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

SCRUTINY REPORT 14

18 FEBRUARY 2014

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

COURTS LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to amend several pieces of legislation to make key improvements to the criminal and civil justice system in the ACT.

BILLS—COMMENT

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

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2013

This is a Bill to amend the *Births, Deaths and Marriages Registration Act 1997*, the *Births, Deaths and Marriages Registration Regulation 1998*, and the *Legislation Act 2001* to improve legal recognition of sex and gender diverse people in the ACT community.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The right to privacy (HRA section 12) in relation to the recording of a person's sex in the register of births

Section 24 of the *Deaths and Marriages Registration Act 1997* (the Act) provides a process whereby a person, or in the case of a child, the child's parents or guardians[1], may apply to the registrar-general for alteration of the record of the person's or the child's sex in the registration of their birth.

The position concerning an adult

Subsection 24(1) concerns an adult, and at present requires (paragraph (c)) as a condition of making a valid application that "the person has undergone sexual reassignment surgery". Clause 9 of the Bill proposes to repeal this paragraph substitute it with

> (c) the person believes their sex to be the sex nominated in the application (the altered sex), and—
>
> (i) has received appropriate clinical treatment for alteration of the person's sex; or
>
> (ii) is an intersex person.

The Committee raises no issue concerning the removal of the requirement that an applicant has undergone sexual reassignment surgery, but there is a significant rights issue arising from what is proposed as a substitute. The ACT Law Reform Advisory Council (ALRAC), in its report *Beyond the Binary: legal recognition of sex and diversity in the ACT* (Report 2, March 2012)[2] ('the Report')

[1] Subsection 24(3) permits an application by only one parent in certain circumstances.
[2] http://www.justice.act.gov.au/resources/attachments/LRAC_Report_7_June.pdf

addressed this issue, and noted that there was majority support within the sex and gender diverse communities in the ACT for self-identification alone to be a sufficient condition. It noted that

> [r]esearch conducted by A Gender Agenda, in their 2011 study of experiences of the sex and gender diverse communities in the ACT, reveals that most respondents (64 per cent) believe that the record of a person's sex should be changed on the basis of making a statutory declaration stating their self-identification as a particular gender; 27 per cent of respondents felt that, in addition, the production of some form of 'letter of support' from a medical or psychological professional should be required; and 6 per cent of respondents believed that some non-surgical medical intervention should also be required (Report at 33).

ALRAC did not however endorse this standpoint, preferring to leave the issue as one of "policy" for the government. The policy outcome is however one that engages the right to privacy (HRA section 12).

The Committee did not attempt to come to a view whether self-identification alone should be a sufficient condition for making an application by an adult, and if it did consider the issue some members would not accept this position. Given however the viewpoints of those directly affected by the policy adopted, the Committee recommends that the Minister explain why self-identification alone should not be a sufficient condition for making an application by an adult.

ALRAC considered that "[a]t the heart of the issue is the extent to which the person applying to change the record of their sex and gender identity has to offer some guarantee or level of comfort that their change of sex and gender identity is genuine and is being recorded in good faith" (at 40). If it is considered that an applicant must demonstrate something more than self-identification, there arises a question about the stringency of the requirement that the person must have received "appropriate clinical treatment for alteration of the person's sex". While this notion is left undefined, it does suggest some form of medical or therapeutic intervention. In its 2009 report, *Sex files: the legal recognition of sex in documents and government records* (ALRC Report), the Australian Law Reform Commission recommended that that the criterion be whether the person had undergone or was undergoing "sex affirmation treatment", and that "[p]sychological counselling concerning sex or gender identity" should satisfy this criterion; (at 38). Paragraph 24(1)(c)(i) appears to be more stringent. The ALRC proposal may not be appropriate in that it appears confusing.

The question is whether paragraph 24(1)(c)(i) might be replaced by a statement that better captures the viewpoint stated by ALRC.

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

The comments just made apply also to the provisions of subsection 25(1).

<u>The position of a child</u>

A child may not apply for alteration of a record, but its parents or guardians may do so if

> (b) the parents, or person with parental responsibility, believe on reasonable grounds that alteration of the record of the child's sex is in the best interests of the child; and
>
> (c) the child—
>
> (i) has received appropriate clinical treatment for alteration of the child's sex; or
>
> (ii) is an intersex person (paragraph 24(2)).

The comments above in relation to paragraph 24(1)(c) apply also to proposed paragraph 24(2)(c).

There is a question whether paragraph 24(2)(b) affords sufficient protection to a child. That the parents express an opinion as what is in the child's best interests is not problematic, but, on the face of it, the parents need pay no regard to the desires of the child. They need adjudge only whether they consider that alteration of the record of the child's sex is in the best interests of the child.

The ALRC standpoint was that "[i]n the case of a child (although possibly depending on the age of a child), the legislation could stipulate that the parent(s) or guardian must make a statutory declaration in relation to the child's desire to identify as a particular sex" (at 39). If this standpoint is accepted, some issues concerning subsection 24(2) arise.

The first is whether an alteration to the records should be available only in respect of children who are above a certain age.

The second is whether the parents should be required to state that the child desires the alteration.

The third is whether there should be some process that would permit a child to procure an alteration to a record where one or all of the relevant parents and guardians do not consider an alteration to be in the child's best interests.

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

CONSTRUCTION AND ENERGY EFFICIENCY LEGISLATION AMENDMENT BILL 2013 (NO. 2)

This is a Bill to amend a number of laws administered by the Environment and Sustainable Development Directorate.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The Committee notes that the Explanatory Statement acknowledges that in various respects provisions of the Bill engage some of the HRA rights. The Explanatory Statement contains a thoughtful and comprehensive analysis of the rights issues, and it is sufficient to refer to them.

- The presumption of innocence in HRA subsection 22(1) is engaged by provisions that would create a strict liability offence; see the Explanatory Statement at 21-23. The Committee adds that there should be specific reference to the availability of the defence of intervening conduct or event in section 39 of the *Criminal Code 2002* in respect of such offences, inasmuch as this defence may in some cases permit the accused to argue that they took 'reasonable steps' to avoid committing the elements of the defence.
- The right to privacy in HRA section 12 is engaged by proposed section 47 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*, which relates to the destruction of things seized under other provision; see the Explanatory Statement at 23-24.
- Although not referred to in the Explanatory Statement, a penalty for an offence that is seriously disproportionate to the gravity of an offence will engage HRA section 10 on the basis that it is an inhuman punishment. By reference to the standards stated in the *Guide to Framing Offences* issued by the Justice and Community Safety Directorate, the Explanatory

Statement provides a detailed justification for various increases in penalties proposed in the Bill; see Explanatory Statement at 19-20.

- By reference to the *Guide to Framing Offences*, the Explanatory Statement justifies a proposal to permit regulations made under subsection 66(5) of the *Electricity Safety Act 1971* to create offences and fix maximum penalties of not more than 60 penalty points for such offences; see Explanatory Statement at 20-21.The standard proposed in the *Guide*, which the Committee accepts as usually appropriate, is a maximum of 30 penalty points.

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

By clause 27, the Bill proposes to amend the *Electricity Safety Act 1971* to permit a regulation made under subsection 66(2) to apply, adopt or incorporate the law of another jurisdiction or an instrument as in force from time to time. Proposed subsection 66(4) states that section 47(5) or (6) of the *Legislation Act 2001* do not apply to any such law or instrument with the result that the law or instrument would not be a notifiable instrument and thus not accessible on the ACT Legislation Register.

The Explanatory Statement acknowledges that "the principle of access to law is important", and justifies the disapplication of section 47 on the basis "full access to law would require that the Territory could only use its own legislation and external documents that were not subject to copyright. Clearly this is not possible, especially for electrical and product standards".

It is on the other hand, common to find in Territory laws that disapply section 47 provision for a member of the public to have access to the adopted law, etc at some designated place, such as at the office of the relevant regulator. Such access will not raise copyright problems.

The Committee recommends that the Minister advise whether consideration was given to providing for an alternative mode of access to the adopted laws.

ROAD TRANSPORT (ALCOHOL AND DRUGS) AMENDMENT BILL 2013

This is a Bill to amend the *Road Transport (Alcohol and Drugs) Act 1977* in relation to alcohol and drug screening tests.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

<u>The HRA rights to liberty (HRA subsection 18(1)) and to freedom of movement (HRA section 13) and the power of a police officer to direct drivers to remain at the scene where they were originally pulled over by police for the purpose of an alcohol or drug screening test where a screening device is not immediately available or not in working order</u>

Clauses 5 to 12 of the Bill propose to empower police officers to direct drivers to remain at the scene where they were originally pulled over by police for the purpose of an alcohol or drug screening test where a screening device is not immediately available or not in working order. These clauses engage the HRA rights to liberty (HRA subsection 18(1)) and to freedom of movement (HRA section 13). An exercise of these powers of direction would bring about a preventative detention of a person for more than a momentary period, they may be viewed as a significant qualification of liberty and of freedom of movement.

The Explanatory Statement at 3-4 offers a justification for limiting these rights, to which the Committee refers the Assembly. It is puzzling that the Explanatory Statement does not attempt to

offer its justification in terms of HRA section 28, and in particular in accord with the framework stated in subsection 28(2).

The Committee draws these matters to the attention of the Assembly and recommends that the explanatory statement offer its justification in terms of the framework in HRA section 28.

Taking clause 5 and proposed subsection 8(1A) as an example, the Committee notes that there is no requirement for a police officer to consider any matter concerning the condition of the driver before making a direction. (It is noted that subsection 8(1) of the Act requires a police officer to order a screening test simply on the basis that the person is or was a driver of a vehicle before ordering a screening test.) Given the nature of the limitation on the HRA rights, there is a question whether an order under proposed subsection 8(1A) should be based on some more particular consideration relevant to the state of the driver.

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

<u>The HRA right to the presumption of innocence (HRA subsection 22(1)) and the qualification of the mistake of fact defence in section 36 of the Criminal Code 2002 available in respect of the strict liability offence in subsection 20(1) of the Act.</u>

The Explanatory Statement (at 1-2) clearly explains the context in which this issue arises.

> A driver commits an offence under section 20 of the Act if they drive with a prescribed drug in their oral fluid or blood (as determined by the results of analysis of samples of the driver's oral fluid or blood). Prescribed drugs are: methylamphetamine (commonly known as ice, speed or crystal meth), cannabis, and ecstasy.
>
> The offence in section 20 is a strict liability offence, which means that no criminal intent or fault element is required to be proven. As this offence is a strict liability offence, drivers are able to rely on section 36 of the *Criminal Code 2002*, which provides that a person is not criminally responsible for a strict liability offence if the person was under a mistaken but reasonable belief about the facts, and, had the facts existed as believed, the conduct would not have been an offence.
>
> This amendment [as proposed in clause 13, by inserting subsection 20(2A) in the Act] would prevent drivers from seeking to rely on this defence where they knowingly took a prohibited substance which they thought was not a prescribed drug which in fact turned out to be a prescribed drug.

That section 36 of the Criminal Code permits the mistake of fact defence to be raised is an important consideration in an assessment whether the creation of a strict liability offence is, in terms of HRA section 28, a justifiable limitation of the presumption of innocence (HRA subsection 22(1)). Qualification of this defence is thus a matter that needs to be justified.

The Committee refers the Assembly to the justification offered in the Explanatory Statement. It notes that this is somewhat confusing in that it refers to "illicit, non-prescribed, drugs" and does not explain that in so doing it equates this concept to that of "controlled drug" used in proposed paragraph 20(2A)(b). Again, there is also no reference to HRA section 28.

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

Strict liability offences and the presumption of innocence (HRA subsection 22(1))
Imposition of a legal burden of proof on a defendant and the presumption of innocence

These issues arise out of clause 15, which proposes to repeal section 22B of the Act and insert new sections 22B and 22C. The Committee refers the Assembly to the explanation and justification offered in the Explanatory Statement at 4-5.

The explanatory statement notes that while a limitation of the presumption of innocence may arise, and offers a justification in relation to the strict liability element, it does not acknowledge that subsection 22C(3) places a legal burden of proof on a defendant in relation a defence. In particular, there is a question whether it would sufficiently meet the object of the limitation if the defendant carried only an evidential burden. Again, there is also no reference to HRA section 28.

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

TOTALISATOR BILL 2013

This is a Bill is for an Act to create a framework for the conduct of totalisators and the regulation of totalisator betting. The Bill will repeal the *Betting (ACTTAB Limited) Act 1964*.

Do any clauses of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?—term of reference (3)(c)

Clauses 22 and 23 of the Bill provide for offences in relation to conducting a totalisator in the ACT, or operating totalisator equipment, by a person who does not have a licence to operate a totalisator.

Part 2 contains the principal requirements associated with the licensing of totalisator activities; part 3 contains the mechanisms to support the eligibility requirements in Part 2 of the Bill and grants the ACT Gambling and Racing Commission (the Commission) powers to acquire the necessary information to assess whether an organisation or corporation meet the eligibility requirements and therefore can be issued with a licence; part 5 contains the mechanisms and requirements for approval of totalisator systems and equipment that may be used in totalisator operations; and part 6 provides the regulatory framework to monitor and enforce totalisator activities in the Territory.

The clauses in these parts of the Bill confer a wide range of administrative powers on the Minister and on the commission, and in almost every instance there is no stated limit concerning the matters that would be relevant or irrelevant to the exercise of the power. On their face, these powers are not sufficiently defined.

It is important that so far as feasible administrative power should be subject to stated limits. Such statements afford guidance to those responsible for the administration of the legislative scheme, and in this way promote good administration. From the public's viewpoint, they afford guidance to those who have been or may be affected by the exercise of power. Should there be an appeal to ACAT, or judicial challenge, to an exercise of power, the statements enhance the capacity of these bodies to correct error.

The Committee does not consider it a sufficient answer to say that ACAT or the courts could fix limits to the administrative powers by a mode of interpretation that seeks to find limits in the policy and scheme of the Act. It should not be necessary for a person to go the expense (and in the case of the courts, a heavy expense) of resorting to ACAT or the courts to find out the limits of the power.

The provisions conferring unfettered powers are those in subclause 11(1), clauses 16 and 17, subclause 18(5), paragraph 24(1)(d), subclause 24(2), paragraph 25(1)(b), subclause 25(2), paragraph

27(c), subclauses 28(1), 37(1), 37(4), 38(1), 38(4), 41(3), 42(1), 42(2), 43(2), 47(1), paragraph 49(1)(b), subclause 49(3), paragraph 50(1)(b), subclauses 52(1), 52(3) and 70(6).

In each case, the Committee asks the Minister whether consideration might be given to inserting in each case an indication of the matters relevant or irrelevant to the exercise of the discretionary power.

In particular, there are instances where the subjective nature of the power could be reduced by requiring that it be exercised only where the Minister or the commission has "reasonable grounds" to consider that the power should be exercised. The relevant provisions are paragraph 24(1)(d), subclause 24(2), subclause 25(2), paragraph 27(c), subclauses 41(3), 43(2), 48(1), paragraph 49(2), subclause 49(6), paragraph 50(1)(b), paragraph 52(1)(b), 52(3) and 70(6).

In each case, the Committee asks the Minister whether consideration might be given to inserting in each case a requirement that the power be exercised only where the Minister or the commission has "reasonable grounds" to consider that the power should be exercised.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

<u>The right to privacy in HRA section 12 and the requirements to provide information</u>

This matter is addressed briefly in the Explanatory Statement. It notes that the Bill

> includes a number of requirements for the provision of information including personal information and details and the ability of the Commission to obtain such information. These requirements may be viewed as engaging the right to privacy. Principal among the provisions which establish these requirements are those in clauses 7, 8, 9, 24, 25, 27, 28 and 41. The provisions of these clauses may require a person to disclose personal details, including a person's criminal history.

At 4-5, the Explanatory Statement then provides a brief justification which asserts that the provisions are necessary, reasonable and proportionate. Given however that the provisions engage the right to privacy, the justification should be framed so as to indicate that the framework stated in HRA section 28 has been taken into account. In particular, it is usually necessary to specifically indicate that consideration was given to whether there was reasonably available any less restrictive means to achieve the purpose the limitation of the HRA right seeks to achieve (see HRA paragraph 28(2)(e)). (See generally the Committee's *Guide to writing an explanatory statement* August 2011, at 5-7.)

The Committee draws these matters to the attention of the Assembly and recommends that the explanatory statement offer its justification in terms of the framework in HRA section 28.

The powers of the commission under clause 28 to require executive officers to give certain information and consents to the commission require particular attention; (the Explanatory Statement at 18-19 offers a brief justification for this clause.) By paragraphs 28(1)(c) and (d), the commissions may require provision of "information" or "documents", but the only limitation placed upon the power to seek this information is that which is "stated in the notice", which, in effect, is no limit at all.

A similar concern arises in respect of paragraph 28(1)(f), by which the commission may require an executive officer to "provide authorities and consents necessary for the commission to obtain further information from other people".

In each case, the Committee asks the Minister whether consideration might be given to requiring the commission to state the purpose for which the information or documents, or the authorities and consents, are sought.

A note to subclause 28(1) states than "an executive officer who fails to comply with a requirement under this subsection is no longer an eligible person (see s 25 (1) (h))". This raises the question whether the obligations placed on the executive officer should be qualified by permitting the person to claim that they have a "reasonable excuse" of non-compliance. A particular basis for such a claim might be that the disclosure by the person to the commission of the information or documents would require the person to breach a duty of confidence owed to a third person.

The Committee asks the Minister whether consideration might be given to qualifying the obligation of a person to comply with a direction given under subclause 28(1) so that the person might claim that they have a "reasonable excuse" of non-compliance.

Displacement of the common law privileges against self-incrimination and exposure to the imposition of a civil penalty, and the right in HRA paragraph 22(2)(i) of anyone charged with a criminal offence "not to be compelled to testify against himself or herself or to confess guilt"

In relation to the powers of the commission under subclause 28(1), subclauses 28(2) and (3) provide:

> (2) A person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to comply with a requirement under subsection (1).
>
> Note The Legislation Act, s 171 deals with client legal privilege.
>
> (3) However, any information, document or thing obtained, directly or indirectly, because of the person's compliance with a requirement under subsection (1) is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence against—
>
> (a) this Act; or
>
> (b) the Criminal Code, part 3.4 (False or misleading statements, 20 information and documents).

It is generally accepted by the Committee, (and by the courts that have considered the matter), that a displacement of the privileges against self-incrimination and exposure to the imposition of a civil penalty is justifiable where the information or documents disclosed cannot be used subsequently upon the prosecution of the person for a criminal offence (or the imposition of a civil penalty) either directly or derivatively (that is, as a source for discovering other inculpatory evidence). An exception to this guideline is allowed where the offence charged is the making of a false statement.

In this case, however, the exceptions extend to a proceeding for an offence against "this Act". In many, if not all, cases the commission will be making a requirement of an executive officer under subclause 28(1) in order (perhaps only in part) to determine if the person may have committed an offence against the Act. For practical purposes, the privileges have been completely displaced.

The Explanatory Statement (at 6-7) offers a justification for subclause 28(2) on an assumption that it limits the right in HRA paragraph 22(2)(i) of "anyone charged with a criminal offence"(the opening words of subclause 22(2)) "not to be compelled to testify against himself or herself or to confess guilt". The essential point in justification is that "voluntary participation in a regulatory scheme may imply a waiver of the benefit of the self-incrimination privilege". This line of argument might be

considered to permit too great an inroad on the common law right and/or paragraph 22(2)(i) of the HRA. Acceptance of this argument would greatly reduce the practical significance of paragraph 22(2)(i) and of the common law right.

The Committee also notes that no attempt is made to justify the limitation in terms of HRA section 28.

The Committee considers that there is a real question as to whether subclause 28(2) is an undue trespass on a personal right, and/or an unjustifiable derogation of the right in HRA paragraph 22(2)(i)[3].

The Committee draws these matters to the attention of the Assembly and recommends that the explanatory statement offer its justification in terms of the framework in HRA section 28.

Strict liability offences and the presumption of innocence (HRA subsection 22(1))

Subclause 55(1) provides that a person who holding a licence to conduct a totalisator who accepts a bet placed by a child is guilty of an offence. The maximum penalty prescribed is 50 penalty units. This is a strict liability offence (subsection 55(2)). The Explanatory Statement justifies this limitation of the presumption of innocence on the basis that this is a regulatory offence. The Committee has no concern.

It does however expect that the Explanatory Statement will draw attention to the Criminal Code defences available, and in particular the mistake of fact defence (Code section 36) and the defence of intervening act (Code section 39).

Natural justice and the Minister's power to suspend a licence without notice (clause 43)

Clause 43 provides that if the Minister has given a direction to a licensee under clause 42 the Minister may by written notice immediately suspend the licensee if the Minister considers it necessary to do so.

This is a decision that would have an immediate and significant impact on the business of the licensee and ordinarily the common law principles of natural justice in relation to administrative decision-making would require that to be valid the decision-maker should have afforded some measure of procedural fairness to the person before making the decision. The Explanatory Statement assumes that this would not be the case here. It states:

> This provision for immediate suspension of a licence is one of "last resort". This is the most serious action that can be taken against a licensee as the process for an immediate suspension of a licence circumvents the normal disciplinary provisions**. The licence becomes suspended prior to any natural justice principles or process being implemented**. Provisions of immediate suspension are a regulatory best practice mechanism for matters where public safety are at a high risk or the public interest is so vastly compromised that the disadvantages to the licensee are outweighed by the greater needs of the community (at 23) (emphasis added).

[3] There is a question whether the HRA right has any bearing on this situation. On its face, the right in HRA paragraph 22(2)(i) of anyone charged with a criminal offence not to be compelled to testify against himself or herself or to confess guilt "appears limited to the application of the privilege during the defendant's own trial. Even if it were read more broadly to cover interrogation by the police, it is nevertheless restricted to events after a person is charged, whereas the key period when the privilege against self-incrimination is at risk in practice is the time between suspicion and charge": J Gans "FW: Evidence Law under Victoria's Charter: Rights and Goals (Part 1)" [2008] *UMelbLRS* 9 http://www.austlii.edu.au/au/journals/UMelbLRS/2008/9.html

This may or may not be a correct understanding of how a court would view the matter. In any event, however, there is no reason why a licensee could not be accorded an opportunity to be given an immediate opportunity to show cause for the revocation of the Minister's notice. To make this effective, the Minister would need to be obliged to state reasons for the decision to suspend. This procedure would not only protect the licensee, but add strength to an argument that natural justice was not required prior to the decision being made.

The ability of the licensee to appeal to ACAT might be of little value, given the delays in this process and the great damage that would have been done to the licensee's interests.

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

Should the disciplinary action the commission may take under paragraph 49(1)(c) be classified as a "criminal proceeding" for the purposes of the HRA and if so, what is the consequence?

Clause 49 empowers the commission to take disciplinary action against a licensee. Subclause 46(1) states the kinds of action that may be taken, and includes "(c) ordering the licensee to pay to the Territory a financial penalty of not more than $1 000 000". By subclause 46(3) "[a] financial penalty imposed under this section may be recovered as a debt payable to the Territory". Establishing a debt in a civil court would require only proof on the balance of probabilities of fact necessary to justify the order.

While this action is not expressed as an offence, this may be how it should be regarded in substance for the purpose of assessing whether it is compatible with the some of the criminal process rights stated in the HRA. The Committee has in the past addressed this issue, but for present purposes it is sufficient to refer to a paper issued recently by the Joint Committee on Human Rights of the Commonwealth Parliament.[4] It states (at paragraph 1.12) that the Joint Committee "considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as "disciplinary" rather than as "criminal").

While the fourth dot point applies to suggest that the action in paragraph 46(1)(c) is not criminal, the other three factors suggest strongly that it is. Assuming this to be the case, subsection 46(3) derogates from that aspect of the presumption of innocence in HRA subsection 22(1) which requires that the elements of a criminal offence be established by the prosecution beyond reasonable doubt is limited by subsection 46(3).

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

[4] *Practice Note 2 (interim)*
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Practice_Notes/practicenote2/index

COMMENT ON PROPOSED GOVERNMENT AMENDMENTS—ANIMAL WELFARE (FACTORY FARMING) AMENDMENT BILL 2013

The Minister for Territory and Municipal Services has proposed amendments to this Bill. A Supplementary Explanatory Statement explains that the object is to extend the prohibition in proposed section 9A – which relates only to keeping a laying fowl in a battery cage – to their keeping in any form of cage. How this is to be achieved is explained lucidly in the Supplementary Explanatory Statement.

In Scrutiny Report No 12 of this Assembly the Committee reported on the Bill and identified some human rights issues. The Committee refers to the Minister's response of 12 February 2014 (attached to this report No. 14), and to the Supplementary Explanatory Statement.

The Committee commends the quality of these responses and in particular to the use in the Supplementary Explanatory Statement of HRA section 28 as a framework for justification of a limitation of a HRA right.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-267 being the Canberra Institute of Technology (Fees) Determination 2013 made under subsection 53(1) of the *Canberra Institute of Technology Act 1987* **revokes DI2011-205 and determines the fees payable for attendance at public access courses and programs.**

Disallowable Instrument DI2013-268 being the Legal Aid (Commissioner—ACTCOSS nominee) Appointment 2013 made under paragraph 16(1)(c)(iv) of the *Legal Aid Act 1977* **appoints a specified person, nominated by the executive committee of the ACT Council of Social Services, as a commissioner of the Legal Aid Commission.**

Disallowable Instrument DI2013-269 being the Electoral (Fees) Determination 2013 (No. 2) made under section 8 of the *Electoral Act 1992* **revokes DI2013-133 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-271 being the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2013 (No. 1) made under section 9 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **revokes DI2011-81 and determines targets for the use of renewable energy (electricity).**

Disallowable Instrument DI2013-272 being the Fisheries Prohibition and Declaration 2013 (No. 2) made under sections 13, 15, 16, and 17 of the *Fisheries Act 2000* **revokes DI2013-248 and determines the restrictions and requirements on fishing.**

Disallowable Instrument DI2013-273 being the Marriage Equality (Same Sex) (Fees) Determination 2013 made under section 48 of the *Marriage Equality (Same Sex) Act 2013* **determines fees for the purposes of this Act.**

DISALLOWABLE INSTRUMENT—COMMENT

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

Validity of appointments / Are these public servant appointments? / Adequacy of explanatory statement.

Disallowable Instrument DI2013-270 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2013 (No. 1) made under section 194 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **appoints specified persons as chair and members of the Medicines Advisory Committee.**

This instrument appoints 3 specified persons as the chair and as members of the Medicines Advisory Committee. The instrument states that it is made under section 194 of the *Medicines, Poisons and Therapeutic Goods Act 2008*, which provides:

194 Establishment of medicines advisory committee

The Medicines Advisory Committee is established.

The explanatory statement for the instrument also refers to section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, which provides:

635 Medicines advisory committee—membership

(1) The medicines advisory committee consists of the following members appointed by the Minister:

(a) a chair;

(b) 2 other members.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) A person is not eligible for appointment to the medicines advisory committee unless the person is a doctor.

Note Doctor does not include an intern doctor (see dict).

(3) The medicines advisory committee must include—

(a) at least 1 member who has had experience in the teaching or practice of psychiatry; and

(b) 1 member nominated by the Australian Capital Territory Branch of the Australian Medical Association.

(4) The instrument appointing, or evidencing the appointment of, a medicines advisory committee member must state whether the person is appointed as the chair, or as another member, of the committee.

The Committee notes that there is nothing in the instrument, or in the explanatory statement for the instrument, that gives any indication as to whether the requirements of subsection 635(3) have been met. The explanatory statement states:

> This Instrument, made under section 194 of the Medicines, Poisons and Therapeutic Goods Act, appoints the following persons as members of the Committee:
>
> - Dr Rashmi Sharma;
> - Dr Alexander Stevens; and
> - Dr Peter Norrie.
>
> Pursuant to section 635 of the Medicines, Poisons and Therapeutic Goods Regulation 2008 Dr Rashmi Sharma is appointed as Chair of the Medicines Advisory Committee.
>
> The Minister has consulted with the Royal Australian and New Zealand College of Psychiatrists, the Australian Medical Association, the ACT Office for Women and the Office for Multicultural, Aboriginal and Torres Strait Islander Affairs on the appointments.
>
> The appointments are for a period of three years commencing on the day after notification.
>
> This instrument is a disallowable instrument under section 229 of the *Legislation Act 2001*.

This does not address the subsection 635(3) requirements.

As the Committee has consistently stated, it does not consider it to be an onerous requirement for instruments of appointment, either on their face or in the explanatory statement, to demonstrate that any formal requirements in relation to the appointment have been met.

As the Committee noted in its Scrutiny Report No 47 of the *Seventh Assembly* (at pages 29-30), in relation to the Racing Appeals Tribunal Appointment 2011 (No. 5) (DI2011-303), in making this comment, the Committee suggests that it is not merely being pedantic in relation to trying to ensure that any pre-requisites for a particular appointment have been met.

As the Committee has previously noted, in 2011, in the case of *Kutlu v Director of Professional Services Review*[5] ([2011] FCAFC 94 (28 July 2011)), the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth *Health Insurance Act 1973*, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

In *Kutlu*, a medical practitioner challenged action taken against him on the basis that members of various committees appointed from the PSR Panel that were involved in the action against him were not properly appointed, because the AMA had not been consulted in relation to various appointments. The Full Federal Court considered whether the statutory requirement to consult was a mandatory requirement, or merely direction that would not result in invalidity if not followed. The Court found that it was a mandatory requirement and that the requirements to consult were "essential preliminaries to the Minister's exercise of the power of appointment". The Full Court

[5] See http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html

found that, as a result, various things done in relation to Dr Kutlu, by various committees, were invalid. The Court stated (at para 32):

> [T]he scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices …

The wider effect of the decision in *Kutlu* was to invalidate scores of other investigations of other medical practitioners. Its effect was extremely damaging – including in a financial sense – to the Commonwealth.

The decision in *Kutlu* (and its consequences) underlines the Committee's reasons for maintaining its diligence in relation to attempting to ensure that any pre-requisites for appointments that come before the Committee have been met. As the Committee has consistently stated, the Committee does not consider that what it seeks imposes an onerous requirement on those who make appointments.

In addition to the issue with subsection 635(3), the Committee notes that there is no indication as to whether or not, in fact, these appointments should be made by disallowable instrument. While the explanatory statement *states* that this is a disallowable instrument, under section 229 of the *Legislation Act 2001*, the Committee notes that, as a result of section 227 of the Legislation Act, section 229 only applies to appointments of persons *other than* public servants. It is for this reason that the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*[6], the Committee stated:

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

There is no such statement here.

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

Further, the Committee would be grateful if the Minister could confirm that the requirements of subsection 635(3) of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* have been met in relation to the appointments made by this instrument and also confirm that the persons appointed are <u>not</u> public servants.

[6] See http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2013-26 being the ACT Teacher Quality Institute Amendment Regulation 2013 (No. 1) made under the *ACT Teacher Quality Institute Act 2010* **amends the ACT Teacher Quality Institute Regulation 2010 by implementing the Australian Professional Standards for Teachers and enforcing requirements of the National Education Reform Agreement between the Commonwealth and the ACT.**

Subordinate Law SL2013-27 being the Road Transport (Alcohol and Drugs) Amendment Regulation 2013 (No. 2) made under the *Road Transport (Alcohol and Drugs) Act 1977* **prescribes the Dräger DrugTest 5000 as an instrument for conducting oral fluid analysis for the purposes of the Act.**

Subordinate Law SL2013-28 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2013 (No. 2) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **provides for the continued dispensing of certain medicines without prescription.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 27 November 2013, in relation to comments made in Scrutiny Report 13 concerning the Crimes Legislation Amendment Bill 2013 and proposed Government amendments to that Bill (attached).
- The Attorney-General, dated 27 November 2013, in relation to comments made in Scrutiny Report 13 concerning the Heavy Vehicle National Law (ACT) Bill 2013 (attached).
- The Minister for Territory and Municipal Services, dated 12 February 2014, in relation to comments made in Scrutiny Report 12 concerning the Animal Welfare (Factory Farming) Amendment Bill 2013 (attached).
- The Minister for Territory and Municipal Services, dated 13 February 2014, in relation to comments made in Scrutiny Report 12 concerning Disallowable Instrument DI2013-223 Animal Welfare (Mandatory Code of Practice) Approval 2013 (attached).

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

Those responses provided to the Committee in a format which meets Web Content Accessibility Guidelines 2.0 (WCAG 2.0), and indicated as "attached", are reproduced at the end of this report.

Mick Gentleman MLA
Deputy Chair
18 February 2014

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)

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
(Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA CITY 2601

Dear Mr Doszpot

I write with reference to Scrutiny Report 13 provided by the Standing Committee on Justice and Community Safety (the Committee) on 22 November 2013 which provides comment on the Crimes Legislation Amendment Bill 2013 (the Bill) and proposed Government amendments to that Bill. I thank the Committee for its consideration of these measures.

Historic Sexual Offences – limitation periods

Rights limited
The Committee refers to laws of the United States of America to suggest that the right against retrospective criminal laws at section 25(1) of the *Human Rights Act 2004* (the HR Act) may be limited by the retrospective repeal of historic sexual offence limitation periods.

If this right is in fact limited it is justified and proportionate as outlined below.

The Committee suggests that the right to a fair trial, the right to be tried without unreasonable delay and the right to examine prosecution witness (at sections 21(1), 22(2)(c) and 22(2)(g), respectively of the HR Act) are limited by the amendment. These limitations are acknowledged and discussed in the Explanatory Statement to the Bill.

Any limitation of these rights is justified and proportionate as outlined in the Explanatory Statement and below.

Justification according to subsection 28(2) framework
The Committee recommends that I provide a justification according to the framework stated in the HR Act subsection 28(2). The Committee then states that 'in particular there is a question as to whether there are reasonably available means for achieving the purpose of the Bill that are less restrictive of the relevant rights of the defendants'.

Much of the analysis of this point is outlined in the Explanatory Statement to the Bill I further elaborate as follows.

The right against retrospective criminal laws

The right states at section 25(1) of the HR Act that 'No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.'

The retrospective repeal of the limitation periods proposed in this Bill do not have the effect that a person may be held guilty of a criminal offence due to conduct that was not a criminal offence when it was engaged in. In *Kononov v Latvia*[7], the European Court of Human Rights considered the issue of time limitations *in* relation to article 7 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms.* This case concerned the prosecution of war crimes, in the context of a domestic criminal law applicable at the time of the offences, under which the prosecution would have been statute barred in 1954. The majority of the Grand Chamber considered that the prosecution did not amount to a retrospective application of the criminal law, as it reflected the application of international criminal law (which was not subject to time limits), rather than the application of the domestic law.

In a joint concurring opinion, Justices Rozakis, Tulkens, Spielman and Jebens, while agreeing with the majority, corrected an inference, which might have arisen from the majority judgment, that a prosecution amounting to an extension of the domestic limitation period would have infringed Article 7. These judges stated that:

> *The right approach to [our] mind is that Article 7 of the Convention and the principles it enshrines require that in a rule of law system anyone considering carrying out a particular act should be able, by reference to the legal rules defining crimes and the corresponding penalties, to determine whether or not the act in question constitutes a crime and what penalty he or she faces if it is carried out. Hence no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly on the basis of rules existing at the time of the commission of the act.*

The Justices distinguished the issue of time limits as a procedural rather than a substantive aspect of the criminal law, which was not relevant to the question of retrospective application.

However, if this right is in fact limited, as suggested by the Committee, it is justified and proportionate for the following reasons.

The Explanatory Statement to the Bill states that 'While the right to not have criminal proceedings brought against a person where a statutory limitation on such proceedings has accrued is not protected by the *Human Rights Act 2004* it warrants some discussion here. This right is limited by the amendment and the limitation is reasonable and justified.'[8]

The purpose of the amendment is to afford victims of historic sexual offences the opportunity to have a prosecution brought against the alleged offender, providing such victims with access to the justice system that was previously denied to them.

It is particularly important to provide this opportunity to historic sexual offence victims as it is well-documented that sexual assault and abuse victims are likely to delay reporting of the crime for a number of reasons and would therefore not have been in a position to report the offence within the 12- month limitation period. The amendment would have the effect of placing both the victim and defendant in these historic sexual offences in the same position as victims and defendants in other historic sexual offence cases, where no limitation period applies.

The amendment would remove a defendant's accrued right to immunity from prosecution.

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[7] [2010] ECHR 667 (17 May 2010)

[8] Explanatory Statement, Crimes Legislation Amendment Bill 2013, page 9

This is essential to afford victims of certain historical sexual offences the opportunity to have criminal proceedings brought for those offences. There are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. In particular, the amendment provides a number of safeguards to ensure that it is the least restrictive approach possible.

(a) Limitation period not retrospectively repealed for less serious offences

The limitation period for these offences is not retrospectively repealed where the offence allegedly occurred (with a consenting non-relation) in a public place. The purpose of this provision is to ensure that consenting sexual acts between non – related adults cannot be prosecuted due to the retrospective repeal.

While the first 2 of these offences (buggery and attempt to commit buggery) refer to 'bestiality with any animal' the amendment does not retrospectively repeal the statutory limitation period for the purpose of allowing a criminal proceeding for an offence of bestiality alone. This is because the offence of bestiality, as it was at the time, will not involve a victim in the same way as other offences covered by the amendments.

(b) Current protections exist for all historic sexual offence cases

Firstly, at common law a trial judge is required to warn a jury where there has been a long delay in bringing a prosecution for a sexual offence, resulting in a perceptible risk of forensic disadvantage to the defendant: *Longman v The Queen* (1989) 168 CLR 79; *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343; *R v BWT* (2002) 54 NSWLR 241; *Dyers v The Queen* (2002) 210 CLR 285. Such forensic disadvantage may be the death of a crucial witness, the loss of documents that could identify the location of the defendant on a particular date or the lost opportunity of investigating the circumstances of the alleged offences.

Secondly, the ACT Supreme Court has the power under the Court Procedures Rules 2006 and the *Human Rights Act 2004* to permanently stay proceedings where the accused would not have a fair trial due to an inability to test facts in issue due to the passage of time. While a permanent stay is an exceptional remedy, it may be granted if the defendant's right to a fair trial has been prejudiced: *Jago v District Court* (1989) 168 CLR 23, for example, by undue delay amounting to abuse of process. The defendant must show that the effect of the delay is that he/she cannot receive a fair trial, despite the trial judge's powers to control procedure, exclude evidence, and give directions to the jury.[9]

Thirdly, there are a number of sentencing principles that protect an accused convicted of an historic sexual offence. A court is "...to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender" (*R v MJR* (2002) 54 NSWLR 368). This means that a court will look to the sentencing range that existed at the time of offending and if that cannot be established, the court will "sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time" (*R v Roberts* [2003] NSWCCA 309, Howie J).

Delay may also be a mitigating factor in sentencing: "a delay in investigation and prosecution of an offence may, when lengthy, lead to a degree of leniency being extended" (*R v Todd* [1982] 2 NSWLR 517 at 519). Delay may affect fairness because of changed circumstances, further suspense or anxiety.

(c) Modern age defence applies to relevant historic sexual offences

Fairness to an accused is enhanced by the Bill which provides that a criminal proceeding cannot be brought against a defendant who is less than 2 years older than the complainant for the following offences:

- Carnally knowing a girl between ten and sixteen

[9] For an example of the circumstances in which a permanent stay will be granted due to an unreasonable delay see: *R v Kara Lesley Mills* [2011] ACTSC 109.

- Attempt to carnally know a girl between ten and sixteen; and
- Indecent assault of girl under sixteen.

This is the law that applies today in the ACT to defendants of comparable sexual offences against children (for example, the offence of sexual intercourse with a young person under 16). This amendment will ensure that it also applies to defendants in proceedings for these historic sexual offences.

The right to a fair trial, the right to be tried without unreasonable delay and the right to examine prosecution witnesses

The Explanatory Statement to the Bill states that 'In individual cases, the amendment may limit the right to a fair trial and/or rights in criminal proceedings (including the right of anyone charged with a criminal offence to be tried without unreasonable delay and to examine prosecution witnesses) at sections 22(2)(c) and (g) of the *Human Rights Act 2004* due to the delay in prosecution.'[10]

The Explanatory Statement discusses in detail the purpose of the limitations, the importance of those purposes, the nature and extent of the limitation, and why there are not any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. This discussion is outlined above in relation to the right against retrospective criminal laws as the same factors are relevant for a discussion of each of these rights.

Section 28(2) analysis

The Committee states that 'it might be considered that the risk of unfairness in any cases that might be prosecuted as a result of section 441 is such that the possibility of prosecution should not be created.'

The rights of victims of historic sexual offences must be balanced against the rights of people who allegedly committed the relevant historic sexual offences. The HR Act upholds human rights but also acknowledges this balancing process when it states that such rights may be limited reasonably and by laws that can be demonstrably justified in a free and democratic society. As outlined above, the importance of providing fairness to victims, together with the safeguards provided by the Bill and current laws means that the amendment, while limiting certain rights, is reasonable and justified.

Californian model

The Committee refers to a 'very similar law enacted in California in 1993'. The Committee quotes a summary of this law as follows:

> In 1993 California passed a statute allowing for the criminal prosecution of individuals where a prior statute of limitations already expired when: (1) the victim was less than eighteen years of age at the occurrence of the crime; (2) the crime involved substantial sexual abuse; (3) independent sources provide evidence "clearly and convincingly" corroborating the victim's allegations; (4) the victim reported the allegations to law enforcement; and (5) the state begins prosecution within one year of allegations made by the victim to law enforcement.

The restrictions provided by the Californian model are not considered appropriate for the following reasons (numbers correspond to the numbers in the paragraph quoted by the Committee, above):

1. A victim of sexual assault who is aged over 18 may have equally legitimate reasons for not reporting the crime until many years later. In particular, a person who is in a relationship where there is a significant power imbalance, such as one involving other forms of violence, may not feel they can report until they have left the relationship or received support from a third party.
2. The crimes for which this Bill retrospectively repeals statutory limitations periods are serious and likely to have long-lasting effects on both victims and those close to them. The Bill specifically excludes the less serious offences (bestiality and consenting acts in a public place) from retrospective repeal of the limitation period.

[10] Explanatory Statement, Crimes Legislation Amendment Bill 2013, page 10

3. This issue is concerned with the strength of the case and how it might be affected by delay and is addressed by current protections applying to all historic sexual offence matters, as outlined above in this letter.
4. A victim would need to report the alleged crime to police officers to enable the commencement of a prosecution. However, it is unclear whether the Californian law required reporting by the victim at the time he alleged crime was committed. Such a limitation would be inappropriate and the kind of limitation this Bill seeks to amend. Victims of sexual assault may not report the crimes committed against them for some time for a variety of reasons. The reasons may include the fact that the perpetrator is a family member; a child may not understand that what has happened to them is a crime; threats may have been made by a perpetrator to silence the victim, victims may believe themselves to be in some way at fault for the assault; or other family members may encourage the victim to not report. In some cases a victim may not be psychologically or physically strong enough to report until many years later.
5. Current law will apply to address issues of delays by the state in bringing a prosecution, as outlined above at page 3.

Government Amendments

Thank you for providing comments in relation to the proposed government amendments.

I will take your comments into consideration in further refining the amendments.

I thank the Committee for their consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General
27 November 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
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Dear Mr Doszpot

Thank you for the Scrutiny of Bills Report No. 13 of 22 November 2013. I offer the following response in relation to the Committee's comments on the Heavy Vehicle National Law (ACT) Bill 2013.

(I) PROVISIONS OF THE BILL

(a) Comment on section 29(1) of the Bill

The Committee has drawn attention to two matters in relation to clause 29 (Provision of information and assistance to Regulator by road transport authority) of the application Bill. The Committee notes that paragraph 29(1)(a) provides that:

> (1) Despite any other territory law, the road transport authority is authorised, on its own initiative or at the request of the Regulator, to give the Regulator—
>
> (a) the information (including information given in confidence) in the authority's possession or control that the Regulator reasonably requires for the local application provision of this Act or the *Heavy Vehicle National Law (ACT)*; ... .

First, the Committee has stated that "in some instances, at least, the exercise of a power to disclose information given in confidence will limit the right to privacy of the confider of the information. There should be justification for the creation of such a power".

It is my view that the limitation on this right is justifiable in the context of the transfer of regulatory responsibilities from the road transport authority to the National Heavy Vehicle Regulator (the Regulator). It is essential that the Regulator is able to exercise its functions under the local application provisions of the Heavy Vehicle National Law (ACT) Act or the *Heavy Vehicle National Law (ACT).* I note that information shared with the Regulator will be subject to the provisions for 'protected information' in the Heavy Vehicle National Law. These provisions

contain general protections in relation to the confidentiality of information, and unauthorised disclosure or use of protected information attracts a maximum penalty of $20,000. The penalties for these offences indicate the seriousness with which their contravention is viewed.

I note that the Explanatory Statement acknowledges that clause 29 may be seen as engaging the right to privacy. The Explanatory Statement (p.16) notes that in light of the need for personal information to be conveyed from the current ACT regulator of heavy vehicles, to the new Regulator, as a part of the effective enforcement of heavy vehicle laws, and having regard to protections afforded to the use or disclosure of such information, the limits on the right to privacy in the Human Rights Act are considered to be reasonable.

Second, the Committee has raised a concern that clause 29 which enables the ACT road transport authority to provide information in the possession of the authority to the new national Heavy Vehicle Regulator (the Regulator), is expressed to operate "despite any other law of the Territory". The Government agrees that the provision cannot limit, and confirms that it is not, intended to limit, the power of the Assembly at a time later than the coming into force of subclause 29(1). It is my understanding, on advice, that the provision could not operate to deprive the effect of subsequent legislation even if it were expressed to do so. A revision to the Explanatory Statement for the Bill will be prepared which clarifies that the proposed section does not express or intend to limit future enactments of the Legislative Assembly; nor, does it restrain the power of the 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.

(II) PROVISIONS OF THE HEAVY VEHICLE NATIONAL LAW

(b) Non-modification of national heavy vehicle provisions to reflect usual ACT legislative practice

The Committee noted that, in order to reflect ACT criminal law and human rights policy, the ACT departed from certain provisions in the model national law – the Road Transport Reform (Compliance and Enforcement Bill) (the 'Model Bill') - when enacting the *Road Transport (Mass, Dimensions and Loading) Act 2009*. The Committee has recommended that Members of the Legislative Assembly should be clearly directed to those provisions of this Bill that have not been modified in the way the equivalent provisions of the *Road Transport (Mass, Dimensions and Loading) Act 2009* were modified, and state why it is considered that there is no incompatibility with the Human Rights Act.

The main model law provisions at issue in the 2009 Bill were identified in the accompanying Explanatory Statement as:

- non-adoption of the provision for a tiered penalty structure with penalties for a first offence and for second/subsequent offences, and providing for a single maximum penalty instead
- replacement of absolute liability with strict liability as the standard for offences
- revision of those offences accompanied by a statutory 'reasonable steps defence' under the model Bill to provide a 'reasonable steps exception' so that an evidential, rather than a legal burden, is placed on the accused if they seek to raise a statutory defence
- provision of an appropriate protection against self-incrimination, providing a full derivative use immunity as opposed to the use immunity in the Model Bill

- revision of inspection and search provisions to reflect the standard provisions for the ACT, in particular, provision that where a police officer or authorised officer wishes to conduct a 'search' of premises, a search warrant will be required prior to undertaking such action
- alignment of the time allowed for a prosecution to commence after an alleged offence to with the standard prosecution limitation periods in section 192 of the Legislation Act.

As the Explanatory Statement for the Heavy Vehicle National Law (ACT) Bill notes, some of the matters dealt with through the earlier departures (in particular, the tiered penalty structure for first and second/subsequent offences) are not part of the National Law and, hence, raise no continuing issues. Where this is not the case, the application provisions of the current bill reflect the nationally agreed approach in the Heavy Vehicle National Law. This is because to depart from the National Law would be inconsistent with the Territory's commitments as a signatory to the *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform* signed by First Ministers in 2011.

The Explanatory Statement for the Heavy Vehicle National Law (ACT) Bill addresses a number of the matters identified above. As noted by the Committee, the Explanatory Statement provides a discussion on pages 18 to 20 of the human rights implications of the application of National Law containing absolute liability offences. For these offences, the mistake of fact defence is not available, but they are subject to the reasonable steps defence. The limits on human rights engaged by these provisions are considered reasonable and proportionate having regard to relevant factors including the importance of heavy vehicle road safety and the role that a consistent national regulatory scheme, as agreed by First Ministers, can play in achieving heavy vehicle safety. It is noted that the only penalties for offences in the National Law are monetary penalties.

The application provisions of the Heavy Vehicle National Law (ACT) Bill exclude the application of the Legislation Act with certain limited exceptions. Section 192 (When must prosecutions begin?) is excluded. The section provides that:

> (1) A prosecution for the following offences against an ACT law may be begun at any time:
> (a) an offence by an individual punishable by imprisonment for longer than 6 months;
> (b) an offence by a corporation punishable by a prescribed fine;
> (c) an aiding and abetting offence by an individual in relation to an offence by a corporation punishable by a prescribed fine.
>
> (2) A prosecution for any other offence against an ACT law must be begun not later than—
> (a) 1 year after the day of commission of the offence; or
> (b) if an ACT law provides for another period—that period.

The National Law makes provision at section 707 for proceedings for offences against the Law which extend the time to institute proceedings from the usual period of one or two years. It is noted that this may be seen to engage subsection 22(2)(c) of the Human Rights Act with regard to the right to be to be tried without unreasonable delay. This matter is discussed by the Queensland Transport, Housing and Local Government Committee in its report of August 2012 on the Heavy Vehicle National Law Bill 2012 (Queensland). The Committee noted that this extension "may infringe the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals" (p.26).

The Committee considered the view set out in the explanatory notes to the Queensland Bill clause 647 (later renumbered as section 707) that strong road safety enforcement grounds exist to justify

the extension of time. This recognised that in some cases, due to the nature of the chain of responsibility offences, it might take longer to identify other parties in the chain and that to enable enforcement action to be taken against other parties in the chain it is necessary to extend the time to commence proceedings.

It was further suggested that a shorter limitation could "discourage enforcement of the chain of responsibility provisions and result in the traditional practice of only enforcing against the driver and perhaps the operator to continue" (Explanatory Notes, p.18). The Queensland Committee stated that it was satisfied that the extension of time to institute proceedings appears justified given the advice about the length of time it can take to determine the parties in the chain of responsibility. A revision to the Explanatory Statement for the Heavy Vehicle National Law (ACT) Bill will be prepared which clarifies this matter.

The Explanatory Statement for the Heavy Vehicle National Law (ACT) Bill addresses the matter of entry and search provisions under warrant at pages 16 to 17 noting that the provision of powers of entry engage a person's right under the Human Rights Act not to have his or her privacy, family or home or correspondence interfered with unlawfully or arbitrarily. It is suggested that there are adequate general safeguards in the development of these powers in the National Law to ensure their exercise does not unreasonably limit or restrict the right to privacy. The Explanatory Statement also discusses the limited circumstances in which entry may be without consent or under warrant as follows:

> Section 498 empowers an authorised officer to enter a place without a warrant or prior consent if the authorised officer reasonably believes that evidence of an offence may be concealed or destroyed unless the place is immediately entered and searched. However, the power cannot be exercised if the place is unattended or if it is a place or part of a place which is used predominantly for residential purposes. As well, the place must be open for carrying on a business, or otherwise open for entry, or required to be open for inspection under the National Law. While this section clearly engages the right to privacy, the gathering of evidence of offences that may otherwise be concealed or destroyed and limiting the power of entry to particular types of properties restricts the right but only to an extent that is reasonable and justifiable. Use of force in this section is limited to that which is reasonably necessary for gaining entry to a place that is required by the National Law to be open for inspection.
>
> Section 499 sets out the additional circumstances which allow authorised officers who are police officers to enter particular places without a warrant or the occupier's consent if the authorised officer reasonably believes that an incident involving the death of or injury to a person or damage to property has occurred. Limitations on the exercise of the power are set out in the section. Again, the power cannot be exercised if the place is unattended or if it is a place or part of a place which is used predominantly for residential purposes. This section does not authorise the use of force. There will be circumstances where authorised officers will need to enter places to investigate a death, injury or damage to property where there is a risk, that unless the authorised officers are able to get quick access to the property, evidence of an offence may be concealed or destroyed. The power of entry in this section engages but does not unreasonably limit the right to privacy.

These provisions for entry without consent or under warrant vary from the approach in the Road Transport (Mass, Dimensions and Loading) Act. That approach departed from the national model law by the requirement that a police officer or authorised officer who wishes to conduct a search of premises must obtain a warrant prior to undertaking such action.

The additional departure from the national model law raised in the context of the Road Transport (Mass, Dimensions and Loading) Act — provision of an appropriate protection against self-incrimination — is discussed below in relation to specific Committee comments.

(c) Certificate evidence – engagement of human rights

The Committee has noted that certificate evidence is not addressed in the discussion in the Explanatory Statement of provisions which may engage human rights and draws attention to the discussion of this in the Victorian Compatibility Statement for its legislation applying the National Law. The Victorian discussion in relation to this matter is noted, including the statement that the availability of certificate evidence engages, but does not limit, the right to the presumption of innocence. A revision to the Explanatory Statement for the Bill will be prepared which addresses this issue.

(d) Deeming provisions – engagement of human rights

The Committee has noted that deeming provisions in relation to 'deemed convictions' or 'deemed evidence of a conviction' are not addressed in the discussion in the Explanatory Statement of provisions which may engage human rights and draws attention to the discussion of this in the Victorian Compatibility Statement for its legislation applying the National Law. The Victorian discussion in relation to this matter is noted, including the statement that the use of deemed evidence of conviction in the National Law is justified, despite it engaging the presumption of innocence, because persons other than the driver and operator of heavy vehicles are often responsible for a breach of the relevant requirements. A revision to the Explanatory Statement for the Bill will be prepared which addresses this issue.

(e) Privilege against self-incrimination – engagement of human rights

The Committee has drawn attention to two matters in relation to the privilege against self-incrimination and the compatibility of subsections 588(2) and 588(3) with the Human Rights Act paragraph 22(2)(i). By way of general observation, I note that provisions in the Model Bill in relation to the matter of privilege against self-incrimination were the subject of departure when the ACT's *Road Transport (Mass, Dimensions and Loading) Act 2009* was developed. As noted above, the departure consisted of improving the protection against self-incrimination by the provision of full derivative use immunity as opposed to the use immunity in the Model Bill.

The ACT provision in section 331 (Protection of information) of the Road Transport (Mass, Dimensions and Loading) Act was adopted by national agreement in the preparation of the Heavy Vehicle National Law and forms the basis of section 588 of the National Law. The Committee has queried whether certain elements of section 588 of the National Law, which will be applied by the operation of the Bill, once enacted, can be justified.

First, the Committee has stated that section 588 "affords only limited protection of the privilege against self-incrimination" pointing, in particular, to the exception of proceedings against Chapter 9 (Enforcement) in relation to the inadmissibility of certain information in evidence against an individual in a criminal proceeding.

Second, the Committee considers that "in respect of a **document** produced by an individual in compliance with a relevant requirement, the privilege is, on any kind of a criminal proceeding against the person, totally abrogated (subsection 588(3))".

Substantively the same issues were raised in Committee comments on section 331 of the Road Transport (Mass, Dimension and Loading) Bill 2009. The Queensland explanatory notes, which are referenced in the Explanatory Statement for the present Bill, reflect the approach outlined in responding to the comments on the 2009 Bill. This includes acknowledgement of authority for the propositions that:

(a) voluntary participation in a regulated activity involves acceptance of submission to the compliance requirements of the regulatory framework, including compulsion to provide information; and

(b) the prior existence of a document at the time it was required to be produced weighs in favour of abrogating privilege.

Having regard to this, and recognising the context and purpose of the National Law, the Government considers that to the extent that a requirement to provide information under Chapter 9 of the National Law engages the privilege against self-incrimination, that limitation is proportionate and justifiable.

I trust that the above response addresses the Committee's comments in relation to the Bill and the provisions of the Heavy Vehicle National Law. I thank the Committee for its comments and observations.

Yours sincerely

Simon Corbell MLA
Attorney-General
27 November 2013

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
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the scrutiny comments of the Standing Committee on Justice and Community Safety on the Animal Welfare (Factory Farming) Amendment Bill 2013 (the Bill), published in Scrutiny Report 12 on 14 October 2013.

Rights to property, trade and livelihood

The committee has indicated that it is possible that a ban on the keeping of hens in a caged system will have an adverse effect on the profitability of a business that produces eggs. I do not disagree with this point, but I would indicate that the object of the Bill is to ensure that a minimum standard exists for factory farming and that factory farming methods that have been shown to be particularly cruel are not used. The very object of the Bill is to ensure that producers do not use certain factory farming methods that have negative animal welfare outcomes in their pursuit of profit.

I would also point out that proposed new section 120 specifically exempts an existing commercial egg producer from the operation of section 9A until 16 May 2016.

Section 120 (1) provides a condition for the above exemption: the existing commercial egg producer must have entered into an agreement with the Territory to convert its facility from a battery cage to a barn system. As all commercial egg producers currently operating in the ACT have entered into such agreements with the Territory, all commercial egg producers will be exempt from the requirements of section 9A until 16 May 2016.

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Future commercial egg producers will, however, be prohibited from operating a cage system for egg production due to the operation of section 9A. As these producers do not exist yet, however, it cannot be said that any right currently held is affected.

From 16 May 2016, the prohibition in section 9A will apply to all commercial egg producers operating in the ACT. The object of this legislation is to ensure greater animal welfare outcomes and to ensure that animal welfare is not compromised in the pursuit of profit.

Human rights implications—presumption of innocence

As the committee has indicated, proposed sections 9A, 9B and 9C of the Bill contain strict liability offences, which engage the right to be presumed innocent under section 22 of the *Human Rights Act 2004.*

The strict liability offence of keeping laying fowls in battery cages in new section 9A targets the commercial farming industry, not domestic producers. As the committee has pointed out, while the offence is targeted at corporations, which do not have human rights, the offence may conceivably result in the prosecution of an individual, if that individual is engaging in commercial egg farming using cages to keep laying fowls.

I agree with the committee that the most obvious line of justification for section 9A is that it is a regulatory offence of a kind where those who might be affected would be expected to be aware of the ban in section 9A.

Further justification for proposed section 9A lies in its aim of greater protection of animal welfare. A free and democratic society expects its lawmakers to enact legislation to ensure that animals will be treated well and not exposed to cruelty, pain or suffering.

Government amendments

I am now proposing government amendments to the Bill. Please find attached a copy of my proposed amendments and their supplementary explanatory statement. The supplementary explanatory statement takes into account the comments of the committee on the Bill as presented.

The government amendments extend the prohibition in proposed new section 9A of the *Animal Welfare Act 1992* from keeping a laying fowl for commercial egg production in a battery cage to keeping a laying fowl for commercial egg production in anything but *appropriate accommodation*. The definition of *appropriate accommodation* precludes keeping a laying fowl for commercial egg production in any form of cage.

I intend on bringing the Bill and the government amendments forward for debate shortly.

I thank the committee for its constructive comments on the Bill as presented.

Yours sincerely

Shane Rattenbury MLA
Minister for Territory and Municipal Services
12 February 2014

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
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the comments of the Standing Committee on Justice and Community Safety's Scrutiny Report 12 regarding the *Animal Welfare (Mandatory Code of Practice) Approval 2013 (No 1)* (DI2013-223), which approves the *Code of Practice for the Sale of Animals in the ACT (Other than Stock and Commercial Scale Poultry)* (Sales Code).

The committee has made two comments regarding the instrument – the first a minor drafting issue about consultation and the second about the incorporation of material by reference. I will address these comments below.

Consultation

I confirm that I was satisfied that adequate consultation had occurred before I approved the code, and thus the requirement in section 23 (3) of the *Animal Welfare Act 1992* was met.

The code was drafted by the Animal Welfare Advisory Committee and recommended to me as a mandatory code. The Territory and Municipal Services (TAMS) Directorate then held public consultation on the sales code in April and May 2012. The stakeholder comments that arose from this public consultation were considered and used to shape the final code.

Stakeholders including the RSPCA, the pet shop industry and the Australian Veterinary Association were sent copies of the draft code before its finalisation. The Justice and Community Safety Directorate also provided comments on the Sales Code, which focused on redrafting of the mandatory elements.

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I have asked TAMS to ensure that explanatory statements for future codes of practice under the *Animal Welfare Act 1992* expressly indicate that the Minister is satisfied that adequate consultation has taken place, and give details of the nature of that consultation.

Incorporation of material by reference

The Sales Code is the first mandatory code of practice made under section 23 of the *Animal Welfare Act 1992*. The Sales Code contains both mandatory provisions and non-mandatory guidelines (referred to as 'Additional Information') to help the reader understand and interpret the mandatory provisions and to provide supplementary information on best practice in animal welfare.

The mandatory provisions are summarised at the start of the Sales Code and are indicated throughout the document in bold type.

The reference in the Sales Code to the International Air Transportation Association's *Live Animal Regulations* is in a non-mandatory guideline. The reference has been provided to draw the reader's attention to the existence of the *Live Animal Regulations*, but does not mandate that they are to be complied with. As such, the Sales Code does not incorporate the *Live Animal Regulations* into ACT law by reference.

The *Live Animal Regulations* have been drafted by the airline industry's trade association. They serve as an international standard for transporting animals by air, and do not have status as law.

In order to avoid any confusion between mandatory and non-mandatory provisions in future codes of practice under the *Animal Welfare Act 1992*, I have asked that mandatory provisions be more clearly indicated.

I thank the committee for its comments, and I hope that this information is of assistance.

Yours sincerely

Shane Rattenbury MLA
Minister for Territory and Municipal Services
13 February 2014