terms of reference.

The Committee draws the Legislative Assembly's attention to these national regulations under principle (1)(b) of the Committee's terms of reference, on the basis that they may unduly trespass on rights previously established by law.

The Committee seeks the Minister's advice as to whether the retrospectivity provided for by these national regulations is "non-prejudicial", in terms of section 76 of the *Legislation Act 2001*.

The Committee draws the Legislative Assembly's attention to these national regulations under principle (2) of the Committee's terms of reference, on the basis that the explanatory statement for the instrument (noting that no explanatory statement was provided) does not meet the technical or stylistic standards expected by the Committee.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Minister for Workplace Safety and Industrial Relations, dated 11 August 2015, in relation to comments made in Scrutiny Report 33 concerning Subordinate Law SL2015-13—Dangerous Substances (General) Amendment Regulation 2015 (No. 2) (attached);
- the Treasurer, dated 17 August 2015, in relation to comments made in Scrutiny Report 35 concerning Disallowable Instrument DI2015-183—Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2015 (No. 1) (attached); and
- the Minister for Health, dated 1 September 2015, in relation to comments made in Scrutiny Report 34 concerning the Mental Health Bill 2015 (attached).

The Committee wishes to thank the Minister for Workplace Safety and Industrial Relations, the Treasurer and the Minister for Health for their helpful responses.

COMMENT ON GOVERNMENT RESPONSE

In relation to the Mental Health Bill 2015, the Committee makes the following comments on the Minister for Health's response.

The Minister responds to the Committee's question whether there were any circumstances in which non-consensual medical procedures were warranted. The Minister's response at page 1 of his letter argues that legislation such as is proposed by the Bill is designed to enable persons with impaired cognitive functioning to enjoy the right to health. The Committee does not join issue here except to point out that when addressing, at page 4, clause 66, which provides that a person for whom psychiatric surgery is proposed may at any time refuse consent (notwithstanding that the Supreme Court has given its consent), the Minister argues that the Government "did not propose to change this important human rights mechanism". In context, this is a reference to the person's ability to refuse consent.

The Committee notes that the presence of clause 66 raises the question of why there is a process to obtain a Supreme Court order if, at the end of the day, the person concerned can override that order.

The Minister states that the obligation in subclause 41A(2) to "notify the court of the reasons for the detention" will not attract the operation of section 179 of the *Legislation Act 2001*, arguing that in this context it is clear that the word "reasons" is used in its ordinary meaning. Section 179 provides:

> 179 **Content of statements of reasons for decisions**
>
> (1) This section applies if a law requires a tribunal or other entity making a decision to give written reasons for the decision, whether the term 'reasons', 'grounds' or any other term is used.
>
> (2) The document giving the reasons must also set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based.
>
> (3) This section is a determinative provision.

Being a "determinative provision", it "may be displaced expressly or by a manifest contrary intention". The Committee adheres to its view that section 41A does not manifest a contrary intention—that is, to displace section 179—and that subclause 41A(2) will attract the operation of section 179.

In comments on the role of ACAT, the Minister rejects the Committee's view that, in some respects, ACAT is a primary decision-maker. The Minister argues that ACAT will be reviewing an application made to it. With respect, the Committee disagrees. The act of making an application to ACAT that it do something is different to the taking of the action requested.

Steve Doszpot MLA
Chair

15 September 2015

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

Disallowable Instrument DI2013-5—Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 1)

Report 27, dated 3 February 2015

Public Sector Bill 2014

Mick Gentleman MLA

MINISTER FOR PLANNING
MINISTER FOR ROADS AND PARKING
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING

MEMBER FOR BRINDABELLA

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No 33 of 26 May 2015. I offer the following response in relation to the Committee's comments on the Dangerous Substances (General) Amendment Regulation 2015 (No 2) ('Amendment No 2').

The Committee has sought advice on the interaction of Amendment No 2 with the Dangerous Substances (General) Amendment Regulation 2015 (No 1) ('Amendment No 1'). In particular, the Committee was interested in how the amendments made by Amendment No 1 would operate in the intervening period between 15 May 2015 and the commencement of Amendment No 2 on 1 February 2016.

Amendment No 1 was designed to ensure homeowners are informed of any risk arising from the presence of loose fill asbestos in living areas of their Mr Fluffy house.

Amendment No 2 will replace the amendments made by Amendment No 1 with a more comprehensive asbestos assessment and management process.

Amendment No 2 creates a regulatory framework for those intending to occupy affected residential premises beyond 30 June 2016. The requirement for a person to have arranged an inspection and the preparation of an asbestos contamination report as made by Amendment No 1 will remain in place until the more comprehensive requirements in Amendment No 2 commence.

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I thank the Committee for its consideration of this regulation.

Yours sincerely

Mick Gentleman MLA
Minister for Workplace Safety and Industrial Relations
August 2015

Andrew Barr MLA

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR URBAN RENEWAL
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No. 35 of 10 August 2015. The Committee has sought my advice on the reasons for the disapplication of subsection 47(6) of the *Legislation Act 2001* in relation to DI2015-183.

DI2015-183 gives effect to the Territory's Vehicle Emission Reduction Scheme which outlines motor vehicle duty payable based the Commonwealth's Green Vehicle Guide (GVG). The GVG is updated frequently by the Commonwealth, when new cars enter the market.

The *Legislation Act 2001* allows for an instrument or law from another jurisdiction to be applied as in force (subsection 47(6)). However, the Act also states that the contents of the ACT legislation register must contain notifiable instruments as made (subsection 22(2)). In the case of the Vehicle Emission Reduction Scheme, the ACT legislation register would need to updated any time the Commonwealth updated the GVG. This can happen a number of times a week.

The GVG is readily accessible to the public on the internet, and the DI provides the website address. The Guide can be accessed directly from the legislation register.

I draw the Committee's attention to the Explanatory Statement for DI2015-183 which provides an explanation for the disapplication of subsection 47(6) of the *Legislation Act 2001* for DI2015-183 which applies to the instrument. The Explanatory Statement states:

> This instrument specifies that section 47 (6) of the Legislation Act 2001 does not apply to the Green Vehicle Guide. That section would require the text of the Green Vehicle Guide to be remade as a new Notifiable Instrument every time the Green Vehicle Guide is amended, which is as frequent as 2–3 times per week, whenever a new vehicle model becomes available for sale. The

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displacement of that section will ensure that the Green Vehicle Guide can be applied automatically for the purposes of this instrument when it is amended by the Commonwealth without the requirement to continually remake it as a Notifiable Instrument.

I thank the Committee for its consideration of this Disallowable Instrument.

Yours sincerely

Andrew Barr MLA
Treasurer

Simon Corbell MLA

DEPUTY CHIEF MINISTER

ATTORNEY-GENERAL
MINISTER FOR HEALTH
MINISTER FOR THE ENVIRONMENT
MINISTER FOR CAPITAL METRO

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair—Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
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Dear Mr Doszpot

I write with reference to Scrutiny Report 34 provided by the Standing Committee on Justice and Community Safety (the Committee) on 29 June 2015 which provides comment on the Mental Health Bill 2015 (the Bill). I thank the Committee for its consideration of the Bill.

It is important that the Mental Health Bill 2015 is read in conjunction with the Mental Health (Treatment and Care) Amendment Act 2014, as together they will become the Mental Health Act 2015. This Act will become operational 7 March 2016. The powers, procedures and orders referred to in the Mental Health Bill 2015 are continuous with the enabling powers, procedures, and orders currently expressed in the Mental Health (Treatment and Care) Amendment Act 2014.

In this letter I have responded specifically to the recommendations of your Committee's Report on the Mental Health Bill 2015.

In the end, a fundamental remains: are there any circumstances in which non-consensual medical procedures are warranted?

Committee draws this matter to the attention of the Assembly.

Response: There are a number of circumstances in which non-consensual medical procedures are warranted and this includes circumstances for people who have either permanent or fluctuating disabilities which impair their cognitive functioning and their enjoyment of the same right to health that the rest of the community enjoys. Guardianship and Powers of Attorney are two legislative methods governments provide to enable people who loose or have diminished capacity to provide a legal standard of supported or substituted consent to be able to enjoy the right to health that is embedded in the right to life. Medical treatment of mental illnesses through the Mental Health Acts of the jurisdictions of Australia are another way governments enable people affected by mental illnesses which diminish their adult capacity to consent to treatment, to enjoy this right. (Pages 5 to

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8 to the Explanatory Statement to the Bill directly address this connection between the right to health and the right to life).

1. *".....whether the provision would be more realistically expressed if words such as "in the opinion of the author of the written statement" were inserted between the words "may" and "have"".*

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

Response: The amendments to the Bill do not require the formation of a medical assessment, rather they require the officers empowered under this section of the Act to form an assessment to the best of their abilities and training. A police officer, for example, is expected to assess the person and situation leading to the emergency apprehension under the Act to the best of their abilities and training as a police officer and include this in their written statement, and a doctor would be expected to assess the person and situation leading to the emergency apprehension under the Act to the best of their abilities and training as a doctor and in this circumstance and only for this class of officer in the section of the Act and Bill it would lead to the formation of a medical assessment.

However, in order to make this intention of the Bill clearer an amendment to the bill, inserting a Note that provides examples what "anything else" may be for S39(1)(f) "anything else that happened ....", for example; the person dropped a package of white powder as they were being apprehended. This type of additional information being included in the written statement may be important for a thorough medical assessment of the apprehended person. The examples in the Note will not be exhaustive.

2. *"In substance, it provides that the person in charge of the facility must notify the court of the "reasons" for the detention of a person at a mental health facility. The content of this obligation will be as described in section 179 of the Legislation Act 2001. There is a question whether this result was intended."*

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

Response: The use of the word "reason" in this context does not raise the obligation described in section 179 of the Legislation Act 2001. It is clear from the context that "reason" is used in its common or ordinary dictionary meaning and that the reasons for detaining the person at the mental health facility include the judgements officers took under section 37 when they apprehended the person and the medical assessments subsequently undertaken as to their mental health state, risks to themselves or other people and acceptance or otherwise of offered treatments.

3. *The Committee considers that the Assembly would be assisted by advice from the Minister as to the legislative history (if any) of the provisions concerning both electroconvulsive therapy and psychiatric surgery.*

The Committee recommends that the Minister respond.

Response: I will respond to this during my speech on the Bill in the Legislative Assembly but otherwise note that:
The provisions regarding electroconvulsive therapy date back to the Mental Health Ordinance 1983 which in 1989 became the ACT Mental Health Act 1983 upon the formation of the first ACT Legislative Assembly following ACT Self-Government. The Mental Health Act 1983 was extensively reviewed and this lead to the current ACT Mental Health (Treatment and Care) Act 1994. Initially the provisions regarding electroconvulsive therapy and psychiatric surgery were translated into the ACT Mental Health (Treatment and Care) Act 1994 without much revision. The

specific provisions regarding electro-convulsive therapy were subject to specific review and amendments in 2002. The sections referring to psychiatric surgery have been translated from the 1983 Mental Health Ordinance to the Mental Health treatment and Care Act 1994 and to this Bill without substantive change other than modernising the language. I specifically address issues regarding psychiatric surgery later in this letter.

4. *It is not clear who makes this assessment. Presumably it is the person who proposes to administer the therapy. There is then a question as to whether the person—or someone acting on their behalf—should have a right to seek review of this assessment.*

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

Response: The ACT Civil and Administrative Tribunal (ACAT) is not the primary decision maker in this case but rather, as is usually the case, acts as a body reviewing a decision made by a primary decision maker. The ACAT is in this case reviewing the application made by the doctor that a person needs electro-convulsive therapy and either; against the review criteria (Section 55C) agreeing with the application by making an order, or if not satisfied against the criteria, not making an order. Section 26 of the ACAT Act 2008 says; "The tribunal may inform itself in any way it considers appropriate in the circumstances". This enables ACAT to seek expert opinion outside of the evidence provided in applications.

The right to seek a review of the assessment:
If the person does not refuse and there is a relevant Electro-convulsive therapy order in place, the person or a representative has a number of opportunities to seek a review. Firstly the ACAT has to hold a hearing to which the person, and / or representative, has a right to be present and at which they can seek a review. Subsequent to the ACAT making an ECT order the person can within draw their agreement for the therapy to proceed; this would then require the doctor to apply for a psychiatric treatment order triggering an ACAT hearing at which the person could seek a review of the doctor's assessment.

5. *This is that "a psychiatric treatment order or a forensic psychiatric treatment order is also in force in relation to the person". A psychiatric treatment order is one made by ACAT under section 28 of the current Act and a forensic psychiatric treatment order is made under section 48ZA.*

The Committee recommends that a Note be inserted at the end of clause 53 indicating by whom and under what power both these kinds of orders may be made.

Response: Once this Bill has been debated and passed the changes it proposes will be incorporated into the significant amendments of the Mental Health Treatment and Care Bill 2014 and this will create a new ACT Mental Health Act 2015. The Committee's recommendation is noted and ACT Health is presently considering this and conferring with the Parliamentary Counsel's Office.

6. *The purpose of this analysis is to bring these alternatives (ACAT model and expert panel model) to the attention of the Assembly.*

Noting this difference of approach within the legislation to the making of medical judgements, the Committee recommends that the Minister explain why the ACAT model has been chosen in one case, and the expert panel model chosen in the other. The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.

Response: Electro-convulsive therapy (ECT) is part of the ordinary continuum of treatments available to treat a range of mental illnesses. Ordinarily ECT is most commonly used to treat people

who have serious depression for which other treatments such as psychological therapies and anti-depressant medications have not been effective. Most psychiatrists would have experience in treating such people on a regular basis. ECT is a very effective treatment in these circumstances and may be life saving for people with severe depression that has acute physical consequences or the person is also suffering from severe suicidal ideation associated with their depression. Separate orders for ECT treatment under the Mental Health Act reflect the sensitivity this subject raises in the community and the expectation for closer scrutiny.

The expert panel and Supreme Court model is chosen for psychiatric surgery because this surgery is very rare and is not be regarded as part of the ordinary continuum of treatment and most psychiatrist will not develop expertise in treating people requiring this treatment option. It is regarded as extraordinary treatment for extraordinary circumstances. The Royal Australian and New Zealand College of Psychiatrist estimate there have been only an average of 2 to 3 cases per year across both countries. The current ACT Chief Psychiatrist can find no records of an application for psychiatric surgery to their office in the last 15 years.

The Supreme Court is intended to provide an additional oversight through its consent for this treatment. The Committee's attention is drawn, however, to Section 66 of the Bill which provides that the person for whom psychiatric surgery is being proposed may at any time refuse to have the surgery performed and the psychiatric surgery may not proceed, regardless of the Chief Psychiatrist and Supreme Court's decisions. ACT Health does not propose to change this important human rights mechanism.

Part 9.3 Psychiatric Surgery

Response: In response to your Report's discussion regarding Part 9.3 of the Bill related to Psychiatric surgery I have identified some further work I now wish to do. This work will take into account your observations regarding the due process rights in the course of a committee consideration of an application and will also propose to bring the expert committees deliberations and report prior to the Supreme Court. This will enable the Supreme Court to have the expert committees report available for its consideration of whether to consent by order to the performance of psychiatric surgery on a person.

Thank you for this opportunity to respond to the Committee's report in relation to the Mental Health Bill 2015.

Yours sincerely

Simon Corbell MLA
Minister for Health

1 September 2015