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

SCRUTINY REPORT 46

19 July 2016

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Jayson Hinder MLA (Deputy Chair)

Ms Joy Burch MLA

Mrs Giulia Jones MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone	02 6205 0173
Facsimile	02 6205 3109
Post	GPO Box 1020, CANBERRA ACT 2601
Email	scrutiny@parliament.act.gov.au
Website	www.parliament.act.gov.au

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

BILLS—NO COMMENT

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

APPROPRIATION BILL 2016-2017

This is a Bill for an Act to appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2016, and for other purposes.

APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2016-2017

This is a Bill for an Act to appropriate money for expenditure in relation to the Office of the Legislative Assembly and officers of the Assembly for the financial year beginning on 1 July 2016, and for other purposes.

RATES (PENSIONER REBATE) AMENDMENT BILL 2016

This is a Bill to amend the *Rates Act 2004* to amend the uncapped rebate scheme.

REVENUE LEGISLATION AMENDMENT BILL 2016

This is a Bill to amend various taxation Acts to improve the Territory's revenue collection system for taxpayers and administrators.

SAFER FAMILIES LEVY BILL 2016

This is a Bill to amend the *Rates Act 2004* to impose a levy on all rural and residential properties in the ACT to support an integrated case management and coordination of family violence services, training for frontline staff, and improvements to the child protection system.

BILLS—COMMENT

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

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2016

This is a Bill to amend various laws relating to building, construction and planning to refine the operation of a range of regulations applying to construction and related work in the Territory, and to implement provisions that complement a review of the *Building Act 2004* and other relevant legislation.

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 RIGHT TO PRIVACY—HUMAN RIGHTS ACT 2004 (HRA), SECTION 12

At page 38ff, the Explanatory Statement identifies a number of provisions in the Bill that engage the right to privacy and assesses their compatibility with this right according to the framework stated in HRA section 28.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

THE PRESUMPTION OF INNOCENCE IN HRA SUBSECTION 22(1) AND THE CREATION OF STRICT LIABILITY OFFENCES

At page 40ff, the Explanatory Statement identifies a number of strict liability offence provisions in the Bill that engage the presumption of innocence and assesses their compatibility with the presumption according to the framework stated in HRA section 28.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

CRIMES (SERIOUS AND ORGANISED CRIME) LEGISLATION AMENDMENT BILL 2016

This is a Bill to amend the *Bail Act 1992* to permit the Director of Public Prosecutions in defined circumstances to apply for a review of a decision to grant bail; to repeal the *Crime Prevention Powers Act 1988* and relocate move-on powers to part 9 of the *Crimes Act 1900*; to amend the *Crimes (Child Sex Offenders) Act 2005* in relation to persons who have been convicted of an offence in a foreign jurisdiction; to amend the *Crimes (Sentencing) Act 2005* to expand the categories of offence which are subject to non-association and place restriction orders; and other matters.

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 detailed explanation of the background to these proposals; identifies the ways in which certain rights in the HRA are engaged; and states a justification for their limitation according to the framework stated in section 28 of this Act.

The Committee draws this matters to the attention of the Assembly, but does not require a response from the Minister.

DISCRIMINATION AMENDMENT BILL 2016

This is a Bill to amend the *Discrimination Act 1991,* in particular in relation to unlawful vilification, and other legislation including the *Human Rights Commission Act 2005,* in particular in relation to the ACT Civil and Administrative Tribunal's (ACAT) consideration of complaints of unlawful discrimination.

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 RIGHT TO FREEDOM OF EXPRESSION (HRA SECTION 16), THE COMMONWEALTH CONSTITUTION'S FREEDOM OF POLITICAL COMMUNICATION, AND THE PROVISION IN THE DISCRIMINATION ACT 1991 REGARDING UNLAWFUL VILIFICATION

Clause 9 of the Bill proposes to expand the existing provision in the *Discrimination Act 1991* (henceforth "the Act") making unlawful certain acts described as "vilification". Clause 8 would repeal existing part 6 of the Act, containing sections 65, 66 and 67, and insert in existing part 7 a new section 67A. Section 67A is very similar to existing section 66. Leaving aside examples of the concept of "other than in private"[1] in subsection 67A(1), and the definition of HIV/AIDS status in subsection 67A(3), the text of section 67A follows:

67A Unlawful vilification

(1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:

(a) disability;

(b) gender identity;

(c) HIV/AIDS status;

(d) race;

(e) sexuality.

(2) However, it is not unlawful to—

(a) make a fair report about an act mentioned in subsection (1); or

(b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

(c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

The changes of substance to the existing section 66 are the addition of the words "revulsion of" in the opening words of section 67A(1), and the addition of "disability" as a relevant ground.

Assessment of the compatibility of this provision with the HRA right to freedom of expression, or of whether it is an invalid derogation of the right to political communication in the Commonwealth Constitution, requires attention to what remedy might be pursued by a person who considers that an unlawful vilification has occurred. The most expeditious, and most likely to be used remedy would be by way of complaint to the Human Rights Commission (HRC), followed, if necessary, by resort to the ACAT. The *Human Rights Commission Act 2005* (the HRC Act) makes provision for this process. In brief, a person aggrieved by an unlawful act under the Act (and this includes a complaint of unlawful vilification) may make a complaint to the HRC (section 42 and paragraph 43(1)(a) of the HRC Act). This is called a discrimination complaint.

[1] One example is "writing a publically viewable post on social media".

A major change proposed by the Bill is to expand the range of persons who may make such a complaint. Schedule 1, Part 1.2, Amendment [1.7] would add paragraph 43(1)(ea) to permit a complaint by "a person who has a sufficient interest in the complaint", and Amendment [1.8] would provide that "a person has a ***sufficient interest*** in a complaint if the conduct complained about is a matter of a genuine concern to the person because of the way conduct of that kind adversely affects, or has the potential to adversely affect, the interests of the person or interests or welfare of anyone the person represents". By Amendment [1.9], the aggrieved person must consent to such a complaint. These changes would increase the chances that a complaint of unlawful vilification will be made to the HRC.

Having regard to the width of the concept of inciting revulsion of a person on a relevant ground, and the facility for a complainant to resort to the HRC and the ACAT, with the consequence that the respondent's reputation and financial resources would as a result be impacted, it is plausible to think that members of the public will hesitate to make comments that might be the basis for a ground of complaint. The consequence is that there would be a chilling effect on their right to free speech.

The HRC may then deal with the complaint but, as a matter of substance, may do no more than refer the matter to conciliation. If the complainant is not satisfied with the HRC process, they may require the HRC to refer the matter to the ACAT. If the ACAT is satisfied that the person complained about engaged in an unlawful act, it must make one or more of the following orders under subsection 53E(2):

(a) that the person complained about not repeat or continue the unlawful act;

(b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;

(c) unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.

An ACAT order might have a substantial impact on the person, including in relation to their reputation and financial loss. In relation to orders under paragraph 53E(2)(c), the Bill proposes to add subsections 53E(2A) and (2B). These provisions require the ACAT to "consider" various matters relating, generally speaking, to the rights of the person the subject of the discrimination, balanced against the interests of the subject of the complaint. Much is left, however, to the discretion of the ACAT.

Another substantial change to the existing regime is the proposal by Amendment [1.13] to add section 53CA, dealing with the onus of establishing complaint about discrimination. This matter is referred to below.

In the light of the provisions of section 67A, and the powers of the ACAT on a complaint of unlawful vilification, the question is whether section 67 is a justifiable limitation on the right to freedom of expression (HRA section 16), or is invalid as derogating from the Commonwealth Constitution's freedom of political communication. For brevity, the issue may be addressed in relation only to the latter question. The Committee refers the Assembly to its consideration of the High Court doctrine in its report below concerning the *Public Sector Management Bill 2013*.

The Explanatory Statement (at pages 2 to 4) addresses this issue in terms of whether section 67A is a justifiable derogation of the HRA right to freedom of expression. The Committee accepts that this approach is appropriate, but considers the rights issue in terms of the Commonwealth Constitution's freedom of political free speech.

The Committee does not make any comment in relation to the addition of "disability" as a ground for the operation of section 67A; see the Explanatory Statement at page 3. The Committee comments are directed to the addition of the words "revulsion of" in the opening words on subsection 67A(1).The Explanatory Statement addresses this change to the law at pages 10-11. It is said that "'inciting revulsion' is adopted from the Victorian *Racial and Religious Tolerance Act 2001* and is in line with the intent of the other aspects of inciting conduct which are about preventing the most seriously ridiculing, contemptuous and hate inciting acts by making unlawful conduct which promotes or urges the strongest feelings of revulsion, hatred or dislike". Little is said about the object of making these acts unlawful. At pages 3 to 4, it is said that "vilifying conduct diminishes the dignity and sense of community inclusion of a person by denying the right of the person to equality and non - discrimination. Vilification acts as a barrier to individuals engaging in and contributing to ACT society, driving divisions in the community, rather than promoting respect and inclusion". It is also said that a vilification law "will serve an important educative function".

Does section 67A burden the freedom of political communication?

This would appear to be so, given that many statements made about the actions of the public service and the Executive, or about the policies that should be adopted by the Assembly or the service and the Executive, may plausibly be argued to incite the conduct made unlawful by section 67A.

Is the end (object) sought to be achieved by section 67A legitimate?

The argument made in the Explanatory Statement has been noted. On the other hand, there is support in the case-law of the High Court for the proposition that promoting civility of discourse is not a legitimate object or end.[2] These comments were made in the context of a law that proscribed offensive language, and it is arguable whether they apply to section 67A. Even if section 67A is not viewed in the same way, it is relevant to take account of what was said by Hayne J in *Monis* on the question whether section 67A is justifiable.

> [220] The elimination of communications giving offence, even serious offence, without more is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.
>
> ...
>
> [222] The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving any offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting

[2] See *Monis*, per Hayne J at [214]. See too *Coleman v Power* [2014] HCA 39, at [81-[82], [197], and [239].

> to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.

The Committee does not suggest that section 67A is invalid, and certainly not so on the basis of Hayne J's remarks. Its purpose here is to put the matter before the Assembly to assist it to decide whether to pass section 67A into law.

If the end is legitimate, is the manner in which it is sought by section 67A, when read with the provisions in the HRC Act concerning ACAT power, reasonably appropriate and adapted to achieving the end in a manner compatible with the system of representative and responsible government?

Relevant to this issue is whether a person who is the target of a complaint based on subsection 67A(1) may raise matters in defence. The Explanatory Statement points to subsection 67A(2). There may be a question whether this degree of protection goes far enough. There is High Court authority for the point that a proscription such as subsection 67A(1) should be accompanied by a range of defences equivalent to those that are available to a person who is sued in defamation.[3]

More generally, the Members of the Assembly might employ the framework for 'proportionality testing' stated by the High Court in *McCloy v New South Wales*:

> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *suitable* — as having a rational connection to the purpose of the provision[6];
>
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> If the measure does not meet these criteria of proportionality testing, ... the measure will exceed the implied limitation on legislative power.[4]

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

THE EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (HRA SECTION 8) AND THE DEFINITION OF "RELIGIOUS CONVICTION" TO ACCORD PROTECTION TO ABORIGINAL OR TORRES STRAIT ISLANDER PERSONS

The Discrimination Act applies to discrimination on the grounds (among other matters) of "religious conviction" (subsection 7(1)), but does not define the term. By clause 34, the Bill would state a non-exhaustive definition that includes within the definition:

> (c) the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and

[3] See *Monis* at [100] and [215] per Hayne J, and see the *Civil Law (Wrongs) Act 2002*, division 9.4.2.

[4] [2015] HCA 34 at [2], per French CJ, Kiefel, Bell and Keane JJ.

(d) engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; ... .

On their face, these provisions engage and derogate from the right in HRA 8 to the equal protection of the law without discrimination, and a section 28 justification should be provided.

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

THE RIGHT TO EQUAL PROTECTION OF THE LAW (HRA SECTION 8) AND THE CREATION OF NEW EXCEPTIONS TO CERTAIN PROHIBITIONS OF DISCRIMINATION

At page 1ff, the Explanatory Statement identifies very generally a number of provisions in the Bill that engage the right to equal protection of the law and assesses their compatibility with this right according to the framework stated in HRA section 28.

The Committee draws this matters to the attention of the Assembly, but does not require a response from the Minister.

THE RIGHT TO A FAIR TRIAL (HRA SECTION 21) AND THE REVERSAL OF THE ONUS OF PROOF IN A DISCRIMINATION COMPLAINT IN THE ACAT

At page 5ff, the Explanatory Statement identifies proposed section 53CA of the HRC Act as engaging and limiting the right to a fair trial (section 21) and assesses its compatibility with this right according to the framework stated in HRA section 28.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

FAMILY VIOLENCE BILL 2016

This is a Bill for an Act to prevent and reduce family violence, keep people, including children, safe, and hold perpetrators accountable by giving the courts power to make family violence orders, creating offences to enforce such orders, promoting efficient access to the courts, and recognising such orders in other jurisdictions.

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, at pages 1 to 8, contains a detailed explanation of the background to these proposals; identifies several ways in which certain rights in the *HRA* are engaged; and states a justification for their limitation according to the framework stated in section 28 of this Act. At some other points in the Explanatory Statement, human rights issues are discussed in the context of particular provision.

The Committee's Report offers some general observations, and points to some particular issues that are not addressed in the Explanatory Statement.

The entitlement of the family to be protected and the extent to which the entitlement may be limited

Subsection 11(1) of the Human Rights Act provides that "[t]he family is the natural and basic group unit of society and is entitled to be protected by society". The scheme in the Bill authorises the Territory—through the police and the judiciary—to intervene and control what happens within a family, even to the extent of forcing its members to separate. The Explanatory Statement acknowledges this generally, and addresses the question of the compatibility of the Bill with subsection 11(1) at pages 5 to 6. The introductory comment deserves notice.

> The amendments in the Bill primarily engage and limit the right to family (s 11 HR Act) given the nature of domestic, family and sexual violence. For this reason, the limitation is discussed in detail. In protecting a victim's right to safety on the one hand, there is a limitation on the accused's[5] right to family that must flow from that protection.

Should clause 37 be amended to better reflect the value stated in subsection 11(2) of the HRA?

Clauses 36 and 37 are summarised in the Explanatory Statement.

> **Clause 36 – Safety of affected person and children paramount**
>
> This clause provides the principle that, in deciding the conditions to be included in a family violence order, a court must give paramount consideration to the safety and protection of the affected person and any child affected by the respondent's conduct. This provision is included to support section 11 of the HR Act (protection of the family and children) and ensure that this consideration is given appropriate weight when the court balances the decision about the conditions to be attached to an order.
>
> **Clause 37 – Least restrictive principle**
>
> This clause provides a balancing consideration for the court to take into account, along with clause 36, when deciding conditions to be attached to an order. This clause provides that the court must ensure the conditions included in a FVO are the least restrictive of the personal rights and liberties of the respondent as possible, while still achieving the objects of the Act and the principle set out in clause 36.
>
> This clause supports section 28 of the HR Act, by requiring the court to consider the conditions that will be the least restrictive on the respondent's human rights.

Clause 36 supports HRA section 11 only so far as concerns subsection 11(2), which provides that "[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind". Clause 36 makes no reference to protecting the family. Clause 37 states balancing considerations, but these focus only on "the personal rights and liberties" of the respondent.

The question arises whether clause 37 should make express mention of the entitlement of the "family" to protection.

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

The scheme specified in the Bill is capable of being employed to protect the interests of men as much as women and children

The Explanatory Statement takes a somewhat ambivalent position on the issue of the classes of persons the Bill is designed to protect. At page 1, it states that "[t]he Bill balances the human rights of a person affected by changes in the law and the public interest in protecting an individual's right to safety within their home and in the community". (A "person affected" will be a respondent to an application for a family violence order (FVO).) It then states that "[i]t is now widely accepted that

[5] Reference to an "accused" in the context of this Bill seems inappropriate. If the court proceeding is a criminal matter, then many more rights issues would arise. The better term is 'respondent'.

gender-based violence is a form of discrimination against women and their children", and notes that "[t]he European Court of Human Rights (ECHR) has confirmed the importance of characterising gender-based violence against women as a form of discrimination that public authorities are required to eliminate and remedy". This approach is reflected in a later statement at page 4 that "[t]he primary purpose of the Bill is to make legislative amendments to protect the lives and safety of women and children where there is a risk posed to them because of domestic, family and sexual violence".

The provisions of the Bill are not, however, framed in a way that assumes or provides specifically that men cannot be the victims of such violence and that their rights cannot be protected by the processes specified in the Bill. Indeed, at pages 3 to 4, the Explanatory Statement expressly acknowledges this to be the case.

> It is also recognised that domestic, family and sexual violence is a problem that affects not only women, an issue that was summarised by the ECHR in *Opuz v Turkey*:
>
> … the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse…is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly [[2009] ECHR, Application no. 33401/02 (9 June 2009), 132].

Is the concept of family violence defined so widely that in some cases the intervention of the Territory would be a disproportionate response?

At pages 10-11 the Explanatory Statement outlines with examples the scope of the concept of family violence" as stated in clause 8:

> **Clause 8 – Meaning of *family violence***
>
> This clause sets out the meaning of family violence for this Act, replacing the term "domestic violence". The definition in this clause expands the previous definition of domestic violence in the DVPO Act to include sexual violence or abuse, emotional or psychological abuse, economic abuse, coercion or other behaviour that controls or dominates the family member and causes them to feel fear for their safety or wellbeing. The clause removes conduct that is harassing or offensive, as it is covered by the more general 'emotional or psychological abuse', and 'threatening behaviour'. The clause also introduces a subsection that defines family violence as behaviour that causes a child to hear, witness or otherwise be exposed to family violence.
>
> Clause 8 (2) outlines that, without limiting the definition of family violence, it can include behaviour that is sexually coercive, damaging property, harming an animal, stalking or deprivation of liberty. These behaviours can fall under a number of categories of 'family violence' for example, 'sexually coercive' behaviour could be both coercion and control as well as sexual abuse.
>
> Sexually coercive behaviour can include behaviour that could be criminal and also behaviour that may not ordinarily be criminally liable, for example using control or coercion to force a person to masturbate or forcing them to perform other sexual activities without their consent.

> Damaging property can extend to damage to property that is not owned by the family member, but which relates to the family member. This would include where a respondent damages property which the family member rents, but does not own. For example, if the respondent punches a hole in the wall of a house belonging to the ACT Government or other agency that is leased to the applicant, this property damage would constitute family violence.
>
> The definition is intentionally broad to ensure that all types of domestic, family and sexual violence are covered. There are a myriad of ways that people can perpetrate violence against a family member and people who suffer this violence should be protected under the law.

This concept is the critical to defining the circumstances in which the Territory may intervene in the affairs of a family. At page 4, the Explanatory Statement adopted a passage from a Canadian case[6] which may be re-phrased to reflect the viewpoints that a limitation of a HRA right must be such that there is a proportionality between the effects of the measures which are responsible for limiting the HRA right or freedom, and the objective of the law that makes the limit.

In simpler terms, the question is whether the limitation goes too far, given the objective sought. In relation to clause 8, the question is given point by the example of the person punching a hole in the wall of a Territory owned house. Specifically, is it proportionate that such an act, without more, should be the basis for Territory intervention? This might be seen as not only a question of the need for intervention in that instance, but also as one of whether the cost of Territory intervention in such cases will reduce the availability of Territory resource for more serious cases. The inclusion of "emotional or psychological abuse", and "economic abuse" within the definition of "family violence" also has the possibility that these questions will arise frequently.

The limitation of the scope of a cross-examination of an affected person by a self-represented respondent and the HRA right in section 21 to a fair trial

Outlining clause 63, the Explanatory Statement states that "[t]his clause implements recommendation 18-3 of the ALRC report, which recommends that the respondent in a protection order proceeding be prohibited from personally crossexamining any person against whom the respondent is alleged to have used family violence".

The Explanatory Statement does address very briefly the need for this restriction, but not such as to be an adequate justification in terms of HRA section 28. It is noted that the Explanatory Statement cites the recommendation of the ALRC, but the Committee's examination of that report suggest that the Commission gave no weight to any right of the respondent, perhaps because it did not need to consider a law such as the HRA.

The Committee recommends that a section 28 justification be included in the Explanatory Statement.

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

[6] *R v Oakes* [1986] 1 SCR 103.

The detention of persons against whom a police-officer proposes to apply for an after-hours order and the HRA right to liberty and security of the person

Clause 105 re-states in substance existing section 75 of the *Domestic Violence and Protection Orders Act 2008*. In *Report 59* of the *6th Assembly*, the Committee commented on the Bill for the 2008 Act. The significance of a power vested in the police to detain a person without there being necessarily any grounds for suspicion that the person has committed a criminal offence is such that these comments bear repeating (with adaptations to refer to clause 105).

105 After-hours orders—detention of person against whom order sought

(1) If a police officer proposes to apply for an after-hours order against a person, the police officer may—

(a) if the police officer is reasonably satisfied of a reason mentioned in section 100 (a) and (b), remove the person to another place; and

(b) detain the person until—

(i) if the order is made—a copy of the order is given to the person; or

(ii) if the application for the order is refused—the police officer is notified by the judicial officer of the refusal.

(2) A person must not be detained under this section for longer than 4 hours.

Paragraph 100(a) refers to "a risk to an affected person of family violence by the respondent", and paragraph 100(b) refers to an order "immediately necessary to ensure the safety of the affected person from the [family] violence, or prevent substantial damage to the affected person's property".

Clause 105 appears to derogate from the right in HRA subsection 18(1):

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

Debate about whether such a power to detain is justified will focus on whether an exercise of the power is "arbitrary" and/or on whether it is in terms of HRA section 28 a justifiable limitation of the right in subclause 18(1).

Some might argue that a provision such as section 59A is necessarily an "arbitrary" deprivation of the right to liberty (and thus incompatible with HRA subsection 18(1)) simply upon the principle that "the involuntary detention of a citizen in custody by the Territory 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".

There is some judicial support in High Court authority for the principle just stated (see Scrutiny *Report No 25* of the *6th Assembly*, concerning the Health Legislation Amendment Bill 2006 (No 2)). But other High Court judges do not preclude the validity of detention otherwise than as a result of an adjudication by a court, and outside the accepted "exceptional cases", either by an exercise of judicial power, or by executive power (see *Scrutiny Report No 25* of the *6th Assembly*).

On this second view, close attention must thus be paid to the circumstances in which the power to detain may be exercised, and the nature of the protections afforded to the person placed in detention. It should be added that those High Court judges that allow for wider latitude for executive detention emphasise that it must be for "protective" and not "punitive" purposes.

Evaluation of whether the deprivation of liberty involved in an exercise by a police officer of the power to detain under clause 105 will focus on the specifics of the circumstances under which the power may be exercised, and how it is exercised. It would be relevant to examine what if any provision is made for where the detention may take place, and what access he or she will have to a lawyer, a doctor or to friends.

The Committee notes that:

- the discretion conferred on the police officer is confined by paragraph 105(1)(a), but ill leave room for a wide area of choice;
- the police officer may detain even if he or she does not apprehend that there is any ground to arrest the person;
- no provision is made for where the person is to be detained, or under what conditions; and
- no provision is made concerning the admissibility in legal proceedings of statements that may be made by the detainee to the police.

This last matter is of considerable significance. There is a question whether the protective provisions of the *Crimes Act 1900* part 10 should apply while the person is in police detention, for they might not otherwise apply.

The Explanatory Statement does offer a HRA section 28 justification for clause 105, but in view of the above comments, does not go far enough.

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

GAMING AND RACING (RED TAPE REDUCTION) LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend various laws relating to gambling in ways designed to reduce the administrative burden of compliance with these laws.

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 RIGHT TO PRIVACY (HRA SECTION 12) AND THE OBLIGATION TO PROVIDE PERSONAL INFORMATION, INCLUDING CRIMINAL HISTORY, FOR APPLICATION PROCESSES

The Explanatory Statement acknowledges that the right to privacy is engaged and limited by a number of provisions which require the submission of an application which may include personal information. It notes that:

> [t]he applicable clauses are 37, 38, 39, 40, 42, 43, and 48 and will affect the following persons under the [*Race and Sports Bookmaking Act 2001*]:
>
> a. an applicant for a race bookmaking licence;
>
> b. a nominated person for a race bookmaker's agent licence;
>
> c. a race bookmaking licensee; and
>
> d. a race bookmakers' agent licensee.
>
> The clauses may be viewed as engaging the right to privacy and reputation as it will require that a person indicated above will need to disclose personal details as part of the application process. As there is also a requirement to consent to a police criminal check, this will include a person's criminal history.

The Explanatory Statement then offers a justification for the limitation of the right to privacy according to the framework stated in HRA section 28. The Committee commends the care taken to provide this statement and its quality.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

PERSONAL VIOLENCE BILL 2016

This is a Bill for an Act to prevent and reduce personal violence (other than family violence), and to facilitate the safety and protection of people who fear or experience personal violence by giving the courts power to make protection orders, creating offences to enforce protection orders, ensuring that access to the courts is as simple, quick and inexpensive as is consistent with justice; and recognising registered orders made elsewhere in Australia and in New Zealand.

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 at pages 1 to 5 contains an explanation of the background to these proposals; identifies several ways in which certain rights in the *HRA* are engaged; and states a justification for their limitation according to the framework stated in section 28 of this Act. At Explanatory Statement, page 15, human rights issues are discussed in relation to provision for closed hearings in clause 55.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2016

This is a Bill to amend the *Public Sector Management Act 1994* so that it will cover all ACT Public Sector entities except Territory owned corporations; formally establish the Senior executive Service; contain heads of power for the employment of ACT public servants; vest all employment powers at the Head of Service level; and apply the ACTPS values to the whole of the public sector.

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 RIGHT TO FREEDOM OF EXPRESSION (HRA SECTION 16) AND THE COMMONWEALTH CONSTITUTION'S FREEDOM OF POLITICAL COMMUNICATION AND THE PROPOSED PROVISION THAT A PUBLIC SERVANT MUST NOT ENGAGE IN CONDUCT THAT CAUSES DAMAGE TO THE REPUTATION OF THE SERVICE OR THE EXECUTIVE

Clause 6 of the Bill provides for a substituted division 2.1 of the Act, and is entitled "Public sector standards". Proposed section 9, which is headed "Public sector conduct", gives rise to a number of human rights issues. This is acknowledged and dealt with in a cursory way in the Explanatory Statement (at page 7), and the matter requires deeper analysis.

Proposed paragraph 9(2)(a) of the *Public Sector Management Act 1994* provides that a public servant must not engage in conduct that causes damage to the reputation of the service or the Executive. What follows is the entirety of the Explanatory Statement comment on this proposal:

> Section 9(2)(a) deliberately[7] includes actions by a public servant that are undertaken outside of official duties. Emergent case law on the impact of out of hours conduct on the employment relationship demonstrates increasing societal and institutional acceptance of this connection. This is particularly true of employee participation in social media fora where there is significant potential for reputational damage to the employer. The need to retain public confidence in the public service outweighs any impingement on an individual's right to privacy, freedom of expression or participation in democratic processes.

The conduct proscribed by paragraph 9(2)(a) will embrace speech, and paragraph 9(2)(a) thereby engages and derogates from HRA subsection 16(2) (the right to freedom of expression), and section 17 ("the right, and ... the opportunity, to (a) take part in the conduct of public affairs, directly or through freely chosen representatives"). This is acknowledged by the Explanatory Statement. There is no reference to HRA section 28 as a basis for these derogations, nor any attempt in substance to make out a justification according to the framework stated in section 28.

There is also a question whether paragraph 9(2)(a) would be invalid as a derogation of the right to freedom of political communication found by the High Court to arise by implication from the provisions in the Commonwealth Constitution. For the purposes of this report, the High Court's doctrine may be taken as a framework for also addressing the question whether paragraph 9(2)(a) is a justifiable derogation of HRA sections 16 and 17.

The central question posed by section 28 is whether the limit to speech is "reasonable" "in a free and democratic society". The High Court test is not substantially (or perhaps at all) different.

The significance of free speech

The judgment of Heydon J on *Monis v The Queen* is a common way of stating judicial attitude on the value of free speech. His Honour said:

[7] It is not however so clear that a court would read the provision this way. There is no express application of this rule to conduct outside of official duties. Given the effect this rule might have on freedom of expression, a court might read it down so that it applied only to official duty conduct, notwithstanding that other rules in subsection 9(2) apply only to what the public servant does in their job. Compare the reasoning of the High Court in *Monis v The Queen* [2013] HCA 4. The Committee will however deal with paragraph 9(2)(a) on the basis intended by the proponent of the Bill.

> [151] The common law right of free speech is a fundamental right or freedom falling within the principle of legality[214]. That must be so if there is any shadow of truth in Cardozo J's claim that freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom."[215] It must be so if Lord Steyn's account of the importance of freedom of expression is convincing. He said[216]:
>
> > "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'[217]. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country".
>
> ...
>
> [152] Of course, Cardozo J was dealing with the First and Fourteenth Amendments to the United States Constitution. ...
>
> Constitutional rights of those kinds are different from a common law right capable of modification by statute. But the considerations underlying a constitutional right of free speech, where it exists, are equally strong indications that the right of free speech at common law is sufficiently important to attract the principle of legality.[8]

The Commonwealth Constitution's freedom of political communication

In *Monis v The Queen*[9] Hayne J said that "where a law has the legal or practical effect of burdening political communication, the boundaries of the freedom are marked by two conditions". **The first** is "the object of the impugned law 'is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... which the Constitution prescribes'".[10] This object is often spoken of as the "legitimate end". **The second** is that the law is reasonably appropriate and adapted to serving the legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[11]

The character of this freedom was described by McHugh J in *Levy v Victoria*: "The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution".[12]

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[8] [2103] HCA 4 (footnote detail omitted).

[9] [2013] HCA 4 at [105]-[106].

[10] Ibid.

[11] [2013] HCA 4 at [61] per Glesson CJ. See now *McCloy v NSW* [2015] HCA 34 at [2] for a more comprehensive statement.

[12] (1997) 189 CLR 579 at 622.

The width of the language on paragraph 9(2)(a)

Whether or not paragraph 9(2)(a) derogates from this freedom will turn on its language and, in particular on the breadth of the conduct it proscribes. Conduct proscribed by paragraph 9(2)(a) will embrace statements made by a public servant in any context and at any time or place that cause damage to the reputation of the service or the Executive. The "service" is the ACT Public Service, and the "Executive" is the Australian Capital Territory Executive, being the Chief Minister and such other Ministers as are appointed by the Chief Minister. See the *Australian Capital Territory (Self-Government) Act 1989* sections 36 and 39.

The only limitation on the communication that is caught by the law is that it has the effect of causing damage to the reputation of the service or the Executive. There is no limitation in terms of whether the information in question was or was not otherwise publicly available, or whether it ought to be or could be made so. Nor is it concerned with whether, in a given instance, any public interest consideration could reasonably justify a prohibition on disclosure. Nor is it necessary to consider (i) whether the information upon which the communication was derived by the official in confidence; or (ii) whether the communication was based on anything learnt by reason of the person being a public servant.

The potential effect on free speech by a public servant of the rule in paragraph 9(2)(a) should also be understood by reference to other provisions in proposed section 9 concerning misconduct. Clause 104 of the Bill would amend the Dictionary to the Act by prescribing that "misconduct, by a public servant, means failure to comply with section 9", and this is also reflected in subsection 9(3), which provides that "[f]or a misconduct procedure, failing to act in a way that is consistent with subsection (1) or (2) may be misconduct". The effect is that a communication by a public servant that is proscribed by paragraph 9(2)(a) may be a basis for a misconduct procedure set out in an industrial instrument or prescribed by regulation.[13] The provision of subsection 9(4) makes it more likely that this will happen. It provides[14] that a public servant (a discloser) must tell the head of service about any misconduct by a public servant or a public sector member of which the discloser becomes aware.

The result of these provisions may be that public servants will be very wary of making any communication that could be plausibly construed as one that causes damage to the service or to the Executive. This result would directly affect their participation in discussion of matters that relate to the operation of responsible government, and thereby affect the effectiveness of the participation of others.

(The matters just discussed also bear directly on the question of whether paragraph 9(2)(a) is a justifiable derogation of the right of a public servant to exercise their right under HRA paragraph 17(a) to take part in the conduct of public affairs, directly or through freely chosen representatives.)

Will a prohibition on a communication effectively burden political communication?

In *Monis v The Queen*[15] Hayne J said that "[t]he expression 'effectively burden' means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".

[13] See the note to subsection 9(3).

[14] Leaving aside the case where the target of the report is the head of service.

[15] [2013] HCA 4 at [105]-[106].

It is possible to conceive of conduct by a public servant that would damage reputation in the relevant sense without that conduct being in the nature of a criticism or reflection on the performance of the public service or the Executive. However, in very many cases this will be so and, in particular, in those cases where the communication will be a basis for a misconduct charge. The words of Finn J (in a similar context) in *Bennett* are appropriate: "[i]ts heartland is concerned with information about political and governmental matters and about the executive organs of the Territory for which ministers are in some measure responsible in our system of government".

It is important to take note of the significance of criticism or reflection by a public servant on the performance of the public service or the Executive. Public servants are better placed than others to appreciate that there is room for criticism, and there is a public interest in their views being known to the citizenry. As Finn J said in *Bennett v President, Human Rights and Equal Opportunities Commission*, "[w]ere it otherwise one could institutionalise a form of public debate about matters of government and public administration that has been described as a 'dialogue of the deaf' between those who do not know and those who will not or cannot tell: cf Kernaghan and Langford, *The Responsible Public Servant*, 89 (1990)".[16]

The point is that in this context the position of public servants cannot be equated with that of other employees. This point may be underlined by reference to observations of McHugh J in *Stephens v West Australian Newspapers Ltd*:[17]

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.

It is arguable that paragraph 9(2)(a) effectively burdens political communication in an extensive way. The words of Finn J in *Bennett* are again appropriate: "It is an impediment to the community being informed as to whether "the democratic machinery is in good working order': Zines, *The High Court and the Constitution*, 380 (4th ed, 1997)". This conclusion affects the question of validity, for the High Court accepts that "[i]t is trite to say that the more extensive the burden on political communication the more difficult it will be to justify the impugned law".[18]

[16] [2003] FCA 1433 at [75].

[17] [1994] HCA 45.

[18] [2013] HCA 4 at [105]-[106], per Hayne J.

Is the object of the impugned law compatible with the maintenance of the system of representative and responsible government?

The Explanatory Statement (at page 7) specifies the object of paragraph 9(2)(a) to be "[t]he need to retain public confidence in the public service". It is assumed that this condition for compatibility of paragraph 9(2)(a) with the constitutional freedom is satisfied.

Are the means chosen to achieve that end reasonably appropriate and adapted to achieving it in a manner compatible with the system of representative and responsible government?

It might be argued that the reach of paragraph 9(2)(a) goes much further than is necessary to achieve the end of retaining public confidence in the public service and of the Executive.

The question is whether the end sought to be achieved by paragraph 9(2)(a) is achievable only by a prohibition of every communication by a public servant that causes damage to reputation in the relevant ways. It might be argued that public confidence is better maintained by the exposure by public servants (in contexts apart from acting as such) of matters that would in the short-term cause damage. Such exposure might ensure that the matters that cause damage are rectified, thereby enhancing public confidence. Moreover, if the law prescribes that the operations of the public service and of the Executive cannot be criticised by those who are well-placed to make that criticism, public confidence in these institutions might be eroded.[19]

Using the language of subsection 28(2)(e), there may be less restrictive means to achieve the object desired. The prohibition in paragraph 9(2)(a) ends might be formulated less restrictively. Particular ends, such as the protection of privacy, or of Cabinet secrecy, or security concerns, would be easier to justify. Rather then simply damage to 'reputation', the question is whether the damage might be framed more specifically, such as in terms of the efficiency or functioning of the service and the Executive.

There is an argument that the relevant communication must be shown to be contrary to the public interest. In *Commonwealth v John Fairfax & Sons Ltd*,[20] Mason CJ said, with reference to the common law doctrine that affords a remedy for a breach of confidence:

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

[19] There may be an analogy with the place of the judiciary. It is essential that the public have confidence in its performance, and it is accepted that this is served – except in limited circumstances – by their proceedings being open to public view.

[20] [1980] HCA 44.

This comment by Finn J in *Bennett v President, Human Rights and Equal Opportunities Commission* might be taken to sum up the argument that paragraph 9(2)(a) is invalid as derogating from the Commonwealth Constitution's freedom of political communication: "The dimensions of the control it imposes impedes quite unreasonably the possible flow of information to the community - information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government."[21]

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

THE EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (HRA SECTION 8) AND THE POWER OF THE HEAD OF SERVICE TO DECIDE THAT AN OFFICE MUST BE OCCUPIED BY ABORIGINAL OR TORRES STRAIT ISLANDER PERSON OR A PERSON WITH DISABILITY

The Explanatory Statement states that proposed section 27 of the Act (see clause 12) "sets out the circumstances under which full merit assessments must be applied to selection processes" in relation to certain positions, including some "offices". The obligations imposed on the head of service to make a merit assessment are however limited to "eligible people" (paragraph 27(2)(a)), and for this provision, "the people who may apply for selection may be limited "(a) for an office—if the office is an identified position". An identified position "means an office that the head of service has decided, in accordance with a prescribed process, must be occupied by—(a) an Aboriginal or Torres Strait Islander person; or (b) a person with disability" (subsection 27(4)).

On their face, these provisions engage and derogate from the right in HRA section 8 to the equal protection of the law without discrimination, and a section 28 justification should be provided.

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

REPORTABLE CONDUCT AND INFORMATION SHARING LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend the *Children and Young People Act 2008*, the *Ombudsman Act 1989*, and the *Working with Vulnerable People (Background Checking) Act 2011* for various purposes, including; to improve reporting and oversight of allegations of misconduct by an employee or volunteer against children in organisations with a duty of care to children and young people, in which scheme the Ombudsman would be vested with oversight; and in various ways to promote improved information sharing with the objective to allow the delivery of services in a way that promotes the safety, welfare and wellbeing of children and young people.

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 RIGHT TO PRIVACY (HRA SECTION 12)

The entirety of what the Explanatory Statement has to say directly about the compatibility of the Bill with the HRA is contained in these two sentences:

[21] [2003] FCA 1433 at [99].

> As the Bill allows for more effective sharing of information between entities working towards the protection of children, there is a necessary and consequential engagement of the individual's right to privacy as codified at section 12 of the HRA. These amendments constitute a reasonable limitation of this right. As required by section 28 of the HRA, all relevant factors have been considered.

At points, the Explanatory Statement does address the purpose of the Bill and mentions elements of the scheme—such as restrictions on the dissemination of information—that might be related to the section 28 framework, but this is never done explicitly. This is an unsatisfactory compatibility statement and necessitates the Committee devoting time to explain the provisions and expose the rights issues.

PROPOSED AMENDMENT OF THE CHILDREN AND YOUNG PEOPLE ACT 2008

Proposed sections 856A and 856B of this Act would "enable the director-general responsible for the Children and Young People Act and a responsible person for approved care and protection organisations to provide information to the commissioner for fair trading for the purposes of exercising their functions under the Working with Vulnerable People (Background Checking) Act" (Explanatory Statement).

While these provisions permit wider dissemination of information that could adversely affect the privacy and reputation of persons, these channels are narrowly defined, and, as the Explanatory Statement points out, "The Working with Vulnerable People (Background Checking) Act provides certain protections about using personal information regarding individuals, and it is an offence to use or divulge this information for other purposes other than for functions under the Act".

The Committee does not raise any issue with these amendments.

Proposed division 25.3.3 of this Act, comprising sections 863A to 863G (see clause 5), is headed "Designated entities sharing reportable conduct information".

The first matter to note is the extensive definition of the term "designated entity". Section 863A(1) picks up the definition in the proposed section 17D of the Ombudsman Act (see clause 9), which prescribes a large range of various kinds of bodies that deal with children. Of note is that this statement includes "a government school or a non-government school", and also "any other entity prescribed by regulation" (see subsection 17D(1)). The definition of "entity" in part 1 of the Dictionary in the *Legislation Act 2000* provides that the word "entity" should be understood to include any "person".[22] This regulation making power could be used to bring any person within the definition of "designated entity", and given that a non-state actor such as a non-government school is provided for, it would be hard to argue that the range of persons who might be included within the definition by regulation is limited to those performing some governmental function.

The nub of the scheme is that one designated entity (the requesting entity) may ask another designated entity (the requested entity) to give it "reportable conduct information in relation to a child, young person or class of child or young person" (proposed 863B(1)), and an obligation on the requested entity to provide that information. By section 863A, "reportable conduct information means any information, including protected information that is relevant to the protection of a child or young person or a class of child or young person against reportable conduct".

[22] There may be a question whether this definition would be impliedly excluded. If that is the intention, it is preferable to so provide explicitly.

The concept of "information that is relevant to the protection of a child" may be taken to include information that an allegation has been made that a person has done something, including committing an offence, against a child. The reporting of information of this kind has the potential to damage the reputation of the person, and in consequence derogate from the right in HRA section 12. The greater the detail of the allegation and the greater provision of other information to justify it, the greater the potential for reputational damage. Information that falls short of an allegation may also have this potential.

Two questions arise: (1) whether provision of this kind of information on such a potentially wide basis is justifiable, and (2), if it is, whether the scheme contains sufficient restriction on the provision of the information.

The Committee has no comment to make in relation to the first issue, except to note that there may be a question whether non-state actors (such as non-government schools) should be included. Non-state actors are not amenable to the same range of review mechanisms as are state actors.

In relation to the second question, it should first be noted that under subsection 863B(2), a requesting entity may make a request on very wide basis. It may do so if satisfied on reasonable grounds that the information is relevant for the requesting entity to make a decision, or a plan, or provide for a service for the safety of a child, etc, or to "deal with a risk" to the child, etc that "might arise in the course of the requesting entity's operation as a designated entity, including as an employer".

There is no obligation to take any account of the potential damage to the reputation of any person who is the subject of the information. In some specific ways, as stated in subsection 863C(2), the interests of this person must be taken into account by the requested entity when it responds to a request under subsection 863C(1). Subject to subsection 863C(2), this entity must provide the information if it is satisfied on reasonable grounds that the information is relevant as described in subsection 863B(2). Subsection 863C(2) provides, however, that the information must not be provided if to do so would:

(a) prejudice an investigation of a contravention or possible contravention of a law in force in the territory; or

(b) prejudice a coronial inquest or inquiry; or

(c) contravene legal professional or client legal privilege; or

(d) enable the existence or identity of a confidential source of information for the enforcement or administration of a territory law to be revealed; or

(e) endanger a person's life or physical safety; or

(f) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of a territory law; or

(g) prejudice a proceeding in relation to a care and protection order; or

(h) not be in the public interest.

The issue is whether these restrictions are wide enough to take account of the potential damage to the reputation of any person who is the subject of the information.

Specifically, there is a question whether subsection 863C(2)(c) should be widened to include other kinds of confidential information, such as that provided to a doctor, or to a counsellor. It should be noted here that the Explanatory Statement makes the argument that "[g]enerally, the safety, welfare and wellbeing of children and young people is treated as more important than protecting confidentiality of information and personal privacy for all designated entities, as reflected in the amendments". It is for the Assembly to evaluate this argument.

Section 863F seeks to enhance the effectiveness of the scheme by providing that "[r]eportable conduct information may be given to a designated entity in accordance with this division despite any territory law to the contrary". The Committee has on many occasions made the point that this provision cannot take effect so far as concerns a law that post-dates the commencement of these amendments (should that occur).

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

PROPOSED AMENDMENT OF THE OMBUDSMAN ACT 1989

Clauses 7 to 11 propose amendments to the Ombudsmen Act.

The monitoring obligation of the ombudsman

Proposed subsection 17F(1) of the Act is a key provision. It provides that the ombudsman must monitor the practices and procedures of a designated entity for the prevention of reportable conduct involving an employee of the entity, and its dealing with reportable allegations or reportable convictions involving an employee of the entity.

The Committee has no comment on this provision

The ombudsman's discretionary power to make investigations of particular matters

This process commences after the head of a designated entity complies with an obligation to provide a written report to the ombudsman about: "any reportable allegation or any reportable conviction involving an employee of the entity"; whether the entity proposes to take any action against the employee; and any relevant written submissions by the employee (subsection 17G(1)). Given the width of the relevant definitions, there may be many occasions for such reports.

The definition of the term "designated entity" in section 17D(1) embraces a large range of various kinds of bodies that deal with children. Its terms have been outlined above.

A "reportable allegation means an express assertion that reportable conduct has happened" (subsection 17D(1)). "[R]eportable conduct" (subsection 17E(1)) means conduct

(a) engaged in by an employee of a designated entity, whether or not in the course of employment with the entity; and

(b) that results in any of the following, regardless of a child's consent:

(i) ill treatment or neglect of the child;

(ii) exposing or subjecting the child to—

(A) behaviour, or a circumstance, that psychologically harms the child; or

(B) misconduct of a sexual nature that does not form part of an offence mentioned in subparagraph (iii); ... .

[The reference to an "express assertion" is presumably intended to pick up the distinction employed in the Evidence Act between express and implied assertions that a fact exists. It is not one that is easy to draw, and it is not apparent why it is picked up in this Bill. Moreover, it is not clear to whom this assertion must be made. Is it enough that the head of the designated entity becomes aware of the assertion? Must the person making the allegation intend that it be acted upon by the head, or by anybody? Does this person need to transmit the allegation—directly or indirectly—to the designated entity?]

Paragraph 17E(1)(iii) includes conduct that results in one or more of specified serious offences of a sexual nature, and paragraph 17(1)(iv) includes conduct that would amount to one or more of specified offences under the *Education and Care Service National Law (ACT) Act 2011*.

Subsection 17E(2) specifies that certain conduct is not reportable. The most significant exception is conduct "that is reasonable discipline, management or care of a child taking into account the characteristics of the child, and any relevant code of conduct or professional standard that at the time applied to the discipline, management or care of the child".

The extensive reach of this obligation may be illustrated by this example. Person A expressly asserts that person B, being an employee of the designated entity, engaged in reportable conduct—say by subjecting the child to behaviour that psychologically harms the child—otherwise than in the course of B's employment—say in a private setting, such as in the home. On the face of it, the head of a designated entity must, within 30 days[23] of on becoming aware of the allegation, make a report to the ombudsman.

This example raises a question for consideration. Should the conduct of an employee of a designated entity be limited to that which has occurred in the course of their employment?

What happens after the head of the designated entity makes a report under subsection 17G(1)(b)?

If the head tells the ombudsman that they do not propose to take any action, the ombudsman may, under subsection 17K(1), decide to conduct their own investigation into the reportable allegation reportable conviction. It appears that the same result would follow if the head advised that some action would be taken, but not amounting to an "investigation".

If the head tells the ombudsman that they propose to conduct an investigation, then in most cases it may be that the ombudsman would await a report on the outcome.[24] Section 17J(1) requires the head, as soon as practicable after the end of an investigation by the entity into a reportable allegation or reportable conviction, to provide the ombudsman with a report about its results, copies of relevant documents, and any other relevant information. The ombudsman may require additional information. Under paragraph 17K(1)(b), the ombudsman may decide to conduct their own investigation into the response of the designated entity to reportable allegation or reportable conviction.[25]

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[23] See subsection 17G(3).

[24] There appears however to be no bar on the ombudsman waiting, for the ombudsman's power to conduct an "own investigation" under section 17K would be available.

[25] The term "reportable conviction" is defined in subsection 17D(1).

Subsection 17K(2) requires the ombudsman to notify the head of the designated entity of certain matters, and subsection 17K(3) governs the action to be taken by the ombudsman after their investigation has concluded. It is critical to note that this includes a discretion to "make recommendations to any person or body" (paragraph 17K(3)(a)(ii)). By subsection 17K(4), "[a]n entity must, as far as practicable, comply with a requirement of the ombudsman under this section".

There is nothing said in these amendments as to how the ombudsman must carry out an investigation, so that the existing provisions in the Ombudsman Act would apply. This detail is critical to an evaluation of whether the ombudsman is an appropriate body to carry out these investigations. Lacking any detail in the Bill, it is presumed that the existing provisions on the Ombudsman Act will apply. At the outset, the general point to be made is that the existing provisions were framed having regard to the original function of the ombudsman to investigate and make recommendations with respect to maladministration within an agency. It is arguable that they are not appropriate to an investigation into allegations of conduct by persons who will probably for the most part be members of the public, in respect of whom the ombudsman may make what are in effect binding recommendations that that person, or some other person, do something or take some action. It is clear from section 17E that the conduct that may the basis for a recommendation may amount to an offence of a serious nature.

An exercise of the powers in section 17K would be a significant departure from the original conception of the ombudsman's role. This role was (and of course remains) to investigate a complaint of maladministration by a government agency, made to the ombudsman, by any person aggrieved by the action. In this role, the ombudsman does not pass judgement on what a member of the public did (except as incidental to assessing what the agency did). Maladministration refers generally to some deficiency in the administrative process leading to the action complained of. The process of investigation rarely involves more than a review of agency documents, including responses to ombudsman queries, and any documents supplied by the complainant. There is rarely any form of hearing, and less so of any confrontation between the agency and the complainant.

At the end of an investigation, the ombudsman may make only a recommendation to the agency that it do something to remedy the maladministration. The recommendation is not binding, and may (and sometimes is) not accepted by the agency, in whole or in part. The ombudsman must behave in a non-adversarial manner so as to better be able to persuade the agency to accept a recommendation.

The process envisaged in this Bill is quite different. It commences with someone making an allegation (it is not clear to whom and in what form), of which the head of the relevant designated entity becomes aware in some unspecified way. The allegation must "involve" (it is not clear how) an employee of the designated entity, whether or not the conduct was in the course of their employment.

The subject of the allegation may be that the employee committed an offence. Investigation of such allegations is generally a matter for the police, and their investigation is highly regulated so as ensure fairness to the target of the allegation; see the *Crimes Act 1900* part 10.

In the end, the ombudsman may make a recommendation "to any person or body" (paragraph 17K(3)(b)). There is nothing said about what kind of recommendation may be made, or more precisely to whom. There is nothing said as to its content, such as in regard to findings against the employee.

To further address the adequacy of the process, the existing provisions on the Ombudsman Act must be considered. Subsections 9(3), (4), and (5) state some basic principles:

(3) An investigation under this Act must be conducted in private and, subject to this Act, in such manner as the ombudsman thinks fit.

(4) Subject to this Act, the ombudsman may, for the purposes of this Act, obtain information from such persons, and make such inquiries, as he or she thinks fit.

(5) Subject to subsection (6), it is not necessary for the complainant or any other person to be afforded an opportunity to appear before the ombudsman or any other person in connection with an investigation by the ombudsman under this Act.

Subsection 9(6) provides some measure of natural justice to a person. With deletions not relevant to the topic here, it provides that the ombudsman must not make a report that sets out opinions that are critical of a person unless, before completing the investigation, the ombudsman has given that person an opportunity to appear before the ombudsman and to make such submissions, either orally or in writing, in relation to the action to which the investigation relates, as the person thinks fit. This obligation arises only after the ombudsman has formed an adverse opinion, and it is arguable that it undermines its utility. Subsection 9(8) provides that at the hearing provided under subsection 9(6), the person "may, with the approval of the ombudsman or of the authorised person, as the case may be, be represented by another person". The discretion of the ombudsman to grant this indulgence is unconfined, and there is nothing said as to legal representation.

Section 11 of the Ombudsman Act is also relevant. It empowers the ombudsman to require any person to provide information relevant to the investigation in the form of a signed written statement, or to produce specified documents. The ombudsman may require the person to attend at a particular place to answer questions. A person is not excused from providing information or producing documents on the ground that this "would contravene the provisions of any other enactment,[26] would be contrary to the public interest or might tend to incriminate the person or make the person liable to a penalty" (paragraph 11(5)(b)). [27] The information would not be admissible in other than a narrow range of legal proceedings. It would however be in the possession of the ombudsman, and if the person self-incriminating is an employee of a designated entity, it would appear to be open to the ombudsman to give the information thus revealed to the commissioner for fair trading under section 17M.

A significant question arising is whether the Ombudsman would be able to pass on to the police information obtained under the provisions that have just been discussed.

There is also a question whether the *Crimes Act 1900* part 10 should apply while a person is questioned by the ombudsman, if that questioning might lead to the person making admissions that would tend to prove that they committed an offence. To be effective, this safeguard might need to be apply whenever the ombudsman questions the target of an allegation.

This has been necessarily a lengthy review, and it suggests that closer attention needs to be given to the process that should be followed by the ombudsman when making an investigation under section 17K. It is fundamentally different to the ombudsman investigations in its maladministration jurisdiction. There is a danger that in the course of this process or subsequently, the privacy and reputation of the target of the investigation could be adversely affected.

[26] This cannot be so where the other enactment post-dates the Ombudsman Act.

[27] The relevant right in the HRA (paragraph 25(2)(i)) applies only after a person is charged with a criminal offence. However, this displacement clearly derogates from the common law right.

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

The provisions regarding the provision and flow of information relating to a reportable allegation

Under section 17H, the head or an employee of a designated entity may disclose any information to the ombudsman that the head or employee believes on reasonable grounds reveals reportable conduct involving or a reportable conviction against an employee of the entity. The ombudsman may then, "if the ombudsman is satisfied on reasonable grounds that the information is relevant to the safety, health or wellbeing of a child or class of child, disclose the information" to the police, the human rights commission or to specified heads of government agencies.

This provision contemplates that one employee may pass on to the ombudsman information that they believe on reasonable grounds to reveal reportable conduct by another employee, and that the ombudsman may then pass that information on to the police and/or various other bodies.

Under section 17M, the ombudsman may disclose specified information to the commissioner for fair trading if satisfied on reasonable grounds that the information is relevant to the exercise of the commissioner's functions under the Working with Vulnerable People (Background Checking) Act. The information includes the general category of "information about an employee of a designated entity".

The question that arises in respect of both provisions, and in particular section 17H, is whether there should be some obligation on the ombudsman to do anything in the way of checking on the reliability of this information, including, in particular, referring it to the target employee for their comment.

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

THE AMENDMENTS PROPOSED TO THE WORKING WITH VULNERABLE PEOPLE (BACKGROUND CHECKING) ACT 2011

The power of the commissioner for fair trading to request information

Existing section 33 of this Act permits the commissioner to seek information or advice from any entity the commissioner considers may be able to give information or advice that will assist the commissioner in conducting a risk assessment for a person. Clause 12 of the Bill proposes to substitute a new section 33 that, in addition to the power to request information, specifies that the entity "must, as far as practicable, comply with the request" (subsection 33(2)), and that an entity giving information or advice "does not contravene any duty of confidentiality the entity has under a territory law or agreement, despite anything to the contrary in the law or agreement" (subsection 33(3)).

Existing section 53 of this Act permits the commissioner to seek information or advice from any entity the commissioner considers may be able to give information or advice that is relevant to whether a registered person continues to pose no risk or an acceptable risk of harm to a vulnerable person.

Clause 13 of the Bill proposes to substitute a new section 53 that, in addition to the power to request information, specifies that the entity "must, as far as practicable, comply with the request" (subsection 33(2)), and that an entity giving information or advice "does not contravene any duty of confidentiality the entity has under a territory law or agreement, despite anything to the contrary in the law or agreement" (subsection 33(3)).[28]

[28] It is the word "territory" that is added.

The scope of these two provisions is not entirely clear. The Legislation Act (part 1 of the Dictionary) provides that the word "entity" should be read to include a reference to a "person", and it may be that these provisions apply to any and every person in the Territory community. If so, imposing on all persons an obligation to meet a request, and to do so irrespective of any obligation of confidentiality that attaches to the information, might be seen as a derogation of the HRA right to privacy.[29] To some extent, the answer to this objection may lie in the answer to the question as to how the duty on disclosure might be enforced.

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

RESIDENTIAL TENANCIES LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend legislation about residential tenancies, including in relation to tenants who have been impacted by domestic violence; condition reports; the release of bond money; the costs of re-securing a property; an optional break-lease term; amendment to the *Uncollected Goods Act 1995*; information to tenants about potential energy consumption; and smoke alarms.

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*

INTRODUCTION: THE PROTECTION AND CERTAINTY OF LEGAL TENURE FOR PEOPLE EXPERIENCING FAMILY AND PERSONAL VIOLENCE

Clause 24 of the Bill proposes the substitution of section 85 of the *Residential Tenancies Act 199*7 with a new division 6.5A of the Act, comprising sections 85, 85A and 85B.

Section 85 defines the terms "protected person", "protection order" and "respondent". A protected person is a person protected order under a family violence order made under the *Family Violence Act 2016* (FV Act) or a person protected order under a personal violence order made under the *Personal Violence Act 2016* (PV Act). A protection order is one made under the FV Act, or an interim or final order made under the PV Act. A "respondent" is a person in relation to whom an application for a family order (or a personal violence order) has been made, or against whom any such order has been made.

Section 85A applies where the Magistrates Court has made a protection order; and the respondent is a party to a residential tenancy agreement in relation to premises; and the protected person is also a party to the residential tenancy agreement, or has been living in the premises as the protected person's home; and either the order includes an exclusion condition or a condition prohibiting the respondent from being within a particular distance from the protected person, or the respondent has given an undertaking to the court to leave the premises.

In these circumstances, the protected person may apply to the ACAT for either an order terminating the existing residential tenancy agreement (paragraph 85A(2)(a)); or an order terminating the tenancy agreement and requiring the lessor to enter into a residential tenancy agreement with the protected person and any other person mentioned in the application (paragraph 85A(2)(b)).

[29] It is the Committee's view that the words "despite anything to the contrary in the law" are ineffectual so far as concerns laws that post-date the commencement of these amendments (should that be the case).

Subsection 85B(2) states the circumstances in which the ACAT may make an order. It must take into consideration the length of time of the protection order and the time remaining on the term of the tenancy (paragraph 85B(2)(a)), and the interests of any other tenants (other than the respondent), and, in particular, whether the other tenants support the application (paragraph 85B(2)(b)).

In relation to a paragraph 85A(2)(b) order, there are further matters to consider as stated in paragraph 85B(2)(c), including some consideration of the interests of the lessor. If a paragraph 85A(2)(b) order is made, the new lease must be on the same terms as the pre-existing lease, except that the ACAT may decide to make "changes". There is no indication given as to what kinds of change may be made, or upon what basis.

These provisions give rise to a number of rights issues.

THE HRA SECTION 11 RIGHT TO THE PROTECTION OF THE FAMILY AND CHILDREN

The Explanatory Statement argues (at page 4) that the Bill engages and supports the right in HRA section 11 to the protection of the family and children "by providing protections and certainty of legal tenure for people experiencing family and personal violence", and points specifically to the "mechanisms for creating and terminating tenancy arrangements to assist a protected person" stated in new division 6.5A.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

THE HRA SECTION 13 RIGHT TO FREEDOM OF MOVEMENT

The Explanatory Statement (at pages 5 to 6) acknowledges that new division 6.5A derogates from the right to freedom of movement (HRA section 13) in that exercise of the ACAT powers "may potentially limit a respondent's right to freedom of movement by excluding them from a valid residential tenancy agreement, thereby restricting their ability 'to reside in a place of one's choice.'" The Explanatory Statement then offers (at pages 5 to 7) a justification for this derogation in terms of HRA section 28. It is for the Assembly to consider the merits of this justification.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

THE COMMON LAW RIGHT TO PROTECTION OF PROPERTY AND THE LIMITATION ON THE POWER OF THE ASSEMBLY STATED IN PARAGRAPH 23(1(A) OF THE AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988

The common law principle of legality recognises a right to property through the principle that parliament does not intend to interfere with vested property rights unless this intention is made unambiguously clear. Of course, the ACAT is clearly empowered to interfere with a property right by extinguishing it, but for the purposes of the scrutiny of bills, it may be concluded that there is here a trespass on a personal right, and this trespass requires justification.

Paragraph 23(1(a) of the Australian Capital Territory (Self-Government) Act provides that the Assembly has no power to make laws with respect to "the acquisition of property otherwise than on just terms". A right to possession or property under a tenancy agreement may be seen as in the nature of a right to property.[30] There is an "acquisition" of property where there is a deprivation of

[30] *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J.

property for the benefit of some other person. A right under a tenancy is a property right, and on the face of it, where the ACAT makes an order extinguishing a tenancy and requiring the lessor to enter a new lease, it has deprived both the respondent/ tenant to the pre-existing lease of property for the purpose of conferring this benefit on the parties (other than the lessor) to the new lease.[31]

The Committee draws this matter to the attention of the Assembly and recommends that the Minister address the deprivation of property that will occur when the ACAT makes an order under proposed section 85B of the Residential Tenancies Act, in terms both of the common law right and paragraph 23(1(a) of the Australian Capital Territory (Self-Government) Act.

TRADERS (LICENSING) BILL 2016

This is a Bill for an Act to establish a single licensing framework for fair trading law.

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 REQUIREMENT THAT THE COMMISSIONER MUST KEEP A REGISTER OF LICENCES AND THE HRA SECTION 12 RIGHT TO PRIVACY

Clause 37 requires the that the commissioner must keep a register of licences and specifies that it must certain information, some of which may be argued to relates to the private affairs of a person. In this way, clause 37 derogates from the right to privacy in HRA section 12. At pages 4 to 5, the Explanatory Statement acknowledges the need to provide a justification and notes HRA section 28. Rather than follow the section 28 framework, the justification is offered according to the principles stated in a Canadian case. It is preferable that the section 28 framework be used.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

WASTE MANAGEMENT AND RESOURCE RECOVERY BILL 2016

This is a Bill for an Act to repeal and replace the *Waste Minimisation Act 2001* and to create a regulatory framework to reward good practice in waste collection, transportation, recovery and reuse, and to discourage the disposal of waste into landfill.

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 PRESUMPTION OF INNOCENCE IN HRA SUBSECTION 22(1) AND THE CREATION OF OFFENCES OF STRICT LIABILITY OFFENCE

The Explanatory Statement at pages 3 to 4 identifies by subject matter a number of clauses that create an offences of strict liability offence and provides a justification by reference to the framework in HRA section 28; (see clauses 50, 61, 64, 70, 73, 79, 81 and 106.)

[31] In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155 at 184-185 Deane and Gaudron JJ said that "[f]or there to be "an acquisition of property" there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property".

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

THE RIGHT TO PRIVACY IN HRA SECTION 12 AND THE VESTING IN AUTHORISED OFFICERS OF POWER TO ENTER PREMISES

At page 4, the Explanatory Statement notes that division 12.2 of the Bill sets out the limited and specific circumstances in which authorised people may enter premises. The Committee accepts that these provisions follow the form commonly found in Territory laws, and this form has been accepted by the Committee as justifiable derogations from the right to privacy and of the common law right to property. It is nevertheless preferable that a justification be offered according to the framework in HRA section 28.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

THE CONFERRAL OF ADMINISTRATIVE POWER

The Committee commends the manner in which administrative power is conferred on the agencies of government that will administer and enforce the regulatory scheme in the Act. In particular, and without addressing all administrative powers, the Committee notes:

- the imposition on a waste manager to consult with any entity that may for this purpose be prescribed by regulation (subclause 22(2));
- the narrow expression of the power of a waste manager to grant or to refuse an application for a licence (subclause 22(3));
- (on the other hand, the discretion of a waste manager to impose a condition on a licence is stated without any qualification (clause 23));
- the duty of a waste manager to provide reasons for the refusal of an application (subclause 23(4));
- the close confinement of the discretion of a waste manager to take regulatory action against a licence-holder, which discretion must in addition be exercised on “reasonable grounds” (clause 44);
- the requirement that a waste manager must issue a show cause notice which provides written notice of the grounds on which the manager considers regulatory action may be taken and the details of the proposed regulatory action (subclause 45(1));
- the requirement that the relevant person be given an opportunity to make written submissions about the proposed regulatory action (paragraph 45(1)(c));
- the duty of the waste manager to consider any submissions (subclause 45(2));
- the requirement that the waste manager must be “satisfied on reasonable grounds that it is appropriate, in all the circumstances, to take the regulatory action” (paragraph 46(1)(a));
- the requirement that before taking regulatory action, the waste manager must tell the person, by written notice the regulatory action that will be take and the day on which the regulatory action takes effect (subclause 46(3));

- that the discretion of a waste manager by declaration to exempt from a provision of this Act a person or class of people, or waste activity of a particular kind or generally, is circumscribed. The conditions are that it be made only "in an emergency" (in which case the declaration is a notifiable instrument), or where the manager is satisfied that it is not practicable to comply with the provision, and noncompliance with the provision will not have any significant adverse effect on public health, property or the environment (in which case the declaration is a disallowable instrument) (clause 68).

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-15 being the Domestic Violence Agencies (Council) Appointment 2016 (No. 1) made under section 6 of the *Domestic Violence Agencies Act 1986* **appoints specified persons as community members of the Domestic Violence Prevention Council.**

Disallowable Instrument DI2016-16 being the Civil Law (Wrongs) Law Institute of Victoria Limited Scheme 2016 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of Victoria's approval of the Law Institute of Victoria Limited Scheme.**

Disallowable Instrument DI2016-31 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2016 (No. 1) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **makes 109MW of capacity available for a large-scale renewable energy wind, solar or a declared energy source (Next Generation Renewables Auction).**

Disallowable Instrument DI2016-32 being the Civil Law (Wrongs) Professional Standards Council Appointment 2016 (No. 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints a specified person to be a member of the Professional Standards Council, representing Victoria.**

Disallowable Instrument DI2016-33 being the Civil Law (Wrongs) Australian Property Institute Valuers Limited Scheme 2016 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of New South Wales' approval of The Australian Property Institute Valuers Limited Scheme.**

Disallowable Instrument DI2016-35 being the Court Procedures (Fees) Determination 2016 made under section 13 of the *Court Procedures Act 2004* **revokes DI2015-137 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-36 being the Legal Profession (Solicitors Practising Fees) Determination 2016 made under section 84 of the *Legal Profession Act 2006* **revokes DI2015-133 and DI2015-290 and determines fees payable for applications for the grant or renewal of a restricted or unrestricted practising certificate.**

Disallowable Instrument DI2016-37 being the Public Place Names (Moncrieff) Determination 2016 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of an urban open space in the Division of Moncrieff.**

Disallowable Instrument DI2016-39 being the Veterinary Surgeons (Fees) Determination 2016 (No. 1) made under section 136 of the *Veterinary Surgeons Act 2015* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-40 being the Board of Senior Secondary Studies Appointment 2016 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the University of Canberra as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2016-41 being the Board of Senior Secondary Studies Appointment 2016 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the Catholic Education Commission as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2016-44 being the Road Transport (General) Numberplate Fees Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-96 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-45 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-97 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-46 being the Road Transport (General) Fees for Publications Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-98 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-47 being the Road Transport (General) Concession Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-101 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.**

Disallowable Instrument DI2016-49 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2016 (No. 1) made under paragraph 174(1)(a) of the *Crimes (Sentence Administration) Act 2005* **revokes DI2015-321 and DI2014-228 and appoints a specified person as chair of the Sentence Administration Board.**

Disallowable Instrument DI2016-50 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2016 (No. 2) made under paragraph 174(1)(b) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as deputy chair (judicial member) of the Sentence Administration Board.**

Disallowable Instrument DI2016-52 being the Firearms (Use of Noise Suppression Devices) Declaration 2016 (No. 1) made under section 31 of the *Firearms Act 1996* **declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.**

Disallowable Instrument DI2016-53 being the Justices of the Peace (Role) Guideline 2016 made under section 3A of the Justices of the *Peace Act 1989* **revokes DI2013-247 and approves a guideline which sets out the role of ACT Justices of the Peace.**

Disallowable Instrument DI2016-54 being the Civil Law (Wrongs) Queensland Law Society Professional Standards Scheme 2016 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of Queensland's approval of the Queensland Law Society Professional Standards Scheme.**

Disallowable Instrument DI2016-55 being the Legal Aid (Commissioner—Specialist Assistance) Appointment 2016 made under paragraph 16(1)(d) of the *Legal Aid Act 1977* **appoints a specified person, with expertise to enable them to provide specialist assistance to the Commission, as a part-time Legal Aid Commissioner.**

Disallowable Instrument DI2016-56 being the Legal Aid (Commissioner—Financial Management) Appointment 2016 made under paragraph 16(1)(c)(v) of the *Legal Aid Act 1977* **appoints a specified person, with expertise in financial management, as a part-time Legal Aid Commissioner.**

Disallowable Instrument DI2016-57 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **suspends pay parking in specified areas to support the National Capital Rally Spectator Stage event.**

Disallowable Instrument DI2016-58 being the Health (Protected Area) Declaration 2016 (No. 2) made under section 86 of the *Health Act 1993* **declares a protected area around an approved medical facility.**

Disallowable Instrument DI2016-59 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2016 (No. 1) made under section 79E of the Long Service Leave (Portable Schemes) Act 2009 and section 78 of the *Financial Management Act 1996* **revokes DI2012-80 and appoints a specified person as an independent member and deputy chair of the Long Service Leave Governing Board.**

Disallowable Instrument DI2016-60 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 6) made under section 13 of the *Road Transport (General) Act 1999* **determines that the road transport legislation does not apply to an entrant vehicle, or the driver of an entrant vehicle, participating in a special stage of the National Capital Rally**

Disallowable Instrument DI2016-61 being the Public Place Names (Gungahlin) Amendment Determination 2016 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends DI2004-19 by reducing the area of the road reservation named Hamer Street in the Division of Gungahlin.**

Disallowable Instrument DI2016-62 being the Official Visitor (Children and Young People) Appointment 2016 (No. 1) made under paragraph 10(1)(a) of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the purposes of the Act.**

Disallowable Instrument DI2016-70 being the Financial Management (Territory Authorities prescribed for Outputs) Guidelines 2016 made under section 133 of the *Financial Management Act 1996* **revokes DI2006-82 and prescribes certain territory authorities for output reporting for the purposes of the Act.**

Disallowable Instrument DI2016-71 being the Financial Management (Budget Financial Statements) Guidelines 2016 made under section 133 of the *Financial Management Act 1996* **revokes DI2011-168 and prescribes the reporting requirements for the budget financial statements.**

Disallowable Instrument DI2016-72 being the Financial Management (Territory Authorities) Guidelines 2016 made under section 133 of the *Financial Management Act 1996* **revokes DI2015-67 and prescribes the entities that are territory authorities for the purposes of the Act.**

Disallowable Instrument DI2016-78 being the Planning and Development (Albert Hall) Land Management Plan 2016 made under section 327 of the *Planning and Development Act 2007* **approves the draft Land Management Plan for the Albert Hall, Canberra, ACT.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

IS THIS INSTRUMENT WITHIN THE POWER GIVEN BY THE ACT?

Disallowable Instrument DI2016-38 being the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2016 made under section 9 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **revokes DI2013-271 and determines a 100% target for the use of renewable energy by 2020.**

This instrument is made under section 9 of the *Climate Change and Greenhouse Gas Reduction Act 2010*, which provides:

> **9 Renewable energy targets**
>
> (1) The Minister must determine, **within 6 months after the commencement of this Act,** targets for the use or generation of renewable energy in the ACT.
>
> (2) A determination is a disallowable instrument.
>
> *Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.
>
> [**emphasis added**]

The "legislation history" for the Act indicates that the substantive provisions of the Act commenced on 5 November 2010. The power given by section 9 was, indeed, exercised within 6 months after the commencement of the Act, when the relevant Minister determined the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2011 (No 1) (DI2011-81), dated 3 May 2011. That instrument was revoked and replaced by the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2013 (No 1) (DI2013-271). The latter instrument is, in turn, revoked and replaced by the current instrument.

The Committee notes that section 46 of the *Legislation Act 2001* provides that the power to make a statutory instrument includes the power to amend or repeal the instrument. However, the Committee also notes that subsection 46(2) of the Legislation Act provides:

> The power to amend or repeal the instrument is exercisable in the same way, and subject to the same conditions, as the power make the instrument.

This being the case, the Committee queries whether the requirement that a determination be made "within 6 months after the commencement of [the] Act" is a condition to which the exercise of the power is subject. Further, the Committee queries whether the power to make the relevant determination is spent, once the six-month period after the commencement of the Act has expired.

The Committee seeks the Minister's advice in relation to the operation of section 9 of the *Climate Change and Greenhouse Gas Reduction Act 2010* and, in particular, whether subsection 46(2) of the *Legislation Act 2001* operates to limit the capacity to revoke and re-make a determination, once the six-month period after the commencement of the Act has expired.

This comment requires a response from the Minister.

EXPLANATION FOR FEES INCREASES

Disallowable Instrument DI2016-42 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-94 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-43 being the Road Transport (General) Driver Licence and Related Fees Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-95 and determines fees payable for the purposes of the Act.**

The two instruments mentioned above determine various fees relating to registration of vehicles and driver licensing, under section 96 of the *Road Transport (General) Act 1999*. The Committee has consistently taken a keen interest into fees determinations. In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

> The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee notes that the Explanatory Statements for the first instrument mentioned above states:

> Vehicle registration fees have been increased by 5%, rounded down to the nearest ten cents. Other fees and charges have been increased by the Wages Price Index (WPI) of 1.6%. The short term registration surcharge (payable for registration periods of less than 12 months) has not been changed.

Similarly, the Explanatory Statement for the second instrument mentioned above states:

> For driver licence periods commencing on or after 1 July 2016, fees are increased by 5%, rounded down to the nearest ten cents, with the five year licence fee rounded down further to $180. All other driver licence related fees have increased by the Wages Price Index (WPI) of 1.6%, rounded down to the nearest ten cents.

In neither case is an explanation provided for the 5% fee increase. This omission is particularly relevant given that the relevant fees increases are more than three times greater than the increases to the other fees, based on the Wage Price Index.

The Committee seeks the Minister's advice as to the basis for the fees increases provided for by the two instruments mentioned above.

This comment requires a response from the Minister.

NO EXPLANATORY STATEMENT

Disallowable Instrument DI2016-48 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2016 (No. 2) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **determines the FiT capacity release to be made available for the grant of FiT entitlements.**

The Committee notes that there is no explanatory statement for this instrument. This may, in part, be regarded as a consequence of the instrument not being made in the "normal" way, in that it was made by way of being a Schedule to the Renewable Energy Legislation Amendment Bill 2016, which was notified on 12 May 2016. The explanatory statement for the Bill states:

> This bill includes a schedule which deems the FiT capacity release disallowable instrument to be made under section 10 of the FiT Act, is taken to have been notified on the Legislation Register, to have commenced on the commencement of the amendment bill and is not required to be presented to the Legislative Assembly under the *Legislation Act 2001*, section 64(1). This will permit the Territory to enter into negotiations and grant FiT entitlements before the six sitting day disallowance period passes. This will permit the Territory to achieve the 100% RET by 2020.

While this background information is useful, it does not obviate the requirement to provide an explanatory statement for the instrument itself, either separately or as part of the explanatory statement for the Bill. Further, an explanatory statement ought to be provided in a way that allows persons seeking to access the instrument, on the ACT Legislation Register, to also access the explanatory statement, on the same page of the ACT Legislation Register as the instrument itself and without having to know about explanatory material that might be available in the explanatory statement for the Bill.

While the Committee has always accepted that there is no formal, legal requirement that an explanatory statement be provided in relation to subordinate legislation, the Committee has always maintained that it is important that an explanatory statement nevertheless be provided.

In its document titled *Subordinate Legislation—Technical and Stylistic Standards: Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

> Principle (b) of the Committee's terms of reference [now principle (2)] 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.

The Committee draws the Legislative Assembly's attention to this instrument, under principle (2) of the Committee's terms of reference, on the basis that (in this case) the absence of an explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

This comment requires a response from the Minister.

MINOR DRAFTING ISSUE

Disallowable Instrument DI2016-51 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2016 (No. 1) made under section 4L of the *Prohibited Weapons Act 1996* **determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.**

This instrument makes a declaration in relation to the use of "noise suppression devices" on firearms. The formal part of the instrument indicates that it is made under "section 4LL" of the *Protected Weapons Act 1986*. The relevant Act contains no such provision. However, the Committee notes that the Explanatory Statement for the instrument correctly identifies paragraph 4L(1)(c) of the Prohibited Weapons Act as the empowering provision.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

MINOR DRAFTING ISSUE

Disallowable Instrument DI2016-63 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2016, including a regulatory impact statement made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the priority household target for the compliance period 1 January to 31 December 2017.**

This instrument sets a "priority household target", under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*. The empowering provision is correctly identified in the formal part of the instrument. The Committee notes, however, that the formal part of the Explanatory Statement for the instrument incorrectly identifies the empowering provision as "Energy Efficiency (Cost of Living) Improvement Act 2012, s9 (Priority household target)".

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

The Committee has examined the following subordinate laws and offers no comments on them:

Subordinate Law SL2016-7 being the Planning and Development (Lease Variation Charge Exemption—Childcare Centres) Amendment Regulation 2016 (No. 1) made under the *Planning and Development Act 2007* **exempts an application by a child care centre to vary a lease from the lease variation charge.**

Subordinate Law SL2016-8 being the Taxation Administration Amendment Regulation 2016 (No. 1) made under the *Taxation Administration Act 1999* **prescribes the Director-General of the Chief Minister, Treasury and Economic Development Directorate as a person who whom taxpayer information can be disclosed for the purposes of revenue forecasting and economic analysis.**

Subordinate Law SL2016-9 being the Legislative Assembly Precincts Regulation 2016 made under section 12 of the *Legislative Assembly Precincts Act 2001* **declares property outside of the Legislative Assembly building as part of the ACT Legislative Assembly precincts for the purposes of the Act.**

Subordinate Law SL2016-11 being the Gaming Machine (Ballots) Amendment Regulation 2016 (No. 1) made under the *Gaming Machine Act 2004* **amends the Gaming Machine Regulation to allow licensees to choose how ballots, for the purposes of the Act, may be conducted.**

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

Subordinate Law SL2016-10 being the Victims of Crime (Financial Assistance) Regulation 2016 No. 1) made under the *Victims of Crime (Financial Assistance) Act 2016* **determines what constitutes an immediate need or economic loss, conditions on the making of a payment and maximum amounts payable for the purposes of the Act. It also prescribes the amounts of recognition payments for primary victims under different circumstances and the amounts of recognition payments for class A and class B related victims.**

This subordinate law determines various matters for the *Victims of Crime (Financial Assistance) Act 2016*, which establishes an administrative scheme to provide assistance to victims who have been injured as a result of an act of violence. Among other things, the subordinate law sets out what constitutes an "immediate need", what is an "economic loss" and determines the maximum amounts payable.

The Committee notes that the Explanatory Statement for the subordinate law contains the following discussion of human rights issues that arise in relation to the subordinate law:

> The Regulation engages a number of the rights in the *Human Rights Act 2004* (the HRA). The following HRA rights are engaged and supported by the Regulation:

- protection of family and children, section 11; and
- right to liberty and security of person, section 18.

Payment amounts

Nature of the right affected

Section 8 of the HRA provides that 'everyone is equal before the law and is entitled to the equal protection of the law without discrimination.' The Regulation may be seen to engage this aspect of section 8 by prescribing different maximum amounts payable for the variety of payments provided for in the Act.

The importance of the purpose of the limitation

The payment amounts were set to ensure an appropriate level of assistance is provided in the large range of circumstances victims of crime face, while also ensuring that the victims of crime financial assistance scheme is financially viable.

The nature and extent of the limitation

The amount for each payment is determined by the clear legislative criteria prescribed by the Regulation. The amounts were set having regard to a number of factors including: the seriousness of the offence, maximum penalty for the offence, the effects of serious injury, the circumstances in which the act of violence occurred, the vulnerability of the victim at the time of the act of violence, the amount available under the current scheme and in other similar interstate schemes, commercial cost of services and the financial viability of the scheme.

The relationship between the limitation and its purpose

The beneficial payments provided for in the Act and prescribed by the Regulation are all set at different levels to appropriately respond to the harmful effects of acts of violence.

Any less restrictive means reasonably available to achieve the purpose

It is considered that there are no less restrictive means available to achieve this purpose. To the extent that there is any limitation on rights this is reasonable, justifiable, set by law and proportionate.

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

RELIANCE ON "HENRY VIII" CLAUSE

Subordinate Law SL2016-12 being the Road Transport (Public Passenger Services) (Transitional Provisions) Regulation 2016 made under the *Road Transport (Public Passenger Services) Act 2001* **modifies the Act to include a transitional provision disapplying section 79 of the Legislation Act from the Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act.**

This subordinate law is made under section 130 of the Road Transport (Public Passenger Services) Act 2001, which provides:

130 Transitional regulations

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015*.

(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

(4) This section expires 1 year after the day it commences.

Note Transitional provisions are kept in the Act for a limited time. A transitional provision is repealed on its expiry but continues to have effect after its repeal (see Legislation Act, s 88).

The Committee notes that it has consistently queried whether, in fact, a provision such as subsection 130(3) correctly reflects the law in the ACT. Subsection 130(3) would appear to contradict the power of the Legislative Assembly, under the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), to make laws from time to time, including (of course) at a time subsequent to the making of the earlier law. It might also be seen as an ineffective attempt to entrench a regulation made under subsection 130(3).

That issue aside, the Committee notes that section 130 is a "Henry VIII" clause, in that it allows the effective amendment (or, in this case, the "modification") of primary legislation by delegated legislation (see the Committee's document titled *Henry VIII clauses—Fact sheet* http://www.parliament.act.gov.au/__data/assets/word_doc/0008/434339/HenryVIII-Fact-Sheet-BW.doc).

The substantive effect of the subordinate law is to insert a new section 131 into the *Road Transport (Public Passenger Services) Act 2001*. That new section has the effect of disapplying section 79 of the *Legislation Act 2001* to the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015*. Section 79 of the Legislation Act provides:

79 Automatic commencement of postponed law

(1) If a postponed law has not commenced within 6 months beginning on its notification day, it automatically commences on the first day after that period.

Example

The *Hypothetical Act 2001* was notified on 5 July 2001 and was expressed to commence on a day to be fixed by the Minister by written notice. If the Act had not commenced by notice on or before 4 January 2002, it would automatically commence on 5 January 2002.

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

(2) This section applies to a law unless it is displaced by, or under authority given by, an Act or, if the postponed law is a subordinate law or disallowable instrument, the postponed law.

(3) This section is a determinative provision.

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

(4) In this section:

enact includes make.

law means an Act, subordinate law, disallowable instrument or notifiable instrument.

Note A reference to an Act, subordinate law, disallowable instrument or notifiable instrument includes a reference to a provision of the Act, law or instrument (see s 7, s 8, s 9 and s 10).

notification day, for a postponed law, means the notification day of—

(a) if the postponed law is a law—the law; or

(b) if the postponed law is a provision of a law—the law that enacts the provision.

postponed law means a law that does not commence on its notification day because a law postpones its commencement until a day or time fixed or determined by a commencement notice.

In short, the effect of section 79 is to commence automatically a law that would otherwise commence by commencement notice if a commencement notice has not been made within the six-month period starting on the notification day for the law.

By way of explanation for the need for section 79 to be disapplied in this particular instance, the Explanatory Statement for this subordinate law states:

Outline

The Regulation modifies the *Road Transport (Public Passenger Services) Act 2001* to include a transitional provision disapplying the *Legislation Act 2001*, section 79 from the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015* (the Amendment Act). The Amendment Act is scheduled commence on 24 May 2016 under the operation of section 79 of the Legislation Act.

The purpose of the Amendment Act is to provide the legislative framework for the second phase of the Government's Taxi Industry Innovation Reforms (the Reforms).

The Reforms commenced on 30 October 2015 with interim arrangements permitting the entry of new business models into the on-demand public transport industry. Specifically the introduction of ridesharing and transport booking services subject to public safety requirements, such as driver and vehicle checks and insurance coverage. The *Road Transport (Public Passenger Services) (Exemptions) Amendment Regulation 2015* refers.

Further actions in the initial phase involved reductions in fees and charges application to taxi and hire car services.

Effect of the regulation

The effect of the Regulation is to allow the Amendment Act to commence on 1 August 2016. The modification occurs under the operation of section 30 of the Amendment Act which commenced on 20 May 2016 thereby allowing the making of transitional regulations under section 130 of Road Transport (Public Passenger Services) Act (as amended).

This delayed timing is to permit the finalisation of subordinate regulations and instruments. It follows targeted stakeholder consultation on exposure draft regulation and related materials, which has been the subject of extensive and detailed submissions and ongoing representations.

The Committee draws the Legislative Assembly's attention to the above explanation.

The Committee notes that, while "Henry VIII" provisions are generally frowned upon by the Committee (and by committees performing a similar role to the Committee), this subordinate law is evidently within the power provided for by section 130 of the *Road Transport (Public Passenger Services) Act 2001*, which has been approved by the Legislative Assembly. The Committee also notes, with approval, that new section 130 expires on 2 August 2016, in line with the proposition that they are "transitional" provisions, the section has a time-limited operation. This is also consistent with the statement in the Explanatory Statement for the subordinate law that one of the intentions of the amendment made by the subordinate law is "to permit commencement of the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015* on 1 August 2016."

The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the Regulatory Impact Statement for the following disallowable instrument and offers no comments on it:

Disallowable Instrument DI2016-63 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2016, including a regulatory impact statement made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the priority household target for the compliance period 1 January to 31 December 2017.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Police and Emergency Services, dated 3 June 2016, in relation to comments made in Scrutiny Report 45 concerning the Emergencies Amendment Bill 2016 (attached).
- The Minister for Health, dated 3 June 2016, in relation to comments made in Scrutiny Report 45 concerning the Mental Health (Secure Facilities) Bill 2016 (attached).

- The Attorney-General, dated 7 June 2016, in relation to comments made in Scrutiny Report 45 concerning the Supreme Court Amendment Bill 2016 (attached).

The Committee wishes to thank the Minister for Police and Emergency Service, the Minister for Health and the Attorney-General for their responses.

Steve Doszpot MLA

Chair

July 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 41, dated 15 February 2016

Disallowable Instrument DI2015-328—Pool Betting (Prescribed Percentage) Determination 2015 (No. 1)

Report 45, dated 31 May 2016

Freedom of Information Bill 2016 (PMB)

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot - Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 45 of 31 May 2016, which contains comments on the *Emergencies Amendment Bill 2016* (the Bill).

The Committee commented on the new offence in section 116A of the Bill of undertaking a high risk activity in the open air whilst a total fire ban is in force for the area. As noted by the Committee, new 116A (2) provides that strict liability applies to subsection (1) (b) (whether a total fire ban is in force for the area). This means that it is not necessary for the prosecution to establish that a person had actual knowledge that a total fire ban is in force for the area.

The Committee queried whether the penalty for the offence (a maximum penalty of 100 penalty units, imprisonment for one year or both – and specifically the option for imprisonment) departs from the guidelines in the JACS Guide to Framing Offences. The Guide to Framing Offences states the maximum penalty for strict liability offence should be limited to a monetary penalty (a maximum of 50 penalty units) and that a penalty of imprisonment be applied only in appropriate cases, and only for a maximum term of imprisonment of six months. I support the principles outlined in the Guide, however I note that the principles outlined in the Guide to Framing Offences apply where the offence is a strict liability offence. As the Explanatory Statement for the Bill notes, strict liability attaches only to a particular element of the offence, rather than the entirety of the offence itself. As such the offence is not a strict liability offence and the restrictions on terms of

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0000 **Email** corbell@act.gov.au
CANBERRA
@SimonCorbell simon.corbell

imprisonment outlined in the Guide do not apply. The potential penalties that may apply – including the potential for up to one year's imprisonment – are appropriate and are in proportion to the seriousness of the risk posed by this conduct.

The Committee submitted that an alternative option would be to confine the application of the offence to particular class of persons who could be expected to know of their obligations during total fire bans, rather than the broader public. This option is not considered to be a viable option, and would not achieve the policy objective of reducing the incidence of fires during total fire ban periods. The risk of fire associated with these high-risk activities when conducted during total fire ban periods remains the same irrespective of the class of persons undertaking the works, as does the potentially serious consequences of the fire that may result.

The Committee also queried whether there were any less restrictive means available to meet the object of the provision. The Committee questioned why the defence of having 'taken reasonable steps' or having exercised 'due diligence' was not available to a defendant. The offence provision was specifically drafted to maintain consistency with the existing offence in section 116 of the Act of lighting a fire during a total fire ban, which also provides that strict liability applies to whether a total fire ban is in force for the area.

Please note that the options provided by the Committee were considered when formulating the offence, but ultimately it was considered that the offence as drafted was the most appropriate way in which to achieve the policy objectives. As the Explanatory Statement outlines, given the potentially devastating consequences to public health and safety, and property and the environment from fires during total fire bans, it is appropriate that the element of the offence be one of strict liability. To do otherwise would undermine the effectiveness of the offence.

I take this opportunity to advise that the ACT Emergency Services Agency will undertake an education campaign to educate the public about the restrictions on undertaking high-risk activities during a total fire ban. This will complement the existing widespread education activities it undertakes to highlight the risks posed by bushfire, particularly during periods when total fire bans are declared.

I thank the Committee for its report and careful consideration of the Bill.

Yours sincerely

Simon Corbell MLA
Minister for Police and Emergency Services

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

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. 45 (the Report) of 31 May 2016. I offer the following response to the Standing Committee's comments on the Mental Health (Secure Facilities) Bill 2016 (The Bill).

The Standing Committee made comment around the subordinate legislation provided for in the Bill, referred to as directions. These directions are anticipated to provide operational detail in how secure mental health facilities are managed and are anticipated as being notifiable instruments. The Standing Committee has recommended that these be disallowable instruments. This recommendation is not supported.

Directions will be developed as a tool to manage facilities on a day to day basis in certain aspects of operation and clinical staff require certainty as to the content of those directions. In addition, it should be noted that the equivalent tools that are published under the authority of the *Corrections Management Act 2007* and the *Children & Young People's Act 2008*, which address places of detention, are also notifiable instruments. As such, by making directions under this Bill notifiable instruments, there is a consistency across the Territory's statute book.

In recognition of the Committee's comments and to ensure a degree of oversight in the development of directions, I have instructed ACT Health to ensure that the Human Rights Commissioner and a number of other parties that will be identified as accredited visitors in the Bill, are actively involved in the consideration and drafting of directions.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0000 **Email** corbell@act.gov.au
CANBERRA
@SimonCorbell simon.corbell

The Standing Committee also recommended that the Explanatory Statement (the Statement) better outline how the Bill engages various provisions in the *Human Rights Act 2004* and provide a more detailed commentary on how those duties that flow from the *Human Rights Act 2004* have been considered when preparing this Bill. I am grateful for those comments and they been very helpful in reconsidering the Statement and how well it considers the Bill's Human Rights obligations and ramifications.

Following the Standing Committee's comments the Statement has been significantly revised to ensure a better exposition of the Human Rights issues in the Bill. The Statement identifies sections in the Bill that engage various Human Rights provisions and outlines, in greater detail, how they have been considered in the drafting of the Bill and how they are justified in the context of section 28 limitations on Human Rights.

Clearly the Bill is required to consistently balance individual rights of those receiving care or visiting secure mental health facilities, with the overriding priority that those facilities can deliver on their therapeutic mission in assisting people in a meaningful recovery. Secure Mental Health Facilities, which carry a degree of inherent risk, can only deliver on their core therapeutic mission if they are safe for patients, staff and visitors.

Specifically, I feel the statement now better articulates where those restrictions on Human Rights are placed and the rationale for so doing. The Bill was drafted in such a manner as to require reasonable grounds before permitting limitations on people's human rights. In addition, if a limitation does not serve any utility in ensuring the safety and security of a facility, I would argue that the Bill makes quite clear that it should not be put in place.

I thank the Standing Committee for its consideration and comments on the Bill.

Yours sincerely

Simon Corbell MLA
Minister for Health

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 45 of 31 May 2016 which contains comments on the *Supreme Court Amendment Bill 2016* (the Bill).

The Committee's report under section 38 of the *Human Rights Act 2004* (HRA) draws a number of matters to the attention of the Legislative Assembly. I am grateful for the Committee's comments and note the recommendation that I respond.

1. <u>Convictions will not be final</u>

The Committee states that 'Some argue that the result of adopting proposed sections 68M and 68N will be that convictions for the most serious crimes will no longer be final...The proposals set no limit to the time that may elapse between the first trial and the retrial.'

The Bill balances the need for fairness to the acquitted person with the fact that a strict operation of the double jeopardy rule can be unjust in some circumstances. It does this by allowing for a retrial only in certain exceptional circumstances. The Explanatory Statement to the Bill outlines all the safeguards provided by the Bill. One of these is that the Court of Appeal must be satisfied that allowing a retrial is in the interests of justice. The Court must take into account the period since the offence for which the acquitted person would be retried was committed. This allows the court to consider, on a case by case basis, whether it has been too long since the offence was allegedly committed for a retrial to be fair.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0000 **Email** corbell@act.gov.au
CANBERRA
@SimonCorbell simon.corbell

2. Police investigations

(a) Time limit

The Committee is correct in its assertion that the Bill does not provide a time limit on police investigation which involves the questioning of third parties or the examination of evidence in relation to the crime. The Government is of the view that the Bill provides a balance between the need for the police to be able to investigate sufficiently to determine, for example, whether a trial has been tainted, and restriction on police powers to protect the rights of the accused.

To achieve this balance, the Bill provides that a police officer can only investigate the offence if the Director of Public Prosecutions (the DPP) has agreed by written notice to the investigation. In this context, 'investigation' means: any arrest, questioning or search of the acquitted person; issue of a warrant for the arrest of the person; any forensic procedure carried out on the person; or any search or seizure of premises or property of or occupied by the person.

The DPP may only agree to the investigation if satisfied that there is or there is likely to be as a result of the investigation, sufficient new evidence to warrant the conduct of the investigation; and it is in the public interest for the investigation to be carried out.

This ensures that the acquitted person cannot be investigated without sound reason to do so.

(b) Publishing information

The Committee notes that 'the Bill contains no restriction on the publicity that may be given – by the police or by others – to these kinds of investigation.' In many cases it is in the interests of police officers to investigate discreetly, particularly where preservation of evidence and willingness of witnesses to talk to the police is at issue. If the police wish to publicise their investigation, the court would be able to take this fact into account in determining whether to allow a retrial or trial.

Publicising an investigation will cause the court to consider whether the publicity has prevented a fair trial, so police will have a disincentive to publicise the investigation of a case where someone has been acquitted. This is particularly the case as only one application for a retrial may be made.

3. Differential punishment

The Government agrees with the Committee that prosecution in accordance with section 68O of the Bill (administration of justice offence that calls into question the acquittal) would not be as desirable as prosecution in accordance with section 68M (fresh and compelling evidence) and as such would only be used as a last resort by the prosecution to ameliorate an unjust operation of the rule against double jeopardy. The preferable option would be to apply under section 68M for a retrial.

4. Section 68O – privilege against self-incrimination

The Committee states, quoting Justice Kirby's extra-judicial comments, '"To punish a person effectively for giving evidence in his trial, and to put that person on trial once again on an accusation of perjury represents a weakening of the privilege against self-incrimination, itself a basic civil right."' The Committee then states that 'This right is stated in paragraph 22(2)(i) of the Human Rights Act'.

The Government agrees that the Bill may have the effect of punishing a person for giving evidence in his or her trial. That is only the case, however, if the person has deliberately given false evidence and it can be proven beyond reasonable doubt that they have committed the offence of perjury. As an accused cannot be compelled to give evidence, the evidence will also have been given voluntarily.

As stated by the Model Criminal Code Officers Committee in their 2003 Report to the Council of Australian Governments on Double Jeopardy reform 'The fact that one happens to be the accused in a criminal trial does not and should not confer a licence to lie on oath.'[1]

Section 22(2)(i) of the *Human Rights Act 2004* provides that: Anyone charged with a criminal offence is entitled to not be compelled to testify against himself or herself or to confess guilt.

The Bill does not affect an accused person's right to not be compelled to testify against himself or herself. Nor does the Bill affect the person's right to not be compelled to confess guilt. The Bill does not require an accused person to appear as a witness in their own trial.

The Bill also provides at section 68O that the prosecution for the administration of justice offence can only occur where the evidence is 'fresh'. That is, the prosecution cannot rely on evidence of (for example, perjury) which could have, with the exercise of reasonable diligence, been presented in the original trial.

5. Retrial for convictions

The Committee states that '...Justice Kirby noted an argument that there was a lack of even-handedness in the reforms, in that they are limited to retrials for acquittals and do not permit applications for a retrial of a conviction...'

In the ACT, there are two different mechanisms for reconsideration of a conviction if the convicted person has already exhausted the appeals process.

Firstly, section 422 of the *Crimes Act 1900* provides that the convicted person may apply to the Supreme Court to order an inquiry into the conviction.

Secondly, section 423 of the Crimes Act provides that the convicted person may apply to the Executive to order an inquiry into the conviction. The purpose of this power is to allow the executive to order an inquiry in cases where, by whatever means, it has received material casting doubts on the safety of a conviction.

[1] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General , *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, November 2003 Discussion Paper, p. 71

Such an inquiry (whether ordered by the Executive or the Supreme Court) is only to be ordered in exceptional circumstances where fresh doubts or questions about the conviction arise. The doubt or question must relate to a material fact, whether previously admitted into evidence or not.

The board of inquiry must provide a report of the inquiry to the full court of the Supreme Court, which may confirm or quash the conviction, order a new trial or make a recommendation to the executive to pardon the convicted person or remit their penalty.

6. Publication – websites

The Committee notes that section 68Z (prohibiting publication of information about the accused and a potential retrial or trial) 'cannot influence the information and comment that will be posted on websites that are set up outside Australia.'

The Government agrees that section 68Z is not a failsafe with respect to publication of information. However, the Bill provides that the court must be satisfied that allowing a retrial or trial is 'in the interests of justice'. This test is deliberately broad to capture situations like that suggested. Section 68P of the Bill provides that in determining whether such an order is in the interests of justice the court must take into account whether an acquitted person to whom the order would relate is, in the circumstances, likely to receive a fair trial. Where information is available to the public on websites set up outside Australia this would be relevant to whether allowing a retrial or trial is in the interests of justice and, more specifically, whether the acquitted person is likely to receive a fair trial.

The Committee also notes that 'Much of the work the police will do to prepare for an application for a retrial may be publicised.' This issue is addressed at 2(b), above.

7. Tainted trial includes tainting by third party

The Committee suggests that the tainted trial exception should not include tainting by a third party and refers to a report prepared by Justice Jane Mathews with respect to NSW draft double jeopardy laws.

The Government considered the report of Justice Jane Mathews[2] in developing its reforms and is satisfied that tainting of a trial by a third party should be included. Where an accused person's trial is tainted by a third party (for example, through jury interference or destruction of evidence) to the benefit of the accused person it may well be the case that the actions of the third party were done at the behest of the accused person. This is virtually impossible to prove but is a likely scenario. The fact remains that the trial has been corrupted and the accused benefits from this corruption.

The Government considers that if a trial has been tainted by an administration of justice offence to the benefit of the acquitted person, even if that offence has been committed by a third party, it is appropriate for that trial to be held again as the legitimacy of the acquittal

[2] Acting Justice Jane Matthews, *Advice to the Attorney General – Safeguards in Relation to Proposed Double Jeopardy Legislation,* 27 November 2003, NSW.

is in question. The tainted trial exception only applies in relation to a serious administration of justice offence, punishable by 5 years imprisonment or more. Additionally, it must also be the case that it is more likely than not that, but for the commission of the administration of justice offence, the acquitted person would have been convicted.

I note that all jurisdictions in Australia, the Council of Australian Governments model and the UK allow an appeal if a third party has been convicted of an administration of justice offence in relation to the trial of the accused.

8. Time limit for applications to the Court

The Committee states that 'It has been suggested that the law should state a fixed period of time, while retaining the "interests of justice" test.'

As outlined at issue 1, above. The Government considers that the right balance is struck by requiring the Court of Appeal to take into account the period since the offence for which an acquitted person would be retried was committed, allowing the court to consider, on a case by case basis, whether it has been too long since the offence was allegedly committed for a retrial to be fair.

The Committee is correct in noting that the Court of Appeal will not only be taking into account the period of time that has lapsed since the offence was allegedly committed but also any difficulties that the lapse of such time might present to an acquitted person in relation to the trial or retrial. The object of the Bill in providing such a broad 'interests of justice' test is to allow the court to take a wide range of relevant issues into account in determining the application.

9. Costs

The Committee states that 'It is arguable that the person acquitted should as of right be entitled to indemnification.'

Although most jurisdictions which have adopted double jeopardy reforms do not provide for the court to order costs for an acquitted person, the ACT Government has made the decision to do so.

The Bill provides that the acquitted person may apply for an indemnification order to cover not only party to party costs but, more generally, the application costs incurred as a result of the application and any resulting proceeding.

It is appropriate for the acquitted person to be required to apply for an indemnification order. Such costs are ordered at the discretion of the court and a wide range of circumstances may be relevant to the question of whether it is in the interests of justice for the indemnification order to be made. This approach allows the court to consider the appropriateness of indemnifying the acquitted person in the individual circumstances of the case.

As noted by the Committee, the court may take into account 'any other matter that the court considers relevant' in determining whether it is in the interests of justice to make an indemnification order.

10. Procedural fairness

The Government agrees that the Bill should clarify that an acquitted person is entitled to appear at the hearing of an application for a retrial or trial and that they may be represented by a legal practitioner at the hearing. This issue is to be addressed by Government amendments.

11. Retrospective application

The Committee states, with respect to section 68O of the Bill that 'Once acquitted of the offence changed, the principle against double jeopardy prevented the prosecution of the person acquitted for perjury. It is the displacement of the principle that should be justified.'

I refer the Committee to pages 8-10 of the Explanatory Statement to the Bill which outlines the justification for limiting the principle against double jeopardy in the Bill.

12. Kable

The Committee asks 'whether the Kable doctrine operates to preclude the Supreme Court exercising a power to order a retrial or a trial'.

The Committee refers to a comment made by Justice Kirby, extra-judicially, about 'an oblique comment' made by Gaudron and Gummow JJ in *R v Carroll*[3]: '"Whether the nature of the judicial power under the Constitution would have anything to say to any legislative attempts that may be made to reopen acquittals is a question that may arise in future cases."'

The Government notes Justice Kirby's comment, together with the following considerations.

The doctrine in *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51 has been described in the following terms: 'functions which undermine the independence and impartiality of state courts — whether in actuality or appearance — are particularly vulnerable to *Kable* doctrine invalidity. Situations in which the political branches of government seek to 'co-opt' state courts into reaching a particular outcome or which involve courts acting in a manner significantly at odds with traditional judicial procedure — such as contrary to the rules of natural justice — are also suspect.' [4]

The Bill gives the ACT Court of Appeal power to determine, on application by the Director of Public Prosecutions, whether certain criteria are met, in determining whether to allow a retrial or trial of an acquitted person. It gives the court broad discretion to determine whether 'it is in the interests of justice' to order the retrial or trial.

[3] *R v Carroll* (2002) 77 ALJR 157

[4] Wheeler, F., *The Kable Doctrine and State Legislative Power over State Courts,* Australasian Parliamentary Review, Spring 2005, Vol. 20(2), 15–30. pp24-25

Whether or not the *Kable* doctrine would apply to the Bill would also depend on whether the High Court were to apply the doctrine widely or narrowly in the future. The Bill is drafted to reflect the current law.

I thank the Committee for its report and careful consideration of the Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0000 **Email** corbell@act.gov.au
CANBERRA
@SimonCorbell simon.corbell