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

SCRUTINY REPORT 22

9 SEPTEMBER 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.

TABLE OF CONTENTS

BILLS

BILLS—NO COMMENT

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

CRIMES AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Crimes Act 1900* to support the Supreme Court's power to consider inquiry reports made under the Act.

PLANNING AND DEVELOPMENT (BILATERAL AGREEMENT) AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Planning and Development Act 2007* to provide that relevant requirements of the Commonwealth assessment and approval process under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) be subsumed into the ACT development application framework under the Act.

BILLS—COMMENT

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

MAJOR EVENTS BILL 2014

This is a Bill for an Act to establish a regime for dealing with major events and important sporting events, and would create a range of criminal offences on the part of those attending the events, or commercial operators, and a range of protections to person organising and conducting the events.

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*

INTRODUCTION

Many of the clauses of the Bill limit rights stated in the *Human Rights Act 2004* (HRA) and/or rights recognised as elements of the common law presumptions of liberty. The Explanatory Statement (at 1-9) addresses only relevant HRA provisions, and does so by taking each right in turn and considering clauses of the Bill that limit that right. The Committee refers Members to this statement. The Committee's approach is to take groups of clauses of the Bill and address the human rights concerns that arise from each group.

A particular human rights concern not developed in the Explanatory Statement is the potential for the powers proposed by this law to be used in a way that would limit freedom of expression, in particular on matters of politics. This perspective underlines the need for close consideration of the Bill and whether the powers it confers might be stated in a more limited fashion that would not compromise unduly the achievement of the purposes of the Bill.

Another matter to raise at the outset is whether the creation of the crowd management powers would operate to restrict or qualify the powers that a venue operator has at general law (such as conferred by the law of contracts and the law of torts). The Committee notes that clause 24 has savings provisions in relation to protection of commercial arrangements and the question is whether similar provision might be made about powers to control entry to, and presence in, venues by a person.

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

CLAUSES 6 TO 10: DECLARATIONS AND NOTIFICATIONS THAT AN EVENT IS ONE OR BOTH OF A MAJOR EVENT OR AN IMPORTANT SPORTING EVENT

The Committee refers to the Explanatory Statement for an explanation of these clauses. The Committee considers that the following issues arise:

1. Noting that the power of the Executive to make a major event declaration (subclause 6(2)) is stated in very broad terms,[1] **the Committee recommends** that the state of satisfaction of the Executive be based on "reasonable grounds", and that to the extent feasible, the relevant elements of the "public interest" be spelt out. In the latter respect, the terms of subclause 8(2) might be a model, given that it states criteria for variation of a major event declaration.
2. Subclause 7(2) enables the Executive to extend the range of criminal offences by expansion of the definition of "prohibited item" in subclause 12(2). (This definition is relevant to the scope of some criminal offences in the Bill.) The creation of a criminal offence by a statutory instrument poses acutely the issue of whether there is an inappropriate delegation of legislative power. That the Executive may act if it "considers it reasonable in the circumstances" sets very little by way of a limit to the power. The Explanatory Statement addresses this issue only by saying that "[t]his provides important flexibility in identifying items which may cause issues for the safety or smooth running of a specific declared event". **The issue is whether a criminal offence should be created or expanded by a subordinate law or some instrument.**
3. The Minister may vary a major event declaration on widely stated criteria, and **the Committee recommends** that the state of satisfaction of the Minister be based on "reasonable grounds".
4. Given that a variation of a major event declaration might be as significant as the declaration itself (and it appears might involve an exercise of the power in subclause 7(2)), **the Committee recommends** that consideration be given to making a variation disallowable by the Legislative Assembly.
5. Noting that the power of the Minister to make an important sporting event notification (subclause 9(2)) will have significant consequences (and it appears might involve an exercise of the power in subclause 10(2)), **the Committee recommends** that consideration be given to making a variation disallowable.
6. **The Committee recommends** that the state of satisfaction of the Minister be based on "reasonable grounds".

[1] Any kind of event may be the subject of a declaration. No commercial activity need be involved.

7. Subclause 10(2) enables the Minister to extend the range of criminal offences by expansion of the definition of "prohibited item" in subclause 12(2). The comment made at point 2 above applies here.

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

CROWD MANAGEMENT OFFENCES AND POWERS

Clauses 12 to 15: prohibited items and offences relating to entry to a venue and the playing field

Clause 12 provides a wide definition of the concept of a "prohibited item" and clause 15 would create offences of taking without permission such an item into a venue, or of having an item in the venue. These are strict liability offences punishable by 25 penalty points. If the person refuses to surrender the item, a police officer may confiscate it (see subclauses 15(4) and 15(5)).

The definition includes "a glass item (other than optical lenses, or an infant's food or drink container)" and "a metal can (other than an infant's food or drink container)". There are many items carried by persons in the ordinary way of moving about that would be affected, such as mobile phones that have glass casing, pill bottles, perfume bottles and cans for deodorants and other personal items. The Committee appreciates that an authorised officer may overlook such items, but it is undesirable that the content of a law be determined by discretionary judgements made from time to time by a large and changing number of authorised officers.

A law that is so indeterminate in its scope of application as to depend for its sensible and fair operation on police and authorised officer discretion might be characterised as an "arbitrary" limit to the right to privacy stated in HRA section 12. **This issue could be addressed by** qualifying the list in such a way that it encompasses only "objects that may present a risk to the safety of people at the event or could significantly interfere with the event" (Explanatory Statement at 12). (The Explanatory Statement notes only that the list "includes" such items. There is no explanation as to why it might be broader.)

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

Clauses 13 and 14 would create offences where a person makes an unauthorised entry to an event venue, stays in the venue or goes onto a playing surface at an event.

The Committee makes no comment on these clauses.

Clauses 16 to 23: stop, detain and search powers

Clauses 16 and 17 would confer on an authorised officer (which includes a police officer), and clause 18 on a police officer only, "stop, detain and search powers". (The power to detain is implicit in the sense that it is necessary to detain to exercise the stop and search powers.) On their face, the powers are widely expressed.

The Explanatory Statement describes **clause 16**: "This clause gives power to an authorised person to request that an event attendee permit a search of their personal property if that person is entering; about to enter; or in; an event venue. If such a request is made, the person must permit the authorised person to search the property as requested. For failing to comply with a request, a strict liability offence with a maximum penalty of 10 penalty units applies".

An exercise of this power restricts the right to privacy, and to the enjoyment of personal property.

On its face, clause 16 states no criteria to guide an authorised officer as to the circumstances in which it is appropriate to exercise this power. It need not be based on any belief or (less so) a suspicion that any state of affairs exists. The Committee also notes that (apart from a person seeking some common law remedy against an authorised officer), there is no provision for the person to obtain compensation for any damage that may occur to property in the course of a search; (clause 59 applies only to the exercise of powers in part 6 of the Bill). **The Committee recommends** that consideration be given to providing for a right to compensation.

The Explanatory Statement describes **clause 17**: "This clause gives power to an authorised person to conduct a scanning search of another person who is entering, or is about to enter, or is in an event venue. A scanning search is a search of a person by electronic or other means that does not require any clothing or items to be removed, or for the person being searched to be touched. It is a strict liability offence for a person to refuse to permit a scanning search when asked. The maximum penalty for this offence is 10 penalty units."

On its face, clause 17 states no criteria to guide an authorised officer as to the circumstances in which it is appropriate to exercise this power. It need not be based on any belief or (less so) a suspicion that any state of affairs exists.

The Explanatory Statement says of **clause 18**: "Clause 18 clarifies that a police officer has the power to ask a person to permit an ordinary search or frisk search of the person". Again, it is a strict liability offence for a person to refuse to permit a search, with a maximum penalty of 10 penalty units.

The powers proposed by clauses 16 to 18 reverse the standpoint of the traditional common law position. In *Scrutiny Report 6* of *1999* (at 5), the Committee quoted from the *Laws of Australia* (vol 11, para 119, as this document then stood):

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

Of course, this statement applies with more force to a person who is not suspected of crime. The Committee noted that "[a]n unauthorised stopping, detention, or search of a person would constitute one or more forms of tortious or criminal behaviour. To stop a person and restrict their movement may amount to a false imprisonment. A search of a person involving any physical touching would involve a trespass to the person. A taking hold of their possessions, including a search of their baggage, would involve a trespass to property". These remedies are not available where a statute expressly authorises the stopping, detaining and searching.

The common law was initially based on notions of property protection, but is now based on the importance of protecting the privacy of a person, and their bodily integrity.[2] The HRA rights of liberty and security of person (subsection 18(1), and of privacy (section 12) derive, in part at least, from the common law tradition.

A statute may displace the common law rights, and also the HRA rights (which at most can be protected by the courts by a non-binding declaration of incompatibility).

[2] There is extensive discussion in *Scrutiny Report 6* of *1999*; see http://www.parliament.act.gov.au/__data/assets/pdf_file/0009/376758/scrutiny9906.pdf

The Explanatory Statement offers a justification (in particular at 2-4, and at other points in the general discussion at 1-9), to which the Committee refers Members.

The Committee notes that these are very extensive powers, and if accepted in a context where authorised officers and police officers need not form any view as to whether a crime has been committed by any person, it may be hard to resist conferment of these powers for the purpose of law enforcement in relation to many other kinds of offences. In terms of whether there are ways of protecting the interests of venue operators that are less restrictive of the right to privacy and other rights, **an issue is why the existing general law protections are not sufficient**. A venue operator has the rights of a possessor of land, and can exclude persons, and subject to damages claims, can order the removal of paying entrants. There is an extensive range of criminal offence provisions that may be invoked by the police to deal with behaviour that causes or threatens harm; see the statement of such offences in paragraph 23(8)(b).

The police have the power to arrest people for committing any of these offences where they believe on reasonable grounds that a person is committing or has committed the offence: see Crimes Act, section 212. Moreover, the police have the power to arrest a person before any of the offences are committed if they believe on reasonable grounds that a person is attempting or conspiring to commit any of these offences: sections 44 to 48 of the Criminal Code.[3]

Over our history, much significance has been placed on limiting as far as feasible the power of state authorities to interfere with the privacy and bodily integrity of citizens by means of stop and search powers, and in the end **the question is whether sufficient justification for their displacement has been shown in relation to clauses 16, 17 and 18**.

An answer to this question will turn in part on whether sufficient attention has been accorded to how these powers should be exercised, and as to the potential consequences of their exercise. The Committee considers that the following matters should be addressed:

- **Should a person seeking to enter a venue have the option of refusing to undergo a search and then ceasing to attempt to enter the venue**? As clauses 16, 17 and 18 are framed, this option is not open, for a request is effective once it is made to a person "about to enter" the venue, and if the person does not permit the search, an offence is committed.
- **Who should exercise such powers**? The Bill answers this question, but the Committee notes that it has been argued by some law reform bodies that only police officers should do so, on the basis that they are better trained and are subject to disciplinary and review procedures that may not be applicable to "security" personnel.
- **What of the gender of the relevant officer**? It may be argued that for some kinds of searches, the person should be searched only by an authorised officer of the same gender.
- **Where should the power be exercised**? These powers will very often be exercised in a public place, and it may be argued that in the interests of the privacy of the person, or for other reasons, there should be provision for the officer to take the person to some other less public place.
- **Should a person being searched** be permitted to have another person in attendance while a search is being conducted?

[3] This paragraph draws on a submission by the Civil Liberties Australia (ACT) Inc, to the Australian Capital Territory Legislative Assembly Standing Committee on Legal Affairs' inquiry into Police Powers of Crowd Control in the ACT (no date).

This submission is referred to later.

- **What degree of force**, if any, may be employed by an officer to make a search?
- **For what period**, if any, may the person be detained in order to make a search?
- **What information should be given to the person** by the officer? An identity card must be shown to the person (see subclause 43(2)[4]), but this falls far short of the range of information which some law reform bodies have suggested should be given. For example, should a person be informed of their ability to claim the privilege against self-incrimination?
- **What records (if any) of an exercise of the power should be kept**, if so, for how long, and to whom should they be made available?
- **Where a search reveals evidence of the commission of a crime**, in particular by the person searched (such as where a quantity of prohibited drugs is found), will this evidence be admissible on a trial of the person for that crime?

In relation to the offence elements, the original provisions in the *Major Events Security Act 2000*[5] (see sections 9 and 10) allowed as a defence[6] that the person had a reasonable excuse to refuse. This defence was removed by the *Criminal Code Harmonisation Act 2005* (schedule 1.218) as part of a harmonisation exercise and without consideration of the desirability of retaining the defence.

Inclusion of this defence would go some way to protecting a person's privacy, and the question is whether it should be included in clauses 16 to 18.

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

Clause 19: Police power to require provision of a name and address

The Explanatory Statement says of **clause 19**: "This clause gives police identical powers to those already contained in [the Major Events Security Act] and allows a police officer to ask for a person's name and home address if that person is entering or about to enter an event venue. The maximum penalty for this strict liability offence is 5 penalty units."

The common law recognised "the right of the individual to refuse to answer questions put to him by persons in authority": *Rice v Connolly* [1966] 2 QB 414 at 419. Today, this right might also be seen as a dimension of a right to privacy.

The question of when and how is it justifiable to impose on a person an obligation to provide their name and address to the police has been considered by law reform bodies, and in particular by the Australian Law Reform Commission (ALRC) in *Criminal Investigation (Report No 2, Interim)* (1975). The ALRC noted that while "[s]tatutory power to require a person to furnish his name and address exists at present in most jurisdictions only in relation to traffic offences[, it] is nonetheless, a power which policemen need, and exercise in practice".[7] The Commission thus recommended:

[4] What is required to prove that a card was "shown" to a person is problematic. Will it be enough that the card is in a plastic envelope carried at the end of string and worn around the neck of the officer?

[5] See the Olympic Events Security Amendment Bill 2000 http://www.legislation.act.gov.au/b/db_11685/20001206-13432/pdf/db_11685.pdf

[6] In respect of which the person would carry only an evidential burden; see sections 58 and 59 of the *Criminal Code 2002*.

[7] ALRC at para 79.

> The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person's name and address is sought, and there should be a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity.[8]

The ALRC linked its recommendations to the means it recommended for enforcing safeguards against an excess of the powers of the police. It instanced "disciplinary action, the exclusionary rule, and the civil action for false imprisonment".[9]

This policy is reflected in section 211 of the *Crimes Act 1900*:

211 Requirement to provide name etc

(1) If—

(a) a police officer has reason to believe that an offence has been or may have been committed; and

(b) believes on reasonable grounds that a person may be able to assist him or her in inquiries in relation to that offence; and

(c) the name or address (or both) of that person is unknown to the officer;

the officer—

(d) may request the person to provide his or her name or address (or both) to the officer; and

(e) if making such a request—shall inform the person of the reason for the request.

(2) If a police officer—

(a) makes a request of a person under subsection (1); and

(b) informs the person of the reason for the request; and

(c) complies with subsection (3) if the person makes a request under that subsection;

the person shall not, without reasonable excuse—

(d) fail to comply with the request; or

(e) give a name or address that is false in a material particular.

It is possible to take the protection further by requiring the police officer to record the reasons given to the person concerned. This was proposed by the Tobacco Amendment Bill 1999 (clause 18, proposed section 12M).[10]

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[8] Ibid at para 322.

[9] Ibid at para 81, footnote 107, and see too at para 204, and see paras 301-302.

[10] http://www.legislation.act.gov.au/b/db_11824/19990325-13594/pdf/db_11824.pdf

The Committee notes that the desirability of retaining section 12 of the *Major Events Security Act 2000* was addressed in a submission by the Civil Liberties Australia (ACT) Inc, to the Australian Capital Territory Legislative Assembly Standing Committee on Legal Affairs' inquiry into Police Powers of Crowd Control in the ACT (no date) ("Civil Liberties Submission").[11] It said:

> Why should a person who is not suspected of doing anything wrong be required to give their name to police, as this section provides for? We do not see the necessity of this provision. People do not have to give their names to the police when they go shopping, or attend the movies, so why at the time of 'seeking to enter a major event'?
>
> Providing a name provides no practical or timely assistance to the ability of the police to protect people attending major events. It is one thing to require a person to give their name to police when the police suspect they have committed an offence or have breached a condition of entry. But to require someone to give their name for no apparent reason, as the Act requires, seems to be an arbitrary and excessive intrusion on a person's privacy.
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> Given the presumption for privacy under section 12(a) of the *Human Rights Act 2004*, this presumption should only be displaced by reasonable cause. If a person is not suspected of committing an offence, it is not business is it of the police that a particular person is attending an event? Why do police need a name? Practically, any terrorist would be able to give a reasonable-sounding name and contact details.
>
> It is worth noting that the ordinary power of police to require people to disclose their name only arises when police reasonably believe that person has committed an offence: see section 211(1) of the *Crimes Act 1900*.

The Committee considers that there is reason to think that the power in clause 19 is too broadly expressed and recommends that consideration be given to its limitation. The discussion above might suggest some of the ways in which this could be done.

In particular, there is a case to argue that a person who is requested to provide name and address details should have the option of refusing to do so and simply not entering the venue.

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

Clause 20: refusal of entry to a venue

The Explanatory Statement says of **clause 20**: "This clause clarifies that an authorised person is able to refuse a person entry to an event venue under certain conditions. This clause is based on the powers police officers had in [the Major Events Security Act] and extends those powers to authorised people. Before refusing entry, authorised people (including police officers) must believe on reasonable grounds that a person has committed or is likely to commit an offence or is likely to contravene a condition of entry of the event".

It is what these "certain conditions" are that gives rise to some concern. The full content of this clause follows:

[11] http://www.parliament.act.gov.au/__data/assets/pdf_file/0004/380380/LA02_Civil_Liberties_Australia_police_powers.pdf

> An authorised person may refuse a person entry to an event venue if the authorised person believes on reasonable grounds that the person—
>
> (a) has committed, or is likely to commit, an offence against—
>
> (i) this Act; or
>
> (ii) while seeking to enter into or while in the venue—another law applying in the ACT; or
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> (b) is likely to contravene a condition of entry to the event venue imposed by an event organiser or a venue manager for the event.

In *Scrutiny Report 4* of *1999* concerning the Olympic Events Security Bill 1999, which contained a very similar provision, the Committee, with reference to the provision that an authorised officer must form a belief that a person has committed or is likely to commit an offence or is likely to contravene a condition of entry of the event, said:

> [w]hen taken in conjunction with the range of offences that would be created by the Act, this is a very broad and draconic power. It offends the general notion that a person may be penalised by reason of what they do, and not simply by reason that it is suspected that they might do something.

Clause 20 is broader than that considered in *Scrutiny Report 4* of *1999* in that the relevant offences are extended to an offence against "another law applying in the ACT" (paragraph 20(a)(ii)). The equivalent clause in the Olympic Events Security Bill 1999 did not include paragraph 20(a)(ii). The significance of this point is that it would support an argument that a less rights restrictive approach to the topic has been thought desirable.

The Civil Liberties submission is critical of section 13 of the Major Events Security Act, which is to the same effect as paragraph 20(a) of the Bill:

> Under section 13 of the Major Events Security Act 2000 police have the power to evict a person from an event if they commit an offence against ANY law of the Territory. Although certain types of behaviour and offences would give police legitimate cause to evict someone from an event, the scope of this provision seems way to broad and far-reaching. Police have the power to evict for ANY Territory offence. That means if someone litters, they may be ejected. If someone smokes in a prohibited area, they may be ejected. Such scope for ejection is extensively too far-reaching, and is conducive to arbitrary interpretation – which is not a sound basis for good public order.
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> The basic police powers of arrest are subject to a number of conditions which act to prevent police arresting someone when they could just as easily proceed by summons: section 212(1) *Crimes Act 1900*. We propose that similar considerations that determine whether a person should be arrested or proceeded against by summons should be used to determine whether or not a person should be ejected from a major event for committing an offence against a law of the Territory. Namely, a person should only be ejected from a major event if police believe on reasonable grounds that one or more of the following will be achieved:
>
> (i) preventing a repetition or continuation of the offence or the commission of another offence;
>
> (ii) preventing the concealment, loss or destruction of evidence relating to the offence;
>
> (iii) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(iv) preventing the fabrication of evidence in respect of the offence;

(v) preserving the safety or welfare of the person.

The Committee considers that there is reason to think that the power in clause 20 is too broadly expressed and recommends that consideration be given to its limitation. The discussion above might suggest some of the ways in which this could be done.

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

Clauses 21 and 22: directions to leave a venue or a part thereof

Subclause 21(1) would empower an authorised officer to direct a person to leave an event venue and not re-enter the venue for a period of 24 hours on the same basis as the power in clause 20 may be exercised. The comments made above apply to subclause 21(1).

In addition, subclause 21(2) would empower an authorised person to give any kind of direction necessary for the good management of an event; or for the safety and enjoyment of people at an event.

This is a very widely expressed power, and may be compared with the more rights-protective provision in the *Major Sporting Events Act 2009* of Victoria:

83 Direction to leave event venue or event area

(1) Subject to subsection (2), an authorised officer may direct a person to leave and not re-enter or not to enter an event venue or an event area if the authorised officer—

(a) believes on reasonable grounds that the person has committed an offence against [specified sections of the Act]; and

(b) has informed the person that the authorised officer has formed the belief referred to in paragraph (a); and

(c) has, prior to making the direction, requested that person to leave or not to enter the event venue or event area and that person has refused to leave or has entered.

(2) A direction under subsection (1)—

(a) must specify that the direction applies for a period of 24 hours; and

(b) may be given in either or both of the following ways—

(i) orally;

(ii) in writing served personally on the person to whom it applies.

The question arises: should the limitations on the scope of the power as stated in the Victorian law be incorporated into clause 21? (This question is relevant, as are many of those posed in this report on the Major Events Bill 2014, to the question whether the restrictions on rights proposed in the Bill are the least rights-restrictive means of achieving the objects of the Bill. This is an issue that must be addressed in a HRA section 28 justification for a limitation of an HRA right, and applies as well to a limitation of any common law right.)

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

Clause 22 would create offences to apply persons who do not abide by directions given under clause 21.

Clause 23: ban orders

The content of this clause is explained at the Explanatory Statement 16 to 17. The Committee appreciates that there will be circumstances where a ban order will be appropriate, and its comments are confined to the scope of the power that would be vested in the Magistrates Court by subclause 23(4), which provides:

(4) The court may make the order if satisfied that—

(a) there is a risk that the offender may disrupt a major event, important sporting event or future event; and

(b) making the order is likely to reduce the risk.

Given the consequences of a banning order for the person banned, **the Committee recommends** that consideration be given to limiting this power in two ways: (1) by requiring the state of satisfaction be based on reasonable grounds, and (2) that the notion of "risk" be qualified by requiring that it be a substantial risk, or some similar narrowing of the concept.

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

Protection of commercial arrangements: protected symbols and clean zones

Equal treatment under the law

The purpose of the Bill is to enact "appropriate laws and effective risk management arrangements to provide for the safety needs of all those attending the relevant event" (Explanatory Statement at 2). These laws are said to "have tangible community benefits and can prevent tragedies like those seen during the Boston 2013 Marathon". In addition, it is said that the Territory will benefit commercially from this proposed scheme, and enhance its profile on national and international levels (Explanatory Statement at 10). Many provisions of the Bill will involve the exercise of the powers of the Territory (by action of the Executive, or of a Minister, and the police or "authorised people") to regulate the conduct of some commercial operators and members of the public who attend events, to the end of enhancing the commercial interests of others, being those who organise or conduct events.

There is thus a question as to whether the Bill discriminates unfairly as between commercial and business operators. This is a broad question that cannot easily be answered, but it arises out of HRA subsection 8(3)—that "[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination protection of the law without discrimination". It also arises out of recognition of the common law presumptions of liberty that every citizen is at liberty prima facie to carry on his business in his own way within the law, operating in conjunction with the principle that there should be no unjust discrimination in the enjoyment of civil and political rights.[12]

[12] On this latter point, see *Mabo v Queensland (No 2)* (1992) 1715 CLR 1 at 42.

The answer to the broad question posed above is one for consideration by each member of the Assembly and there is no particular perspective the Committee can offer in assistance. The question might be posed in another way, and is appropriate for the Minister to answer. Why are the general law remedies not sufficient to protect the commercial interests of venue operators? (There is a partial list of these remedies in clause 24.)

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

The Committee raises some particular issues arising out of parts 4 and 5.

1. **The Committee recommends** that consideration be given to making the state of satisfaction required of the Minister before giving notice under subclause 25(2) of a protected symbol to be based on reasonable grounds. The same point arises with regard to subclause 31(2).
2. Subclause 32(2) would create an offence where, without permission, a person "street trades in an area adjacent to a clean zone for a major event to a person in the clean zone". The term "adjacent" is not defined and introduces a large element of vagueness into a criminal offence. Business operators should be able to predict with precision when their business activity will be lawful. This activity is not inherently immoral and of course conducting a business is critical to the operator's financial position.

The Explanatory Statement states that "[t]his offence applies to people who set up transient trading operations near to or in close proximity to a clean zone. The term 'adjacent' has its ordinary meaning". It is however not apparent to the Committee why this offence is limited to "people who set up transient trading operations". On its face, the offence applies to any person who trades. **The Committee recommends** that consideration be given to rewording subclause 32(2) so that it applies as intended.

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

Parts 6 and 7: authorised people, their powers, return and forfeiture of things seized and surrendered or confiscated prohibited items

The Committee has no comment on these parts of the Bill.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2014-224 being the Domestic Violence Agencies (Council) Amendment Appointment 2014 made under section 6 of the *Domestic Violence Agencies Act 1986* **amends DI2013-33 by deleting reference to the appointment of the position of "Officer in Charge of Crime Prevention" and replacing it with "Officer in Charge of Crime Reduction".**

Disallowable Instrument DI2014-225 being the Environment Protection (Consultation on Application for Environmental Authorisation) Declaration 2014 (No. 2) made under section 48 of the *Environment Protection Act 1997* **declares that section 48 of the Act does not apply to specified prescribed activity.**

Disallowable Instrument DI2014-226 being the Pest Plants and Animals (Pest Plants) Declaration 2014 (No. 1) made under section 7 of the *Pest Plants and Animals Act 2005* **revokes DI2009-67 and determines specified plants to be pest plants.**

Disallowable Instrument DI2014-227 being the Exhibition Park Corporation (Governing Board) Appointment 2014 (No. 1) made under sections 8 and 9 of the *Exhibition Park Corporation Act 1976* **and sections 78 and 79 of the** *Financial Management Act 1996* **revokes DI2012-184 and DI2012-231 and appoints specified persons as chair and deputy chair of the governing board of the Exhibition Park Corporation.**

Disallowable Instrument DI2014-228 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2014 (No. 2) made under paragraph 174(1)(b) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as the deputy chair (judicial member) of the Sentence Administration Board.**

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2014-18 being the Road Transport (Offences) Amendment Regulation 2014 (No. 1) made under section 23 of the *Road Transport (General) Act 1999* **increases the infringement notice penalties.**

SUBORDINATE LAWS—COMMENT

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

"HENRY VIII" CLAUSE / HUMAN RIGHTS ISSUES

Subordinate Law SL2014-16 being the Heavy Vehicle National Law (ACT) (Transitional Provisions) Regulation 2014 made under the *Heavy Vehicle National Law (ACT) Act 2013* **modifies the Act to include a new section 42A that modifies the *Crimes Act 1900*.**

This subordinate law amends the *Heavy Vehicle National Law (ACT) Act 2013*. The effect of the amendment is to modify the operation of the *Crimes Act 1900*. In particular, it amends subsection 187(2) of the Crimes Act with the effect that Part 1C of the *Crimes Act 1914* (Cwlth) does not apply to infringement notice offences for the Heavy Vehicle National Law, where the police officer intends to serve an infringement notice under the Heavy Vehicle National Law or not take any further action.

As noted in the Explanatory Statement for this subordinate law:

> Section 187(1) of the *Crimes Act 1900* provides that part 1C of the *Crimes Act 1914* (Cwlth) applies in relation to most types of ACT summary offences. Part 1C includes protections for people arrested and interviewed for indictable Commonwealth offences.
>
> However, section 187(2) provides that the provisions of part 1C do not apply to a range of offences, including infringement notice offences under the *Road Transport (General) Act 1999*, where a police officer intends to either proceed by way of infringement notice or take no further action in relation to the offence.

> The rationale for section 187 (2) is that the protections of part 1C are not appropriate or necessary to circumstances where an offender is dealt with by way of infringement notice. Applying those requirements would be an impediment to dealing efficiently with routine traffic matters. This reasoning would also apply to summary heavy vehicle offences under the National Heavy Vehicle Law.

In effect, this subordinate law extends the exemption previously provided for under subsection 187(2) of the Crimes Act to infringement notices under the Heavy Vehicle National Law.

As also noted in the Explanatory Statement for this subordinate law, it is made under section 42 of the Heavy Vehicle National Law (ACT) Act, which provides:

> **42 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act or the Heavy Vehicle National Law (Consequential Amendments) Act 2013.
>
> (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
>
> (3) A regulation under subsection (2) has effect despite anything else in this Act, the Heavy Vehicle National Law (Consequential Amendments) Act 2013 or another territory law.

The Committee notes that section 42 is a "Henry VIII" clause, as it allows for the modification of primary legislation by subordinate legislation (see the Committee's publication entitled *Henry VIII clauses—Fact sheet*, available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf). However, the Committee also notes that the subordinate law is evidently within the power given by the empowering provision.

This comment does not require a response from the Minister.

The Committee notes that the Explanatory Statement for the instrument contains a reasonably detailed discussion of the human rights implications of the amendments made by this subordinate law. The Committee draws the attention of the Legislative Assembly to that discussion.

This comment does not require a response from the Minister.

MINOR DRAFTING ISSUE / STRICT LIABILITY OFFENCE

Subordinate Law SL2014-17 being the Gambling and Racing Control (Code of Practice) Amendment Regulation 2014 (No. 1) made under the *Gambling and Racing Control Act 1999* **and** *Gaming Machine Act 2004* **amends the Gambling and Racing Control (Code of Practice) Regulation by removing ACTTAB Limited from offence provisions. It gives power to the Commission to approve training programs about the responsible provision of gambling services and also provides for an office provision where a licensee does not record a problem gambling incident within three consecutive trading days.**

The Committee notes that, in 2 places on page 3, the Explanatory Statement for this subordinate law refers to the subordinate law as a "Bill".

The Committee also notes that the Explanatory Statement states that the subordinate law contains a new strict liability offence—new paragraph 20A(2)(b). However, the Committee also notes that, in line with requirements previously stated by the Committee (see page 5 of the Committee's document entitled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*— available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Explanatory Statement contains an explanation as to why the offence needs to be one of strict liability.

These comments do not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received a response from the:

- Lifetime Care and Support Commissioner, dated 20 August 2014, in relation to comments made in Scrutiny Report 21 concerning Disallowable Instruments DI2014-192 and DI2014-203 to DI2014-218, being the Lifetime Care and Support (Catastrophic Injuries) Guidelines 2014 (attached).
- The Minister for the Environment, dated 2 September 2014, in relation to comments made in Scrutiny Report 20 concerning the Gas Safety Legislation Amendment Bill 2014 (attached).
- The Attorney-General, dated 4 September 2014, in relation to comments made in Scrutiny Report 21 concerning Disallowable Instruments (attached)—
  - DI2014-80—Victims of Crime (Victims Advisory Board) Appointment 2014 (No. 4); and
  - DI2014-81—Victims of Crime (Victims Advisory Board) Appointment 2014 (No. 5).

Steve Doszpot MLA
Chair

9 September 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)

Report 20, dated 29 July 2014

Education and Care Services National Amendment Regulations 2014

Red Tape Reduction Legislation Amendment Bill 2014

Utilities (Technical Regulation) Bill 2014

Report 21, dated 11 August 2014

Disallowable Instrument DI2014-124 - Freedom of Information (Fees) Determination 2014

Disallowable Instrument DI2014-126 - Hawkers (Fees) Determination 2014

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CANBERRA

ACT Government

Lifetime Care and Support Scheme of the Australian Capital Territory

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
Canberra City ACT 2600

Dear Mr Doszpot,

Scrutiny Report 21 – Comments relating to Lifetime Care and Support Guidelines

As the Lifetime Care and Support Commissioner of the Australian Capital Territory, I am responding to comments made by the Committee on pages 15 to17 of the Committee's Scrutiny Report 21 dated 11 August 2014. I am responding to the comments, rather than the Treasurer, because under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act* 2014 ('the Act'), it is the Commissioner who is responsible for making LTCS Guidelines.

The Committee queried why the Lifetime Care and Support Guidelines were made in 17 separate parts rather than in a single instrument. The Guidelines were individually made so that they can be more easily and transparently updated as required in the future. Issuing each topic as a separate Guideline allows a topic to be updated and completely reissued with the effective date applying to the whole updated Guideline. If only a single Guideline had been issued, it could have resulted in a confusing document with multiple effective dates as various sections are updated as necessary in the future.

The 17 separate Guidelines are posted on the LTCS website so that information on individual topics may be easily accessed. It is intended to also post a consolidated version of all the Guidelines on the LTCS website in the very near future for those readers who require a complete set of Guidelines.

The Committee also queried why terms such as 'assessor', 'certificate' and 'dispute' were defined differently. These terms used in different Parts of the Guidelines reflect the different dispute processes and types of assessor set out in the Act. For example, Part 7, Division 7.1 of the Act specifies disputes about eligibility are required to be referred to an eligibility assessor. In comparison, Part 7, Division 7.2 of the Act specifies disputes about motor accident injuries are required to be referred to a principal claims assessor. Part 7, Division 7.3 of the Act requires treatment and care assessors. Under the Act assessors are required to be appointed by the Commissioner and each type of assessor requires specific qualifications or experience.

The Committee also queried the definitions of 'days' in Appendix A to Part 2 and Appendix A to Parts 3 and 4 of the LTCS Guidelines. In all 3 Parts it is clear the time relates to working days. In Part 2 this is emphasised by specifically stating that it does not refer to calendar days. I acknowledge the Committee comments and will review both definitions at the next revision of the Guidelines.

Yours sincerely,

Karen Doran
Lifetime Care and Support Commissioner
August 2014

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No. 20 (the Report) on the Gas Safety Legislation Amendment Bill 2014 (the Bill).

I provide the following information on the Committee's comments.

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

Clause 7 of the Bill includes a new proposed section 183 of the *Construction Occupations (Licensing) Act 2004*. That section provides that the repealed *Gas Safety (Appliance Worker Accreditation Code) Approval 2007* (the Code) is taken to be, and always to have been, valid. The Committee has asked whether there are any persons other than currently accredited people whose rights or interests may be affected prejudicially by proposed section 183.

It is not expected that any other persons rights and interests would be affected prejudicially. Consumers of gas appliance work services rely on the validity of the accreditation system. If the Code, or the accreditations issued under the Code, were considered invalid consumers would not have the protection of the accreditation system and potentially insurances and other mechanisms that would apply to work carried out under a legitimate accreditation. Similarly, employers of accredited people may be open to liabilities relating to unaccredited work. Validating the code and existing accreditations removes any doubt for employers, consumers and accredited people about the status of accreditations.

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Has there been an inappropriate delegation of legislative power?—term of reference (3)(d)
Accessibility of adopted instruments as law of the Territory

The Committee has raised whether it might be possible on the Legislation Register or, perhaps, in or at some other place, to provide a means for accessing instruments and documents that form part of the law but are not otherwise published on the Legislation Register because of the disapplication of section 47(5) or (6) of the Legislation Act. The Committee suggested an option of providing a hyperlink to some other source.

Access to documents was considered in the drafting of the Bill. In general, the method of alternative access is provided for only once the document to be adopted is identified. This is because different types of documents may need to be made available in different ways depending on the Territory's own access arrangements. Therefore, the regulation-making power does not attempt to prescribe an alternative access arrangement that may be suitable for all documents.

As noted in the Explanatory Statement it is the practice to provide notes and other information in the text of an instrument or in explanatory information highlighting where adopted instruments can be found. This will generally include a hyperlink, where available, current at the time of publication. This is evidenced in the Bill, which contains links to Standards Australia Ltd's website for access to adopted Australian Standards in new section 6H of the *Gas Safety Act 2000* (clause 18) and new sections 17C (clause 140) and 18D (clause 157) of the *Gas Safety Regulation 2001*.

Has there been an inappropriate delegation of legislative power?—term of reference (3)(d)
Does a clause of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?—term of reference (3)(b)
Dispensation of a statutory provision by regulation

The Committee has identified the proposed section 23 (4) of the Gas Safety Act as a "Henry VIII" clause that would empower the Minister to displace the operation of three statute-created offences by regulation. It further comments that the proposed section does not prescribe a limit to matters that may be relevant or irrelevant to the exercise of the power.

This provision redrafts the existing section 24 of the Gas Safety Act to be compliant with the *Criminal Code 2002*. Proposed section 23 (4) is derived directly from the existing power at section 24 (4) and is not a new power.

The provision does delegate legislative power to the Minister. However, in considering whether that delegation is inappropriate I note that the power exists to restrict the operation of the offence provision rather than to extend or expand it. For example, the existing circumstances prescribed for section 24 (4) under section 18F of the Gas Safety Regulation, which will continue under the new section 23 (4), are:

(a) the connection of an appliance to a consumer piping system or its use, in accordance with approval for commissioning, under section 18E;
(b) the connection of an appliance to a consumer piping system, or its use, with the planning and land authority's approval, for product testing, product development or experimental purposes;
(c) the sale, for scrap material, of an appliance that has been disabled for the use of gas.

There does not appear to be a reason why section 23(4) needs to state the grounds upon which this power of dispensation might be exercised unless there is an expectation that the power could be exercised inappropriately or against the intent of the provision. There are quite diverse circumstances in which the application of the offences may be unreasonable or impractical. The intent of the provision is to allow necessary flexibility by giving the responsible Minister the capacity determine circumstances as required.

The provisions in proposed section 9 (2) of the *Gas Safety Regulation 2001* (see clause 125) do not describe an analogous power. Section 9 (2) relates to a decision made by a statutory office holder under regulation that can be made without reference to any other person or the Assembly. In contrast, the Act new section 23 (4)/existing 24 (4) provision requires that the Minister must make a regulation to prescribe the circumstances.

The Assembly may amend or disallow regulations made under this part if it feels that the circumstances prescribed are not appropriate.

In *ADCO Constructions v Goudappel* [2014] HCA 18, the High Court held valid clauses in an Act that authorised regulations where the provisions of the Act could be amended in the manner specified in the regulations.

Gagelar J noted that the underlying legislative purpose of such clauses is "evidently to provide a flexible means of making adjustments" to provisions without requiring adjustments to be embodied in further amendments to an Act. He noted that conferring powers on the executive as may be considered by the executive to be appropriate is subject to disallowance and scrutiny by bodies with a comparable role to the Committee's.

Gagelar J further stated:

> *"That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clauses". The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another."*

In consideration of the above, I do not consider that new section 23 (4) represents an inappropriate delegation of legislative power.

Does a clause of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?—term of reference (3)(b)

The Committee has commented on the drafting of proposed subsection 27 (2). This clause does not introduce new powers but simply redrafts the existing provision to replace the planning and land authority with the construction occupations registrar as the statutory officer responsible for exercising the power. It is effectively a consequential amendment to a power that has been exercised continuously and without incident since the inception of the Gas Safety Act. I consider that the power in the provision is sufficiently defined at present.

I thank the Committee for its considered comments and remarks on the analysis of the human rights issues and access to law in the Explanatory Statement for the Bill.

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

Yours sincerely

Yours sincerely

Simon Corbell MLA
Minister for the Environment

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

Thank you for the Standing Committee's comments provided in the Scrutiny Report 21 in relation to appointments made to the Victims Advisory Board under the *Victims of Crime Act 2004*.

I note the issue raised by the Committee about the authority for appointing 2 part-time members against the single position under the Act to represent the interests of Indigenous communities under s 22D of the Act.

I take this opportunity to advise the Committee that since these appointments were made, one of the appointed Aboriginal and Torres Strait Islander members has resigned, leaving only one member. I have remade the remaining member's appointment with a revised explanatory statement that omits mention of the joint appointment.

I have asked my Directorate to provide me with advice about this provision in light of the Committee's concerns as to the scope to appoint two persons. I am keen to be able to facilitate increased participation on the Board by Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with a disability.

Thank you for raising this issue with me.

Yours sincerely

Simon Corbell MLA
Attorney-General

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