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

SCRUTINY REPORT 27

3 FEBRUARY 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

ANNUAL REPORTS (GOVERNMENT AGENCIES) AMENDMENT BILL 2014

This is a Bill to amend the *Annual Reports (Government Agencies) Act 2004* and other legislation to permit the consolidation of annual report requirements, and for other allied purposes.

APPROPRIATION (LOOSE-FILL ASBESTOS INSULATION ERADICATION) BILL 2014-2015

This is a Bill for an Act to appropriate money for the Loose-fill Asbestos Insulation Eradication Scheme for the financial year that began on 1 July 2014.

BILLS—COMMENT

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

CRIMES LEGISLATION AMENDMENT BILL 2014

This is a Bill to amend a number of Territory laws that relate to crimes, criminal detection, and sentencing.

THE CREATION OF OFFENCES RELATING TO VOYEURISTIC CONDUCT

The Bill proposes (in clause 7) to insert into the *Crimes Act 1900* a new section 61B that would create two offences designed to criminalise conduct that makes intimate observation of a person, or captures visual data of a person, in circumstances where a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be, in one case, an invasion of privacy and indecent, and in the other, an invasion of privacy.

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

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

PROPOSED SUBSECTION 61B(1) OF THE CRIMES ACT

These provisions are complex and raise a number of human rights issues. The first offence to consider is that provided for in subsection 61B(1):

(1) A person (the offender) commits an offence if—

(a) the offender—

(i) observes another person with the aid of a device; or

(ii) captures visual data of another person; and

(b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be—

(i) an invasion of privacy; and

(ii) indecent.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

The prosecution (P) would in the first place need to prove beyond reasonable doubt that the defendant (D) intended to do either of the acts stated in paragraph 61B(1)(a). It will be noted that such acts are in very many circumstances innocuous, and, moreover, it is immaterial whether the place where they were committed was public or private. So far as proving that D intended to do anything, paragraph 61B(1)(a) sets a very low threshold.

Secondly, P would need to prove that the particular acts of D were, in the circumstances, both an invasion of privacy and indecent according to the opinion of a reasonable person. P would not need to prove that D was aware that her or his acts were both an invasion of privacy and indecent according to those standards.[1]

(On this analysis, the offence is not one of strict liability. Paragraph 61B(1)(b) simply states circumstances in which the acts described in paragraph 61B(1)(a) intended by D will amount to the offence.[2] On this basis, it is difficult to understand why subsections 61B(2) and (3) have been included. These provide:

(2) Strict liability applies to subsection (1) (b) (i).

(3) Absolute liability applies to subsection (1) (b) (ii).

The point is that since P need not prove any intention on D's part in relation to paragraph 61B(1)(b), it appears to make no sense to include provisions that have the effect of obviating the need for P to establish a fault element. **The Committee recommends that this issue be clarified by the Minister**.)

Given the low threshold of paragraph 61B(1)(a), whether D commits an offence will turn on how the magistrate will apply the objective standard in paragraph 61B(1)(b). There will be many cases where the answer to this question is far from obvious. As French CJ observed in *Monis v The Queen*:[3]

> The characteristics of the reasonable person, judicially constructed for the purpose of such statutory criteria, have been variously described. A "reasonable man" in *Ball v McIntyre* was "reasonably tolerant and understanding, and reasonably contemporary in his reactions." A reasonable person was said, in the Supreme Court of New South Wales, to be "neither a social anarchist, nor a social cynic". The reasonable person is a constructed proxy for the judge or jury. Like the hypothetical reasonable person who is consulted on questions of apparent bias, the construct is intended to remind the judge or the jury of the need to view the circumstances of

1 Compare *Director of Public Prosecutions (ACT) v AW* [2013] ACTCA 35, [65] per Katzmann J. On the other hand, D's motive or, more accurately, her or his purpose or intention, is part of the context in which the act(s) took place and may be taken into account by the fact-finder who determines whether "in all the circumstances", the acts were both an invasion of privacy and indecent according to those standards (ibid at [63]). But P would not be obliged to adduce evidence of D's motive. On D would be placed a practical burden of proof to adduce the evidence.

2 Ibid at [65].

3 [2013] HCA 4 at [44], and see too at [47].

> allegedly offensive conduct through objective eyes and to put to one side subjective reactions which may be related to specific individual attitudes or sensitivities. That, however, is easier said than done. [footnotes omitted]

In this case, the magistrate must ask, after taking into account "all the circumstances" (which itself imports a large element of vagueness) whether, according to the attitude of the hypothesised reasonable person,[4] the acts of D are "an invasion of privacy" and also "indecent". The two concepts are also of a protean character.[5] The Explanatory Statement (at 6) argues that "[i]t is neither possible nor appropriate to define privacy as the concept of privacy can mean different things to different people and in defining 'privacy' the concept would lose its relevance". Noting that "the observing or capturing of visual data must be indecent as assessed according to the common law definitions of indecency", it is said that "[i]n this regard, the level of indecency will be assessed according to what is "contrary to the ordinary standards of morality of respectable people within the community", as well as the context of the "nature or quality of the act in itself" (footnotes omitted).

In a particular case, the result may well be that D may be convicted of a crime in circumstances where their moral culpability is low. That is, because he or she did not anticipate how the magistrate would understand the concepts of "invasion of privacy" and "indecent", it cannot be said that D intended to breach these standards, or was reckless in those regards. This may be particularly so where D is a young person. This problem was addressed by the ACT Human Rights Commission in its submission to the Committee.

In some circumstances, D may attempt to establish a defence. Subsection 61B(4) provides:

> (4) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant—
>
> (a) believed on reasonable grounds that the other person consented to the defendant observing or capturing visual data of the other person; or
>
> (b) did not know, and could not reasonably be expected to have known, that the observing or capturing of visual data of the other person was without consent.

Imposition of a burden of proof on D and the presumption of innocence in HRA subsection 22(1)

To make out this defence, D would carry a legal burden of proof, and that engages the presumption of innocence stated in HRA subsection 22(1). This matter is addressed in the Explanatory Statement (at 11-12), to which the Committee refers Members of the Assembly. This issue was also addressed at length in a submission to the Committee from the ACT Human Rights Commission, signed by both the Human Rights and Discrimination Commissioner and the Children and Young People Commissioner.

Section 61B(4) would create a defence, and it is technically not correct to speak of it requiring D to disprove an element of the offence. But it is accepted that for the purposes of applying HRA

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4 There is another element of uncertainty here. In *Moni* at [46], French J noted that "[t]he "reasonable persons" test ... does not specify the assumptions upon which it is to be applied. One assumption might be that the reasonable persons referred to in the section have bare knowledge of the [relevant acts of D] and its attendant circumstances but that [these acts] not directed to them and not otherwise affecting them. An alternative assumption is that the reasonable persons are affected by the [relevant acts]". French CJ spoke of the former as being the "more conservative assumption", in the sense that this would be a more limited way of understanding the scope of these words. Given that subclause 61B restricts freedom of speech, this may be how a Territory court would approach this offence. It is however a matter that might be clarified.

5 [2013] HCA 4 at [47].

subsection 22(1), the presumption is engaged where D must adduce evidence in order to avoid conviction.

Given the serious nature of this offence, as measured by the potential for D to be imprisoned for two years, it is arguable that the offence should be restructured so that an element of the offence as described in subsection 61B(1) is that D did not believe on reasonable grounds that the other person consented to the observing or capturing of the visual data, or that D did not know, and could not reasonably be expected to have known that the observing etc was without consent. Depending on the particular factual matrix, this may set a high hurdle for P, but this approach is found in relation to serious criminal offences. If this option was taken up, the presumption of innocence would not be engaged.

The Explanatory Statement argues that given the fact to be established is D's state of mind, it is reasonable to require D to adduce evidence on this issue. If this is accepted, the question is whether D should discharge this burden to the evidential standard or to the apparently higher legal standard.

If subsection 61B(4) were reframed so that D need meet the evidential standard, they would need to persuade the magistrate that the evidence showed that it was within reason to think that D made out the components of the defence. If so persuaded, the magistrate would look to P to prove beyond reasonable doubt that D did not possess the requisite belief or knowledge. If this option were taken, subsection 22(1) is engaged, but its derogation is more likely to be regarded as justifiable under HRA section 28.

As it stands, subsection 61B(4) casts a legal burden on D, so that D must persuade the magistrate, on the balance of probabilities, that they made out the components of the defence. There are judicial decisions to the effect that casting a legal burden on a D is not justifiable. (Of course, such decisions are based on the particular statutory context, and do not necessarily apply to subsection 61B.)

The ACT Human Rights Committee sees a significant difference between the two burdens. The Committee notes that in this context, where what is in issue is D's state of mind, it may not be so material. If D carried an evidential burden, they would need to point to evidence before the magistrate to support their claim that they did not have the relevant state of mind.[6] If the evidential burden was met, P would then need to prove the opposite. P would be likely to point to the particular circumstances of how and when the image was captured, and what kind of image was captured, and argue that D should simply not be believed. If D carried a legal burden the issue would also in many cases come down to whether they should be believed.

This analysis may also suggest, however, that the task of P, and particularly in cases where the image is obviously indecent, may not be materially different were the burden to be expressed as evidential.

The Committee refers this issue to the Assembly and calls upon the Minister to respond.

A defence-based satisfaction of objective criteria

The more significant problem from D's standpoint is that it is not relevant to consider their subjective belief as to whether a person affected by the observing or capture of the visual data consented.

[6] The D might of course choose not to give evidence, and rely on other evidence to discharge the evidential burden. In this case, D could not be cross-examined by P. In this case, however, P might submit to the magistrate that D's failure to give evidence would permit the magistrate to more easily make findings of fact in favour of P, and/or to draw from other facts inferences favourable to P. Section 20 of the *Evidence Act 2011* applies only in a criminal proceeding for an indictable offence. Proceedings for an offence as proposed in the Bill will, given the penalty provision, be tired summarily. It is likely then that D will give evidence and be subject to cross-examination.

Again, it is the magistrate who will assess what D thought or should have thought according to objective criteria. On this basis, D's moral culpability is lower than would be the case where their subjective belief was the touchstone for the application of the defence.

Is the offence in subsection 61B(1) too harsh?

The Committee does not of course question the policy objective of subsection 61B(1), but there is an issue as to whether the manner in which it is proposed to achieve that objective is too harsh. On one view, a harsh offence engages the right to the right to liberty and security of person (HRA subsection 18(1)), in particular where a convicted person may be imprisoned.

The first element of harshness lies in the fact that the application of subsection 61B(1), and of the defence in subsection 61B(4), will turn on how the fact-finder applies objective standards.

The second element of harshness lies in the penalty. While section 61B(1) may not in theory include elements of strict and absolute liability, it is analogous to such offences. Where a convicted person may be imprisoned where their moral culpability is low, the rights to liberty and security, and not to be punished in a cruel way are engaged.

An argument that this offence should be less draconic may also be supported by reference to the right freedom of expression (HRA subsection 16(2) and the common law basis of this right). The capturing of visual images may well amount to an act of "expression" within the reach of HRA subsection 16(2). It may well be that Territory courts will reason that political and artistic expression should in particular be accorded the protection of freedom of expression. The capturing of visual images is often involved in such modes of expression.[7] It is arguable that subsection 61B(1) engages that right in the sense of penalising its exercise.

Where capturing of the visual image is for the purpose of a political communication, there will be an issue as to whether it is an impermissible burden on the freedom found by the High Court to be implicitly stated in the Commonwealth Constitution.[8]

In terms of a justification for derogating from freedom of speech, or of the constitutional freedom of political communication, a critical issue is whether less restrictive means are reasonably available.

This is a matter for the Minister to address. The Committee suggests that consideration be given to a graded series of offences. Proposed section 61B might be regarded as relatively low level, warranting a much lower penalty. A heavier penalty might then be attached to an offence framed so that the prosecution must prove that D intended, or was recklessly indifferent as to whether D's acts were an invasion of privacy and indecent. An intermediate offence might be framed to apply where D was aware that her or his acts would be regarded by a reasonable person as an invasion of privacy and indecent.

The Committee also notes the suggestion in the ACT Human Rights Commission submission that the Minister consider adopting the course taken in Victoria in section 70AAA of the *Crimes Act 1958*, which involves creating exceptions available to persons below 18.

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

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7 As apparently, is the case in respect of the freedom of expression protection in the European Convention on Human Rights; see https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-10-freedom-expression.

8 See below, the discussion of this human right limitation in the report on Electoral Amendment Bill 2014 (No 2).

PROPOSED SUBSECTION 61B(5) OF THE CRIMES ACT

Subsection 61B(5) would, in its material parts, provide:

(5) A person (the offender) commits an offence if—

(a) the offender observes with the aid of a device or captures visual data of—

(i) another person's genital or anal region; or

(ii) for a female or a transgender or intersex person who identifies as a female—the breasts; and

(b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be an invasion of privacy.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

The analysis and comments made above apply here, but noting that compared to proposed subsection 61B(1), subsection 61B(5) is significantly broader, in that the magistrate need address only whether, on the objective standard, the acts amount to an "invasion of privacy". It is probably unlikely that capturing data could be in the course of a political communication, but the right to freedom of expression (HRA subsection 16(2)) would be engaged.

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

Finally, the Committee notes that elements of vagueness or uncertainty are also introduced by some of the exceptions stated in subsection 61B(8). An objective standard is incorporated in paragraphs 61B(8)(b)(iii) and (vi). Given the wide variety in clothing fashion, the concept of "underwear" is uncertain, and D's understanding of this concept might be very different to that of a magistrate.

ELECTORAL AMENDMENT BILL 2014 (NO 2)

This is a Bill to amend the *Electoral Act 1992* in response to recommendations made by the Select Committee on Amendments to the *Electoral Act 1992* in its report *Voting Matters* (June 2014) and by the Electoral Commission in its Report to the ACT Legislative Assembly *Proposed changes to the Electoral Act 1992* (September 2014).

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

Report under section 38 of the *Human Rights Act 2004*

The amendments proposed range across a wide range of topics, and many of them are of a minor or uncontroversial character. That proposed by clause 14 appears to engage the *Human Rights Act 2004*. There is also a question whether if enacted this change would be invalid as a burden of the freedom of political communication embedded in the Commonwealth Constitution, and which operates as a restraint on the legislative power of the Assembly.

THE CAP ON ELECTORAL EXPENDITURE: CLAUSE 14

Freedom of expression (HRA subsection 16(2)) and the right to take part in public affairs (HRA paragraph 17(a))

The Electoral Act sets caps on expenditure by parties and candidates for an election; see Division 14.2B. Critical to the operation of these limits is the expenditure cap for the particular election, and this is prescribed in section 205D. Clause 14 proposes to substitute for the current (and out-dated) paragraph 205D(a) a provision to read "(a) for an election held in 2016 - $40,000". This sum is then multiplied by the number of candidates to a maximum of five per electorate, and given that the 2016 election will be contested in five electorates, the total maximum cap will be $1,000,000. The cap applied to the 2012 election was $60,000 per candidate.

A restriction on expenditure by parties and candidates for an election probably engages the right to freedom of expression stated in HRA subsection 16(2), and the right to "take part in the conduct of public affairs, directly or through freely chosen representatives" stated in paragraph 17(a). These rights may be limited, but only if justified according to the test and framework stated in HRA section 28. In relation to clause 14, these rights probably overlap, and the question may be framed in terms of whether an expenditure cap as proposed would limit freedom of expression, and, if so, whether it is justifiable.

The constitutional freedom of political communication

The scope of this freedom was stated succinctly by French CJ in *Monis v The Queen*:[9]

> The Australian Constitution limits the power of parliaments to impose burdens on freedom of communication on government and political matters. No Australian parliament can validly enact a law which effectively burdens freedom of communication about those matters unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government in Australia.

It seems clear that the $40,000 cap is a burden on political communication "because it places a ceiling on the amount of political donations which may be made and on the amount which may be expended on electoral communications".[10] The critical question is then "whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. The enquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so".[11]

It should be noted that in Unions NSW the High Court accepted the object of the legislative provision in issue in the case was the legitimate aim of regulating "the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted".[12] It found however that the provision in issue was invalid—as a burden on political communication—because did nothing to promote the achievement of those legitimate purposes.[13]

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9 [2013] HCA 4 at [2].

10 *Unions NSW v New South Wales* [2013] HCA 58 [41], where the High Court spoke of similar provisions in NSW law.

11 Ibid at [44], footnote omitted.

12 Ibid at [51].

13 Ibid.

Apart from its endorsement of the legislate purposes of a law regulating donations, the decision in Unions NSW does not assist in assessing whether the proposed amendment of paragraph 205D(a) is invalid. The critical question in this regard is the same as that posed by the High Court. In substance, the test is the same as that posed by HRA section 28 when the question is whether a law that engages an HRA right is justifiable.

The Explanatory Statement provides very little by way of a section 28 justification for proposed paragraph 205D(a) of the Electoral Act. The significance of this matter to the working of the electoral process is such that a full justification is called for, and the Committee recommends that this be done.

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

JUDICIAL COMMISSIONS AMENDMENT BILL 2014

This is a Bill to amend the Judicial Commissions Act 1994 to create a scheme for the consideration of complaints relating to the behaviour of a judicial officer where substantiation of the complaint would not warrant consideration by the Legislative Assembly of the removal of the officer.

BACKGROUND

The Bill proposes a part-time judicial council with powers to receive, investigate, and report to heads of jurisdiction or to the Attorney-General about complaints against judicial officers. Where the council is satisfied on reasonable grounds that a complaint is wholly or partly substantiated, then it must[14] (a) if the complaint could justify parliamentary consideration of the removal of the judicial officer, make a recommendation to the Executive that it appoint a judicial commission to examine the complaint,[15] or, if parliamentary consideration was not justified, (b) refer the complaint to the head of the relevant jurisdiction.[16] In this second case, the reference may include recommendations as to what steps might be taken to deal with the complaint.[17]

It is these second cases that the Explanatory Statement refers to as "low and medium level complaints" (at 1), or "minor complaints" (at 3).

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

Report under section 38 of the *Human Rights Act 2004*

Creation of the proposed scheme may be seen to enhance the right to a fair trial stated in HRA section 21, and, more fundamentally, of the right of the members of the public to an independent and competent judiciary for the resolution of disputes and criminal matters. In relation to the detail of such a scheme, it is critical that the public have confidence, to the maximum degree achievable, that the scheme will operate in a transparent, clear and rigorous fashion. From this standpoint, the Committee raises a number of matters for consideration by the Minister and the Assembly. It is also to be noted that the judicial council is not a judicial body. It is a statutory body exercising administrative functions

14 See clause 28, proposed section 35J; see too proposed section 17 (clause 9).

15 See clause 8 of the Bill, proposing a new section 17 for the Act. The powers of such a commission are provided for in the Act.

16 That is, the Chief Justice, or the Chief Magistrate, as the case may be.

17 See proposed subsection 35C(2) (clause 28). However, the Committee notes below a problem in the cross-reference in paragraph 35J(1)(b) to section 35C.

and, as a starting point, should be subject to the same accountability regime that applies to other such bodies. Again, from this perspective, a number of issues arise with respect to the council, and to some other exercises of administrative power.

EARLY DISMISSAL OF A COMPLAINT BY THE JUDICIAL COUNCIL

By a substituted section 14 (clause 5) of the Act, a person may complain to the council or the Attorney-General about a matter that relates or may relate to the behaviour or physical or mental capacity of a judicial officer (other than a presidential member of the ACAT).[18] By proposed subsection 35A(1), the council must conduct a preliminary examination of a complaint. After having done so, it may take a one or other of two steps that would at that point conclude its investigation.

One[19] is that it "may" dismiss the complaint "if satisfied on reasonable grounds" of any of a number of matters. These are (proposed subsection 35B(1)):

(a) the complaint is one that the council is not required to deal with;

(b) the complaint is frivolous, vexatious or not in good faith;

(c) the subject matter of the complaint is trivial;

(d) the matter complained about happened at too remote a time to justify further consideration;

(e) in relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint;

(f) without limiting paragraph (e), the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights;

(g) the person complained about is no longer a judicial officer;

(h) having regard to all the circumstances, further consideration of the complaint is unnecessary or unjustifiable.

These are very broad grounds for dismissal of a complaint without full investigation. The public may never become aware of the particular grounds taken by the council. On one reading of the Bill, it has a discretion (but not a duty) (undefined by the relevant power in subsection 35I(5)) to inform the unsuccessful complainant. From the standpoint of accountability of the council, there may be a question whether there is a lack of transparency.

On another reading however, subsection 35I(5) has no application to an early dismissal of a complaint. Unless the council has dismissed a complaint under sections 35B or 35C, subsection 35D(1) requires it to "conduct an examination of a complaint", and sections 35D to 35H then state the powers of the council upon an investigation. Section 35I then states that the council "must" dismiss the complaint in certain circumstances, and states circumstances in which a report must or may be provided. In this context, subsection 35I(5) appears to be referring only to a report after an investigation has been conducted, and does not apply to an early dismissal under subsection 35B(1).

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18 The Bill makes provision for the creation of a yet to be promulgated "protocol" to govern complaints about a presidential member of the ACAT; see clause 8.

19 The second and alternative option is to exercise its power under section 35C; this is considered below under the heading "Action to be taken by the council where it is satisfied on reasonable grounds that a complaint is wholly or partly substantiated".

The Committee recommends that this situation be clarified. The Committee suggests that the council should have a power to notify a complainant of an early dismissal.

The Committee notes that subsection 35B(1) is copied from the equivalent provision in the NSW legislation.[20] Few jurisdictions have a statutory scheme of this kind. One that does is New Zealand, and the parallel provision in its law omits provision of grounds (d), (e) and the "catch-all" (h). Ground (f) is more narrowly stated, in that instead of the words "judicial or other function", the New Zealand provision refers to "judicial decision or judicial function".[21]

The issue may be posed by asking the question: what would be lost were the power in section 35B to dismiss without examination of a complaint framed according to the New Zealand model rather than that of New South Wales?

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

ACTION TO BE TAKEN BY THE COUNCIL WHERE IT IS SATISFIED ON REASONABLE GROUNDS THAT A COMPLAINT IS WHOLLY OR PARTLY SUBSTANTIATED

The Committee has noted that where the council is satisfied on reasonable grounds that a complaint is wholly or partly substantiated, then it must[22] (a) if the complaint could justify parliamentary consideration of the removal of the judicial officer, make a recommendation to the Executive that it appoint a judicial commission to examine the complaint,[23] or (b) refer the complaint to the head of the relevant jurisdiction.[24] The Committee raises no issue about these outcomes, but it raises an issue for clarification about how the second option is framed.

It is necessary first to note the role of proposed section 35C. After a preliminary investigation, the council may, as an alternative to dismissing the complaint under section 35B, refer it to the relevant head of jurisdiction if "satisfied on reasonable grounds that although the complaint appears to be wholly or partly substantiated, it does not justify the attention of the council" (subsection 35C(1)). Such a reference "may include recommendations as to what steps might be taken to deal with the complaint" (subsection 35C(2)).

Returning now to what may happen after an examination of a complaint and a finding by the council that the complaint is wholly or partly substantiated, if the council finds that the complaint could not justify parliamentary consideration of the removal of the judicial officer, it must "refer the complaint under section 35C".

On one reading, this does not make sense. As the Explanatory Statement states, "Section 35C ... allows the council to refer a complaint to the relevant head of jurisdiction if satisfied on reasonable grounds that it does not justify the council's attention". But section 35J is addressing a situation where the council has given the complaint attention; it applies after the council has concluded its examination of the complaint. What is intended is that at this stage the council may refer the matter to the head of the jurisdiction, and make any recommendations it may have as what steps might be taken to deal with the substantiated complaint.

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20 See *Judicial Officers Act 1986*, section 20.

21 See *Judicial Conduct Commission and Judicial Control Act 2004*, paragraph 16(1)(f).

22 See clause 28, proposed section 35J; see too proposed section 17 (clause 9).

23 See clause 8 of the Bill, proposing a new section 17 for the Act. The powers of such a commission are provided for in the Act.

24 That is, the Chief Justice, or the Chief Magistrate, as the case may be.

The issue is whether paragraph 35J(1)(a) might be reworded to better reflect this intention.

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

THE EXCLUSION OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS; CLAUSES 36, 37 AND 38

Clauses 36, 37 and 38 propose to amend paragraphs (a), (c) and (e) of section 60 the Act to the end only of substituting in them references to other provisions of the Act as it would stand if it were amended by the passage of this Bill. These (and other) paragraphs in section 60 provide that a proceeding for an injunction, declaration or prerogative order must not be brought in relation to certain decisions of the Executive, a member of the Legislative Assembly, and the proceedings of a commission.

In addition, item part 1.1 of schedule 1 proposes to amend the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act) "to add a decision of the Executive to appoint a judicial commission at the recommendation of the council under section 17(3), a decision of the Attorney-General to refer a complaint to the council under section 15, or any other decision of the judicial council to the schedule of decisions to which that Act does not apply".

While these may be seen as technical amendments, they nevertheless require scrutiny of the provisions as a whole. (It should also be noted that section 60 was enacted 20 years ago, and prior to the commencement of the Human Rights Act.) Moreover, the amendment proposed by part 1.1 of the schedule appears to be a substantive amendment, in that the exclusion of the ADJR Act is not currently provided for in the Act.

The question is whether these amendments are an acceptable qualification of (a) the powers of a court to issue the remedies of injunction, declaration or prerogative order, and (b) of the power of the Supreme Court to grant remedies of a similar nature under the ADJR Act.

One source of limitation is subsection 48A(1) of the A*ustralian Capital Territory (Self-Government) Act 1988* (Cwlth) (the Self-Government Act), which provides that "[t]he Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory". It is now accepted that this guarantees to the Supreme Court jurisdiction to consider challenges to the legality of an exercise of executive or administrative power by persons or bodies in whom such powers have been vested by Territory law. A law of the Territory that purported to limit this power is invalid to that extent.

This is not an easy question to answer. These amendments are aimed at excluding any possibility of judicial review of the relevant administrative or executive decisions. In other laws, there will be found exclusion of ADJR Act relief, leaving review by the common law remedies intact, albeit restricted by a limitation period.[25] These amendments are more extensive.

It is entirely unclear how the Supreme Court might determine whether these amendments unacceptably limit the original jurisdiction that is necessary for the administration of justice in the Territory. Perhaps it would apply a test similar to that found in HRA section 28. That test is in any event relevant here because these amendments might be seen to derogate from the right to a fair trial stated in HRA subsection 21(1).

[25] Such as the Planning and Development (Symonston Mental Health Facility) Bill 2014, considered in *Scrutiny Report 19* of 27 May 2014.

On the other hand, a proportionality test may be irrelevant. It may be that if there is, in respect of any class[26] of administrative or executive decisions, a purported exclusion of the judicial review jurisdiction of the Supreme Court, the relevant statutory provision will be invalid on the basis that it contradicts subsection 48A(1) of the Self-Government Act.

The basis of this argument is that subsection 48A(1) should be understood to have the same effect as paragraph 75(v) of the Constitution of the Commonwealth. The effect of paragraph 75(v) is explained extra-curially by the Chief Justice of the High Court:[27]

> In [*Bodruddaza v Minister for Immigration and Multicultural Affairs*[28]] the judges elaborated upon what Dixon J had said, linking the purpose of s 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:
>
> > An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers [(2007) 228 CLR 651 at 668].
>
> Section 75(v) furthered that end through the control of "jurisdictional error". ... Examples of jurisdictional error include a mistake of law which causes the decision-maker to identify a wrong issue, ask itself a wrong question, ignore relevant material or rely upon irrelevant material. In some cases a decision-maker may make an erroneous finding or reach a mistaken conclusion on the basis of which its authority or powers are exceeded. Other aspects of executive decision-making which may be challenged in the exercise of the constitutional jurisdiction may include bad faith or a breach of the rules of procedural fairness by the decision-maker. Those rules of procedural fairness are taken to apply to the exercise of public power unless clearly excluded [*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 93 [126] per McHugh J].

Thus, a provision in Commonwealth law that purports to exclude judicial review of a class of administrative decisions is invalid. It may be argued that subsection 48(1) of the Self-Government Act is analogous to paragraph 75(v), at least insofar as concerns the administrative review jurisdiction of the Supreme Court. The common law and equitable remedies stated in paragraph 75(v) are of the same nature as the remedies stated in the proposed amendments. Thus, it might be argued, the amendments proposed to section 60 of the Judicial Commissions Act would, if passed into law, be invalid.

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

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26 Compare *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14 [49].

27 http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25mar11.pdf

28 [2007] HCA 14.

PLANNING AND DEVELOPMENT (CAPITAL METRO) LEGISLATION AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Planning and Development Act 2007*, the *Planning and Development Regulation 2008* and the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act) to the end of assisting the Government to expedite the construction and completion of the Capital Metro light rail project.

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions? (paragraph 3(c) of the terms of reference)

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

Report under section 38 of the *Human Rights Act 2004*

RESTRICTION OF ACAT MERITS REVIEW AND OF JUDICIAL REVIEW AND THE RIGHT TO A FAIR TRIAL (HRA SUBSECTION 21(1))

As summarised in the Explanatory Statement, the Bill "removes ACAT merit review and ADJR Act appeal rights for development approvals for light rail tracks and associated infrastructure. These restrictions do not apply if the development approval involves a 'protected matter' under the Act as amended by the *Planning and Development (Bilateral Agreement) Amendment Act 2014*".

The Explanatory Statement makes the general point that merits and legality review "are important avenues for review and accountability. However, they can result on occasion in delay, uncertainty and costs for the proponent and the wider community", and can frustrate the timely and certain implementation of policy. This may also be said concerning non-government plans and policies, to the detriment of non-government investors and developers, whose increased costs may be passed on to members of the public. It might however be said that a light rail policy is polycentric inasmuch as its effects are spread far wider than planning decisions affecting more limited developments, and on this basis are less amenable to merits review by a body such as ACAT, or legality review by the Supreme Court. The point is that polycentric decisions are less amenable to review by lawyers, involving as they do a consideration of a wide range of social and economic matters.

Merits review by ACAT. The Explanatory Statement notes that "[d]evelopment approvals for light rail and associated infrastructure will not be subject to third party ACAT merit review. In other respects, the development application, assessment and approval process remains the same as for standard development applications"; see part 4 of the Bill. Similar restrictions in the *Planning and Development (Symonston Mental Health Facility) Amendment Act 2014* are cited as a precedent.

Legality review by the Supreme Court.[29] In the first place, the Bill (see clause 4) would amend the ADJR Act so that the remedies created by this law could not apply to a decision in relation to a development proposal for light rail and associated infrastructure". The justification offered is that

> [d]elivery of the Capital Metro project is a core commitment of the ACT Government. It is a project of major significance to the Territory and to the Canberra community. The exclusion of the ADJR Act will remove uncertainty and potential delays for this important initiative.

[29] The Explanatory Statement refers to "appeals" to the Supreme Court. This is not technically correct. An appeal is usually a means of obtaining a merits review by a tribunal (such as ACAT) or by a court. The ADJR Act and the common law remedies of a similar nature available from the Supreme Court permit only a narrower "legality review" of the relevant administrative decision.

This last sentence is an overstatement. It will remain open to a person to seek legality review from the Supreme Court by means of the 'common law' remedies, and thereby create as much uncertainty and delay as would result from an ADJR application by means of the common law remedies.

The effect of proposed sections 137C and 137D of the *Planning and Development Act 2007* (the Planning Act) is that a person must seek common law based judicial review (usually in the Supreme Court) of a light rail declaration, or of a decision in relation to a development proposal related to light rail, within 60 days of the declaration or of the decision (as the case may be).

In *Scrutiny Report 16* of 1 April 2014, concerning the Planning and Development (Project Facilitation) Bill 2014, the Committee considered a similar clause. It noted that ordinarily an application for a Supreme Court remedy based on the common law "must be filed in the court not later than 60 days after the day when the grounds for the grant of the relief sought first arose" (*Court Procedure Rules* subrule 3557(2)), but that the court "may extend the time mentioned in subrule (2) only in special circumstances" (subrule 3557(3)). In respect of the relevant clause of the Bill under analysis, it noted that was "an unusual restriction on the availability of a Supreme Court remedy based on the common law in that it does not permit the court to extend time. An issue to be considered is whether clause 85M should also provide for a court to extend the time limit of 60 days". The Minister's response was in terms that the clause would not be changed; see the letter of 7 April 2014, appended to *Scrutiny Report 17* of 24 April 2014.

If the restriction in subsection 48A(1) of the Self-Government Act is to the same effect as paragraph 75(v) of the Commonwealth Constitution,[30] there is an issue as to the validity of proposed sections 137C and 137D of the Act.

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[31], the High Court held in effect that a law with respect to the commencement of proceedings under s 75(v) will be invalid if, whether directly or as a matter of practical effect, it curtails or limits the right or ability of applicants to seek relief under s 75(v) as to be "inconsistent with the place of that provision in the constitutional structure".[32] Speaking of the time limit provision in issue in that case, the High Court said that:

> [s]ection 486A is cast in a form that fixes upon the time of the actual notification of the decision in question. This has the consequence that the section does not allow for the range of vitiating circumstances which may affect administrative decision-making. It is from the deficiency that there flows the invalidity of the section.[33]

The Court also said:

> [the] fixing upon the time of the notification of the decision as the basis of the limitation structure provided by s 486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit. The present case where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser, is an example.[34]

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30 See the discussion above in relation to the Judicial Commissions amendment Bill 2014.

31 2007] HCA 14.

32 Ibid at [53]. The Court left open whether a broader restriction might apply; that is, any fixed time limit upon the making of an application to the High Court for a paragraph 75(v) remedy was impermissible. The Court referred to *Plaintiff S157/2002* [2003] HCA 2 at [5] and [104] for an explanation of the meaning of these words.

33 Ibid at [55].

34 Ibid at [57].

There is, of course, a question as to how far, in the light of subsection 48A(1) of the Self-Government Act, these holdings apply to a time limit on judicial review relief in a Territory law. There does however appear to be a substantial issue to be addressed by the Minister.

The Committee refers the Assembly to the justifications stated in the Explanatory Statement at pages 7 to 8.

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

PUBLIC POOLS BILL 2014

This is a Bill for an Act to establish an administrative framework to support management practices for Territory owned public pools, and involves the repeal of part 2 and part 3 of the *Public Baths and Public Bathing Act 1956*.

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

Report under section 38 of the *Human Rights Act 2004*

Those clauses of the Bill that engage one or more of the rights stated in the HRA are of relatively minor significance. There is in any event a careful and thorough canvassing of the rights issues raised in the Explanatory Statement at pages 5 to 17. The Committee commends the skill and effort taken by the drafters of the Explanatory Statement.

Do any provisions of the Bill inappropriately delegate legislative powers? (paragraph 3(d) of the terms of reference)

A WIDELY EXPRESSED POWER, VESTED IN THE MINISTER, TO EXEMPT A POOL FACILITY OR A PERSON FROM THE ACT

In the material parts, subclause 11 provides:

(1) The Minister may exempt a pool facility or person from this Act.

(2) In deciding whether to exempt a pool facility or person from this Act, the Minister must take into account any criteria prescribed by regulation.

...

(5) An exemption is a disallowable instrument.

The Committee commented on such a clause in Scrutiny Report 26, in relation to the Food Amendment Bill 2014,[35] noting that it conferred a discretion in the Minister that was not limited (except in so far as a court, on a challenge to an exercise of the power, might discern limits), and that it departed from the constitutional principle that the executive should not be empowered to dispense with provisions of a statute.

The Explanatory Statement (at pages 21-22) acknowledges these concerns, and offers a justification for creating such a power. Subclause 11(2) is designed to address the problem of the wide discretion by permitting a regulation to specify criteria according to which it must be exercised.

[35] http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/664278/8Scrutiny26.pdf

From the standpoint of limiting such powers, and preserving the Assembly's position, it would be more desirable to provide that subclause 11(1) could not be exercised unless and until a regulation was made in terms of subclause 11(2).

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

CONSULTATION REQUIREMENTS

The Bill would empower the Minister in some cases, and the director-general in others, to make various kinds of subordinate laws. The process for making a subordinate law is more likely to produce a rational outcome if, prior to being made, the maker has consulted with those likely to be affected by the law.

By subclause 13(1) the Minister may determine "standards" in relation to the operation or management of a pool facility, and, by subclause 13(2), must consult beforehand with "stakeholders", and must invite written submissions on the relevant standard. (This seems to mean that this latter invitation must extend to everybody, and **the Committee recommends that this be clarified**. The Explanatory Statement (at 25) does not assist in this regard.) A determination is a disallowable instrument. The Committee notes that the consultation requirement was inserted to address the fact that the Minister's discretion is not specifically limited. In the Committee's view, a consultation requirement is valuable in any case.

By subclause 14(1), the director-general may determine "standards" in relation to certain operational matters, and, by subclause 14(3), must consult and invite submissions beforehand. These standards are a notifiable instrument.

On the other hand, a consultation requirement does not attach to other subordinate law-making powers; see subclause 12(1) (conferring power on the director-general to determine notifiable minimum qualifications in certain respects), subclause 15(1) (conferring power on the director-general to determine notifiable standards in certain respects), subclause 16(1) (conferring power on the director-general to determine notifiable standards in certain respects), and subclause 17(1)) (conferring power on the Minister to issue notifiable guidelines for fees).

As noted, the Committee sees value in attaching a consultation requirement to any kind of subordinate law-making process where that is feasible. Given in particular that the director-general and the Minister will be aware of the relevant "stakeholders", (by reason of their being obliged to consult in two cases), it would not seem unduly onerous to require consultation in relation to the subordinate laws permitted by clauses 12, 15, 16 and 17.

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

COMMENT ON THE EXPLANATORY STATEMENT

This Explanatory Statement is of a very high standard. It has explained the Bill's provisions and purposes in a clear manner that will greatly assist any member of the public; and it has addressed the human rights issue well; and it has paid respect to the views expressed by this Committee on issues that arise under its terms of reference.

PUBLIC SECTOR BILL 2014

This is a Bill to create a scheme for the establishment of the Australian Capital Territory Public Service, the employment of persons in public sector entities, and about the values, principles, accountability and administration of the public sector.

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

Report under section 38 of the *Human Rights Act 2004*

Do any clauses of the Bill makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

LACK OF CLARITY CONCERNING THE AMBIT OF AN EMPLOYEE'S OBLIGATIONS UNDER PARAGRAPH 9(2)(A)

According to the Explanatory Statement subclause 9(2) states it "is deliberately broader in its application than section 9(1) and it prescribes actions that a public sector member must not do. It applies outside the performance of official functions. The proscribed behaviours are completely inconsistent with an individual continuing as an employee". Most of the subparagraphs concern actions that are in some way related to the employee's employment, but paragraph 9(2)(a) proscribes "damage [to] the reputation of the public sector or the Executive". If this encompasses what is said or done by an employee in some capacity that is not related to their employment duties, then this rule engages a number of an employee's HRA rights, such as to privacy (section 12), freedom of expression (section 16), and the right to participate in politics (HRA section 17). But given the statement that subsection 9(2) "applies outside the performance of official functions" this is what might be intended.

It is noted that paragraph 9(2)(a) encompasses damage to the reputation of the Executive, standing alone.

The Committee recommends that the Minister clarify the ambit of paragraph 9(2)(a), and if necessary provide justifications in terms of HRA section 28.

LACK OF CLARITY CONCERNING THE AMBIT OF AN EMPLOYEE'S OBLIGATIONS UNDER SUBCLAUSE 9(4)

Subclause 9(4) provides that

> [a]n employee (a discloser) must tell the following person about any maladministration or misconduct by another employee of which the discloser becomes aware:
>
> (a) the head of service;
>
> (b) if the alleged maladministration or misconduct is by the head of service—the commissioner.

There are a number of points of uncertainty about the way this provision will work. The concept of "misconduct" is reasonably clear, but that of "maladministration" is potentially very wide and could be understood to cover a wide field. The Bill does not provide a definition.

"Maladministration" is defined in section 8 of the *Public Interest Disclosure Act 2012* to mean "an action about a matter of administration that was—(a) contrary to a law in force in the ACT; or (b) unreasonable, unjust, oppressive or improperly discriminatory; or (c) negligent; or (d) based wholly or partly on improper motives". The "negligence" ground for the application of this definition is probably the widest basis for its operation and could well be applied to many types of relatively minor errors by employees.

However, this definition in the Public Interest Disclosure Act is narrower than other uses of the term by public administration scholars, by lawyers, and by ombudsman bodies, in which spheres it is often taken to mean that there was some error, even of a minor and non-culpable kind, in the way policy or law was administered. The fact that the term is not defined in this Bill in the way it is in the Public Interest Disclosure Act could be a basis for argument that in the Bill the term "maladministration" is intended to have such a wider operation.

The Committee recommends that consideration be given to defining the term in the Bill in the way it is in the Public Interest Disclosure Act.

A further problem is that the Explanatory Statement envisages a role for subclause 9(4) that is narrower than that it would appear to have on a plain reading. It imposes a duty on an employee to report maladministration or misconduct; the employee has no discretion in the matter, and failure to discharge the duty might itself be seen as maladministration, thus rendering the employee liable to report. The Explanatory Statement probably acknowledges that this is not desirable, and offers a more limited view. It states:

> While it is unlikely that misconduct action would be instigated against an employee who fails to disclose maladministration or misconduct by another employee unless that employee was also involved in the maladministration or misconduct – in which case the misconduct would be the alleged act or omission itself – this provision plays an important role in providing legal authority for an employee to report alleged misconduct. It sits alongside provisions in the *Public Interest Disclosure Act 2012* in this regard.

The Public Interest Disclosure Act does not require the reporting of one employee of misconduct and the like by another, while on its face subclause 9(4) does. If the intention is to provide a legal basis for a report, then this is perhaps what subclause 9(4) should only do. The intention might be to reserve the possibility of a report that an employee failed to discharge their duty, and to exercise discretion whether to proceed with the matter. It is however undesirable that a law be framed widely on the basis that its actual scope is left to those who enforce the law.

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

Finally, the statement that "[t]he obligations in section 9 are to be read subject to other legal rights or requirements" makes sense only where on legal analysis the operation of section 9 has been displaced by another law. It cannot be set aside by some standard, or instruction, or whatever, that does not as a matter of law prevail over section 9.

The Committee recommends that this statement be clarified.

FAIR PROCEDURE FOR THE PUBLIC SECTOR STANDARDS COMMISSIONER IN RELATION TO SUSPENSION AND REMOVAL

Clause 13 provides a process for the suspension and removal of the Public Sector Standards Commissioner. In contrast to analogous laws (such as the *Legislative Assembly (Office of the Legislative Assembly) Act 2012*, see section 13 ff, and the *Auditor-General Act 1996* section 9B ff), the Bill makes no provision for such fundamental matters such as provision of notice to the Commissioner and the reasons for suspension, a timely opportunity to the Commissioner to make oral or written submissions in reply (in particular to the Assembly), and any step (such as consideration by an Assembly Committee) between the Chief Minister's actions and consideration in the Assembly. On the face of it, the Bill does not provide a sufficient measure of natural justice to be afforded the Commissioner.

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

A MISLEADING PROVISION

The Explanatory Statement notes that clause 60 will allow employment information to be shared across the public sector:

> The provision authorises the sharing and disclosure of certain information between information holders, or a person authorised by an information holder to receive information. Disclosure includes communicating or publishing the information.

There is no comment on subclause 60(1), which states that "[t]his section applies despite any other territory law". As the Committee has pointed out on many occasions, on its ordinary meaning, such a statement cannot have any legal effect where a territory law later in time than the passage of this Bill into law makes a provision contrary to any provision in section 60.

There is provision in the *Legislation Act 2001* for a law to contain a statement that a particular provision is a "determinative provision", in which case may be displaced expressly or by a manifest contrary intention (rather than simply by a contrary intention): subsection 6(2). It is explained in subsection 6(4) that a "declaration of a provision as 'determinative' indicates that it is the intention of the Legislative Assembly that, if the provision is to be displaced at all in a particular case, a more deliberate displacement is required than if the provision were a non-determinative provision". The Committee notes that this Bill does not contain a statement that clause 60 is a deliberative provision.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2014-277 being the Road Transport (General) MyWay Smart Card Fees Determination 2014 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **and section 13AA of the Road Transport (General) Regulation 2000 revokes DI2013-1 and determines fees payable for the issue or replacement of MyWay Smart Cards.**

Disallowable Instrument DI2014-278 being the Public Place Names (Mitchell) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends DI1997-189 by revoking the name of a road in the Division of Mitchell.**

Disallowable Instrument DI2014-279 being the Taxation Administration (Land Tax) Determination 2014 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2014-181 and determines the rates for the calculation of land tax for residential land for the purposes of the** *Land Tax Act 2004***.**

Disallowable Instrument DI2014-280 being the Planning and Development (Land Agency Board) Appointment 2014 (No. 2) made under section 42 of the *Planning and Development Act 2007* **and paragraph 78(7)(b) of the** *Financial Management Act 1996* **appoints a specified person as a member of the Land Agency Board.**

Disallowable Instrument DI2014-282 being the Road Transport (General) Application of Road Transport Legislation Declaration 2014 (No. 3) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the Blue Range Rallysprint.**

Disallowable Instrument DI2014-283 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 10) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **determines 13 specified Tabcorp ACT Pty Ltd temporary locations as sports bookmaking venues.**

Disallowable Instrument DI2014-285 being the Health (Fees) Determination 2014 (No. 4) made under section 192 of the *Health Act 1993* **revokes DI2014-148 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-286 being the Official Visitor (Disability Services) Visit and Complaint Guidelines 2014 (No. 1) made under section 23 of the *Official Visitor Act 2012* **makes the Official Visitor for Disability Services Visit and Complaint Guidelines.**

Disallowable Instrument DI2014-288 being the Duties (Corporate Reconstruction) Determination 2014 (No. 1) made under sections 70A, 91A and 208AA of the *Duties Act 1999* **determines the guidelines for the approval, by the Commissioner for ACT Revenue, of duty concessions for certain eligible transactions.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

IS THIS A DISALLOWABLE INSTRUMENT?

Disallowable Instrument DI2014-284 being the Gene Technology (GM Crop Moratorium) Advisory Council Member Appointment 2014 (No. 1) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* **appoints the members of the ACT Gene Technology Advisory Council.**

This instrument appoints seven specified persons as members of the ACT Gene Technology Advisory Council.

The Explanatory Statement for the instrument states:

> Under subsection 11(3) of the [*Gene Technology (GM Crop Moratorium) Act 2004*], the Council consists of eight members appointed by the Minister for Health.

It goes on to state:

> All current members of the Council are to be reappointed.

There are two issues with the Explanatory Statement. First, the proposition that the Council consists of eight members, together with the proposition that all current members are to be reappointed, does not sit particularly well with the fact that this instrument only appoints seven specified persons. However, the Committee notes that the list of current members of the Council that appears in the final paragraph of the Explanatory Statement includes the name of the Chair of the Council, who is not appointed by this instrument. This is a little confusing but not a serious deficiency in the Explanatory Statement.

This comment does not require a response from the Minister.

The second issue is that this instrument comes before the Committee as a disallowable instrument. However, the Committee notes that there is no indication as to whether or not, in fact, the appointments should be made by disallowable instrument. While the Explanatory Statement states that this is a disallowable instrument, under section 229 of the *Legislation Act 2001*, the Committee notes that, as a result of section 227 of the Legislation Act, section 229 only applies to appointments of persons other than public servants. It is for this reason that the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), the Committee stated:

> Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the Explanatory Statement for an instrument of appointment contains a statement to the effect that "the person appointed is not a public servant".

There is no such statement here.

While it might be argued that it should be assumed that, given that the persons here are being *re-appointed*, the persons were not public servants when appointed and are not public servants now. But that situation might have changed. The person might have *become* a public servant in the meantime. As a result, it is preferable that each of the specified persons' non-public servant status be addressed, even in the case of a re-appointment.

As the Committee has consistently pointed out, this is not an onerous requirement.

The Committee draws the Legislative Assembly's attention to this instrument under principle (2) of the Committee's terms of reference, on the basis that the Explanatory Statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

Further, the Committee would be grateful if the Minister could confirm that each of the specified persons reappointed by this instrument is <u>not</u> a public servant.

DISAPPLICATION OF SUBSECTIONS 47(5) AND 6 OF THE LEGISLATION ACT

Disallowable Instrument DI2014-287 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2014 (No. 1) made under section 25 of *the Energy Efficiency (Cost of Living) Improvement Act 2012* **revokes DI2012-264 and approves the Energy Efficiency Improvement Eligible Activities Interim Code of Practice.**

The Committee notes that section 4 of this instrument disapplies subsections 47(5) and (6) of the *Legislation Act 2001*. Those subsections provide:

> (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.
>
> (6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

(a) the law or instrument as in force at the time the relevant instrument is made;

(b) each subsequent amendment of the law or instrument;

(c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;

(d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

As the Explanatory Statement for the instrument notes, the effect of section 4 is that the various instruments incorporated by reference by the instrument—Australian Standards and various building codes—are not "notifiable instruments" and, as a result, are not required to be published on the ACT Legislation Register.

The Explanatory Statement for the instrument addresses this issue as follows:

Clause 4 Disapplication of notification requirement

Clause 5 disapplies , sections 47 (5) and 47(6) of the *Legislation Act 2001*, so that published standards and codes that are relied on in the code of practice do not have to be notified on the ACT legislation register. This has been done for copyright reasons.

Documents referenced in the code include Australian Standards, the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA). These documents are subject to copyright, making them inappropriate to notify on the legislation register. Australian Standards are available at www.standards.org.au. The BCA and PCA, including published State and Territory appendices, are available on the ABCB web site at www.abcb.gov.au.

The Explanatory Statement also notes the effect of section 5 of the instrument:

Clause 5 Referenced documents

This clause provides advice regarding how the community can access the Australian Standards, the BCA and the PCA, including how they can freely access the BCA and PCA, considering that access to the standards and codes are generally otherwise by paid purchase or subscription.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2014-26 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2014 (No. 2) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **increases the membership of the Medicines Advisory Committee to seven, because of a perceived lack of expertise and community representation within the public health sector.**

Subordinate Law SL2014-28 being the Magistrates Court (Fisheries Infringement Notices) Amendment Regulation 2014 (No. 1) made under the *Magistrates Court Act 1930* **amends Schedule 1 of the Magistrates Court (Fisheries Infringement Notices) Regulation to ensure that numbering aligns with relevant offences in the Act and that the offences are suitable as infringement notice offences.**

Subordinate Law SL2014-29 being the Rail Safety National Law (ACT) Regulation 2014 made under the *Rail Safety National Law (ACT) Act 2014* **prescribes devices and instruments for use in drug and alcohol testing of rail safety workers.**

Subordinate Law SL2014-30 being the Magistrates Court (Major Events Infringement Notices) Regulation 2014 made under the Magistrates Court Act 1930 allows infringement notices to be issued for specified offences.

SUBORDINATE LAW—COMMENT

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

STRICT LIABILITY OFFENCES

Subordinate Law SL2014-27 being the Work Health and Safety Amendment Regulation 2014 (No. 3) made under the *Work Health and Safety Act 2011* **amends the Work Health and Safety Regulation 2011 by inserting two notice requirements in response to the issue of loose fill asbestos affected homes and their demolition.**

This subordinate law inserts a new section 466 into the *Work Health and Safety Regulation 2011*. The new provision includes 2 new strict liability offences, relating to the failure of a "licensed asbestos removalist" to give to the Work Safety Commissioner notice of certain things in connection with the removal of loose-fill asbestos from a structure. Maximum penalties apply of $3600 for an individual or $18 000 for a body corporate.

In relation to the strict liability offences, the Committee notes, that in accordance with the Committee's requirements, the Explanatory Statement for the subordinate law sets out an explanation of the need for these strict liability offences. It states:

> Failure to comply with either of these requirements is an offence. Section 6A of the WHS Regulation provides that, unless otherwise specified, the physical elements of an offence are strict liability.
>
> For the two offences in the Regulation, the prosecution is required to prove only the conduct of the accused. However, where the accused produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made the conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.
>
> The application of strict liability has been carefully considered during drafting. The strict liability offences arise in the regulatory context where for reasons such as worker and public safety, and the interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of his or her professional involvement, to know the requirements of the law.
>
> In addition, at the time of the making of the Regulation, a tradesperson who has carried out building work or who intends to carry out building work (which is defined in the *Building Act 2004* as including demolition work) is able to apply to the Environment and Planning Directorate to ascertain whether or not a residential property contained loose fill asbestos and was part of an asbestos removal program. Information about this policy is available at: http://www.planning.act.gov.au/customer_information/community/new_building_file_search_process_-_asbestos_removal_program. Also, at the time of writing, a person carrying out building work on a class 1, 2, 3 or 4 building, or a class 10 building associated with a class 1, 2, 3 or 4 building which was built before 1985 (or building which was commenced before 1985) is required under the *Building Act 2004* to include in the building approval application an asbestos removal control plan which must be complied with.

Therefore, the mental or fault element can justifiably be excluded. The rationale is that people who owe work safety duties (such as employers, persons in control of aspects of work and designers and manufacturers or work structures and products – as opposed to members of the general public) can be expected to be aware of their duties and obligations to workers and the wider public.

This comment does not require a response from the Minister.

NATIONAL REGULATIONS—COMMENT

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

POSITIVE COMMENT

Rail Safety National Law National Regulations 2012 made under the Rail Safety National Law (NSW).

The Committee notes with approval that, in line with the Committee's previous comments on national regulations, these national regulations are accompanied by an Explanatory Statement and also that the Explanatory Statement contains an explanation of the legislative scheme of which these national regulations are a part.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Education and Training, dated 24 November 2014, in relation to comments made in Scrutiny Report 26 concerning the Canberra Institute of Technology Amendment Bill 2014 (attached).
- The Attorney-General, dated 25 November 2014, in relation to comments made in Scrutiny Report 26 concerning the Crimes (Sentencing) Amendment Bill 2014 (attached).
- The Minister for Health, dated 25 November 2014, in relation to comments made in Scrutiny Report 25 concerning Disallowable Instrument DI2014-249, being the Health (Local Hospital Network Council—Deputy Chair) Appointment 2014 (No. 1).
- The Minister for Health, dated 26 November 2014, in relation to comments made in Scrutiny Report 26 concerning the Food Amendment Bill 2014.
- The Minister for the Environment, dated 9 December 2014, in relation to comments made in Scrutiny Report 26 concerning the Water Efficiency Labelling and Standards (ACT) Bill 2014 (attached).

The Committee wishes to thank the Minister for Education and Training, the Attorney-General, the Minister for Health and the Minister for the Environment for their helpful responses.

Steve Doszpot MLA
Chair

3 February 2015

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 20, dated 31 July 2014

Red Tape Reduction Legislation Amendment Bill 2014

Joy Burch MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR DISABILITY
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR RACING AND GAMING
MINISTER FOR WOMEN
MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mr Doszpot

I write to address issues raised in Scrutiny Report 26 provided by the Standing Committee on Justice and Community Safety (the Committee) on 21 November 2014 which provides comment on the Canberra Institute of Technology Amendment Bill 2014 (the Bill).

The Committee raises concerns about proposed section 64 of the Bill headed 'offences—use or divulge protected information'. Specifically, the Committee asks whether subsection 64(5) is necessary given subsection 64(3) and queries whether subsection 64(5) is a more limited statement of circumstances covered by the exception in 64(3)(c).

Subsections 64(3)(c) and 64(5) deal with two different issues. The first provision permits a 'person to whom the section applies' to disclose protected information in a court proceeding. Subsection 64(5) is aimed at the issue of whether a 'person to whom the section applies' can be compelled to disclose protected information to a court. Its focus is not admissibility of evidence as alluded to by the Committee but the compellability of a witness to disclose protected information to the court.

I trust that I have adequately addressed the Committee's concerns.

Yours sincerely

Joy Burch MLA
Minister for Education and Training
November 2014

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Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR CAPITAL METRO

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 26 of 21 November 2014 which contains comments on the Crimes (Sentencing) Amendment Bill 2014 (the Bill).

The Committee's report under section 38 of the *Human Rights Act 2004* (HRA) draws two matters to the attention of the Assembly and recommends that I respond.

The first matter relates to the question of whether the provisions of the Bill engage section 25(2) of the HRA. I note the Committee is of the view that there is a case that they do. In support of this proposition, the dissenting judgment of Elias CJ in *Morgan v The Superintendent, Rimutaka Prison* [2005] NZSC (Morgan) is referenced.

I am grateful to the Committee for bringing this case to my attention and am of the view that it does not provide significant support for the contention that the Bill's provisions may engage section 25(2) of the HRA. I note that the three judges giving the majority verdict considered the term penalty to be that 'to which the offender is liable' and 'could lawfully be imposed; at the time of the offence'. One judge, Henry J, noted that 'the penalty can only be the prescribed maximum'.

The substance of the majority view in *Morgan* is that the variation of penalty referred to in the New Zealand Bill of Rights (the equivalent of section 25(2) of the HRA) is the total available sentence, not the 'individual manifestation of that kind of offending'. By that, the majority judges meant the penalty available for an offence should be considered in the generic sense rather than the offence the offender had actually committed. In relation to ACT sentencing practices, the way in which an offender commits an offence and their individual circumstances may make it appropriate to allow them to serve that sentence of imprisonment by way of periodic detention, but it does not alter the effect that a sentence of imprisonment is the penalty imposed.

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The Committee states that ‘what is required is a realistic assessment of whether the new rule increases the punishment to which the offender is liable’. The Committee goes on to say that, with reference to periodic detention, some offenders would regard periodic detention as more lenient than full time detention. While I would agree that some individuals may perceive periodic detention to be more lenient that does not take away from the fact that the two ways of serving imprisonment amount to the same punishment. As the Explanatory Statement makes clear, the Bill’s provisions do not increase the punishment to which the offender is liable, but only alter the way in which a sentence of imprisonment may be served.

I remain of the view that section 25(2) of the HRA is not engaged as set out in the Explanatory Statement to the Bill

The second matter raised by the Committee is a perceived lack of clarity in the Explanatory Statement on the issue of proportionality under section 28 of the HRA. While I do not consider the Explanatory Statement requires amendment I am happy to provide further information to assist the Committee.

The Committee is correct in its view that by discussing a less restrictive approach the Explanatory Statement is referring to the fact that the new provisions would only apply to offenders who commit an offence after commencement of the Bill. However, the Committee’s question relates more to the question of resources.

As I informed the Legislative Assembly in my presentation speech for this Bill, the purpose of the Bill is to bring periodic detention as a way of serving a sentence of imprisonment to a managed and timely end. If the provisions of the Bill were to apply to offences committed on or after commencement then the Territory would need to provide facilities for periodic detention to be served for an undefined period for an ever decreasing number of offenders. Such facilities would require funding for a limited number of offenders while reducing the funding available for better, more effective sentencing options.

Offenders are not always brought to justice swiftly, for a wide variety of reasons. For example, a complaint of historic sexual abuse may not be made for many years after the event. If the Bill’s provisions were to apply only to offences committed on or after commencement, such an offender could potentially be sentenced to a combination of full-time and periodic detention. In that event, the Territory would need to provide facilities for decades, even if those facilities were never used.

I consider that the Explanatory Statement addresses all the requirements of section 28 of the HRA in considering whether any limitation of human rights is justified and, in doing so, balances the value of adhering to the HRA.

I thank the Committee for its report and careful consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR CAPITAL METRO

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Role (the Committee) Report No. 26 (the Report) on the Water Efficiency Labelling and Standards (ACT) Bill 2014 (the Bill).

I provide the following information on the Committee's comments. The Bill adopts the Commonwealth Water Efficiency Labelling and Standards legislation as it exists from time to time. I confirm that the sections referred to in the Report are the relevant strict liability offence provisions inserted into the Commonwealth Act in the 2012 amendments.

It was not considered necessary to list the amendments to the Commonwealth legislation in the explanatory statement as the Commonwealth legislation has been and is subject to change, and thus would render the explanatory statement obsolete. Indeed, the main purpose of the Bill is to capture the Commonwealth legislation regardless of the evolving change.

I thank the Committee for its considered comments.

I trust that I have addressed the Committee's concerns.

Yours sincerely

Simon Corbell MLA
Minister for the Environment

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