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

SCRUTINY REPORT 31

28 APRIL 2015

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Dr Chris Bourke MLA (Deputy Chair)

Mr Jeremy Hanson CSC MLA

Ms Mary Porter AM, MLA

SECRETARIAT

Ms Janice Rafferty (Acting Secretary)

Ms Joanne Cullen (Acting Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone	02 6205 0173
Facsimile	02 6205 3109
Post	GPO Box 1020, CANBERRA ACT 2601
Email	scrutiny@parliament.act.gov.au
Website	www.parliament.act.gov.au

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 comments on them:

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Children and Young People Act 2008* to in relation primarily to the membership of the Children and Young People Death Review Committee.

GOVERNMENT PROCUREMENT (NOTIFIABLE INVOICES) AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Government Procurement Act 2001* and the *Government Procurement Regulation 2007* to improve transparency and accountability in government spending.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2015

This is a Bill for an Act to amend a number of Acts in the Justice and Community Safety Directorate portfolio.

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2015

This is a Bill for an Act to amend a number of Acts concerning planning and building law in ways that make minor policy and editorial amendments.

STATUTE LAW AMENDMENT BILL 2015

This is a Bill for an Act to amend a number of Acts and regulations for statute law revision purposes only.

BILL—COMMENT

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

HUMAN RIGHTS AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Human Rights Act 2004* to extend the application of Part 5A of the Act to the right to education provided for in section 27A of the Act, and to insert into section 27 a number of rights that are applicable only to Aboriginal and Torres Strait Islander peoples.

PROVISION FOR RIGHTS THAT ARE APPLICABLE ONLY TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

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*

In section 5 of the *Human Rights Act 2004* (HRA), the notion of "human rights" is employed to mean the civil and political rights in Part 3 of the Act and the economic, social and cultural rights in Part 3A. Clause 7 of the Bill proposes to add to the Part 3 rights by the insertion into section 27 of a new

subsection 27(2), to provide as follows:

(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

(a) to maintain, control, protect and develop their—

(i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and

(ii) languages and knowledge; and

(iii) kinship ties; and

(b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The HRA protects the Part 3 rights in three main ways.

First, subsections 32(1) and (2) provide that if a proceeding is being heard by the Supreme Court, and an issue arises in the proceeding about whether a Territory law is consistent with a human right, and the Court, is satisfied that the Territory law is not consistent with the human right, it may declare that the law is not consistent with the human right. In short, the Supreme Court is empowered to make a declaration of incompatibility. A declaration does not affect the validity, operation or enforcement of the law, or the rights or obligations of anyone. On the other hand, the Attorney-General must present to the Legislative Assembly a copy of a declaration and her or his response to it. It will then be a matter for the Assembly whether the relevant law is amended or repealed.

Secondly, by HRA section 30, "[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights". One consequence is that every administrative power conferred by a Territory law must be exercised, so far as possible, in a way that does not limit a Part 3 or a Part 3A right.

Thirdly, under paragraph 40C(2), a person may start a proceeding in the Supreme Court against the public authority, or rely on the person's rights under this Act in other legal proceedings, where the person claims that a public authority has acted in contravention of section 40B and alleges that the person is or would be a victim of the contravention. On such a proceeding the Supreme Court may "grant the relief it considers appropriate except damages".[1] Subsection 40B(1) states that is it unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right.

A note to proposed subsection 27(2) states that the primary source of these rights is Articles 25 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*. This document was adopted by the United Nations General Assembly on 13 September 2007. A General Assembly Declaration is not a legally binding instrument under international law, but may be seen as a statement of goals to which those states that adopt it aspire. The Australian Government endorsed the declaration in April 2009.

Considering the extent of the protection to the rights (as outlined above) stated in proposed subsection 27(2), it is clear that this statement of them is not merely aspirational. These rights may

[1] The reference to "other legal proceedings" in paragraph 40C(2)(b) means that persons are able to rely on the HRA rights in other forums, such as the Magistrates Court, the Childrens Court, and the ACAT. Such bodies cannot grant a remedy under section 40C(4), but may address the rights issue within the context of their existing powers and processes—"Economic, social and cultural rights in the *Human Rights Act 2004*—Section 43 review", a paper tabled in the Legislative Assembly on 25 November 2014, at 5.3-5.4.

be invoked in support of an application for a declaration of incompatibility, or in a proceeding for relief under section 40C.

From a human rights standpoint, debate about whether proposed subsection 27(2) should be inserted into the HRA may be viewed as a matter of whether it cuts across existing HRA rights to an extent that is unacceptable.

From this perspective, the primary right is that in HRA subsection 8(3): "Everyone is equal before the law and is entitled to the equal protection of the law without discrimination". The example appended to this subsection cites discrimination because of race as an example. It is often regarded as one of the most fundamental of the rights upon which our constitutional system is founded. A law which confers on certain persons rights not afforded to others cuts across the right to equal protection of the law. It might also, in a particular situation, cut across any of the other rights stated in Part 3 of the HRA.

On its face, proposed subsection 27(2) cuts across this right, but might be supported by argument that the right in subsection 8(3) (as any other HRA right) is not absolute (as HRA section 28 contemplates). There are circumstances where some group of persons defined by some characteristic (in this case, race), may, by reason of certain circumstances, be accorded certain rights not available to other persons. In this case, inserting proposed subsection 27(2) is based on argument that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights, and have "distinctive spiritual, material and economic relationships ... with the land and waters and other resources with which they have a connection under traditional laws and customs" (Explanatory Statement at 5). These rights require protection in the manner provided for in proposed subsection 27(2). There is, however, no further elaboration of why protection is required.

It is a matter for each Member of the Assembly to consider whether proposed subsection 27(2) is an acceptable limitation of the right to equal protection of the law, and other rights stated in HRA Part 3. The Committee may perhaps assist this consideration by making three points.

The first is that proposed subsection 27(2) is not an absolute right, but may be limited by a law, or by an administrative action, where that limitation is "proportionate" according to the test stated in HRA section 28.

Secondly, subsection 27(2) will not "trump" any or all of the other rights stated in HRA Part 3. If, say, a law that is protective of the right to privacy is argued to be incompatible with proposed subsection 27(2), assessment of the proportionality of the limitation on the rights in proposed subsection 27(2) will need to give weight to the right to privacy. (These are of course, very open-ended assessments. While this is often spoken of as a "balancing exercise", there are no scales to determine when there is or is not an appropriate "balance".)

Thirdly, there is the issue of just how extensive are the rights in proposed subsection 27(2). Those opposed to the adoption of the *Declaration on the Rights of Indigenous Peoples* raised questions about the reach of the articles upon which proposed subsection 27(2) is based. Questions such as:[2] will the right to have "material and economic relationships with land" "recognised" apply to interests in land now lawfully held by third parties? Will the right to protection of Aboriginal and Torres Strait Islander peoples' "knowledge" lead to the recognition of new types of intellectual property? Will the right to protection of cultural heritage, (which the Explanatory Statement acknowledges may embrace laws— see at 4-5) be a basis to argue that a rule or a practice warranted by customary law should be recognised notwithstanding its incompatibility with the general law applicable to all persons?

The Committee does not suggest that if the answer to these questions is in the positive, that is a good reason to oppose the adoption of proposed subsection 27(2). There are many who would adopt

[2] These questions are adapted to apply to the particular rights stated in proposed subsection 27(2).

the quite contrary position. The point here is simply that how such questions are answered may have a bearing on whether proposed subsection 27(2) should be adopted.

The Explanatory Statement attempts to deal with similar questions. There is however a question whether the Explanatory Statement understates the potential legal effect of proposed subsection 27(2).

It argues that proposed subsection 27(2) "does not intend, and is not designed, to confer or create real or intellectual property rights over the expressions or manifestations of that cultural heritage, as regulation of those property rights is a matter for the Commonwealth. If such rights are claimed they must be claimed and exercised in accordance with the processes set out under the relevant Commonwealth laws". The Commonwealth Constitution confers power on the Commonwealth Parliament to make laws with respect to "copyrights, patents of inventions and designs, and trade marks" (paragraph 51(xviii)). This is not however a power exclusive to the Commonwealth, and a Territory law is operative so long as not inconsistent with a Commonwealth law. This a very complex matter, but it must be allowed that the particular assertion of a right, for example, to protection of "languages and knowledge" (subparagraph 27(2)(a)(ii)) may not be inconsistent with a Commonwealth law. There is also the question of whether such an assertion could be said to be classified as an assertion of a copyright, a patent or a trade mark (or any other such interest that has been recognised to fall within this Commonwealth power).

The Explanatory Statement makes a similar argument concerning proposed paragraph 27(2)(b):

> Section 27(2)(b) provides for the recognition and valuing of these [material and economic] relationships as a separate clause, to indicate that the HRA does not and cannot confer property rights or other rights to maintain, control, protect and develop, over these relationships with the environment and resources, as this is a matter for the Commonwealth. If such rights are claimed they must be claimed and exercised in accordance with the processes set out under the relevant Commonwealth laws.

It is difficult to follow this argument, perhaps because there may be words omitted from the first sentence. But the general point seems incorrect. The Commonwealth Parliament does not have legislative power over "environment and resources", and much less so concerning "property rights". It has some discrete powers that are employed to regulate some aspects of these matters, but again these powers are not exclusive. There are several Territory laws that also regulate some such aspects, and it is not unrealistic to view proposed subsection 27(2) as another such law.

The Explanatory Statement makes a positive statement about the intention behind paragraph 27(2)(b). It

> is not to confer property rights through the recognition of native title (which has been extinguished in the ACT), but to require the ACT Government to recognise the prior and continuing relationships of Aboriginal and Torres Strait Islander peoples with the Canberra region and environment as first owners and custodians and to value the importance of those relationships as an integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment.

Paragraph 27(2)(b) does not however require the Territory Government or the Legislative Assembly to do anything. It provides that Aboriginal and Torres Strait Islander peoples must not be denied the right to recognition of these relationships. It is arguable that these relationships must be recognised as existing at the present time, and be relied upon in any appropriate legal forum. For example, a relevant person may seek to have the Supreme Court make a declaration that a particular right falling within the notion of a "relationship" exists in a particular context. (Just what are "material and economic relationships" with land, waters and other resources will of course be a matter for debate and clarification.)

Furthermore, any Territory law must be interpreted in a way that is compatible with this right (see HRA, section 30), and if not capable of such an interpretation, the law may be subject to a declaration of incompatibility.

Of course, it may also be said that executive or legislative action should be employed to afford recognition, but this does not appear to be the extent of these rights.

In apparent reference to paragraph 27(2)(a), the Explanatory Statement argues that

> [c]ultural rights are already necessarily limited at the point where they might infringe on the enjoyment of other rights in the HRA supporting community safety, such as the right to life and the right to of liberty and security of person. These limitations are established via legislative provisions that create offences for a gamut of criminal conduct, in a whole range of statutes, and which apply across the whole community, regardless of culture.

There is however nothing in proposed subsection 27(2) to suggest that these rights are necessarily subject to limitation by a law that is protective of some other HRA right. As discussed above, one right does not trump another. The right to liberty is subject to limitation where that is proportionate, and such an assessment it would be necessary to take into account the proposed subsection 27(2) rights. On the face of it, an Aboriginal and Torres Strait Islander might argue that to the extent that a law protective of liberty applied to them, it was incompatible with their right (for example only) to maintain their "distinctive ... observances".

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

THE EXTENSION OF THE APPLICATION OF PART 5A OF THE ACT TO THE RIGHT TO EDUCATION PROVIDED FOR IN HRA SECTION 27A

Noting subsection 27A(3), HRA section 27A states a quite limited right to education. It provides:

27A Right to education

(1) Every child has the right to have access to free, school education appropriate to his or her needs.

(2) Everyone has the right to have access to further education and vocational and continuing training.

(3) These rights are limited to the following immediately realisable aspects:

(a) everyone is entitled to enjoy these rights without discrimination;

(b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

By reason of HRA section 30, every administrative power conferred by a Territory law must be exercised, so far as possible, in a way that does not limit the rights stated in subsection 27A(3). A challenge to the exercise of such a power on the basis that the decision-maker had not appreciated that the power was limited by reference to an HRA right might be by way of application to the Supreme Court for an ADJR Act or "common law" remedy, or might arise collaterally in any other legal proceeding before a Territory court or tribunal (such as ACAT). Furthermore, a law might be called into question in a Supreme Court proceeding by means of an application for a declaration of incompatibility.

At present, however, HRA Part 5A does not permit a person to rely on its provisions—in particular section 40B—imposing obligations on public authorities to act consistently with HRA rights, nor to start a proceeding in the Supreme Court for relief (except damages) in respect of a contravention of these obligations. This is the consequence of subsection 40B(3), which defines "human rights" as employed in section 40B so that it does apply to Part 3A rights. (At present, the only Part 3A rights are those stated in section 27A.)

Clause 8 of the Bill proposes to omit subsection 40B(3). The Explanatory Statement states that

> [t]his definition ... operated to limit the right to education in section 27A to an interpretational right only, with the obligations on public authorities in Part 5A of the Act not extending to the right to education.

An "interpretational right" is however significant, and what section 40B adds to the effect of HRA section 30 is not clear. The Committee assumes that there is some difference.

The Explanatory Statement continues:

> This amendment has the effect of providing the right to education (an economic, social and cultural right derived from the International Covenant on Civil and Political Rights) with the same 'status' as the civil and political rights in Part 3. It imposes an obligation on public authorities to comply by acting and making decisions in accordance with the right to education in s 27A.

The amendment does much more than this. It would enable a person who is or would be a victim of a contravention of the obligation stated in section 40B(1) to start a proceeding in the Supreme Court on this basis (subsection 40C(2)), and to seek relief as the Court "considers appropriate (except damages)" (subsection 40(3)). Just what the extent of this relief might be is yet to be determined, but on the face of it, it will be more extensive than existing relief available in analogous proceedings.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond, in particular to explain (a) what subsection 40B(1) adds to the effect of HRA section 30, and (b) the potential consequences of the adoption of a clause so far as concerns the availability of Supreme Court relief under subsection 40C(4).

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—COMMENT

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

Is this a disallowable instrument? / Minor drafting issues

Disallowable Instrument DI2015-41 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2015 (No. 1) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as a non-judicial member of the Sentence Administration Board.**

This instrument appoints a specified person as a non-judicial member of the Sentence Administration Board. The formal part of the instrument states that the appointment is made under paragraph 174(1)(b) of the *Crimes (Sentence Administration) Act 2005*. However, the Committee notes that the formal part of the Explanatory Statement for the instrument incorrectly states that the instrument is made under paragraph 174(1)(b) of the Act (which only applies to the appointment of the chair and deputy chairs of the board).

The Committee notes that it is only the appointment of non-public servants that must be effected by disallowable instrument. The Committee notes that section 227 of the *Legislation Act 2001* provides that section 229 (which requires the making of statutory appointments by disallowable instrument) 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* (available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), the Committee stated:

> Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not 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 in the Explanatory Statement for this instrument.

As the Committee has consistently pointed out, this is not an onerous requirement.

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 person appointed by this instrument is not a public servant.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2015-8 being the Unit Titles Amendment Regulation 2015 (No. 1) made under the *Unit Titles Act 2001* **amends the definition of Attachment in the Act and corrects minor inconsistency between the regulation and the Surveyor (Surveyor General) Practice Directions 2013 No. 1.**

Subordinate Law SL2015-9 being the Road Transport (Driver Licensing) Amendment Regulation 2015 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* **allows the Road Transport Authority to issue a driver licence with an address other than the licence holder's home address to particular individuals.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 24 March 2015, in relation to comments made in Scrutiny Report 29 concerning the Courts Legislation Amendment Bill 2015 (attached).
- The Minister for Workplace Safety and Industrial Relations, dated 31 March 2015, in relation to comments made in Scrutiny Report 28 concerning Subordinate Law SL2014-32—Work Health and Safety (Asbestos) Amendment Regulation 2014 (attached).

The Committee wishes to thank the Attorney-General and the Minister for Workplace Safety and Industrial Relations for their helpful responses.

Steve Doszpot MLA
Chair

April 2015

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 31 July 2014

Red Tape Reduction Legislation Amendment Bill 2014

Report 27, dated 3 February 2015

Disallowable Instrument DI2014-284 - Gene Technology (GM Crop Moratorium) Advisory Council Member Appointment 2014 (No. 1)

Public Sector Bill 2014

Simon Corbell MLA

DEPUTY CHIEF MINISTER

ATTORNEY-GENERAL
MINISTER FOR HEALTH
MINISTER FOR THE ENVIRONMENT
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 note the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) has released Scrutiny Report No. 29 (the Report) containing comments on the *Courts Legislation Amendment Bill 2015* (the Bill). I thank the Committee for its comments and offer the following in response to those comments.

Clause 20 – Coronial investigation scene orders

I note the Committee's comments about the coronial scene investigation powers inserted by clause 20 of the Bill, and particularly about the use of a 'reasonable in the circumstances' criteria in relation to the exercise of police powers in proposed new s 68G(1) of the *Coroners Act 1997*. This provision states that a police officer may exercise the investigation scene powers given to him or her in any way that the officer considers reasonable in the circumstances, and is consistent with the coronial investigation scene order or declaration that applies in the particular case. I note that 'reasonableness' is a well established legal principle, and would be exercised by a police officer in light of the provisions of the *Human Rights Act 2004*, including, as the Committee has pointed out, s 30 of that Act which provides that '[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.

Relevant rights which would be considered by police in assessing the reasonableness of a particular exercise of coronial scene powers would include the right to privacy and reputation (s 12), the right to freedom of movement (s 13) and the right to liberty and security of the person (s 18). These rights all emphasise that exercise of police discretionary powers must not be unlawful or arbitrary. Police engage in routine consideration of these rights in respect of the exercise of their many and varied powers. Common law suggests the exercise of police powers may involve legitimate interference with these rights as long as this does not go beyond what would be an ordinary and natural consequence of the due exercise of the power (DPP v Kaba [2014] VSC 52 at para 448).

Clause 24 – Interlocutory orders binding on a trial judge

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0000 Fax: (02) 6205 0535 Email: corbell@act.gov.au
Twitter: @SimonCorbell Facebook: www.facebook.com/simon.corbell

CANBERRA

The Committee has queried whether new s 76 of the *Court Procedures Act 2004*, which is inserted by clause 24 of the Bill, may prejudice a defendant's right to a fair trial. The provision has been drafted to ensure this is not the case, by the insertion of new s 76(3):

> '(3) An order, ruling or direction of the Supreme Court under subsection (2) is binding on the trial judge at the hearing of the trial *unless in the opinion of the trial judge it is not in the interests of justice for the order, ruling or direction to remain binding*.' (emphasis added)

I note the Committee's specific comments about whether there may be a circumstance that arises in which the defendant cannot adduce evidence that is relevant or necessary to showing that the defendant should not be convicted. However, the provision ensures that it is possible to re-litigate issues if the trial judge thinks it is necessary in the interests of justice to do so, which is intended to cover such situations and ensure a defendant's right to a fair trial is maintained.

The provision is similar to existing s 130A of the *Criminal Procedure Act 1986 (NSW)*, which provides that pre-trial orders as well as orders made during the trial (if that trial is then discontinued) are binding on future trial judges.

The amendment reduces the opportunity for re-litigation of process matters which can happen when the trial judge is different from the judge making the pre-trial orders, determinations or findings. Currently, undoing interlocutory orders at trial can add unnecessary time to the trial and prevent the matter from being heard within estimates timeframes.

Clause 25 – Pre-trial disclosure of expert evidence

I acknowledge the Committee's consideration of the proposed new requirement for pre-trial disclosure of expert evidence in the *Court Procedures Act 2004*.

I consider the provisions will allow the issues in a trial to be narrowed at the earliest possible opportunity. This will result in more efficient, timely trials, and reduce the length and complexity of trials. In most cases this will mean fewer resources expended by the accused person, the prosecutor and the courts.

I also consider that the changes strike the right balance between the interests of the Territory in having an effective trial process and the rights of an accused. The requirement in the Bill is only for the accused to disclose expert evidence that they intend to use in the trial at an earlier stage of the trial process. The accused is not being required to disclose anything they would not otherwise have disclosed. I also note that while requirements for defendants to disclose information prior to trial are known to have drawn criticisms by some, including those outlined by the Committee, the argument that compulsory pre-trial disclosure infringes the fundamental principles of the right to silence or the right against self-incrimination has also been rejected by others, including by the United Kingdom Royal Commission on Criminal Justice.[3]

I draw to the Committee's attention that human rights jurisdictions such as Victoria and the United Kingdom have enacted similar provisions. The Victorian Court of Appeal has recently commended an interpretation of the Victorian provisions which favoured "the early determination of questions of law and otherwise the facilitation of expeditious and economic determination of criminal proceedings" (DPP (Cth) v JM [2012] VSCA 21, [295]-[297]).

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[3] Royal Commission on Criminal Justice (1993) at 97-98, www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice

I advise that the amendments in the Bill were drafted in accordance with the ACT's *Human Rights Act 2004*, and were modelled on the existing provisions of the *Criminal Procedure Act 1986* (NSW), noting that those provisions require more extensive pre-trial disclosure of material than is proposed in this Bill.

I trust this information is of assistance to the Committee. I thank the Committee for its consideration of the Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

Mick Gentleman MLA

MINISTER FOR PLANNING
MINISTER FOR ROADS AND PARKING
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING

MEMBER FOR BRINDABELLA

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

Dear Mr Doszpot

I am writing in relation to comments in the Standing Committee on Justice and Community Safety's Scrutiny Report No 28 of 16 February 2015 in relation to the *Work Health and Safety (Asbestos) Amendment Regulation 2014* (the Regulation). I appreciate the considered comments provided by the Committee and provide the following response.

The purpose of the Regulation is to adopt Chapter 8 of the national model Work Health and Safety Regulations, which governs the management, control and removal of asbestos in workplaces. In adopting this standard, the Regulation introduces a range of asbestos-related offences.

The Committee has noted that these include strict liability offences and has drawn attention to its technical and stylistic expectation that an explanatory statement identify the reason why each offence needs to be one of strict liability, and any defences available.

In response, I would draw the Committee's attention to the fact that all work health and safety offences are strict liability offences, unless otherwise prescribed. This is accomplished by section 12A of the *Work Health and Safety Act 2011* (the Act), and section 6A of the *Work Health and Safety Regulation 2011*.

The reasons for this are already explained in the Explanatory Statement to the Act, which provides:

> *The offences incorporating strict liability elements have been carefully considered during the Bill's development. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties.*

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0218 Fax: (02) 6205 0368 Email: GENTLEMAN@act.gov.au
Twitter: @GENTLEMANMick Facebook: www.facebook.com/MickGentleman

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In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. The rationale is that people who owe work safety duties such as persons conducting a business or undertaking, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offence is irrelevant.

This strict liability framework has operated in the Territory since the model work health and safety laws came into effect on 1 January 2012. The Chapter 8 offences that the Regulation now implements were developed as part of the same harmonised package of laws, for the same reasons, and to give effect to the same objectives.

That being said, I appreciate the Committee's view and the reasons for it. In the interests of completeness I will ensure that future amendments to the Act or Regulations giving effect to harmonisation include a statement on strict liability offences.

I trust this information is of assistance to the Committee.

Yours sincerely

Mick Gentleman MLA
Minister for Workplace Safety and Industrial Relations