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

SCRUTINY REPORT 29

10 MARCH 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

UNIVERSITY OF CANBERRA AMENDMENT BILL 2015

This is a Bill to amend the *University of Canberra Act 1989* with regard to the governance and operations of the University and its Council.

DANGEROUS SUBSTANCES (LOOSE-FILL ASBESTOS ERADICATION) LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend various laws of the Territory to facilitate the implementation of the Loose-fill Asbestos Insulation Eradication Scheme Buyback Program announced by Government on 28 October 2014.

BILLS—COMMENT

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

COURTS LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend a number of Territory laws relating to the administration of justice by Territory courts and tribunals; in particular, the *Coroners Act 1997*, to allow the coroner to establish a coronial investigation scene, and to list the powers that a police officer has within that scene to collect and preserve evidence; and, in relation to a trial for an indictable offence, the *Court Procedures Act 2004*, to state the relationship between interlocutory orders and the conduct of a trial, and to require pre-trial disclosure by parties of expert evidence.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

Coronial investigation scene orders (clause 20) and powers and the rights to privacy (HRA section 11), freedom of movement (HRA section 13), and liberty and security of the person (HRA section 18)

By clause 20 of the Bill, a new part 5A would be inserted into the Coroners Act to regulate coronial investigation scenes. A coroner may make an order directed to a police officer to establish such a scene and to exercise certain powers in relation thereto (proposed section 68C). Proposed section 68E states an extensive range of powers available to the police in order to preserve evidence related to the investigation. The exercise of these powers could limit various HRA rights; in particular the rights to privacy (HRA section 11), freedom of movement (HRA section 13), and liberty and security of the person (HRA section 18). In certain circumstances, a police officer may establish a scene in the expectation that a coroner may make an order (proposed section 68F), and exercise the powers stated in section 68E.

A noteworthy provision is that in proposed paragraph 68G(1)(a) that the police officer's powers "may be exercised by the police officer in any way that— (a) the officer considers reasonable in the circumstances". While broadly stated, a court might read down the scope of this power so that its

exercise could not limit an HRA or common law right; there is, for example, a question whether this power would permit the use of physical force against the person. The Committee draws this to the attention of the Minister, to consider whether, as expressed, paragraph 68G(1)(a) is adequate to achieve its intended objective.[1]

The Explanatory Statement (at 3-4) acknowledges that part 5A engages the HRA rights of freedom of movement and liberty and security of the person, and offers a justification in terms of HRA section 28. It does not mention the right to privacy, but the justification would apply to this right too.

The Committee refers the Assembly to the Explanatory Statement.

Provision regarding the effect of an interlocutory order made by the Supreme Court in relation to a trial for an indictable offence on the conduct of the trial by the trial judge (clause 24) and the right to a fair trial (HRA subsection 21(1))

Clause 24 of the Bill proposes to insert a new section 76 in the Court Procedures Act. Subsection 76(1) defines the jurisdiction of the Supreme Court in relation to the conduct of a criminal proceeding against an accused person for an indictable offence. Subsection 76(2) would empower a judge of the Supreme Court to make interlocutory orders, rulings or directions which would have effect, as the case may be, prior to the empanelling of the jury, or prior to the hearing of evidence before a judge conducting the trial alone. In some cases, the judge making an interlocutory order, etc would not be the judge involved in the trial. Whether or not this is so, subsection 76(3) proposes a rule for the effect of an interlocutory order, etc on the conduct of the trial:

> (3) An order, ruling or direction of the Supreme Court under subsection (2) is binding on the trial judge at the hearing of the trial unless in the opinion of the trial judge it is not in the interests of justice for the order, ruling or direction to remain binding.

HRA subsection 21(1) guarantees to everyone the right to have "criminal charges, and right and obligations recognised by law" decided by a court "after a fair and public hearing". It is easily accepted that fairness to a defendant on a criminal trial requires that on the trial itself he or she be permitted to adduce any evidence that is relevant to showing that the defendant should not be convicted.

From this standpoint, an issue of the compatibility of proposed subsection 76(3) and HRA subsection 21(1) may arise where, on an interlocutory ruling, a judge makes an order that certain evidence is admissible or not admissible, and later, on the trial, the defendant wishes to have the trial judge make a different ruling. This situation could easily arise. Whether a particular piece of evidence is relevant or not must be assessed by having regard to the totality of the evidence adduced or to be adduced on the trial. That is, a piece of evidence standing alone may not appear to be relevant, but,

[1] When interpreting a statute or subordinate law, courts apply the principle of legality to the effect of requiring a very clear statement in a statute that a particular common law right is displaced. In *Coco v The Queen* [1994] HCA 15 High Court endorsed the principle stated by O'Connor J in *Potter v Minahan* [1908] HCA 63 that "[i]t is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". In *Coco*, the court said that "curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'" ibid at [12]. This approach would inform the application by a Territory court of section 30 of the *Human Rights Act 2004*, which provides that "[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights". These are the rights stated in part 3 of the Act. In *Coco*, it was held that a power to enter onto premises for the purposes of installing listening devices in circumstances did not permit entry that constituted an unlawful trespass. The Court did not accept the argument that since a person would be unlikely to assent to the entry, a power to enter without permission to install devices was necessarily implicit in the power. Similar reasoning might apply to paragraph 68G(1)(a). That is, it might be argued that the explicit powers in section 68E to "remove" someone from a scene, or to "prevent" a person from entering a scene, did not implicitly authorise the use of force (a trespass to the person), and that the general words of paragraph 68G(1)(a), being tied to the powers in section 68E, did not extend those powers.

when placed alongside other evidence, does appear relevant. The problem is that on an interlocutory proceeding, the judge may not be aware of the totality of the evidence. At this stage, it is not possible to run the whole case so that the judge may assess the relevance of one piece of evidence in the context of all the other evidence.[2]

One the face of it, a rule that a ruling on evidence at the interlocutory stage is "binding" on the trial judge derogates from the right to a fair trial. It is, however, open to the trial judge to rule that it is not "in the interests of justice" to be bound by the interlocutory ruling. It is difficult to think that a trial judge would preclude a defendant from adducing evidence relevant to showing that the defendant should not be convicted. There may however be other circumstances where a defendant would not be prejudiced by the application of the primary rule in proposed subsection 76(3).

The Committee recommends that the Minister explain whether or not it is envisaged that there may be circumstances where the application of subsection 76(3) could result in prejudice to the ability of a defendant to adduce any evidence, or to act in any other way (such as by cross-examination), that is relevant or necessary to showing that the defendant should not be convicted. To the extent that this is possible, the right to a fair trial would be compromised. In this event, a justification in terms of HRA section 28 would be required.

The Committee notes that the very brief justification in the Explanatory Statement argues that "[t]he purpose of the amendments is to ensure that when initial proceedings happen in the Supreme Court before a judge who is not ultimately the trial judge, issues cannot be re-litigated by the parties **simply** because there is a new judge to test those arguments" (emphasis added). This misses the point that a defendant might wish to revisit an interlocutory ruling because, on the trial, there is additional material or evidence that bears on the desirability of the earlier ruling.

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

Pre-trial disclosure of material relating to evidence of experts to be adduced on the trial (clause 25) and the right to a fair trial (HRA subsection 21(1)), the right to be presumed innocent (HRA subsection 22(1)), and the right not to be compelled to testify against him- or herself (HRA subsection 22(2)(i)).

By clause 25, a new division 8.3 would be inserted in the Court Procedures Act to regulate the pre-trial disclosure of expert evidence. There is a short summary of the provisions of this division in the Explanatory Statement to which the Committee refers. In short, as the Explanatory Statement states, "[t]he effect of this division is to require [expert] evidence that would be presented during the trial to be disclosed prior to the trial". It is important to note that by proposed section 79C, the trial court has a discretion "to refuse to admit expert evidence sought to be adduced that has not been disclosed in accordance with division 8.3. The court may also grant an adjournment to the party who did not receive notice of the expert evidence if the non-disclosure would prejudice their case" (Explanatory Statement).

The Explanatory Statement argues that these provisions do not engage any of the HRA rights.

> The amendments requiring pre-trial disclosure of expert evidence by both parties do not limit the right to a fair trial. These amendments only apply to evidence that will be adduced at the trial. There is no impact on the rights and privileges that apply to the accused person in relation to self-incrimination - the disclosure provisions merely put a framework around the timing of the

[2] Of course, the trial judge must make relevance rulings in the course of the trial. He or she may however change a ruling, or admit a piece of evidence provisionally. At the interlocutory stage, terse options are not available.

> disclosure and require that both the prosecutor and the accused person give notice and copies of this evidence to each other within a reasonable timeframe. This will assist to reduce the lengthiness of trials by removing the potential for adjournments if unforeseen expert evidence is presented after the trial has commenced. In most cases, shorter trials mean fewer resources expended by the accused person, the prosecutor and the courts. Also, streamlining trial processes increases the likelihood that all matters will be heard more promptly, protecting the human rights of those charged with offences (at 2-3).

The question whether a defendant should be required to make any kind of pre-trial disclosure of her or his case-theory, or of evidence to be adduced, is far more complex and has provoked strong disagreement between and among judges and practitioners. Participants in this debate acknowledge that such requirements detract from common law rights of a kind also found in the HRA.

To assist the Assembly to appreciate the range of perspectives on this issue, albeit that it is focussed by this Bill on the pre-trial disclosure of expert evidence, this Report will outline three perspectives that have been advanced in debate on comparable NSW laws.

Pre-trial disclosure by the defence: a public defender's perspective

At a time when he was a NSW Senior Public Defender, Mr John Nicholson QC[3] wrote a paper[4] highly critical of the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000 of NSW. This Bill provided for a number of pre-trial obligations of the prosecution and the defence. (These obligations did not apply to all indictable offences, but only insofar as the trial judge imposed them.) His starting point was the right to silence, but he regarded this as a misnomer. He said that "[t]he right to silence is more properly described as a right against self-incrimination and a right to remain silent without suffering an inference of guilt as a consequence." He then added:

> Interwoven with the right to silence there has been a burden upon the prosecution when alleging criminal conduct against a person before a court, to prove its allegation without assistance from the person accused. This concept required the prosecution to advance its case even if ignorant of any answer the accused person might seek to make at trial should the accused choose to provide an answer in the defence case.

This statement reflects the common law position as stated by Brennan J in *Petty & Maiden v The Queen*[5]*:*

> A criminal trial is the prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so far as it reasonably can, any "defence" which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof: *Shaw v. The Queen* [1952] HCA 18 ; (1952) 85 CLR 365, at pp 379-380.

[3] Later appointed to the District Court of NSW.

[4] The 'Right' to Silence - Only Half a Right (2000) http://www.publicdefenders.justice.nsw.gov.au/pdo/public_defenders_right_silence.html

[5] (1991) 173 CLR 95.

In the Territory, the right against compelled self-incrimination is expressed in HRA paragraph 22(2)(i), which provides that "[a]nyone charged with a criminal offence is entitled to the following guarantees, equally with everyone else: ... (i) not to be compelled to testify against himself or herself or to confess guilt". The 'interwoven burden' on the Crown might be said to be encompassed by the right to a fair trial stated in HRA subsection 21(1).

Mr Nicholson's argument is that requirements imposed on the defence to assist the Crown 'chisel away' at the right against compelled self-incrimination and also assist the prosecution to continue to investigate after the matter has entered the litigation phase. He first instanced the statutory requirement that a defendant give a pre-trial notice of alibi, noting that "[f]ailure to give notice means the accused has to obtain leave of the court to adduce evidence in support of an alibi". He added:

> Of course, the prosecution, upon receiving the notice, invariably required the police to investigate the claimed alibi. Thus, in addition to gaining an insight into the defence being mounted in the litigation phase of the trial, the police would be given a 'second wind' in the investigation phase. Many an accused has been undone by his 'alibi notice' and many an alibi has evaporated after witnesses have been subject to inquiry by police checking their account. Worse, more than one alibi notice has been tendered against an accused person, as evidence going to the question of guilt.[6]

Mr Nicholson gave other examples; being the hearsay notice requirements of the Evidence Act, notices of an intention to adduce evidence disclosing a protected confidences, and notice of intention to adduce evidence of substantial mental impairment where the defendant contends that by virtue of the substantial mental impairment he/she is not liable to be convicted of murder. In all these instances, a defendant would signal in some detail the nature of the defence they proposed to run at the trial. In this way, the defence would assist the Crown to prosecute the defendant, and suggest lines of further investigation.

Mr Nicholson concluded with an attack of the rationale offered for the obligations for other kinds of pre-trial proposed in the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000 of NSW:

> The inter-weaving of the 'right' to silence and the burden of proving the guilt of an accused is being too rapidly unstitched for reasons not candidly articulated. Parliament abolished the dock statement arguing it lengthened criminal trials. Pre-trial disclosure is also advocated 'in order to reduce delays in complex criminal trials'. ... These reasons are nonsense and hide the true agenda. Pre-trial disclosure will lengthen the pre-trial litigation process, not diminish it. Any lengthening of the pre-trial process cannot diminish delay. Indeed, it is arguable it will not contribute to the more efficient use of court time, if the Court is caught up in adjudicating on what does or does not comply with disclosure requirements.
>
> The unstitching of the inter-weaving of the right to silence and the burden of proof is changing the balance of fundamental cultural values - presumptions of innocence, and burdens of proving guilt. With pre-trial disclosure comes the pressure on the accused to establish - at least pre-trial - that he has an arguable defence. What happened to the concept that the Crown must prove its allegations of criminal conduct without assistance from the person accused. What has happened to the concept that the prosecution should advance its case even if ignorant of any answer the accused person might seek to make. It won't be long before courts are asking accused persons 'How can you possibly run a trial?'

[6] Perhaps the point here is that the alibi notice is, when compared to other evidence, evidence of a false statement by the defendant, and thus evidence of consciousness of guilt.

> Finally, we should no longer kid ourselves that the right to silence has been preserved during the investigation stage. The investigation of those accused of crime will now (if it didn't in the past) continue right up until the jury retires to consider its verdict. Each requirement upon the defence to give a disclosure notice of one kind or another, is an abuse of the right to silence - an abuse which is occurring not only at the litigation stage, but also at the prolonged investigation stage.

Pre-trial disclosure by the defence: a public prosecutor's perspective

The *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* of NSW amended the scheme in the 2002 law in a number of ways. In particular, it requires pre-trial disclosure by both the prosecution and the defence in all indictable offence cases. The scheme was extended to disclosure of reports and evidence of experts (amongst other matters). A former NSW Director of Public Prosecutions was critical of the scheme.[7] Noting the extensive range of matters that must, as ordered by the court,[8] be disclosed by the defence, Mr Cowdrey and his co-author observed:

> It can be seen that they impose new and extensive disclosure obligations on the defence. Responding to familiar complaints from police about the imbalance of criminal justice, these provisions treat prosecution and defence as equals: but to do so ignores the fact that the state brings a criminal case against the individual and that a gross disparity in resources exists. Declining funding for legal aid generally and, via the Aboriginal Legal Service ('ALS'), for Aboriginal and Torres Strait Islander suspects and defendants specifically, will worsen this disparity.[9]

This paper queried the need for a mandatory disclosure regime. It noted that:

> the District and Supreme Courts already have the power to order pre-trial disclosure and other case management procedures under subsection 149E(1) of the Criminal Procedure Act, which empowers the court to "make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial", including an order of disclosure. In practice, only in a handful of cases have the courts intervened in such pre-trial management. All this strongly indicates that there was no need for more extensive defence pre-trial disclosure ....

It is to be noted that subsection 149E(1) does not refer specifically to the making of an order for disclosure, so it may be assumed that this is how it is applied in NSW. Clause 4733 of the *Court Procedures Rules 2006* of the Territory provides that if the accused person is committed for trial, the court may, on the appearance date— ... (j) give any other directions that the court considers appropriate. On the face of it, the ACT Supreme Court now has power to make disclosure orders as it would appear necessary on a case-by-case basis.

Pre-trial disclosure by the defence: a judicial perspective

There was debate within the NSW legal profession as to the wisdom of instituting a mandatory pre-trial disclosure regime. A majority of a Working Group on Trial Efficiency, comprised of a large number of legal experts, advised that mandatory disclosure would be counter-productive (notably in

[7] Mr Cowdrey; see David Dixon and Nicholas Cowdrey, "Silence Rights" (2013) 17(1) AILR 23.

[8] See subsection 143(2) of the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* of NSW.

[9] He also noted that "the prosecution [would be required] to institute procedures and create paperwork that in many instances will be unnecessary and burdensome. It is hard to reconcile this with the government's commitment to reducing unnecessary administration and delays in the criminal process" (at 24).

increasing costs "arising out of the need for the prosecution and defence to brief counsel significantly in advance of the trial date)", but this advice was not accepted prior to the enactment of the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013 (NSW)*.

Some NSW Supreme Court judges argue strongly in support of a case-management regime. A paper by Justices Johnson and Latham[10] referred to the statement of Brennan J in *Petty & Maiden*, and that it encapsulated "the basis of conventional opposition to attempts in NSW and elsewhere to introduce mandatory disclosure of the accused's case at a criminal trial on indictment, beyond the provision of an alibi notice". They also acknowledged the human rights basis for the common law approach.

> The absence of any requirement for disclosure stems from the presumption of innocence [compare HRA subsection 22(1)], the onus of proof [compare HRA section 22(1)] and the right to silence [compare HRA paragraph 22(2)(i)]. Generally speaking, it is the last of these that has been most frequently examined in the context of defence disclosure, because it is directly assailed by casting an obligation upon the accused to disclose the basis upon which he/she contests the Crown case.

But, their Honours added,

> [i]n the 20 years since *Petty & Maiden*, a number of developments in the law, technology, medical science and public administration have made significant inroads on the absolutism of that expression of the conduct of a criminal trial. Those developments, and the impact that they have had on the administration of criminal justice, go a long way towards explaining the introduction of a regime of compulsory pre-trial defence disclosure in NSW at the beginning of 2010.

They argue that these changes were driven in large part by what has been described as a "global public management revolution" over the last two decades of the 20th century. ... Essentially, all arms of government, including the courts, are required to give greater emphasis to economy, efficiency and effectiveness. The active intervention of a trial judge in the management of a case promotes those aims without necessarily compromising the accused's right to a fair trial". They then added:

> On a more fundamental and practical level, two of the most compelling reasons for active case management of a criminal trial are the increasing complexity of technical and scientific evidence that is routinely introduced in criminal trials, and the importance of maintaining and strengthening the participation of members of the public in the administration of justice in the form of jury service. The two are often related.

The point here is that jurors (and in particular those who are "gen X (born between 1961 and 1981)" are bored by way in which complex evidence is presented piecemeal, and in ways undiluted by aids such as diagrams and explanations.

On the other hand, an approach to court procedures that emphasises matters such as "efficiency" is strongly resisted by other judges. Chief Justice Spigelman of NSW put it colourfully when he said[11] that:

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[10] Criminal Trial Case Management : Why Bother? (2011) - http://www.aija.org.au/Criminal%20Justice%202011/Papers/Latham&Johnson.pdf

[11] *The 14th Lionel Murphy Memorial Lecture - Economic Rationalism and the Law* (2000) http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2000.pdf

> [o]ne characteristic of our administration of justice is its inefficiency when compared with some other systems of decision-making.
>
> There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, act on the basis that no one had any rights and not have to publish reasons for their decisions. Even greater "efficiency" would be quickly apparent if judges had made up their minds before the cases began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.
>
> Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law, in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision-making in order to ensure that governments act with the consent of the governed.
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> The values that are served by our system of justice and by our parliamentary institutions should not be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of a market system.

Evaluation

The Committee considers that there is reason to think that mandated pre-trial disclosure by a defendant on a charge for an indictable offence engages the HRA rights to the presumption of innocence and the right not to be compelled to self-incriminate. There may also be more broadly a question whether such disclosure limits the right to a fair trial (HRA subsection 21(1)).The issue then is whether derogation of these rights is justifiable in terms of HRA section 28.

This is a question for the Assembly to consider, and the Committee offers the above discussion to assist the Assembly. In the end, it is for the Minister to provide a persuasive justification. In contrast to a jurisdiction such as NSW, it must be noted that the Assembly has, by enactment of the *Human Rights Act 2004*, taken a stronger view of the significance of the fair trial rights than is the case at common law. The protection of these rights will necessarily come at the cost to efficiency in the conduct of trials, and it might be argued that considerations of efficiency and shorter trials should not easily trump the HRA fair trial rights.

Two more particular matters might be noted. First, there is the question whether the provisions in division 8.3 might be framed less restrictively of the rights. In particular, rather than rules that apply in all cases, it might be left to the relevant Supreme Court judges to determine, on a case-by-case basis, whether and to what extent they should apply.

Secondly, there is a question whether the proposed rules are adapted to achieving their intended purpose. As will be seen from the above, there are experienced practitioners who think that the rules will produce more, and not less, complexity. There is also a question whether the rules will add to the cost of making a defence to a charge, and indeed widen the gap in the disparity of resources between the prosecution and the defence. It is argued that where there is a gap there is no "equality of arms" that should characterise a fair criminal trial.

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

DOMESTIC ANIMALS (BREEDING) LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend the *Animal Welfare Act 1992*, the *Domestic Animals Act 2000*, and the *Domestic Animals Regulation 2001* to prevent the intensive breeding of dogs and cats in the Territory, and to create a licensing scheme to regulate breeders of dogs and cats.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

The creation of strict liability offences and the presumption of innocence (HRA subsection 22(1))

The Bill proposes to insert new sections 72 and 72K into the Domestic Animals Act, both of which contain offences of strict liability. These provisions engage the presumption of innocence stated in HRA subsection 22(1). This is fully acknowledged in the Explanatory Statement, and it offers a detailed justification within the framework stated in HRA section 28.

The Committee commends the quality of this statement and regards it as sufficient to enable the Assembly to evaluate the justification.

The Committee draws these matters to the attention of the Assembly and does not call upon the Minister respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-13 being the Public Trustee (Fees) Determination 2015 (No. 1) made under section 75 of the *Public Trustee Act 1985* **revokes DI2014-115 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-14 being the Work Health and Safety (Fees) Determination 2015 (No. 1) made under section 278 of the *Work Health and Safety Act 2011* **revokes DI2014-139 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-15 being the Environment Protection (Fees) Determination 2015 (No. 1) made under section 165 of the *Environment Protection Act 1997* **revokes DI2014-155 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-25 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Membership) Appointment 2015 (No. 1) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **appoints specified persons to be members of the Climate Change Council.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 17 February 2015, in relation to comments made in Scrutiny Report 27 concerning the Electoral Amendment Bill 2014 (No. 2) (attached).
- The Acting Minister for Sport and Recreation, dated 27 February 2015, in relation to comments made in Scrutiny Report 27 concerning the Public Pools Bill 2014 (attached).
- The Treasurer, dated 28 February 2015, in relation to comments made in Scrutiny Report 28 concerning Disallowable Instrument DI2015-4—Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2015 (No. 1), Disallowable Instrument DI2015-5—Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2015 (No. 1) and Disallowable Instrument DI2015-6—Taxation Administration (Amounts payable—Over 60s Home Bonus Scheme) Determination 2015 (No. 1) (attached).

The Committee wishes to thank the Attorney-General , the Acting Minister for Sport and Recreation and the Treasurer for their helpful responses.

Steve Doszpot MLA
Chair

10 March 2015

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 20, dated 31 July 2014

Red Tape Reduction Legislation Amendment Bill 2014

Report 27, dated 3 February 2015

Disallowable Instrument DI2014-284 - Gene Technology (GM Crop Moratorium) Advisory Council Member Appointment 2014 (No. 1)

Public Sector Bill 2014

Report 28, dated 3 February 2015

Subordinate Law SL2014-32—Work Health and Safety (Asbestos) Amendment Regulation 2014 (No. 1)

Subordinate Law SL2014-37—Gaming Machine Amendment Regulation 2014 (No. 2)

Subordinate Law SL2015-1—Gaming Machine Amendment Regulation 2015 (No. 1)

Simon Corbell MLA

DEPUTY CHIEF MINISTER

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

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Chair

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No. 27 of 3 February 2015 (the Report), which contains comments on the *Electoral Amendment Bill 2014 (No. 2) 2014* (the Bill).

I note that the Committee's report under section 38 of the *Human Rights Act 2004* (HRA) suggests that the Explanatory Statement accompanying the Bill requires further justification for proposed s 205D(a), which will lower the caps on electoral expenditure.

I thank the Committee for bringing this matter to my attention and propose to table a revised explanatory statement to provide further explanation in relation to this matter.

I thank the Committee for its consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

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Mick Gentleman MLA

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

MEMBER FOR BRINDABELLA

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

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 27 of 3 February 2015 which contained comments on the Public Pools Bill 2014 (the Bill). As the Minister for Sport and Recreation, Mr Shane Rattenbury MLA is on leave, I am responding on his behalf.

I thank the Committee for their kind comments in relation to the treatment of human rights issues and the overall comment on the Bill's Explanatory Statement.

The response below addresses the Committee's comments in relation to the Minister's power to exempt a pool facility or person from the Act and on consultation requirements.

Clause 11 – Minister's power to exempt a pool facility or person from the Act

Clause 11 has been drafted in line with the overall design of the Bill towards self-regulation and risk management, and allows the Minister to be responsive to changing industry trends and safety standards.

I note that the Committee's comments on this matter also relate to comments made in Scrutiny Report 26 in relation to the Food Amendment Bill 2014 and, in particular, to constitutional principles raised in *O'Donoghue v Ireland* [2008] HCA 14 (23 April 2008).

Notwithstanding that the passage quoted on page 8 of Scrutiny Report 26 is from Kirby J in dissent (not Gummow, Hayne, Heydon, Crennan and Kiefel JJ as indicated), it is my view that the key phrase in that passage is 'without authority of Parliament'.

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Here, the proposed exemption power is presented, along with the rest of the Bill, for the consideration of the Assembly. If the Bill is passed, the Minister's power to exempt a pool facility or person from the Act would be exercised with the authority of Parliament. A further opportunity for Assembly oversight is provided through the fact that an exemption is a disallowable instrument in accordance with subclause 11(5) of the Bill.

In any event, I consider that the exemption power in the Bill is distinguishable from the matters considered in *O'Donoghue v Ireland* as those matters involved questions of Federal-State relations in the absence of specific consideration by State Parliaments (but with the consent of the State executive). The exemption power included in this Bill does not involve any inter-jurisdictional considerations.

Consultation Requirements

As an overarching comment, I note that the Government can, and does, consult with the community frequently on many issues without specific legislative requirements to do so.

The specific legislated consultation requirements at clauses 13 and 14 of the Bill were included as standards made under these clauses relate to the operation and management of a pool facility, and may affect 'day to day' operations where national standards or best practice principles are not in place.

The Committee has suggested that a consultation requirement in relation to subordinate laws under clauses 12, 15, 16 and 17 would not seem onerous. I do not consider that a legislated consultation requirement is appropriate for these clauses, for the reasons below:

- Clause 12 – Qualifications, skills and training. This area of pool management involves National Training Packages subject to consultation during development and accredited training by the Royal Life Safety Society – Australia.

- Clause 15 – Conditions of entry and removal. The conditions of entry and removal are evidence-based, such as hygiene requirements and affects of alcohol around or in water, or as a result of findings from inquiries such as a coronial inquiry. This provision is linked to the removal powers and offences, and fundamental to the early intervention approach to anti-social behaviour. It is a policy area that needs to balance social justice issues with community safety and the operational needs of managing a business.

- Clause 16 – Signs. This provision relates to how signs are to be designed and constructed (lettering, colour, font etc) and displayed. Design and construction considerations will be based on international and national standards which are subject to consultation as part of their development. Display requirements are based on policy considerations of adequate public notification and best practice.

- Clause 17 – Pool Fee Guidelines. This provision applies to Category 1 facilities, which are Territory owned public pools. Accordingly, the provision requires contractors to the Territory to comply with the policy framework in setting fees as the assets are community based. As the funding arrangements for Territory pools involves Territory budget considerations I consider it inappropriate that these guidelines be subject to mandatory consultation processes beyond the general Budget consultation.

Further, I note that transparency is achieved through requirements or standards made under the above clauses being notifiable instruments.

In relation to the Committee's comment seeking clarification on whether consultation is restricted to "stakeholders" or extended to "everybody", I consider that as a matter of statutory construction subparagraphs 13(2)(a) and 13(2)(b) and subparagraph 14(2)(a) and 14(2)(b) must be read together. The Bill provides that the specific legislated requirements in clauses 13 and 14 apply to consultation with the people or organisations that conduct the activity or are engaged in the industry to which the standard relates must be consulted. As noted above, the Government may conduct broader consultation at any time.

Minor and Technical Government Amendments

Finally, I would like to advise the Committee that I intend to move two minor and technical Government amendments to the Bill during debate.

The first is an amendment to the commencement provision so that rather than commencing on the day after notification, the Act will instead commence by notice. This amendment is not intended to unduly the delay the commencement of the Act, however, a brief delay in commencement will provide an increased opportunity to train existing operators after the height of the busy summer swimming season has passed and ensure that processes and procedures are in place to ensure a smooth transition to the new Act. The standard 6-month automatic commencement under the *Legislation Act 2001* has been retained.

The second is an amendment to clause 17 to ensure that the fee setting provisions operate in accordance with the intent outlined in the Explanatory Statement for clause 55 to support the continuation of flexible contracting arrangements. Where there is no determination in force for a category 1 facility, the operator may set fees, taking into account any pool fee guidelines issued by the Minister. I consider that this amendment avoids any potential doubt in relation to fee setting processes and procedures for category 1 facilities. A consequential amendment will remove Note 2 from clause 55.

I trust that this response addresses the Committee's comments. I thank the Committee for its consideration of the Bill.

Yours sincerely

Mick Gentleman MLA
Acting Minister for Sport and Recreation
February 2015

Andrew Barr MLA

CHIEF MINISTER

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

MEMBER FOR MOLON

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

Scrutiny Report 28 – Disallowable Instruments and Retrospectivity

I am writing in response to comments in the Scrutiny Report 28 of 16 February 2015, in relation to Disallowable Instruments DI2015-4 (the Home Buyer Concession Scheme), DI2015-5 (the Pensioner Duty Concession Scheme) and DI2015-6 (the Over 60s Home Bonus) ('the instruments').

The Committee has identified that the instruments have a slight retrospective commencement of one day and seeks assurance that this retrospectivity does not create a prejudicial disadvantage to any affected persons.

The revoked instruments in place prior the current instruments under question implemented somewhat restrictive conditions on the Commissioner for ACT Revenue ('Commissioner'), in relation to accepting late applications for various home buyer assistance schemes. These applications could only be accepted if it was considered 'unduly onerous' for the taxpayer to lodge an application within time; this was limited to exceptional circumstances such as grave personal tragedy or illness.

The 'unduly onerous' provisions have now been replaced with a much broader discretion for the Commissioner to accept a late application, if considered fair and reasonable to do so. The Commissioner can then make a reassessment of the duty liability.

The instruments under question thus provide the Commissioner a more flexible and fair response in relation to applications for home buyer assistance schemes that are made out of time. Adapting this new approach provides a far more beneficial and equitable outcome for taxpayers, providing concessional duty to otherwise eligible applicants, such as pensioners and first home buyers. The retrospectivity of the instruments is therefore not considered prejudicial on any person.

For completeness, I refer the Committee to each of the Explanatory Statements for the instruments, where this new, broader approach is explained and where it is noted that implementation of these instruments is of benefit to taxpayers.

I thank the Committee for its comments regarding section 76 of the *Legislation Act 2001* and the requirement that Explanatory Statements expressly address this provision where retrospectivity is in play; such comments will be incorporated into explanatory material for taxation matters in future should the situation require it.

I trust that the above adequately addresses the Committee's requests.

Yours sincerely

Andrew Barr MLA
Treasurer
February 2015