Legislative Assembly for the ACT

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

Scrutiny Report

25 AUGUST 2008

Report 59

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS

Bill—No comment

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

CRIMINAL CODE (DRUG EQUIPMENT) AMENDMENT BILL 2008

This Bill would amend the *Criminal Code 2002* to insert new offence provisions relating to the sale and supply of drug equipment.

ROAD TRANSPORT (THIRD-PARTY INSURANCE) AMENDMENT BILL 2008

This Bill would amend the *Road Transport (Third-Party Insurance) Act 2008* with reference to the time for giving notice of a claim to the Nominal Defendant.

Bills—Comment

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

CORRECTIONS MANAGEMENT AMENDMENT BILL 2008

This Bill would amend the *Corrections Management Act 2007* to expand the current power for the chief executive to direct ACT Corrective Services officers to strip search a detainee.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

The purpose of the Bill is well explained in the Explanatory Statement and it also draws attention to and adequately discusses the way in which HRA subsection 10(2) (medical treatment without consent) is engaged and any incompatibility justified under HRA section 28.

The Committee refers the Assembly to the Explanatory Statement.

CRIMES LEGISLATION AMENDMENT BILL 2008

This Bill would amend various pieces of legislation in relation to criminal proceedings.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

Many of the proposed amendments are consequential on the amendment made in Part 1.10 of the Schedule to change the definition of an indictable offence in the *Legislation Act 2001*. No comment on these amendments is necessary.

Some of the proposals for amendment do however raise human rights issues, and some of these may be seen to be issues arising under the *Human Rights Act 2004*. The Committee will not generally try to distinguish a specifically HRA issue from an issue as to whether a particular provision might be an undue trespass on personal rights and liberties.

Change to the nature of a committal hearing[1] - the hand-up brief

By restricting or in some cases prohibiting a defendant from cross-examining a prosecution witness at a committal hearing, the Bill would in effect change the theoretical nature of a committal from one where witnesses gave oral evidence and were cross-examined, to one where the magistrate would in general decide whether to commit the defendant by examination of written statements. The particular rights issues are addressed below.

The amendments would provide a legislative base for the "hand-up committal".[2] First, the Bill "does not provide for applications to be made for witnesses to be called to give oral evidence as evidence in chief as it is contemplated that this evidence will always be given through the tendering of written statements" (Explanatory Statement). Secondly, proposed section 90AB of the Bill would severely restrict the circumstances in which a witness may be called for cross-examination at a committal hearing.

In its general introductory part, the Explanatory Statement outlines the nature of the change in an historical setting:

> The committal process is the process by which indictable charges are committed to the Supreme Court. *It is an administrative procedure* where the Magistrate presiding over the case makes a decision, based on the evidence before the court, to commit the defendant to stand trial, or be sentenced, in the Supreme Court. It has been recognised for many years that the practical side of the committal process in the ACT has moved beyond its legislative basis. When committals were initially formulated it was expected that all evidence would be taken orally, with witnesses called and cross-examined. With the development of a culture and practice of full disclosure of prosecution cases the modern committal will normally proceed with the Magistrate accepting written witness statements as evidence upon which to base the decision to commit a matter to the Supreme Court.
>
> The Bill recognises this transition and changes the legislation so that hand-up, or paper, committals are the rule (emphasis added).

The Explanatory Statement is clearly based on a particular theory about the purpose of a committal hearing which with some simplification may be called an administrative process viewpoint. It is one taken by some judges. For example, in *Barton v R* [1980] HCA 48 at [3], Wilson J said:

[1] The Committee notes the change in terminology proposed by the Bill. As said in Department of Justice and Community Safety, Discussion Paper - REFORMS TO COURT JURISDICTION, COMMITTAL PROCESSES AND THE ELECTION FOR JUDGE ALONE TRIALS, May 2008 (henceforth "DP") at paragraph 34 "Committals are referred to as 'preliminary examinations' in the current legislation. It is appropriate to replace these references in the legislation with the term 'committal hearing' to bring the legislation into line with common terminology used by the legal profession in the ACT, and indeed, in Australia".

[2] See DP paragraphs 35-51.

> The committal proceeding is a procedure designed to facilitate the administration of criminal justice. It serves this purpose in two ways: in the first place, it marshals the evidence that is tendered on behalf of the informant in deposition form, a form which enables it to be perpetuated and be available for use at the trial in the event of the witness being dead or otherwise unavailable; in the second place, it requires the magistrate to be satisfied that the evidence establishes a prima facie case before the accused person is committed to stand trial: … . Although it will ordinarily do so, a committal proceeding is not designed to aid an accused person in the preparation of his defence.[3]

This may be contrasted to a more defendant oriented viewpoint that stresses the role of the committal in ensuring that a fair trial on indictment follows a committal. For example, in *Hanna v Kearney* [1998] NSWSC 227, Studdert J, with reference to the circumstances in which a judge should permit cross-examination of a witness on a committal hearing, said that:

> the fundamental objective of the committal proceedings must be borne in mind, namely *the objective of facilitating a fair trial in the event that the person charged is committed and later stands trial*. This may mean that there are substantial reasons for requiring a witness for crossexamination for a proper understanding of the nature of the prosecution case or for an understanding of the basis of a relevant opinion held by a witness. I do but give those instances, I certainly do not intend them to be exhaustive (emphasis added).

As noted below, some High Court judges have expressed similar views.

The point to be made at the outset is that the administrative process perspective of the Explanatory Statement is not the only possible viewpoint, and against this background the Committee will turn to proposed section 90AB of the *Magistrates Court Act 1930* – see Schedule 1.77.

> **90AB Witnesses generally not to be cross-examined at committal hearing**
>
> (1) **The court must not require a witness to be called for cross examination at a committal hearing if—**
>
> (a) the hearing relates to a sexual offence (whether or not it relates also to another offence); and
>
> (b) **the witness is a complainant in relation to the sexual offence**.
>
> (2) **The court must not require any other witness to be called for cross examination** at a committal hearing **unless**, on application by the party seeking to cross-examine the witness, **the court is satisfied that—**
>
> (a) the party has—
>
> (i) identified an issue to which the proposed questioning relates; and
>
> (ii) provided a reason why the evidence of the witness is relevant to the issue; and
>
> (iii) explained why the evidence disclosed by the prosecution does not address the issue; and
>
> (iv) identified to the court the purpose and general nature of the questions to be put to the witness to address the issue; **and**

[3] See too *Moss v Brown* [1979] 1 NSWLR 114 at 125 per Moffitt.

(b) the interests of justice cannot adequately be satisfied by leaving cross-examination of the witness about the issue to the trial.

(3) In this section:

sexual offence means an offence against the Crimes Act 1900, part 3 (Sexual offences), part 4 (Female genital mutilation) or part 5 (Sexual servitude). [Emphasis added]

In its specific part, the Explanatory Statement states:

> This amendment provides the circumstances in which a witness may be called to be cross examined during a committal hearing. Complainants in sexual offence cases cannot be cross examined at a committal hearing under any circumstances.
>
> Other witnesses may only be cross examined if a Magistrate, after hearing an application, decides that it is in the interests of justice for that witness to be called, and requires the witness to be available for cross examination. The purpose of the legislation is to avoid lengthy court delays, to protect witnesses from giving evidence twice, to encourage defendants to focus their minds on what the issues in the case are, and to enable defendants access to cross examine witnesses if the prosecution evidence does not adequately disclose the case or the details of a relevant issue.

It is odd that the Explanatory Statement sees a benefit to the defendant lying in their ability to make an application to the court for leave to cross-examine some kinds of witnesses. The Explanatory Statement does not acknowledge that the defendant would be better placed to protect her or his position if they had – as they now have – an unrestricted right to cross-examination.

The Explanatory Statement makes no reference to the possible impact of the HRA, nor to any other kind of rights consideration. It appears to the Committee that some rights issues do arise.

<u>The prohibition on cross-examination except with leave of the court</u>

HRA subsection 22(2)(g) provides that anyone charged with a criminal offence is entitled:

> (g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses.

It appears that the words "to examine prosecution witnesses" should be read standing alone, so they state an unqualified right to cross-examine prosecution witnesses. It is arguable that they apply to what occurs at a committal hearing.[4] To the contrary it might be argued that subsection 22(2)(g) is directed to what happens at the trial of a defendant, and a committal hearing is not part of the hearing of the charge on the trial.

Whether this latter argument is accepted turns on how one views the object of a committal hearing. Those who see it as an administrative procedure may argue that this point is a decisive answer to argument that what happens at a committal raises rights issues.

[4] Some support for this may be found in *W v Attorney-General* [1993] 1 NZLR 1 at 9, line 57.

On the other hand, some judges have firmly rejected this approach. In *Barton v R* [1980] HCA 48, Gibbs CJ and Mason J (with whom Aickin J agreed) said:

> 43. … For us to say, as has been suggested, that the courts are concerned only with the conduct of the trial itself, considered quite independently of the committal proceedings, would be to turn our backs on the development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial.

It is arguable that subsection 22(2)(g) is engaged, and if this is so, the restriction on this right by proposed section 90AB needs to be justified under HRA section 28.

Whether or not subsection 22(2)(g) is engaged, HRA subsection 21(1) may be relevant. It states a right to a fair trial:

> 21 (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

If it is accepted that what happens at a committal hearing is inextricably linked to the fairness of a subsequent trial, then the fairness of that trial can turn on just what happens at the committal. The argument would be that restrictions on the ability of a defendant to cross-examine prosecution witnesses at the committal may well compromise the fairness of the trial.

If HRA subsection 21(1) is engaged, the restriction on this right by proposed section 90AB needs to be justified under HRA section 28.

Leaving aside the complete prohibition in sexual offence proceedings (see below), the rights issue raised by proposed section 90AB is whether the restrictions on the ability of a defendant to cross-examine a prosecution witness at a committal hearing are a proportionate restriction on the rights in HRA subsection 21(1) and/or paragraph 22(2)(g).

The answer to this question will turn on (1) what value is placed on the ability to cross-examine at the committal, and (2) the extent to which that ability is restricted and the reasons for that restriction.

Some judges place a high value on the ability to cross-examine. In *Hanna v Kearney* [1998] NSWSC 227, Studdert J said that "[p]lainly there would be prejudice to the defendant in every case where the offence is denied and where the defendant does not have the opportunity of cross-examining the alleged victim at committal". In *Barton* (see above), Stephen J said that "loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable. How serious this will be to the accused will depend upon the nature of the offence charged and of the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused".[5]

[5] His Honour was addressing a case where there had been no committal at all, but this does not dilute the significance he attached to the value of cross-examination.

In a paper delivered in 1990, Mr Terry Higgins (as he was then) argued:

> It is certainly true that it is no necessary part of a committal that each witness must be called to give oral evidence. The 'paper committal' under which the evidence is presented by way of a formal proof of evidence does no injustice to an accused provided:
>
> (i) the statement is limited to admissible evidence; and
>
> (ii) the witness is, on proper notice, available to an accused to cross-examine.[6]

Against these views may be set the argument that the right in HRA subsection 22(2)(g), or in subsection 21(1), does not require more than one opportunity to cross-examine and this will be provided at the trial.[7]

There are also views that an unrestricted right to cross-examine gives rise to a defendant's counsel focussing on the credit of the witness, and in particular on whether what they said at the committal agrees with what they said on an earlier occasion.[8] This may explain why proposed paragraph 90AB(2)(a)(i) requires a defendant seeking leave to cross-examine a prosecution witness to identify how the cross-examination to identify an issue to which the proposed questioning relates. It may be that cross-examination to show an inconsistency in statements made by the witness cannot be a ground for the magistrate to grant leave to cross-examine.

This is a technical area of the law, and it is probably only legal practitioners with close acquaintance with how it works who could offer deeper insights into the rights issues that arise from the proposed changes.

The Committee's purpose has been to place the proposals in a wider context than apparent from the Explanatory Statement.

In the end, the question for the Assembly is whether the restrictions on the ability of a defendant to cross-examine a prosecution witness at a committal hearing are a proportionate restriction on the rights in HRA subsection 21(1) and/or paragraph 22(2)(g)

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

<u>The complete prohibition on cross-examination of a complainant in relation to a sexual offence</u>

Is the complete prohibition on the cross-examination of a complainant in relation to sexual offence proceeding a proportionate restriction on the rights in HRA subsection 21(1) and/or paragraph 22(2)(g)?

The effect of proposed paragraph 90AB(1)(b) is that a defendant cannot in any circumstance cross-examine a witness if the hearing relates to a sexual offence and the witness is a complainant in relation to the sexual offence.

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[6] http://www.aic.gov.au/publications/proceedings/07/higgins.pdf

[7] In relation to (2) see A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) at 23.8.7.

[8] "I am of the view that very often the way in which cases [mounted by a defendant] are conducted are very much based upon what I have described as "what can the witnesses remember?" It does not seem to me that the purpose of cross-examination at a committal was to allow counsel to set up credit issues based merely on that proposition": Paul Coghlan QC - http://www.aija.org.au/ctr/COGHLAN.HTM.

It is clearly more difficult to justify an unqualified prohibition on the ability of a defendant to cross-examine a prosecution witness at a committal. The Explanatory Statement offers no justification. In its specific part, the Explanatory Statement states merely that "[c]omplainants in sexual offence cases cannot be cross examined at a committal hearing under any circumstances".

The Discussion Paper (DP) states:

> Reforms for sexual assault victims recommended by the DPP and the AFP in the ACT in their March 2005 report Responding to Sexual Assault outline a proposal that child sexual assault victims should never be called for cross examination at committal and adult sexual assault victims should only be required to be available for cross examination at committal *if there are special reasons*. In one sense this is a recognition that there may be certain types of crimes and/or certain types of victims who should be treated differently from others for committal purposes" (paragraph 41) (emphasis added).

The DP does not seek to explain why "certain types of victims who should be treated differently from others for committal purposes". The argument may well be along the lines that experience indicates "that many [complainants] of sexual offending [are] reluctant to become involved in the criminal trial process if it would expose them to more than one session of cross-examination in relation to the alleged offending".[9]

It is to be noted however that the Bill goes further than the proposal referred to by the DP, for it makes no allowance for special reasons to be advanced by the defendant to warrant cross-examination of the complainant.

It may be argued that a total prohibition will give rise to an injustice to some defendants to sexual offence charges. This may be illustrated by reference to the decision of the New Zealand Court of Appeal in *W v Attorney-General* [1993] 1 NZLR 1. The court was concerned with a provision that prohibited the examination or cross-examination of a sexual offence complainant unless that was necessary "in the interests of justice" (see at 3). In an analysis that was sympathetic to the object of the provision, Cooke P provided some examples of situations where the interests of justice would be served by permitting cross-examination. He instanced cases:

- "where there is some special reason to think that cross-examination of the complainant may lead to a discharge of the defendant rather than a committal for trial" (at 6);

- where the defendant might apprehend that the complainant might not be able to give oral evidence at the trial and thus "reasonably wish to have cross-examination recorded" (at 7); and

- where "identity might be disputed" and "the defendant might wish to pin the complainant down to a description of the offender before she became more familiar with the appearance of the defendant" (at 7).

The point is that under proposed subsection 90AB(1), in these kinds of cases – being ones where Cooke held that cross-examination would be required "in the interests of justice" – a defendant could not seek leave to cross-examine.

[9] A Butler and P Butler, above, at 23.8.7.

Cooke P made another point of particular relevance to the provisions of the Bill. The Bill proposes to state the test to be applied by the magistrate in determining whether to commit the defendant for trial as a single test of whether "the court is of the opinion, having regard to all the evidence before it, that there is no reasonable prospect that the person would be convicted of the offence" (see Schedule 1.83, proposing paragraph 97(a) of the *Magistrates Court Act 1930*).

Under this test, a magistrate is not limited to assessing the strength of the prosecution case 'at its highest'. Thus, the court may assess the credibility – in the sense of the believability - of the evidence of the prosecution witnesses, and may compare the strength of the evidence of the prosecution to that of the defence. As Cooke P put it, a defendant "can go into the witness box and persuade the [magistrate] that he should not be committed for trial because, comparing the complainant's evidence with his own, no reasonable jury would convict" (at 8).

Cooke then noted that while this would "require an unusually strong defence case", the right to endeavour to make it out would be practically taken away if the section [governing a grant of leave to a defendant to cross-examine a complainant in a sexual offence] were to be administered so as always to preclude cross-examination on matters going to credibility, even though the defendant may well be in a position to demonstrate that, considered against his own and in the light of all the circumstances, the complainant's evidence is not reasonably capable of being accepted as credible (at 9).

In the end, the question for the Assembly is whether the complete prohibition on the cross-examination of a complainant in relation to a sexual offence proceeding is a proportionate restriction on the rights in HRA subsection 21(1) and/or paragraph 22(2)(g).

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

The timing of an election by the defendant to have a matter dealt with summarily in the Magistrates Court rather than proceed to the Supreme Court for trial – see Schedule 1.36, proposing a new subsection 375(6A) to the *Crimes Act 1900*

Once the full prosecution case has been disclosed at case management hearing, should a defendant at a committal hearing be required to elect whether (i) to have the case determined to finality by the magistrate as an exercise of summary jurisdiction, or (ii) to have the magistrate continue to deal with the case as a committal, with the consequent possibility that he or she would be tried on indictment before the Supreme Court?

Existing section 375 of the *Crimes Act 1900* provides for circumstances where a defendant may elect to have certain kinds of charges that would otherwise be tried on indictment before the Supreme Court tried summarily before a magistrate. In practice, a particular matter will begin as a committal proceeding and will be conducted on an assumption that the matter will proceed to Supreme Court trial. Thus the function of the magistrate is to determine if the matter should so proceed according to the test which will now be stated in proposed paragraph 97(a) of the *Magistrates Court Act 1930* (see above). However, at any stage of the proceeding – although usually the end of the prosecution evidence – the defendant may elect to have the matter dealt with summarily and thus finalised in the Magistrates Court. If the defendant so elects, the function of the magistrate will change to the very different one of determining the guilt or innocence of the defendant.

The amendments proposed at Schedule 1.36 are designed to implement a policy that a defendant must make election of jurisdiction once the full prosecution case has been disclosed at case management hearing.

Referring to proposed section 375 (6A), the Explanatory Statement states:

> This clause requires the Magistrate to ask the defendant, at the time the matter is ready to be listed for hearing, whether the defendant consents to the case being disposed of summarily. This is a change from the previous common law position … .
>
> The change is a recognition of both the change in practice so that a defendant now has the prosecution case at the time that the matter is listed for hearing, and of the amendments in this Bill that place prohibitions and restrictions on witnesses being called at committal hearings. The election for jurisdiction before the matter has commenced a hearing avoids the situation where a witness who ought not be giving evidence in a committal, gives evidence in a hearing only to find that it has become a committal. The amendment it also designed to avoid forum shopping for magistrates who are perceived to be more favourable to one party or the other.

The fair trial issue may be posed by reference to comments by Higgins J (as he was then) in *Fares v Longmore* [1998] ACTSC 133 that "it is quite unfair to expect a defendant necessarily to be in a position to consent or not to summary jurisdiction before all relevant matters are known". This comment was made prior to the introduction of the Case Management Hearing process in November 1999. As the DP explains:

> The process involves a strict timetable of brief preparation and delivery, encourages the parties to enter into appropriate and constructive negotiation and have the issues explored further by a Magistrate at a case management hearing before the matter is listed for a contested hearing (para 11).

But Higgins J made the further point that:

> 13 … a magistrate's decision as to the propriety of disposing of the matter summarily does require consideration of all relevant matters. Some of those matters might well not appear until the evidence and, possibly, submissions have been concluded.

The current requirements for prosecution disclosure do not provide an answer to this point.

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

Thresholds for summary and indictable jurisdiction and trial by jury

Is the proposed increase in the threshold for matters that must be dealt with summarily in the Magistrates Court – which has the consequence of removing the right to trial by jury in relation to a wide range of offences – an unjustifiable qualification of that right?

The Explanatory Statement states:

> The Bill increases the threshold for matters that *must be dealt with summarily* in the Magistrates Court, to cover offences with a maximum penalty of up to 2 years' imprisonment … . This will mean that offences such as common assault, failing to answer bail, neglect of children, and threatening to cause property damage that carry a maximum penalty of 2 years' imprisonment *can only be determined in the Magistrates Court* (emphasis added).[10]

This change would result from a change to the definition of "indictable offence" in the *Legislation Act 2001* – see Schedule 1.10 of the Bill.

The rights issue arising is encapsulated in this comment by Murphy J in *Barton* (see above):

> 8 … In recent years, there has been a marked trend in Australia to turn indictable offences into summary ones, and in the creation of new offences, to make them summary rather than indictable. … The trend to replace indictable offences by summary ones seriously erodes the institution of trial by jury, which is the most important safeguard for the liberties of the people.[11]

High Court Chief Justice Gleeson identified another reason to maintain trial by jury against the trend to making more offences triable summarily:

> Public participation in the administration of justice is a part of our legal tradition. Trial by jury remains the procedure by which most serious criminal cases[12] are decided, although in recent years, in the interest of reducing cost and delay, there has been a trend towards making more offences triable summarily. It is important for Parliaments to keep in mind *the public interest in involving the community in the administration of justice*, especially criminal justice. Through the jury system members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility (emphasis added).[13]

The public interest in involving the community is well expressed in remarks by Brennan J in *Brown v The Queen* [1986] HCA 11, and he adds a further reason for retention of the jury:

> The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community. We have fashioned our laws governing criminal investigation, evidence and procedure in criminal cases and exercise of the sentencing power around the jury.

[10] For a fuller discussion, see DP at paragraphs 18-29.
[11] Many High Court judges have spoken along similar lines about the high constitutional role of the jury; see *Kingswell v R* (1985) 159 CLR 264 at 298 per Deane J; *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J; and *Cheng v The Queen* (2000) 203 CLR 248 at 277 per Gaudron J.
[12] There is of course room for debate about what are the most serious cases.
[13] http://law.anu.edu.au/nissl/Gleeson.pdf

In *Kingswell v R* [1985] HCA 72, Deane J said:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a "fair go" tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness.[14]

The Explanatory Statement offers by way of justification that

> [t]hese changes will more properly allocate matters to the Magistrates Court that can fall within the range of sentencing expertise of that Court, recognising the professional ability of the Magistrates to deal with an expanded jurisdiction.

What must be put in the balance however is the value of trial by jury, and the Committee suggests that whenever some dilution of its role is proposed, that the Assembly call for a full justification.

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

The test to be applied by the magistrate when deciding whether to commit a person to trial on indictment – Clause 1.82 – Proposed paragraphs 94 (a) and (b) of the *Magistrates Court Act 1930*

The Explanatory Statement states:

> This amendment inserts the new test to be applied by a Magistrate in determining whether a matter should be committed to the Supreme Court. It is intended that the Magistrate is able to take the prosecution evidence and any evidence put by the defendant into account in applying the test. This means that the Magistrate may also take the credibility of any witness who has given evidence into account in making the assessment of whether there is a reasonable prospect of conviction.

No human rights issue needing comment arises.

[14] A South Australian judge who conducted the first judge-alone murder trial in that State was moved in his reasons for decision to recommend that such trials should only be conducted before a jury: see *R v Marshall* (1986) 43 SASR 448 at 499, where White J quoted passages from *Brown* and *Kingswell*.

Appeals from a Magistrates Court to the Supreme Court – Schedule 1.87 – 1.94

The Explanatory Statement states:

> The Bill abolishes the current two-stage process for appeal by way of order to review where an application for an order nisi is made before a decision from the Magistrates Court can be reviewed by the Supreme Court and replaces it with a one step process where an appeal is instituted by lodging a notice of appeal. It preserves the nature of the appeal for a review of a decision, but changes the process by which that appeal occurs. The new appeal process is referred to as a 'review appeal' to refer to the distinction between the grounds of appeal for an appeal under *Magistrates Court Act 1930*, Division 3.10.3 and those under Division 3.10.2.

No human rights issue needing comment arises.

Costs in criminal matters in the Magistrates Court - Schedule 1.95 Proposed section 244 of the *Magistrates Court Act 1930*

Is the provision in proposed clause 244 of the *Magistrates Court Act 1930* that the award of costs lies in the unconfined discretion of the magistrate an adequate principle for dealing with the question of costs in summary matters? Or should the Act frame the power of the magistrate on the principle that in ordinary circumstances, an order for costs should be made in favour of a successful defendant?

Subclause 244(1) of the *Magistrates Court Act 1930* would provide that:

> (1) The power of the court to award costs is subject to the following:
>
> (a) if the court makes a conviction or order in favour of the informant—it **may order** that the defendant must pay to the informant the informant's costs;
>
> (b) if the court dismisses the information, or makes an order in favour of the defendant—it **may order** that the informant must pay to the defendant the defendant's costs; … .

Thus, the decision to award costs lies in the apparently unconfined discretion of the magistrate. In relation to this discretion, the courts have held that generally it should be exercised in favour of a successful defendant.

In *McEwen v Siely* (1972) 21 FLR 131 at 136, the Supreme Court of the Australian Capital Territory proposed that the power of the Magistrates Court to award costs should be exercised upon the principle that "generally an acquitted defendant should have his costs unless he has by his conduct brought the proceedings or their continuation upon himself or unless some other consideration is present which makes it unjust to award him costs".

This approach was approved by a majority of the High Court in *Latoudis v Casey* [1990] HCA 59 – see at [12] and [16]-[17] per Mason CJ, at [13] per Toohey J, and at [2]-[3] per McHugh J. Mason CJ said:

> In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs. As the Report of Committee on Costs in Criminal Cases (N.Z.), (1966), par.30, stated:
>
> > "Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences."

The question is whether the position of a successful defendant would be better protected were the Act to frame the power of the magistrate on the principle that in ordinary circumstances, an order for costs should be made in favour of a successful defendant.

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

The Committee notes that provision for a regulation to fix a scale of costs is not on its face problematic; much will turn on the content of the regulation. It should be noted that in *Latoudis v Casey* at [3] McHugh J noted that "[a]n order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connection with the litigation: *Kelly v. Noumenon Pty Ltd* (1988) 47 SASR 182, at p 184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory".

Ex parte hearings by a Magistrates Court – Schedule 1.84 Proposed subsection 110(1A) of the *Magistrates Court Act 1930*

The Explanatory Statement states:

> The Bill also makes changes to the *Magistrates Court Act 1930*, section 110. That Act currently allows for summary matters to be heard in the absence of the defendant if the defendant has been served with a summons, in what is termed an ex parte hearing. However the provisions for service of a summons do not require the defendant to be personally served with a summons, so there could be cases where a defendant knows nothing about a case that is being heard in his or her absence. This is incompatible with the *Human Rights Act 2004*, section 22(2)(d), that provides the right to be tried in person. There could also be cases where a defendant may have been personally served with the summons but does not understand the potential consequences of not attending court to have the matter heard.
>
> To remedy this situation the Bill amends the provisions of the *Magistrates Court Act 1930* so that the Magistrate may only proceed to hear a summary charge in the absence of the defendant if the Magistrate is satisfied that the defendant is waiving the right to attend in person, and that the decision to waive the right is a (sic) fully informed and made voluntarily.

The Committee agrees with this analysis and has no further comment to make.

DOMESTIC VIOLENCE AND PROTECTION ORDERS BILL 2008

This is a Bill for an Act about orders to protect people from domestic violence and personal violence. It would repeal the *Domestic Violence and Protection Orders Act 2001* and regulations and instruments made under that Act. The legislative scheme would be substantially restructured and some alterations made to the existing scheme.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

General remarks

The Committee outlined a general framework for assessing compatibility of a domestic violence law with human rights standards in *Scrutiny Report No 4* of the *Sixth Assembly*, concerning the Domestic Violence and Protection Orders Amendment Bill 2005. Its detail will not be repeated here, but it might be noted that the Committee identified how the protection of a number of rights stated in the *Human Rights Act 2004* might be enhanced by a law of the kind adopted in the 2005 Bill – and now restated in this Bill. These rights were:

- the right to life: HRA subsection 9(1);
- the right to liberty and security of person: subsection 18(1);
- the right to equality before the law: section 8;
- the right to protection of the family and children: section 11; and
- the right to privacy and reputation: section 12.

The Committee added:

> when attention is paid to the precise detail of a domestic violence law, and in particular to the ways in which such a law bears upon the respondent to an order made under such a law, other rights may come into focus. The law may operate to impose significant limitations on the right to property, or the liberty of movement of a respondent, or to authorise a deprivation of liberty.[15] A respondent might argue that her or his privacy, or their right to be part of a family is adversely affected.
>
> This is far from a complete rights framework for an analysis of a domestic violence law, but it shows, as is commonly the case, that rights are in conflict one with another.

Particular topics identified in *Scrutiny Report No 4* of the *Sixth Assembly*

In this earlier report, the Committee commented on three particular aspects of the Bill. These were:

- the extension of the definition of "personal injury" to include "nervous shock" in the context of the definition of domestic violence or personal violence – see now subclause 13(3) when read with paragraph 13(1)(a) and subclause 14(1);

- the breadth of the definition of "relative" in these contexts – see now paragraph 15(2)(c)(ii) and the Examples; and

[15] See the scope of the final orders that may be made under subclause 48(2).

- the restrictions placed on the extent to which information concerning proceedings and orders made under the scheme might be made public – see now Part 13.

These issues will not be canvassed again, and Assembly Members who wish to pursue these matters are referred to *Scrutiny Report No 4*.

It needs to be added that there is, when compared to the existing scheme, a significant extension of the range of persons who can be subject to domestic violence to "someone who is in a domestic relationship" with another person (see paragraph 15(1)(e)). The Explanatory Statement explains that:

> A 'domestic relationship' is defined by reference to the *Domestic Relationships Act 1994*, which provides for this type of relationship by stipulating that a personal relationship may exist between people although they are not members of the same household.

In its general part, the Explanatory Statement stated:

> The Bill responds to community concerns regarding the need to ensure all types of domestic relationships are contemplated by the Act. This Bill extends the category of relationship within the Act and now includes intimate heterosexual and homosexual relationships in circumstances where the parties do not reside together. It has long been recognised that intimate relationships such as boyfriend/girlfriend and same sex relationships of this type, share similar dynamics to those relationships already contemplated by the Act.

The Committee notes that in the third paragraph of the Explanatory Statement dealing specifically with clause 15, the reference should be s 15(1)(e) (rather than to (c)), and considers that it would be better to combine what is said on this topic in the general part and the specific part of the Explanatory Statement.

There are some other provisions that give rise to rights issues that will be noted briefly

Position of children under 10 – clause 20

Does the provision in clause 20 that a child who is less than 10 years of age cannot be named as a respondent on an order adequately recognise the right in HRA subsection 11(2)?

As stated in the Explanatory Statement:

> Clause 20 introduces a new provision to exclude a child who is less than 10 years of age as being named as a respondent on an order. The prior reach of the legislation to children under the age of criminal responsibility is considered inappropriate due to the potential incapacity of that child to understand an order or the consequences of any breach of the order. It is not intended that this provision exclude children from being named on orders when they require protection. It relates only to children under the age of 10 named on orders as respondents.

HRA subsection 11(2) states:

> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

From one perspective, clause 20 is consistent with this right, for the reason stated in the Explanatory Statement. From another, it might be argued that it removes the ability of some other child – who is the target of the domestic or personal violence – to obtain an order against another child who is the perpetrator of the violence.

If this second approach is accepted, it might be argued that the object of the clause could be achieved in a way that accorded greater recognition to the interests of the victim child – that is by limiting clause 20 to circumstances where the child was incapable of understanding the order or the consequences of any breach of the order.

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

Right to fair trial – circumstances in which an interim order can become a final order – clause 36

The Committee notes that some provisions of the Bill are designed to deal with the human rights issues arising from the decision of the Supreme Court in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125.

In very general terms, clause 36 clarifies the circumstances in which an interim order can become a final order, and clauses 93 and 94 provide for a review by the Magistrates Court of an order that has become final as a consequence of the interim order process.

The Committee considers that these amendments meet the problem identified in *SI bhnf CC v KS bhnf IS* and that no human rights issue arises out of clauses 36, 93 and 94.

Reasons for judicial decisions

Should a judicial officer making an emergency order be obliged to state reasons for this decision?

While a police officer must give reasons for making an application to a judicial officer for an emergency order (paragraph 70(2)(c)), it appears that the judicial officer is not obliged to give reasons for making the order (while being obliged to give reasons for refusing to make the order – paragraph 70(c)).

The Committee cannot see any reason why the decision to make an order should not be accompanied by an obligation to give reasons for the decision.

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

Right to liberty and the detention of a person against whom it is proposed to seek an emergency order

Does the provision in clause 75 for the detention of a person against whom it is proposed to seek an emergency order derogate from the right to liberty and security of person (HRA subsection 18(1)), and, if so, is it in terms of HRA section 28 a justifiable limitation of that right?

Only a police officer may apply to a judicial officer for the latter to make an emergency order (clauses 68 and 69). Such an order "may prohibit the respondent from being on premises where the aggrieved person lives" (subclause 76(1)), and may do "something mentioned in section 48 (2) … (other than paragraph (a)) only if the judicial officer making the order is satisfied that it is necessary to ensure the safety of the aggrieved person" (subclause 76(2)).

A judicial officer may make an emergency order if satisfied that:

(i) the respondent has behaved in a way that satisfies the judicial officer that there are reasonable grounds for believing that, if an emergency order is not made, the respondent may cause physical injury to, or substantial damage to the property of, the aggrieved person or a child of the aggrieved person; and

(ii) the aggrieved person is a relevant person in relation to the respondent; and

(iii) it is not practicable to arrest the respondent, *or there is no ground to arrest the respondent*; … (emphasis added).

The right to liberty is engaged by clause 75:

> **75 Detention of people against whom emergency orders sought**
>
> (1) If it is proposed to apply for an emergency order against a person, a police officer may—
>
> (a) if appropriate, remove the person to another place; and
>
> (b) detain the person until the application for the order has been dealt with and a copy of any order made is given to the person.
>
> (2) A person must not be detained under this section for longer than 4 hours.

This provision appears to derogate from the right in HRA subsection 18(1):

> 18 (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 is it 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 State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".

There is some judicial support in High Court authority for the principle just stated (see *Scrutiny Report No 25* of the *Sixth 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 *Sixth 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 75 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 very wide, given that he or she need consider only whether the detention is "appropriate";

- in the light of paragraph 69(a)(iii), it would appear that 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.

The Committee notes that the Explanatory Statement makes no reference to the Human Rights Act and does give any indication of matters relevant to an assessment of whether clause 75 is a proportionate limitation on the right to liberty. There is no statement of the object of the clause, or of whether its object could be achieved by means that are less restrictive of the right to liberty.

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

Points of clarity

Subclause 10(1) states that "[a] domestic violence order may be made as a final, interim or emergency order", and paragraph 10(2)(b) states that such an order "may include a prohibition mentioned in section 48 (What final orders (other than workplace orders) may contain)". A literal reading suggests that any kind of domestic violence order may include a prohibition mentioned in section 48, but this may not be intended.

In **subclause 18(1)**, the Committee suggests that a Note cross-refer to the Dictionary definition of "aggrieved person".

Comment on the Explanatory Statement

This Explanatory Statement does not meet the standards expected. In many places it offers only a very brief explanation of the relevant provision. In other places – see the list below – it appears to state the effect of the clause inaccurately.

This is a very important piece of law, and the Explanatory Statement can play a role in making it intelligible to the public. The Committee suggests that it be carefully reviewed.

Clause 15 – the Explanatory Statement states that "Clause 15 (previously s 10A) defines (not exhaustively), who is a relevant person for the purpose of this Act". This may not be correct, for subclause 15(1) says that "For this Act, ***relevant person***, in relation to a person (the ***original person***), means …(etc)". The use of the word "means" appears to have the consequence that this is an exhaustive definition.

Clause 18 – the Explanatory Statement states that "Clause 18 (previously s 11) specifies who may apply for certain non-emergency orders …". This is hard to follow, in that subclause 18(1) says that "An aggrieved person may apply to the Magistrates Court for a non-emergency protection order". There is no restriction to "certain" kinds of such orders.

Clause 26 – the Explanatory Statement states that "The clause also provides that the registrar may do anything they consider appropriate in relation to the application on, or before, the return date". This refers to subclause 26(2), but it is more limited in scope, in that it says "The registrar may do anything else to *assist the hearing* of the application that the registrar considers appropriate …".

Clause 29 – the last sentence reads: "If a final order is considered as the result of an interim order, and the final order not made the interim order is inherently revoked". This sentence is obscure. What are the words "final order is considered as the result of an interim order" meant to convey?

Clause 30 – the wording should be "that *only one* interim order".

Clause 31 – last sentence – the wording should be "litigation guardian", and "to assist" be replaced with "assisting".

Clause 35 – subclauses 35(3)–(5) are not explained.

Subclause 36(1) – this is a very loose description of this subclause. It is the rest of the clause that has the effect described in the Explanatory Statement in relation to subclause 36(1).

Clause 43 – in explanation of subclause 43(4), add "or s 44 applies".

Clause 46 – it would be better to follow the wording of subclause 46(1) and say "the Magistrates Court on application *may* make a final order" (rather than "can make").

In the second paragraph, the second sentence is a statement of but one example where clause 46 may apply, and this should be made clear.

Clause 59 – third paragraph – the sentence "It is not intended that an applicant or respondent will be able to have an order amended unless there has been a relevant change in circumstances, or the order as it stands is considered to be too restrictive of the personal rights and liberties of the respondent" – is very obscure and should be reworded in positive language to say what is intended (as against what is not).

Clause 60 – last sentence – "Clear instructions are to be given by the Court to the respondent and the applicant regarding the application of such an amendment". Where does the clause make such a stipulation?

Clause 62 – while this may be the drafter's intention, subclause 62 does not state that "the Magistrates Court, on application, may amend a final order by extending it in circumstances where the court is satisfied that the aggrieved person is still in need of the protection afforded by the order".

There should also be explanation of subclause 62(4).

This list is not intended to be exhaustive.

GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL 2008

This Bill would amend the *Guardianship and Management of Property Act 1991* to provide for a scheme of health attorneys.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

The purpose of the Bill is well explained in the Explanatory Statement and it also draws attention to and adequately discusses the way in which human rights norms are engaged and any incompatibility with them may be justified. (The Explanatory Statement does not refer to relevant provisions of the *Human Rights Act 2004* – which appear be sections 10 and 18.)

The Committee refers the Assembly to the Explanatory Statement.

WORK SAFETY BILL 2008

This is a Bill for an Act to repeal the *Occupational Health and Safety Act 1989* and create a regime of work safety law. The scheme will extend coverage beyond the traditional employment relationship to cover all people who have a worker-like relationship; attach responsibility to those who control the generation of risks and who are in a position to eliminate or minimise the risks; state risk management principles; place a general duty on all employers (broadly defined) to consult all workers on matters that may affect their health and safety; permit private prosecution for unions and employer organisations; contain extensive provision to enhance the enforcement of and compliance with the law; and provide for review of administrative decisions.

Report under section 38 of the Human Rights Act 2004
Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

In the time that has been available to it, the Committee cannot provide a detailed rights analysis. All the provisions of the Bill have been carefully reviewed, and the comments that follow identify in summary form what the Committee sees to be significant rights issues.

Strict liability offences and imprisonment

The Explanatory Statement states:

> The Bill has strict liability offences in clauses 30, 31, 32, 33, 34, 39, 41, 47, 48, 53, 55, 70, 72, 88, 89, 121, 122, 128, 135, 138, 144, 150, 159 and 181. … . The rationale [for their inclusion] is that people who owe work safety duties such as employers, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.
>
> Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offences is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

A key issue is whether the presumption of innocence (HRA subsection 22(1)) involved in the creation of a strict liability offence (or the provision for strict liability in relation to an element of the offence) is justifiable where the penalty may amount to imprisonment.[16]

See clauses 31, 32, 33 and 34. A similar issue arises with respect to the reversal of the onus of proof in clause 43.

The Committee has often drawn attention to HRA compatibility issue where imprisonment is a potential penalty.[17] The Committee considers that where imprisonment is a potential penalty, the Explanatory Statement should state a specific justification in this regard.

Powers of entry onto premises

The Committee draws attention to two aspects of the scheme:

- clause 63 will empower the authorised representative of a registered organisation to enter premises, it being unusual for the law to authorise persons who are not government officials to exercise such a power; and

- the powers of inspectors to enter premises are somewhat wider than those usually found in regulatory schemes – see in particular paragraph 74(1)(e), clause 81 (noting subclause 81(4)), and subclause 84(1).

[16] Alternatively, provision for imprisonment might be seen to derogate from HRA subsection 18(1) and/or section 10.
[17] See *Scrutiny Report No 37 of the Sixth Assembly*, concerning the Corrections Management Bill 2006; see too *Scrutiny Report No 46 of the Sixth Assembly*, concerning the Occupational Health and Safety Amendment Bill 2007.

Power of an inspector to require a person to provide their home name and address

By subclause 88(1), "[a]n inspector may require a person to state the person's name and home address if the inspector believes on reasonable grounds that the person is committing, is about to commit, or has just committed, an offence against this Act".

The Committee always draws attention to such powers, for while not unusual, they do alter the common law rule that a government official does not have such a power.

The power to require persons to answer questions or produce documents

In Part 6, there is a scheme whereby a person who is believed on reasonable grounds to have contravened, or be contravening, a provision of this Act may be required to attend a hearing to answer questions and/or to produce documents (clause 119). The person commits and offence of he or she refuses to attend or does not answer the questions or produce the documents (clause 121 and 122).

By subclause 123(3):

> The person cannot rely on the common law privileges against selfincrimination and exposure to the imposition of a civil penalty to refuse to answer the question or produce the document.

The usual extent of protection against the use of the information derived in a subsequent prosecution of the person (except for making false statements) is significantly reduced by subclause 123(4):

> However, any information, document or thing obtained, directly or indirectly, because of the giving of the answer or the production of the document is not admissible in evidence against the person in a civil or criminal proceeding, **other than a proceeding for an offence against this part** or the Criminal Code, part 3.4 (False or misleading statements, information and documents) (emphasis added).

In other words, the person can be compelled to self-incriminate in respect of offences under Part 6 of the Bill (and not, it should be noted, for any offence under other parts of the Bill). There are a number of offences in Part 6 that do not relate to any falsity in statements made by a person under compulsory examination.

This is nevertheless a significant inroad on the privilege against self-incrimination.

Private prosecutions

The Committee draws attention to clause 218 which, as stated in the explanatory statement:

a. enables a prosecution to be commenced with the written consent of the secretary of a registered union or the chief executive of a registered employer orgainsation (sic);
b. extends the authority to prosecute safety duty offences in the Bill (with the ability to proscribe other offences – this will not include the industrial manslaughter offences in the *Crimes Act 1900*); and
c. reserves the right of the Director of Public Prosecutions to intervene and take over or discontinue a private prosecution at any time.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-185 being the Education (Government Schools Education Council) Appointment 2008 (No. 5) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member of the Government Schools Education Council, chosen from nominations of the peak organisation representing parent associations of government schools.**

Disallowable Instrument DI2008-186 being the Health Records (Privacy and Access) (Fees) Determination 2008 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2007-197 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-187 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 6) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drivers competing in a special stage of the 2008 BRM Silverstone Safari Rally.**

Disallowable Instrument DI2008-188 being the Cultural Facilities Corporation (Governing Board) Appointment 2008 (No. 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* **revokes DI2008-50 and appoints a specified person as a member and chair of the Cultural Facilities Corporation.**

Disallowable Instrument DI2008-189 being the Long Service Leave (Building and Construction Industry) Contractors Levy Determination 2008 (No. 1) made under section 53 of the *Long Service Leave (Building and Construction Industry) Act 1981* **determines the levy payable by a registered contractor during a quarter.**

Disallowable Instrument DI2008-190 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 5) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2008-55 and determines a specified organisation to be a Parking Authority for Block 19 Section 63, suburb of City.**

Disallowable Instrument DI2008-191 being the Financial Management (Periodic and Annual Financial Statements) Guidelines 2008 made under section 133 of the *Financial Management Act 1996* **prescribes the level of reporting requirement in the periodic and annual financial statements.**

Disallowable Instrument DI2008-192 being the Surveyors (Chief Surveyor) Practice Directions 2008 (No. 1) made under section 55 of the *Surveyors Act 2007* **revokes DI2003-118 and determines the Chief Surveyor Practice Directions.**

Disallowable Instrument DI2008-193 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2008 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2007-241 and determines specified ACTTAB agencies to be sports bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2008-194 being the Education (Government Schools Education Council) Appointment 2008 (No. 6) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member, chosen from nominations of the peak organisation representing students, of the Government Schools Education Council.**

Disallowable Instrument DI2008-195 being the Education (Government Schools Education Council) Appointment 2008 (No. 7) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member, chosen from nominations of the peak organisation representing students, of the Government Schools Education Council.**

Disallowable Instrument DI2008-196 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2008 (No. 3) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **appoints a specified person to the ACT Accreditation and Registration Council.**

Disallowable Instrument DI2008-198 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2008 (No. 1) made under subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985* **revokes DI2006-66 and AF2006-15 and approves AF2008-96, the blood donation declaration form.**

Disallowable Instruments—Comment

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

No Explanatory Statement / Is this instrument validly made?

Disallowable Instrument DI2008-197 being the Prohibited Weapons (Laser Pointers) Declaration 2008 made under section 6A of the *Prohibited Weapons Act 1996* **determines circumstances in which a person is able to possess and user a laser pointer.**

The Committee notes that there is no Explanatory Statement for this instrument. While the Committee accepts that the absence of an Explanatory Statement does not affect the validity of an instrument, the Committee has consistently maintained that not providing an Explanatory Statement can operate to deny the Committee, the Legislative Assembly and the general public vital information about the operation of an instrument.

This instrument is made under section 6A of the *Prohibited Weapons Act 1996*, which provides:

> **6A Declarations about authorised possession and use of laser pointers**
>
> (1) The registrar may, in accordance with any guidelines under section 6B, declare that the possession or use of a laser pointer is authorised.
>
> *Note 1* A power to make a statutory instrument includes power to make different provision in relation to different matters or different classes of matters (see Legislation Act, s 48.)
>
> *Note 2* A reference to an Act includes a reference to a provision of an Act (see Legislation Act, s 7 (3)).
>
> (2) A declaration may provide for the authorisation—
>
> (a) to apply generally or in a particular case; or
>
> (b) to be conditional.
>
> (3) A declaration is a disallowable instrument.
>
> *Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.
>
> (4) In this section:

laser pointer means a prohibited weapon that is a hand-held article, commonly known as a laser pointer, designed or adapted to emit a laser beam with an accessible emission level of greater than 1mW.

Section 6B provides:

6B Guidelines for declarations under section 6A

(1) The Minister may make guidelines about the making of a declaration under section 6A.

(2) The registrar must comply with any guidelines under this section.

(3) A guideline is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The Committee notes that any guidelines under section 6B of the Prohibited Weapons Act must be complied with. That being so, it would assist the Committee (and the Legislative Assembly) if there was some indication – probably in an Explanatory Statement – as to whether or not (a) any guidelines under section 6B have been made and (b) if such guidelines *have* been made, that they have been complied with.

In making this statement, the Committee notes that there is no indication on the ACT Legislation Register that guidelines have been made under section 6B of the Prohibited Weapons Act. Nevertheless, the Committee considers that it would be helpful if this was indicated to the Committee (and the Legislative Assembly) by way of an Explanatory Statement.

Minor typographical errors

Disallowable Instrument DI2008-199 being the Adoption Review Committee Appointment 2008 (No. 1) made under section 17 of the *Adoption Act 1993* **appoints specified persons as members of the Adoption Review Committee.**

The Committee notes that, for no apparent reason, this instrument contains the notation "Attachment A" in the top right-hand corner. The Committee also notes that paragraph 3 of the Explanatory Statement for this instrument contains, at the beginning an unnecessary "On". Finally, the Committee notes that it is not strictly correct for paragraph 5 of the Explanatory Statement to indicate that the instrument "seeks" to make the appointments in question, as the instrument, in fact, makes the appointments.

Inadequate Explanatory Statement

Disallowable Instrument DI2008-200 being the Environment Protection (Declarations of non-application of section 48) Revocation 2008 (No. 1) made under section 48 of the *Environment Protection Act 1997* **revokes DI2002-156, DI2003-14 and DI2003-31.**

This instrument revokes three declarations made under section 48 of the *Environment Protection Act 1997*. Section 48 provides:

48 Consultation on application for environmental authorisation

(1) If the [Environment Protection Authority] receives an application under section 47 in relation to a prescribed activity (other than a prescribed activity to which a declaration under subsection (6) applies), the authority must prepare a written notice—

(a) containing a brief description of the prescribed activity and its location; and

(b) indicating where copies of the application may be obtained; and

(c) inviting anyone to make written submissions about the application to the authority, at the place stated in the notice, no later than the date (the ***relevant date***) stated in the notice.

(2) The relevant date must be at least 15 working days after the day the notice is notified under the Legislation Act.

(3) The notice is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

(4) The authority must also publish the notice in a daily newspaper.

(5) The notice must be notified under the Legislation Act, and published in a daily newspaper, within 10 working days after the day the authority receives the application.

(6) The Minister may, in writing, declare that this section does not apply to a prescribed activity.

(7) A declaration under subsection (6) is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

This means that the effect of the revocations in question is that there is no requirement to notify the public of "prescribed activities" to which a revocation applies.

The instrument in question merely states that it revokes three disallowable instruments that are identified merely by their "DI" references. The Explanatory Statement for the instrument states:

> The *Environment Protection Act 1997* (the Act) establishes a scheme for application and grant of environmental authorisations for activities that may harm the environment. Part of that scheme includes a requirement in section 48 that the Environment Protection Authority (the EPA) advertise applications for authorizations and accept submissions from the public about them.
>
> Subsection 48(6) empowers the Minister to declare that Section 48 (and its requirement for advertisement of authorisation applications) does not apply to a given activity.
>
> This instrument revokes the following disallowable instruments made under subsection 48(6) of the Act:
>
> - DI2002-156 Environment Protection Declaration of non-application of section 48 2002 (No. 1);
> - DI2003-14 Environment Protection Declaration of non-application of section 48 2003 (No. 1); and
> - DI2003-31 Environment Protection declaration that consultation under section 48 on application for an environmental authorisation is not to apply to this prescribed activity 2003 (No. 2).

There is no indication, either in the body of the instrument or in the Explanatory Statement, as to what the revoked instruments relate to or why they have been revoked.

The Committee notes that DI2002-156 relates to the burning of fireworks seized under the *Dangerous Goods Act 1975*. The Explanatory Statement for that instrument states:

> This instrument exempts the EPA from advertising applications from ACT Workcover in relation to burning fireworks seized under the *Dangerous Goods Act 1975*. If the proposed activity is advertised, there are substantial safety and security issues, so it is far preferable that it take place without public knowledge.

DI2003-14 relates to the operation of commercial landfill. The Explanatory Statement for that instrument states:

> This instrument exempts the EPA from publicly notifying an application for an authorisation for the operation of a commercial landfill. It is expected that ACT NOWaste will make an application for an environmental authorisation in relation to the disposal of materials from sites that were destroyed by bushfires in January 2003. Advertising the application of the environmental authorisation will take time and it is preferable to prepare the disposal site and commence operation as soon as possible.
>
> This exemption is intended for that authorisation only, and will be revoked once the application from ACT NOWaste has been processed.

DI2003-31 relates to "outdoor concert activities". The Explanatory Statement for that instrument states:

> This instrument exempts the EPA from publicly notifying an application for an authorisation to undertake outdoor concert activities, using amplifying equipment where the venue has the capacity to hold more than 2 000 persons and is not an authorised concert venue. It is expected that Ministry of Sound Pty Ltd will make an application for an environmental authorisation in relation to a Bush Fire Benefit concert to be held on 16 March 2003 at Stage 88 in Commonwealth Park. Advertising the application for the environmental authorisation will take time and cannot be completed before the planned concert.
>
> This exemption is intended for that authorisation only, and will be revoked once the application from Ministry of Sound has been processed.

The Committee considers that it would have been of assistance to the Committee (and the Legislative Assembly) if the Explanatory Statement for the instrument now before the Committee contained some background information on the instruments being revoked. It would also have been of assistance for the Explanatory Statement to have indicated why these instruments (and particularly DI2002-156) are now being revoked. As a result, the Committee draws attention to the Explanatory Statement for this instrument, under principle (b) of the Committee's terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

Minor typographical error

Disallowable Instrument DI2008-201 being the Planning and Development (Fees) Determination 2008 (No. 5) made under section 424 of the *Planning and Development Act 2007* **revokes DI2008-165 and determines fees payable for the purposes of the Act.**

The Committee notes that section 5 of this instrument refers to "the legislation register". For consistency with other instruments, it would be preferable if the reference were to "the ACT Legislation Register".

Accessibility of legislation

Disallowable Instrument DI2008-202 being the Building (ACT Appendix to the Building Code of Australia) Determination 2008 made under subsection 136(2) of the *Building Act 2004* **revokes DI2005-176 and deletes requirements for the removal and handling of asbestos based materials.**

This instrument makes a new "Australian Capital Territory Appendix to the Building Code of Australia". It is made under subsection 136(2) of the *Building Act 2004*. Section 136 provides:

> **136 Building code**
>
> (1) In this Act:

building code means the Building Code of Australia prepared and published by the Australian Building Codes Board, as amended from time to time by—

(a) the Australian Building Codes Board; and

(b) the Australian Capital Territory Appendix to the Building Code of Australia.

(2) The Minister may, in writing, make an Australian Capital Territory Appendix to the Building Code of Australia.

Note Power given under an Act to make a statutory instrument (including the Australian Capital Territory Appendix to the Building Code of Australia) includes power to amend or repeal the instrument (see Legislation Act, s 46 (1)).

(3) The Australian Capital Territory Appendix to the Building Code of Australia is a disallowable instrument.

Note 1 A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Note 2 An amendment or repeal of the Australian Capital Territory Appendix to the Building Code of Australia is also a disallowable instrument (see Legislation Act, s 46 (2)).

Section 2 of this instrument provides that "the Australian Capital Territory Appendix to the Building Code of Australia as published in the Building Code of Australia 2008 edition, Volumes One and Two" is the Australian Capital Territory Appendix to the Building Code of Australia. This is, in effect, an incorporation of material by reference.

Section 2 of the instrument provides that subsection 47(5) of the *Legislation Act 2001* does not apply to the instrument. Subsection 47(5) provides:

(5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

This means that there is no requirement to publish "the Australian Capital Territory Appendix to the Building Code of Australia as published in the Building Code of Australia 2008 edition, Volumes One and Two" on the ACT Legislation Register.

The Committee notes, however, that the Explanatory Statement for this instrument offers the following explanation for the dis-application of subsection 47(5):

> The determination provides that for the purposes of this determination, section 47(5) of the *Legislation Act 2001* does not apply. This clause removes the requirement for the text of the ACT Appendix to the Building Code of Australia to be notified. Doing so would impinge on copyright as the Appendices to the Building Code of Australia are published by the Australian Building Codes Board (ABCB), the copyright owner.

The Committee also notes that section 4 of the instrument provides:

> 4 A copy of the Australian Capital Territory Appendix to the Building Code of Australia is available for inspection by members of the public between 9am and 4.30pm on business days at the ACT Planning and Land Authority shopfront, Dame Patty Menzies House, 16 Challis Street, Dickson.

As a result of section 4, the Committee considers that there has been an appropriate balancing of the interests of the copyright owners, on the one hand, and the accessibility to the general public of material upon which the instrument relies, on the other.

Subordinate Laws—No comment

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

Subordinate Law SL2008-30 being the Road Transport Legislation Amendment Regulation 2008 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* **and the** *Road Transport (Vehicle Registration) Act 1999* **allows the Road Transport Authority to include information or material in renewal notices for driver licences and vehicle registration.**

Subordinate Law SL2008-31 being the Road Transport (Third-Party Insurance) Amendment Regulation 2008 (No. 1) made under the *Road Transport (General) Act 1999* **amends the *Road Transport (Third-Party Insurance) Regulation 2000* by revising the maximum premiums that can be charged by an authorised insurer for the various premium classes for CTP policies.**

Subordinate Laws—Comment

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

Accessibility of legislation / Minor typographical error

Subordinate Law SL2008-32 being the Agents Amendment Regulation 2008 made under the *Agents Act 2003* **prescribes the new education qualifications necessary for an applicant to become eligible for a real estate, stock and station and business agent's licence or certificate of registration.**

Section 8 of this subordinate law inserts a new section 18A into the *Agents Regulation 2003*. New section 18A provides:

> **18A Disapplication of Legislation Act, s 47 (6)**
>
> The Legislation Act, section 47 (6) does not apply to the *Administrative Arrangements Order* (Cwlth).
>
> *Note* The text of an applied, adopted or incorporated instrument applied as in force from time to time is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (6) is not disapplied (see s 47 (7)).

Subsection 47(6) of the *Legislation Act 2001* provides:

> (6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
>
> (a) the law or instrument as in force at the time the relevant instrument is made;
>
> (b) each subsequent amendment of the law or instrument;
>
> (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
>
> (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

As stated in the Explanatory Statement to this subordinate law, the effect of new section 18A is that the Commonwealth *Administrative Arrangements Order* (AAO), which is incorporated by reference in the Agents Regulation, is not a notifiable instrument and, as a result, is not required to be published on the ACT Legislation Register.

The Committee notes that the AAO is referred to in the definition of "approved", in the Dictionary for this instrument, which provides:

> ***approved***, for the Property Services Training Package (CPP07), means approved by the Commonwealth Department of State responsible for training under the *Administrative Arrangements Order* (Cwlth), as in force from time to time.

While the Committee would generally prefer that material incorporated by reference is subject to the requirements of section 47 of the Legislation Act (and, in particular, to the requirement that it be published on the ACT Legislation Register), the Committee also notes that this particular material is already readily available on the Internet (eg at http://www.pmc.gov.au/parliamentary/index.cfm). That being so, the Committee makes no further comment on this subordinate law, other than to observe that it might assist users of the Agents Regulation if there was an indication (perhaps in the Explanatory Statement to this subordinate law) as to where the AAO can be found.

Finally, the Committee notes that the reference to "notified instrument" in the 4th line of page 5 of the Explanatory Statement for this subordinate law should, presumably, be a reference to "*notifiable* instrument".

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 20 August 2008, in relation to comments made in Scrutiny Reports Nos. 55, 57 and 57 concerning the following Bills:
  - ACT Civil and Administrative Tribunal Bill 2008;
  - ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008; and
  - ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008 (No. 2).
- The Attorney-General, dated 21 August 2008, in relation to comments made in Scrutiny Report 57 concerning the Sexual and Violent Offences Legislation Amendment Bill 2008.

The Committee wishes to thank the Attorney-General for his helpful responses.

Bill Stefaniak, MLA
Chair

August 2008

LEGAL AFFAIRS—STANDING COMMITTEE (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No 1)

Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No 4)

Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No 1)

Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**

Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No 1)

Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No 1)

Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No 1)

Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 **(PMB)**

Bills/Subordinate Legislation

Report 15, dated 22 August 2005
Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
Hotel School (Repeal) Bill 2005
Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September
Civil Law (Wrongs) Amendment Bill 2005 **(PMB)**

Report 18, dated 14 November 2005
Guardianship and Management of Property Amendment Bill 2005 **(PMB)**

Report 19, dated 21 November 2005
Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006
Registration of Relationships Bill 2006 **(PMB)**
Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Report 28, dated 7 August 2006
Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006
Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006
Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006
Crimes Amendment Bill 2006 (PMB)
Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007
Civil Partnerships Bill 2006

Report 43, dated 13 August 2007
Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)
Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)
Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007
Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007
Crimes (Street Offences) Amendment Bill 2007 (PMB)
Legal Profession Amendment Bill 2007

Report 47, dated 12 November 2007
Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 49, dated 3 December 2007
Government Transparency Legislation Amendment Bill 2007 (PMB)
Sentencing Legislation Amendment Bill 2007 (PMB)
Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)
Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008
Children and Young People Amendment Bill 2007 (PMB)
Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)
Long Service Leave (Private Sector) Bill 2007 (PMB)

Bills/Subordinate Legislation

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008
Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007
Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Report 53, dated 7 April 2008

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2008
Disallowable Instrument DI2008-23 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 3)
Disallowable Instrument DI2008-24 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 4)
Disallowable Instrument DI2008-25 - Emergencies (Bushfire Council Members) Appointment 2008

Report 54, dated 5 May 2008

Crimes (Forensic Procedures) Amendment Bill 2008
Protection of Public Participation Bill 2008 (PMB)
Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2008 (PMB)
Subordinate Law SL2008-10 - Magistrates Court (Building Infringement Notices) Regulation 2008

Report 55, dated 10 June 2008

Disallowable Instrument DI2008-54 - Legal Profession (Bar Council Fees) Determination 2008 (No. 1)
Disallowable Instrument DI2008-58 - Major Events Security Declaration 2008 (No. 1)
Disallowable Instrument DI2008-59 - Major Events Security Declaration 2008 (No. 2)
Projects of Territory Importance Bill 2008
Waste Minimisation (Container Recovery) Amendment Bill 2008 (PMB)

Report 56, dated 23 June 2008

Disallowable Instrument DI2008-104 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2008 (No. 1)
Subordinate Law SL2008-18 - Domestic Animals Amendment Regulation 2008 (No. 1)
Subordinate Law SL2008-21 - Dangerous Substances (Explosives) Amendment Regulation 2008 (No. 1), including a regulatory impact statement

Report 57, dated 28 July 2008

Civil Partnerships Amendment Bill 2008 (PMB)

Bills/Subordinate Legislation

Crimes (Controlled Operations) Bill 2008
Disallowable Instrument DI2008-120 - Nature Conservation (Flora and Fauna Committee) Appointment 2008 (No. 1)
Disallowable Instrument DI2008-99 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2008 (No. 1)
Justice and Community Safety Legislation Amendment Bill 2008 (No. 2)

Report 58, dated 18 August 2008

Disallowable Instrument DI2008-129 - Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2008 (No. 1)
Disallowable Instrument DI2008-130 - Health Professionals (Fees) Determination 2008 (No. 3)
Disallowable Instrument DI2008-133 - Public Place Names (Bonner) Determination 2008 (No. 1)
Disallowable Instrument DI2008-145 - Attorney General (Fees) Determination 2008
Disallowable Instrument DI2008-159 - Architects (Fees) Determination 2008 (No. 1)
Disallowable Instrument DI2008-168 - Water and Sewerage (Fees) Determination 2008 (No. 2)
Disallowable Instrument DI2008-176 - Residential Tenancies Tribunal Appointment 2008 (No. 1)
Disallowable Instrument DI2008-177 - Residential Tenancies Tribunal Appointment 2008 (No. 2)
Legislative Assembly (Members' Staff) Amendment Bill 2008
Subordinate Law SL2008-29 - Juries Fees Amendment Regulation 2008 (No. 1)

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Reports No. 55 of 10 June 2008, No. 57 of 28 July 2008 and No. 58 of 18 August 2008. I offer the following response in relation to the Committee's comments on the ACT Civil and Administrative Tribunal (ACAT) Bill 2008, the ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008, and the ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008 (No 2). In response to the Committee's comments on the Justice and Community Safety Amendment Bill 2008 (No 2), I refer the Committee to the response below regarding the power to issue a warrant requiring a subpoenaed person to be brought to the tribunal.

ACT Civil and Administrative Tribunal Bill 2008

Inclusion of small claims matters in the ACAT's jurisdiction

The Committee has raised the question of whether the determination of common law causes of action up to $10,000 (i.e. small claims) by the ACAT raises human rights issues. Allowing the ACAT to hear and determine small claims matters allows for increased access to justice, by providing a more appropriate and accessible forum for small claims hearings. The transfer of the small claims jurisdiction is an attractive option as it does not fit well within the broader civil jurisdiction of the Magistrates Court – claims procedure is different, and hearings vie for priority with more substantial criminal and other matters.

Incorporation within a consolidated tribunal provides the possibility of an accessible jurisdiction for dealing with small civil matters. It would also provide a better fit as a 'one stop shop' for a range of related claims presently associated with residential tenancies, building disputes and utility matters. The Bill requires that before the General President allocates a case, they must consider the nature and complexity of the case, and whether to allocate a member with special qualifications and expertise to handle the case. It should be noted that within the existing ACT tribunals, a number of tribunals handle a large number of what might be considered small civil disputes. This is particularly the case in relation to the Residential Tenancies Tribunal. Ultimately, the inclusion of small claims is a

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policy decision to be made by government. In this case, for the aforementioned reasons, the government believes the inclusion of the small claims jurisdiction will facilitate better processes and improved access to justice.

Procedure of the tribunal

The Committee has expressed concern regarding the tribunal's rule making powers and the flexibility given to sitting tribunal members to control proceedings. Although the certainty created by rules is desirable, excessive and unnecessary rigidity in procedure may frustrate access to justice and lead to unjust outcomes, particularly in relation to the subject matter to be dealt with by the tribunal. The tribunal and its members must have an appropriate level of flexibility to deal with individual cases, and not be unjustifiably bound by rules inappropriate in the circumstances which may create additional costs and unnecessary delays. The Bill strikes a balance between certainty and flexibility by allowing the tribunal to determine procedural rules for general application, whilst allowing for flexibility in the appropriate circumstances.

With respect to the Committee's comments regarding allowing a rule to prescribe a longer time for doing a thing than what was initially prescribed in the Act, once again I reiterate the importance of allowing the tribunal to run its own caseload, and to have the opportunity to extend time periods specified by the Act in appropriate circumstances, without needing to resort to time and resource-intensive legislative amendment. I note that a rule may only extend, and may not shorten a time for doing a thing under the Act. Lengthening the time available to complete a process is more likely to result in greater fairness and improved access to justice.

Privilege against self-incrimination

The Committee suggests that notes to subclause 41(1) and to clause 33 refer to sections 170 and 171 of the *Legislation Act 2001*. Sections 170 and 171 state that an Act must be interpreted to preserve the common law privileges against self-incrimination, exposure to the imposition of a civil penalty and client legal privilege. I thank the Committee for its comment, which I will address by way of a government amendment.

Public hearings

It is a fundamental principal of our justice system that justice not only be done, but that justice must be seen to be done. Allowing public access to courts prevents abuse of power behind closed doors. Any provision which considers the possibility of closing a court should begin from the principle that the court should be opened, unless there is a strong public policy reason to the contrary. The exceptions to the open court rule in the Bill have been drafted consistently with the right to fair trial provision in the *Human Rights Act 2004*, and allow sufficient scope for the closure of the court where the right to a public hearing is outweighed by competing interests.

Power to issue a warrant requiring a subpoenaed person to be brought to the tribunal

It is necessary to ensure that witnesses vital to a hearing are compelled to attend the tribunal, to avoid unnecessary delays and additional costs to the parties. Accordingly, clause 42 creates a limited power to issue a warrant requiring a subpoenaed person to be brought before the tribunal, which balances the right to liberty and security of person against the tribunal's fundamental object of resolving matters brought before it as quickly as is consistent with achieving justice. The first check on this power is that the order may only be made by a presidential member, whose independence is ensured because they may only be removed from office by way of judicial commission. Secondly, the warrant may only be issued where the tribunal has taken reasonable steps to contact the person,

and the issue of the warrant is in the interests of justice. This step ensures that the presidential member will carefully consider and balance the competing rights in each particular case. Finally, clause 43 sets out stringent procedures for the police officers who execute the warrant. The procedures include that an officer must release the person if the officer reasonably believes that the person cannot be immediately brought before a presidential member. This procedural requirement ensures that a person subject to such a warrant will not be detained for any longer than is necessary to bring the person to the tribunal to give the subpoenaed evidence. These checks and balances ensure that clauses 42 and 43 comply with section 18 of the Human Rights Act. The power to issue the warrant is clearly not arbitrary, as it may only be exercised where it is in the interests of justice (which are clearly defined in the clause) and at most will result in a person being detained for a very short length of time.

Costs

The Committee considers that there should be some explanation of why the usual rule in civil matters that the "loser pays" does not apply in the civil disputes jurisdiction of the tribunal. The costs policy in the Bill starts from a "user pays" principle, but allows for adjustment depending on the circumstances. I note that clauses 48 and 49 are wide in their application, allowing the tribunal to award costs in a variety of circumstances including where the tribunal finds in favour of the party, where a party causes unreasonable delay, and where a party contravenes an order.

ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008

Commencement

The commencement provision was included for precisely the reason that the Committee has identified, which is to allow sufficient flexibility in the timing of various jurisdictions commencing in the new tribunal's jurisdiction.

Issuance of non-disclosure certificate by a Minister

The Committee has requested justification for this limitation on a right to a fair trial. The right of a Minister to issue a non-disclosure certificate is clearly limited to instances where the disclosure of information is not in the public interest. A basic and established principle of judicial review is the right of government to decline to disclose information where the disclosure is not in the public interest (refer section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)), justifying its inclusion in the tribunal's administrative review jurisdiction.

The Committee has asked whether the non-disclosure certificate provisions apply to the civil jurisdiction. The Bill does not propose to extend the application of the public interest test to the civil jurisdiction, as these provisions have been crafted in the context of administrative review, not civil matters. As suggested by the Committee, the ACAT may use its powers in Part 5 to control its procedure.

Finally, the Committee has requested an explanation of the intended effect of proposed subsection 22H(2). Subsection 22H(1) effectively provides that this division is a code, excluding the operation any other interpretative or other rule of law concerning the "public interest". However, subsection 22H(2) provides that the Division does not affect the operation of the *Human Rights Act 2004*. Accordingly, to the extent that a provision of the *Human Rights Act 2004* and any relevant jurisprudence on a human right might assist in determining what is and is not in the public interest and when information should be released, it may be considered by the tribunal.

ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008 (No 2)

Amendments proposed to the *Occupational Health and Safety Act 1989*

The Committee observed that proposed section 9 of the Act (see Part 1.77 of Schedule 1 of this Bill) would confer on the Minister a power to grant to a person (or persons) an exemption from complying with any or all provisions of the *Occupational Health and Safety Act 1989*. The Committee commented that it appreciates that this proposal substantially restates the existing position under section 9 of the Act, and that the point of the new provision is to permit an unsuccessful applicant to seek review of the decision by the ACAT instead of, as at present, the AAT.

I note that it would have been impractical to re-examine, from scratch, every policy decision that underlies administrative reviews in the ACT. I note the Committee's interest in the provision and will advise the relevant policy area of its interest.

The Committee has asked, where the ACAT reverses a refusal of the Minister to grant an exemption, is the tribunal decision "an exemption" so that it is a disallowable instrument? The Committee noted that in principle, the ACAT decision should be so treated, for otherwise the Assembly has no control over the power to dispense with the operation of the laws it has enacted. It is not easy to see how an ACAT decision can be notified and presented to the Assembly.

Decisions of a tribunal should not be the subject of the ordinary disallowance process. Instead, in the ordinary course decisions of a tribunal may be examined by the Assembly and, within the constitutional restraints placed on the Assembly, may be the subject of legislative action by the Assembly.

Protection of confidential information in proposed section 184 of the *Utilities Act 2000*

The Committee accepted that most of the proposed amendments are designed merely to replace provisions of an existing law providing for review by the AAT with provisions providing for ACAT review. In these cases, a reader looking at a particular part of Schedule 1 and at the Explanatory Statement could well see what that part of Schedule 1 was designed to do.

The Committee commented that in proposed Part 12 there may be an instance where the provisions in Part 1.103 introduce matter not found in the existing Act or in the ACAT Act. Proposed section 184 of the Utilities Act would make provision for the protection of confidential information by ACAT. It may have missed something, but the Committee cannot see any parallel provision in the Utilities Act or in the ACAT Act. The Committee asked, does the provision in proposed section 184 of the Utilities Act, which would make provision for the protection of confidential information by ACAT, engage the right to a fair trial (HRA subsection 21(2)), and if so, is any incompatibility justifiable?

New section 184 of the Utilities Act is taken from section 172 of the existing Utilities Act, which provides:

172 Protection of personal and confidential information

(1) The council must preserve the confidentiality of information gained in the exercise of its functions, including—

(a) personal information; and

(b) information that—

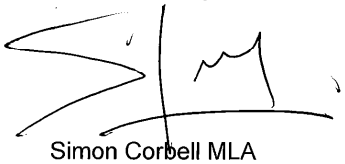
(i) could affect the competitive position of a utility or another person; or

(ii) is commercially sensitive for some other reason.

New section 184 of the Utilities Act does not impact on the right of a fair trial – it simply protects information of a commercially significant nature obtained in the course of proceedings under the Utilities Act before the ACAT.

I trust that the above comments clarify the provisions and issues raised, and I again thank the Committee for its observations.

Yours sincerely



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20 AUG 2008

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Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly Committee Office
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Bill

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 57 of 28 July 2008. I offer the following response in relation to the Committee's comments on the Sexual and Violent Offences Legislation Amendment Bill 2008 (the Bill).

The right of an accused to adduce evidence on a criminal trial

The rule in *Browne v Dunn* [1894][1] is intended to ensure 'fairness in adversarial proceedings'[2] by ensuring that a witness is given the opportunity to respond to a contradictory version of events which may be given by a witness for the other side. In a criminal trial, this means that if the defence intends to lead evidence which challenges the evidence of a prosecution witness, the defence must cross-examine the prosecution witness on the contradictory version of events, so that the prosecution witness has the opportunity to comment on it. [3]

Proposed section 38C prohibits the personal cross-examination of a complainant and other vulnerable witnesses in sexual and violent offence proceedings by a self-represented accused. If an accused refuses legal representation, or refuses to co-operate with the person's legal representative, the rule in *Browne v Dunn* may be breached, because the complainant or vulnerable witness may have no opportunity to respond to the contradictory case put by the accused. The purpose of proposed paragraph 38C(4)(b) is to ensure that the court warns a self-represented accused person about the implications of the rule in *Browne v Dunn*. It is not a restatement of the prohibition already established in common law and as such does not impose any penalty upon the accused that will compromise their ability to adduce evidence probative of their innocence. The warning is not a limitation on the right of an accused to examine prosecution witnesses or the right to a fair trial.

[1] *Browne v Dunn* [1894] 6 R 67.
[2] New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* Report 101 (2003), 78.
[3] Andrew Ligertwood, *Australian Evidence Law* (3rd ed, 1998) 506.

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Proposed section 38C is modelled on a similar provision in the Victorian *Evidence Act 1958* developed in response to recommendations made by the Victorian Law Reform Commission in the *Sexual Offences: Law and Procedure* Final Report[4]. The Commission reported that the courts already have experience in dealing with self-represented accused persons who unintentionally breach the rule in *Browne v Dunn* when cross-examining witnesses. Gleeson J in *R v Birks*[5] suggested that in such a case the judge should allow the accused to give evidence in breach of the rule and allow the prosecution to apply for permission to recall an earlier witness whose evidence is disputed, so that the witness can give evidence-in-chief about the matter in dispute. The Commission reported that this would be an appropriate way of dealing with the rare situation in which a witness has not had the opportunity to contradict the evidence of the accused, because the accused has declined court-appointed legal representation, and recommended that there was no need to amend the law to permit this to be done. The courts are well equipped to deal with a breach of the rule in *Browne v Dunn* in a way that ensures that the rights of an accused are upheld and accordingly no amendments were made in the Bill.

The right of an accused to a fair and public hearing

Proposed section 39 provides the court with the discretion to order that the court be closed to the public while a complainant or similar act witness in a sexual or violent offence proceeding is giving evidence. While the note appended to proposed subsection 39(2) is not part of the Act, and therefore has no legal effect, it serves to remind and provide guidance to the court of the principles under the *Human Rights Act 2004*, in particular the right to a fair and public hearing, and the recognised circumstances where closing the court to the public would be a justifiable limitation on this right. It is not the intention of proposed subsection 39(3) to override human rights principles and there is no express exclusion of the operation of the *Human Rights Act 2004* in this subsection or any other provision of the Bill.

Equal application of the law

Proposed subsection 39(4) replicates existing subsection 39(3) of the *Evidence (Miscellaneous Provisions) Act 1991*. The existing subsection ensures that, if the court exercises its discretion to close the court to the public, the complainant is entitled to have a person of his or her choosing present in court. Existing subsection 39(3) was originally inserted into the *Evidence Act 1971* in 1985 as part of a raft of amendments to reform the substantive and evidentiary laws relating to sexual offences. It was envisioned that the person would be a social worker, parent or close friend to offer moral support. The amendments were designed to create a climate more conducive to the reporting of sexual assaults by victims. The amendments were developed to have a two-fold aim, namely the securing of a fair trial for an accused person and, simultaneously, the minimising of both the reality and perception of unfairness to the victim under the existing law.

The Bill provides the complainant with a statutory entitlement to have a support person present while they are giving evidence. This entitlement recognises that a complainant is not a party to the proceeding, and therefore is not legally represented in the proceeding, placing them in a position of disadvantage against the accused. The entitlement acts to place the complainant on equal footing with the accused. The accused is not disadvantaged by this measure, as the accused is fully entitled to the presence of as many support people in the courtroom while they are giving their evidence, and is legally represented in the proceeding. Therefore, the subsection does not impact on the right in the *Human Rights Act 2004* to equality before the law. It would be unfortunate and

[4] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure* Final Report (2004).
[5] *R v Birks* (1990) 19 NSWLR 677, 688.

undesirable for one protective measure to hinder the operation of another protective measure, when both measures are required to prevent the re-victimisation of a complainant in court proceedings. Therefore, proposed subsection 39(4) ensures that an order to close the court to the public does not inadvertently override an order permitting the presence of a support person while a complainant is giving evidence in a proceeding. The explanatory statement has been amended to clarify this position.

The right to a fair trial and admission of recording/written statement

Proposed division 4.2A
Proposed division 4.2A permits the tendering and admission into evidence of an audiovisual recording of an interview between the police and children or intellectually impaired persons as their evidence-in-chief at trial. Proposed division 4.2A does not involve the derogation of any human rights. A copy of the transcript will be provided to the accused, and the accused will be entitled to listen to and view the recording, in advance of the trial. This will provide the accused with sufficient time to prepare itself for the cross-examination. The accused person's right to cross-examine the witness is not affected by proposed division 4.2A, and will occur in the normal manner following the admission of the recording. The recording provides a reasonable substitute for the live testimony of the witness, as it continues to allow the accused, the judge and the jury to observe the visual and oral characteristics of the witness, such as their demeanour, voice and language. The court is also provided with a broad discretion to admit or reject the recording as the evidence-in-chief of the witness. The explanatory statement has been amended to clarify that proposed division 4.2A does not involve derogation of human rights for the above reasons.

Proposed division 4.2B
It is important to note that proposed division 4.2B does not permit the prosecution to adduce evidence from a witness in the form of a statement made out of court by a witness. Proposed division 4.2B establishes a unique process to facilitate the taking of the entire evidence of children, intellectually impaired people, or vulnerable adults, in sexual assault offence proceedings. While the evidence is taken prior to the trial, it is taken under the same conditions as it would have been at trial. The pre-trial hearing is conducted in court, with the relevant parties in attendance, and with the normal rules of evidence applying. The evidence taken under these conditions is recorded and then played at the trial. Therefore the ordinary rules of hearsay would not apply to this evidence.

Proposed division 4.2B does not involve the derogation of any human right. Pre-recording the evidence before the trial, but after the committal proceeding, ensures that an accused person has sufficient notice of the case against them to conduct an adequate cross-examination. An accused person will have the same opportunity to cross-examine a witness at a pre-trial hearing as they would have had at trial. If at trial evidence is given, which the accused could not have anticipated when the pre-recording was conducted, so that the witness could not have been cross-examined on it, provision is made for the witness to be recalled at trial for cross-examination on this new evidence.

The safeguard proposed in section 40T allows the accused to make an application to the court for an order that witness attend at trial to give further evidence. The court may only make such an order if satisfied that:

(a) if the witness had given their evidence-in-chief, cross-examination and re-examination evidence at trial (as opposed to the evidence being pre-recorded), the witness could be recalled; and

(b) it is in the interests of justice to make the order.

The requirement, that the judge must be satisfied that the witness could be recalled, does not include the case in which the accused wishes to cross-examine the witness. The accused would have already cross-examined the witness at the pre-trial hearing. Recalling a witness involves the calling of a witness, who has already given their evidence-in-chief, cross-examination and re-examination evidence, to give further evidence, for example, in relation to fresh evidence given at trial and not anticipated by the accused when the pre-recording was conducted.

Amendments to the *Magistrates Court Act 1930*

In 1980, the majority of the Australian High Court considered that committal proceedings constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. [6] However, it is doubtful whether modern human rights jurisprudence would consider that committal proceedings are a necessary prerequisite for a fair trial. The European Court of Human Rights has been reluctant to prescribe precisely which procedures are necessary for compliance with Article 6 of the Convention, provided national systems conform to the principles prescribed within it. There is nothing within the terms of the Article itself, or in the jurisprudence of the Court, to necessitate a preliminary hearing before trial. [7] The House of Lords has considered that the right to cross-examine at a preliminary hearing finds no place in most human rights instruments, perhaps in none. [8]

Despite this, the amendments to the *Magistrates Court Act 1930* do not abolish committal proceedings in the ACT, and therefore an accused person's right to a fair trial will not be affected. The amendments to the *Magistrates Court Act 1930*, which permit the tendering and admission into evidence at committal of a transcript of a recording of an interview between the police and a child or intellectually impaired person, do not engage human rights. The transcript is subject to the same rules in relation to the tendering and admission of a written statement, currently provided for in the *Magistrates Court Act 1930*. The accused is provided with notice that the prosecution intends to tender the transcript and has the opportunity to request to listen to, or view, the recording before the transcript is tendered. The accused is also provided with the opportunity to request that the child or intellectually impaired witness attend and give oral evidence-in-chief instead of having the transcript tendered. Even where the transcript is tendered, the accused will be provided with the opportunity to test the evidence through cross-examination, either at committal or in the case of a sexual assault victim, at trial.

The amendments to the *Magistrates Court Act 1930*, which prohibit absolutely the calling and cross-examination of alleged victims of sexual offences at committal, also do not engage human rights. Human rights literature recognises that the right to cross-examine witnesses is a relative guarantee. The mere fact that an accused was not provided with the opportunity to question a witness or that, despite the defence's request, the witness was not called, cannot in itself make the proceedings unfair. [9] While the accused will be prohibited from calling and cross-examining a victim of sexual assault at committal, the accused will continue to have an adequate and proper opportunity to challenge and question the victim at the trial.

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[6] *Barton v R* (1980) 147 CLR 77 at 100.

[7] John Jackson and Sean Doran, *The Future of Committal Proceedings in Northern Ireland* (2003) at para 5.6.

[8] *R v Bedwellty Justices, ex parte Williams* [1997] AC 225, per Lord Cooke of Thorndon.

[9] Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005) 294.

The human rights literature also recognises that the right to cross-examine witnesses can be limited. One of the recognised limitations is in cases involving victims of sexual offences who risk being further traumatized by confrontations with the alleged perpetrator of the offence. [10] The prohibition recognises that repeated cross-examination is likely to perpetuate the trauma and frustration of victims of sexual assault and disadvantage them in the presentation of their evidence. Despite the prohibition, the accused's rights are safeguarded by continuing to have the opportunity to test the evidence of the victim at trial.

Similar act witness

Under the Bill, a witness in a sexual or violent offence proceeding who falls within the definition of a similar act witness is afforded similar protections to those of a complainant in the proceedings while they are giving evidence. The following protections are available to a similar act witness:

- arranging the courtroom in a way which blocks the view of the accused from the witness,
- a prohibition on the personal cross-examination of the witness by a self-represented accused;
- the presence of a support person while the witness is giving evidence;
- closure of the court to the public while the witness is giving evidence; and
- evidence can be given via audiovisual link in a room separate to the courtroom but connected to it.

It must be remembered that these protections are available to a witness who is a complainant in a sexual or violent proceeding, regardless of the evidence they are giving. Therefore, a complainant will be protected even when they are giving evidence that he or she has on some occasion, other than an occasion for the charge, been sexually or violently assaulted.

However, a witness, other than a complainant, will only be afforded protection if the evidence they are giving in the proceeding is evidence that relates to an act committed on the witness by the accused, and is 'tendency or coincidence' evidence within the meaning of the *Evidence Act 1995* (Cwlth). The protections are designed to recognise that a witness, giving evidence of sexual or violent abuse allegedly committed by the accused, suffers from a vulnerability similar to that of the complainant, and is therefore deserving of protections to reduce the trauma and stress and likelihood for potential intimidation.

Pfennig v The Queen (1995)[11] provides a good example of the kind of situation the legislation attempts to address. Evidence of the abduction and rape of a young boy by the accused was adduced in a trial at which the accused was charged with the murder of another young boy to prove the requisite disposition. The evidence was admissible because the prosecution case pointed to an abduction of the boy for sexual purposes, and that this required a person of the requisite disposition equipped with the means of carrying out an abduction. The amendments in the Bill would ensure that, in the future, when evidence of this type is adduced through the testimony of the witness who has suffered at the hands of the accused, the witness would be afforded protection while giving this evidence.

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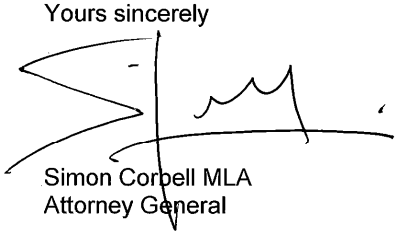
[10] Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005) 312.
[11] *Pfennig v The Queen* (1995) 182 CLR 461.

While the definition of 'similar act witness' is limited to tendency or coincidence evidence, the limitation is reasonable, as it is hard to imagine a situation in which the prosecution would call a witness to give evidence in a proceeding that he or she has, on some occasion other than the occasion for the charge, been sexually or violently assaulted by the accused and that evidence is not tendency or coincidence evidence. However, implementation of the legislation will be closely monitored to ensure that the definition appropriately covers the class of witness intended.

I trust that the above comments clarify the provisions and issues raised, and I again thank the Committee for its observations.

Yours sincerely



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