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

SCRUTINY REPORT 8

30 MAY 2013

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

AUSTRALIAN CAPITAL TERRITORY (MINISTERS) BILL 2013

This is a Bill for an Act to provide that the number of Ministers for the Territory is not to exceed 6.

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Children and Young People Act 2008* to make provision for the placement of a child or young person where the director-general has daily care responsibility for the child or young person.

FAIR TRADING (FUEL PRICES) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Fair Trading (Fuel Prices) Act 1993* to create offences in relation to a failure to comply with rules concerning the display of prices for fuel.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2013 (NO 3)

This is a Bill for an Act to amend a number of laws administered by the Justice and Community Safety Directorate.

OFFICIAL VISITOR AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Official Visitor Act 2012*, and other legislation, in relation to the functions of an official visitor.

PLANNING AND DEVELOPMENT (TERRITORY PLAN VARIATIONS) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008* to improve the management of the Territory Plan.

SUPREME COURT (APPOINTMENT OF RESIDENT JUDGES) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Supreme Court Act 1933* to increase the number of judges of the Supreme Court to at least 5, including the Chief Justice.

BILLS—COMMENT

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

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Administrative Decisions (Judicial Review) Act 1989* to provide for who may make an application under this Act for a review by the Supreme Court of an administrative decision.

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

The *Administrative Decisions (Judicial Review) Act 1989* (the ADJR Act) provides a means for a "person aggrieved" by an administrative decision to seek a review of it in the Supreme Court. The court may review on grounds that raise issues about the legality of the decision. The court cannot go further and consider the merits of the decision (as can for example, the ACT Civil and Administrative Tribunal (ACAT) in relation to decisions that can be appealed to that body). Review by the court under ADJR is often very expensive and time consuming.

The term "person aggrieved" limits the range of persons who can apply for ADJR review. The core notion is that the person's interests are adversely affected by the decision. The purpose of this Bill is to expand that range. The term "eligible person" would be defined (see clause 14) to embrace any individual, corporation, or unincorporated body where "the subject matter of the application relates to a matter that forms part of the objects or purposes of the organisation or association".

Clause 6 proposes a new section 4A that begins in subclause (1) by providing that an eligible person may make an application for review; that is, it would not matter that the decision had no adverse impact on the person's interests; (for ease of understanding, such a person is referred to as a "public interest litigant"). However, subclause 4A(2) qualifies the breadth of this broad standing rule in subsection 4A(1) in two main ways. First, paragraph 4A(2)(a) provides that a person may not make application where that person's ability to make application has been excluded by an enactment.

Secondly, paragraph 4A(2)(b) provides that a person may **not** make application where **all** of the following apply:

- the interests of the eligible person are not adversely affected by the decision (paragraph 4A(2)(b)(i)); and
- the subject matter of the application is a decision about an individual, and an order of the Supreme Court may prejudicially affect the individual (paragraphs 4A(2)(b)(ii) and (iii)); and
- the application fails to raise a significant issue of public importance (paragraph 4A(2)(b)(iv)).

These qualifications narrow the breadth of subclause 4A(1). Most ADJR applications are by persons whose interests are or would be adversely affected by the decision and such persons will fall within the broad rule in subclause 4A(1) because the condition stated in paragraph 4A(2)(b)(i) is not satisfied. This result is not problematic.

In relation to the conditions for the exclusion of the broad standing rule stated in paragraphs 4A(2)(b)(ii) and (iii), the Committee notes that there is no provision in the Bill to amplify, (or illustrate, such as in a Note), when a decision will be "about" an individual. Such a Note would be helpful.

There may be cases where although the decision is about an individual, an order of the Supreme Court in relation to the decision will not "prejudicially affect" that individual. If so, the broad standing rule will apply because the condition stated in paragraph 4A(2)(b)(iii) is not satisfied. It should be noted that even if these two conditions are satisfied, the Supreme Court will need to consider whether the condition in paragraph 4A(2)(b)(iv) is also satisfied before the broad standing rule applies. This case is considered below.

In some cases, perhaps many, the administrative decision will not be "about an individual". Where the decision is not of this character—such as where it is about a corporation—the broad rule in subclause 4A(1) will apply because the condition stated in paragraph 4A(2)(b)(ii) is not satisfied. That is, the Supreme Court will not need to assess whether the application raises a significant issue of public importance. (There is comment on this case below.)

Where the conditions in paragraphs 4A(2)(b)(ii) and (iii) are satisfied, the broad standing rule will nevertheless apply if the Supreme Court finds that the application raises "a significant issue of public importance" (paragraph 4A(2)(b)(iv)).

<u>The right to privacy (HRA paragraph 12(a)) and the breadth of the scope of the standing rule in subclause 4A(1)</u>

It follows from what has just been said that where the decision is about an individual and an order for review may "prejudicially affect" that individual, and that individual does not make an application for review, any eligible person (such as a public interest litigant) may make application so long as the Supreme Court finds that the application raises "a significant issue of public importance".

The Explanatory Statement acknowledges that subclause 4A(1) limits the right to privacy (see at pages 3-4). It notes that "the possibility exists that a particular decision that involves a largely private matter yet raises an issue of significant public importance may be litigated and the process of that litigation may involve a limitation on the privacy of the person who was the subject of the decision" (page 3). A brief section 28 justification is offered:

> Any limitation that does arise is demonstrably justifiable under section 28 of the *Human Rights Act 2004*. It comes about out of necessity to give effect to, and is offset by the importance of, the purpose of the Bill; to protect the rule of law and ensure the legality of government decisions. Any limitation that may occur depends very much on the particular decision that is the subject of the review, even if the right is engaged it is unlikely that the extent of the limitation will be significant. There is no alternative means of achieving this and the limitation on the right is limited to the greatest extent possible (see notes on clause 6 re new section 4A(2)(b)) (page 3).

The result of a public interest litigant being able to challenge an administrative decision that prejudicially affects an individual may well be to cause matters of private and/or business concern to the individual to be revealed during the course of a Supreme Court proceeding. The public (and of course the media) have pre-trial access to documents filed or created for the litigation, and the hearing in court will be open to the public. Reporting of this information—or merely by reason of the information coming to the notice of only a single person—could well be embarrassing to the individual whose interests are prejudicially affected by the administrative decision that is challenged by the public interest litigant.

There is no elaboration in the Explanatory Statement of the assertion that "even if the right is engaged it is unlikely that the extent of the limitation will be significant". **This is a critical issue, and the Committee recommends that the Member elaborate on the basis for the opinion that the limitation of the right to privacy would not be likely to be significant.**

The respondent to the application will be the government body that made the licence decision, but the individual whose interests are adversely affected may feel obliged to be joined as a party and thereby incur significant legal expense (as well as other economic and personal costs that are often associated with being a party to litigation). Where the application for review succeeds, the individual would probably not be able to recover their costs, and might be obliged to contribute to those of the

successful public interest applicant. Where the public interest applicant "loses" the case, the individual may not be able to recover all (or sometimes any) of the costs it incurred, in particular in relation to those not directly attributable to engaging lawyers.

The Committee notes that there is no obligation on (or even capacity for) the Supreme Court Justice who assesses whether the public interest litigant can rely on the broad rule in subsection 4A(1) to take into account the privacy interest of the individual whose interests are prejudicially affected by the administrative decision. Given that the individual may feel compelled to join the litigation, with consequent legal and other costs, the interests of the individual may extend beyond her or his "privacy" interests. (The scope of this notion is problematic, and it would be undesirable were a consideration as to whether the broad standing rule was displaced to become bogged down by debate about whether some adverse effect on the individual was an effect on a "privacy" interest.)

There is thus an issue here as to whether section 4A would (in terms of HRA paragraph 28(2)(e)) less restrictively limit the right to privacy in HRA paragraph 12(a) were the interests of the individual be a matter the Supreme Court must take into account. **The Committee recommends that the Member also address this specific issue.**

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

Where the administrative decision is about a corporation, the broad standing rule in subsection 4A(1) applies and the Supreme Court will not consider whether an application by a public interest applicant raises "a significant issue of public importance". For example, the decision may be to grant a licence to a corporation to do something, and the public interest applicant may consider that the grant of the licence is unlawful.

The respondent to the application will be the government body that made the licence decision, but the corporation may feel obliged to be joined as a party and thereby incur significant legal expense. Where the application for review succeeds, the corporation would probably not be able to recover its costs, and might be obliged to contribute to those of the successful public interest applicant. Where the public interest applicant "loses" the case, the corporation may not be able to recover all (or sometimes any) of the costs it incurred, in particular in relation to those not directly attributable to engaging lawyers.

It might be contemplated that corporations are able to wear these costs, but this may not be true of small corporations that are not, in terms of their wealth, different to individuals.

The Committee draws this matter to the attention of the Assembly and recommends that the Member respond.

<u>The right to a fair trial (HRA subsection 21(1)) and the exclusion of a right of appeal from a decision of the Supreme Court to the Court of Appeal in relation to a decision to grant a person to intervene in an ADJR proceeding</u>

Clause 12 of the Bill proposes to insert a new section 19A into the Act to govern the circumstances in which the Supreme Court (which usually comprises a single Justice) may grant to a person who is not a party to an ADJR application (such as a "public interest litigant") leave to intervene (that is, to participate) in the proceeding. The result could well be increased legal expenses for the other parties.

By proposed subsection 19A(4), "[t]here is no right of appeal in relation to a decision of the Supreme Court under this section". Any such appeal would in the first place be to the Territory Court of Appeal.

The Explanatory Statement argues that "[t]he intention of the Bill is to allow people to participate in public interest matters and ensure the legality of government decisions in an efficient manner. It would be inconsistent with this aim if matters were effectively allowed to be delayed for significant periods while interlocutory decisions were appealed".

The Explanatory Statement makes no reference to the right of a person to a fair trial stated in HRA subsection 21(1). The Committee acknowledges that the scope of this right is very uncertain, but it could be taken to include a right, at least in certain circumstances, to pursue an appeal against an adverse decision to the full extent of the facility for appeal in the relevant jurisdiction (here, the ACT). This right can be displaced if this is justifiable under HRA section 28. The Explanatory Statement, as just noted, justifies this limitation on the right to appeal. On the other hand, a party who opposes the intervener might argue that there should be an opportunity to test the legality of a Supreme Court decision on the matter.

Another justification for a right to further appeal might lie in the public interest in enabling the Court of Appeal to settle any differences that might emerge from inconsistent decision of Supreme Court Justices.

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

Comment on the Explanatory Statement

The Committee found it difficult to appreciate the practical effect of proposed section 4A. It recommends that the Member provide examples of how the rules in this section as to who does and who does not have standing to make an application for ADJR Review would apply in what are expected to be fairly common situations.

AUDITOR-GENERAL AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Auditor-General Act 1996* in various ways.

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

In a number of respects, provisions of the Bill are a positive engagement with some HRA rights, in the sense that they are compatible with the rights and enhance its application.

Clause 31 proposes a new section 19A of the Act[1] which provides for a decision by the Auditor-General alone, after consideration of the public interest and after consultation with the Chief Minister, to include deliberative information in a report for the Legislative Assembly. This provision enhances freedom of information about the activity of government, and thus of HRA rights to freedom of expression (HRA subsection 16(2)), and participation in public life (HRA section 17).

[1] Clause 32 then proposes to renumber the amended section 19A as section 20.

Clause 44 proposes to add new subsections 35(4) and (5) to the Act. By ensuring that protected information may be disclosed to a court (and under the Evidence Act) the right to a fair trial (HRA subsection 21(1)) is enhanced. The amendments would also enhance the right to privacy and reputation (HRA section 12) by allowing a person who the information is about to consent to its disclosure. By clause 42, similar qualifications to a prohibition on divulging protected information is contained in proposed section 36 of the Act (see subsection 36(3)).

In this respect, the Explanatory Statement appears to take a different view of the Bill. Proposed section 36(5) provides that:

> [a] person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another law applying in the territory.

This may be the basis for the statement in the Explanatory Statement that:

> [t]he existing provisions have been changed slightly to ensure that information obtained in an audit cannot be used in civil or criminal proceedings other than in relation to offences under the Act. This is consistent with the principles in section 22 of the Human Rights Act – rights in criminal proceedings.

This comment is not further explained, and may refer to the privilege against self-incrimination. It appears however to overlook the significance of the words "unless it is necessary to do so for ... another law applying in the territory". The Committee has understood these words to embrace the *Evidence Act 2011*, and in particular the rule that in a court proceeding a party is entitled to adduce any evidence that is relevant to issues arising in the proceeding. The Committee has also understood this right to be a component of HRA subsection 21(1), that is, of the right to a fair trial. It should also be noted that the privilege against self-incrimination, as stated in HRA paragraph 22(2)(i), and as it operates more widely at common law, would continue to apply on any trial.

The Committee recommends that the Minister explain what is intended to be conveyed by the statement in the Explanatory Statement and whether she accepts the Committee's understanding about the operation of the Evidence Act.

HERITAGE LEGISLATION AMENDMENT BILL 2013

This is a Bill to amend the *Heritage Act 2004* and, to a lesser extent, the *Tree Protection Act 2005*, with the primary objects of providing the Minister with call-in powers in relation to decisions affecting the registration or cancellation of a place or object on heritage protection grounds, and removing two appeal provisions, and also to make a range of other technical and administrative amendments.

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

<u>The right to a fair trial (HRA subsection 21(1)) and the removal of rights to seek review of administrative decisions</u>

As the *Heritage Act 2004* (henceforth "the Act") stands, a person with standing may seek review by the ACT Civil and Administrative Tribunal (ACAT) of a decision not to provisionally register a place or object, and of a decision to extend, or not extend, a period of provisional registration; (see Schedule 1). Clause 73 proposes the deletion of reference to these decisions in the Schedule, with the result that they would not be reviewable.

In the section of the Explanatory Statement headed "Human rights analysis", it is accepted that these amendments potentially limit the right to a fair trial embedded in HRA subsection 21(1). In relation to a decision not to provisionally register a place or object, the Explanatory Statement in justification is very brief. It is said that "any limitation imposed by the Amendment Bill is considered to be a reasonable limit", and after reference to comparable Territory legislation that:

> reviewable decisions will be brought in-line with other jurisdictions and comparable legislation in the ACT. In particular, this will be achieved through removing an appeal right against a decision of the Heritage Council not to provisionally register a place or object as there is no strong natural justice argument for retaining this provision, particularly as the concerned party can provide a fresh nomination to the Heritage Council with a new or redeveloped argument and evidence for provisional registration. Further, where council intends not to provisionally register a place or object, a person may apply to the Minister to request that he or she call-in the decision.
>
> A decision not to provisionally register a place or object is unlikely to impose significant impacts on a person.

In relation to the second relevant decision, it is said:

> [t]he decision to extend (or not extend) the five month provisional registration period as a reviewable decision will be removed. It appears that this reviewable decision serves little benefit as it is probable that a registration decision would occur prior to ACAT hearing the appeal. Instead, provision is included in the Amendment Bill at Clause 31 so that the Council can extend the provisional registration period, with the Minister able to overturn this decision within ten working days.

While ACAT review is removed, a person with standing could seek review by way of the expensive and prolix review on legality grounds by the Supreme Court.

HRA subsection 21(1) is also engaged by those provisions of the Bill (see clause 40, proposing sections 50A and 50B of the Act) that would empower the Minister to call-in a referable heritage matter, and, instead in the council, make the heritage decision required. (A "referable heritage matter" is defined in clause 86, which would add the definition to the Dictionary. The concept means a matter requiring a decision about a provisional registration under section 32, registration of a place or object under section 40, or cancellation of the registration of a place or object under section 47.) It is not the fact that the Minister would be empowered in this way that engages HRA subsection 21(1), but the fact that there is no provision for review of the Minister's decisions, other than by a person with standing seeking by the Supreme Court.

The justifications offered in the Explanatory Statement for the provisions of the Bill just noted fall far short of what is required of a justification in terms of HRA section 28. In particular, reference should be made to the non-exhaustive factors stated in subsection 28(2). The Committee does not express a view about the compatibility of these provisions with HRA subsection 21(1), but it does stress the need in all cases for a proper section 28 justification. The Minister for the Environment is referred to the Committee's Guide to writing an explanatory statement[2], at para 3.8ff.

[2] http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf

In particular the Committee considers that the Minister should explain the assertion in the Explanatory Statement that a decision not to provisionally register a place or object is unlikely to impose significant impacts on a person. A particular situation calling for explanation is where a decision affects a number of people considered as a collective rather than having an effect on an individual.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister provide a section 28 justification in the Explanatory Statement.

The Explanatory Statement (page 3) notes that the Bill provides additional recognition and protection of Aboriginal places and objects through:

- changes to the definition of 'Aboriginal place' and 'Aboriginal object' which provide greater clarity and certainty that all Aboriginal places and objects are protected under the Amendment Bill (Clause 7);
- ensuring that heritage guidelines may be made for an Aboriginal place or object (Clause 19); and
- ensuring that the conservator consults with representative Aboriginal organisations under the *Tree Protection Act 2005* about matters affecting Aboriginal heritage trees (Clauses 47, 89 and 91)

The Explanatory Statement argues that these provisions promote the rights of minorities as stated in HRA section 27 (see at pages 2-3), and in particular, with reference to clause 19, states that "[t]his amendment creates positive engagement with human rights legislation, by creating greater recognition and protection for the heritage of a minority group - Aboriginal people".

The Committee accepts that these clauses may be seen as a positive engagement with HRA section 27, which provides that "[a]nyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language".

On the other hand, however, these clauses, on their face, limit the right in HRA subsection 8(3), which provides that "[e]veryone 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". Over recent years, Ministers have accepted that clauses such as those above do limit this right, and have often provided a full section 28 justification for the limitation of this right.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide a section 28 justification in the Explanatory Statement.

<u>The right to privacy (HRA paragraph 12(a) and the provision of personal information to be provided by the commissioner for revenue to the council or the Minister</u>

Where the council or the Minister may, or must, give notice to a person under this Act; or intends taking action under this Act which affects a person, and the person is uncontactable, the council or the Minister may ask the commissioner for revenue for either the person's name and the person's home address or other contact address (see clause 70, proposing section 118A of the Act).

Given that the information provided to the commissioner for revenue would not have been provided on an understanding that it might be provided to the council or Minister, it may be said that this clause engages HRA paragraph 12(a).

The Explanatory Statement makes no reference to HRA paragraph 12(a), although it does note that "privacy provisions of other legislation prevent council from obtaining up to date and accurate property owner contact details" (page 26). It also notes that this provision for data transfer would be beneficial to property owners.

While the Committee considers that reference to HRA paragraph 12(a) should have occurred, in these circumstances it is sufficient to draw the issue to the attention of the Assembly.

Has there been an inappropriate delegation of legislative power?—term of reference (3)(d)

Proposed subsection 203(1) of the Act (see clause 72) would provide that a regulation may prescribe transitional matters necessary or convenient to be prescribed. By subsection 203(2), such a regulation may modify Part 20 of the Act (which deals with transitional matters).

As such, subclause 203(2) is a Henry VIII clause, and there should be a justification provided in the Explanatory Statement. There is none here.

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

Purported restriction of the power of the legislative power of the Legislative Assembly

Subclause 203(3) would provide that "[a] regulation under subsection (2) has effect despite anything 10 elsewhere in this Act or another territory law".

The Committee has commented adversely on such a provision in *Scrutiny Reports 1, 2, 3* and *5* of this Assembly. In essence, its view is that at least so far as concerns an Act passed by the Assembly after the date this Bill becomes law as an Act (assuming that occurs), that first-mentioned later Act will prevail over any inconsistent and irreconcilable provision of the latter Act.[3]

In *Scrutiny Report 3* (at page 21), the Committee said that:

> where a provision [of this kind] is included in a bill, the explanatory statement in relation to the clause should have a paragraph identical in effect to the words of the second last paragraph of the response from the Minister for Health. This paragraph reads:
>
> > The section is not expressed, and does not intend, to [limit] future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.

The Explanatory Statement to this Bill makes no concession to the view of the Committee. In explanation of clause 203, it makes no reference to subclause 203(3).

The Committee adheres to its view that where such a provision is included in a Bill, that at least the Explanatory Statement should state a justification and contain the paragraph above.

[3] The Committee's reasoning is stated in *Scrutiny Report 3*, at 14-15.

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2013 (NO 2)

This is a Bill for an Act to amend the the *Road Transport (Driver Licensing) Act 1999* and the *Road Transport (Driver Licensing) Regulation 2000*, to provide for an alcohol ignition interlock program in the Australian Capital Territory.

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

The Explanatory Statement commences with a statement of the purposes of the Bill and an outline of its main features. It then contains a section entitled "Human rights implications" and the comments that follow relate to that statement, which should be read with the comments. The Committee appreciates the effort taken to address the human rights issues.

<u>The right to equality before the law (or to the equal protection of the law) (HRA section 8) and the creation of a scheme applicable to only some persons convicted of drink-driving offences</u>

The Explanatory Statement raises this issue, and particularly at page 9 in a comment on clause 18 of the Bill. In relation to this particular clause, which as explained has the effect of dealing more harshly in terms of penalty with persons convicted of some offences, it is pointed out that these offences "have more serious road safety implications". The Assembly might consider this justification extends to the whole alcohol ignition interlock program.

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

<u>The right to privacy (HRA section 12) and the sharing of personal information between agencies</u>

By proposed section 73ZZD of the *Road Transport (Driver Licensing) Regulation 2000* (henceforth "the regulation") the road transport authority may disclose interlock-related information to persons who install interlocks and provide services in relation to them, and to a police officer or prosecutor in connection with the enforcement of the road transport legislation.

The Explanatory Statement does not specifically offer a justification for this provision, which does appear to engage HRA section 12, but the general justification offered (see Explanatory Statement at pages 3-4) would embrace this provision. It might be added that it might be reasonable to suppose that a person whose personal affairs would be revealed by a data transfer of this kind would expect that this might occur.

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

<u>The right of a person not to be subjected to medical treatment without her or his free consent (HRA subsection 10(2)) and the power of a court to order an offender to undergo a treatment program in conjunction with participation in an alcohol interlock program</u>

The Explanatory Statement allows that this right might be engaged by these provisions, but does not specifically offer a justification for them. The general justification offered (see Explanatory Statement at pages 3-4) would embrace these provisions. The Committee also draws attention to the Explanatory Statement comment on proposed section 73U of the regulation (at page 12).

The right to freedom of movement (HRA 13), the right to privacy (HRA section 12), and the powers conferred on a police officer or authorised person to inspect interlocks in a motor vehicle

The powers are stated in proposed section 81A of the *Road Transport (General) Act 1999* (see clause 37).

The Explanatory Statement allows that these rights might be engaged by these provisions, but does not specifically offer a justification for them. The general justification offered (see Explanatory Statement at pages 3-4) would embrace these provisions.

The Committee adds that these police powers are in the usual form.

The Committee draws this matter to the attention of the Assembly

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

The Explanatory Statement notes that there are "several strict liability offences in the Bill that may engage rights relating to criminal trials, mainly relating to the installation, use and maintenance of interlocks and the way that information about interlock usage is reported". These offences are not identified. The Committee takes them to be those stated in proposed sections 73ZA to 73ZD, 73ZI to73ZK, and 73ZW to 73ZZB of the regulation. It is helpful to the Committee and to the Assembly if the Explanatory Statement identifies the strict liability offences specifically.

The Committee expects that there will be a specific justification for creation of strict liability offences. The Explanatory Statement at page 3 states:

> The use of strict liability in these offences is considered to be a reasonable limitation of rights on the basis that these offences involve breaches of positive duties or obligations that are necessary for the effective operation of the scheme, and that allowing for carelessness or inadvertence that results in non-compliance would defeat the purpose of the scheme.

The problem with this line of justification is that it can be advanced in relation to any kind of crime. It would in regard to every crime be advantageous to the prosecution to have to prove merely that the defendant did the acts that constitute the physical elements of the crime, and to avoid the need for any evidence to prove a fault element; that is, as the case may be having regard to the nature of the offence, that the defendant intended to commit those acts, or, was reckless with regard to a result of those acts.

The more acceptable justification is that the strict liability offences are imposed in relation to a particular scheme of regulation, where those who commit the physical elements of an offence might be expected to have been aware of the fact that there is an offence, and, being so aware, exercise care not to commit the physical elements. This is probably the case with respect to at least most of the strict liability offences proposed, and the Committee notes that so far as concerns a person subject to an interlock condition, the proposed amendment to subsection 57(3) of the reasonable grounds (see clause 16) may assist to create such awareness in these persons. This expectation is also reasonable where the offender is a person who benefits from the scheme of regulation, and this may apply to the offences in proposed sections 73ZW to 73ZZB of the regulation.

A further matter the Committee has accepted as relevant is the gravity of the penalty provided. Penalties up to 50 penalty points are regarded as acceptable. The penalties for these proposed offences are 20 penalty points.

The Committee considers that the limitation on the presumption of innocence is justifiable under HRA section 28.

It however adds that the Explanatory Statement should refer specifically to at least two of the defences available under the *Criminal Code 2000* to a person charged with a strict liability offence. These are the mistake of fact defence (Code section 36), and the defence of intervening conduct or event (Code section 39). The latter is important in that it permits of a limited defence that the defendant took care to avoid committing the physical elements of the offence. The Committee understands that the Government accepts that there should be mention of these defences.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-47 being the Road Transport (General) Segway Exemption Determination 2013 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2012-136 and extends the declared area within which an operator can conduct segway tours.**

Disallowable Instrument DI2013-48 being the Civil Law (Wrongs) Law Institute of Victoria Limited Scheme 2013 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of Victoria's approval of the Law Institute of Victoria Limited Scheme.**

Disallowable Instrument DI2013-49 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the Mazda MX-5 Media Challenge.**

Disallowable Instrument DI2013-50 being the Road Transport (General) (Police Motorcycle Rider) Exemption Revocation 2013 made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2013-31, which exempts members of the Australian Federal Police, undertaking police motorcycle rider training and assessment, from novice rider licensing requirements.**

Disallowable Instrument DI2013-51 being the Road Transport (Third-Party Insurance) (Industry Deed) Approval 2013 made under section 6 of the *Road Transport (Third-Party Insurance) Regulation 2008* **approves the Industry Deed.**

Disallowable Instrument DI2013-54 being the Road Transport (General) (Garbage and waste disposal) Exemption 2013 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **allows the driver of a garbage or waste disposal truck to drive the wrong way along Astrolabe Street, Red Hill, to collect waste or garbage from houses.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Inadequate explanatory statement

Disallowable Instrument DI2013-46 being the Health (Fees) Determination 2013 (No. 2) made under section 192 of the *Health Act 1993* **revokes DI2013-3 and determines fees payable for the purposes of the Act.**

This instrument, which was notified on 27 April 2013, revokes an earlier instrument (DI2013-3), notified on 17 January 2013. The instrument determines various fees.

The explanatory statement for the instrument states:

> The Determination comes into effect on the day after notification and reproduces Determination DI2013-3 except for:
>
> - a change to the Hospital Accommodation single room fee (A1c);
> - changes to Driver Rehabilitation Service fees (S5); and
> - the date of effect.

No other information is provided in relation to the instrument.

In relation to the paragraph A.1.(c) amendment, the Committee notes that the revoked instrument provides:

Column 1 Service		Column 2 Amount exclusive of GST	Column 3 Amount inclusive of GST (if applicable)
A. Hospital Accommodation Fees – Standard Patients			
1. If the patient is a private patient other than a compensable patient or a non-eligible person, and is:			
(a) in a multiple-bed room;	per day	$318.00	n/a
(b) in a single room, otherwise than at the patient's request;	per day	$318.00	n/a
(c) in a single room at the patient's request; or	per day	$550.00	n/a

(d) Hospital in the Home		Fee as specified in agreement between the relevant health fund and the relevant ACT Public Hospital	n/a

This instrument provides:

Column 1 Service		Column 2 Amount exclusive of GST	Column 3 Amount inclusive of GST (if applicable)
A. Hospital Accommodation Fees – Standard Patients			
1. If the patient is a private patient other than a compensable patient or a non-eligible person, and is:			
(a) in a multiple-bed room;	per day	$318.00	n/a
(b) in a single room, otherwise than at the patient's request;	per day	$318.00	n/a
(c) in a single room at the patient's request; or	per day	$550.00 **or a Fee as specified in agreement between the relevant health fund and the relevant ACT Public Hospital**	n/a
(d) Hospital in the Home		Fee as specified in agreement between the relevant health fund and the relevant ACT Public Hospital	n/a

The bolded words above are the words that are added by this instrument.

There appears to be no way of working out any basis on which a decision is to be made as to which of the options provided for in paragraph (c) are to be adopted. The Committee considers that it is desirable that guidance on this issue should be provided.

The Committee seeks the Minister's advice as to how it is intended that paragraph A.1.(c) is to operate.

In relation to the Driver Rehabilitation Service Fees, prior to the making of this instrument, the fees provided were:

Column 1 Service		Column 2 Amount exclusive of GST	Column 3 Amount inclusive of GST (if applicable)
5. Driver Rehabilitation Service			
(a) Initial Assessment – Non compensable;	Per assessment	$212.00	$233.20
(b) Initial Allied Health Assessment;	Per assessment	$407.00	n/a
(c) Initial Assessment Report and Driving Instruction;	Per assessment	$313.00	n/a
(d) Lesson (compensable and non compensable);	Per lesson	$113.00	$124.30
(e) Re-assessment – Non compensable;	Per assessment	$129.00	$141.90
(f) Allied Health Re-assessment.	Per assessment	$313.00	n/a

The new fees provided are:

Column 1 Service		Column 2 Amount exclusive of GST	Column 3 Amount inclusive of GST (if applicable)
5. Driver Rehabilitation Service Non Compensable Patients:			
(a) Initial Assessment and Report by Occupational Therapist;	Per assessment	$525.00	n/a
(b) Initial Assessment by Driving Instructor;	Per assessment	$212.00	$233.20
(c) Re-Assessment by Occupational Therapist;	Per assessment	$129.00	n/a

(d) Lesson;	Per lesson	$113.00	$124.30
Compensable Patients:			
(e) Initial Assessment and Report by Occupational Therapist;	Per assessment	$720.00	n/a
(f) Re-Assessment by Occupational Therapist	Per assessment	$313.00	n/a
(g) Lesson	Per Lesson	$113.00	$124.30

While some of the new fees seem to replicate fees provided for in the revoked instrument, a new fee of $720.00 appears to have been introduced. No explanation is provided in relation to the new fee.

The Committee maintains a keen interest in fees determinations, as noted in the Committee's document titled *Subordinate Legislation—Technical and Stylistic Standards: Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf, which states:

> **FEES DETERMINATIONS**
>
> The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.
>
> The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:
>
> - by whom the fee is payable; and
> - to whom the fee is to be paid

The Committee maintains a similar interest in relation to new fees. The Committee expects that new fees that are provided for in instruments be identified and explained. This has not occurred in relation to this instrument, the explanatory statement for which does not even acknowledge that (what appears to be) a significant new fee is provided for.

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

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2013-9 being the Road Transport (Police Driver and Rider Exemptions) Amendment Regulation 2013 (No. 1) made under sections 26 and 28(2) of the *Road Transport (Driver Licensing) Act 1999* **and sections 33 and 35 of the** *Road Transport (Safety and Traffic Management) Act 1999* **consolidates and updates existing exemptions for police drivers and riders.**

Subordinate Law SL2013-10 being the Criminal Code Amendment Regulation 2013 (No. 1) made under the *Criminal Code 2002* **extends the application date in the Criminal Code to 1 July 2017.**

PROPOSED GOVERNMENT AMENDMENT—JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2013 (NO. 3)

The Committee has examined the proposed Government amendment to the Justice and Community Safety Legislation Amendment Bill 2013 (No. 3) and has no comment to make in relation to it.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Housing, dated 13 May 2013, in relation to comments made in Scrutiny Report 6 concerning the Community Housing Providers National Law (ACT) Bill 2013.
- The Attorney-General, dated 27 May 2012, in relation to comments made in Scrutiny Report 5 concerning the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013.

The Committee wishes to thank the Minister for Housing and the Attorney-General for their helpful responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee refers to the concluding parts of the response of the Attorney-General to *Scrutiny Report 5*, concerning the Monitoring of Places of Detention (Optional Protocol on the Convention on Torture) Bill 2013, where the Attorney-General deals with the Committee's comments on clauses 8, 13 and 16 of the Bill.

The Committee reiterated what it had said in *Scrutiny Report 3* concerning such provisions, which in its view are calculated to mislead a reader of the Bill as to their legal effect. The Committee there said:

> where a provision [of this kind] is included in a bill, the explanatory statement in relation to the clause should have a paragraph identical in effect to the words of the second last paragraph of the response from the Minister for Health. This paragraph reads:
>
> > The section is not expressed, and does not intend, to [limit] future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.

The Attorney-General accepts that the suggested paragraph is a correct statement of the law. The Committee still finds it difficult to appreciate why such clauses are nevertheless inserted into Territory law. It finds it more difficult to understand why the Attorney-General disagrees with the Committee's recommendation that, where they are inserted, the Explanatory Statement should include this paragraph in relation to the relevant clause.

The Attorney-General describes these clauses as "technical" in nature. The Committee considers that they have a substantive effect—that is, are calculated to mislead. The objection to them is founded on a notion that is fundamental to the rule of law—that is, that provisions of a law should be clear and effective. This is not the case here.

Steve Doszpot MLA
Chair

30 May 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 7, dated 13 May 2013

Disallowable Instrument DI2013-45 - Education (Government Schools Education Council) Appointment 2013 (No. 2)

Shane Rattenbury mla

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR CORRECTIONS
MINISTER FOR HOUSING
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR AGEING

Member for Molonglo

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

Dear Mr Doszpot

I am writing regarding comments by the Standing Committee on Justice and Community Safety in Scrutiny Report No 6 of 2 May 2013 on the *Community Housing Providers National Law (ACT) Bill 2013*. I thank the Committee for its comments. I offer the following response in relation to the matters raised by the Committee.

The Bill adopts the Community Housing Providers National Law to overcome the barriers, gaps and inconsistencies that have arisen through each State and Territory regulating community housing providers in a different way.

Nationally consistent legislation necessarily requires each jurisdiction to balance a need to account for the local context, including appropriate oversight, with the achievement of universal implementation. However as the Committee has identified there are a number of important issues to be resolved and each matter raised by the Committee is addressed in turn below.

The Committee questioned whether a clause of the Bill inappropriately delegates legislative power (to another Australian Parliament).

The committee questions whether a provision in the Bill in subclauses 7(2), (3) and (4) require any amendment to the National Law to be presented to the Assembly within 6 sitting days as a Disallowable Instrument is sufficient oversight for the Assembly.

One of the key objectives of the *Community Housing Providers National Law* is to ensure that regulatory requirements for community housing providers are consistent across Australia. The approach to making and amending the National Law is intended to ensure that the National Law is universally applied across all participating jurisdictions and that any future amendments are agreed by participating jurisdictions and adopted and implemented consistently.

The governance arrangements described in the *Intergovernmental Agreement*

to establish a National Regulatory System for Community Housing requires that any amendments to the National Law are agreed by the Ministerial Council prior to submission to the Parliament of the host jurisdiction. This Council is currently the Select Council on Housing and Homelessness, on which the ACT is represented by the ACT Minister for Housing.

The Committee's suggestion that amendments should come into force "only after a positive resolution of the Legislative Assembly" would cause the ACT to be potentially several months out of step with other jurisdictions in implementing changes to the National Law.

In effect the current provisions of the Bill whilst ultimately ensuring that any change in the law is supported by the Assembly does create the potential for an amendment to the law to be in force for a period before the Assembly can disallow the law.

There is a difficult balance between these competing issues, at this point it is considered that the 'ordinary' disallowance provisions are appropriate and provide the right balance between local oversight and national consistency.

The Explanatory Statement (ES) has been revised to provide greater clarity.

Clause 10 of the National Law

The Committee also questions the appropriateness of the delegation of legislative power under subclause 10(2) which requires Registrars to comply with "any guidelines made jointly by the relevant Ministers of each participating jurisdiction and published in the New South Wales Government Gazette or on the NSW legislation website".

While there is provision for binding guidelines governing the exercise of the functions to be made by the Council, the scope of these guidelines for the exercise of the Registrar's functions are of course limited by the substantive provisions of the Act (including the code in schedule1).

As the committee has previously observed this in and of itself is not a sufficient justification for delegating the power however in this situation it is relevant because of the relatively prescriptive nature of the statutory requirements. This is intended to provide a universal approach to avoid a lack of consistency in the implementation of the scheme that could impede a harmonised national system.

I acknowledge that there is limited direct oversight by the Assembly and that ordinarily this type of delegated power would be subject to a disallowance provision. Nevertheless in this circumstance given the nature of the particular power and the practical reality that the guidelines will have a relatively limited impact on the operation of the scheme and the need for a multi jurisdictional approach, it is appropriate that the capacity to make binding guidelines be delegated to the Council.

The committee also raised a concern about how a person may access the

guidelines. The guidelines are published on the NSW legislation website and ACT Parliamentary Counsel's Office will include a link on the Legislation Register to the Legislation website of the host jurisdiction as is their common practice.

In addition to publication on the NSW legislation website, the guidelines are also published on the National Regulatory System for Community Housing (NRSCH) website (http://www.nrsch.gov.au/).

The Explanatory Statement has been revised to provide greater clarity.

The Committee questioned whether there is a failure to protect the privileges against self-incrimination and of legal professional privilege.

The Bill and the National Law do not limit the common law privileges against self-incrimination and exposure to the imposition of a civil penalty or to client legal (legal professional) privilege. As the Committee has observed to restrict common law rights generally requires a clear and express intention to do so.[1]

In the context of legal professional privilege a clear indication of abrogation of the right is required.[2] The privilege against self incrimination may be limited by express words or by necessary implication.[3] There is no intention and no necessary implication to displace either of these privileges.

I do not believe that it is necessary to make reference to sections 170 and 171 of the *Legislation Act* in the Community Housing Providers National Law (ACT) Bill 2013. However I do recognise that this matter should be addressed in the Explanatory Statement and the ES has been revised to make it clear that clause 15(2) is not intended to displace these privileges. .

The Committee seeks a justification for the exclusion of Territory liability to compensate a person adversely affected by actions of the Registrar or Statutory Manager.

Clause 24 of the National Law provides for this exemption, however, Clause 7(1) of the Community Housing Providers National Law (ACT) Bill 2013 applies the National Law as a law of the Territory, except for Clause 24.

The Explanatory Statement has been revised to provide greater clarity.

Comment on the Explanatory Statement.

The Community Housing Providers National Law (ACT) Bill 2013 and the Community Housing Providers National Law (ACT) Bill 2013 Explanatory Statement were modelled on the New South Wales *Community Housing*

[1] *Coco v R* (1994) 179 CLR 427.

[2] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

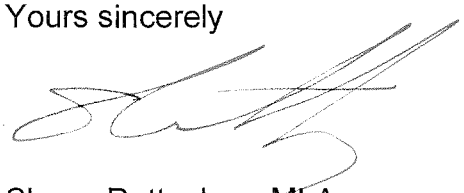
[3] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ.

Providers (Adoption of National Law) Act 2012 and the New South Wales Bill's Explanatory Statement. This approach has also been taken by other jurisdictions to ensure national consistency in the explanation of the Law.

The committee raised a particular concern about the application of the Human Rights Act to the national law. There is nothing in the Bill to exclude or limit the operation of the *Human Rights Act 2004* which will apply to both the operation and the interpretation of the Bill and the National Law in the ACT. The ES has been revised to make this clear.

I thank the Committee for it comments in relation to the Explanatory Statement and a revised ES addressing the issues raised by the Committee will be tabled during the debate on the Bill and a copy is attached to this letter.

Yours sincerely



Shane Rattenbury MLA
Minister for Housing

13 MAY 2013

Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety Scrutiny Committee's (the Committee) Report No. 5 (the Report) on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (the Bill).

The Committee has drawn a number of matters to the attention of the Assembly. I will respond to each of these matters separately.

Limitations on the right to privacy

The Committee refers to the discussion at pages 2 and 3 of the Explanatory Statement, which notes that clauses 11 to 13 of the Bill may limit the right to privacy under section 12 of the *Human Rights Act 2004* (HRA). The Committee notes that while the Explanatory Statement provides a justification for the Bill's limitation of the right to privacy, it does not refer to section 28 of the HRA 'or in substance employ the framework for justification that section 28 states' and recommends that I reissue the Explanatory Statement.

In this instance I have decided not to amend the Explanatory Statement as, in my view, it already substantively addresses the five factors set out under s 28(2) of the HRA. The Explanatory Statement clearly identifies:

a) the nature of the right affected — that is the right to privacy under s 12 of the HRA;
b) the importance of the limitation, which is clearly articulated — 'to ensure the subcommittee is able to undertake its mandate to "prevent torture and other cruel, inhuman or degrading treatment or punishment and to strengthen the protection of persons deprived of their liberty against torture and other forms of ill-treatment";

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c) the nature and extent of the limitation – the subcommittee's access rights under the bill, based on its mandate as set out in the Optional Protocol and in accordance with the subcommittee's guidelines;
d) the relationship between the limitation and its purpose –that the level of access provided to the subcommittee is to ensure that the subcommittee can effectively carry out its role; and
e) any less restrictive means reasonably available – that there are no less restrictive means available to achieve the purpose of the limitations identified. By ratifying the Optional Protocol, Australia will be accepting the jurisdiction of the subcommittee as defined in the Optional Protocol.

The Committee has indicated that 'a particular issue is whether the Bill's limitations on the right to privacy are the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve'. I draw the Committee's attention to the discussion on page 3 of the Explanatory Statement. The explanation of the limitation's purpose is taken directly from the Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment. The Explanatory Statement explains that without the level of access proposed by the Bill, the subcommittee would not be able to effectively carry out its role.

The Explanatory Statement further indicates that the Bill clearly limits the scope of the information that must be provided to the subcommittee to information that is relevant for evaluating the needs and measures that should be adopted to strengthen, if necessary, the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. Records held by a health practitioner, a lawyer or other professional who is under a duty not to disclose information are clearly excluded under the Bill.

Appointment of 'experts'

In relation to access to places of detention, clauses 11 and 12, the Committee has recommended that I clarify how and by whom it would be determined whether a person was an 'expert'. The Explanatory Statement explains at page 2 that the operation of this bill needs to be considered in conjunction with the provisions in OPCAT together with the *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment* and the subcommittee's *Outline of a regular SPT visit.*

Article 13 of OPCAT provides that members of the subcommittee may be accompanied, if needed, "by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention." Guideline 4 further provides that experts must have "expertise that is essential for conducting the visit, provided that such expertise does not exist among available members of the subcommittee" (para 9).

Access to information: clauses 13 and 14.

Clause 13 (3) prescribes a broad category of operational information in relation to the place of detention as distinct from the information prescribed in s 13(2) which relates to information relevant to the evaluation of needs and any measures that need to be adopted to strengthen the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. In drafting the national model bill, it was agreed that minimising access to sensitive operational information was necessary to mitigate any risk of compromising the security of detention centres, no matter how small that risk.

The purpose of this clause is to protect certain professionals from being required to provide information that would be subject to confidentiality arising out of a particular relationship. In relation to Legal Professional Privilege, it is difficult to envisage a circumstance in which the records would be held by a party other than the lawyer or the client who was a detainee. If there were, the obligation for confidentiality would be covered under 14 (1)(c). If legal records are held by a detainee, that person would not be obliged to provide that information in any case (although they may choose to). In the unlikely circumstance that such information were held by the detaining authority, it is likely that legal professional privilege would be extinguished in any case.

Interviews with a detainee or other person at a place of detention: clause 15.

As with clause 13(3), this clause prescribes a broad category of operational information in relation to the place of detention as distinct from the information prescribed in s 13(2) which relates to information relevant to the evaluation of needs and any measures that need to be adopted to strengthen the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. As with clause 13(3), this clause is intended to minimise transmittal of sensitive operational information.

The subcommittee's general operation and investigative powers

I note the Committee's comments in relation to the subcommittee's general operation and investigative powers. I also note the Committee's view that "the absence of [legal protections] is a significant factor pointing against compatibility of these provisions with the right to privacy in HRA section 12."

Section 10(1) of the Human Rights Act provides that no one may be tortured or treated in a cruel inhuman or degrading way. The purpose of this right, based on article 7 of the International Covenant on Civil and Political Rights, is to "protect the dignity and the physical and mental integrity of the individual". Under section 10, the ACT is obliged to "afford everyone protection through legislative and other measures as may be necessary against [acts prohibited under this section]" (*ICCPR general comment* 20, Para 2).

Ratification of OPCAT, including acceptance of the jurisdiction of the subcommittee, is a widely-sanctioned, international mechanism that this Government supports as a positive measure to monitor and prevent torture, cruel, inhuman or degrading treatment in places of detention in the ACT. The subcommittee has a set of rigorous guidelines that it must observe when undertaking its role, including only interviewing people with their "express informed consent" (guideline 8, para 22).

The Committee has drawn a number of technical clauses to my attention and recommended I respond to concerns that these provisions purport to restrict the legislative power of the Legislative Assembly and are apt to at least potentially mislead members of the public as to just what is the law of the Territory. The three provisions cited by the Committee are:

1. *clause 8: "A provision of any other territory law that prevents, or limits, the exercise of any function by the subcommittee in relation to a detainee or place of detention under this Act has no effect to the extent of any inconsistency with this Act";*
2. *subclause 13(5): "A provision of any Act or other law that restricts or denies access to records does not prevent the responsible Minister or detaining authority from complying with this section"; and*

3. *subclause 16(2): "This section has effect despite any duty of secrecy or confidentiality or any other restriction on the giving or disclosure of information (whether or not imposed by or under an Act) applicable to the person.*

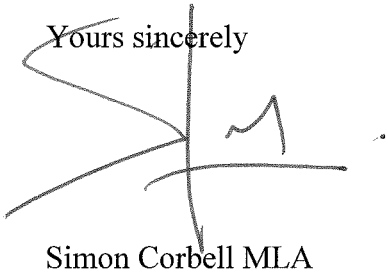
In relation to these provisions, the Committee has suggested that the following words would explain their operation and effect:

'The section is not expressed and does not intend to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.'

This is my understanding of the operation and effect of these provisions.

I trust my response satisfies the Committee's concerns in relation to these matters.

Yours sincerely



Simon Corbell MLA
Attorney-General

21.5.12