Legislative Assembly for the Australian Capital Territory

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Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Scrutiny Report No. 13 of 2001

28 August 2001

Terms of reference

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(2) The Committee will consider whether:

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

(i) meet the objectives of the Act under which it is made;

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

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

(iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.

(b) the explanatory statement meets the technical or stylistic standards expected by the Committee.

(c) clauses of bills introduced in the Assembly:

(i) do not unduly trespass on personal rights and liberties;

(ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) do not 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) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four members.

(4) 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 and circulation.

(5) The Committee be provided with the necessary additional staff, facilities and resources.

(6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

Members of the Committee

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Adviser: Mr Peter Bayne
Secretary: Mr Tom Duncan
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Celia Harsdorf
(Scrutiny of Bills and Subordinate Legislation Committee)

Role of the Committee

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

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment on them.

Eggs (Labelling and Sale) Bill 2001

This is a Bill for an Act to regulate the labeling and sale of hen eggs in the Territory.

Bills - Comment

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

Evidence (Miscellaneous Provisions) Amendment Bill 2001

This Bill would amend the Evidence (Miscellaneous Provisions) Act 1991 by creating a privilege in respect of certain communications by, to, or about a victim or alleged victim of a sexual offence.

Comment

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Right to a fair trial

The provisions of this Bill are quite complex, and it is not clear how they would impact o the conduct of a criminal trial. The Explanatory Memorandum does not provide a clear statement of the content of each provision, nor of how it would operate. In these circumstances, it is difficult to assess the Bill.

As the Explanatory Memorandum notes, a party to a matter, which of course includes a defendant charged with a sexual offence, is entitled to call evidence that is relevant to proof of the issues of fact involved. This is the primary rule for the admissibility of evidence: (section 56 of the *Evidence Act 1995*). With few exceptions, the common law required that a person was obliged, if called as a witness, to give evidence about a fact whether or not that person had been given that information in confidence.

This remains the case. It is very common in litigation for a person, such as a doctor, to be required to give evidence about matters communicated to the doctor in confidence, albeit that the communication was made for the purpose of the doctor treating, the confider of the information (the patient).

The Explanatory Memorandum states that in recent years, defence lawyers have sought to obtain from sexual assault counsellors information provided to the latter by complainants of sexual assault. The aim of this Bill is to create “a sexual assault communications privilege. The intent is to create a presumption that a person cannot be compelled to produce details of a protected confidence to [a] court and that it

cannot be used in evidence unless the court is satisfied that the evidence will have substantial probative value".

The Explanatory Memorandum states that defence lawyers have sought access to this information in order to prove consent by the complainant. This does not reflect the full range of uses of such information, and it is necessary to be aware of what is that range.

A statement made by a complainant to a counsellor after the alleged offence occurred has evidential value in a number of ways, and is of much use to the prosecution as it is to the defendant. Where the complainant made that statement when the events to which it relates were "fresh" in her or his mind, the prosecution may adduce evidence of the statement as evidence that the events occurred. That is, the hearsay rule is displaced in these circumstances; (section 66 of the *Evidence Act 1995*). In addition, if the statement is consistent with the account given by the complainant, the evidence of the statement will also enhance the credibility of the complainant as a witness of truth on the trial, and in this way permit the prosecution to submit that all of the evidence given on the trial by the complainant should be believed.

Where that statement was *not* made by the complainant when the events to which it relates were "fresh" in the mind of the complainant, the prosecution may nevertheless adduce evidence of the statement if the defendant has alleged that the complainant made a prior inconsistent statement, or had concocted the evidence given by the complainant; (section 108 of the *Evidence Act 1995*). If this occurs, the evidence of the statement may not only restore the credibility of the complainant, but also constitutes evidence that the events occurred; (section 60 of the *Evidence Act 1995*).

It is thus the case that the prosecution may make use of a statement made by a complainant to a counsellor after the alleged offence occurred. Such use is quite common. The Bill does not restrict this use of such statements, whether made in confidence by the complainant to the counsellor or not. See proposed new section 42, relating to consent to the use of a protected confidential communication.

By reason of such use by the prosecution, there arises a problem to which an answer is not apparent. If the prosecution proposes to adduce evidence of a statement made by a complainant to a counsellor, it would seem fair that the defendant be provided with all such statements, whether they support the prosecution or not. But would these provisions affect the ability of the prosecution to make such provision? The answer may well be no.

A defendant may make use of a statement made by a complainant to a counsellor for purposes other than to prove consent by the complainant. Where the statement was 'fresh', the defendant may rely on what is said in the statement about the existence of a fact issue as evidence of that fact. Where the statement was *not* 'fresh', (and of course where it was), the defendant may rely on any inconsistency between that is in the statement and what the complainant said in evidence in court as evidence of a lack of credibility of the complainant. This evidence of lack of credibility may then be used to submit to the jury that all of the evidence of the complainant should not be believed. Moreover, where the evidence of the statement is adduced on only a

credibility basis, it nevertheless becomes evidence that the events occurred; (section 60 of the *Evidence Act 1995*).

Thus, from the defendant's point of view, evidence of what a complainant said to a counsellor has multiple forensic uses, and may, in some cases, form, in addition to D's denials, the substance of the evidence of the defendant in exculpation. Any restriction on use of such evidence will reduce the ability of the defendant to adduce evidence probative of innocence where that evidence is critical to her or his defence.

A defendant may adduce evidence of *what he or she said* about the events in question. This evidence may be used as hearsay evidence of the truth of what was said where the statement was made when the events were 'fresh' in the mind of defendant. If it is alleged by the prosecution that the defendant made a prior inconsistent statement, or had concocted the evidence given by the defendant, the evidence of the statement may not only restore the credibility of the defendant, but is also evidence that the events occurred. On the other hand, a prosecution may adduce evidence of what a defendant as hearsay evidence of the truth of what defendant said on the bsis that defendant made an admission; (section 81 of the *Evidence Act 1995*). In this case, it would not matter that the admission was made later than the time when the events were 'fresh' in the mind of defendant, and thus, to this extent, there is some inequality in the treatment of the defendant. The prosecution may also make use of statements by defendant to show that he or she made a prior inconsistent statement.

It should be noted that the Bill does not appear to restrict the ability of a prosecution to obtain and adduce evidence of an out of court statement made by a defendant, even of that statement was made in confidence to a counsellor. (A person who becomes aware that he or she is accused of a sexual offence may well consult a counsellor.) One issue that arises is whether the Bill places the defendant on a footing of inequality in regards to the way that law would regard statements to counsellors by the complainant on the one hand, and the defendant on the other.

The general concern is whether these restrictions are such that it may be said that a defendant will be denied a fair trial. On the face of it, there is justification in so saying.

In *R v Seaboyer* [1991] 2 SCR 577, at p 609B-E, McLachlin J said, , in the judgment which she delivered on behalf of the majority in that case, that "it is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues in the case. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial" (as paraphrased by Lord Hope in *R v A* [2001] UKHL 25. This is not the end of the matter, for, as lord Hope also noted, there is a view that there is a "the balance between the rights of the defendant and those of the complainant" that is "in need of adjustment if women are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct" (ibid).

We will address below the question of how the Assembly might determine if the provisions of this Bill strike the appropriate balance. Before doing so, it is noted that the operation of these provisions in this Bill may be ameliorated by the trial judge

granting leave to the defendant to adduce the evidence – see proposed new sections 38 and 39. A number of matters should, however, be noted.

Of fundamental significance is that the admissibility of the evidence of the communication would lie in the discretion of the trial judge, (or be based on her or his making a discretionary judgment). This in itself raises the objection that on a criminal trial, the defendant's ability to adduce evidence probative of innocence should rest on rules and not on an exercise of judicial discretion. In addition, there are some more particular points about the scheme under the Bill.

First, the evidence of the protected confidence must, taken by itself or with other evidence, "have substantial probative value". There are some issues here. First, it is not clear to what the 'value' of the evidence relates. Evidence has probative value in the sense that it makes the existence of some fact more likely than it would be without the evidence. What that fact is will presumably for the defendant to nominate, but this is not entirely clear. Secondly, the test of "substantial probative value" is very high. Cases decided under the *Evidence Act 1995* have held that it means more that that the evidence has "significant probative value", and that in turn has been held to require a showing that the evidence tendered must cogently prove the fact to be established. It would appear that a showing of "substantial probative value" requires something more. It might be held to require a showing that the evidence of the statement of the complainant, would, if admitted, and taken with other evidence, be such as satisfy the trial judge that the jury would necessarily acquit the defendant. This test would be very hard to meet. At the least, there is great obscurity about just what would be required to meet this test that the evidence "have substantial probative value". Moreover, it is not clear on which party would rest the onus of proof to meet this test.

Secondly, the trial judge cannot give leave to the defendant is there is "other evidence of the protected confidence available". This is very unclear, and says nothing about the probative value of that evidence. The other evidence might be very weak, and assist the defendant very little, yet constitute a reason why the trial judge could not grant leave.

Thirdly, and notwithstanding that the evidence of the protected confidence has "substantial probative value", the trial judge may choose not grant leave on the basis that the public interest in preserving the confidence outweighs the public interest in allowing the evidence of the statement to be presented. The public interest in allowing inspection would seem to lie in defendant being granted a fair trial, and, given that the evidence must have "substantial probative value", it is difficult to see how there could be a countervailing public interest that would deny a defendant the ability to adduce the evidence.

Turning now to the general issue of whether the provisions of this Bill trespass unduly on rights and liberties, discussion in the judgments in *R v A* [2001] UKHL 25 (a decision of the UK House of Lords), provides some general guidance as how the Assembly might approach this issue.

The rights of the defendant that might be said to be infringed by the Bill are common law rights in the sense that Australian judges would acknowledge that a defendant is entitled to a fair trial. In *R v A* the court addressed the statement of those rights in

Article 6 of the European Convention. By Article 6(1), a person charged with a criminal offence is entitled to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". More particularly, by Article 6(3), the person has the right "(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as winterizes against him". These statements accord with the approach of the common law.

Some of the judges in *R v A* addressed the question of methodology when there arose an issue of whether a law was compatible with this Article. Lord Steyn said:

> 37. The methodology to be adopted is important. In a helpful paper … Lord Lester of Herne Hill QC has summarised the correct approach …:
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> > "The first question the courts must ask is: does the legislation interfere with a Convention right? … . It is at the second stage, when the Government seeks to justify the interference with a Convention right, under one of the exception clauses, that legislative purpose or intent becomes relevant. It is at that stage the principle of proportionality will be applied."
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> …
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> 38. It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. … The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play. … In determining whether a limitation is arbitrary or excessive a court should ask itself:
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> > "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Lord Hope said:

> 51. It is plain a balance must be struck between the right of the defendant to a fair trial and the right of the complainant not to be subjected to unnecessary humiliation and distress when giving evidence. The right of the defendant to a fair trial has now been reinforced by the incorporation into our law of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Human Rights Act 1998. But the principles which are enshrined in that article have for long been part of our common law. The common law recognises that a defendant has the right to cross-examine the prosecutor's witnesses and to give and lead evidence. The guiding principle as to the extent of that right is that prima facie all evidence which is relevant to the question whether the defendant is guilty or innocent is admissible. As the fact that the act of sexual intercourse was without the consent of the complainant is one of the essential elements in the charge which the prosecutor must establish, the defendant must be

> given an opportunity to cross-examine the prosecutor's witnesses and to give and lead evidence on that issue. That is an essential element of his right to a fair trial.
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> 52. But the extent to which a defendant may go in the exercise of his right to be given that opportunity is a matter to which the common law has failed to provide a satisfactory answer.

Lord Hope later addressed the terms of Article 6 and said:

> 91. But article 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witnesses. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial in article 6(1). The test of compatibility which is to be applied where it is contended that those rights which are not absolute should be restricted or modified will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved": … . A fair balance must be struck "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights": … . The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community and the protection of the individual.
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> 92. … . The prevalence of sexual offences, especially those involving rape, which are not reported to the prosecuting authorities indicates a marked reluctance on the part of complainants to submit to the process of giving evidence at any trial. The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation or distress.
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> …
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> 94. The question is whether these provisions have achieved a fair balance. This will be achieved if they do not go beyond what is necessary to accomplish their objective. That is the essence, in this context, of the principle of proportionality. Furthermore, to ask oneself whether they are fair to the defendant is to address one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate.

The Committee draws this general framework to the Assembly to assist to evaluate the provisions of this Bill.

Liquor Amendment Bill 2001

This Bill would amend the Liquor Act 1975by the repeal and the replacement of section 159 of the Act. The key provision in the proposed new section 159 is that if an information against a provision of the Act states that a substance is liquor, the statement is evidence that the substance is liquor within the meaning of the provision.

Comment

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The presumption of innocence

Proposed new section 159 may involve reversal of the burden of proof in respect of what may be an element of the relevant offence. It is however not clear how a court would interpret the effect of section 159. It may be that the defendant need only adduce evidence sufficient to raise an issue of fact as to whether the substance was liquor, in which case the prosecution would bear the legal onus of proof. On the other hand, a court might find that the defendant would need to prove, on the balance of probabilities, that the substance was not liquor. If the provision has this latter effect, it has the effect of qualifying the presumption of innocence; see *R v Director of Public Prosecutions; ex parte Kebeline* [1999] UKHL 43, per Lord Hope of Craighead.

Nevertheless, in the words of Lord Hope, such provisions “may not be as damaging to the presumption of innocence as might at first sight appear. There is also the question of balance, as to the interests of the individual as against those of society. The [European] Convention [for the Protection of Human Rights and Fundamental Freedoms] jurisprudence and that which is to be found from cases decided in other jurisdictions suggests that account may legitimately be taken, in striking the right balance, of the problems which the legislation was designed to address”.

Article 6(2) of that Convention provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Lord Hope noted views expressed by the European Court of Human Rights in *Salabiaku v France* (1988) 13 E.H.R.R 379:

“Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law ... . Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.

He went on to say: “The cases show that, although article 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse onus clauses, whether they be evidential (presumptions of fact) or persuasive (presumptions of law). In each case the question will be whether the presumption is within reasonable limits”. In order to resolve a particular matter, Lord Hope suggested a convenient way of breaking down the broad issue of balance into its essential components:

"… consider the following questions: (1) what does the prosecution have to prove in order to transfer the onus to the defence? (2) what is the burden on the accused - does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or (I would add) to which he readily has access? (3) what is the nature of the threat faced by society which the provision is designed to combat?"

The Committee commends this framework as a means to determine whether any qualification of the presumption of innocence involved in proposed new section 159 is justifiable.

Road Transport (Safety and Traffic Management) Amendment Bill 2001 (No 2)

This Bill would amend the *Road Transport (Safety and Traffic Management) Act 1999* to enable police officers to seize motor vehicles within a 10-day period of the vehicle being used by a person to commit burnouts and street racing offences.

Comment

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Right to property

By proposed new paragraph 10B(1)(a) combined with proposed new subsection 10B(1A) – see clause 4 – a police officer who believes on reasonable grounds that a vehicle has been used in committing offences relating to burnouts (section 5B of the Act) and street racing (section 5A of the Act) may seize the vehicle within a 10-day period of the vehicle being so used.

The Committee notes that

- There is no duty to return the vehicle before the expiration of 28 days even if a prosecution is not commenced (paragraph 10(1)(c));
- The chief police officer may return the vehicle at any time where the owner did not consent to its use to commit an offence (paragraph 10F(3)(b)); and
- A Magistrate may return the vehicle at any time where satisfied that otherwise excessive hardship of other injustice may be caused to a person (subparagraph 10G(2)(b)(ii)).

The Committee draws these matters to the attention of the Assembly. The issue is whether the deprivation of property involved in the seizure of a vehicle in these circumstances is justifiable.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments made concerning;

- Cooperatives Bill 2001 in Report No. 12 of 2001
- Food Bill 2001 in Report No. 12 2001

Copies of the responses are attached. The Committee thanks the Treasurer and the Minister for Health, Housing and Community Services for their helpful responses.

Paul Osborne, MLA
Chair

August 2001