Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Scrutiny Report

1 DECEMBER 2011

Report 46

TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

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

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

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

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

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

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

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

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

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2011

This Bill proposes the amendment in minor ways the *Crimes (Sentencing) Act 2005;* the *Crimes (Sentence Administration) Act 2005;* and the *Corrections Management Act 2007* to resolve certain operational issues and to improve corrections administration.

ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) BILL 2011

This Bill proposes an Act to establish a Scheme to support the development of up to 210 MW of large-scale renewable energy generation capacity for the Australian Capital Territory.

PLANNING AND BUILDING LEGISLATION AMENDMENT BILL 2011 (NO 2)

This Bill proposes the amendment in minor ways a number of laws relating to planning, building and the environment.

Bills—Comment

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

ELECTORAL (ELECTION FINANCE REFORM) AMENDMENT BILL 2011

This Bill proposes the amendment of the *Electoral Act 1992* to: set limits on gifts to political entities and on the expenditure by candidates, parties and third-party campaigners; strengthen disclosure provisions; and refine public-funding provisions, by linking public funding amounts to corresponding Senate provisions, and providing funding for administrative expenditure incurred by political entities (subject to acquittal and audit).

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

(In what follows, a reference to "SCJACS Committee Report" is to the report of the Standing Committee on Justice and Community Safety, *A Review of Campaign Financing Laws in the ACT*, (September 2011)).[1]

It is apparent that the proposals in the Bill engage some of the freedoms stated in HRA, and in particular:

[1] http://www.parliament.act.gov.au/downloads/reports/Campaign%20Financing%20Report%202011.pdf

- subsection 8(3): "Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. ...";
- subsection 16(2): "Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her"; and
- paragraph 17(a): "Every citizen has the right, and is to have the opportunity, to— (a) take part in the conduct of public affairs, directly or through freely chosen representatives; ...".

Moreover, a critical limit to the legislative power of the Legislative Assembly, and one which is designed to enhance freedom of expression and political participation, lies in what is called the implied freedom of political communication, a restriction that has been found by the High Court to be embedded in the Commonwealth Constitution. The High Court has held that the fact that the Australian Constitution enshrines a system of representative government implies the need for freedom of communication on "political" matters. The freedom operates "as a burden on government to ensure that institutions work in accordance with the principles and assumptions inherent in the text and construction of the constitution which establishes the, presumed democratic, representative system of government".[2] As expressed by the ACT Electoral Commissioner, the "freedom is not absolute, but limited to the extent necessary for the effective operation of representative and responsible government in Australia" (Committee Report 2.11).[3][4]

At many points, the SCJACS Committee noted the possible effect on this freedom on a law regulating campaign financing. It provided a general context by quoting (Committee Report 2.13) Dr Twomey:

> Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution (the *Lange* test). Accordingly, reform proposals concerning party financing must be measured against this test, and special attention must be given to the types of issues that have concerned the High Court in the past, such as laws that unduly favour incumbents or unreasonably limit political communication by third parties.[5]

[2] Katharine Gelber, The scope of the implied freedom of political communication in Australia, (2002), http://arts.anu.edu.au/sss/apsa/Papers/gelber.pdf

[3] Given this freedom, the Committee will not refer to the more express provision in the HRA subsection 16(2) guaranteeing freedom of speech, inasmuch as while the latter encompasses the implied freedom, it is not necessary for the present discussion to take into account its further reach.

[4] See further Dr Anne Twomey, The Reform of political donations, expenditure and funding, NSW Department of Premier and Cabinet, November 2008, 8-12 <http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0015/33027/Twomey_Report.pdf>

[5] Ibid at 1.

The SCJACS Committee noted further that:

> [w]hen she appeared, Dr Twomey told the Committee that jurisdictions could legislate for caps on political donations and electoral expenditure, so long as such arrangements were able to be seen as 'reasonably appropriate and adapted to achieve a legitimate end and adapted to achieve a legitimate end'. In general, limits on donations and expenditure were likely to meet the High Court's test in *Lange* so long as they were implemented 'carefully and sensibly'. Dr Twomey also advised the Committee that the High Court did not 'like electoral laws that favour incumbents' [footnotes omitted] (Committee Report 2.14).

This observation concerning the attitude of the High Court should not be limited to laws that would favour incumbents. A law that, on its face, treated an incumbent less equally than other relevant persons or groups would derogate from the right to the equal protection of the law stated in HRA subsection 8(3). So, too, would a law that singled out for unfavourable treatment a particular political group, whether an incumbent or not. Moreover, subsection 8(3) would apply to a law that, in its practical operation, had any of these effects.

It will be apparent that there will be much room for divergence of opinion as to whether a particular law is invalid by reason of the implied freedom of political communication. The same is true of the effect of the relevant freedoms found in the Human Rights Act.

It is also not sufficient to evaluate the Bill in terms of the scope of the implied freedom. Dr Twomey has noted that "[i]n Australia, attempts to imply a principle of equality from the provisions in the Constitution dealing with elections have failed".[6] In the ACT, however, the right stated in HRA section 17, buttressed by the "equal protection of the law" statement in HRA subsection 8(2), may mean that this line of argument may succeed in relation to Territory electoral laws. Twomey notes that the German Constitutional Court "has placed importance on political parties having an equal opportunity in public debate".[7] The Canadian Supreme Court has held that the political rights in the Canadian Charter "would be breached by any provision that interfered with the capacity of the members and supporters of small political parties to play a meaningful role in the political process".[8] Twomey also notes that the United States Supreme Court appears to be less receptive to this line of argument,[9] and of course much will depend on the particular law in issue. What is however clear is that the statement in HRA section 17 requires a much broader framework for consideration of the fairness with which smaller parties and non-party actors are treated in ACT electoral laws.

In this Report, the Committee can do no more than to raise a rights issue that arises out of what is stated in the primary elements of the Bill. It is clear that this issue was often canvassed in the hearings of the SCJACS Committee, and Members of the Assembly are referred to the clear and balanced analysis in that Committee's Report. The Committee also refers to the comprehensive discussion in the paper of Dr Twomey to which reference has just been made.

[6] Ibid at 58.
[7] Ibid at 60.
[8] Ibid at 62.
[9] Ibid at 59.

Limitations on donations to political parties

Proposed section 205H of the Act (clause 15) reflects recommendation 1 of the Committee, that is, "that donations to political parties, candidates or third parties be limited to $7,000 in a reporting year".

The SCJACS Committee notes the view of the ACT Government that the implied freedom of political communication posed "a risk that an ACT law which limits or bans political donations or expenditure on political advertising will be invalid" (Committee Report 4.20). It also noted that:

> [m]ore positively, the Government noted that this risk was 'significantly diminished if it can be seen that the measure is a proportionate response to policy challenges within the electoral system (such as measures to limit fraudulent or hidden benefits), or enhances representative democracy'. As a result, any legislation impinging on political donations should strike 'a balance between transparency and the right to participate in the political process' (Committee Report 4.21).[10]

Limitation on election expenditure

The relevant provisions of the Bill are found in clause 15, which propose to insert a new division 14.2A into the Act. The provisions are summarised in the Explanatory Statement, and centre on prescribing a cap on the amount of money that may be spent on an election campaign by the candidates. The provisions distinguish between a "party grouping", an MLA who is not a party MLA, and "a non-party candidate grouping" (see clause 11 of the Bill). The last mentioned refers to a candidate who is not a party candidate. The provisions extend to entities associated with each of these categories. Monetary caps are prescribed in relation to these categories. The provisions are explained in the Explanatory Statement. There is a full comparative analysis in the Committee Report (4.34ff), together with its recommendations, which are substantially mirrored in the provisions of the Bill.

The SCJACS Committee notes that the Explanatory Statement acknowledges that "[i]t could be considered that "the freedom to... impart information" ([HRA] s16(2)) was constrained by limitations on expenditure. These provisions burden the implied freedom in that they "have the effect of limiting political communication because most expenditure by candidates and parties during an election campaign is for the communication of messages ...".[11] On the other hand, the Committee noted that "the freedom to... receive information" ([HRA] s16(2)) would be enhanced, through the increased capacity of individuals and organisations to participate in the political process – if that is measured by the capacity to receive a greater range of political communications and views, rather than the same views more often, more loudly or in larger print and full colour".

The Committee notes that the human rights context identified above applies to all these provisions.

[10] See too Twomey's analysis, ibid, at 16-17.
[11] Ibid at 29.

Limitation on election expenditure by third parties

Proposed paragraph 205A(1)(d) (clause 15) proposes that for a "third-party campaigner", (defined in an amendment to section 198, see clause 11), the expenditure cap be $30,000, or that amount declared under subsection 205A(2).

The SCJACS Committee Report dealt specifically with the issue of third party campaign expenditure (see 4.69ff). It noted that:

> [t]he Democratic Audit of Australia advised the Committee that the Canadian Supreme Court had ruled in favour of limiting third party election advertising, and that 'the restriction of some voices' had been deemed necessary 'so that others might be heard'. It noted that in *Harper v Canada* (2004) 'the Supreme Court found that while limiting third party election advertising did restrict freedom of expression, the restrictions were reasonable in the interests of electoral fairness'. In this sense, the Court found that 'restrictions were necessary to provide a level playing field for political discourse', to 'prevent wealthy voices from overwhelming others'.

Twomey's analysis reveals however that other constitutional courts have found laws limiting third-party expenditure for an election invalid, on free speech or wider ground.[12] What is involved is a clear restriction on freedom of expression, and a justification in terms of HRA section 28 would be required. There may also be an argument that restricting third-party speech for an election unjustifiably limits the capacity of those political groups that are "emerging", and/or not represented in the Assembly, to fruitfully engage in the political process, thus engaging HRA section 17.

Offence provisions

On another basis, the Committee draws particular attention to the offence provisions. Proposed section 205C (clause 15) applies to these persons: the registered officer of a party, an MLA who is not a party MLA, a candidate who is not a party candidate, and the relevant person for a third-party campaigner. Taking the first mentioned as an example, proposed subsection 205C(1) provides:

> (1) The registered officer of a party commits an offence if—
>
> (a) the party grouping for the party incurs electoral expenditure in a capped expenditure period for an election; and
>
> (b) the total amount of the expenditure is more than the expenditure cap for the party grouping for the capped expenditure period for the election.
>
> Maximum penalty: 100 penalty units.

No fault element is stated, and in these circumstances it might be expected that subsection 22 of the *Criminal Code* 2002 would apply. This provides as follows.

> (2) If the law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

[12] Ibid at 32-37, and see the reference at footnote 164.

However, proposed section 205D clearly assumes that there is no fault element in subsection 205C(1) and its equivalents, for the former provides for the fault element of recklessness, and states a penalty of 1000 penalty points. This can be seen from subsection 205D(1), which is identical to subsection 205C(1) with the addition of a paragraph (c), which states:

> (c) the officer is reckless about whether the electoral expenditure is more than the expenditure cap for the period.

The Committee recommends that the proponent of the Bill explain:

- whether it is intended that in relation to subsection 205C(1) subsection 22 of the *Criminal Code* 2002 is displaced, and whether it is considered that this is achieved; and

- if so, how the displacement of any fault element, which amounts to providing for absolute liability, is justified in terms of HRA section 28, given that this derogates from the presumption of innocence stated in HRA subsection 22(1).

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

Limitations on gifts

In the words of the Explanatory Statement, proposed section 205F "sets a maximum penalty of 1,000 penalty units if the registered officer of a party; an MLA who is not a party MLA; a candidate who is not a party candidate; or a person who is the relevant person for a third-party campaigner receives a gift or gifts totalling more than $7,000 in a financial year from a person". In addition, proposed section 205F states a prohibition on indirect gifts to avoid this statutory limit.

These restrictions burden the constitutionally implied freedom of political communication (see Committee Report 4.164, quoting Dr Twomey), and engage the relevant HRA rights. They are more likely to be found compatible with these rights if account is taken of that element of the Act that provides for public funding of an electoral campaign. This point is made by Dr Twomey:

> Public funding itself does not burden freedom of political communication, but rather enhances opportunities for political communication. However, if it forms part of a scheme which involves limits on political donations or expenditure and therefore potentially burdens political communication, the whole scheme will need to be reasonably appropriate and adapted to serve a legitimate end, as required by the Lange test. Accordingly, great care would have to be taken with setting thresholds for receiving public funding and with setting the level of funding in a manner that does not unduly favour incumbents or discriminate against minor parties or new parties.

Public funding

Influenced by Dr Twomey's opinion, the Committee recommended that "the current public funding regime in the ACT should be adjusted to compensate for the restrictions on revenue recommended in the report, and to improve equality of access to the electoral system" (Committee Report 4.185), and specifically that "the level of public funding provided to

eligible candidates and parties per eligible vote be increased. The rate of funding should be pegged to the rate provided with respect to the per-eligible-vote amount for the Australian Senate, and should initially be 75% of that amount, increasing to 85% by 2016" (4.187). Proposed section 207 of the Act (see clause 16) follows this recommendation, except that it is proposed to move immediately to the 85% figure.

It may be argued that this proposal (together with the other allied provisions in the Act) limits the right in HRA section 17. In general the scheme may be seen as a form of compensation to a party or to a candidate for having taken part in an election, and having to some extent succeeded. A direct entitlement based on the votes gathered, as is found in the Act, may result in a windfall to the relevant person, inasmuch as the amount received may be more than that expended. In may be contrasted with a re-imbursement scheme, which focuses on the amount actually expended by the relevant person. In its effect, the direct entitlement scheme might be seen to entrench existing and successful parties and candidates, and make it more difficult for other political persons or groups to have their voices heard in political debate.

Administrative expenditure funding

The Bill proposes that a new division 14.3A of the Act provide for public funding of the administrative expenditure of (only) parties and of non-party MLAs. The provisions are outlined in the Explanatory Statement.

The scheme might be seen to entrench existing and successful parties and candidates, and make it more difficult for other political persons or groups to have their voices heard in political debate, and thus engage HRA section 17.

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

FREEDOM OF INFORMATION AMENDMENT BILL 2011

This Bill proposes to amend the *Freedom of Information Act 1989* to give partial effect to the Government Response to the Standing Committee on Justice and Community Safety's Inquiry into the *Freedom of Information Act 1989*.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

In what follows, "SCJACSFOI" refers to Standing Committee on Justice and Community Safety Report No 5 of 2011, The *Freedom of Information Act 1989* http://www.parliament.act.gov.au/downloads/reports/JACS05%20FOI.pdf, and "GRFOI" refers to ACT Government Response to the Standing Committee on Justice and Community Safety Report No 5 of 2011 into the *Freedom of Information Act 1989* http://www.parliament.act.gov.au/downloads/reports/7th%20JCS05%20FOI.pdf.

In recent Territory history, there has been a long and thorough examination of the ways in which the *Freedom of Information Act 1989* ("the Act") should be reformed. SCJACSFOI was tabled in the Assembly in April 2011 and GRFOI was tabled in August 2011. In the latter, the Government agreed with most of the recommendations in SCJACSFOI. This Bill proposed by the Attorney-General proposes an Act to give effect to the Government position. The result, however, is that this Bill differs in some critical respects from the recommendations in SCJACSFOI.

Whether any person, or at least any citizen or resident has a constitutional right to access to documents (or simply "information") in the possession of government has been much debated, but it cannot be said that it has been resolved. Both SCJACSFOI and the Explanatory Statement to the Bill refer to both HRA rights and other relevant rights. However, little turns on how this debate is resolved. The HRA rights do not mandate the provision by law of an unqualified right of access. It is accepted on all sides that there must be some qualification to such a right, and the debate centres on just what qualifications are appropriate.

There are three respects in which this Bill differs from the recommendations in SCJACSFOI.

Executive documents

Following the existing section in the Act, the Bill proposes an exemption as follows:

33 Executive documents

(1) A document is an exempt document if—

(a) it—

(i) was created for the purpose of submission to the Executive for its consideration; and

(ii) has been submitted, or is proposed by a Minister to be submitted, to the Executive for its consideration; or

(b) it is an official record of the Executive; or

(c) it is a document that is a copy of, or of a part of, or contains an extract from, a document mentioned in paragraph (a) or (b); or

(d) disclosure of the document would disclose a deliberation or decision of the Executive and it is not a document officially publishing a decision of the Executive.

Note Access to the Cabinet notebook is excluded under s 11 (2).

(2) This section does not apply to a document mentioned in subsection (1) (a), (b) or (c) to the extent that the document contains purely factual material unless—

(a) the disclosure of the document under this Act would disclose a deliberation or decision of the Executive; and

(b) the fact of that deliberation or decision has not been officially published.

(3) In this section:

Executive includes a committee of the Executive.

A potential weakness with this provision is that it would permit a government, were it so minded, to protect any document, dealing with any topic, from the risk of disclosure. This could be achieved by the device of the Minister directing that all documents dealing with a particular topic (or by some other description) to be prepared for submission to a committee of the executive (or to the executive itself). In the event an FOI request was made, the Minister need give evidence only that he or she intended to submit the document to the committee. (The Scrutiny Committee does not suggest that the current government has this in

mind. Unfortunately, the history of FOI laws in Australia provides a foundation for thinking that this is not an unrealistic risk.)

SCJACSFOI recommends a very different approach, consistent with its general approach that an exemption should not simply apply to certain categories of documents, but also by reference to the effects of disclosure. In relation to "cabinet" documents it recommends adoption of a reformed version of the way such documents are dealt with under the New Zealand *Official Information Act 1982*. This Act does not state a specific exemption for cabinet documents, but rather states a number of ways in which non-disclosure would serve specified public interests in the maintenance of constitutional arrangements and conventions concerning the functioning of government. The preferred option recommended in SCJACSFOI is set out in SCJACSFOI 4.41, and see more generally at 3.37 – 3.52 and 4.36 – 4.43.

It is a matter for the Assembly as to which approach should be preferred. The Scrutiny Committee notes that were the New Zealand approach to be adopted, it would follow that proposed section 43 of the Act (see clause 6 of the Bill) would also need to be deleted.

Conclusive certificates

Under the Bill, it would be possible for a certificate to be issue to support a claim for exemption under proposed section 35 of the Act (see clause 6 of the Bill), which concerns documents affecting national security, defence or international relations. SCJACSFOI did not address this issue.

The qualification that any document that satisfies the description in an exemption should also require to be justified for non-disclosure on the basis that this is necessary in the public interest

SCJACSFOI recommends that all exemptions be subject to such a qualification. In contrast, the Bill provides that certain exemptions should not be qualified by a public interest test – see those in proposed sections 33 to 41 of the Act (see clause 6 of the Bill).

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

GAMING MACHINE AMENDMENT BILL 2011

This Bill proposes to amend the *Gaming Machine Act 2004* in various ways, including the movement and transfer of gaming machines, the introduction of a $250 per day per card Automatic Teller Machine (ATM) withdrawal limit for venues and a medium to longer term target for the number of gaming machines in the ACT of 4,000.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The offence of allowing ATM allowing withdrawals exceeding $250

Clause 14 proposes to insert a new section 153A into the Act, whereby the licensee of the relevant premises permits to remain on the premises an ATM "which allows a person to withdraw more than a total of $250 from all automatic teller machines at the licensed premises, using a single debit card or credit card, on a gaming day".

There are no doubt some in the general community that would argue that an ATM limit breaches their rights in some way. Just how this right may be expressed is very unclear.

Does regulation of gambling engage the right to privacy? It is accepted that this right includes the "lifestyle" choices made by an individual, but it is also argued that this reasoning applies only to a lifestyle choice of a private (and not a public) nature. The issue arose in a United States of America case where the law in issue regulated online gambling. The court rejected an argument that the right to privacy that has been found to be embedded in the USA federal constitution was implicated. The Court of Appeals for the 3rd Circuit said:

> Both [of the Supreme Court decisions in] *Lawrence* and *Earle* involved state laws that barred certain forms of sexual conduct between consenting adults in the privacy of the home. *Lawrence*, 539 U.S. at 567; *Earle*, 517 F.3d at 744. As the Supreme Court explained in Lawrence, such laws "touch upon the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567. Gambling, even in the home, simply does not involve any individual interests of the same constitutional magnitude. Accordingly, such conduct is not protected by any right to privacy under the constitution. Cf. *Am. Future Sys., Inc. v. Pennsylvania State Univ.*, 688 F.2d 907, 915-16 (3d Cir. 1982) ("We are unwilling to extend the constitutional right of privacy to commercial transactions completely unrelated to fundamental personal rights ...".)

This view may not be the end of a rights analysis. It might perhaps be argued that the right to privacy encompasses a right to have access to one's own money. Perhaps a restriction as proposed could be seen to involve a restriction on how a person deals with their own property.

Notwithstanding the lack of clarity about how a right to have unlimited access to one's bank account via an ATM may be expressed, the Committee recommends that the Minister provide a justification in terms of HRA section 28 for the restriction proposed in clause 14 of the Bill to add a new section 153A to the Act.

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

The Committee notes that the Explanatory Statement provides a justification for the creation of a strict liability offence, and makes no comment on this matter.

RETIREMENT VILLAGES BILL 2011

This Bill proposes an Act to regulate retirement villages, and in particular regarding the registration of retirement villages; the making and altering residence contracts; the release of information to prospective residents through the general inquiry document and the public information document; the management of the financial affairs of retirement villages; the protection of the rights of retirement village residents; the participation of residents in the operation of the village; and the process for the resolution of a dispute between retirement village operators and retirement village residents.

Administrative law issues

A point of uncertainty concerning the process of registration of a scheme for a retirement village

As stated in the Explanatory Statement, by clause 12 "a person may apply to the Commissioner for Fair Trading to register a scheme for a retirement village, provided that that person is the proposed controller of the scheme and, if that person is an individual, the individual is above 18 years of age. The application must be accompanied by details of the land involved; the units and facilities that will be provided and any factors upon which the provision of these services is dependent; and anything else prescribed by regulation".

By subclause 13(1), the Commissioner for Fair Trading must register the scheme, or refuse to register. By subclause 13(2), the commissioner may register a scheme only if satisfied that the application complies with clause 12, and that the applicant has not been prohibited from operating a scheme for a retirement village under two specific provisions of the Bill. One reading, perhaps the one that would normally be taken at least by a lay-person, is that these are the only matters relevant to whether the applicant should be registered.

Subclause 14(1), however, appears to assume that other matters might be relevant. In particular, paragraph 14(1)(f)(ii) provides that it would be relevant for the commissioner to seek information concerning the applicant from other people (including financial and other confidential information) that is relevant to "(B) a consideration of whether the applicant continues to be a suitable person to operate a scheme for a retirement village".

If a wider reading of the scope of the discretion in subclause 13(1) is intended, then this clause is open to the objection that it would confer an uncontrolled discretion. The Committee appreciates that a court would "read down" the clause, but, as it has often said, it is desirable, and not least from the point of a view of a lay-reader, that a discretion should be structured and limited.

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

Wide or unconfined discretions

A scheme operator for a retirement village must apply in writing to the Commissioner for Fair Trading to transfer the registration of the scheme for the retirement village (subclauses 15(1) and (2)). A resident may object to the transfer. The commissioner has power to transfer or to refuse to transfer (subclause 15(4)). Again, this appears to be a narrow discretion (paragraphs 15(5)(i) and (ii)), but in this case the commissioner must also be satisfied that "transferring the registration of the scheme is appropriate, having regard to the objections, if any, made under subsection (3)". No indication is given as how appropriateness is to be assessed. Again, the Committee's view is that the discretion should be more limited.

The same issue arises concerning the commissioner's power to cancel, or to refuse to cancel, the registration of a scheme; (see clause 18).

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

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The right to privacy and the power of the commissioner to require a person to authorise disclosure of financial and confidential information

In relation to paragraph 14(1)(f), its effect is that the commissioner may compel an applicant for a scheme to authorise the disclosure of financial and other confidential information that is about the applicant. Such a provision clearly engages the right to privacy in HRA paragraph 12(a), and is justified only if not interfered with "arbitrarily". This question must be addressed in the same terms as a justification under HRA section 28 is addressed.

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

Clause 18: does it permit a form of civil conscription?

A right not specifically addressed in the HRA, but arguably accepted at common law, is that a person should not be required (or "conscripted") to perform a particular form of employment or business.[13]

This right may be engaged by reason of the fact that the commissioner can refuse to permit the cancellation, at the request of the operator, of a scheme for a retirement village (subclause 18(4). The effect of a refusal would be to compel the operator to continue to work, to employ others, and to expend money to operate the village.

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

Are some criminal offences too vaguely worded?

Vagueness in the manner in which an offence provision states the elements of the offence will engage the HRA and otherwise may be seen as incompatible with the rights of a defendant. To adapt slightly what the Committee said in *Scrutiny Report No 20* of the *7th Assembly*, concerning the Crimes (Serious Organised Crime) Amendment Bill 2010:

> The vagueness of [an element of the crime] might lead to a conclusion that the offence provisions which turn in part on its application lack a sufficient degree of certainty. There are many precedent cases that state a principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[14] The principle was expressed long ago by the United States Supreme Court thus:

[13] It might be noted that section 51(xxiiiA) of the Commonwealth Constitution prohibits civil conscription in relation to medical and dental services.

[14] See generally the discussion in *Report No 6* of *2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20* of the *Fifth Assembly*, concerning the Criminal Code 2002, and *Report No 20* of the *Sixth Assembly*, concerning the Casino Control Bill 2005.

> [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[15]

This principle might be found to be an element of one or more rights stated in the HRA (such as the right to liberty and security of the person: HRA subsection 18(1)).

Another way to state the objection is to see it as a delegation of legislative power to a court called upon to interpret the vague term, or, at least, as requiring the court to make "political" or "value" judgements.[16]

In the Bill, this issue arises in respect of the following offence provisions:

- paragraph 68(b) (and paragraph 70(1)(ii)) – how would an operator understand what an expression of interest includes?;
- paragraph 71(1)(a) - how would an operator understand when some detail in a public information document becomes "*materially* inaccurate"?; and
- paragraph 100(4)(a) - how would an operator understand whether he or she or it has "*considered* a resident's rights to live in the retirement village"?

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

Does a clause of the Bill inappropriately delegate legislative power? Committee term of reference (c)(iv)

Subclause 510(3) would confer on the executive a power, stated in a form now commonly found in Territory Acts, to make transitional regulations that may modify that part of the Act that governs the topic of "transitional matters". As such, it has the character of a Henry VIII clause; (see *Scrutiny Report No 45* of the *7th Assembly*, concerning the Business Names Registration (Transition to Commonwealth) Bill 2011).

The Explanatory Statement offers this justification for the provision:

> A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

[15] *Lanzetta v New Jersey* (1939) 306 US 451, quoting *Connally v General Construction Co*., 269 U.S. 385, 391.
[16] In *Taikato v R* [1996] HCA 28, the majority of the High Court said that "under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing".

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

Misleading provision

Subclause 510(3) of the Bill provides:

> (3) A regulation under subsection (2) has effect despite anything in another territory law.

This is misleading in that a provision of a Territory law cannot limit the power of the Legislative Assembly to enact a later statute to amend an earlier law. The public should be able to rely on what a plain reading of a law suggests, and this is clearly not the case with subclause 510(3). It once again recommends that such clauses not be stated in a bill.

The Explanatory Statement addresses this objection in these words:

> A provision of Part 15 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly.

With respect to the author of the Explanatory Statement, the Committee maintains that such a provision is misleading. While a lawyer and some others will appreciate that a regulation (or an Act) cannot control the content of any regulation passed after the commencement of a regulation made under subclause 510(2), many members of the public will not.

The Committee also disagrees with the proposition that "[t]he section is not expressed ... to authorise the making of a regulation limiting future enactments of the Legislative Assembly". A contrary reading is likely to be the one taken by many readers. Moreover, as a matter of law, an Act has prospective operation, unless a contrary intention appears. That is, it applies to events or matters that have not occurred or do not exist at the time the law commences. Thus, a law requiring a vehicle to be registered applies to a vehicle that comes into existence after commencement. It is difficult to see why this should not apply to an Act or a Territory law mentioned in subclause 510(3).

The Committee would appreciate a statement from the Member as to why subclause 510(3) is included. It appears to add nothing to an understanding of the Act, and indeed will confuse many readers.

The Committee refers to its comments in Scrutiny Report No. 45 concerning the Business Names Registration (Transition to Commonwealth) Bill 2011 and to the comments made by the Deputy Chair during his presentation speech for the Report on 15 November 2011.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2011-283 being the Civil Law (Wrongs) South Australian Bar Association Inc Scheme 2011 (No. 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the South Australian Bar Association Inc Scheme.**

Disallowable Instrument DI2011-284 being the Public Place Names (Casey) Determination 2011 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of 15 new roads in the Division of Casey.**

Disallowable Instrument DI2011-295 being the Liquor (Fees) Determination 2011 (No. 1) made under section 227 of the *Liquor Act 2010* **revokes DI2010-273 and determines fees payable for the purposes of the Act.**

Disallowable Instruments—Comment

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

Drafting issue

Disallowable Instrument DI2011-279 being the University of Canberra Council Appointment 2011 (No. 1) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2011-280 being the University of Canberra Council Appointment 2011 (No. 2) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2011-281 being the University of Canberra Council Appointment 2011 (No. 3) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2011-282 being the University of Canberra Council Appointment 2011 (No. 4) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

The Committee notes that the four instruments listed above appoint four specified persons as members of the University of Canberra Council. In each case, section 3 of the instrument states:

> **3 Appointment**
>
> I appoint [or reappoint] [specified person] as a member of the University of Canberra Council from 21 October 2011 until 20 October 2014 [or, in the case of one instrument, 31 December 2011].

The Committee notes, however, that the Explanatory Statements for the various instruments state:

> This instrument appoints [or reappoints] [specified person] **as a part time member** of the University of Canberra Council for three years from 21 October 2011 until 20 October 2014 [or, in the case of one instrument, 31 December 2011]. The appointee is not a public servant and the determination is a disallowable instrument for the purpose of division 19.3.3 of the *Legislation Act 2001*. (emphasis added)

The Committee notes that there is no provision in the *University of Canberra Act 1989* for part time members of the Council. The statement in the Explanatory Statements is therefore puzzling (and, presumably, incorrect).

This comment does not require a response from the Minister.

Subordinate Law—No comment

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

Subordinate Law SL2011-29 being the Liquor Amendment Regulation 2011 (No. 2) made under the *Liquor Act 2010* **amends the *Liquor Regulation 2010* to reflect the new licensed trading hours for on licensees and permit holders, as set out in the Liquor (Fees) Determination 2011.**

Vicki Dunne, MLA
Chair

December 2011

JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008
Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009
Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009
Disallowable Instrument DI2009-75—Utilities (Consumer Protection Code) Determination 2009

Report 10, dated 10 August 2009
Disallowable Instrument DI2009-93—Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)

Report 14, dated 9 November 2009
Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58—Heritage (Council Chairperson) Appointment 2009 (No. 1)

Report 18, dated 1 February 2010
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010
Education (Suspensions) Amendment Bill 2010 (PMB)

Report 22, dated 27 April 2010
Infrastructure Canberra Bill 2010 (PMB)
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-65—Auditor-General (Standing Acting Arrangements) Appointment 2010

Bills/Subordinate Legislation

Report 30, dated 15 November 2010
Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)
Discrimination Amendment Bill 2010 (PMB)

Report 34, dated 24 March 2011
Road Transport (Third-Party Insurance) Amendment Bill 2011

Report 38, dated 27 June 2011
Disallowable Instrument DI2011-75—Territory Records (Advisory Council) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-76—Territory Records (Advisory Council) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-77—Territory Records (Advisory Council) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-78—Territory Records (Advisory Council) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-79—Territory Records (Advisory Council) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-80—Territory Records (Advisory Council) Appointment 2011 (No. 6)

Report 39, dated 28 June 2011
Electoral (Donation Limit) Amendment Bill 2011 (PMB)

Report 40, dated 11 August 2011
Crimes (Penalties) Amendment Bill 2011 (PMB)

Report 42, dated 15 September 2011
Children and Young People (Transition to Independence) Amendment Bill 2011 (PMB)

Report 43, dated 13 October 2011
Disallowable Instrument DI2011-194 - Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1)
Disallowable Instrument DI2011-228 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-229 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-231 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-232 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-233 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-234 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 6)

Bills/Subordinate Legislation

Disallowable Instrument DI2011-235 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7)
Disallowable Instrument DI2011-236 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8)
Disallowable Instrument DI2011-237 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9)
Subordinate Law SL2011-26 - Gene Technology Amendment Regulation 2011 (No. 1)

Report 44, dated 24 October 2011

Disallowable Instrument DI2011-246 - Domestic Animals (Cat Curfew Area) Declaration 2011 (No. 1)
Disallowable Instrument DI2011-264 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-265 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-266 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-267 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-268 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-269 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 6)
Disallowable Instrument DI2011-270 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 7)

Report 45, dated 10 November 2011

Business Names Registration (Transition to Commonwealth) Bill 2011
Disallowable Instrument DI2011-263 - Road Transport (General) (Segway Exemption) Determination 2011 (No. 2)