



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

8 MAY 2006

Report 25

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (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 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.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, 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.

BILLS:**Bills—No Comment**

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

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2006

This is a Bill to amend the *Road Transport (Public Passenger Services) Act 2001* and the *Road Transport (Vehicle Registration) Act 1999* to introduce non-transferable taxi licences; simplify provisions dealing with the accreditation of taxi networks so that there is one kind, rather than several kinds, of accreditation for taxi networks; and transfer from regulation to primary legislation the entry and search powers of authorised persons and police officers inspecting the premises of public passenger service operators and approved premises for the purpose of vehicle inspections.

SENTENCING LEGISLATION AMENDMENT BILL 2006

This is a Bill to amend or repeal a number of Territory laws in ways that follow as a consequence upon the enactment of *Crimes (Sentencing) Act 2005* the *Crimes (Sentence Administration) Act 2005*, and the enactment of a Corrections Management Act. The Bill also provides transitional arrangements to enable the existing custodial laws to apply until the Corrections Management Act has commenced. The Bill would also extinguish some archaic common law disabilities consequent upon conviction.

Bills—Comment

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

CIVIL UNIONS BILL 2006

This is a Bill for an Act to provide a scheme for two people, regardless of their sex, to enter into a formally recognised union (a civil union) that attracts the same rights and obligations as would attach to married spouses under Territory law.

* * *

Under the proposed Act, any 2 people (“regardless of their sex”— subclause 5(1)) may enter into a civil union if:

- neither person is younger than 16 years;
- where one person is 16 or 17 years old, that consent is given by “**each** person with responsibility to make long-term decisions for the person” (subclause 10(1)(a), emphasis added), or by the Childrens Court (subclause 10(1)(b), and see subclause 10(4));

- neither is married (which presumably means married under the *Marriage Act 1961* (Cth)) or in a civil union; (and noting that a regulation “may provide that a relationship under a corresponding law is a civil union for the purpose of territory law”: subclause 19(2));
- they are not in a prohibited relationship as defined in clause 8; and
- they comply with the prescribed formalities.

To enter into a civil union, the 2 people concerned must “give notice to an authorised celebrant of their intention to enter into a civil union” (subclause 9(1)). The celebrant, “as soon as practicable after receiving the notice and statutory declarations”, “must give each person a written notice setting out the nature and effect of a civil union”. The Explanatory Statement explains that this is “to ensure that the parties are aware of the nature of the relationship they are creating”.

The 2 people may then enter into a civil union with each by making a declaration before the authorised celebrant and at least 1 other witness”: subclause 11(1). This declaration must be made “not earlier than 1 month, and not later than 18 months, after the day the notice was given to the authorised celebrant”: subclause 11(2). The Explanatory Statement explains that this time requirement of 1 month “is intended as a cooling off period”. The declaration

must be made by each person to the other and must contain a clear statement that—

- (a) names both parties; and
- (b) acknowledges that they are freely entering into a civil union with each other: subclause 11(3).

The provisions regarding termination are described compendiously in the Explanatory Statement:

Clause 12 specifies how a civil union is terminated. A civil union will be automatically terminated on the death or marriage of one of the parties. A civil union may also be terminated by the parties or the Supreme Court under clause s 13 and 14.

Clause 13 sets out the procedure for the parties to a civil union to terminate the civil union. A civil union may be terminated by notice given to the registrar-general. If only one party is seeking to terminate the civil union, a copy of the termination notice must also be served personally on the other party. Requirements for personal service are specified in clause 18. A termination notice, unless it is withdrawn, takes effect 12 months after it has been given to the registrar-general.

Clause 14 provides that a party to a civil union may also apply to the Supreme Court for an order terminating a civil union. This provision is included to cover situations where the party is unable to use the termination procedures in clause 13 – eg. the whereabouts of other party is unknown.

[QUERY - Subclause 14(1) provides:

- (1) On application by a party to a civil union, the Supreme Court may make an order terminating the civil union if the court considers that—
 - (a) the civil union cannot be terminated under section 13; but
 - (b) it is not the intention, or is no longer the intention, of both parties to be in the civil union.

The Committee appreciates that paragraph 14(1)(a) would apply where the party seeking to terminate is unable to use the termination procedures in clause 13 because the whereabouts of the other party is unknown. However, if that other party is not contactable, would the Supreme Court necessarily find that it is that party's intention not to be in the civil union? In some circumstances, it would be reasonable to so find, but in others it may not.]

The 2 people who enter a civil union will thereby affect their legal status as a matter of Territory law. This is the effect of subclause 5(2):

- (2) A civil union is to be treated for all purposes under territory law in the same way as a marriage.

Subclause 5(2) would be accompanied by these Notes:

Note 1 **Territory law** includes the common law (see Legislation Act, dict pt 1, def *law*).

Note 2 The Legislation Act, s 168A provides that, in an Act or statutory instrument—

- a reference to a person's *spouse* includes a reference to the person's civil union partner; and
- a reference to a *marriage* includes a reference to a civil union; and
- a reference to a person being *married* includes a reference to the person being in a civil union.

The Legislation Act, dict pt 1 defines *civil union* as a civil union under this Act.

These definitions apply to all Acts and statutory instruments except so far as the contrary intention appears (see Legislation Act, s 144 and s 155 (1)).

Some particular aspects of the Bill should be noted.

First, it places no restriction in terms of sex or sexual orientation on the persons who may enter a civil union.

Second, the Bill does not affect existing provision in Territory law that recognises a “domestic partnership” as a status that in Territory law has the same standing as marriage under the *Marriage Act 1961*. Two persons cannot be in a “domestic partnership” unless as a matter of fact they have made a commitment, reflected in the way they conduct themselves towards one another, to live as a couple. This is apparent from subsection 169(2) of the Legislation Act:

- (2) In an Act or statutory instrument, a *domestic partnership* is the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.

Example of indicators to decide whether 2 people are in a domestic partnership

- 1 the length of their relationship
- 2 whether they are living together
- 3 if they are living together—how long and under what circumstances they have lived together
- 4 whether there is a sexual relationship between them
- 5 their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them
- 6 the ownership, use and acquisition of their property, including any property that they own individually
- 7 their degree of mutual commitment to a shared life
- 8 whether they mutually care for and support children
- 9 the performance of household duties
- 10 the reputation, and public aspects, of the relationship between them

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).

It should be noted that any 2 people, and in particular regardless of sex, or age, may be in a domestic partnership. If a dispute arose as to whether they were, the person or body applying the law would need to resolve the matter as a question of fact. That is, 2 people cannot ‘declare’ themselves to be in a domestic partnership, although such a declaration, depending on how it was made, might have some (but hardly conclusive) probative value as evidence that the parties were in such a relationship.

Third, the Explanatory Statement acknowledges that “the Commonwealth *Marriage Act 1961* ... provides that while a person who is 16 but not 18 years of age may get married with the relevant consents and authorisations, only one of the parties may be under 18 years of age”. This contrasts with the Bill, which allows that both parties may be younger than 18 years. The Explanatory Statement justifies a different rule in two ways:

[The Bill] reflects the age of consent specified in the *Crimes Act 1900* for the sexual component of any such relationship. ... There is currently no prohibition on a [sic] two people who are 16 but not yet 18 forming a domestic partnership, only in having that domestic partnership formally recognised. To deny such a couple equal access to the law solely on the basis of their age is discriminatory. Allowing such a couple access to the law also promotes the right to equal protection of the law in accordance with the *Human Rights Act 2004*.

Fourth, the Explanatory Statement states that

Clause 7 provides that a person may not enter a civil union if they are married or already in a civil union. The rights and obligations flowing from a civil union are premised on a primary relationship and this requirement recognises that there can only be one primary relationship at any given time.

The Committee notes, however, that it appears that it is no impediment to person A entering into a civil union with person B that A is in a domestic partnership with person C. Given the definition of a domestic partnership, it would be fair to characterise it as a primary relationship. It should also be noted that a civil union is not terminated upon one of the parties becoming a partner in a domestic partnership with some other person.

The Explanatory Statement does not address these matters. It may be that the explanation lies in the fact that a person may enter a marriage under the *Marriage Act* notwithstanding that they are in a domestic partnership, and that entering into such a relationship does not bring a marriage to an end.

The endeavour to assimilate a civil union to a marriage is not carried through so far as concerns dissolution of the relationship. Among other requirements, parties to a marriage cannot obtain a divorce unless they establish as a matter of fact that they have lived separately (although perhaps under the “one roof”) for at least 12 months and one day, which is a condition of establishing that the marriage has broken down and there is no reasonable likelihood that that parties will get back together. Other significant limitations are that

- if there are children aged under 18, the court can only grant a divorce if it is satisfied that proper arrangements have been made for them; and
- if the parties have been married less than two years, then, before filing the application, the spouses must attend counselling with an approved family and child counsellor to discuss the possibility of reconciliation.

In contrast, once proper notice to terminate a civil union has been given, termination results from the effluxion of 12 months. In this period, the parties to the civil union could be living together, even in such a way that they would be in a domestic partnership.

QUERY – Supposing a situation where one or both of the parties to a civil union has or have a compelling reason to terminate the union prior to the effluxion of 12 months, will the Supreme Court be able to terminate the union under clause 14? (One such reason might be that one party wishes to terminate the union so that he or she could enter a civil union with another person.) If it is thought that clause 14 should be available, it is noted that paragraph 14(1)(b) might be too strict.

Human rights issues concerning this Bill will be found in the comment following the Registration of Relationships Bill 2006.

REGISTRATION OF RELATIONSHIPS BILL 2006
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This is a Bill for an Act to provide for the registration of a significant relationship, and of a caring relationship between 2 people, regardless of their sex. Registration would attract the same rights and obligations as would attach to persons in a domestic partnership under Territory law.

* * *

Under the proposed Act, any 2 people may register a deed of relationship of a significant relationship, or a caring relationship (as appropriate to their circumstances), if:

- both are adults - that is, over 18 years of age (subclause 18(1));
- both live in the Territory (paragraph 8(1)(a));
- neither is married (which presumably means married under the *Marriage Act 1961* (Cth)), or a party to a deed of arrangement (paragraph 8(1)(b));
- in the case of a significant relationship, they are not related by family (paragraph 8(1)(b), and see the definition in clause 7);
- both are in the same significant relationship, or the same caring relationship (paragraph 8(1)(c)); and
- they comply with the prescribed formalities.

Two persons are in the same *significant* relationship if they “have a relationship as a couple” (paragraph 5(1)(a)). While the Bill is not entirely clear on this point, it appears that it is solely for the 2 people concerned to determine whether they are in such a relationship – which they do by making an application to the registrar-general for registration of a deed of relationship in relation to a significant relationship.

Two persons are in the same *caring* relationship if one or each of them “provides the other with domestic support and personal care” (subclause 6(1)). This is subject to exclusion of persons who provide that care for a fee, etc (subclause 6(2)). An application relating to a caring relationship must be accompanied by a certificate by a lawyer stating that he or she has given advice to each party seeking registration concerning the effect of entering into the deed (see subclause 8(3)).

Upon receiving an application, the registrar-general:

- must wait 28 days before deciding to either register the deed of relationship or refuse to register (subclause 10(1));
- “may require either or both of the applicants to give the registrar-general further information” (subclause 10(2)); and
- unless the application is withdrawn, decide whether to register the deed, or refuse to register the deed (subclause 10(3)).

QUERY – it is not clear why the registrar-general is given a choice.

A deed of relationship is revoked:

- if either party dies, or marries (subclause 12(1));
- the Supreme Court so orders (although there appears to be no statement of the basis on which this can occur; or
- by the registrar-general on application by either or both of the parties.

This last matter is governed by clause 13. If only one party seeks revocation, that party must effect personal service of the application on the other. If

- both apply, or if the other is personally served with notice;
- if the application is not withdrawn in the interim; and
- the Supreme Court does not order otherwise (although there appears to be no statement of the basis on which it might do so). It is perhaps designed to cover a case where one party seeking revocation cannot effect personal service on the other under clause 13);

the registrar-general must revoke the deed 90 days after the application was made.

The legal effect of registration of a deed of relationship is set out in clause 11:

11 Effect of registration of deed of relationship

If a deed of relationship is registered under this Act—

- (a) the parties to the deed are, for the purposes of all territory laws, taken to be in the significant or caring relationship to which the deed relates; and

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- (b) the relationship is taken to be a domestic partnership for the purposes of all territory laws; and
 - (c) a court may make an order under the Domestic Relationships Act 1994, part 3 (Adjustment of property interests and maintenance) in relation to the relationship whether or not the relationship has existed for at least 2 years.

Some particular aspects of the Bill should be noted.

First, the Bill does not endeavour to assimilate a deed of relationship to a marriage, but rather to a domestic partnership. It might, however, be noted that while only adults may be parties to a deed, one of the parties to a marriage may be a child (that is, a person under 18 years). It is also the case that it will be easier to terminate a deed than to obtain a divorce.

Second, it should be noted that person A could be in a domestic partnership with B, yet enter into a deed for a significant relationship with C. The result would be that for the purposes of Territory law, A would be a party to two different domestic partnerships.

**Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?**

The object of both this Bill and the Civil Unions Bill 2006 is to promote the right to equal protection of the law in accordance with section 8 of the *Human Rights Act 2004*.

8 Recognition and equality before the law

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

In a letter of 19 August 2005 to the Chief Executive of the ACT Department of Justice and Community Safety, the Human Rights Commissioner argued that

[r]ecognition of same-sex relationships is important to ensure that minority prejudices are not legitimated and reinforced by the legal framework. It is vital in this context that same-sex relationships are not accorded “second-class” status to heterosexual relationships.

This cannot be taken as a complete statement of the policy driving both Bills. The Explanatory Statement to the Civil Unions Bill 2006 (see above) indicates that the concern is to provide a means for two classes of couples to have the ability to formalise by legal process a relationship between them, and thus be treated so far as the Territory is concerned as if they were married:

- opposite sex couples who do not wish to be married under the Marriage Act; and
- same sex couples who cannot be married under the Marriage Act.

This may explain why neither Bill is directed in its terms to providing means for persons in a same-sex relationship to enter into a civil union or a deed of arrangement.

The Committee draws this matter to the attention of the Assembly.

RADIATION PROTECTION BILL 2006

This is a Bill to establish a system to regulate the use of ionising radiation in the Territory, and make provision for the future regulation of non-ionising radiation. It would repeal and replace the *Radiation Act 1983*. It would establish a Radiation Council to licence dealings in a radiation source, and to register a radiation source. The Minister would be empowered to make emergency orders, and authorised officers would have extensive powers to enforce the law. Duties of care and the like created by the Bill would be supported by offence provisions.

Report under section 38 of the *Human Rights Act 2004* Has there been a trespass on personal rights and liberties?

Is the provision for strict liability offences justifiable?

The presumption of innocence and the reversal of the burden of proof

The Committee notes that a number of strict liability offences would be created, but also that the Explanatory Statement has provided a statement of justification, which, on its face, would appear to justify derogation of the presumption of innocence; see, for example, the explanatory provided in relation to clause 53 and note what is said below in relation to clause 61.

The Committee notes that the offence in clause 61 is punishable up to a maximum of 100 penalty points. This exceeds the generally accepted maximum of 50 penalty points where a strict liability offence is concerned, but the Committee notes that this is specifically justified in the Explanatory Statement:

Clause 61 makes it an offence to fail to comply with a condition of the registration of a radiation source. The conditions on registrations will generally relate to the safety of people using them and others who might be exposed to radiation as a result of their use. For this reason it is appropriate to have a significant penalty, and for the offence to be strict liability.

Should the Chief Executive be empowered by an emergency order to detain a person otherwise than in connection with the enforcement of the law?

The right to liberty and detention

Under clause 47, the Chief Executive may be empowered by an emergency order made by the Minister to detain a person; see paragraph 47(2)(b). By subclause 47(3):

- (3) An order may only authorise the detention of a person—
- (a) for reasonable testing to decide whether, because of the radiation incident, the person has been contaminated and poses a serious risk to the health or safety of anyone else or of the safety of anyone else’s property or the environment; and
 - (b) if the person is contaminated and poses a serious risk to the health or safety of anyone else or of the safety of anyone else’s property or the environment—to prevent the person contaminating anyone else, anyone else’s property or the environment.

The question for the Assembly is whether the circumstances in which detention may occur are such that it should or should not be characterised as an “arbitrary” detention in terms of HRA subsection 18(1): “(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.”

Fair trial and natural justice

Subclauses 57(2) and 59(6) provide that the relevant trier of fact may find a defendant guilty of an alternative offence “only if the defendant has been given procedural fairness in relation to the finding of guilt”.

The Committee commented on an identical provision in the Animal Welfare Bill 2006 in its last Report (*Scrutiny Report No 24 of the Sixth Assembly*), and sought an explanation of why as matter of policy such provisions were inserted. It did so because courts are obliged by both common law and HRA subsection 21(1) to observe natural justice (or procedural fairness) in relation to the exercise of any power that could affect a defendant adversely. Express provision in a statute in relation to some particular judicial power creates a slight risk that in relation to other such powers under the statute there is no obligation to observe natural justice. This risk is of concern to the Committee in the discharge of its role. It may be added that it appears somewhat offensive for the legislature to direct the courts to observe procedural fairness.

The Committee appreciated that as a matter of policy it is thought that Territory statutes should contain the provisions such as subclauses 57(2) and 59(6), but it wished to understand, given the common law and HRA subsection 21(1), **why** this policy was adopted. This would permit it to make a better assessment of whether, from a rights perspective, they were desirable.

The Committee has received a response from the Minister to its comment on the Animal Welfare Bill 2006, but this affirms only that as a matter of policy Territory statutes will contain such a provision.

Powers of entry, search, seizure and allied powers

Authorised officers would have extensive powers to enforce the law by the exercise of powers of entry, search, seizure and allied powers. They are of the kind that is found in comparable Territory laws, and on past reviews the Committee has not found them to involve an undue trespass on personal rights and liberties.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)
Is there an undue trespass on personal rights and liberties? – para (c)(i)

Clause 116 would permit the Minister to approve codes of practice, and that such a code “may apply, adopt or incorporate an instrument, as in force from time to time” (subclause 116(2)). Clause 117 then governs notification of incorporated documents, and displaces subsection 47(6) of the *Legislation Act 2001*. The Committee has explained in *Scrutiny Report No 22 of the Sixth Assembly* (concerning the Motor Sport (Public Safety) Bill 2006) why this is a matter of concern. It acknowledged there that there were legitimate reasons to displace subsection 47(6) and to provide in its stead an alternative means for the public to find the text of an incorporated document, (which the Committee notes is done by clause 118 of this Bill). It repeats what it said in *Scrutiny Report No 22*:

The Explanatory Statement does not explain why this alternative is thought desirable. The Committee appreciates that there may be good reasons to provide for displacement, but considers that they should be stated in the Explanatory Statement. (It is also noted that the Statement does not attempt any explanation of the scheme, and thus compares unfavourably to the explanation given about a similar scheme in the Explanatory Statement to the Tree Protection Bill 2005 – see *Scrutiny Report No 6 of the Sixth Assembly*).

TERRORISM (EXTRAORDINARY TEMPORARY POWERS) BILL 2006

This is a Bill to give effect in the Australian Capital Territory to the agreement between the Commonwealth, State and Territory Governments adopted at the Council of Australian Government's Terrorism Summit held in Canberra on 27 September 2005. It was agreed to strengthen Australia's counter-terrorism laws, and to this end, this Bill provides for (a) the making, effect of, and the carrying out of preventative detention orders; and (b) the making and effect of special powers authorisations.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

ASSESSING JUSTIFIABILITY FOR A DEROGATION OF RIGHTS

There is no doubt that at many points, and in many ways, provisions of the Bill “engage” human rights standards in that they derogate from a particular right stated in the *Human Rights Act 2004*. For example, and critically, the provisions under which a person may be deprived of their liberty to live and move around in the community and placed in detention for a period clearly derogate from the statement in HRA subsection 18(1) that “[e]veryone has the right to liberty”. That is not the end of the inquiry, for the derogation from HRA subsection 18(1) will not be incompatible with the HRA if the particular restriction is justifiable under HRA section 28 (see below).

An indication of the range of rights affected in one way or another by some provision of the Bill is apparent from the Explanatory Statement's assertion that

the Bill achieves consistency with regard to the following rights:

- Protection from torture, cruel, inhuman or degrading treatment (s 10(1) HRA);
- Protection of the family and children (s 11 HRA);
- Freedom of movement (s 13 HRA);
- Freedom of thought, conscience, religion and belief (s 14 HRA);
- Freedom of assembly and association (s 15 HRA);
- Humane treatment when deprived of liberty (s 19 HRA);
- Fair trial (s 21 HRA);
- Rights in criminal proceedings (s 22 HRA); and
- Rights of minorities (s 27 HRA).

At no point, however, does the Explanatory Statement identify how any particular provision derogates from these rights, nor does it justify the claim of consistency in any particular respect. (The one exception is that the strict liability offence in clause 38 is sought to be justified.) The Explanatory Statement does state that legal advice provided to the government “concluded that the Bill is compatible with the HRA”. That advice was not tabled in the Assembly until the afternoon of Wednesday, May 3 and the Committee was not able to take it into account when preparing this Report.

The Explanatory Statement also states that some provisions of the Bill would derogate from the right to liberty (HRA section 18), and the right to privacy (HRA section 12), and in these respects, the Explanatory Statement does offer a justification:

these interferences are likely to be “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of s 28 of the HRA on the basis that:

- The obligation to respond to the threat of terrorism, including through legislative means, is an important and significant objective;
- The restrictions on rights are reasonable and necessary, taking into account the importance of achieving consistency within a national regime; and
- The bill incorporates extensive safeguards, which, in the context of a national regime, represent the least restrictive options available.

This line of justification might also be invoked to justify all other HRA rights derogations, but it does not take the analysis very far. The assumption that the fact that a Territory law will operate as part of a national scheme of legal regulation is a matter relevant to an assessment of justifiability under HRA section 28 is perhaps questionable, but the Committee leaves it to each Member of the Assembly to determine whether they accept this reasoning.

Each member of the Assembly must ask whether a particular derogation is justifiable. In terms of HRA section 28 the question is whether the provision that derogates from an HRA right is a reasonable limit, set by a Territory law, which limit has been demonstrated to be justifiable in a free and democratic society.

Before turning to section 28, it may assist to set out a very general framework in which the justifiability issues might be addressed. It comes from a report of the United Kingdom Joint Committee On Human Rights, *Review of Counter-Terrorism Powers* (Eighteenth Report of Session 2003-2004):¹

7. Political debate about the fight against terrorism is often conducted in terms of a choice between security and public safety on the one hand and human rights and the rule of law on the other. This is a false dichotomy. As the Home Secretary noted in the introduction to his discussion paper, security is itself a fundamental right, and the State is under a positive obligation under human rights law to protect it.

8. The starting point in any debate about counter-terrorism powers is therefore the State's positive obligation to take the measures necessary to protect everyone within its jurisdiction against terrorist acts. To the extent that current laws are inadequate to provide this protection against the level of threat which actually exists, the State is therefore required *by human rights law* to enact such additional laws as can be shown to be required to protect against the current threat. [Footnote: For example, the first sentence of Article 2(1) ECHR states that "Everyone's right to life shall be protected by law." This has been interpreted by the European Court of Human Rights as imposing a positive obligation on States to take appropriate steps to safeguard the lives of those within its jurisdiction, including by the adoption of laws protecting life against the acts of third parties.]

9. The same human rights framework which requires States to act to combat terrorism also imposes certain basic requirements that all counter-terrorism measures must satisfy: for example, they must not be arbitrary, they must not involve torture or [the use of] the fruits of torture, they must respect peremptory norms such as the prohibition of discrimination on racial grounds, they must respect the basic principles of a fair trial, and they must be subject to proper judicial supervision.

This last point is stated in the Explanatory Statement to the Bill:

There is a clear need for laws to combat terrorism. However, in making such laws it is critical that Australia's fundamental legal principles of justice (the rule of law, proportionality, respect for the legal process, the separation of powers and basic human rights such as the right to a fair trial) are preserved. Any legislation must comply with Australia's international human rights obligations, in particular the International Covenant on Civil and Political Rights; must be proportionate; and be subject to judicial review and oversight.

¹<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15802.htm>

Given the centrality of section 28, the Committee considers that it is desirable to provide an extended consideration of just what is involved in its application.

Section 28 is in very similar terms to the analogous provisions in section 5 of the *New Zealand Bill of Rights Act 1990* and section 1 of the *Canadian Charter of Rights and Freedoms*. (Both these documents drew on analogous provisions in the International Covenant on Civil and Political Rights and the European Convention on Human Rights, although there are some material points of difference.) These precursors to section 28 have been subject to extensive analysis. Without attempting to be definitive the following statement may assist the Legislative Assembly in its consideration of whether a derogation from an HRA right is justifiable.

There is now an enormous judicial and academic body of commentary on provisions such as section 28. This Report has made use of Canadian and New Zealand commentary, and in particular of two articles: the commentary on section 1 of the Canadian Charter in P W Hogg, “Section 1 Revisited” 1 *National Journal of Constitutional Law* 1, and the commentary on section 5 of the New Zealand Bill of Rights Act in A S Butler, “Limiting Rights” (2002) 33 *Victoria University of Wellington Law Review* 22.²

On the face of it, two basic issues are presented by section 28:

- is the derogation a reasonable limit to the right, and
- can it be demonstrably justified in a free and democratic society?

As Hogg notes, however, “[t]he courts have not attempted to distinguish between the two requirements, but have assumed that the language of reasonableness and demonstrable justification articulates a single standard ...” (above at 2). Hogg suggests that “the requirement of reasonableness may be redundant, because a limit that is demonstrably justified must of necessity be reasonable”.

Before turning to that single standard, the point is well made by Butler that the words of section 28 have a bearing on how that standard should be formulated and applied. First, it speaks of a derogation being a “reasonable” limit to the right. There is a significant point of difference here with other human rights laws which require that a derogation be “necessary”. Butler points out (above at 16) that “the European Court of Human Rights recognised in an early case that the word “necessary” does not contain the “flexibility of such expressions as ... “reasonable” ...”. Hence “necessary” and “reasonable” need not necessarily be equated, and this can have substantive effect on one's approach to limitations”. (Footnotes omitted.)

Second, there is the question of what role is performed by the words “free and democratic society”. Butler points to various questions that arise. For present purposes, it may be noted that he suggests that the words may convey the notion that “the word ‘democratic’ reflect[s] a desire to recognise public space for discussion and disagreement, and reasonable freedom for the majority [acting through Parliament] to act in limiting rights reasonably” (above at 16).

² [<http://www.nzlii.org/nz/journals/VUWLR/2002/22.html>] Page references below are to this website.

This approach would justify some degree of judicial deference to legislative judgement about whether a derogation of a HRA right was justifiable.

Few judges have attempted to explore the significance of the concept of a “free and democratic society”, but rather have formulated a framework comparable to the single standard developed by the Canadian Supreme Court. This single standard is expressed in a statement of four cumulative criteria, and each requires a short elucidation.

A further prefatory remark must be made. The elements of the single standard are not applied uniformly on every occasion. The courts vary their application from case to case. Butler (above at 20, footnotes omitted) notes that

the Constitutional Court of South Africa has consistently eschewed a mechanistic application of tests and has resisted a ... stepped test: “The Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check”. The Court has emphasised that “different rights have different implications for ... an open and democratic society based upon freedom and dignity” and, accordingly, “there is no absolute standard which can be laid down for determining reasonableness ...”. Rather, the Court is to engage in “a nuanced and context-sensitive form of balancing”. Thus, in *State v Mamamela* the Court said:

As a general rule, the more serious the impact of the measure or the right, the more persuasive or compelling the justification must be.

See too below, the test under the heading “The nature of the task involved in the application of section 28”.

Is the objective of the law which engages the particular right “sufficiently significant” to warrant the overriding of that right?

This is a complex question, and the person supplying an answer must choose at what level of generality the objective will be stated; then decide whether that objective is one that is compatible with the values of a free and democratic society; and then decide whether in the circumstances it is reasonable to override the right. This third matter is in substance the same as the fourth criterion, and is better left to that stage.

The object of the law is usually stated in very general terms, and here it may be said to be the protection of the community against the commission of acts of terrorist outrage. Put at that level, it is not difficult to accept that that object is compatible with the values of a free and democratic society, and that in pursuit of that object the HRA rights that are engaged by this Bill might be overridden. The “might be” qualification requires that attention be given to the other elements of the section 28 assessment.

* * *

The next three questions focus on the means chosen by the law to advance the objective, and are often generally described as the requirement of proportionality.

Is there a rational connection between the means chosen by the law and the objective they are to serve?

This might be restated in the question: is it reasonable to suppose that if those means are employed, the objectives of the law will be advanced?

It might be thought that there will be very few cases where this test is not satisfied. It would be very unlikely that those who drafted the law would have failed to perceive the lack of any rational connection between the means adopted and the advancement of the objective of the law. This test could be made stricter if some qualifying phrase such as “substantial rational connection” was employed, but this is not how the test is usually posed. On the other hand, there may be a case where the rational connection is so trivial as to be irrelevant; (see the case cited in Hogg, above at 8-9).

* * *

The third and fourth questions allow greater scope for a more qualitative assessment of the means employed.

Was it reasonable for the law-maker to have chosen the means employed in the law notwithstanding that other means less restrictive of the HRA right could have been chosen?

The question is put in this way because - notwithstanding some judicial statements to the contrary - it is clear that in practice the courts in other countries do permit a measure of choice to the law-maker. In other words, they do not insist that the law-maker must choose those means which impair the right to the least extent. The courts have permitted a “margin of appreciation” to the law-maker. They allow that there is no lack of proportionality so long as the means chosen are within the range of those means that could reasonably be chosen. This allows that reasonable people might nevertheless disagree as to what means within that range should be chosen. If the means chosen by the law-maker are within this range, the court will not 'second-guess' the law-maker.

Hogg, above, at 17-23 shows that the categorical statement by Dickson CJC in *R v Oakes* [1986] 1 SCR 103 at 139 that the means chosen must be the least drastic means was quickly modified to a test which permits a “margin of appreciation” to the law-maker. Butler (above) cites case-law from New Zealand and South Africa to the same effect, and outlines the reasons for the adoption of the “reasonable means” test. (It has often been noted, as Butler writes, that “it would be a dull and unimaginative lawyer indeed who could not come up with some alternative that limited a right a little less drastically or a little less restrictively in almost any situation” (above at note 138, citing case-law).

In *Report No 20 of the Sixth Assembly*, the Committee pointed out that in *R v Sharpe* [2001] SCR 45 at paras 96-97, McLachlin CJC said:

[96] ... it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account:

[97] This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal.

Hogg points out that in the Canadian experience, it is in the application of this third criterion (or the second element of the proportionality test) that debate and judicial disagreement occurs.

Thus, *taking each instance* where a provision of the Bill engages an HRA (or other) right, the questions for the Assembly are:

- could the objective of the provision have been achieved in some other way which would have involved a less drastic derogation from the HRA right?; and
- if so, was it nevertheless reasonable for the law-maker to have chosen the means reflected in the provision?

If the first question is answered 'no' or if the second question is answered "yes", the provision satisfies this third criterion.

In this respect, a critical issue for the Assembly is whether it would be feasible, and, if so, less restrictive of the right to liberty and other HRA rights to deal by other means with the threat of terrorist activity. If so, the question would then be whether it was nevertheless reasonable for the law-maker to have chosen the means stated in the Bill. These are matters for the Assembly to address, and the following comments are designed to assist in this task.

One possible alternative means is to make greater use of conventional criminal prosecution under the existing or an extended range of terrorism-related offences. Several members of the community have urged this on Australian bodies considering anti-terrorism laws. See Standing Committee on Legal Affairs, *Report No 3 of the Sixth Assembly*, Report on Terrorism (Extraordinary Temporary Powers) Bill 2005— exposure draft at paras 1.31-1.35; 1.38—1.46 and the dissenting report of Dr Foskey at 6.36ff.

On the other hand, use of the criminal process is thought by some to be not feasible. As noted by the United Kingdom Joint Committee On Human Rights, *Review of Counter-Terrorism Powers* (Eighteenth Report of Session 2003-2004) at paragraph 52, it is argued that:

the obstacle to bringing such prosecutions is that the evidence on which suspicion of involvement in international terrorism is based is usually intelligence material which would either be inadmissible as evidence in court or is the sort of material that the authorities do not wish to make available in open court because of the possible prejudice to their sources or methods.

See too Standing Committee on Legal Affairs, *Report No 3 ...* at para 1.32, for similar views held by the Australian Federal Police and others.

There are those who would argue that these problems might be accommodated by a variety of special measures to facilitate prosecution, such as:

New Investigative Techniques: ... such as ... the use of intercept evidence ...[and] extended search powers ...

Protecting Sensitive Information: ... [such as] providing the state with greater control over the use and disclosure of sensitive and confidential information in court ... [and the amendment of] evidence laws to protect sensitive information.

Criminal Procedure: ... [such as] specific judicial procedures in the context of terrorism-related prosecutions. For example, ... investigative hearings, which enable judges to compel even self-incriminating evidence; and ... videoconferencing technology for witness confrontations to avoid unnecessary transfers.

Sentencing: ... [such as] higher sentences for terrorism-related offences than for equivalent offences without a terrorist motivation ... [and] the statutory assurance of lower sentences for those who have committed terrorist offences but who renounce terrorism and cooperate with the police.

Detainee's Rights: ... [such as] longer pre-charge detention and longer periods without access to legal counsel in cases of suspected terrorism ...: (Joint Committee, above at page 26).

In contrast, others might argue that it is undesirable – and perhaps contrary to the right to equality before the law – to create a separate regime for a particular range of criminal offences. Moreover, each of these changes to ordinary criminal procedure would each raise an issue of compatibility with the HRA (and in particular, with the fair trial rights in sections 21 and 22).

Another means to deal with the terrorist threat is to create a scheme for civil restriction orders. That is, “rather than detain ... to impose restrictions on the liberty of the individuals concerned, for example on their freedom of movement by curfews, tagging, or daily reporting requirements, on their freedom of association, or on their ability to use financial services or to communicate freely”: (Joint Committee, above paragraph 75). Such orders might be accompanied by a criminal procedure for determining whether there has been a breach of a relevant order.

This alternative nevertheless raises a range of HRA issues. In the view of some, they are as acute as provision for a short period of detention. The UK Joint Committee did however see them as an alternative “worthy of further exploration” (Joint Committee, above paragraph 80).

* * *

The fourth question points to the need for a global qualitative assessment of whether the derogation of the HRA right is justifiable.

Is the derogation from the HRA (or other) right “too high a price to pay for the benefit of the law”?

This statement is drawn from Hogg, above at 23. Hogg argues that in Canadian law this step in the analysis is redundant. He argues that in effect it has already been asked in answering the first question. That is, one does not get to this fourth question unless it has already been found that the objective of the law of which the particular provision is a part is sufficiently important to warrant the overriding of the right from which the provision derogates. This is the same inquiry posed by this fourth question.

This may be so, (although it depends on how the first criterion is stated), but the Committee suggests that it is useful to ask the question again. By the fourth stage, the person or body applying the section 28 test will, by reason of having considered the third question, have a deeper appreciation of the impact of the law on the right in question.

Asking this fourth question also avoids the danger that the first three questions will be seen as a sufficient yardstick for evaluation. Butler (above at 20, footnotes omitted) notes that the Constitutional Court of South Africa

has consistently eschewed a mechanistic application of tests and has resisted a stepped, *Oakes* style test: “The Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check”. The Court has emphasised that “different rights have different implications for ... an open and democratic society based upon freedom and dignity” and, accordingly, “there is no absolute standard which can be laid down for determining reasonableness ...”. Rather, the Court is to engage in “a nuanced and context-sensitive form of balancing”. Thus, in *State v Mamamela* the Court said:

As a general rule, the more serious the impact of the measure or the right, the more persuasive or compelling the justification must be.

Moreover, at this stage it may be easier to ask another question involved in the application of section 28. Section 28 speaks of “limits” to the HRA rights, and the Canadian Supreme Court has held that a derogation of a right which amounts to a “denial” of the right cannot be justified under section 1 of the Canadian Charter; see Hogg, at 9. The line between a denial and a limitation is obviously one that will be hard to draw, but if it is drawn by having regard to the severity of the derogation, then there is scope for a meaningful application of the word “limits” in HRA section 28.

Finally something must be said about the nature of the task involved in the application of section 28.

The nature of the task involved in the application of section 28

In *Ministry of Transport v Noort* [1992] NZLR 260 at 283), (and adapting this to section 28), Richardson J said that the tests involved in the application of section 28 “necessarily involve public policy analysis and value judgements on the part of the Courts”, and that “in principle [the inquiry] will properly involve consideration of all economic, administrative and social implications”. He continued:

In the end it is a matter of weighing:

- (1) The significance in the particular case of the values underlying the Bill of Rights Act;
- (2) The importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
- (3) The limits sought to be placed on the application of the [Bill of Rights] Act provision in the particular case; and
- (4) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

The Committee has pointed out in the past that this is a task particularly suited to members of the Assembly. In *Scrutiny Report No 12 of 1998*, the Committee said:

[T]he questions raised by rights arguments are questions for politicians to answer. Speaking of the rights provisions of the Constitution of the USA, Judge Learned Hand, one of the most respected figures in USA legal history, said that “[t]he answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh” (*The Spirit of Liberty* (1963) at 161). It is, ultimately, “a choice between what will be gained and what will be lost” if the law in question is valid. This is ultimately a question politicians must answer.

The way a Member answers these questions will turn crucially on her or his findings of fact. Whether one thinks the incompatibility with a particular right is justified under section 28 will turn on one’s understanding of the factual circumstances and policy needs that are or may be said to give rise to the need to make a law which is incompatible with a particular right. Very broadly, two somewhat contrasting standpoints are evident in the debates concerning anti-terrorist laws. On the one hand, there are those who would apply the precautionary principle, that is, “the idea that if the consequences of an action are unknown, but are judged to have some potential for major or irreversible negative consequences, then it is better to avoid that action” (Wikipedia). On the other hand, others take the stand that a derogation from a fundamental liberty must be based on a clear showing of a presently identifiable danger.

Moreover, there is another set of contrasting standpoints between those who would accept assurances that there is “intelligence” information not in the public domain which may provide a factual basis for a section 28 justification, and those who do not accept – at least to the same extent – such assurances as a basis for this judgement.

* * *

This report will not attempt to evaluate whether each provision of the Bill which arguably derogates from an HRA right might or might not be said to be justifiable under section 28. Rather, it will seek to explain the major elements of the scheme of the Bill and point to the critical rights questions that arises out of these elements.

(Some elements of the scheme that are clearly protective of the rights of certain classes of persons – such as children and persons suffering a disability – are not the subject of comment.)

THE SCHEME FOR PREVENTATIVE DETENTION

The effect of a preventative detention order

Upon the Supreme Court making a preventative detention order under clause 18, the person affected may - by action of a police officer - be taken into custody and detained for a period. In short, he or she will be locked up in a State administered place of detention. A police officer may use force to effect the custody and detention (clause 40), and the detainee may be subjected to a frisk search and an ordinary search (clause 41). There is a guarantee of humane treatment (clause 48). Upon being detained the person may not “contact anyone” and may be prevented from doing so (clause 49), except that the person is entitled to contact certain persons (clauses 50-53) unless in respect of most of these persons the Supreme Court has made a prohibited contact order under clause 32 which precludes contact with a named person. The nature of any contact may be monitored.

Who makes a preventative detention order?

Upon application by a senior police officer, **the Supreme Court “may make a preventative detention order” (subclause 18(1)) on one or the other of two bases.** The first, under subclause 18(4), may be referred to as detention to prevent a terrorist act, and the second, under subclause 18(6), as detention to preserve evidence.

The first basis [subclauses 18(4) and 18(5)] is that the Supreme Court is satisfied, on reasonable grounds,

- (a) that the person:
 - (i) intends, and has the capacity, to carry out a terrorist act; **or**
 - (ii) possesses something connected with the preparation for, or carrying out of, a terrorist act; **or**

(iii) has done an act in preparation for, or planning, a terrorist act;

and

- (b) that it is reasonably necessary to detain the person to prevent a terrorist act; **and**
- (c) that detaining the person under the order is the least restrictive way of preventing the terrorist act mentioned in subparagraph (b); **and**
- (d) that detaining the person for the period for which the person is to be detained under the order is reasonably necessary to prevent the terrorist act.

A significant limitation on this power is contained in subclause 18(5), which provides that “[f]or subsection (4), the terrorist act must be imminent and, in any event, be expected to happen some time within the next 14 days”.

QUERY -- So far as the calculation of the 14 days is concerned, is the time up to 14 days to run from the date of the preventative detention order, **or** from the time the Supreme Court hears the matter, **or** from the date of the application to the Supreme Court by the senior police officer?

The second basis [subclause 18(6)] is that the Supreme Court is satisfied, on reasonable grounds,

- (a) that a terrorist act has happened within the last 28 days; and
- (b) that it is reasonably necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act; and
- (c) that detaining the person under the order is the only effective way of preserving the evidence mentioned in paragraph (b); and
- (d) that detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence.

QUERY -- There is perhaps some lack of clarity surrounding the words “is to be detained” in paragraph 18(6)(d). Is this period fixed in terms of what the senior police officer stipulated in the application as “the period for which the person is to be detained” (see paragraph 17(1)(e)), or might the Supreme Court fix a different period? Then, when applying paragraph 18(6)(d), can the Supreme Court have regard to the possibility that the period of the order might be extended under clause 26? (it would appear not).

The Supreme Court must give reasons for making the order, and take steps to explain its effect to the person effected (subclause 18(8)).

Against this background there can be posed the first set of rights issues.

Given that a preventative detention order will derogate from various rights stated in the HRA, and, in particular the right to liberty in HRA subsection 18(1), are the derogations justifiable in terms of HRA section 28?

This may be broken down into three questions:

In the circumstances stated in subsections 18(4) and 18(6), is it justifiable to permit the detention of a person?

Should the Supreme Court be invested with the power to make the primary decision to detain?

Are the provisions concerning the length of a period of detention justifiable?

In the circumstances stated in subsections 18(4) and 18(6), is it justifiable to permit the detention of a person?

The right to liberty is stated in HRA section 18:

18 Right to liberty and security of person

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
- (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

There arises first a problem of interpretation. It is not clear how section 18 interacts with section 28. In *Scrutiny Report No 14 of the Sixth Assembly*, in connection with the Litter Amendment Bill, the Committee addressed these issues.

Subsection 18(1) then provides that “no-one may be arbitrarily ... detained”. It is clear from the reports of the United Nations Human Rights Committee, and from courts in other countries, that a detention may be “arbitrary” even if it is authorised by a law. It is accepted, as summarised by Hamilton J in *Manga v Attorney-General* [2000] 2 NZLR 65 at 71, that [a]ll unlawful detentions arbitrary, and lawful detentions may also be arbitrary if they exhibit features of inappropriateness, injustice, or lack of predictability or proportionality.

Turning now to subsection 18(2), which deals with a deprivation of liberty, this provision might be thought to afford a narrower protection to a person, for it appears to permit a deprivation “on the grounds and in accordance with the procedures established by law”. There is here no limitation in terms that a deprivation not be arbitrary. This reading is probably not correct. Rather, subsection 18(2) states an additional requirement - that is, a deprivation of liberty necessarily amounts to a detention, and, in addition to that deprivation not being “arbitrary” (subsection 18(1)), it must also be “on the grounds and in accordance with the procedures established by law” (subsection 18(2)). What this adds is that the detention “must be specifically authorized and sufficiently circumscribed by law”: S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) [11.10]; (see also the same point made concerning HRA section 12, ...). (It would also be possible to read subsection 18(1) as stating that unless the law is of this character, there would necessarily be an “arbitrary” detention. There is clearly some overlap between subsections 18(1) and (2).)

If this analysis is correct, the justifiability analysis takes place in the application of HRA section 18, and not under section 28. No issue of substance turns on this, but the Committee notes that the Explanatory Statement assumes that an “arbitrary” detention could be justifiable under section 28.

Analysis of section 18 in respect of this Bill is complicated in that there are two different groups of people who could claim that their right to liberty is breached by the preventative detention scheme. On the one hand, those who are detained under the scheme might argue that it is too draconic in its effects. On the other hand, some in the community might argue that their liberty is at risk from terrorist activity and that the scheme will not be effective enough.

The interests of the detainee are recognised in paragraph 9 of the Preamble:

- 9 In enacting these extraordinary temporary measures, the Legislative Assembly, therefore, considers that it is critical that Australia's fundamental legal principles (such as the rule of law, respect for the legal process, the separation of powers, and respect for human rights) be preserved.

A denial of liberty by reason of detention by an executive authority derogates from several rights. In an earlier Report dealing with a Bail Bill the Committee observed:

A denial of an application for bail results in the person being detained in custody, in circumstances not unlike that of a jail. The effects on that person and on others were noted by Hunt CJ at CL in *R v Kissner* (Supreme Court, NSW, 17 January 1992, unreported; quoted in *Chau v DPP* (Commonwealth) 132 ALR 430 at 433):

the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and to his family, and usually with severe effects upon the applicant's business or employment, his finances, and his abilities to prepare his defence and to support his family.

It might be added that detention will have a stigmatisation effect – that the detainee will carry the badge of having been somehow associated with terrorism, which in turn will have effects well beyond the end of the detention.

The Domestic Violence (Amendment) Bill (No. 2) 1998 introduced into law provision for the making of emergency protection orders by which a police-officer, without any reference to a judicial office-holder, may detain a person for up to 4 hours. It was clear from the Bill that this process could be used even though there were no grounds to arrest the proposed respondent. The process was to be used for the purpose of facilitating the civil process of the obtaining the service of an emergency protection order on the respondent. In *Scrutiny Report No 12 of 1998*, dealing with the response of the Attorney-General to the Committee's first report on this Bill, the Committee asked whether the detention of a person divorced from the criminal process was necessarily an undue trespass on personal rights and liberties. (In terms of the HRA, the question is whether such a derogation from the right to liberty in HRA section 18 is justifiable under section

28). A view that the detention of a person divorced from the criminal process is necessarily unjustifiable draws support from a statement by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-8:

23. ... It would ... be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, **the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.** (Emphasis added) ...

24. There are some qualifications which must be made The most important is that ... the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive. ... the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts ... to order that a person committed to prison while awaiting trial be admitted to bail.

Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline the citizens of this country enjoy, at least in times of peace a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth. (Footnotes omitted.)

[It should be noted that where a court denies bail to a person charged with an offence, the effect is that the person is detained and this detention is also regarded as non-punitive. Of course, such period of detention in a jail, of a person who has not of course been adjudged guilty of crime, may be for many months or indeed for more than a year. If acquitted at trial, the person is not entitled to compensation for this detention.]

It might be argued that the principle, which has been emphasised in the text above, is a fundamental of Australian law and should be read as a component of the right to liberty in HRA section 18. Moreover, it may be argued that it is not capable of displacement under HRA section 28 except in those exceptional cases noted by their Honours.

It may be that the Territory Supreme Court will read the HRA in this way. Some High Court judges support the proposition stated in *Lim* noted above: see *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46 at [80], and see at [85]. But this view may not command majority support on the present High Court. Other Justices have not precluded the validity of detention otherwise than as a result of an adjudication by a court, and outside the accepted “exceptional cases”, either by an exercise of judicial power, or by executive power. (The relevant references are in the opinion of Mr Gagelar SC, “In the Matter of Constitutional

Issues concerning Preventative Detention in the Australian Capital Territory” 26 October, 2005³, para 15ff.) Some judges have pointed out that in time of war, Commonwealth law has provided for detention by executive order, and that the High Court has upheld the legislation. There is, however, at least strong minority support, and the issue remains open. (The question is explored in the legal opinion of Mr Gagelar SC, above).

In any event, it is of course open to a member of the Assembly to adopt as an appropriate rights standpoint the principle that, a limited category of exceptional cases apart, “the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt”. On this basis, the member would conclude that the preventative provisions of the Bill are in breach of the HRA.

The liberty interests of those who claim to be at risk of terrorist outrages is recognised in paragraph 5 of the Preamble to the Bill:

- 5 The community needs to be protected from acts of terrorism. If law enforcement agencies have evidence that a terrorist act is imminent or has happened, they need to be able to respond appropriately to prevent it or investigate and reduce its impact.

It has been noted above that the UK Joint Committee On Human Rights cited the European Court of Human Rights for a view that the State has a positive obligation to take the measures necessary to protect everyone within its jurisdiction against terrorist acts. This use of the law to protect the community, in a way that derogated from a right stated in the Commonwealth Constitution, was upheld by the High Court in *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116; [1943] HCA 12.

The Governor-General, acting under World War II national security regulations, declared that the Jehovah's Witnesses were acting to the prejudice of the defence of the Commonwealth by propagating doctrines which undermined the efficient prosecution of Australia's war effort. One result was that the Jehovah's Witnesses worship hall in Adelaide was seized. The High Court held that the laws authorising the making of the declaration and the seizure of the premises did not breach section 116 of the Constitution's prohibition on Commonwealth laws preventing the free exercise of religion. Section 116 did not preclude laws prohibiting actions which, although undertaken in pursuit of religious convictions, were prejudicial to the war effort.

Latham CJ cited John Stuart Mill for the proposition that “the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective”: [1943] HCA 12 at 10. He said further:

³<http://www.chiefminister.act.gov.au/docs/Gageler_advice_261005.pdf

In pursuance of [its legislative powers], the Commonwealth can defend the people, not only against external aggression, but also against internal attack, and in doing so can prevent aid being given to external enemies by internal agencies. No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people: above at paragraph 11.

He added:

the power of the Commonwealth to protect the community against what are now called fifth-column activities, that is, internal activities directed towards the destruction of the people of the Commonwealth, is not so weak as to be limited to legislation for the punishment of offences after they have been committed. Parliament may, in my opinion, under the defence power, seek to prevent such offences happening by preventing the creation of subversive associations or ordering their dissolution.

(Some other judges spoke in similar terms.)

There is not a great deal more the Committee can say to assist each MLA to determine if it is justifiable to permit the detention of a person in the circumstances stated in subsections 18(4) and 18(6).

In making this assessment, particular account should be taken of

- the definition of “terrorism” in the Bill in clause 6. This is a key consideration, given that the wider the range of activities brought with the scheme, the less is it justifiable;
- subclause 11(1), by which a preventative detention order cannot be applied for, or made for, a child; and
- the requirement in paragraph 18(4)(c) that the detaining of the person under an order be “the least restrictive way” of achieving the object of the detention, and the requirement in paragraph 18(6)(c) that the detaining of the person under an order be “the only effective way” of achieving the object of the detention.

Should the Supreme Court be invested with the power to make the primary decision to detain?

The Bill would vest in the Supreme Court of the Territory – acting as a court – the power to order the detention of a person. Several submissions to the Committee’s inquiry into the Exposure Draft supported this aspect of the Bill. For example, as noted in Standing Committee on Legal Affairs, *Report No 3 of the Sixth Assembly, Report on Terrorism (Extraordinary Temporary Powers) Bill 2005— exposure draft* at para 1.62:

The ACT Human Rights Office supported giving jurisdiction to the ACT Supreme Court because of its special role under the Human Rights Act, the sensitivity and significance of the issues likely to arise in hearings under the proposed legislation, and the need for appropriate and tailored procedures.

This Committee expressed a preliminary view in support; see *Report No 3 ...* at para 1.60. The Committee did, however, note views that a significant rights issue was involved, and that some raised the possibility that the role of the Supreme Court would be found to be unconstitutional. The Committee now records another view that spells out an argument that to vest in the Supreme Court the role of primary decision-maker **may** undermine the protection of rights.

The relevant rights standpoint is that a court should not be vested with a power the exercise of which would compromise the institutional integrity of the court. The rationale for this principle is that a court whose institutional integrity is compromised is less able - in the exercise of any of its powers - to protect human rights. If a court is perceived to lack institutional integrity - in simple terms, that it is not sufficiently separate from the executive and legislative branches of government - then it will be less able to afford protection to human rights by reason that

- some will not trust the courts to offer protection and will not resort to them for protection; and/or
- others will not respect the decisions of courts, a consequence of which is that decisions which do protect rights will be less effective.

Of course, to vest one particular power in a court may not have much adverse effect. But if one incompatible power is vested, then more may follow, and at some point the cumulative effect is damage to the ability of the court to protect rights. To avoid this outcome, the argument is that no incompatible power should be vested.

Assessment of whether vesting a power to make a preventative detention order would compromise the institutional integrity of the Supreme Court requires that regard must be had, on the one hand, to the combined effect of those matters which suggest that the Court's institutional integrity would be compromised, and, on the other, to those matters which suggest the contrary. In the end, it is a matter of judgment.

One particular aspect of the role of the Supreme Court that some might argue compromises its integrity is its role as part of a tri-partite process of decision-making in which the Supreme Court is one part, and Commonwealth executive authorities constitute the other two parts.

The first part of the process occurs under those provisions of the *Anti-Terrorism Act (No 2) 2005* (Cwlth) under which a preventative detention order of 48 hours duration may result from action taken in the first place by a senior police officer, and then by an order made by a person who is a retired judge, or a current Federal Court judge or federal Magistrate (but in neither case acting as a judge, but in a "personal capacity").

The second part of the process may occur when the Supreme Court is called upon to make a preventative detention order under clause 18 of the Bill. If an order is made, the result is that the person is held in detention while Commonwealth authorities (ASIO, the APF) decide whether to move to the third step in the process.

The third part of the process may occur under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cwlth). This law “enables ASIO to obtain a warrant from an ‘issuing authority’ for the questioning of a person before a ‘prescribed authority’ in order to obtain intelligence that is important in relation to a terrorism offence. A warrant may also provide for a person to be detained for questioning if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority, or may destroy or damage evidence. ... The subject of a warrant cannot be detained for more than [7 days].”

To remove the Supreme Court as the primary decision-maker would not remove the Court as a body which may review the legality of an exercise of the detention power. The Supreme Court would retain its ordinary powers of reviewing the legality of an exercise of this power. Moreover, given that the exercise of a power to detain derogates from the right to liberty in section 18 of the *Human Rights Act 2004*, on any such review the Supreme Court’s powers would, if English case-law was followed, permit the court to exercise significantly greater power than is afforded by the usual principles of judicial review of administrative action. In particular, the Supreme Court could make its own assessment of whether a decision to detain was a proportionate means of dealing with a situation before the detaining authority.

It is for the Assembly to determine if placing the Supreme Court in the role of primary decision-maker in relation to the power to detain can be justified under HRA section 28.

<i>Are the provisions concerning the length of a period of detention justifiable?</i>

The gravity of the adverse consequences of a detention will turn in part upon the duration of that detention. In this respect, the provisions of the Bill are very complex, and an extended explanation may assist the Assembly. (The case of the interim preventative detention order is dealt with separately.)

A preventative detention order starts when it is made (subclause 22(1)(b)), and ends at the end of the period stated in the order as the end point (subclause 22(2)).

Clause 21(3) then states two rules to govern what that end point must be.

First, by paragraph 21(3)(a), and subject to the rule in paragraph 21(3)(b), the end time must be no later than 7 days after the person is first **detained** under the order.

(It needs to be noted that the preventative detention order might be made at a point earlier than the detention of the person because the person is not then accessible and cannot be immediately detained. In such a case, the order might state the end period in terms of it ending 7 days after first detention occurs. But the effect of paragraph 22(2)(a) is that the order will cease to have effect if the person is not detained within 48 hours (2 days) of the order being made. In this case, another application might be made, and the rules in clause 12 as to multiple orders (see below) would not apply because the person had not been detained.)

While the end time specified in the order must be no later than 7 days after the person is first detained, the order can be extended (and then further extended) by order of the Supreme Court under clause 26 for a maximum period of up to 7 days after the person is first detained under the period as extended (or further extended). The end time of an extended (or further extended) order is also subject to a 14 day limit; (see paragraph 26(2)(b), which states a rule identical to that stated in 21(3)(b)).

Second, by paragraph 21(3)(b), the end time must be “no later than 14 days after the person is first taken into custody and detained, or detained, under any preventative detention order, or corresponding preventative detention order, for the **same terrorist act**”. The Explanatory Statement explains:

No combination of orders may allow a person to be detained for more than 14 days in relation to the same terrorist act – the end time must be no later than 14 days after the person was first detained under an order or corresponding order for the same act.

The Explanatory Statement does not however provide any examples to illustrate. Perhaps it might operate as follows. Suppose:

- preventative detention order A is made under subclause 18(4) (detention to prevent a terrorist act) in relation to a particular terrorist act and that the person is detained on that day. This order will fix an end point of 7 days after the detention of the person. Suppose the order extended for 2 more days; and
- during the detention of the person under order A - say on the 8th day of the detention - application is then made for order B under subclause 18(6) (detention to preserve evidence) in relation to **the same** particular terrorist act.

In these circumstances, the result of paragraph 21(3)(b) is that the end point of order B must be no later than 14 days after the person was detained under order A - that is, in these circumstances it must end no later than 5 days after it was made (given that the person was in detention on that day).

Of course, paragraph 21(3)(b) would so operate only if the Supreme Court was satisfied that the terrorist act which is said to underpin the making of order B is the “same” terrorist act upon which order A was based. This is a question of fact, but there are some complex legal issues.

QUERY - What meaning should the Supreme Court give to the word “same”. Does it mean 'exactly the same' - in which case paragraph 21(3)(b) may not often apply - or does it mean 'substantially the same'? Also complex is the question of how the Supreme Court should describe the components of a terrorist act. For example, is the date on which the act is expected to occur a material point of difference?

That is, if the application for order B is made on the basis of a *different* terrorist act, paragraph 21(3)(b) does not apply. The Supreme Court could make the order to end up to 7 days after the person is first detained under this order, and entertain an application for an extension for a further 7 days.

This is one example of how a person may remain in detention for longer than 14 days by reason of a combination of multiple preventative detention orders.

Section 12 also sets some limits to the making of multiple preventative detention orders.

These rules operate from the time a person is detained (and noting again that the effect of paragraph 22(2)(a) is that the order will cease to have effect if the person is not detained within 48 hours (2 days) of the order being made).

The rules contemplate:

- an existing preventative detention order A;
- that the relevant person is detained under that order; and
- then an application for and the making of a subsequent order B in relation to the same person.

It must be noted that order A will embrace an order made by the Supreme Court under clause 18, and any kind of “corresponding preventative detention order”. This latter is an order under the Commonwealth Criminal Code, division 105, or under a law of a State or another Territory that provides for preventative detention of people in relation to terrorist acts (see clause 9).

Under subclause 12(1), if order A is made on the basis of assisting in preventing a terrorist act happening **within a particular period**, then order B cannot be made for the person on the basis of assisting in preventing the **same terrorist act** happening within that period.

Subclause 12(1) refers to an order made under subclause 18(4). As the Note explains, “It will be possible to apply for, and make, another preventative detention order for the person on the basis of preserving evidence of, or relating to, the terrorist act if it happens”. This is a reference to an order under subclause 18(6). It appears, however, as explained above, that subclause 21(3) would set a limit as to what might be stipulated as the end point of order B.

QUERY - The Committee suggests that the Note to subclause 12(1) might more fully explain the situation.

It is also to be noted that **subclause 12(1) does not apply if order B relates to a different period**. It may not be easy to work out just what is the relevant period in relation to an order under subclause 18(4). Unless one can establish clearly the period in respect of which order A is made under subclause 18(4), it will not be possible to work out whether order B relates to a different period. Subclause 18(5) provides some guidance, but does not solve the problem. The position may be more complex where order A is one made under a provision of a corresponding law which is similar to subclause 18(4).

QUERY - It is also noted that the body of evidence to which order A relates may be completely different to the body of evidence to which order B relates. In such a case, the prohibition in subclause 12(1) will apply (so long as both orders relate to the same terrorist act.) Is this result intended?

Under subclause 12(2), if order A is made on the basis of assisting in preventing a terrorist act happening **within a particular period**, then order B cannot be made for the person on the basis of assisting in preventing a **different terrorist act** happening within that period, **unless** “the application, or the order, is based on information that became available only after” A was made.

QUERY - There are imponderables here. Available to whom? What will be a different body of information?

Subclause 12(2) does not apply if order B relates to a **different** period. (See comments above concerning the difficulty in fixing the relevant periods.)

Under subclause 12(3), if order A is made on the basis of preserving evidence of, or relating to, a terrorist act, then order B cannot be made for the person on the basis of preserving evidence of, or relating to, the **same** terrorist act.

The Committee has drawn attention to the difficulty attending assessment of whether the two terrorist acts are the “same”. This may be more complicated where order A is a corresponding order. It may - by reason of lack of access to relevant documents and records of the Commonwealth or the State or Territory under whose laws the relevant corresponding order was made - be that much more difficult to ascertain just what was the terrorist act upon which the corresponding order was based.

QUERY - It is also noted that the body of evidence to which order A relates may be completely different to the body of evidence to which order B relates. See above the comment made in relation to subclause 12(1).

Subclause 12(4) applies only to a preventative detention order made under the ACT regime (and **not** to a corresponding preventative detention order).

QUERY - Why this should be so is not apparent, and not explained in the Explanatory Statement.

The rule is that if order A (either of a kind under subclause 18(4) or under subclause 18(6)) is made for a person on the basis of particular information, then order B (of either kind) cannot be made “solely on the basis of the same information”.

The rule in subclause 12(4) may not be a significant restriction on the making of another order. It may be easy to show that order B is not made “solely” on the basis of the same information, or that the information is not the same.

Subclause 12(5) then states circumstances in which the restrictions on the making of multiple orders in subclauses 12(1) to 12(3) do not apply. It is not easy to appreciate the scope of paragraph 12(5)(c), which states that one such circumstance is “the making of a preventative detention order for a person after the making of a corresponding preventative detention order”. On the face of it, this provision seems to contradict the policy evident in subclauses 12(1) to 12(3), which provisions cover a corresponding order. The Explanatory Statement states:

Subclause (5) relaxes these restrictions in relation to orders that extend interim or final orders or that follow on from previous orders under the laws of other jurisdictions.

QUERY - The Committee notes that paragraph 12(5)(c) uses the word “after”, and, as a matter of ordinary English, this is not the equivalent of the words “follow on” used in the Explanatory Statement. The word “after” does not suggest that order B should follow closely in point of time the making of (corresponding) order A. The Committee suggests that it needs to be explained - by reference to the words of paragraph 12(5)(c) and desirably a case-scenario - how it is that subclauses 12(1) to 12(3) have any application where the order A is a corresponding preventative detention order.

(It is possible - perhaps predictable - that a court would read down paragraph 12(5)(c) so that it did not apply to the specific situations affected by subclauses 12(1) to 12(3). If this occurred, the example given in the Explanatory Statement might not hold true.)

It is for the Assembly to determine if these provisions concerning the duration of an order, and for the making of successive orders, can be justified under HRA section 28.

Rights in relation to the hearing of applications for preventative detention orders and prohibited contact orders

This is dealt with in clause 13, which is outlined in the Explanatory Statement:

Clause 13 confers a range of procedural and representation rights on persons who are the subject of applications for preventative detention orders or prohibited contact orders.

These do not apply in relation to applications for interim preventative detention orders.

Subclauses (2) to (6) provide that a person is entitled:

- to be served with a copy of an application and to be given written notice of the place, date and time the application is to be heard;

- to be present at the hearing either in person or, if the court directs, by videolink; and
- to be represented by a lawyer of their own choice, or, where relevant, a lawyer appointed by the legal aid commission. They, or their lawyer, are entitled to examine and cross-examine witnesses and make submissions at the hearing.

This is additional to any of the other ordinary rights the person will have in legal proceedings and is subject to the Supreme Court's inherent powers to regulate its proceedings.

Subclause (8) permits the court to hear an application in the absence of a person where it is satisfied that the person or their lawyer was properly notified of the hearing.

These provisions afford procedural fairness and do not on their face derogate from any HRA right. It appears that the law of evidence will apply. It must be noted that "the Supreme Court's inherent powers to regulate its proceedings" will permit the court to close proceedings to the public, and to issue suppression orders. In addition, some evidence adduced before the court may be denied to the potential detainee and her or his lawyers; see section 130 of the *Evidence Act 1995* (Cwlth).

The interim preventative detention order

An application for an order under one or other of subclause 18(4) or 18(6) is made by a senior police officer to the Supreme Court: subclause 16(1). Among other matters, the officer must "state the period for which the person is to be detained under a preventative detention order ...": subclause 17(1)(e). For ease of understanding what follows, this order is referred to as a "full" order. The application must also "state whether an interim order is applied for ..." (subclause 17(1)(c)).

QUERY - would it assist to insert the word "also" in subclause 17(1)(c) - and in para 20(1)(b)?

The Supreme Court may make an interim preventative detention order if

- when the senior police officer, acting under clause 16, made application for the "full" order, the officer stated that an interim order was also applied for (see paragraph 20(1)(b), and note paragraph 17(1)(c)), and
- the officer did **not** serve upon the person sought to be detained a copy of the application, or give to that person notice of the place, date and time of the hearing by the Supreme Court of the application for the "full" preventative detention order.

If satisfied that certain facts exist (see below), the Supreme Court may make an interim preventative detention order, the effect of which will be to authorise the detention of the person (subclause 21(1)).

By subclause 20(4), "[t]he interim order may be made in the absence of, and without notice to, the person (or any representative of the person)".

It is apparent from subclause 20(2) that the point of an interim preventative detention order is to permit the detention of the relevant person until the Supreme Court can commence to hear the application for the “full” order. If it makes an interim order, the Supreme Court must “fix the date and time when the hearing of the application is to be resumed” (paragraph 20(5)(b)).

By subclause 20(6), this “date and time ... must be no later than 24 hours after the interim order is made”. On resumption, the rules relating to the hearing of an application in clause 13 will apply.

Rights issues arising out of the above, and out of further aspects of the scheme for the making of an interim preventative detention order, are now addressed.

Is it justifiable to provide for an ex parte hearing of an interim preventative detention order?

Of course, an interim preventative detention order is made in the absence of the person to be the subject of the order, and without any representative of that person having any opportunity to make submissions to the Supreme Court. Courts have been long vested with power to make interim orders on an ex parte basis.

The question for the Assembly is whether this is justified where the order is one for the detention.

Is it justifiable to provide for the making of an interim preventative detention order on the grounds stated in clause 20?

Two limiting conditions should first be noted.

First, by paragraph 20(2)(a), an order cannot be made if the person is in custody or being detained under a territory law or a law of the Commonwealth, a State or another Territory. As the Explanatory Statement notes this “includes a corresponding preventative detention law”.

Second, by paragraph 20(2)(b), an order cannot be made if the person has been detained “under a corresponding preventative detention order for the same terrorist act”.

If neither of these two limiting conditions applies, the Supreme Court may make an interim preventative detention order

if satisfied, on reasonable grounds, that ... taking the person into custody, and detaining the person, pending hearing and making a final decision on the application is reasonably necessary to -

- (i) prevent a terrorist act; or
- (ii) preserve evidence of, or relating to, a terrorist act”: paragraph 20(2)(c).

The point of subclause 20(3) is to make it clear that these two bases match the bases in subclauses 18(4) and 18(6) upon which the Supreme Court may make a “full” order. That is, in assessing whether interim detention is reasonably necessary to “prevent a terrorist act”, the Supreme Court will refer to subclause 18(4) (and subclause 18(5)) for a list of those matters which are relevant to making this assessment. In a similar way, the application of paragraph 20(2)(c)(ii) is affected by subclause 18(6).

It is for the Assembly to determine if these provisions concerning the grounds upon which an interim preventative detention order may be made can be justified under HRA section 28.

Is it necessary, in terms of the particular Supreme Court Justices involved, to separate the function of making an interim preventative detention order from that of making the preventative detention order?

The Supreme Court has to determine very quickly, and in absence of the person affected, whether to make an interim preventative detention order.

Given that the particular Supreme Court Justice who makes the interim preventative detention order has in these circumstances taken a view on the substantive issue that will be involved in a determination of whether a “full” order should be made, it might be thought that her or his involvement in the hearing of the application for the “full” order would give rise to a reasonable apprehension that he or she would be biased against the person sought to be detained.

This problem could be accommodated by provision that the hearings of the application for the “full” order take place before a different Supreme Court judge.

It is for the Assembly to determine if these provisions concerning how the Supreme Court is constituted would amount to a derogation from the right to a fair trial in HRA section 21(1), and, if so, whether that derogation can be justified under HRA section 28.

What happens when an interim preventative detention order is made?

The person may be detained, and by subclause 20(7), the person must be given a copy of the application for the “full” order and written notice of the place, date and time the application is to be heard. By subclause 20(6), the date and time fixed by the Supreme Court for the hearing of the application to be resumed “must be no later than 24 hours after the interim order is made”.

The result is that the person will have, at the most, 24 hours to arrange for representation, or otherwise to prepare for the hearing of the application for the “full” order. This is a very short time frame, and thus the circumstances under which the duration of the interim order may be extended may be of much interest to the detainee as they will be to the government. These provisions are, however, very complex.

Is the provision concerning the duration of an interim preventative detention order justifiable?

Subclause 21(2) provides that “[t]he end time for an interim order must be no later than 24 hours after the person is first detained under the order”.

QUERY -- Such detention must occur within 48 hours of the making of the interim preventative detention order - for otherwise the order will lapse (paragraph 22(2)(a)). The hearing of the application for the “full” order (spoken of by the Bill as a “resumed hearing”) must however have commenced within 24 hours of the making of the interim order (see subclause 20(6)). By the end of that period, the person may not yet be in detention. What would happen then? Extension of the interim preventative detention order under subclause 23(2) is not possible because subclause 23(3) could not be satisfied – because the person has not yet been detained.

If the person is in detention, the Supreme Court may consider that it cannot determine the application without an adjournment of the hearing. Thus, the Supreme Court is given power

- under paragraph 23(2)(a) to adjourn a resumed hearing, and
- under paragraph 23(2)(b) to “extend, or further extend, the period for which the interim order is in force until the adjourned hearing”.

But subclause 23(3) then prescribes:

- (3) The period as extended, or further extended, must be stated in the order and must end no later than 24 hours after the person is **first detained under the order**.

QUERY - On the face of it, the words “the order” refer to the interim order. By subclause 21(2), the end time for an interim order can be no later than 24 hours after the person is first detained under the order. Clause 23(3) appears to say that as extended the order must also end at this point.

If the reference was instead to the interim order as extended, then the Supreme Court could make an order under paragraph 23(2)(b) that would have the effect that the person would remain in detention - for no longer than another 24 hours - notwithstanding the elapse of 24 hours after the detainee was detained under the initial interim order. The Supreme Court could then extend the extended order for another 24 hours, and so on. The effect of course could be that the person would be in detention for more than 24 hours - indeed for several days - prior to the Supreme Court making the “full” order and the commencement of detention under that order. But this could assist the person concerned – for they need to prepare for the hearing of the application for the “full” order.

* * *

The report will now turn to other aspects of the preventative detention scheme.

Setting aside a preventative detention order

Clause 31 provides for the setting aside or amendment by the Supreme Court of preventative detention orders. Supposing a request was made to do so, the refusal of a police officer detaining a person under a preventative detention order to release the person from detention under the order under subclause 42(1) might also be a basis for a judicial review challenge.

Carrying out a preventative detention order

The relevant provisions are contained in Division 2.8.

The first step may be that the chief police officer, acting under clause 36, nominates a senior police officer (the nominated senior police officer) “to supervise the exercise of functions in relation to the preventative detention order” (subclause 36(1)). The role of the nominated senior police officer is spelt out in clause 36. If discharged properly, this device will function as a protection for the person detained.

Upon identifying her or himself (subclauses 35(2) to (4)), a police officer may take into custody and then, subject to clause 43, detain the person (subclause 35(1)). The detaining officer must endorse the order with the date and time of the detention, and of the place of detention (clause 37).

Are the ways in which the provisions derogate from the right to privacy justifiable?

Further consideration of the provisions in Division 2.8 involve addressing derogations of (at least) the right to privacy, and an introduction is necessary. Section 12 of HRA provides:

12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily;

A number of provisions of the Bill derogate from the right to privacy in HRA section 12 in the very limited sense of this concept that it is “a negative right to occupy a private space free from government intrusion” (*National Coalition for Gay and Lesbian Equality and another v Minister of Justice* [1998] ZACC 15 [116]). It is arguable that a compulsion to reveal information to government invades that private space free. More clearly, the exercise of powers by government to enter and search property invades that space. An interference with bodily integrity occasioned by a use of force against a person clearly does so, as well as derogating from the right to liberty in HRA section 18.

In relation to provisions which derogate from the right to privacy in HRA section 12, the issue for the Assembly is whether the derogation is “arbitrary”. If it is not, there is no breach of section 12; if it is, it is hard to see how it could be justified under HRA section 28. The Committee addressed this issue in *Scrutiny Report No 2 of the Sixth Assembly*, concerning the Water Efficiency Labelling and Standards Bill 2004, where it said:

Is that interference unlawfully or arbitrary? On its face, there is no breach of section 12 unless the interference with the right is unlawful or arbitrary. This creates a problem of interpretation. (See N Jayawickrama, *The Judicial Application of Human Rights Law* (2002) at 603, noting the problems the Human Rights Committee of the United Nations has had with Article 17 of the International Covenant on Civil and Political Rights, on which section 12 is based.)

The word “unlawfully” may be taken to mean that the interference is one sanctioned by a law that conforms to a rule of law requirement that it be sufficiently clear in what it prescribes that a citizen can regulate their conduct, and that it is accessible to the public; see S Joseph, et al, *The International Covenant on Civil and Political Rights* (2nd ed, 2004) at 481. It cannot be, however, that the mere fact that the interference is sanctioned by law means that there is no breach of section 12. This interpretation would rob section 12 of any value.

This result can be avoided by reasoning that although an interference may not be unlawful, it may breach section 12 by reason that it is an “arbitrary” interference. This may mean that the interference must be “reasonable” in terms of the objectives and scope of section 12, and be a “proportionate” manner of imposing the interference. In the end, the assessment of whether an interference is arbitrary may be much the same inquiry as is made under HRA section 28. (Section 28 does not come into play unless the law is in breach of section 12.)

On the question whether the interference is arbitrary, (as just explained), a principle adopted in other jurisdictions is that

an assessment must be made as to whether in a particular situation the public’s interest to be left alone by government must give way to government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement: *Hunter et al v Southam Inc* [1984] 11 D.L.R. (4th) 641 at 652-3 per Dickson J, a Canadian case cited by the Constitutional Court of South Africa in *Bernstein v Bester* [1996] ZACC 2 [76].

In making this assessment, it may also be relevant to assess the extent to which the interference affects the freedom and dignity of the person concerned. A high value may be placed on an expectation of privacy in relation to matters such as bodily integrity, private correspondence, and in relation to her or his residence; see N Jayawickrama, *The Judicial Application of Human Rights Law* (2002) at 606.

The power to require another person to provide name and address

Under clause 38(1), a police officer seeking to detain a person pursuant to an order may

require a person to give the police officer the person's name and home address if the officer believes, on reasonable grounds, that the person may be able to assist the police officer in executing a preventative detention order (subclause 38(1)).

The police officer is required to identify her or himself (subclauses 38(2) and (3), although a failure to do so does not affect the lawfulness of the potential detainee's detention (subclause 38(6)). However, the legal obligation to comply with subclause 38(1) on the part of the person whose name and address is sought arises only if the police officer complies with subclauses 38(2) and (3) (see subclause 38(4)). Failure to comply with this legal obligation is an offence punishable up to a maximum of 20 penalty points, and is a strict liability offence (subclause 38(4)).

Is it justifiable in these circumstances stated in clause 38(1) to require a person to provide their name and address - given that an exercise of the power is not tied to the police gaining assistance in relation to the detection of a breach of the criminal law?

The Committee has addressed such provisions on several occasions and in *Report No 50 of the Fifth Assembly*, concerning the Emergencies Bill 2004, it provided general guidance:

The common law recognised “the right of the individual to refuse to answer questions put to him by persons in authority”: *Rice v Connolly* [1966] 2 QB 414 at 419. This may be regarded as a dimension of the “right to silence”, or, more particularly, of the privilege against self-incrimination; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at paras 8.1 and 8.8.

Today, this right might also be seen as a dimension of a right to privacy, in particular where the person questioned is not suspected of committing a crime. A right to privacy is stated in section 12 of the *Human Rights Act 2004*:

When is it justifiable to impose on a person an obligation to provide their name and address?

There are statutory provisions that impose on a person an obligation to provide their name and address if a state official believes that the person might be able to assist in inquiries in relation to the commission of an offence. ...

The ALRC noted that while “[s]tatutory power to require a person to furnish his name and address exists at present in most jurisdictions only in relation to traffic offences[, it] is nonetheless, a power which policemen need, and exercise in practice”: Australian Law Reform Commission, *Criminal Investigation* (Report No 2, Interim) (1975) at para 79. The Commission thus recommended:

The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person’s name and address is sought, and there should be a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity: ALRC at para 322.

It is significant that the power in clause 38 is **not** tied to the police gaining assistance in relation to the detection of a breach of the criminal law. Whether this leads to the conclusion that it is not justifiable in these circumstances to require a person to provide their name and address is for the Assembly to decide.

The power to enter premises

If a police officer “believes, on reasonable grounds” that the person the subject of the detention order is on any premises (subclause 39(1)), the officer

may enter the premises, using any reasonably necessary force, and with any reasonably necessary assistance from other police officers, at any time of the day or night for the purpose of searching the premises for the person or taking the person into custody (subclause 39(2)).

Except in either of two circumstances, the police officer “must not enter premises (or a part of premises) used for residential purposes at any time between 9 pm on a day and 6 am on the next day” (subclause 39(3)). The two circumstances are that the police officer

believes, on reasonable grounds, that -

- (a) it would not be practicable to take the person into custody, either at the premises or somewhere else, at another time; or
- (b) it is necessary to enter the premises to prevent the concealment, loss or destruction of evidence of, or relating to, a terrorist act.

The police officer is not required to obtain a judicial warrant before entering the relevant premises.

Is it justifiable in these circumstances stated in clause 39 to enter premises without a judicial warrant?

In *Scrutiny Report No 6 of the Sixth Assembly*, in relation to Subordinate Law SL 2005-4, the Committee referred to the principles expressed by the Senate Standing Committee for the Scrutiny of Bills in its *Fourth Report of 2000 – Entry and search provisions in Commonwealth legislation* (6 April 2000), as appropriate general framework for determination of whether some particular power of entry and/or search was justifiable. These principles require consideration of whether:

- the intrusion involved in a power of entry and search is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- the power to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;

- when granting powers to enter and search, Parliament should do so expressly, and through primary, not subordinate, legislation;
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;
- in considering whether to grant a power to enter and search, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two—in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases.

The power to use force

The Bill does not explicitly authorise the police officer to use force in order to take the potential detainee into custody or detention, but clause 40 assumes that force may be used. Clause 40 provides that the police officer must not

use more force, or subject the person to greater indignity than is reasonably necessary-

- (a) to take the person into custody or detain the person; or
- (b) to prevent the escape of the person after being taken into custody or detained.

QUERY While clause 40 assumes that force may be used, there may be a prospect that the Supreme Court will not read clause 40 as an authority to use force. It might so conclude by analogy with the reasoning of the High Court in *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, that a power to derogate from the right to liberty must be conferred in explicit terms.

Is it justifiable in these circumstances stated in clause 40 to permit a police officer to use force?

The Committee has taken the view that a “high value may be placed on an expectation of privacy in relation to matters such as bodily integrity”; (see above, quote from *Scrutiny Report No 2 of the Sixth Assembly*, concerning the Water Efficiency Labelling and Standards Bill 2004).

On the other hand, granting to the police authority to use force in the execution of the law is commonly provided for, in particular where physical resistance might be expected in some instances.

The power to search

Subclause 41(1) governs the search of a person taken into custody under preventative detention order for seizable items – being anything that would present danger to a person, could be used to assist an escape of a person from lawful custody, or could be used to contact someone else to operate a device remotely. A police officer may conduct a frisk search or ordinary search to ascertain whether the detainee is carrying a seizable item.

It is implied by subclause 41(3) that a police officer may conduct a frisk search or ordinary search of the detainee for evidence of, or relating to, a terrorist act if the officer suspects, on reasonable grounds, that the person is carrying evidence of, or relating to, a terrorist act.

Schedule 1 contains provisions governing these searches.

QUERY – is it sufficient to merely imply that this power exists? See the *Coco* problem, noted above.

Is it justifiable in these circumstances stated in clause 41 to permit a police officer to conduct a personal search of a person taken into custody for detention?

The Committee has addressed such provisions on several occasions and in *Report No 15 of 2000* concerning the Court Security Bill 2000 it noted that powers of personal search infringed upon privacy.

As stated in *Laws of Australia* vol 11 para 119:

At common law power does not exist for the personal search by police of suspects prior to their being arrested. There is no general power at common law ... enabling police to stop and search suspects, either by frisk or more intrusive search, or to seize their property.

This statement applies with more force to persons who are not suspects, such as those who might be able to assist the police in some way.

...

It is sensible to speak of a “common law principle of bodily inviolability”, as did the majority of the High Court in *Marion’s Case* (1992) 175 CLR 218 at 248. Their Honours approved of a view that this principle was allied with, or the basis for, a right to privacy. In relation to powers of search, detention and the like, the common law began from notions of right to property, and to bodily inviolability. There is a link between the latter and the notion of a right to privacy, and it is this right which is nowadays seen as the starting point for an assessment of the desirability of these kinds of powers. For example, Feldman states that “[s]top and search powers have been described as “a major interference with people’s right to privacy, and a relatively minor interference with the right to freedom from physical interference””: Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) at 176-177.

The ALRC Report (see above) accepted that there was an informal use of such powers by the police, and it was better that they be regulated. The ALRC concluded that

the power to search persons and vehicles without warrant should [be available in] the following situations, namely where there are reasonable grounds to suspect that there may be found (i) an offensive weapon, or (ii) something which is the fruit of a serious crime, the means by which it was committed, or material evidence to prove its commission. By a ‘serious’ crime we mean, here as elsewhere, one punishable by a sentence of more than six month’s imprisonment; ALRC Report at 204.

The ALRC linked its approval of conferring limited powers of stop and search on the police on the ground that an exercise of police power would be subject to police-specific complaint mechanisms, and to discipline within the police force; see ALRC Report at para 204, and see paras 301-302.

The powers of personal search conferred by clause 41 are not tied to the investigation of criminal offences and in this way travel beyond the usual circumstances in which powers of personal search are conferred. On the other hand, it might be argued that it is justifiable to confer such powers where the object is to prevent the occurrence of acts of terrorism.

The nature of detention

Detention in accord with clause 43 arrangements will promote the observance of HRA rights

The effect of paragraph 35(1) is that the detention of the person the subject of the detention order must be made in accordance with clause 43. It is the function of the chief police officer, acting “with the Minister’s written approval” to “make written arrangements in relation to the detention of people under preventative detention orders” (subclause 43(1)). Before this approval is sought, the chief police officer “must consult with the chief executive, the human rights commissioner, the ombudsman and the public advocate about the arrangements” (subclause 43(2)).

QUERY Subclause 43(6) contemplates that the arrangements may be changed, but it is not clear whether the obligations to consult and seek approval prescribed by subclauses 43(1) and (2) apply to a change. It is not said who may change the arrangements. Is this covered by the *Legislation Act 2001*?

Subclause 43(3) states a basic qualitative control on the content of the arrangements by providing that they “must be consistent with human rights”, and the guidelines to govern “the minimum conditions of detention and standards of treatment for detainees” (paragraph 43(4)(i)) must make similar provision (paragraph 43(5)(b)), as well as providing specifically for protection of particular rights in respect of segregation from prisoners or remandees, contact with other persons, sex and age, cultural and religious needs, health care, and disabilities.

The force of these protections is made greater by making it an offence for a person detaining someone under an order to “engage(s) in conduct in relation to the detained person that contravenes the arrangements under this section”, punishable up to “100 penalty units, imprisonment for 1 year or both” (see subclause 43(10)).

Clause 48 also states a basic qualitative control that applies to the exercise by any person “exercising authority under the order or implementing or enforcing it” subclause 48(1). This control is that

- [a] person being taken into custody, or detained, under a preventative detention order-
- (a) must be treated with humanity and respect for the inherent dignity of the human person; and
 - (b) must not be subjected to cruel, inhuman or degrading treatment

The arrangements must “provide for the human rights commissioner, the ombudsman and the public advocate to be able to visit a place where a detainee is detained” (paragraph 43(4)(g)). These officers must be given a copy of the arrangements and of any changes to them (subclause 43(6)).

Are the restrictions on the ability of a detainee to contact persons (other than those detaining her or him and police officers justifiable?

The provisions of the Bill are very complex, and represent an attempt to balance the interests of the detainee to make contact with family, friends, employers, lawyers, and the like, against the interest of the government in ensuring that the nature of the contact does not undermine the point of the detention, such as by undermining efforts to prevent the occurrence of a terrorist act, or to detect the perpetrators of an act.

Are the provisions for the making of a prohibited contact order justifiable?

Given that a prohibited contact order will “trump” the rights of contact conferred by clauses 50, 52 and 53 (see clause 57), it is necessary to commence with the provisions governing the making and effect of a prohibited contact order.

A senior police officer, when making application for a preventative detention order, or during the currency of an order (subclause 32(2)), may apply to the Supreme Court for a “prohibited contact order in relation to the person's detention under the preventative detention order” (subclause 2(1)). Under subclause 32(7), the Supreme Court

may make a prohibited contact order prohibiting the person for whom a preventative detention order has been made from contacting, while the person is detained under the preventative detention order, the person or people stated in the prohibited contact order if the court is satisfied, on reasonable grounds, that the prohibited contact order is reasonably necessary for 1 or more of the purposes mentioned in subsection (3).

These purposes are (see subclause 32(3)):

- (a) to avoid jeopardising action that is being taken to prevent a terrorist act;
- (b) to prevent serious harm to a person;
- (c) to preserve evidence of, or relating to, a terrorist act;

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- (d) to prevent interference with the gathering of information about-
 - (i) a terrorist act; or
 - (ii) the preparation for, or the planning of, a terrorist act;
 - (e) to avoid jeopardising-
 - (i) the arrest of a person who is suspected of having committed an offence against the Commonwealth Criminal Code, part 5.3 (Terrorism) or another serious offence; or
 - (ii) the taking into custody of a person for whom a preventative detention order is in force or for whom a preventative detention order is likely to be made; or
 - (iii) the service on a person of a control order under the Commonwealth Criminal Code, division 104.

On application by the detainee, or a senior police officer, the Supreme Court must or may set aside a prohibited contact order on the bases stated in subclause 32(43).

The rules governing contact between the detainee and other persons

Subject to exceptions, the governing rule, stated in subclause 49(1) is that the detainee

- (a) is not entitled to contact anyone; and
- (b) may be prevented from contacting anyone.

QUERY Before turning to the exceptions in clauses 50 to 53, it is noted that there is no provision for a circumstance where the detainee may wish to speak or write to a person responsible for the detention of the detainee. Is this deliberate?

It must also be noted that, apart from the provision for contact between the detainee and the ombudsman and the human rights commissioner guaranteed by clause 51, these exceptions do not prevail over the terms of a prohibited contact order (see clause 57).

QUERY Given clause 57, it is not clear why subclauses 52(7) and 52(8) contain the words “subject to any prohibited contact order”. Would these subclauses be subject to the effect of such an order in any event? If that is so, the inclusion of these words creates some confusion.

Are the provisions governing contact between the detainee and family, friends, employees, business associates and some others a justifiable derogation of the right to privacy?

Subclause 50(1) states that the detainee is entitled to a 'once only' contact (although see subclause 50(4) for an exception), “as soon as possible” after being detained, but and only by “phone, fax or email”, with:

- one only member of the detainee's family (paragraph 50(1)(a)) except that “if the detained person has 2 parents or 2 or more guardians, the person is entitled to have contact with each of the parents or guardians” (subclause 50(2));

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- one only of those non-family persons with whom the detainee is living (paragraph 50(1)(b));
 - the detainee's employer (paragraph 50(1)(c)) (and presumably this means each employer if there is more than one);
 - one only of the persons the detainee employs in a business (paragraph 50(1)(d));
 - one only of the 'business associates' of the detainee (paragraph 50(1)(e)); and
 - any other person or persons “the police officer detaining the person agrees to the person contacting” (paragraph 50(1)(f)).

There is in subclause 50(3) a severe limitation on the nature of the contact permissible under subclause 50(1). As put in the Explanatory Statement, the detainee may let family, etc know **only**:

- that they are safe, but is being detained under a preventative detention order;
- the period for which they are being detained under the order; and
- their place of detention (but only in relation to family members and cohabitants).

Subclauses 50(4) and (5) state an exception of somewhat unclear scope to the rules stated in subclause 50(1). By subclause 50(4),

[a] detained person is also entitled to have the further contact with the person's family or anyone else that is allowed under the preventative detention order.

QUERY There a lack of clarity surrounding this rule. The reference to “*further contact*” *might* be taken to suggest that the person with whom contact is authorised by the preventative detention order must be one of the persons mentioned in subclause 50(1). Is this intended? Why is the reference to “the person's family” rather than to a 'member of the person's family'? Does the qualifying phrase “that is allowed under the preventative detention order” attach to both of the phrases “the person's family” and “anyone else”, or only to the latter? The latter reading is perhaps the more natural, but may not be intended.

By subclause 50(6), the relevant preventative detention order must fix the periods of time and the days on which contact may occur under subclause 50(4). Where contact under subclause 50(4) is permitted, it appears it may take **any** form (see the words “includes” in subclause 50(5)), and may be by a visit from the person making the contact, or a communication with that person “by phone, fax or email” (see subclause 50(5)).

The limitation on the nature of the contact stated in subclause 50(3) does not apply to contact authorised under subclause 50(4).

Are the provisions governing the monitoring of contact between the detainee and family, etc justifiable?

This is governed by clause 55, which provides that contact under clause 50, or under clause 53 (dealing with people with impaired decision-making ability), “may take place only if it is conducted in a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order” (subclause 55(1)).

There will of course be much room for dispute as to what an effective monitoring will require in particular circumstances.

The Explanatory Statement explains what is to occur where it is proposed that contact may take place in a language other than English; see subclauses 55(2) to 55(4).

Is it justifiable to permit the recording of a communication between the detainee and family, etc?

Given the absence of a provision similar to subclause 56(10) (see below), it may be that the monitoring police officer may record the communications.

QUERY - is this intended?

Clause 56(10) prohibits the recording of a communication between the detainee and a lawyer where that has been monitored. It is not apparent why a similar restriction does not apply to a communication between the detainee and family, etc.

Is it justifiable to place no restriction on the use in any legal or other proceeding of the content of the communications between the detainee and family, etc?

In the absence of any restriction on the use that may be of the content of the communications between the detainee and family, etc, (which, as has been noted, may be recorded by the monitoring police officer), it would appear that there is no restriction.

QUERY - is this intended?

This interpretation is buttressed by the fact that so far as concerns a communication between the detainee and a lawyer, there is a restriction in subclause 52(12).

The provision in clause 51 for contact between the detainee and the ombudsman and the human rights commissioner is protective of HRA rights

Clause 51 provides that

A person detained under a preventative detention order is entitled to contact, and be contacted by, the human rights commissioner and the ombudsman.

Are the provisions concerning a detainee's contact with lawyers justifiable?

A right to confidential communication with one's lawyers may be said to be a component of the right to privacy in HRA section 12.

The submissions to the Standing Committee on Legal Affairs in its consideration of the Exposure Draft revealed a marked divergence of opinion concerning the circumstances, if any, in which the police might monitor a detainee's contact with her or his lawyers. This is revealed by these extracts from Standing Committee on Legal Affairs, *Report No 3 of the Sixth Assembly*, Report on Terrorism (Extraordinary Temporary Powers) Bill 2005—exposure draft (footnotes omitted):

2.109 The provisions of the exposure draft preserve the confidentiality of lawyer client communications in the first instance, contrasting with counterpart Commonwealth and state legislation, which provide for the monitoring of such communications. ...

2.110 Several submissions suggested that there should be no monitoring or use of communications between lawyers and clients, The Australian Government Attorney-General's Department noted the unpopularity of monitoring but said that the risks of disclosures had to be minimised. The AFP expressed concern that the test needing to be met before monitoring could be done was 'very stringent' in the context of preventing or responding to terrorist acts, given that the communications could compromise counter-terrorism operations or put the community at risk. The AFP preferred mandatory monitoring.

2.112 The Committee recognises the fundamental importance of client-lawyer confidentiality subject to limited derogation in appropriate circumstances. There is a public interest in encouraging full and frank disclosure between lawyers and clients.

2.115 The Committee also notes that several law associations are critical of the proposed monitoring provisions. ... [T]he Law Council of Australia consider that communications between a person in detention and his or her legal adviser should be 'completely privileged', and that monitoring of communications by police should not be allowed.

The Committee does not propose to canvass the merits of this debate. The report will outline the relevant provisions of the Bill. That there is a derogation of the right to privacy is clear – the question is whether it is justifiable.

When there may be contact with a lawyer

Subclause 52(1) begins by stating that "[a] person detained under a preventative detention order is entitled to contact a lawyer privately and at any time for the purpose of" (and then follow various purposes - see below).

QUERY - The effect of the use of the words “at any time” is not clear. Clauses 50 to 53 make no provision as to the time at which contact may occur. On general principle, such contact would be limited to contact at a “reasonable” time, thus excluding, in the absence of some particular factor, contact in the middle of the night. The use of the words “at any time” in subclause 52(1), if read literally, appear to allow to the detainee the right to insist on contact at such times.

There is then in subclause 52(1) a long and complicated statement of the purposes for which a detainee may contact a lawyer. Paragraph 52(1)(a) deals with the purpose of “obtaining advice from a lawyer about the person's legal rights in relation to a part 2 application”, (that is, an application for a preventative detention order and related orders), and paragraphs 52(1)(b) to (d) deal with the detainee arranging for a lawyer to act for the detainee in connection with legal proceedings under the Bill or proceedings which flow out of action taken under the Bill.

Paragraph 52(1)(e) deals with the purpose of “arranging for a lawyer to act for the person in relation to an appearance, or hearing, before a court or tribunal that is to take place while the person is detained under the order”.

QUERY - The Committee does not query the justification in human rights terms of this provision, but wonders why it is not available where the detainee wishes to simply **obtain legal advice** in relation to some issue that is of pressing importance.

This situation may be covered by subclause 52(9):

- (9) Also, subject to any prohibited contact order, the police officer detaining the person must allow the person to have reasonable contact with a lawyer for a purpose other than a purpose mentioned in subsection (1).

But this provision gives rise to other problems.

QUERY - The word “reasonable” would, it might be thought, have been read in to the other forms of contact specified in at least clauses 50, 52 and 53. Does the specific reference to the word here mean that it cannot be read into the provisions concerning other forms of contact? This would not appear to be sensible.

QUERY - The “purpose other than a purpose mentioned in subsection (1)” presumably means a purpose in respect of which a lawyer can assist by reason of skill as a lawyer. If this is accepted, should this be stated? And if this is so, is there any point in making specific provision as is made in subclause 52(1)? Would not subclause 52(9), with some statement as has just been suggested, suffice? This would make it easier to understand the scheme.

<i>The form of contact with a lawyer</i>
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By subclause 52(2), the form of contact between a detainee and a lawyer is not limited, as it is in the case of contact with family, etc, to phone, fax or email. The word “contact” is not defined exhaustively, but includes “being visited by the lawyer”.

With which lawyers may a detainee have contact?

Subject to any prohibited contact order which excludes contact between the detainee and a particular lawyer (see clause 57 and subclause 52(8)), the detainee is “entitled under [clause 52] to contact a lawyer of the person's choice, whether or not the lawyer has an appropriate security clearance” (subclause 52(8)).

There is then a complicated scheme whereby the detainee may obtain the services of a lawyer through the legal aid commission. The commission must, on a request by the detainee for assistance in choosing a lawyer (subclause 52(3)), “provide reasonable assistance to the person to choose a lawyer, including by arranging for a suitable lawyer to contact and act for the person if the person asks it to make the arrangements” (subclause 52(4), and see subclause 52(6)). If the detainee asks the commission to provide legal representation, “the commission must provide the representation or arrange for it to be provided if the person cannot afford the cost of obtaining the assistance from a private lawyer” (subclause 52(5)). In making these arrangements under subclauses 52() and (5), the commission “may give priority to lawyers who have been given an appropriate security clearance”. (It is noted that the commission has a discretion in this respect.)

Monitoring contact with a lawyer

Subclause 56(1) states a rule that contact between the detainee and the lawyer “must not be monitored” but this is subject to any “direction” under subclause 56(2) which “requires the contact between them to be monitored”. As summarised in the Explanatory Statement, subclause 56(2) allows the senior police officer to direct in writing that contact between a person and a specified lawyer be monitored if they are satisfied on reasonable grounds that one or more of the following consequences may happen if it is not monitored:

- interference with or harm to evidence relating to a serious offence;
- interference with or physical harm to a person;
- the alerting of a person suspected of committing a serious offence;
- interference with investigations relating to terrorist acts;
- the alerting of a person which interferes with actions to prevent a terrorist act; or
- the alerting of a person which interferes with their arrest for a terrorist act.

Prior to giving a direction, the senior police officer must give notice to the legal aid commission, and consult with the public interest monitor (subclauses 52(3) and (4)), and, subsequent to giving a direction, inform the detainee, the relevant lawyer, and the nominated senior police officer (see clause 36), as well as recording the reasons for giving the direction (subclause 52(5)).

The effect of a direction is that the contact must be monitored in the same way that contact with family, etc must be monitored (subclause 52(6)). There are almost identical provisions (to those in 55(2) to 55(4)) concerning contact in a language other than English (subclauses 56(7) to (9)).

The need to obtain a direction is backed up by the offence provision in subclause 52(11).

Restriction on the use in any legal or other proceeding of the content of the communication with a lawyer

Subclause 52(12) provides:

Any communication between a person detained under a preventative detention order and the person's lawyer is subject to legal professional privilege and it is not admissible in evidence against the person in any court proceeding.

QUERY - There is an ambiguity in this statement. Should this be read as a statement that evidence of the communication is not admissible "in any court proceeding" because it is subject to legal professional privilege? Or is it to be read as stating two rules: (a) that the communication is subject to legal professional privilege – which would have the effect that it could not be adduced in proceedings other than a "court proceeding", and (b) evidence of the communication is not admissible "in any court proceeding" without consideration of whether it is subject to legal professional privilege.

A court might read subclause 52(12) in this second wider sense, but this is not obviously so. This second sense affords greater protection to the right to privacy.

QUERY - Why not refer to client legal privilege as defined in the *Evidence Act 1995* – or to both legal professional privilege and client legal privilege

The prohibition on the recording of a communication with a lawyer

Subclause 56(10) prohibits recording by providing that "[a] communication that is monitored under this section must not be recorded".

The questioning of a detainee

Do the provisions of clause 58 concerning the questioning of a detainee while in detention provide sufficient protection?

Subclause 58(1) prohibits the questioning of a detainee by anyone except where the questioning is (in the words of the Explanatory Statement) "for specific purposes relating to the person's identity, welfare and legal rights". This refers to paragraphs 58(1)(a) and (b). In addition, under paragraph 58(1)(c), the person may question a detainee for the purpose of "allowing the person to comply with a requirement of this part in relation to the detained person's detention under the order".

Such legitimate questioning as does occur must be videoed or, if this is impracticable, taped (subclause 58(3)).

Moreover, clause 58 has no application “to questioning that is part of contact under any of [clauses 50 to 54]” - that is, to questioning that is part of contact with family members or lawyers or with the public advocate or human rights commissioner. This presumably includes questioning by a police officer that may be classified as “part of” such kinds of contact.

The prohibition in subclause 58(1) is backed up by an offence provision punishable by a heavy penalty (subclause 58(2)), and by subclause 58(5), which provides:

If a person questions someone in contravention of this section, any answer to a question, and any information, document or thing obtained, directly or indirectly, because of the giving of an answer, are not admissible in evidence against the person in a civil or criminal proceeding.

It must be noted that the prohibition in subclause 58(1) applies **only** while the detainee “is detained under a preventative detention order”, which by clause 9 is defined to mean such an order (including an interim preventative detention order) made under clause 18. Subclause 58 does not place any restriction on subsequent use (such as on a subsequent criminal proceeding) of statements made by the detainee to the police:

- in answer to legitimate questions;
- otherwise than in response to questioning; (an analogy is provided by the High Court decision in *Kelly v The Queen* [2004] HCA 12, where the High Court held that a statement made to police after video-recorded interview completed, and not made in response to any police question, was not “made in the course of official questioning”, and thus not affected by provisions of a law that gave protections to such statements); and
- in answer to questions upon the cessation of the preventative detention order; (noting that once the relevant order is revoked or lapses, the prohibition ceases, and yet the former detainee may still be in the company of the police).

This points to a rights issue that may arise in respect of some other provisions but which is best mentioned here.

Should a detainee be afforded the same protections afforded under the general law to a person who is in police custody?

The fact that police will be present when a person makes statements to them or others poses a rights issue that the Committee has troubled the Committee in the past. Such statements will often be admissions as to the existence of facts probative of the person’s guilt of a crime, and, as such, have great evidential significance from the point of view of the prosecution. Where a person is in police custody in relation to the investigation of a criminal offence, he or she is entitled to the benefit of various and extensible protections afforded by the *Crimes Act 1914* (Cwlth). These protections relate to matters such as:

- the giving of a caution to the person that they need not speak, and that what they say may be used in evidence;
- the periods for which a person may be questioned;
- the provision of information as to matters such as the person's ability to speak to a lawyer;
- the tape-recording of statements made.

But these protections do not apply where, although the person is in custody or merely in the presence of the police, this is otherwise than in relation to the investigation of a criminal offence. Yet in such contexts the person may make admissions.

In *Scrutiny Report No 12 of 1998*, dealing with the Domestic Violence (Amendment) Bill (No. 2) 1998, the Committee noted that the person detained under the proposed law would be in police custody, but not in relation to the investigation of a criminal offence. The Committee suggested that the detainee be given rights in respect of access to friends, or a lawyer, or in respect of questioning by the police, of a similar nature to the extensive protections in the *Crimes Act 1914* which apply to a person in police custody in relation to the investigation of a criminal offence, in the Territory. The Committee said:

There is (thus) the possibility that a respondent in detention will make admissions which could be the basis for a criminal charge, in circumstances where none of the extensive protections in the *Crimes Act 1914* apply. It is true, as the [Attorney-General states in his response to the Committee's first report on this Bill] that the admissibility in court of these admissions will be assessed in terms of the requirements of the *Evidence Act* (see, in particular, sections 84, 85, 90 and 138). But, in practice, it is the provisions of the *Crimes Act 1914* which give real significance to the requirements of the *Evidence Act*. It is a breach of the *Crimes Act 1914* which is often the occasion for the operation of the *Evidence Act*.

Are the provisions for the taking, use and destruction of identifying material justifiable derogations of the right to privacy?

The scheme of the Bill is in clauses 59, 60 and 61. The Explanatory Statement explains (noting that it wraps up both clauses 60 and 61 in the explanation of clause 60, and leaving aside the position of a person with impaired decision-making ability):

Clause 59 Taking identifying material

Clause 59 sets out the extent to which, and manner in which, a police officer may take identifying particulars from a person being detained under a preventative detention order. Subclause (2) enables a police officer of or above the rank of sergeant to take identification material from a detained person if the person consents in writing or if the officer believes in reasonable grounds that it is necessary to confirm the person's identity. Reasonable force can be used to take identifying material in the latter situation.

Clause 60 Use of identification material

Clause 60 provides that identifying materials taken from a person being detained under a preventative detention order may only be used to ascertain whether the person is the person stated in the preventative detention order. Identifying materials are required to be destroyed 1 year and 1 month after the material was taken if proceedings for the preventative detention order or the person's treatment under a preventative detention have not been started. If relevant proceedings are started within 1 year of the material being taken, identifying material are required to be destroyed 1 month after the proceedings are no longer on foot.

The concept of identification material is defined in clause 9 of the Bill.

Given the very limited use that may be made of the material gathered, the derogation of the right to privacy may be justifiable under HRA section 28. (In *Scrutiny Report No 10 of 2001*, the Committee cited the Australian Law Reform Commission view in *Criminal Investigation (Report No 2)*, (1975) that the taking by the police of identifying material from a person in custody be limited to circumstances where that was necessary to identify the person or to afford evidence of the commission of the crime for which the person was in custody.

SPECIAL POWERS

There are two kinds of special powers authorisation: a preventative authorisation made under clause 66, and an investigative authorisation made under clause 73. The Supreme Court or the Magistrates Court may make each kind.

The preventative authorisation

On application by the chief police officer the court may, under clause 66:

... authorise the exercise of powers under division 3.4 if the court is satisfied, on reasonable grounds –

- (a) that a terrorist act is happening or will happen some time within the next 14 days; and
- (b) that the authorisation would substantially assist in preventing the terrorist act, reducing its impact or both; and
- (c) if the authorisation is for or includes an area—that it is reasonably necessary to give the authorisation for that area.

An authorisation under clause 66 is defined in clause 63 to be a 'preventative authorisation'.

The authorisation must state when the order is to start and end (paragraph 69(1)(d) and (e)), but the end time cannot be more than 7 days after the authorisation is given (subclause 68(2)). An authorisation must also (subclause 68(1)):

- be in writing;
- be directed to all police officers;
- state that it is a preventative authorisation; and
- describe the general nature of the terrorist act and name or describe (if appropriate by using a picture map or other visual depiction) one or more of the following:
 - an area in which the special powers may be exercised;
 - a person sought in connection with the terrorist act; and
 - a vehicle sought in connection with the terrorist act.

The authorisation may include conditions and restrictions on the exercise of the powers under the authorisation (subclause 68(3)).

The Supreme Court or Magistrates Court may set aside or amend a preventative authorisation on application by the chief police officer or interested person (clause 69). An authorisation cannot be extended, but there is no restriction on multiple preventative authorisations or investigative authorisations, including where an authorisation is to start immediately after the end of a preventative authorisation (clause 70).

The investigative authorisation

On application by the chief police officer the court may, under clause 73:

... authorise the exercise of powers under division 3.4 if the court is satisfied, on reasonable grounds—

- (a) that a terrorist act has happened within the last 28 days, is happening or will happen some time within the next 14 days; and
- (b) that the authorisation would substantially assist in achieving 1 or more of the following purposes:
 - (i) apprehending a person responsible for the terrorist act;
 - (ii) investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act);
 - (iii) reducing the impact of the terrorist act; and
- (c) if the authorisation is for or includes an area—that it is reasonably necessary to give the authorisation for that area.

An authorisation under clause 66 is defined in clause 63 to be an ‘investigative authorisation’.

In relation to the contents of an investigative authorisation, clause 75 is identical to clause 68 except that the end time may be no later than 24 hours (subclause 75(2)). There are also identical provisions concerning the setting aside (clause 76) and extension (clause 77) of these authorisations.

Protections to a person affected by an exercise of power under an authorisation

Before turning to the content of these special powers, regard should be had to the ways in which the Bill seeks to afford some protection to a person affected by their exercise.

Prior notice of the exercise of these powers

Prior to the exercise of one or more of the powers set out in clauses 79, 80, 81 or 83, the police officer must tell the affected person the reason for exercising the power, and, if the officer is not in uniform, show the person evidence that the police officer is a police officer (subclause 78(4)).

Prior to, or when or as soon as possible after the exercise of one or more of the powers set out in clauses 82, 83, 84 and 85, the police officer must, but only if asked by the person, tell the affected person the reason for exercising the power, and, if the officer is not in uniform, show the person evidence that the police officer is a police officer (subclause 78(6)).

Protection for the person whose person, vehicle or premises are searched

Such a person may, not later than 1 year after the search, ask the chief police officer in writing for a written statement that the search was conducted in accordance with the Act. The chief police officer must provide such a statement or written reasons why a statement cannot be provided (subclauses 78(8) and (9)). Under the general law, the person affected may pursue various legal remedies if the search was not conducted in accordance with the Act, and these provisions do not add to those remedies. Pursuit of those remedies may be assisted if the chief police officer states that the search was not in accordance with the Act.

The use of force and its limits: clause 86

The effect of clause 86 is described in the Explanatory Statement:

Clause 86 provides that it will be lawful for a police officer to use such force as is reasonably necessary to exercise a power (including force reasonably necessary to break into premises or a vehicle or anything in or on premises, a vehicle or a person).

However, a safeguard has been included to ensure a police officer take steps to ensure that any harm to a person or damage to a thing or premises arising from the exercise of a power is limited to that which is reasonably necessary to enable the effective exercise of the power.

The safeguard stated in subclause 86(2) probably adds little to what in any event would be the legal position, but the Committee sees virtue – from the point of view of rights protection – in making the position explicit on the face of the Bill.

Minimisation of damage: clause 87

The scope of clause 87 is fully described in the Explanatory Statement. Such provisions are commonly found in Territory laws where appropriate.

Compensation for exercise of special powers: clause 88

The scope of clause 88 is fully described in the Explanatory Statement. Such provisions are commonly found in Territory laws where appropriate.

Return of things seized etc under special powers: clause 90

The scope of clause 90 is fully described in the Explanatory Statement. Such provisions are commonly found in Territory laws where appropriate.

Disposal of seized property on application to court: clause 91

The scope of clause 90 is fully described in the Explanatory Statement.

QUERY The Committee notes that so far as concerns the circumstances in which the court may order the return of a seized thing, it is given an unconfined discretion. This compares to the statement in clause 90 that a police officer is obliged to return the thing only where satisfied that “its retention as evidence is not required” (paragraph 90(1)(b)). It is not apparent why the court’s discretion is not similarly limited.

The powers that may be exercised by any police officer when either kind of authorisation is in force - Division 3.4*The purposes for which these powers may be exercised*

Any police officer (subclause 78(1), and see subclause 78(2)) may exercise the powers stated in Division 3.4, but only for certain purposes, being:

- (a) for a preventative authorisation—preventing the terrorist act to which the authorisation applies, reducing its impact or both; and
- (b) for an investigative authorisation, 1 or more of the following purposes:
 - (i) apprehending a person responsible for the terrorist act to which the authorisation applies;
 - (ii) investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act);
 - (iii) reducing the impact of the terrorist act (subclause 78(1)).

The exercise of these powers for any other purpose would be unlawful. Subclause 78(1) spells out what in any event would be the legal situation, but the Committee sees no harm and possible benefit, in this provision.

Rights issues arising out of the exercise of the specific powers

The various powers that are conferred by Division 3.4 are adequately described in the Explanatory Statement and little purpose is served by repeating this material here. The exercise of these powers stated in Division 3.4 will engage various rights. The extent of the derogation involved will be less severe in respect of some powers than in respect of others. The most obvious rights engaged are now noted.

The right to liberty (HRA section 18) will be engaged under those powers which permit the detention (albeit for a brief period) of a person in order to facilitate the exercise of some other power: see clause 80 (detention to execute a search), and clause 81 (detention of vehicles).

The right to privacy (HRA section 12) will be engaged under various powers: see clause 79 (the power to require a person to provide personal details); clause 80 (the power to stop and search a person and the things in their possession or control); clause 81 (the power to search vehicles); clause 82 (the power to move vehicles); clause 83 (the power to enter and search premises); and clause 85 (the power to seize things).

The right to freedom of movement (HRA section 13) will be engaged under the power in clause 84 to cordon off a target area or part of it.

It is critical to note that, for the most part, the exercise of a Division 3.4 power is **not** tied to a police officer or the like holding a reasonable belief or even suspicion that the person affected by the exercise of the power is connected with the planning for or commission of a criminal offence, or that the person might in some way provide evidence of the commission of an offence. For example, several powers may be exercised in respect of a “target person”, and such a person is simply one who has been named or described as a target person in the authorisation; see clause 63. (The exception is the power in clause 85 to seize things, where the exercise of the power is predicated upon the police officer suspecting on reasonable grounds that the thing may have been used to carry out a terrorist act, or suspecting on reasonable grounds that the thing may provide evidence of a serious offence.)

The critical question in relation to all these provisions of the Bill is whether the derogation of the HRA right involved is justifiable under HRA section 28.

Additional comment on some particular powers is warranted.

Power to require personal details from a person: clause 79

It is noted that a person may refuse to supply personal details “if the person has a reasonable excuse” (subclause 79(4)).

From one perspective, availability of a reasonable excuse defence may be viewed as a safeguard which will protect rights. This is offset by the possibility that some who are questioned by a police officer may be unaware of this safeguard, a problem that might be accommodated by requiring the police officer to inform the person of this safeguard.

From a different perspective, subclause 79(4) might be seen as robbing clause 79 of any utility. The vagueness of the concept of 'reasonable excuse' may be such that any person who is aware that he or she may decline to provide the information can plausibly decline. One basis would be that to answer might tend to incriminate the person, but a wider basis might simply be that to answer would infringe the privacy of the person. Given HRA section 12 (right to privacy component), this claim has a plausible basis.

Power to search a person: clause 80

The inclusion of Schedule 1 is commended.

See comment above concerning the reasonable excuse defence.

Power to enter and search premises: clause 83

This clause provides:

- (1) A police officer may enter and search premises in a target area.
- (2) A police officer may enter and search any premises for a target person or target vehicle if the officer suspects, on reasonable grounds, that the person or vehicle is at, on or in the premises.
- (3) A police officer may detain a person who is at, on or in premises entered under this section for as long as is reasonably necessary to conduct a search of the premises.

QUERY The Committee queries whether the Explanatory Statement has correctly described the scope of clause 83. The Explanatory Statement states:

Clause 83 empowers police to enter and search premises in an area named or described in a special powers authorisation. To exercise the power the officer must suspect, on reasonable grounds, that a person or vehicle that is named or described in a special powers authorisation is at, on or in the premises.

This explanation runs together subclauses 83(1) and (2).

Another reading is that these subclauses state two quite distinct powers. That is, under subclause 83(1), a police officer may enter and search any premises that are located in a target area. This is an open-ended power, but on general principle it would be limited to a search for a purpose which could be said to fall within the purposes of the Bill (including the purpose of some particular provision of the Bill).

Then, under subclause 83(2), a police officer may enter and search any premises – whether or not located in a target area – if the officer suspects, on reasonable grounds, that a person or vehicle that is named or described in a special powers authorisation is at, on or in the premises.

If this second reading is correct, then the rights issues are more acute.

ACCOUNTABILITY FOR THE EXERCISE OF SPECIAL POWERS

By clause 92, the ACT Chief Police Officer is required to make and keep (for 7 years) records about the exercise of special powers under the legislation. This obligation can be elaborated in a regulation made under the legislation. By clause 95, the Chief Police Officer is also required to report to the Minister as soon as possible after a special powers authorisation ends. That report must include and address specified matters and be presented to the Legislative Assembly (with appropriate and acknowledged editing as permitted) not later than 6 sitting days after the day the Minister receives the report. This provision adds strength to the general requirement that the chief executive must report annually on the use and effectiveness of Act (see clause 98).

The Committee restates its comment in *Report No 3* that “[t]hese are welcome provisions and demonstrate a stronger commitment to accountability under this legislation than in other jurisdictions, which only require annual reporting to parliaments on the conferring and exercise of special powers under their counterpart legislation”.

TERRORISM (PREVENTATIVE DETENTION) BILL 2006

This is a Bill for an Act to authorise preventative detention in relation to terrorist acts, and for other related purposes.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

The Committee’s report on the Terrorism (Extraordinary Temporary Powers) Bill 2006 (henceforth T(ETP) Bill), which is immediately above, canvasses a range of issues - both at the general and particular level – relevant to an assessment of whether a law to authorise preventative detention otherwise than in relation to the enforcement of the criminal law is compatible with the rights stated in the *Human Rights Act 2004*. That analysis and commentary is relevant to the Terrorism (Preventative Detention) Bill 2006 (henceforth generally referred to simply as “this Bill” or “the Bill”).

This report will take the form of drawing attention to what appear to be points of difference of approach taken by this Bill to that found in T(ETP) Bill, where that difference might have significance for the rights assessment.

It must be noted at the outset that: (a) the Bill does not include any provisions concerning special powers authorisations and their consequences; and (b) the Bill is not accompanied by an Explanatory Statement. The lack of an Explanatory Statement, and the paucity of explanation on the Explanatory Statement which accompanies the T(ETP) Bill, may mean that the Committee has not identified some material point of difference. In any event, opinions about what is a material point of difference will differ.

When the Supreme Court may make a preventative detention order

Like the T(ETP) Bill, this Bill would empower the Supreme Court to make two kinds of preventative detention order (a) to permit detention to prevent a terrorist act, and (b) to permit detention to preserve evidence: see clause 9 of the Bill. Some points of difference are now noted.

In relation to detention to prevent a terrorist act, the Bill provides:

- (1) A preventative detention order may be made against a person if—
 - (a) there are reasonable grounds to suspect that the person—
 - (i) will engage in a terrorist act; or
 - (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
 - (iii) has done an act in preparation for, or planning, a terrorist act; and
 - (b) making the order would substantially assist in preventing a terrorist act happening; and
 - (c) detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act happening.

In contrast, the T(ETP) Bill provides that a person may be detained:

- ... if the Supreme Court is satisfied, on reasonable grounds—
- (a) that the person:
 - (i) intends, and has the capacity, to carry out a terrorist act; **or**
 - (ii) possesses something connected with the preparation for, or carrying out of, a terrorist act; **or**
 - (iii) has done an act in preparation for, or planning, a terrorist act;

and
 - (b) that it is reasonably necessary to detain the person to prevent a terrorist act; **and**
 - (c) that detaining the person under the order is the least restrictive way of preventing the terrorist act mentioned in subparagraph (b); **and**

- (d) that detaining the person for the period for which the person is to be detained under the order is reasonably necessary to prevent the terrorist act.

1. Under the T(ETP) Bill the Supreme Court must be “satisfied, on reasonable grounds” that circumstances stated in paragraph 18(4)(a) exist. Under this Bill, the test is whether the Supreme Court “has reasonable grounds **to suspect**” that these same circumstances exist: paragraph 9(1)(a). The latter is on the face of a lower threshold.

On the other hand, it might be noted that it appears that the Supreme Court must be satisfied that “there are reasonable grounds to suspect, etc” according to the civil standard of proof – that is, the court must be satisfied “on the balance of probabilities” (see subsection 140(1) of the *Evidence Act 1995* (Cth)). In its application the Supreme Court would have regard to the “the gravity of the matters alleged” (paragraph 140(2)(c)), and to the consequence that a person would be detained.

2. The circumstances stated in paragraphs 9(1)(b) and (c) of this Bill appear on their face to permit detention to prevent a terrorist act in a wider set of circumstances than those stated in the T(ETP) Bill. One marked contrast is between paragraph 9(1)(b) of the Bill and paragraph 18(4)(c) of the T(ETP) Bill.

To the extent that the circumstances permitting detention to prevent a terrorist act are, under the Bill, wider than those under the T(ETP) Bill, the former represents a greater derogation of the right to liberty. Whether that derogation is nevertheless justifiable under HRA section 28 is a separate question.

In relation to the circumstances permitting detention to preserve evidence, clause 9(3) of the Bill provides:

- (3) A preventative detention order may also be made against a person if—
- (a) a terrorist act has happened within the last 28 days; and
 - (b) it is necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act; and
 - (c) detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of preserving any such evidence.

Clause 18(6) of the T(ETP) Bill provides:

- (6) This subsection applies if the Supreme Court is satisfied, on reasonable grounds—
- (a) that a terrorist act has happened within the last 28 days; and
 - (b) that it is reasonably necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act; and
 - (c) that detaining the person under the order is the only effective way of preserving the evidence mentioned in paragraph (b); and

- (d) that detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence.

On their face, paragraphs 18(6)(c) and (d) have the effect of permitting detention in a narrower range of circumstances than is permissible under the comparable provisions of this Bill. Again, whether the greater derogation of the right to liberty permissible under the Bill is nevertheless justifiable under HRA section 28 is a separate question.

Provision concerning the age of a detainee

Under subclause 10(1) of the Bill, “[a] preventative detention order cannot be applied for, or made, in relation to a person who is under 16 years old”.

Under subclause 11(1) of the T(ETP) Bill, “[a] preventative detention order cannot be applied for, or made, for a child”. As the accompanying Note indicates, “*Child* means an individual who is under 18 years old (see Legislation Act, dict, pt 1)”.

The Explanatory Statement to the T(ETP) Bill explains:

The clause is consistent with the *Convention of the Rights of the Child* which provides in Article 37 that States Parties shall ensure that:

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

The detention of children is a disproportionate limitation on the rights of the child.

It must also be noted that by Article 1, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

The Explanatory Statement does not explain why the detention of a child under the T(ETP) Bill cannot not be characterised as “a measure of last resort and for the shortest appropriate period of time”. Nor does it explain why “[t]he detention of children is a disproportionate limitation on the rights of the child”.

Also relevant to this issue, and more directly so, is HRA section 11(2):

- (2) Every child has the right to the protection needed by the child because of being a child,

A derogation of this right might be justifiable under HRA section 28.

In the absence of an Explanatory Statement accompanying this Bill, there is no consideration available to the Assembly of whether subclause 10(1) of the Bill is a derogation of HRA subsection 11(2), and, if so, whether it is justifiable under HRA section 28.

This is a matter for the Assembly to address.

The provision for the making of an interim preventative detention order

The scheme under the Bill is quite different to that under the T(ETP) Bill. Under the Bill, it appears that the Supreme Court does not take a view of a preliminary kind on the issues that arise when an application for a preventative detention order is made; see subclause 13(2).

In contrast, under the T(ETP) Bill, the Supreme Court does take a view on these matters; see the text in report on the T(ETP) Bill under the heading “*Is it justifiable to provide for the making of an interim preventative detention order on the grounds stated in clause 20?*” The Committee identified a rights issue arising from this function; see the text in the report on the T(ETP) Bill under the heading “*Is it necessary, in terms of the particular Supreme Court Justices involved, to separate the function of making an interim preventative detention order from that of making the preventative detention order?*”

Reasons for making a preventative detention order – national security information

Under the T(ETP) Bill, the Supreme Court must give its reasons for making a preventative detention order: subclause 18(8).

In effect, the Bill makes the same provision (see subclause 15(1)), but then adds:

To remove any doubt, subsection (1) (e) does not require information to be included in a summary if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cwlth)).

The duration of preventative detention orders

The two schemes appear closely similar, and it not obvious that there is some material difference. But, given the lack of an Explanatory Statement for this Bill, and the paucity of explanation on the Explanatory Statement which accompanies the T(ETP) Bill, the Committee may not have perceived what some Member may perceive to be material difference.

What is the “same terrorist act”?

This is a key concept under both Bills. This Bill narrows the concept in subclause 16(9):

- (9) For this section—
 - (a) a terrorist act ceases to be the same terrorist act if there is a change in the date on which the terrorist act is expected to happen; and
 - (b) a terrorist act that is expected to happen at a particular time does not cease to be the same terrorist act only because of—

- (i) a change in the people expected to carry out the act at that time; or
- (ii) a change in how or where the act is expected to be carried out at that time.

It is a matter of conjecture whether a court interpreting the concept of “same terrorist act” in the T(ETP) Bill would narrow it in this fashion. If it did not, (and it would be plausible to argue that it should not), then the T(ETP) Bill is a more restrictive derogation of the right to liberty.

The nature of hearings before the Supreme Court

On the face of it, this Bill affords a lesser measure of procedural fairness to the potential detainee than the T(ETP) Bill. In respect of the latter, see the matter under the heading “*Rights in relation to the hearing of applications for preventative detention orders and prohibited contact orders*” in the report on that Bill.

This Bill provides:

20 Rules of evidence

- (1) This section applies to a proceeding in the Supreme Court in relation to an application for the making or revocation of a preventative detention order or prohibited contact order.
- (2) The Supreme Court may take into account any evidence or information that the court considers credible or trustworthy in the circumstances and, in that regard, is not bound by principles or rules governing the admission of evidence.

21 Closure of court and restriction on publication of proceedings

- (1) This section applies to a proceeding in the Supreme Court in relation to an application for the making or revocation of a preventative detention order or prohibited contact order.
- (2) The proceeding must be heard in the absence of the public.
- (3) The Supreme Court may, in any such proceeding, make the orders relating to the suppression of publication of the whole or any part of the proceeding or of the evidence given in the proceeding that, in its opinion, are necessary to secure the object of this Act.

The rules of evidence

Displacement of the rules of evidence raise rights issues. In *Scrutiny Report No 2 of 2001*, concerning the Children and Young People Bill 1999, the Committee said in relation to a provision similar to clause 20:

Such provisions are common, and are often thought to be an antidote to legalism in court proceedings. They do, however, raise issues about whether the parties to those proceedings receive a fair trial. In *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41, Brennan J said that:

To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J. pointed out, though in a dissenting judgment, in *The King v. War Pensions Entitlement Appeals Tribunal; ex parte Bott* (1933) 50 C.L.R.228 at p.256:

“Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice.'“

The courts have a particular concern with displacement of the rules governing the reception of hearsay evidence. (These rules have, in any event, been considerably relaxed by the *Evidence Act 1995*.) In a recent case in the Supreme Court of the Territory, Higgins J pointed to

the general risk inherent in drawing an inference of factual truth from untested out-of-court statements by unseen declarants. ... [G]enerally, to rely on such statements as representing the truth is not only unsafe but also unfair as against parties who were not present when the declarations were made. This is particularly so when the truth or otherwise of the content of the declaration is an important issue in the trial: *A and B v. Director of Family Services* [1996] ACTSC 48.

Closed hearings

The provision in subclause 21(2) that “[t]he proceeding must be heard in the absence of the public” derogates from the principle of open justice stated in HRA subsection 21(1), but subsection 21(2) allows that

the press and public may be excluded from all or part of a trial -

- (a) to protect morals, public order or national security in a democratic society; or
- (b) if the interest of the private lives of the parties require the exclusion; or
- (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.

The problem with subclause 21(2) is that it states a blanket rule. Nevertheless, the very nature of the proceedings will in many cases require exclusion of the public.

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

Contact between a detainee and others

The schemes in the two Bills are broadly comparable, but there are some material differences. The Committee notes that restrictions on the ability of a detainee to contact family, etc derogates from her or his right to privacy (see HRA section 12).

In relation to the T(ETP) Bill, the matter is dealt with under the heading “*Are the provisions governing contact between the detainee and family, friends, employees, business associates and some others a justifiable derogation of the right to privacy?*”.

The provisions of this Bill appear to derogate substantially less than those of the T(ETP) Bill. In particular:

- the right to contact family, etc (subclause 36(1)) is not limited, as it is in subclause 50(1) of the T(ETP) Bill, to contact by “phone fax or e-mail” but is unrestricted and, on its ordinary meaning, “contact” would extend to a visit. (This reading is buttressed by the specifically limited provision concerning contact in paragraph 36(1)(f)); and
- the detainee is not prohibited from disclosing any particular information in the course of contact to family, etc, for no restriction is stated. This compares more favourably, from a privacy perspective, to the severe limitation in subclause 50(3) of the T(ETP). Subclause 36(2) merely confirms that certain information may be transmitted.

Both Bills have provision for the detainee to be given permission to contact persons other than family, etc: see subclauses 50(4) – (6) of the T(ETP) Bill, and paragraph 36(1)(f) of this Bill. The difference between the schemes is that under the T(ETP) Bill, this contact is much more unrestricted than contact with family, etc, while under this Bill it is more restricted.

The Explanatory Statement to the T(ETP) Bill does not explain the difference in treatment concerning contact between family members and others, and there is no Explanatory Statement to this Bill.

Contact with lawyers

The schemes in the two Bills are broadly comparable, but there are some material differences. The provisions of the T(ETP) Bill are more favourable to the position of the detainee in a critical respect in that under this Bill:

- it is a police officer (rather than the Legal Aid Commission) who must give reasonable assistance to the detainee to obtain the services of a lawyer (see subclauses 38(3) and (4)); and

- there is no provision for legal aid to the detainee.

The schemes in the two Bills for the monitoring of contact between the detainee and a lawyer are different, in that under this Bill monitoring is mandatory, while under the T(ETP) Bill a senior police officer must, on certain grounds, direct such monitoring. On the face of it, the scheme of the T(ETP) Bill is more favourable to the position of the detainee, but in practice the schemes might operate in a very similar fashion.

The questioning of detainees

The schemes in the two Bills approach the topic in quite different ways, and it is difficult to say whether one is more favourable to the position of the detainee than the other. The outcomes could well be similar.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2006-52 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2001-265 and DI2001-267 and determines specified locations to be sports bookmaking venues for the purposes of the Act.

Disallowable Instrument DI2006-56 being the Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006 made under section 45 of the *Tree Protection Act 2005* determines the criteria for tree registration and cancellation of registration.

Disallowable Instrument DI2006-58 being the Tree Protection (Criteria for Tree Management Precincts) Determination 2006 (No. 1) made under section 38 of the *Tree Protection Act 2005* determines the criteria for the declaration of a tree management precinct.

Disallowable Instrument DI2006-59 being the Utilities Water Conservation Measures Approval 2006 made under the *Utilities Act 2000* and the *Utilities (Water Conservation) Regulation 2006* determines the criteria for the declaration of a tree management precinct.

Disallowable Instrument DI2006-62 being the Public Sector Management Amendment Standard 2006 (No. 5) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2006-63 being the Casino Control (General Tax) Exemption 2006 (No. 1) made under section 126 of the *Casino Control Act 2006* exempts the casino licensee from paying general tax in relation to ACTTAB gaming activity conducted in the casino.

Disallowable Instrument DI2006-66 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2006 (No. 1) made under subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985* revokes DI2004-57 and AF2004-2 and approves AF2006-15, the blood donation donor declaration form.

Disallowable Instrument DI2006-67 being the Public Place Names (Harrison) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new park in the Division of Harrison.

Disallowable Instruments—Comment

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

No Explanatory Statement/Minor drafting issue/Is this a disallowable instrument?

Disallowable Instrument DI2006-53 being the Gambling and Racing Control (Governing Board) Appointment 2006 (No. 1) made under section 11 of the *Gambling and Racing Control Act 1999* appoints a specified person as an ordinary member and deputy chairperson of the Gambling and Racing Commission.

The Committee notes that there is no Explanatory Statement to this instrument.

The Committee notes that this instrument states that it is

made under the *Gambling and Racing Control Act 1999*, s 11 (Establishment of governing board) (see *Financial Management Act 1996*, s 78(5)(b))

The Committee notes that section 11 of the *Gambling and Racing Control Act 1999* merely establishes the relevant board. As indicated by the words in the second set of brackets, the power to appoint the members of the board is contained in section 78 of the *Financial Management Act 1996*. The power to appoint is actually contained in subsection 78(2), not paragraph 78(5)(b). The Committee also notes, however, that subsection 78(5) provides:

- (5) An appointment of a member—
 - (a) must not be for longer than 3 years, unless the establishing Act allows a longer period; and
 - (b) is an appointment under the provision of the establishing Act that establishes the governing board.

As a result, the statement in the instrument as to the provisions under which it is made is correct.

The Committee notes that the person appointed by this instrument is appointed both as an ordinary member of the board and as deputy chairperson of the board. The power to appoint a deputy chairperson is contained in section 79 of the Financial Management Act. As a result, the instrument might also have referred to section 79 as the authority under which it was made.

Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument. This requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointment(s) contained in it is/are not public servant appointment(s). In this case, there is no Explanatory Statement, so the Committee (and the Assembly) has no way of knowing whether or not this is a public servant appointment and, as a result, whether or not this is, in fact, a disallowable instrument. Nor does the Committee (or the Assembly) have any indication as to whether the relevant Assembly committee has been consulted, as required by section 228 of the *Legislation Act*. As a result, the Committee seeks the Minister's confirmation that this is the case.

Minor drafting issue

Disallowable Instrument DI2006-54 being the Tree Protection (Advisory Panel) Appointment 2006 (No. 1) made under subsection 69(1) of the *Tree Protection Act 2005* appointments specified persons as members of the Tree Advisory Panel.

This instrument appoints 5 named individuals as members of the Tree Advisory Panel, established by section 68 of the *Tree Protection Act 2005*. The appointments are actually made under subsection 69(1) of the *Tree Protection Act*. The Committee notes that subsection 69(3) of the *Tree Protection Act* provides:

- (3) The Minister must not appoint a person to the advisory panel unless the person has extensive experience in 1 or more of the following fields:
 - (a) arboriculture;
 - (b) forestry;
 - (c) horticulture;
 - (d) landscape architecture;
 - (e) natural and cultural heritage.

The Committee notes that a person cannot be appointed unless he or she has extensive experience in one or more of the nominated fields. It is a pre-condition of appointment. That being so, it would have assisted the Committee (and the Assembly) if the Explanatory Statement to the instrument contained an indication that the persons appointed each have experience in one or more of the required fields. In making this statement, the Committee notes that the Explanatory Statement indicates that the Standing Committee on Planning and Environment was consulted in relation to the appointments. That being so, the Committee might assume that the credentials of the appointed persons have been checked and that, in each case, the requirements for appointment have been met. Nevertheless, the Committee considers that it would be appropriate (and that it would not cause any great inconvenience) if a statement to this effect was included in the instrument appointing the persons in question.

Minor comment

Disallowable Instrument DI2006-55 being the Tree Protection (Approval Criteria) Determination 2006 (No. 1) made under section 21 of the *Tree Protection Act 2005* determines the criteria for approving an activity that would or may damage a protected tree.

Disallowable Instrument DI2006-60 being the Tree Protection (Approval Criteria) Determination 2006 (No. 2) made under section 21 of the *Tree Protection Act 2005* revokes DI2006-55 and determines the criteria for approving an activity that would or may damage a protected tree.

The Committee notes that DI2006-60 repeals and replaces DI2006-55, which was made only a week prior to DI2006-60. The Committee also notes that the Explanatory Statement to DI2006-60 states that the purpose of the later instrument is to correct a technical error made in the earlier instrument. As a result, the Committee makes no further comment on the instruments.

Is this a disallowable instrument?

Disallowable Instrument DI2006-57 being the Housing Assistance (Public Rental Housing Assistance Program) Review Committee Appointments 2006 (No. 1) made under section 26 of the *Housing Assistance Public Rental Housing Assistance Program 2005 (No. 2) (Disallowable Instrument DI2005-281)* appoints specified persons as members of the Housing Review Committee.

Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument. This requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointment(s) contained in it is/are not public servant appointment(s). The Committee notes that there is no such statement in the Explanatory Statement to this instrument. As a result, the Committee (and the Assembly) has no way of knowing whether or not any of the appointments made by this instrument are public servant appointments and, as a result, whether or not this is, in fact, a disallowable instrument. While this might be inferred from the fact that (as noted by the Explanatory Statement) the Standing Committee on Health and Disability has considered the appointments, the Committee considers that it would be appropriate (and that it would not cause any great inconvenience) if a statement to this effect was included in the instrument appointing the persons in question.

The Committee notes that there is a typographical error in the Explanatory Statement, in that the name of the person appointed at the second of the dot-points on the left appears to be misspelled.

Positive comment

Disallowable Instrument DI2006-61 being the Casino Control (Fees) Determination 2006 (No. 1) made under section 143 of the *Casino Control Act 2006* determines the fees payable for the purposes of the Act.

This instrument sets fees for the purposes of the *Casino Control Act 2006*. The Committee notes with approval that the Explanatory Statement to the instrument indicates which fees are new fees and, in the case of existing fees, what was the previous fee. The Committee also notes that the Explanatory Statement gives an explanation for the increase in fees. The Committee commends this approach to other agencies.

Positive comment

Disallowable Instrument DI2006-64 being the Veterinary Surgeons (Fees) Determination 2006 (No. 1) made under section 58 of the *Veterinary Surgeons Act 1965* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2006-70 being the Optometrists (Fees) Determination 2006 (No. 1) made under section 55 of the *Optometrists Act 1956* revokes DI2003-117 and determines the fees payable for the purposes of the Act.

These instruments set fees for the purposes of the *Veterinary Surgeons Act 1965* and the *Optometrists Act 1956*, respectively. The Committee notes with approval that, in each case, the Explanatory Statement to the instrument indicates which fees have been increased, by how much and for what reason. The Committee commends this approach to other agencies.

Positive comment

Disallowable Instrument DI2006-65 being the Electoral (Commission Chairperson and Member) Appointment 2006 (No. 2) made under section 12 of the *Electoral Act 1992* appoints specified persons as chairperson and a member of the ACT Electoral Commission.

This instrument appoints two named persons as chairperson and member of the Electoral Commission, respectively. The appointments are made under section 12 of the *Electoral Act 1992*. The Committee notes that subsections 12(2) and (3) of the Electoral Act sets out certain pre-requisites for the appointments. The Committee notes with approval that the Explanatory Statement to the instrument indicates that all relevant prerequisites are met by the appointees. The Committee commends this approach to other agencies.

Is this a disallowable instrument?

Disallowable Instrument DI2006-69 being the Legal Aid (Commissioner (Bar Association Nominee)) Appointment 2006 (No. 1) made under subsection 7(3) of the *Legal Aid Act 1977* appoints a specified person as a part-time commissioner of the Legal Aid Commission.

This instrument appoints a named person as a part-time commissioner of the Legal Aid Commission. The person is the nominee of the ACT Bar Association and such appointment is provided for by paragraph 7(1)(c) of the *Legal Aid Act 1977*.

Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument. This requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointment(s) contained in it is/are not public servant appointment(s). The Committee notes that there is no such statement in the Explanatory Statement to this instrument.

In making this observation, the Committee notes that the Explanatory Statement indicates that, as required by the Legislation Act, the relevant Assembly committee has been consulted in relation to the appointment. In fact, the relevant committee is this Committee (albeit in its role as the Standing Committee on Legal Affairs). While this would ordinarily lead to an inference that the Committee, in fact, *knows* that the person in question is not a public servant, this does not detract from the Committee's general stance in relation to such instruments, ie that it would be appropriate (and that it would not cause any great inconvenience) if a statement to the effect that the person appointed is not a public servant was included in every relevant instrument of appointment.

Subordinate Laws—No comment

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

Subordinate Law SL2006-6 being the Magistrates Court (Tree Protection Infringement Notices) Regulation 2006 made under the *Magistrates Court Act 1930* provides for infringement notices to be issued for offences against the Act.

Subordinate Law SL2006-7 being the Utilities (Electricity Transmission) Regulation 2006 made under section 15 of the *Utilities Act 2000* prescribes the transmission of electricity through an electricity transmission network to be a utility services for the purpose of the Act.

Subordinate Law SL2006-8 being the Casino Control Regulation 2006 made under the *Casino Control Act 2006* prescribes the functions that may be preformed by a casino employee, the area to be designated as the casino and the core trading hours.

Subordinate Law SL2006-11 being the Magistrates Court (Utilities Water Conservation Infringement Notices) Regulation 2006 made under the *Magistrates Court Act 1930* determines a system of infringement notices for certain offences in relation to the enforcement of a water conservation and restriction scheme under the Utilities (Water Conservation) Regulation 2006.

Subordinate Laws—Comment

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

Strict liability offences

Subordinate Law SL2006-9 being the Utilities (Water Conservation) Regulation 2006 made under the *Utilities Act 2000* provides for the introduction and enforcement of water conservation measures.

The Committee notes that subsections 7(2), 14(2), 17(2) and 23(2) of this subordinate law create strict liability offences, each carrying a maximum penalty of 10 penalty units (ie \$1,000.00 for individuals and \$5,000.00 for corporations - see section 133 of the *Legislation Act 2001*).

As noted in *Report No 2 of the Sixth Assembly* (and as repeated by the Committee on numerous occasions since), the use of strict liability offences is a recurring issue for the Committee. In that Report (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred to the principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences (at page 9).

In particular, the Committee noted that, in its *Report No 38 of the Fifth Assembly*, it had proposed that where a provision of a bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Report No 38 of the Fifth Assembly*, the Committee went on to say:

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that, in this instance, the Explanatory Statement addresses neither of the principles set out by the Committee in its *Report No 38 of the Fifth Assembly*. All that the Explanatory Statement does is to acknowledge that the offences in question are strict liability offences.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

Minor drafting issue

Subordinate Law SL2006-10 being the Racing (Jockeys Accident Insurance) Regulation 2006 made under the *Racing Act 1999* determines the provisions to manage applicable NSW law associated with the Act.

The Committee notes that the Explanatory Statement to this instrument refers to “[s]ection 61BA(2) of the amended Act”. The Committee cannot identify such a subsection and assumes that this is a typographical error.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Urban Services, dated 29 March 2006, in relation to comments made in Scrutiny Report 22 concerning:
 - SL2005-39 being the Road Transport Legislation Amendment Regulation 2005 (No. 1).
 - Domestic Animals (Validation of Fees) Bill 2006.
- The Minister for the Territory and Municipal Services, dated 1 May 2006, in relation to comments made in Scrutiny Report 23 concerning:
 - DI2006-9 being the Domestic Animals (Fees) Determinations 2006 (No. 1); and
 - DI2006-27 being the Road Transport (Public Passenger Services) (Minimum Service Standards—Taxi Network) Approval 2006 (No. 2).
- The Attorney-General, dated 2 May 2006, in relation to comments made in Scrutiny Report 22 concerning the Motor Sport (Public Safety) Bill 2006.
- The Minister for the Territory and Municipal Services, dated 2 May 2006, in relation to comments made in Scrutiny Report 24 concerning the Animal Welfare Amendment Bill 2006.
- The Minister for Industrial Relations, undated, in relation to comments made in Scrutiny Report 24 concerning the Asbestos Legislation Amendment Bill 2006.

The Committee wishes to thank the Minister for Urban Services, the Attorney-General, the Minister for Territory and Municipal Services and the Minister for Industrial Relations for their helpful responses.

Bill Stefaniak, MLA
Chair

May 2006

**LEGAL AFFAIRS—STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION COMMITTEE)**

REPORTS—2004-2005-2006

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)
Members' Hiring Arrangements Approval 2004 (No. 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff)
Office-holders' Hiring Arrangements Approval 2004 (No. 1)

Report 3, dated 17 February 2005

Health Records (Privacy and Access) Amendment Bill 2005. **(Passed 17.02.05)**

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-260 – Health (Interest Charge) Determination 2004
(No. 1)
Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)
Determination 2004 (No. 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)
Approval 2004 (No. 1)
Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management
Plan) 2005
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005
(PMB)
Subordinate Law SL2004-52 – Health Professionals Amendment Regulation 2004
(No. 1)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 5, dated 14 March 2005

Disallowable Instrument DI2005-12 – Health Professions Boards (Procedures)
Pharmacy Board Appointment 2005 (No. 1)
Disallowable Instrument DI2005-8 – Community and Health Services Complaints
Appointment 2005 (No. 1)

Bills/Subordinate Legislation

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No. 1)

Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No. 1)

Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No. 1)

Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Disallowable Instrument DI2005-34 – Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)

Report 11, dated 20 June 2005

Disallowable Instrument DI2005-33 – Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-61 – Radiation (Fees) Determination 2005 (No. 1)

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 (**PMB**)

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No. 2)

Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1)

Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No. 2)

Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No. 1)

Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No. 2)

Bills/Subordinate Legislation

Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No. 3)

Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No. 2)

Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No. 1)

Hotel School (Repeal) Bill 2005 (**Passed 25.08.05**)

Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No. 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (**PMB**)

Report 18, dated 14 November 2005

Disallowable Instrument DI2005-209 – Health (Fees) Determination 2005 (No. 3)

Disallowable Instrument DI2005-212 – Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1)

Guardianship and Management of Property Amendment Bill 2005 (**PMB**)

Report 19, dated 21 November 2005

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No. 1)

Report 22, dated 6 March 2006

Construction Occupations Legislation Amendment Bill 2006 (**Passed 30.03.06**)

Disallowable Instrument DI2005-298 - Health (Fees) Determination 2005 (No. 6)

Disallowable Instrument DI2005-302 - Public Health (Risk Activities) Declaration 2005 (No. 1)

Disallowable Instrument DI2005-303 - Public Health (Infection Control) Code of Practice 2005

Report 23, dated 27 March 2006

Disallowable Instrument DI2006-11 - Health Professionals (ACT Nursing and Midwifery Board) Appointment 2006 (No. 1)

Disallowable Instrument DI2006-12 - Health Professionals (Medical Board) Appointment 2006 (No. 1)

Disallowable Instrument DI2006-24 - Mental Health (Treatment and Care) (Official Visitors) Appointment 2006 (No. 1)

Subordinate Law SL2006-1 - Health Professionals Amendment Regulation 2006 (No. 1)

Bills/Subordinate Legislation

Subordinate Law SL2006-2 - Health Professionals Amendment Regulation 2006
(No. 2)

Report 24, dated 1 May 2006

Disallowable Instrument DI2006-36 - Canberra Institute of Technology (Fees)
Determination 2006

Disallowable Instrument DI2006-38 - Transplantation and Anatomy (Designated
Officers) Appointment 2006 (No. 1)

Disallowable Instrument DI2006-48 - Health Professionals Pharmacy Board
Appointment 2006 (No. 1)

Disallowable Instrument DI2006-50 - Health Professionals Podiatrists Board
Appointment 2006 (No. 1)

Disallowable Instrument DI2006-51 - Transplantation and Anatomy (Designated
Officers) Revocation 2006 (No. 1)



JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES

MINISTER FOR URBAN SERVICES

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

m/Al



Bill
Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 22 dated 6 March 2006. I offer the following response in relation to the matter raised by your Committee.

3. Subordinate Law SL2005-39 - Road Transport Legislation Amendment Regulation 2005 (No. 1)

The Committee comments that the Explanatory Statement to the subordinate law does not address whether, in the case of a strict liability offence, a defendant should be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

The defences of mistake of fact and intervening conduct or event are available to a defendant in relation to a strict liability offence, under sections 36 and 38 respectively of the Criminal Code. Similarly, the defences of duress, sudden or extraordinary emergency, and self-defence are available under, respectively, sections 40, 41 and 42 of the Criminal Code.

These defences are available to a defendant regardless of whether or not an Explanatory Statement mentions that the defences are available. The operation of the Criminal Code is not affected by statements made or not made in an Explanatory Statement.

From this time on, an Explanatory Statement for a Road Transport Legislation amendment that includes strict liability offences will refer to the defences that are available under the Criminal code.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495




2. Domestic Animals (Validation of Fees) Bill 2006

The Scrutiny of Bills Committee noted that the retrospective validation of the collection of the fees was not an undue trespass on the rights of members of the public who purchased dogs from the pound.

The Committees comments have been noted.

Yours sincerely


John Hargreaves
Minister for Urban Services

29 March 2006

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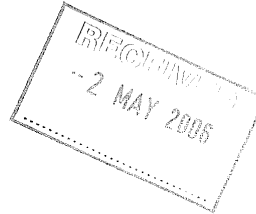




John Hargreaves MLA

MINISTER FOR THE TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella



Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

ml
Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 23 dated 27 March 2006. I offer the following response in relation to the matter raised by your Committee.

3. Domestic Animals Act 2000 (DI2006-9)

The Scrutiny of Bills Committee noted that the instrument addresses concerns that are previously mentioned in Report No 13. It recognises that the Domestic Animals (Validation of Fees) Bill 2006 was introduced as a result of these concerns.

The Committees comments have been noted.

4. Road Transport (Public Passenger Services) Regulation 2002 (DI2006-27)

The Committee made minor comment that this instrument was re-made (revoking DI2006-21) to correct an error, amending Minimum Service Standards to provide for a dedicated wheelchair accessible taxi manager to be available on Christmas Day.

The Committees comments have been noted.

Yours sincerely

John Hargreaves
John Hargreaves MLA
Minister for the Territory and Municipal Services

March 2006
1 May

ACT LEGISLATIVE ASSEMBLY

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Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ^{Bill} Stefaniak

I refer to Scrutiny Committee Report No 22 of 6 March 2006 in which the Committee drew attention to the need to amend the *Legislation Act 2001*, section 47 so that the scheme for notification and publication of a document incorporated by reference applies where the incorporation is by a provision of an Act. As noted by the Committee, section 47 only applies where a document is incorporated by a statutory instrument authorised by an Act.

The committee's suggestion has identified an important point and I have asked that consideration be given to it in a general review of the section's operation. I hope that the outcome of the review will be available in the Statute Law Amendment Bill to be introduced in the Spring Assembly sittings.

Thank you for raising the operation of the section with me.

Yours sincerely

Simon Corbell MLA
Attorney General

2.5.06

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John Hargreaves MLA

MINISTER FOR THE TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601


Dear Mr Stefaniak

Thank you for the Scrutiny of Bills Report No. 24 of 1 May 2006. The Committee has noted an issue by proposed new section 7B of the Act (Clause 4 of the Bill) and a minor issue that the word “communities” in the Explanatory Statement should read “community’s”.

Proposed new section 7B of the Act (Clause 4 of the Bill)

The Committee noted that by proposed new section 7B of the Act (Clause 4 of the Bill) the trier of fact (that is the Court) in relation to a prosecution in respect of proposed new section 7A may find the defendant guilty of the alternative offence against existing section 7, **“but only if the defendant has been given procedural fairness in relation to that finding of guilt”**.

The Committee also noted that although it has no objection in principle to the above proposition in Clause 4 of the Bill, it is concerned that it has been thought necessary to state it in the statute.

We note the Committee’s observation in this instance. Having said that, Parliamentary Counsels Office (PCO) has advised that this is a standard clause for an alternative provision that has been used in ACT legislation for some time and is a Criminal Law Policy. PCO also advised that it is based on a Commonwealth formulation that is used in a number of Commonwealth offences and appears quite often in the *ACT Criminal Code 2002*.

ACT LEGISLATIVE ASSEMBLY

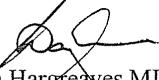
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The word “communities” in the Explanatory Statement

We note the Committee’s observation in this instance is correct and that the reading of the word “communities” should read “community’s” in the Explanatory Statement.

I trust that this information satisfactorily addresses matters raised in the Committee’s report.

Yours sincerely


John Hargreaves MLA
Minister for the Territory and Municipal Services

 May 2006



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2601

Dear Mr Stefaniak

Re: Asbestos Legislation Amendment Bill 2006

I refer to Report No.24 of the Standing Committee on Legal Affairs (Performing the Duties of a Scrutiny of Bills and Subordinate Legislation Committee) and particularly to comments on the Asbestos Legislation Amendment Bill 2006.

I would like to thank the Committee for its comments contained in the Report, particularly in regard to clause 1.9 of the Bill.

The Government also notes the Committee's comments in relation to the Explanatory Statement for the Bill. A revised Explanatory Statement has now been prepared to address the Committee's comment and will be tabled in the Assembly on Tuesday 2 May 2006.

Thank you again for your comments.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

ACT LEGISLATIVE ASSEMBLY

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