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

4 APRIL 2011

Report 35

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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SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2011-27 being the Public Place Names (Macgregor) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of five roads in the Division of Macgregor.**

Disallowable Instrument DI2011-29 being the Work Safety (ACT Code of Practice for Formwork) Code of Practice 2011 made under section 18 of the *Work Safety Act 2008* **approves the Code of Practice for Formwork 2011.**

Disallowable Instrument DI2011-30 being the Road Transport (Safety and Traffic Management) Child Restraints Approval 2011 made under paragraph 66(1)(b) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2009-1 and determines the types of child restraints approved by the Road Transport Authority for new Rule 266 of the Australian Road Rules.**

Disallowable Instrument DI2011-31 being the Road Transport (Safety and Traffic Management) Booster Seats Approval 2011 made under paragraph 66(1)(aa) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **determines the types of booster seats approved by the Road Transport Authority for new Rule 266 of the Australian Road Rules.**

Disallowable Instrument DI2011-32 being the Road Transport (Safety and Traffic Management) Child Safety Harnesses Approval 2011 made under paragraph 66(1)(ba) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **determines the types of child safety harnesses approved by the Road Transport Authority for new Rule 266 of the Australian Road Rules.**

Disallowable Instrument DI2011-33 being the Road Transport (General) (Guidelines about withdrawal of infringement notices) Determination 2011 made under subsection 32(1) of the *Road Transport (General) Act 1999* **determines the guidelines for withdrawal of public passenger infringement notices.**

Disallowable Instrument DI2011-34 being the Architects Board Appointment 2011 (No. 1) made under subsection 70(2) of the *Architects Act 2004* **appoints specified persons as members of the Australian Capital Territory Architects Board, one of whom is registered as an architect, one who is a commercial lawyer and one who has been nominated by a representative body.**

Disallowable Instrument DI2011-36 being the Road Transport (Public Passenger Services) (Defined Rights Conditions) Determination 2011 (No. 1) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2008-228 and determines the conditions for defined rights to be allocated in a ballot of defined rights for non-transferable leased taxi licences.**

Disallowable Instrument DI2011-40 being the Road Transport (Driver Licensing) Driving Instruction Code of Practice 2011 (No. 1) made under section 118 of the *Road Transport (Driver Licensing) Regulation 2000* **revokes DI2007-81 and approves the Code of Practice for Accredited Driving Instructors.**

Disallowable Instrument DI2011-41 being the Civil Law (Wrongs) Professional Standards Council Appointment 2011 (No. 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2001* **repeals DI2008-265 and DI2009-177 and appoints specified persons as members of the Professional Standards Council.**

Disallowable Instrument DI2011-42 being the Public Place Names (Weston) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Weston.**

Disallowable Instrument DI2011-43 being the Public Place Names (Franklin) Amendment Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends DI2006-215 and determines the names of three roads in the Division of Franklin.**

Disallowable Instruments—Comment

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

Minor drafting issue / Is this instrument strictly necessary?

Disallowable Instrument DI2011-28 being the Domestic Violence Agencies (Project Coordinator) Revocation 2011 made under section 14 of the *Domestic Violence Agencies Act 1986* **and section 210 of the** *Legislation Act 2001* **revokes the appointment of a specified person as Domestic Violence Project Coordinator.**

This instrument revokes an instrument under which a specified person was appointed as the Domestic Violence Project Coordinator. The Committee notes that the formal part of the instrument indicates that it is made under section 11 of the *Domestic Violence Agencies Act 1986* and sections 208 and 210 of the *Legislation Act 2001*. However, the Explanatory Statement for the instrument refers to section **14** of the Domestic Violence Agencies Act and only section 210 of the Legislation Act.

Section 11 of the Domestic Violence Agencies Act provides:

> **11 Appointment**
>
> The Minister must appoint a Domestic Violence Project Coordinator.
>
> *Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.
>
> *Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).
>
> *Note 3* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

Section 14 of the Domestic Violence Agencies Act provides:

> **14 Termination of appointment**
>
> The Minister may terminate the appointment of the coordinator—
>
> (a) for misbehaviour or physical or mental incapacity; or
>
> (b) in accordance with the instrument of appointment.
>
> *Note* A person's appointment also ends if the person resigns (see Legislation Act, s 210).

Sections 208 and 210 of the Legislation Act provide:

208 Power of appointment includes power to suspend etc

(1) The appointer's power to make the appointment includes the power—

(a) to suspend the appointee, and end the suspension; or

(b) to end the appointment, and appoint someone else or reappoint the appointee if the appointee is eligible to be appointed to the position; or

(c) to reappoint the appointee if the appointee is eligible to be appointed to the position.

(2) The power to suspend the appointee, end the appointment or reappoint the appointee is exercisable in the same way, and subject to the same conditions, as the power to make the appointment.

Example

If the appointment power is exercisable only on the recommendation of a body, the power to suspend, end the appointment or reappoint is exercisable only on the recommendation of the body.

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 s 126 and s 132).

…….

210 Resignation of appointment

(1) An appointment ends if the appointee resigns by signed notice of resignation given to the appointer.

(2) However, if the appointer is the Executive, the notice of resignation may be given to a Minister.

The Committee simply notes the discrepancy between the instrument and the Explanatory Statement as to the empowering provisions.

The Committee also queries whether, in the light of the provisions set out above, it is strictly necessary to revoke an instrument of appointment when the relevant appointee resigns.

This comment does not require a response from the Minister.

Drafting issue

Disallowable Instrument DI2011-35 being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 1) made under section 32 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as chair of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2011-37 being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 2) made under section 31 of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the student body.

Disallowable Instrument DI2011-38 being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 3) made under section 31 of the *Canberra Institute of Technology Act 1987* repeals DI2010-251 and appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, not representing the interests of industry or commerce, but having experience and knowledge relevant to the functions of the Council.

Disallowable Instrument DI2011-39 being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 4) made under section 31 of the *Canberra Institute of Technology Act 1987* repeals DI2009-254 and appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, not representing the interests of industry or commerce, but having experience and knowledge relevant to the functions of the Council.

These instruments appoint four specified persons as the chair and as members of the Canberra Institute of Technology Advisory Council. The Committee notes that, for each instrument, section 2 is in the following terms:

> **2 Commencement**
>
> This instrument commences on the day after the date of notification until [specified date].

The Committee assumes that the intention of section 2 is to provide for the commencement of the instrument and to set the term of the appointment. If that is the case, the Committee suggests that it would be preferable if words along the lines of "and operates" were inserted between "notification" and "until". The heading to section 2 might also be amended, to indicate that it not only provides for the commencement of the instrument but also sets the term of the appointment.

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 SL2011-6 being the Court Procedures Amendment Rules 2011 (No. 1) made under section 7 of the *Court Procedures Act 2004* amends rules 4733 and 4735 and creates a new rule 4735A to facilitate amending the current pre-trial procedure.

Subordinate Law SL2011-7 being the Litter (Shopping Trolleys) Regulation 2011 made under the *Litter Act 2004* sets the number of prescribed shopping trolleys for paragraph 24G(3)(c) of the Act.

Subordinate Law SL2011-8 being the Work Safety Amendment Regulation 2011 (No. 1) made under the *Work Safety Act 2008* amends the Work Safety Regulation 2009 so that to be eligible to be an authorised representative, a person must, in part, have completed a training course approved by the Work Safety Council.

Subordinate Law SL2011-9 being the Environment Protection Amendment Regulation 2011 (No. 2) made under the *Environment Protection Act 1997* amends the definition of "Zone G" in Schedule 2 to clarify which areas this noise zone standard applies to.

GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, dated 29 March 2011, in relation to comments made in Scrutiny Report 34 concerning the Evidence Bill 2011.

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

PROPOSED AMENDMENTS—COMMENT

Amendments to the Courts Legislation Amendment Bill 2010 proposed by Mr Rattenbury

In *Report No 32*, this Committee reported on this Bill. It noted that the effect of a proposed amendment to subsection 190(1) of the *Legislation Act 2001* would be that offences under ACT law with a maximum penalty of five years or less would be dealt with in the summary jurisdiction of the Magistrates Court. Correspondingly, all such offences could not be tried on indictment in the Supreme Court, in which forum the defendant would have an option of trial by jury, or trial by judge alone.

In contrast subsection 190(1) of the Legislation Act now provides that offences under ACT law with a maximum penalty of two years or less must be dealt with in the summary jurisdiction of the Magistrates Court. In addition, defendants charged with offences with maximum penalties from two to five years imprisonment may elect to have these matters dealt with summarily in the Magistrates Court or heard on indictment in the Supreme Court.

In *Report No 32*, the Committee commented extensively on the effect that the Bill would have on the right to trial by jury. This Report addresses a set of amendments to the Bill to be moved by Mr Shane Rattenbury.

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

Trial by jury

These amendments would omit the proposal in the Bill to amend subsection 190(1) of the Legislation Act (see amendment 15), but would amend the *Crimes Act 1900* (henceforth referred to as "the Act") to "create a new process for determining which indictable offences are to be heard summarily in the Magistrates Court" (amendment 9).

This process would be applicable to a wide range of criminal offences (as defined in proposed subsection 375AA(1) of the Act). This range includes many offences with a prescribed penalty of between three and five years imprisonment. (Given that subsection 190(1) of the Legislation Act would not be amended, offences under ACT law with a maximum penalty of two years or less *must* be dealt with in the summary jurisdiction of the Magistrates Court.)

Proposed section 375AC would create a process whereby the Magistrates Court would, at a point where a case was ready to be listed for hearing, seek consent from one or more parties for the case to be disposed of summarily. Critically, it is provided that where the defendant is before the Magistrates Court charged with an offence punishable by imprisonment for not longer than five years, the court *must* in the first place seek consent for a summary hearing from the *prosecutor* (subparagraph 375AC(a)(i)). The Explanatory Statement explains as follows:

> Initially, the prosecutor must be asked whether they consent to the case being disposed of summarily. If the prosecutor consents, the case will be heard summarily. The defendant is not asked if they consent to summary disposal. It is the intent of section 375AC(a)(i) that the decision of the prosecutor to grant consent or refuse consent is not appealable in a higher court. This is consistent with other discretions handed to prosecution under the Crimes Act which are also not appealable.[1]
>
> Under section 12 of the *Director of Public Prosecutions Act 1990* the DPP can publish guidelines and it is anticipated that guidelines would be prepared to indicate how prosecutors exercise the discretion afforded by section 375AC(1)(a)(i).
>
> This new process hands discretion to the prosecutor that will influence which court hears a case.

More critically, this provision would confer on the prosecutor discretion to decide whether the particular indictable offence with which the defendant is charged is to be tried summarily, or, alternatively, is to be tried on indictment before the Supreme Court by jury, (or, at the option of the defendant, by a judge alone). If the prosecutor consents, the defendant loses her or his right to trial in the Supreme Court, and the provision is thus a significant restriction on the right to trial by jury.[2] This is the issue arising out of the proposed amendment to the Bill that is addressed in these comments.

The Explanatory Statement accepts that "that there is a right to a jury trial that warrants protection in the ACT", and that section 28 of the *Human Rights Act 2004* "sets the framework for assessing whether a limitation [of this right] is justified". The Explanatory Statement then addresses the specific factors listed in subsection 28(2).

Concerning "(a) the nature of the right affected", it is said only that it is "the right to a jury trial for serious criminal cases". What may be added is the point made earlier by the Explanatory Statement; that is, that the right is "deeply rooted in the Anglo-Australian legal and political tradition".[3] As such, it may be argued that this is not a right that should easily be limited.

Concerning "(b) the importance of the purpose of the limitation", the Explanatory Statement argues that the

> purpose of the limitation is to free the Supreme Court to deal with more complex and serious cases and, in the process, assist the Supreme Court to address the existing backlog of cases. That is, the purpose of the limitation is to give greater protection to the right to have cases heard without unreasonable delay. The limitation is therefore important. Some people are waiting two years in remand, deprived of their liberty, to have their case heard by the Supreme Court. This raises serious question about compatibility with the right to be tried without unreasonable delay.

[1] Such decisions would however be amenable to judicial review by the Supreme Court, under the *Administrative Decisions (Judicial Review) Act 1989*, or under procedures in the *Supreme Court Act*.
[2] This point is fully acknowledged in the introductory parts of the Explanatory Statement.
[3] The Explanatory Statement adopted this statement from *Scrutiny Report No 32* of the *7th Assembly*, concerning the Courts Legislation Amendment Bill 2010, at 3.

Earlier, the Explanatory Statement referred to paragraph 22(2)(c) of the Human Rights Act provision that "Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else … (c) to be tried without unreasonable delay". It argues that

> [b]y diverting more cases from the Supreme Court to the Magistrates Court, the amendments will free the Supreme Court to work through its existing backlog of cases. ... This amendment will assist the Supreme Court to reduce waiting times for trial and better protect the rights of defendants.

The weight to be attached to this consideration is a matter for the Assembly. The Committee notes that there is no factual information provided to permit an assessment of the state of the backlog, and that the changes proposed are not limited in time to that period within which the Supreme Court might clear its backlog of cases.

The point concerning the Supreme Court's case-load is further addressed with below.

Concerning "(c) the nature and extent of the limitation", it is first argued in the Explanatory Statement that "[t]he extent of the limitation is relatively small. Currently, all offences within the range of three years up to life have the right to choose a jury trial. The proposal would restrict that right to offences between 6 years and life".[4]

On the other hand, whether this may be counted as a "small" limitation would also turn on an assessment of the number of potential defendants who appear before the Magistrates Court charged with offences within the range of three years possible imprisonment up to five years imprisonment. The Explanatory Statement does not provide any information that would permit this assessment.

Secondly, the Explanatory Statement points out that where the defendant is deprived of the right to trial by jury by reason of the decision of the prosecutor to consent to a summary trial, the maximum term of imprisonment to which the defendant, *if convicted on that trial*, may be sentenced is two years. It is argued that "[t]hus where the limitation is applied, this is ameliorated by the cap on the sentence. The prospective penalty is limited to the equivalent of a higher end summary offence".

On the other hand, a defendant might consider that he or she has lost the chance of an acquittal by reason of being deprived of a trial by jury, or trial by Supreme Court judge alone.

Concerning "(d) the relationship between the limitation and its purpose", the Explanatory Statement turns to the "the underlying causes of the need for reform".

> The Supreme Court is currently having to spend much of its time hearing and deciding cases that could be dealt with expertly, efficiently and appropriately in the Magistrates Court. If appropriate cases can be directed to the Magistrates Court, as is proposed in these amendments, then the Supreme Court will be free to focus its resources on the most serious cases and, in the process, work through the backlog of cases currently waiting to get to court.

[4] More exactly, the reference should be to "offences between 5 year plus and life".

> In this context, the amendments reflect a policy decision taken by the ACT Greens to ensure an acceptable level of efficiency is gained from existing court resources before considering alternative policies such as additional resources or the creation of additional courts.

Again, the weight to be attached to this consideration is a matter for the Assembly. The Committee's comments are offered to assist debate and to draw attention to relevant legal considerations.

This problem is to be addressed by conferring on the prosecutor appearing on the matter in the Magistrates Court discretion to decide whether the particular offence with which the defendant is charged is to be tried summarily, or, alternatively, is to be tried on indictment before the Supreme Court by jury, or, at the option of the defendant, by a judge alone.

There is a question whether it is fair to vest in the prosecutor, who represents a party (the Crown) to the criminal matter before the Magistrates Court, a discretion to decide whether the other party, the defendant, should be deprived of the capacity to decide whether to be tried before the Supreme Court. It may be argued to be unfair in that the prosecutor has an interest in the matter. The Explanatory Statement does cite other discretions vested in the prosecutor, being "the decision whether to proceed with a prosecution at all in the first place, what charges to proceed with and whether to give an undertaking that particular evidence will not be used against a person in future prosecutions". The question is whether the power to deprive the defendant of the capacity to decide whether to be tried before the Supreme Court is of a much more fundamental character.

Passing from this matter, it is far from clear how the prosecutor would assess whether a decision in a particular case that it should be heard summarily would assist in clearing a backlog of Supreme Court criminal matters. Assuming[5] that it would be lawful for the prosecutor to make such an assessment, there is a question as to how could he or she go about establishing a factual basis for a decision in relation to a particular prosecution.

It may be that it is intended that the prosecutor will not be concerned to make such an assessment, but instead will focus on a much narrower issue. The Explanatory Statement notes that by proposed subsection 375AF(1) of the Act, a Magistrates Court sentencing a defendant tried at the election of the prosecution alone via subparagraph 375AC(1)(a)(i) cannot impose a sentence greater than two years' imprisonment, a fine of $5,000 or both. It noted too that "[t]his section will be ***a*** central factor in determining whether the prosecution consents to summary disposal" (emphasis added). It is not however possible without more information to assess the effect on the Supreme Court's criminal jurisdiction if the prosecutor's discretion is exercised on this basis.

[5] There is a question whether it would be relevant for the prosecutor to have any regard to the effect of a decision to consent to summary trial or not on the backlog of Supreme Court matters. It is not possible to find in the *Director of Public Prosecutions Act 1990* any indication that this would be a relevant matter. Perhaps the Supreme Court on an application for judicial review would find such an indication in the Explanatory Statement to these amendments, but this cannot be assumed. It should also be noted that the fact that there is no "appeal" from a decision of a prosecutor does not preclude judicial review of a decision.

The Committee notes that the terms in which the prosecutor's discretion is conferred are open-ended and not limited to an assessment of the maximum sentence that might be imposed.

In this connection, it must be noted that it may be unlawful for the Director of Public Prosecutions to direct that for a particular period of time, or without time limitation, every relevant criminal matter, or every matter in a particular category, should be heard summarily and direct the prosecutors to act accordingly.[6] It may be argued that proposed subparagraph 375AC(a)(i) requires that this decision be made by reference to the circumstances of each particular case. The courts are very reluctant to accept that an administrative decision-maker can adopt, and less so can be directed to adopt, an inflexible policy as to how the relevant discretion will be exercised. It is however very difficult to predict how a court on judicial review would rule on these issues.

These common law principles for determining the boundaries of an administrative power might be affected by section 12 of the *Director of Public Prosecutions Act 1990*, which confers on the director a power to give directions or furnish guidelines in relation to prosecutions or proceedings to a person who conducts prosecutions for offences, and provides that such guidelines " may be of a general nature or in respect of a particular case" (subsection 12(3)).

Even if the director could act in these ways, there remains the question whether this officer could ever be in a position to know what policy would rationally serve the objective of reducing the Supreme Court backlog. There is no means of communication between the Supreme Court and the Director of Public Prosecutions on such matters. Furthermore, it would be improper for the Supreme Court to communicate any information with the purpose of influencing the content of any guidelines to be made by the Director of Public Prosecutions. A lack of rational connection between the proposed limitation on the relevant human right is fatal to an argument that the limitation is proportionate. In other words, the question to be asked is whether it is reasonable to suppose that if prosecutors are given a discretion to consent or not to summary trial to the relevant criminal offences, the purposes of this law will be advanced.[7]

Concerning "(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve", the Explanatory Statement argues that

> [a] less restrictive option would have been to create a new category of either 2-3 year offences or 2-4 year offences. This would have resulted in fewer people having access to the right of a jury trial impacted upon. However, adopting either of these models would also have resulted in a less positive outcome on the issue of delays.
>
> It is also important to note that the amendments proposed are a less restrictive means than that which has been proposed in the Government's reform.[8]

[6] Nor could a particular prosecutor adopt such an inflexible policy on her or his own accord.
[7] See the discussion in *Scrutiny Report No 25* of the *6th Assembly*, at 16.
[8] It is difficult to see that much importance should be attached to this matter. The issue is whether the limitations in the proposed amendments are justifiable, and this cannot easily be established by pointing out that some other limitations might be more restrictive.

Assessing whether there are any less restrictive means reasonably available to achieve the purpose of the limitation requires a factual inquiry that should include an analysis of why the problem sought to be addressed by the limitation arose. In this case, it is that there is such a backlog of Supreme Court criminal matters awaiting trial that access to that court by criminal defendants should be restricted.

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

Vicki Dunne, MLA
Chair

April 2011

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)
Eggs (Cage Systems) Legislation 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 33, dated 3 March 2011
Health Amendment Bill 2011

Report 34, dated 24 March 2011
Disallowable Instrument DI2011-13 - University of Canberra (Academic Board) Statute 2011
Disallowable Instrument DI2011-17 - Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-24 - Health Professionals (Veterinary Surgeons Board) Appointment 2011 (No. 1)
Road Transport (Third-Party Insurance) Amendment Bill 2011
Subordinate Law SL2011-1 - Environment Protection Amendment Regulation 2011 (No. 1)
Subordinate Law SL2011-2 - Road Transport Legislation Amendment Regulation 2011 (No. 1)

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
MINISTER FOR ENERGY
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 34 of 24 March 2011. I offer the following response in relation to the Committee's comments on the Evidence Bill 2011 (the Bill).

While the Committee did not have any comments on the substantive provisions of the Bill, it did recommend that the explanatory statement would benefit from including more information about a number of provisions which engage rights under the *Human Rights Act 2004*.

I will table a revised explanatory statement to address the following issues raised in the Committee's report:

1. **Clause 18: compellability of domestic partners and others in criminal proceedings generally**

The Committee identified that this clause promotes the right to preservation of family in section 11(1) of the *IHuman Rights Act 2004*. The revised explanatory statement will include information to explain how the clause promotes the right.

2. **Clause 19: compellability of domestic partners and others in certain criminal proceedings**

The Committee identified that this clause engages the right to preservation of the family in section 11(1) of the *Human Rights Act 2004*. The Committee argued that the clause derogates from that right. However, the clause is designed to promote the right. The revised explanatory statement will include information on two ACT Supreme Court cases which explain how the clause promotes the right.

3. **Clause 20: comment on failure to give evidence**

The Committee identified that this clause engages the right of a defendant not to be compelled to testify against himself or herself (the right to silence) in section 22(2)(i) of the *Human Rights Act 2004*. The Committee argued that the clause derogates from that right. However, the clause is

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designed to promote the right. The revised explanatory statement will include in
explain how the clause promotes the right.

4. Part 3.2: exceptions to the hearsay rule

The Committee identified that the exceptions to the hearsay rule engage the right
the right of a defendant to examine prosecution witnesses in sections 21(1) and 2
Human Rights Act 2004. The revised explanatory statement includes information
that the bill contains a safeguard against reliance on hearsay evidence in clause 1
provides the Court with the discretion to exclude such evidence where its prejudi
probative value.

5. Clause 67: notice to be given

The Committee identified that this clause engages the right to a fair trial and the r
to have adequate time to prepare his or her defence in sections 21(1) and 22(2)(b)
Rights Act 2004. The Committee noted that there is no guidance provided to the
discretion in subclause (4) should be exercised. The revised explanatory stateme
information which clarifies that in deciding whether to make a direction under su
must take into account the factors listed in clause 192(2).

6. Clause 127: religious confessions

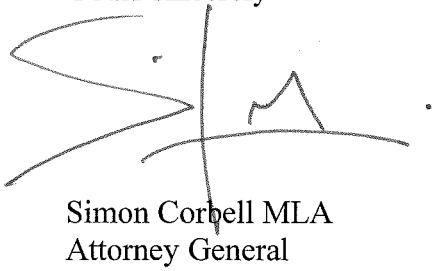
The Committee identified that this clause engages the right to a fair trial in sectio
Human Rights Act 2004. The revised explanatory statement will include informa
how the derogation of this right is justified. Information will also be included to
clause promotes other rights in the *Human Rights Act 2004* regarding religion.

I also offer the following response in relation to the Committee's specific concer
operation of the privilege:

- The reason the privilege can only be claimed by a member of the clergy is
purpose. It is focused on protecting the ethical duty on members of the cl
what is said to them in confidence.
- Subclause (4) defines a religious confession to mean a confession made b
member of the clergy in the member's professional capacity according to
member's church or religious denomination. The scope of the definition
depending on the circumstances of each case and the religion involved.
- There would be a danger in defining the types of religious bodies to whicl
applies. This is a matter that is better left to the discretion of the court on
basis. Any attempt to define the religious bodies to which this privilege a
inevitably unduly limit the application to the detriment of rights under the
2004.

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

Yours sincerely



Simon Corbell MLA
Attorney General

27.5.11