Legislative Assembly for the ACT

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

Scrutiny Report

13 OCTOBER 2011

Report 43

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

CHILDREN AND YOUNG PEOPLE (EDUCATION AND CARE SERVICES NATIONAL LAW) CONSEQUENTIAL AMENDMENT BILL 2011

This Bill would amend the *Children and Young People Act 2008*, to make provision consequent upon the introduction of the *Education and Care Services National Law (ACT) 2011*.

CRIMES (SENTENCING) AMENDMENT BILL 2011

This Bill would amend the *Crimes (Sentencing) Act 2005* to require the annual publication of data on recidivism rates of people who have been sentenced in the ACT, and to require the Government to undertake a review of the Act, particularly concerning how well the purposes of sentencing are being achieved.

Bill—Comment

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

WORKING WITH VULNERABLE PEOPLE (CONSEQUENTIAL AMENDMENTS) BILL 2011

This Bill would amend a number of Acts consequent upon the enactment of the *Working with Vulnerable People (Background Checking) Act 2011*, and relate to background checking requirements across a range of regulated activities.

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

The object of the Bill is outlined in the Explanatory Statement as follows:

> The *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act) asks an individual to provide their conviction and non-convictions information, including spent conviction information, to assist in determining their suitability to work or volunteer with vulnerable people accessing a regulated activity or service.
>
> The Consequential Bill aligns the *ACT Teacher Quality Institute Act 2010; Children and Young People Act 2008; Public Sector Management Act 1994;* and *Spent Convictions Act 2000* with the WWVP Act on implementation of the background checking scheme, and will result in an individual being required to be registered under the WWVP Act if they wish to work or volunteer with vulnerable people accessing a regulated activity.

The Explanatory Statement notes that:

> [c]onsideration of human rights and discrimination, as provided in Section 28 of the *Human Rights Act 2004* and Sections 7 (Grounds) and 8 (What constitutes discrimination) of *the Discrimination Act 1991* (ACT) were integral to the development of the consequential amendments,

and acknowledges that some clauses of the Bill engage "the individual's right to recognition and equality before the law, privacy and reputation, and to take part in public life". It offers as the rationale for these restrictions inherent in background checking "that the past behaviour of an individual provides an indication of the possible future behaviour of that individual", and with reference to section 28 of the Human Rights Act, notes a number of protection measures are included in the WWVP Act "to ensure an individual's human rights are not unreasonably limited ... and an individual is not subject to unreasonable discrimination".

The rights issues were fully canvassed at the time the Bill for the WWVP Act was introduced and debated in the Assembly, and given the consequential nature of the amendments proposed in this Bill, the issues will not be restated here. The Committee refers Members to *Scrutiny Report No 27* (20 September 2010) for its review of the Bill and an identification of a range of instances in which its provisions engaged the Human Rights Act. The Committee also draws attention to this analysis and also to the response of the Minister that is appended to *Scrutiny Report No 30* (15 November 2010).

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

PROPOSED AMENDMENTS—TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2011

The Committee has been provided with a set of amendments to be moved to this Bill by Mr Rattenbury, and an accompanying Explanatory Statement.

The object of the amendments is to remove the provisions of the *Terrorism (Extraordinary Temporary Powers) Act 2006* concerning preventative detention. It is clear that these provisions restrict the right to liberty and security of the person stated in subsection 18(1) of the Human Rights Act, and the issue for consideration is whether the restriction is justifiable in terms of HRA section 28.

This matter was addressed in the Explanatory Statement for this Bill, and the Explanatory Statement for Mr Rattenbury's amendments joins issue on this score. How the debate on the retention of the preventative detention elements of the Act is to be resolved is a matter for the Assembly.

The Committee also refers the Assembly to its discussion of the Bill for the Act in *Scrutiny Report 25* of the *Fifth Assembly*.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2011-204 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2011 (No. 1) made under section 20 of the *Remuneration Tribunal Act 1995* **determines fees and allowances for members of the Remuneration Tribunal.**

Disallowable Instrument DI2011-218 being the Corrections Management (Official Visitor) Appointment 2011 made under subsection 57(1) of the *Corrections Management Act 2007* **appoints a specified person as an Official Visitor.**

Disallowable Instrument DI2011-226 being the University of Canberra (Granting of Status) Revocation Statute 2011 made under section 40 of the *University of Canberra Act 1989* **revokes DI1995-171.**

Disallowable Instrument DI2011-230 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2011 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2011-203 and approves the inclusion of ACTTAB Limited sub-agencies in the Ginninderra Labor Club and Woden Tradesmen's Union Club.**

Disallowable Instrument DI2011-238 being the Civil Law (Wrongs) Australian Computer Society Limited Liability (NSW) Scheme Amendment 2011 (No. 1) made under Schedule 4, sections 4.10 and 4.11 of the *Civil Law (Wrongs) Act 2002* **amends the ACS Limited Liability (NSW) Scheme by adding South Australia and Western Australia to the list of jurisdictions in which the Scheme operates and changing the title of the Scheme.**

Disallowable Instrument DI2011-239 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 4) made under section 12 of the *Road Transport (General) Act 1999* **disapplies the road transport legislation to a road or road-related area where a special stage of the 2011 Brindabella Motor Sport Club Corporate Sponsor Ride Day is being conducted.**

Disallowable Instrument DI2011-240 being the Public Place Names (Crace) Determination 2011 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Crace.**

Disallowable Instrument DI2011-242 being the Public Health (Fees) Determination 2011 (No. 1) made under section 137 of the *Public Health Act 1997* **revokes DI2010-314 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2011-243 being the University of Canberra (Liquor) Statute 2011 made under section 40 of the *University of Canberra Act 1989* **revokes DI2008-128 permits the University of Canberra to issue licences for the sale and consumption of liquor in non-university cafes and restaurants on campus.**

Disallowable Instrument DI2011-244 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **disapplies the road transport legislation to a road or road-related area where a special stage of the 2011 Brindabella Motor Sport Club Corporate Sponsor Ride Day is being conducted.**

Disallowable Instrument DI2011-245 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 4) made under paragraph 174(1)(b) of the *Crimes (Sentence Administration) Act 2005* **revokes DI2011-113 and appoints a specified person as deputy chair of the Sentence Administration Board.**

Disallowable Instruments—Comment

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

Use of young persons in Tobacco Compliance Testing Procedures—Possible human rights issues—Inadequate Explanatory Statement

Disallowable Instrument DI2011-194 being the Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1) made under section 42D of the *Tobacco Act 1927* **revokes DI2007-80 and approves the Tobacco Compliance Testing Procedures.**

This instrument revokes and re-makes "Tobacco Compliance Testing Procedures". It is made under section 42D of the *Tobacco Act 1927,* which provides:

42D Approval of compliance testing procedures

(1) The Minister may approve procedures for carrying out approved programs of compliance testing.

(2) The Minister must not approve procedures under subsection (1) unless satisfied that the procedures—

(a) provide that, in carrying out a compliance test, a purchase assistant's welfare is paramount; and

(b) appropriately protect a purchase assistant's health and safety; and

(c) allow a purchase assistant to stop taking part in a compliance test at any time during the test; and

(d) ensure that, as far as practicable, a purchase assistant's identity is protected during a compliance test; and

(e) require a purchase assistant to be, as far as practicable, indistinguishable from other purchasers and to look like a young person; and

(f) require a purchase assistant not to lie to anyone about how old the assistant is during a compliance test; and

(g) only allow a compliance test to take place during normal business hours or at any other time when the premises where the test takes place is being used in relation to the seller's normal business; and

(h) comply with anything else prescribed by regulation.

(3) An approval under subsection (1) is a disallowable instrument.

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

The concept of "purchase assistant" is defined in subsection 42B (1) of the Tobacco Act, which provides:

42B What is a *compliance test*?

(1) A ***compliance test***—

(a) involves a young person (a ***purchase assistant***), under the supervision of an authorised officer, purchasing, or trying to purchase, tobacco products from tobacco licence-holders; and

(b) is carried out to obtain evidence that may lead to the prosecution of a person, or other action being taken against a person, for an offence against section 14 (Supply of smoking product to under 18 year olds) in relation to a tobacco product; and

Example of other action

disciplinary action under division 7.3 against a tobacco licence-holder

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

(c) may involve the purchase assistant and the authorised officer engaging in conduct that would, apart from section 42F (Lawfulness of compliance testing), be an offence against a territory law.

The Explanatory Statement for this instrument states:

Compliance testing is a strategy to test the compliance of tobacco sellers in relation to section 14 (Supply of smoking products to under 18 year olds) of the Act. It involves a trained young person (a purchase assistant) under the supervision of an authorised officer attempting to purchase cigarettes or other tobacco products from the seller.

The procedures stipulate that before a young person can be used as a purchase assistant the authorised officer must have obtained in writing the informed consent of the young person and at least one of the person(s) with parental responsibility for the young person, as defined in the *Children and Young People Act 2008.*

These procedures were previously approved by the Minister for Health in March 2007. It was noted in the 2007 procedures that the procedures would be subject to review, taking into account any issues that may arise in the course of conducting compliance testing. As a result of unsuccessful campaigns for volunteers, the procedures have been revised to allow the Office of Regulatory Services to offer a reward to a volunteer. The nature of the reward is to be determined by the Office of Regulatory Services but may only be given to the purchase assistant after participation in the compliance program. Another change has been to remove the restriction on the method of engagement of volunteers. The previous procedures required either a newspaper advertisement or a recruitment agency. This restriction was found to be unworkable. There, however, remains a restriction on the engagement of children of agency employees.

Section 6.7 of the instrument offers this information about the "reward":

> **6.7 Follow up after completion of a program of CTs**
>
> Following the involvement of the PA [purchase assistant] in a CT [compliance test], and within seven days from the end of a CT, the Team Leader should contact the PA and the person(s) with parental responsibility to establish whether the young person has any concerns about having conducted a CT or has suffered any ill effects or repercussions. If the PA expresses any concerns, the Team Leader should report the concerns to the Registrar of Tobacco so the Agency can arrange for counselling and support services.
>
> A reward for the conduct of the CT should be provided to the PA at this time. The nature of reward is at the discretion of the Agency and may include vouchers, including gift or movie vouchers.
>
> A letter of appreciation should also be given to the young person and the person(s) with parental responsibility. Within three weeks of the PA's involvement in a CT, the person(s) with parental responsibility for the young person should be contacted to determine whether the young person has suffered any further ill effects or repercussions associated with the CT.
>
> The results of the program should be stored in the appropriate file to monitor trends and given appropriate protection.
>
> The Registrar of Tobacco is required by the Act to report the following to the Chief Executive of ACT Health:
>
> - the number of compliance tests carried out during the financial year;
> - the number of contraventions of section 14 (Supply of smoking product to under 18 year olds) detected by the tests; and
> - actions taken in relation to the contraventions.
>
> This information will be reported in ACT Health's Annual Report for each financial year.

The Committee notes that it has previously observed, in the context of the Bill for what was enacted as the Tobacco Act, that the use of children in compliance testing, when viewed from a rights perspective, was "controversial". In its *Scrutiny Report No 32* of the *Sixth Assembly*, the Committee stated:

> The Committee's limited research reveals that, when viewed from a rights perspective, a proposal to use children in compliance testing is controversial. The Explanatory Statement states that this "is a strategy which involves test purchases of cigarettes or other tobacco products made by trained young persons under the supervision of an authorised officer".
>
> Perhaps most clearly, the proposal engages subsection 11(2) of the *Human Rights Act 2004*:
>
> (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.
>
> This may be read as casting an obligation on government to provide that protection, as well as to refrain from laws that diminish it. In this context, however, citation of subsection 11(2) can cut more than one way. On the one hand, the proponents of this Bill can argue that it will enhance the enforcement of a law designed to protect the health of children. This way of looking at the scheme is noted, although only quite briefly, in the Explanatory Statement. On the other, critics can point to the dangers to children posed by their acting as agents of the enforcing authorities.

The Committee then set out (in some detail) views supportive of the proposal and views critical of the proposal. It is useful to repeat those views here:

Views supportive of the proposal

This kind of scheme has been supported by several government agencies in Australia. A Discussion Paper issued by Queensland Health noted that:

> In 2001 the Commonwealth Department of Health and Ageing commissioned the report, *A National Approach for Reducing Access to Tobacco In Australia by Young People Under 18 Years of Age*, which recommends a system of routine compliance monitoring of tobacco retailers as a strategy for doing this. This report stated that "regular compliance checks involving the participation of young people are the most effective, least costly and practical means of monitoring illegal sales of tobacco to young people" (Commonwealth Dept of Health & Ageing, 2001: 11). This is a position endorsed by authorities in the United States, the United Kingdom and New Zealand, and most states and territories of Australia (Commonwealth Dept of Health & Ageing, 2001). [The reference is to Commonwealth Department of Health & Ageing (2001) *A National Approach for Reducing Access to Tobacco In Australia by Young People Under 18 Years of Age*.]

In relation to the concern with the safety of the children involved, the paper said:

> 126. Concern has been expressed that aggrieved shopkeepers may harm young people in some way, however, no adverse incidents have ever been reported in the literature on this subject. All protocols and procedural guidelines produced for training purposes by those jurisdictions involved in this type of compliance monitoring activity highlight the importance of undertaking procedures for removing young people from the shop when health officials or other enforcement officers confront shopkeepers with evidence of the sale (Commonwealth Dept of Health & Ageing, 2001).

The document is at www.health.qld.gov.au/atods/documents/23179.pdf.

The Report of Queensland Health dealt with the policy issues in more detail; see Queensland Health, *The Tobacco and Other Smoking Products Act 1998, Review, Report*, October 2004 - www.health.qld.gov.au/atods/tobaccolaws/documents/25400.pdf.

It cited submissions of 'health groups' that:

> the current system of surveillance is not effective, as some 58% of retailers in Queensland routinely sell tobacco products to children under the age of 18 years. They provided an example of the Tasmanian Government, which recently reduced the proportion of retailers illegally selling to minors from 48% to 5%, following the introduction of a system using children, and publicising prosecutions;

and that

> out of some 250,000 supervised test purchases around the world, there has been not one reported incident involving any minors coming to harm. Further, they argued that research and evaluation suggest the children involved in the test purchases felt empowered in that they were doing something worthwhile for society, and they were more likely to discuss smoking with their peers, and to encourage peers and family to quit or to avoid initiating smoking.

The report also noted that:

> 108. The Office of Youth Affairs, the Office of Child Safety, and the Commission for Children and Young People supported the introduction of a system using children, subject to certain conditions.
>
> - The Office of Youth Affairs would require that ethical guidelines and protocols be developed.
> - The Department of Child Safety would require that a legal position as to the legality of Queensland Health enforcement officers procuring the unlawful sale of a tobacco product be determined.
> - The Commission for Children and Young People would require that adequate consultation be made with young people in the development of ethical guidelines and protocols, that particular attention and care should be taken with the development of those protocols that deal with a child's giving evidence in a Court, and **the children involved should be adequately remunerated**.

Note that the phrase emphasised above was not emphasised in the Committee's discussion of the Bill. *Scrutiny Report No 32* of the *Sixth Assembly* goes on to say (in relation to the views supportive of the proposal):

> The Report concluded:
>
> > 110. Finally, the problems associated with acquiring enough evidence to prosecute retailers who break the law would be alleviated, if a system using children was used. This would be because the child's true age would be known beyond all reasonable doubt. The process of gathering evidence for prosecutions would be greatly simplified by not having to prove the age of the child.

Scrutiny Report No 32 then set out views critical of the proposal:

> Views critical of the proposal
>
> The Committee is aware that the ACT Council of Social Services (ACTCOSS) has drawn attention to the rights issue thrown up by the proposal to use children to test retailer compliance with the law concerning the sale of tobacco products. It did so in a comment to the "Consultation Paper: Effective Enforcement of the 'Sales to Minors' Requirements of the ACT Tobacco Act 1927". The relevant document is ACTCOSS, On the Consultation Paper: Effective Enforcement of the "Sales to Minors" Requirements of the ACT Tobacco Act 1927 www.actcoss.org.au/.../Publications%202005/Comments/Cmt%20on%20Tobacco%20Act%201927%20Consultation.doc.
>
> ACTCOSS noted that it received "the consultation papers on 17 May, less than 2 weeks before the close of consultations. Our understanding is that the consultation has not been widely distributed, nor is it publicly available (for example, by being displayed on the ACT Health website)", and added that "there is a divergence in views among the community sector about the appropriateness of Controlled Purchase Operations [CPOs]. Our impression is that while health orientated organisations appear very supportive, those who focus more on human rights and child protection are less enthusiastic.".
>
> ACTCOSS expressed concern at the proposals, pointing in particular (inter alia) to
>
> - The use of children in operations involving committing offences; [and]
> - The use of triggering an offence by way of deception, regardless of whether this is legally defined as 'entrapment' or otherwise.

[ACTCOSS recognised that one Victorian Supreme Court case has held that a CPO is not "legally considered 'entrapment'": see *Rice v Tricouris* [2000] VSC 73. The Committee notes that this decision addresses only the issue of whether the evidence obtained is admissible on a trial, and not the broader range of rights issues.]

ACTCOSS acknowledged that "the use of children for CPOs in Australia is not new and is practiced in a number of jurisdictions. We also understand that there is little evidence that children involved in CPOs are likely to be psychologically harmed by their involvement or more likely to commence or maintain smoking behaviours". The submission continued:

> The stated aim of CPOs is to increase compliance with the Tobacco Act, and presumably, this is done by convincing retailers that a child who seeks to buy tobacco products may be, in fact, a stooge sent by the Department of Health, resulting in a decreased propensity to offend against the provisions of the Tobacco Act. However, this approach necessarily casts children as deceptive and not to be trusted, and ACTCOSS raises the concern that inducing retailers to distrust children is not an ideal means to enforce legislation.
>
> ACTCOSS would point out that children and young people are already the subject of community distrust, and are more likely to be subject to surveillance for shoplifting or engaged by security officers in retail environments. While ACTCOSS supports increased compliance with tobacco legislation, doing so by creating an environment that utilises suspicion in child behaviour as a motivation is less than welcome.
>
> Deception and Law Enforcement
>
> In a more general sense, ACTCOSS continues to question proposals that seek to enhance compliance with the law or securing convictions by using deception by police or other public authorities. One of the aims of the Canberra Social Plan is to "promote fairness and understanding". The use of deception by Governments promotes distrust and suspicion and works to reduce community cohesion and undermines social capital.
>
> …
>
> While [these proposals are] aimed a very specific area of public policy, it should not be considered in isolation from the more general principles of good governance. ACTCOSS supports open, honest and transparent government, and adopting practices that necessarily involve deception by the State erodes public trust in government and appeals to fear rather than the more ethical instincts of people.

As to the likely effect of the scheme, ACTCOSS said:

> As the ACT Government's own research shows, less than a quarter of young people actually derive their cigarettes through illegal sales. Many more obtain tobacco products through friends and relatives, or through others buying them on their behalf. The obviously point to note that even if CPO completely eliminated direct tobacco sales to minors, this would make only incremental reductions in the total availability of tobacco to children.
>
> A broader approach to enforcing tobacco regulation would also place greater attention to reduction in these forms of obtaining tobacco, rather than only through illegal sales direct to children. ACTCOSS is unaware of additional ACT Government strategies in this area.

Scrutiny Report No 32 then went on to discuss the issue of parental responsibility:

> Parental responsibility and the use of a young person as a purchase assistant
>
> The Committee draws attention, in particular, to proposed subsection 42E(2) of the Act. This provides that a young person may be used as a "purchase assistant" if that person "and at least 1 person who has parental responsibility … have given informed consent to the young person being a purchase assistant.". The Committee suggests that this proposal needs careful consideration.
>
> The Committee draws this matter to the attention of the Assembly.

The Committee notes that the parental responsibility issue also arose when the Committee considered the instrument that this instrument revokes and replaces. In *Scrutiny Report No 41* of the Sixth Assembly, the Committee stated:

> In its *Scrutiny Report No 32* of the *Sixth Assembly*, the Committee commented on the Tobacco (Compliance Testing) Bill 2006, which (when enacted) inserted into the Tobacco Act the amendments that authorise these procedures. Among other things, the Committee commented on proposed subsection 42E(2) of the Tobacco Act. The Committee noted that this proposed subsection required that at least 1 person who has parental responsibility for a young person must give his or her informed consent to the young person acting as a "purchase assistant" under the proposed amendments. The Committee suggested that this proposal needed careful consideration.
>
> The Minister for Health responded to the Committee's comments in a letter dated 16 November 2006. In that letter (which is reproduced in the Committee's *Scrutiny Report No 34* of the *Sixth Assembly*, Ms Gallagher advised the Committee that the provision in question
>
> > was specifically drafted to be consistent with the requirements of the *Children and Young People Act 1999*.
>
> Ms Gallagher went on to state:
>
> > In addition, the Bill was developed in consultation with the Department of Justice and Community Safety and the Office for Children, Youth and Family Support.

The Committee went on to state:

> The provision was enacted by the Legislative Assembly, in the form in which it was originally presented. It provides:
>
> **42E Carrying out of compliance testing**
>
> (1) An authorised officer may carry out a compliance test in accordance with an approved program and the approved procedures.
>
> (2) An authorised officer may use a young person as a purchase assistant in a compliance test only if the young person, and at least 1 person who has parental responsibility under the *Children and Young People Act 1999* for the young person, have given informed consent to the young person being a purchase assistant.
>
> *Note* If 2 or more people have parental responsibility for a young person, each of the people may act alone in discharging the responsibility (see *Children and Young People Act 1999*, s 19 (2)).

As indicated at the outset, this instrument approves procedures for compliance testing. The approved procedures are set out in Schedule 1 of the instrument. Appendix 1 to Schedule 1 contains guidelines in relation to the engagement and training of personal assistants. Paragraph 2 of Appendix 1 states:

The young person and the person(s) with parental responsibility for the young person, prior to undertaking the training for the purpose of being a PA for CTs, must sign a Consent form (at **Appendix 3**). If two people have parental responsibility then both signatures will be required.

This seems to be at odds with the Explanatory Statement to the instrument, which states:

> The procedures stipulate that before a young person can be used as a purchase assistant the authorised officer must have obtained in writing the informed consent of the young person and at least one of the person(s) with parental responsibility for the young person, as defined in the *Children and Young People Act 1999.*
>
> It also appears to be at odds with the Note to section 42E of the Tobacco Act, subsection 19(2) of the Children and Young People Act and the Minister's response to the Committee's original comments on the Bill.
>
> The Committee would appreciate the Minister's advice as to meaning and effect of the statement in Appendix 1 to Schedule 1 of the instrument.

The Minister responded to the above comment, in a letter dated 3 September 2007 (see *Scrutiny Report No 45* of the *Sixth Assembly*). The response is not especially relevant to the issue currently before the Committee.

In terms of the instrument currently before the Committee, the issues raised in *Scrutiny Report No 32* of the *Sixth Assembly* continue to apply. The only difference that should be noted is that the introduction (by this instrument) of a "reward", which addresses an issue raised by the report of Queensland Health, *The Tobacco and Other Smoking Products Act 1998, Review, Report* (October 2004), which is quoted in *Report No 32*.

Another point that should be noted is that the human rights aspects of this instrument are not in any way addressed in the Explanatory Statement for the instrument. The Committee notes that this was an issue that it identified in its comments on the original Bill. In her response to comments on the Bill, the (then) Minister for Health acknowledged that the Explanatory Statement for the Bill should have mentioned the Human Rights Act. The Minister also noted, however, that the Bill was "fully compliant" with the Human Rights Act and that a Compliance Statement was tabled when she presented the Bill to the Legislative Assembly.

The Committee notes that, in introducing the original Bill, the (then) Minister for Health stated:

> The bill provides the minister with the power to approve procedures with compliance testing. The procedures must protect the welfare, health and safety of young people who assist in compliance tests and ensure that it could not be alleged that the tobacco seller was misled into selling the tobacco product, by considering the welfare, health and safety of purchase assistants; allowing a purchase assistant to withdraw from a compliance test at any time; protecting the anonymity of a purchase assistant; making certain that a purchase assistant is indistinguishable from other young purchasers; and requiring a purchase assistant not to lie about their age.

> There is no evidence in the literature on compliance testing or from other jurisdictions to suggest that participating in compliance testing results in physical, emotional or moral harm to the youth volunteering as the purchase assistant. We need to balance our responsibilities to the young people doing compliance testing with our responsibilities to the young people who smoke. I assure members of the Legislative Assembly that every effort will be made to stop any harm befalling the young people who act as purchase assistants, but I am convinced that we need to establish this scheme to reduce the harm from smoking amongst young people in Canberra. I commend the bill to the Assembly. (*Assembly Debates*, 17 August 2006, page 2299)

The Committee retains its concerns about the "controversial" elements of the use of young people as purchase assistants. Given the detailed concerns previously expressed by the Committee about previous legislation on this subject, particularly in relation to the Human Rights Act implications, it is surprising the Explanatory Statement for this instrument does not address the Human Rights Act implications in any way.

The Committee draws this instrument to the attention of the Legislative Assembly, on the basis that:

- **the Explanatory Statement for the instrument does not meet the technical or stylistic standards expected by the Committee, contrary to principle (b) of the Committee's terms of reference; and**
- **the instrument may raise issues in relation to a right protected by the *Human Rights Act 2004*, as contemplated by principle (d) of the Committee's terms of reference.**

The Committee would also appreciate the Minister's response to the Human Rights Act issues mentioned above.

Retrospectivity—Positive comment

Disallowable Instrument DI2011-212 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 3) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **revokes DI2011-199 and appoints a specified person as a non-judicial member of the Sentence Administration Board.**

The Committee notes that this instrument, dated 16 August 2011, appoints the holder of a specified position in ACT Corrective Services as a non-judicial member of the Sentence Administration Board, from 1 August 2011. The retrospective operation of the appointment is addressed in the Explanatory Statement, which states:

> The instrument is taken to have commenced on 1 August 2011 and has retrospective application. This instrument appoints the public servant in the position of Senior Manager, Community Based Corrections, ACT Corrective Services (position number: 45877) as a non judicial member of the Board for the period commencing on 1 August 2011 and ending on 30 July 2014. The appointment does not adversely affect any person's rights and does not impose liabilities on a person.

The Committee notes with approval that this statement allows the Committee (and the Legislative Assembly) to be satisfied that there is no issue with subsection 76(2) of the *Legislation Act 2001*, which prohibits the retrospective operation of statutory instruments that include "prejudicial" retrospectivity.

This comment does not require a response from the Minister.

Minor drafting issue—Does the ACT Local Hospital Network Council currently have a deputy chair?

Disallowable Instrument DI2011-227 being the Health (Local Hospital Network Council—Chair) Appointment 2011 (No. 1) made under section 18 of the *Health Act 1993* **appoints a specified person as chair of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-228 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 1) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, experienced in managing public consultations, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-229 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 2) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with consumer of health services experience, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-231 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 3) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with financial management experience, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-232 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 4) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with academic, teaching and research experience in health services, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-233 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 5) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with primary health care organisation and medical practitioner experience, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-234 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 6) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with expertise in clinical matters, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-235 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with expertise in clinical matters, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-236 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with expertise in clinical matters, of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2011-237 being the Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9) made under section 16 of the *Health Act 1993* **appoints a specified person as a member, with health management experience, of the ACT Local Hospital Network Council.**

The first of the instruments mentioned above appoints a specified person as the chair of the ACT Local Hospital Network Council. The Committee notes that both the formal part of the instrument and also the Explanatory Statement for the instrument indicates that it is made under section 16 of the *Health Act 1993*. The Committee notes, however, that section 16 of the Health Act only relates to the appointment of members of the Council and that, in fact, it is section 18 of the Health Act that provides for the appointment of the chair and deputy chair. Section 18 provides (in part):

> **18 Chair and deputy chair**
>
> (1) The Minister must appoint—
>
> (a) a member to be chair; and
>
> (b) another member to be deputy chair.

This comment does not require a response from the Minister.

The Committee notes that the nine instruments following the first instrument appoint a series of persons as members of the Council. The members have various areas of expertise that are identified in subsection 17(1) of the Health Act as being skills that members appointed to the Council must have.

The Committee also notes, however, that none of the nine members appointed by the instruments mentioned above appears to be appointed as deputy chair. The 10 instruments mentioned above are the only current instruments of appointment listed, under the Health Act, on the ACT Legislation Register.

Given that subsection 18(1) of the Health Act provides that the Minister must appoint a deputy chair of the Council, the Committee seeks the Minister's advice to whether (and, if so, how) subsection 18(1) of the Health Act has been complied with.

Drafting issue

Disallowable Instrument DI2011-241 being the Planning and Development (Land Agency Board) Appointment 2011 (No. 1) made under section 42 of the *Planning and Development Act 2007* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Land Agency Board.**

This instrument appoints a specified person as a member of the Land Agency Board. The Committee notes that the formal part of this instrument indicates that the appointment is made under section 79 of the *Financial Management Act 1996*. However, the formal part of the Explanatory Statement indicates that the appointment is made under paragraph 78(5)(b) of the Financial Management Act, while the body of the Explanatory Statement indicates that the appointment is made under section 42 of the *Planning and Development Act 2007* "together with **section 78** of the *Financial Management Act 1996*".

On the face of this instrument, section 79 of the Financial Management Act does not apply to this instrument of appointment. Section 79 applies to the appointment of the chair and deputy chair of a governing board. In this case, the specified person is merely appointed as a member of the Land Agency Board.

As to paragraph 78(5)(b) of the Financial Management Act, the Committee notes that it provides:

> (5) Also, unless the establishing Act otherwise provides, a person must not be appointed as a member if—

(a) the person is a public servant; and

(b) if the governing board has a maximum of 6 members or less— the appointment would result in more than 1 public servant being a member of the board; and

(c) if the governing board has a maximum of more than 6 members—the appointment would result in more than 2 public servants being members of the board.

The Committee notes that section 43 of the Planning and Development Act:

43 Land agency board members

(1) The land agency board has at least 5, but not more than 8, members.

Note 1 A chair and deputy chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

Note 2 The chief executive officer of the corporation is a member of the governing board (see *Financial Management Act 1996*, s 80 (4)).

If the Land Agency Board must have between five and eight members—with the maximum of eight members being more than the six member maximum mentioned in paragraph 78(5)(b)—it is difficult to see how paragraph 78(5)(b) of the Financial Management Act could apply in relation to this instrument of appointment.

The Committee assumes that this is simply an example of a "precedent" for an instrument of appointment being used in circumstances where the precedent does not, in fact, apply. The Committee notes that it has warned against the use of precedents in this way in its recently-published "Tips and traps" document for subordinate legislation (available on the Committee's website, at http://www.parliament.act.gov.au/downloads/committee-business/Subordinate-legislation-stylistic-standards-updated.pdf).

The Committee would appreciate the Minister's advice as to the provision under which this instrument of appointment was, in fact, made.

Subordinate laws—No comment

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

Subordinate Law SL2011-25 being the Victims of Crime Amendment Regulation 2011 (No. 1) made under the *Victims of Crime Act 1994* **amends the Regulation by removing reference to the Health Services Commissioner with respect of any role related to the review of internal decisions.**

Subordinate Law SL2011-27 being the Workers Compensation Amendment Regulation 2011 (No. 1) made under the *Workers Compensation Act 1951* **amends the Regulation to provide clarity on the expectations that attach to approved insurers and self-insurers during the approval/exemption process and once licensed/exempted, and ensures mechanisms are available to government to review compliance with the regulatory framework.**

Subordinate law—Comment

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

Accessibility of legislation

Subordinate Law SL2011-26 being the Gene Technology Amendment Regulation 2011 (No. 1) made under the *Gene Technology Act 2003* **amends the** *Gene Technology Regulation 2004* **to correspond with amendments made to the Commonwealth *Gene Technology Regulations 2001*.**

As set out in the Explanatory Statement, "this subordinate law amends the *Gene Technology Regulation 2004* (the regulation), a component of the national framework for the regulation of gene technology, to correspond with amendments made to the Commonwealth *Gene Technology Regulations 2001* effected by the Commonwealth *Gene Technology Amendment Regulations 2011 (No 1).*

The Committee notes that various of the substantive amendments made by this subordinate law refer to rely on "*AS/NZS 2243.3:2010*". Section 19 of this subordinate law inserts into the Dictionary of the *Gene Technology Regulation 2004* the following definition"

> ***AS/NZS 2243.3:2010*** means the Australian/New Zealand Standard *Safety in laboratories Part 3: Microbiological safety and containment*, jointly published by Standards Australia and Standards New Zealand, as in force on 1 September 2011.
>
> *Note* AS/NZS 2243.3:2010 may be purchased at www.standards.org.au.

This means that any person seeking to work out the content of the Gene Technology Regulation must *purchase* a copy of *AS/NZS 2243.3:2010*. The Committee also notes that the Explanatory Statement for this subordinate law contains no explanation as to why this limitation on the accessibility of the (incorporated by reference) content of this subordinate law is necessary. While the Committee assumes that the necessity is related to the value of *AS/NZS 2243.3:2010* to its copyright-owner, the Committee would appreciate the Minister's advice as to what (if any) consideration has been given as to the ability of those affected by the amendments of the Gene Technology Regulation that are made by this subordinate law to access *AS/NZS 2243.3:2010.*

In making this comment, the Committee notes that the incorporation of Australian/New Zealand Standards was the topic of a paper at the recent Australia - New Zealand Scrutiny of Legislation Conference (held in Brisbane, on 26-28 July 2011). The paper was presented by the Hon Janine Freeman MLA, a member of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament (see http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/current-inquiries/SLC_Conference). In the paper, Ms Freeman discussed in some detail (among other things) the methodology that leads to Standards, the pros and cons for their use and also to recent Productivity Commission reports that deal with the use of Standards. Ms Freeman stated:

> 2.19 In describing the relationship between Standards and regulation, Standards Australia describes voluntary Standards as "*self-regulation*" but a Standard called up in regulation "*Coregulation*". That adopted Standards have legal effect underlay many of the Productivity Commission recommendations considered in this Paper. For example, when considering the cost of accessing regulatory standards, it said:
>
> > *This both increases the costs to business of complying with legal requirements and limits the capacity of consumers to keep track of their legal entitlements.*

2.20 The interplay between Standards and legislation raises rule of law questions. An important principle of rule of law is:

> *the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process.* (footnotes omitted)

Ms Freeman concluded her paper by stating:

> 9.1 The issues raised in calling up Standards are complex and often require consideration of detail beyond that possible in the time available to the Parliament to debate a Bill.
>
> 9.2 However, these issues do raise important 'rule of law' questions as to whether the traditional safeguards against abuse of delegated legislation-making power are being eroded.
>
> 9.3 Given the increased incidence of calling up Standards, we consider it worthwhile to reconsider the rationales for, and practical effect of, calling up Standards in the context of modern Standard-making and 'calling up' practices.

These are issues that the Committee considers are worthy of further thought.

The Committee would appreciate the Minister's advice as to what (if any) consideration has been given as to the ability of those affected by the amendments of the Gene Technology Regulation that are made by this subordinate law to access *AS/NZS 2243.3:2010*.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 15 September 2011, in relation to comments made in Scrutiny Report 40 concerning the Security Industry Amendment Bill 2011.
- The Minister for the Arts, dated 28 September 2011, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instrument DI2011-17, being the Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1).
- The Attorney-General, dated 6 October 2011, in relation to comments made in Scrutiny Report 42 concerning the Crimes (Certain Penalty Increases) Amendment Bill 2011.
- The Attorney-General, dated 6 October 2011, in relation to comments made in Scrutiny Report 42 concerning the Crimes (Protection of Witness Identity) Bill 2011.
- The Attorney-General, dated 11 October 2011, in relation to comments made in Scrutiny Report 42 concerning the Evidence Amendment Bill 2011.

The Committee wishes to thank the Attorney-General and the Minister for the Arts for their helpful comments.

COMMENTS ON GOVERNMENT RESPONSES

Security Industry Amendment Bill 2011

By letter of 15 August 2011, the Attorney-General responded to the Committee's comments on the Security Industry Amendment Bill 2011 in *Scrutiny Report No 40* (11 August 2011).

The Committee raised an issue as to proposed section 9E, which would provide that an applicant mentioned in proposed subsection 9(2) (being the commissioner or chief police officer) must be told if a "court proposes to find that [certain] information is not criminal intelligence". Its concern was that "[i]t is generally considered improper for a judicial body, or a tribunal such as ACAT, to convey to any party or person what it proposes to do by way of making a decision".

In response, the Attorney argues that the reasoning of French CJ in *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 rebuts the suggestion made by the Committee that proposed section 9E might be incompatible with the essential functions of a court, on the basis of the doctrine in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24. With respect, it is very difficult to see that what was said by French CJ, or in the more relevant majority opinion, has any bearing on the issue raised by the Committee. As identified by the majority, the sole issue before the Court was whether "the the Full Court [of South Australia] erred in law in finding s 28A of the [relevant South Australian] Act to be valid notwithstanding that it required the Licensing Court to hear and determine the review without disclosing to K-Generation information classified as "criminal intelligence" which had been relied upon by the Liquor Commissioner in refusing the application for an entertainment venue licence" (at [108]). The issue raised by proposed subsection 9(2) is quite different.

Moreover, in finding section 28 valid, the majority, as well as French CJ, emphasised that the Licensing Court had discretion to proceed otherwise than in open court; (see at [147]). In contrast, proposed subsection 9(2) is cast in mandatory terms, providing that the court "must" tell the applicant about what it proposes to do.

A second matter of concern was raised by the Committee.

> Proposed subsection 9G(3) provides that, on a proceeding, the court may take any steps it considers appropriate to maintain the confidentiality of the information, and by subsection 9G(4):
>
> > The court must not give any reason for making a finding in relation to the information, other than the public interest.
>
> The hallmark of judicial reasons is that they are reasoned, and do not simply consist of assertions of opinion. To compel a court to refuse to issue reasons might be argued to be incompatible with the essential functions of a court, on the basis of the doctrine in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24.

Again, the Attorney's response relied on statements by French CJ and Kirby J in the *K-Generation* case. Again, the Committee cannot see that these statements, or anything in the majority opinion, have any bearing on the issue.

Crimes (Protection of Witness Identity) Bill 2011

By letter of 6 October 2011, the Attorney-General responded to the Committee's comments on this Bill in *Scrutiny Report 42*.

1. The Committee was concerned with subclause 11(2) of the Bill, which provides that a decision to give a witness identity protection certificate is final and is not subject to appeal or review, and must not be called into question, quashed or invalidated by a court. The response acknowledges that this affects the right of an accused to have rights recognised by law decided by a court and constitutes a limitation on subsection 21(1) of the Human Rights Act. It goes on to offer a justification for this limitation.

The Committee also suggested that "it is possible that the power of the Assembly to restrict judicial review is limited by subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*". The Attorney-General's response argues that subclause 11(2) is necessary, but does not deal with the concern that it may be inconsistent with subsection 48A(1). Subsection 48A(1) gives the Supreme Court all appellate jurisdiction "that is necessary for the administration of justice in the Territory". It may be that the Supreme Court has not yet answered the question of whether subsection 48A(1) does control the legislative power of the Assembly, but it is a question to be seriously addressed.[1]

2. The Attorney-General's response deals with the Committee's concern that a witness identity protection certificate can be set aside by the trial judge only where it would, in defined circumstances, prevent a party from cross-examining a witness as to the credibility of that witness (or, perhaps, of some other witness). The Committee stated that "it is odd that a defendant is entirely precluded from using evidence of the name and address of a witness to cross-examine as to issues of fact, while being permitted to use the evidence to attack the credibility of the witness". The response argues that this kind of evidence "will almost always be relevant to credibility" and that, on the "very rare occasion" that it would be relevant to facts in issue, "the court has the power to stay the proceeding". The response identified this as a power to prevent an abuse of the court's processes, and cited authorities.

It is impossible to anticipate just when evidence of name and address would, in a particular case, be relevant to the facts in issue, and difficult to say that these occasions would be "very rare". Moreover, it may well be that a court would hold that it cannot invoke its power to stay a proceeding where the unfairness arises out of the application of a law. In other words, the court might find that it cannot stop the operation of a law.

Vicki Dunne, MLA
Chair

October 2011

[1] See *Lucas-Smith v Coroner's Court of the ACT* [2009] ACTSC 40 [37], and compare *Evans v Shiels* [2004] ACTSC 19 [11] ff, and *Commissioner for Housing v Ganas* [2003] ACTSC 34.

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

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

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

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

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

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

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

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

Bills/Subordinate Legislation

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

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

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

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

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

Report 41, dated 22 August 2011
Disallowable Instrument DI2011-169—Superannuation Management Guidelines 2011
Disallowable Instrument DI2011-170—Financial Management (Territory Authorities) Guidelines 2011

Report 42, dated 15 September 2011
Children and Young People (Transition to Independence) Amendment Bill 2011 (PMB)
Disallowable Instrument DI2011-197—Planning and Development (Remission of Lease Variation Charges) Determination 2011 (No. 1)
Disallowable Instrument DI2011-216—Education (Government Schools Education Council) Appointment 2011 (No. 2)

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No. 40 of 11 August 2011 and the Standing Committee on Justice and Community Safety's comments on the Security Industry Amendment Bill 2011 (the Bill).

In response to the Committee's recommendation that a replacement Explanatory Statement be prepared, I note the issues raised and will be tabling a revised Explanatory Statement in the Legislative Assembly during the September 2011 sitting period.

The Committee has raised an issue in relation to the drafting of section 9E (clause 4), stating that "it is generally improper for a judicial body ... to convey to any party or person what it proposes to do by way of making a decision." The Committee expresses a concern that a party might wish to challenge or criticise the proposal or that the proposed decision could become the subject of public discussion.

The intent of this section is to enable the Chief Police Officer or the Commissioner the opportunity to withdraw information from consideration in circumstances where a court proposes to find such information does not constitute criminal intelligence, thereby protecting information, the disclosure of which may have serious consequences.

Part 2A (clause 4) is modelled on s 28A(5d) of the *Liquor Licensing Act 1997* (SA) which was the subject of an appeal to the High Court of Australia (HCA) in *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4. In considering s 28A(5), Chief Justice French stated (at para 76) "[p]roperly construed s 28A(5) gives the Licensing Court and the Supreme Court a degree of flexibility in the steps to be taken to maintain the confidentiality of criminal intelligence. ... There is nothing in the Act to prevent the Court from taking into account the fact that the information has not been able to be tested by or on behalf of the applicant, in assessing its weight."

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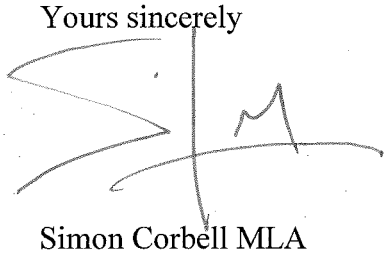
In relation to proposed s 9G(4) – confidentiality of criminal intelligence in court, the Committee comments that to compel a court to refuse to issue reasons could arguably be incompatible with the essential function of a court.

I again refer to the decision in *K-Generation* where the HCA held that s28A(5) of the *Liquor Licensing Act 1997* (SA) is valid and does not offend the *Kable* principle. Justice Kirby concluded (at para 258) "[a]s was intended, the provisions diminishes the role of a court to decide claims to privilege with respect to "criminal intelligence". However, it does not involve the State Parliament or the Police Commissioner impermissibly "instructing" a court on a particular case. It does not prevent a court from performing traditional judicial functions. It does not diminish the integrity and independence of a court in a constitutionally impermissible way."

French CJ observed (at para 10) "... it cannot be said that the section confers upon the Licensing Court or the Supreme Court functions which are incompatible with their institutional integrity as courts of the States or with their constitutional roles as repositories of federal jurisdictions. Properly construed the section leaves it to the courts to determine whether information classified as criminal intelligence answers that description. It also leaves it to the courts to decide what steps may be necessary to preserve the confidentiality of such material. ... It leaves it open to the courts to decide whether to accept or reject such material and to decide what if any weight shall be placed upon it."

I trust this information addresses the Committee's concerns and I thank the Committee for its interest in these issues.

Yours sincerely



Simon Corbell MLA
Attorney General
15.9.11

Joy Burch MLA

MINISTER FOR COMMUNITY SERVICES
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR AGEING
MINISTER FOR WOMEN
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee Report No. 34 of 2011.

In the Report, the Committee noted that the Disallowable Instrument DI 2011-17 to appoint Ms Sandra Lambert as a member of the Cultural Facilities Corporation unnecessarily made a reference to Section 78 (5) (b) of the *Financial Management Act 1996.*

The reference should have been made to Section 78 only and future Disallowable Instruments for the Corporation will comply with this reference.

Thank you for bringing the matter to my attention.

Yours sincerely

Joy Burch MLA
Minister for the Arts
28 September 2011

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MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.42 (the Report) containing comments on the *Crimes (Certain Penalty Increases) Amendment Bill 2011* (the Bill). I offer the following response to those comments.

The Committee suggests that prescription of a maximum penalty for a criminal offence engages the right in section 10(1)(b) of the *Human Rights Act 2004* to not be punished in a cruel, inhuman or degrading way.

The Government does not believe that the prescription of *any* maximum penalty engages the right in section 10(1)(b). This section clearly refers to "cruel, inhuman or degrading" punishment, not to punishment in general. In many cases where maximum penalties are prescribed, particularly monetary penalties or short terms of imprisonment, the punishment cannot be said to risk being "cruel, inhuman or degrading".

The Committee may be suggesting that section 10(1)(b) is engaged where a maximum penalty is prescribed that is grossly disproportionate to the offence committed. Generally, a punishment might be said to be cruel or inhuman if it is "grossly disproportionate": *Soering v United Kingdom* [1989] 11 EHRR 439; *State v Makwanyane* [1995] SA 391.

The Government accepts that the penalty increases proposed by the Bill are significant. The penalties for culpable driving causing death, culpable driving causing grievous bodily harm and negligently causing grievous bodily will be approximately doubled. The penalties for intentionally inflicting grievous bodily harm and recklessly inflicting grievous bodily harm will be increased by one third.

However, the Government is not of the view that the new maximum penalties proposed for these offences can be considered grossly disproportionate.

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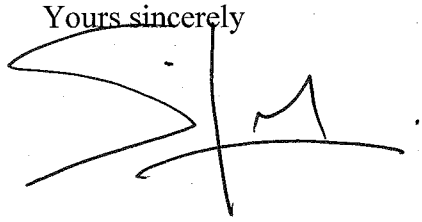
The offences are some of the most serious in the criminal law. They result in either the death of the victim or grievous bodily harm to the victim, including devastating injuries just short of death such as permanent coma or paralysis.

In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045, the Canadian Supreme Court observed that in order for a punishment to be "cruel or unusual" it must be "so excessive as to outrage the standards of decency". Although the increases are significant, the penalties are clearly still proportionate to the seriousness of these offences and cannot be said to risk outraging the ACT community's standard of decency. The new maximum penalties are in line with those that exist in other Australian jurisdictions and also with the nationally agreed Model Criminal Code. They are also in balance with other existing penalties for offences against the person in the Territory. In light of these factors, I submit that the right in section 10(1)(b) is not engaged by the Bill.

If the view prevails that the right in section 10(1)(b) is in fact engaged by the Bill, the Government believes that the same arguments apply to show that the limitation on the right is reasonable and justified.

I thank the Committee for their consideration of this Bill.

Yours sincerely



Simon Corbell MLA
Attorney General
6.10.11

Simon Corbell MLA

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MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.42 (the Report) containing comments on the Crimes (Protection of Witness Identity) Bill 2011 (the Bill).. I offer the following response to those comments.

A privative clause

The Committee indicates concern with respect to subclause 11(2) of the Bill on two grounds.

Limitation of rights under the Human Rights Act

The Committee suggests that subclause 11(2) of the Bill may limit rights under subsection 21(1) of the *Human Rights Act 2004* (the HRA).

Subclause 11(2) of the Bill provides that: a decision to give a witness identity protection certificate is final and is not subject to appeal or review; and must not be called into question, quashed or invalidated by a court.

Subsection 21(1) of the HRA provides that: 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.

The Committee suggests that by removing from judicial review the decision to give or not give a protection certificate, a right of the accused may be affected.

It is possible that subclause 11(2) affects the right of an accused to have rights recognised by law decided by a court as the decision to give a witness identity protection certificate cannot be appealed or reviewed. A decision to give a witness identity protection certificate prevents the disclosure of a witness' true name and address. Although there is no "right" for an accused to

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have the real name and address of an undercover witness disclosed, I do accept that through the operation of the provisions in the Bill such a decision may limit the broader right of an accused to a fair trial.

If subclause 11(2) does engage and limit subsection 21(1) of the HRA, it does so in a way that is restricted and justified.

A decision to give a witness identity protection certificate is not appealable as the decision is based on sensitive information and the process of review may result in disclosure of the operative's name and address. In the Government's view, judicial appeal of such a decision would undermine the purpose of the witness identity protection scheme.

I draw the committee's attention to the discussion of limitation on the right to a fair trial at pages 5-8 of the Explanatory Statement to the Bill. The discussion concludes that such limitation is reasonable and justified.

Subclause 11(2) is also necessary to give effect to the operation of the scheme across borders. All other jurisdictions that have adopted the scheme have also enacted privative clauses. This ensures consistency across jurisdictions with respect to witness protection certificates that are given in another state or territory.

Subsection 48A(1)

The Committee suggests that 'it is possible that the power of the Assembly to restrict judicial review is limited by subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*.'

The Government considers that subclause 11(2) is necessary as the decision whether to give a witness identity protection certificate is based on highly sensitive information, and the decision could not be reviewed without disclosing this information. This may put at risk the safety of certain people, and may jeopardise ongoing investigations. This would defeat the purpose of the witness identity protection regime.

In addition, subclause 11(3) of the Bill provides that a decision whether to give a protection certificate can be called into question in disciplinary proceedings against the decision maker.

The Government also notes that subclause 18(2) of the Bill provides for the court to give leave or make an order to allow disclosure of an operative's identity or address, despite a decision made by the chief officer under subclause 11(1).

The Joint Working Group Report (November 2003), in considering this question, concluded that the provisions adopted in the Bill are appropriate and that while the decision to issue a certificate is to be made within the law enforcement agency, it will be made only at the highest levels of the agency.[1]

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[1]Cross-Border Investigative Powers for Law Enforcement Report, November 2003, p.261

Finally, the court retains its power to stay proceedings in the interests of justice.

***Section 130 Evidence Act 1995 (Cwlth)*(the Evidence Act)**
The Committee states that 'the existence of section 130 is not ... a sufficient or even particularly relevant matter to consider when addressing the scheme of the Bill.'

As the Committee notes at page 6 of its Report, section 130 of the Evidence Act and the common law concerning public interest immunity are relevant as a starting point in considering the witness protections provided by the Bill. Section 130 applies broadly to evidence where the public interest in admitting it is outweighed by the public interest in preserving confidentiality. By contrast, the Bill applies narrowly to a very specific type of evidence (that is, the real name and address of the operative witness) and a very narrow class of witness (that is, undercover operatives).

Limitation of rights under the Human Rights Act 2004
The Committee suggests that a 'fair trial challenge' to a witness identity protection certificate could arise in two ways. The Committee states that in the context of a particular proceeding where the operation of a certificate would deny a party a fair trial, the remedy might be to stay the proceeding. The Government agrees with this assessment. The Explanatory Statement to the Bill expressly notes at page 8 that the Bill does not affect the power of the court to stay proceedings: 'If there were cases where the protection of the witness' identity means that the defendant is unable to properly test the facts in issue, the court has a discretion to stay the proceedings in the interest of justice.'

The Committee suggests that an alternative fair trial challenge 'may be that the certificate procedure is in all cases HRA incompatible'.

The Government is of the view that the limitations on rights by the Bill are reasonable and justified under section 28 of the HRA.

An analysis of the Bill's engagement of rights enshrined in sections 21 and 22(b) and (g) of the HRA is provided in the Explanatory Statement to the Bill at pages 5 – 8.

The Committee refers to a statement by Lord Bingham in *R v Davis* in which he suggests that: "keeping the identity of witnesses secret would, among other things, place serious limitations on effective cross-examination." The Government queries what is meant here by 'identity of witnesses'. In *R v Davis* the case involved the decision of a trial judge to allow several witnesses to give evidence without disclosing their true name and address but also without disclosing any particulars which might identify the witnesses. The witnesses gave evidence from behind screens so they could not be seen by the accused and their voices were subject to mechanical distortion to prevent recognition by the accused.[2]

[2] R v Davis[200 8] UKHL 36

The protection of witness identity can be distinguished from the situation described in *R v Davis*. This is discussed at page 6 of the Explanatory Statement to the Bill.

It should also be noted that the Bill only applies to a narrow class of witness. The Bill strictly limits non-disclosure of identity in relation to officers working as undercover operatives.[3]

The Bill is also narrowed in its application by virtue of the fact that only the most serious cases are subject to such undercover investigations.

Credibility

The Committee discusses the concern of the courts that a defendant may explore the credibility of a prosecution witness. The Committee specifically refers to *R v Davis* quoting the judgment in *Smith v Illinois*: 'when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives.'

The Government has ensured that the Bill addresses this issue. Clause 18 provides that the court may give leave to allow the disclosure of a witness' identity, despite the existence of a witness identity protection certificate where such disclosure is required to explore credibility.

Facts in issue

The Committee discusses a number of cases indicating that:

1. withholding from the defendant the name and address of a witness would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him (*R v Davis; S v Leepile*);
2. there are circumstances in which the issue of whether a witness was at the place he or she claimed to be is an issue of fact, and not an issue as to the credibility of the witness (*Piddington v Bennett & Wood Pty Ltd*); and
3. the name and address of a witness may be relevant to establishing a defence such as entrapment (*R v Scott*).

It may be possible to conceive of a situation where 'there are circumstances in which the issue of whether a witness was at the place he or she claimed to be is an issue of fact, and not an issue as to the credibility of the witness.' However, such a situation will be extremely rare.

With respect to points 1 and 2 of the Committee above: should the accused need to lead evidence of the witness' true name and/or address to prove that the witness was not in fact at a particular place at a particular time (as alleged by the witness) such evidence would also be

[3] The definition of operative in the Act is someone who is authorised to acquire and use an assumed identity under the *Crimes (Assumed Identities) Act 2009* or a participant in an authorised operation under the *Crimes (Controlled Operations) Act 2008*.

broadly relevant to the witness' credibility (whether they were able to witness what they said they did) and therefore may be allowed by the court under clause 18 of the Bill.

With respect to point 3, the Government notes that there is no substantive defence of entrapment in Australia.[4] Circumstances of entrapment may be relevant in sentencing but the rules of evidence do not apply to sentencing proceedings unless the court specifically directs.

The Committee states that 'it is odd that a defendant is entirely precluded from using evidence of the name and address of a witness to cross-examine as to issues of fact, while being permitted to use the evidence to attack the credibility of the witness...'. The Government is of the view that the name and address of a witness (whether an undercover operative or not) will almost always be relevant to credibility and it would only be in a very rare circumstance that the real name and address of an undercover operative would only be relevant to proving facts in issue.

Finally, if, on the very rare occasion that disclosure of the real name and address of an undercover operative who is a witness in a criminal proceeding is necessary for the defendant to prove a fact in issue and such disclosure is not also relevant to the credibility of the witness then the court has the power to stay the proceeding.

Less restrictive means

The Committee suggests that 'there is no indication that any less restrictive measures were considered'. The Government draws the Committee's attention to page 17 of the Explanatory Statement which explains why the less restrictive measure of allowing the court (as opposed to the law enforcement agency) to assess whether an undercover operative's identity will be protected is not workable:

> It is not appropriate to call on the court to assess operational law enforcement or intelligence issues such as the possible risks to a person or to an investigation or security activity if an operative's true identity is disclosed. The court cannot be informed of the possible risks without disclosing highly sensitive information about operational matters and ongoing investigations. The court is unlikely to be able to test the information given (for example, about death threats to an operative) as it would not be practicable to call and cross-examine witnesses. It is the role of the law enforcement agency to ensure the security and success of investigations into criminal activity and the safety of operatives.

The Government is of the view that if this less restrictive measure were adopted, the entire purpose of the Bill (to protect the identity and therefore safety of undercover operative witnesses and integrity of investigations) would be undermined.

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[4] *Ridgeway v The Queen* (1995) 184 CLR 19

Interests of justice and interests in a fair trial

The Committee suggests that the Explanatory Statement appears to overstate the power of the court under clause 18 in stating that 'the court may give leave where the interest of justice, specifically the interests in a fair trial, require the witness' identity to be disclosed to explore credibility' as there is no reference to the interests of a fair trial in subclause 18(4).

Subclause 18(4) provides that the court must be satisfied it is in the interests of justice for the operative's credibility to be tested. It seems that the most likely situation in which it will be in the interests of justice for the operative's credibility to be tested is where a fair trial cannot be had without allowing such testing.

Stay of proceedings

The Committee requests that the court's power to stay proceedings be identified.

Rule 4750 of the Court Procedures Rules 2006 empowers the Supreme Court to grant a stay in proceedings prior to arraignment of the accused.

The ACT Supreme Court has stated that:

> A permanent stay of proceedings is a remedy available to prevent an abuse of the court's processes: *Barton v The Queen* [1980] HCA 48; (1980) 147 CLR 75 (at 96, 107, 116). This power is in aid of the courts' general power to prevent unfairness to the accused: *Connelly v Director of Public Prosecutions* (1964) AC 1254 (at 1347) per Lord Devlin.[5]

In *Dupas v R* the High Court stated that:

> A prosecution which is an abuse of process is to be stayed. This will be only in an extreme or singular case because it is only in such a case that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences; there is no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered.[6]

In the case of *R v NRC* a stay was granted in the proceeding as the defence was unable to cross-examine an important witness.[7]

On the basis of the above legislation and judicial authority, in the extraordinary event that the non-disclosure of the undercover witness' real name and address meant that the accused would be unable to properly test facts in issue and therefore have a fair trial, the court may grant a stay of proceedings.

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[5] R v Trong Ruyen Bui [2011] ACTSC 102

[6] *Dupas v R* [2010] HCA 20.

[7] *R v NRC (No 2)* [2001] VSCA 210

Subclause 23(1)

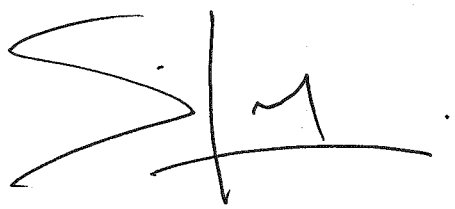
The Committee recommends that subclause 23(1) not be stated in the Bill as it is misleading.

Subclause 23(1) provides that: despite any other territory law the functions of a chief officer of a law enforcement agency under this Act must not be delegated to anyone else.

The subclause is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. The Government is of the view that subclause 23(1) is not misleading and is clear in its intention to ensure that inappropriate delegation of the power to give a witness identity protection certificate does not occur.

I thank the committee for their consideration of this Bill.

Yours sincerely



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Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 42 of 15 September 2011. I offer the following response in relation to the Committee's comments on the Evidence Amendment Bill 2011 (the Bill).

Protection of confidential communications – clarity of operation
In its report the Committee expressed concern that there is a lack of clarity surrounding the scope of the court's discretion to exclude evidence of a protected confidence. The Law Society raised a similar concern during consultation on the exposure draft of the Bill.

The professional confidential relationship privilege proposed to be established by the Bill has been drafted in the form recommended by the Law Reform Commissions (Australia, Victoria and New South Wales) in their joint review of evidence law in 2005 and agreed to by the Standing Committee of Attorneys-General in 2007. It also mirrors section 126B of the New South Wales *Evidence Act 1995* where the privilege has been operating successfully since 1997.

It is clear from the NSW explanatory statement and parliamentary speeches that section 126B is intended to provide only one discretion. The discretion under subsection (1) is to be exercised taking into account the matters in subsections (3) and (4). The explanatory statement for the Commonwealth amendments that inserted a journalist privilege based on the NSW privilege in 2007 also indicates the intention for only one guided discretion.

A review of the case law in NSW suggests that section 126B is being interpreted as intended since it was established in 1997. In the absence of case law to the contrary, and in accordance with the ACT's commitment to implementing the model evidence law without substantive variation, the Bill sees the ACT implementing the uniform privilege unchanged. The explanatory material accompanying the reforms in the ACT clearly expresses the intention for only one guided discretion.

However, I believe that there would be value in considering an amendment to the privilege to further clarify the intention. Any amendments to the model law must be considered at the national

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level and it is proposed that the ACT will raise this issue in the appropriate manner. Officers from my Directorate have commenced that process through consultation with officers in other jurisdictions.

Protection of confidential communications – human rights
In its report the Committee noted that the professional confidential relationship privilege engages the right to a fair trial and referred the Assembly to the treatment of this in the explanatory statement. The Committee then provided three additional points on the matter:

- the exclusion of a communication might have a significant detrimental effect on the ability of a party to prove their case;
- the operation of the privilege may add considerable time, cost and complexity to the conduct of many trials and gives the example of personal injury cases;
- the list of non-exhaustive factors set out in proposed subsection 126B(4) to guide the exercise of judicial discretion makes no reference to the value of a party's right to a fair trial.

As noted in the explanatory statement, this privilege is not absolute. It allows a range of competing public interests to be balanced by the court in determining whether a confidential communication should be disclosed. It is clear, while not specified, that there is plainly a public interest in a defendant receiving a fair trial. Section 126B(4) contains a number of factors which would require the court to consider principles of fair trial, including the probative value and importance of the evidence in the proceeding, the nature and gravity of the offence, the availability of any other evidence, and whether the party seeking to present the evidence is a defendant. Section 30 of the *Human Rights Act 2004* provides that a Territory law must be interpreted in a way that is compatible with human rights.

The Committee's concern that the establishment of the privilege will add time, cost and complexity to trials is mitigated by the operation of the pre-court procedures for personal injury claims contained in the *Civil Law (Wrongs) Act 2002*. Parties will continue to be obligated to provide relevant reports and documents to put parties in a position where they have enough information to assess liability and quantum in relation to a claim. These measures foster efficiency in case processing and management and assist settlement of cases before they get to court.

Government is confident that the professional confidential relationship privilege established by the Bill strikes an appropriate balance between the public interest in preserving the confidentiality of communications and the public interest in ensuring an accused person is given a fair trial in criminal proceedings.

Protection of the identity of a journalist's source
In its report the Committee noted similar concerns as those above about the journalist privilege engaging the right to a fair trial. In particular, the Committee notes that proposed section 126K(2) makes no reference to the value of a party's right to a fair trial.

My comments above in relation to the professional confidential relationship privilege also apply to the journalist privilege. The court will invariably consider fair trial considerations when deciding whether to disclose an informant's identity. Section 30 of the *Human Rights Act 2004* provides that a Territory law must be interpreted in a way that is compatible with human rights.

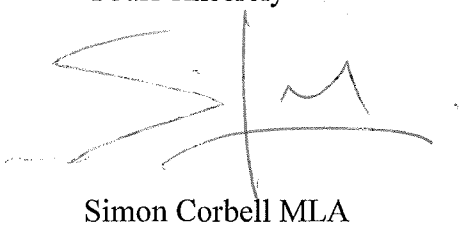
Submission to Commonwealth Senate Committee
In its report the Committee referred to my submission, as Attorney General, to the Commonwealth Senate Standing Committee inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009. My comments, as reproduced in the Committee's report, should be noted in the context in which they were given; the amendment of a privilege which had been prepared for and endorsed by all Australian Attorneys-General to apply to all professions where confidentiality is key.

The journalist privilege to be established by the Bill is a different model to the privilege I commented on in 2009. It is designed specifically to protect from disclosure information about the identity of a journalist's source by establishing a presumption against the disclosure of evidence that

would reveal their identity. While it doesn't allow for automatic loss of this presumption where an offence has been committed, it does allow the court to take this into account in determining whether the presumption is rebutted. This provides the flexibility for the court to take into account the specific circumstances of each case before it and consider all relevant facts before determining where the public interest lies. This judicial discretion acknowledges that misconduct is usually involved in these cases because disclosure by a confidential source of information to a journalist often involves committing a crime or an act that attracts civil action.

I trust that the above response answers the Committee's concerns and I thank the Committee for its observations.

Yours sincerely



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11.10.11