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

SCRUTINY REPORT 38

20 OCTOBER 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILL—NO COMMENT

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

BUILDING (LOOSE-FILL ASBESTOS ERADICATION) LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend Territory laws to a number of amendments to facilitate the implementation of the demolition and resale components of the Loose-fill Asbestos Insulation Eradication Scheme that was announced by Government on 28 October 2014.

LOTTERIES AMENDMENT BILL 2015

This is a Bill to amend the *Lotteries Act 1964* to provide a definition of the requirements for an entity who intends to enter into a lottery agreement with a lottery operator.

RATES AMENDMENT BILL 2015

This is a Bill to amend the *Rates Act 2004* to establish a methodology for changes in the unimproved value of airport lands.

BILLS—COMMENT

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2015 (NO 3)

This is a Bill for an Act to amend the *Children and Young People Amendment Act 2008* to give effect to a number of important elements of *A Step Up for Our Kids* (Out-of-home care Strategy 2015-2020) that was released by the ACT Government in January 2015.

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

Report under section 38 of the Human Rights Act 2004

The Explanatory Statement contains a careful statement of the human rights issues arising from the Bill and addresses justifications for limitations according to the framework stated in section 28 of the *Human Rights Act 2004* (HRA). The Committee refers Members of the Assembly to this statement.

CRIMES (DOMESTIC AND FAMILY VIOLENCE) LEGISLATION AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Crimes Act 1900* to provide that strangulation that does not cause unconsciousness will be an act that endangers health; the *Domestic Violence and Protection Orders Act 2008* to create a category of an interim domestic violence order that would remain interim until any outstanding related criminal charges were finalised; and the *Evidence (Miscellaneous Provisions) Act 1991*, primarily to allow police records of interview of a complainant to family violence and all sexual offences to be admitted as evidence in chief.

INTRODUCTION

The Committee has addressed human rights issues that arise out of a bill of this kind on a number of occasions since 1998.[1] In those reports it stated a starting point for analysis of these issues that is similar to that stated in the Explanatory Statement at pages 1 to 4. Such bills are aimed at enhancing the prospect that those subject to violence in a family context may enjoy the benefit of various rights stated in the *Human Rights Act 2004* and those recognised by the common law. As the Explanatory Statement acknowledges, the manner in which such enhancement is proposed may also engage and limit the rights of others and, in particular of course, of persons who are alleged to have perpetrated the violence. Where a provision of a bill limits HRA rights, the proponent of the bill should offer a justification for the limitation in terms of the framework stated in HRA section 28. The Committee also expects that a similar kind of justification will be offered for any provision that limits a common law right.

From this standpoint, there are some aspects of the Bill that warrant a comment.

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

Report under section 38 of the *Human Rights Act 2004*

THE PROPOSED CREATION OF A CATEGORY OF "SPECIAL INTERIM ORDER" UNDER THE DOMESTIC VIOLENCE AND PROTECTION ORDERS ACT 2008

The current *Domestic Violence and Protection Orders Act 2008* ("the Act") empowers the Magistrates Court to make an "interim order" on an application for a final domestic violence order. The court must be satisfied on the matters stated in section 29, and these include, in particular, that the order is necessary to ensure the safety of the aggrieved person or a child of that person. There are provisions of the Act that limit the periods during which an interim order has effect. These time limits are stated having regard to the fact that an interim order may restrain the respondent in ways that could cause hardship to and severely restrict the exercise by the respondent of various of the HRA rights, such as the right to move freely and to reside in her or his usual place of residence.

In part 3 of the Bill, it is proposed to define the concept of an interim order so that it would embrace two kinds of such orders, being (1) a "special interim order", and (2) (as a residual category) a "general interim order".

Clause 12 of the Bill proposes to insert section 30A into the Act, and paragraph 30A(1)(a) would permit the Magistrates Court, when making an interim order, to make a special interim order if "(i) the application is for a final domestic violence order; and (ii) there is a related charge outstanding in relation to the respondent; ... ". A related charge is a charge against the respondent where that person is "a relevant person in relation to the aggrieved person" (being a familial or domestic relationship) and the offence charged is a "domestic violence offence" (other than an offence against section 90 of the Act). Part 1.2 of Schedule 1 of the Act specifies a large range of offences for this purpose.

[1] *Scrutiny Report No 3 of 1998*, concerning the Domestic Violence (Amendment) Bill 1998; *Scrutiny Report No 12 of 1998* (in Government Responses section); *Scrutiny Report No 4* of the *Sixth Assembly* concerning the Domestic Violence and Protection Orders Amendment Bill 2005; and the *Scrutiny Report No 59* of the *Sixth Assembly* concerning the Domestic Violence and Protection Orders Amendment Bill 2008.

Proposed division 4.3 of the Bill (see clause 30) specifies the periods for which a general interim order remains in force. The general rule is that it must not be in force for more than two years, but there is provision for the making of a further order (see clause 30, proposed section 41D), and for an extension where an adjournment has been necessary.

Proposed division 4.4 of the Bill (see clause 30) specifies the periods for which a special interim order remains in force. The basic rule is that the court cannot decide the application for the final order until all related charges are finalised (see section 42B). Also relevant is proposed section 34A of the Act (see clause 19), which provides that the return date for the application for the final order must be (a) not earlier than the day all related charges are finalised; and (b) not later than 21 days after the day all related charges are finalised.

In its discussion of division 4.4, the Explanatory Statement (at page 5) argues that the bar on the making of a final order until after outstanding criminal charges are finalised protects the respondent's right to a fair trial on those charges. The point here is that since the Magistrates Court cannot hold a hearing to determine if a final order should be made until after the charges have been finalised, the respondent/accused cannot be in effect compelled to give evidence (and, in particular, make admissions) prior to the trial on the charges.

On the other hand, it appears to be recognised that the "right to family" (referring to HRA subsection 11(1)) of the respondent/accused is limited due to the continued operation of the special interim order (page 5). It is also stated that "[a] person may also be punished with imprisonment if they breach the order, which engages their rights under section 18" (page 6).

The nub of the justification for limiting the rights of the respondent may be found in this statement at page 6 of the Explanatory Statement:

> This Bill establishes a new category of "special" interim DVO to increase the protections available to victims of domestic violence where there are related criminal charges. The new orders may prevent the subject of the order from contacting or visiting their family in certain circumstances.

It is also stated that "[t]he purpose of the amendments discussed above is to protect victims of domestic and family violence from further traumatisation". These amendments include those in division 4.4, but it is unclear how they would protect against "further traumatisation". It is said further that:

> there are no less restrictive means available to provide added protections for both respondents and applicants who are subject to a DVO with current related criminal charges. The orders will remain interim until after the related criminal charges are heard and a decision is made on the final orders. ... This amendment reflects the positive obligation of states to actively protect citizens from domestic and family violence.
>
> The ability of the Magistrates Court to issue conditions appropriate for each person's circumstances, together with the right of review by the respondent to the orders provide safeguards which ensure the respondents rights are represented in the granting of special interim orders.

(The reference in the passage above to a "DVO" is potentially misleading. What is meant is a special interim order.) The Committee refers Members of the Assembly to the Explanatory Statement discussion at pages 11-12.

It may be asked, however, why is it considered necessary to create the separate category of special interim orders. Their effect is that the restrictions on the rights of the respondent that flow from the making of an interim order are automatically extended until the finalisation of the criminal charges. This may extend their operation beyond the current general rule that an interim order expires after two years. It seems to be assumed that this extension is necessarily warranted to protect the aggrieved person.

Under section 41 of the current Act, where an interim order that has ended or is about to end after two years, the Magistrates Court "may make a further general interim order if satisfied there are special or exceptional circumstances (having regard to the principles for making protection orders) that justify the making of a further general interim order". (Proposed section 41D, which applies to a general interim order, is in identical terms.) The relevant principles are stated in section 7 of the Act, and would appear to require the court to consider whether there is in the particular case a need to make a new order to ensure that the aggrieved person, and any child is not at risk of exposure to domestic violence.

Section 41 of the current Act (and proposed section 41D) appear to provide a means to protect the aggrieved person and any child while at the same time ensuring that the limitations on the rights of the respondent involved in an extension beyond two years is warranted in the particular circumstances.

A matter to be considered is whether this means for protecting the aggrieved person by extending the operation of an interim domestic violence order will achieve that object while at the same time being less restrictive of the rights of the respondent.

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

EVIDENCE IN DOMESTIC VIOLENCE PROCEEDINGS

Clause 85 of the Bill proposes to insert a new part 4.3 into the *Evidence (Miscellaneous Provisions) Act 1991* ("the Act") and is headed "Evidence in domestic violence proceedings". Division 4.3.1 states definitions; division 4.3.2 permits the giving of certain evidence in closed court; and division 4.3.3 provides for certain recorded statements taken in a police interview to be admissible as evidence. These are complex provisions, but inasmuch as they limit some of the rights of a defendant to a criminal charge, they need to be carefully considered.

A key concept is that of a "domestic violence proceeding". Somewhat simplified, this is a proceeding—which is likely to be a proceeding leading to a criminal trial of a person—for a domestic violence offence. The complainant for such an offence is a person against whom a domestic violence is alleged, or has been found, to have been committed and who is a relevant person in relation to the accused person. ("Relevant person" is defined in section 36B of the Act, and generally covers person in some familial or domestic relationship with the accused.[2]) (The concept of "recorded statement" will be considered later.)

[2] Section 36B is the current section 38B of the Act as it is proposed to be slightly amended by clauses 60 to 62 of the Bill.

EVIDENCE THAT MAY BE GIVEN IN A CLOSED COURT

The relevant provision is proposed section 78 of the Act. It applies to a complainant giving evidence in a domestic violence offence proceeding if the court considers that the complainant has a vulnerability that affects the complainant's ability to give evidence because of either:

- the circumstances of the proceeding, or
- the complainant's circumstances (subsection 78(1)).

In such a case, "[t]he court may order that the court be closed to the public while all or part of the complainant's evidence (including evidence given under cross-examination) is given" (subsection 78(3)). It may be that the scope of this open-ended discretion is limited by subsection 78(4) which provides that the court "must consider" whether the complainant wants to give evidence in open court, and also whether "it is in the interests of justice that the complainant give evidence in open court".

An order made under proposed section 78 does not stop "a person nominated by the complainant" from being in court (paragraph 78(5)(a)). **A point for clarification** is whether more than one person may be nominated. The usual rule is that the singular includes the plural,[3] but perhaps in this instance it is intended that only one person may be nominated. If so, this limitation might be made more explicit.

In addition, an order does not stop from being in court a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer (subsection 78(5)).[4]

Comment:

1. In the first place, it should be noted that "giving evidence" includes a case where a recorded statement is put in evidence under proposed division 4.3.3 (see subsection 78(6)). The section is however very clearly not restricted to this situation. The Explanatory Statement does understand this, but also states that of particular concern is evidence being given by a complainant "when they are being interviewed shortly after a traumatic event. The evidence is being taken at a time when the complainant is particularly vulnerable and it is important that they have the ability to seek to request the evidence be heard in a closed court" (Explanatory Statement at page 32). With respect, this does not make sense. Section 78 is dealing with evidence given on a trial, which may be, and usually is, months or even years after any interview they may have had with any person. It may be that the Explanatory Statement intends to refer to evidence under proposed division 4.3.3. The Victims of Crime Commissioner also seems to have asked for a restriction that relates only to this kind of evidence (see at page 32).

In the light of this material in the Explanatory Statement, there is a question whether the intention was to make provision for a closed court only in a case where a recorded statement is put in evidence under proposed division 4.3.3.

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

[3] See paragraph 145(b) of the *Legislation Act 2001*.

[4] Section 40 of the Act contains a prohibition on the publication of the name or identity of the complainant.

2. The discretion of the court under subsection 78(3) is practically unconfined. Even if subsection 78(4) qualifies the discretion, the notion of "the interests of justice" does little if anything to state a limit. These provisions are open to the objection that "[t]he broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness".[5]

The right to a fair trial stated in HRA section 21 includes the right to a "public hearing". Subsection 78(3) limits that right, and must be justified under HRA section 28. Subsection 28(1) provides that the limit must be "set by laws", and this is usually taken to require that there must be a sufficient degree of predictability and certainty about how the limit will apply. It is arguable that an open-ended discretion does not satisfy this requirement.

The problem might be overcome by linking the exercise of the discretion to the threshold judgement required by subsection 78(1). This would be a less restrictive limit on the right of an accused to a trial by a public hearing.

3. Of necessity the accused must be present in court at all times, and also presumably her or his legal representatives. An issue is why the accused may not also nominate "a person" to be in court at the relevant times. In this connection, one possibility to consider is whether persons nominated by the accused might observe the proceedings in court by video link.

4. The more fundamental issue is whether providing for a closed court in these circumstances is justifiable. The right to a fair trial stated in HRA section 21 includes the right to a "public hearing" is fundamental to the fair and proper administration of justice. In its recent report *Traditional Rights and Freedoms*,[6] the Australian Law Reform Commission stated:

> 10.43 Open justice is one of the fundamental attributes of a fair trial. That the administration of justice must take place in open court is a 'fundamental rule of the common law'. The High Court has said that 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances'.
>
> 10.44 In *Russell v Russell*, Gibbs J said that it is the 'ordinary rule' of courts of Australia that their proceedings shall be conducted 'publicly and in open view'; without public scrutiny, 'abuses may flourish undetected'. Gibbs J went on to say:
>
> > Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.[footnotes omitted].

The Committee refers the Assembly to the justification offered in the Explanatory Statement at page 30 in particular.

[5] A proposition quoted with approval in Justice M J Beazley and M Pulsford, "Discretion and the rule of law in the criminal justice system" (2015) 89 ALJ 158 ate 159. Justice Beazley is the President of the NSW Court of Appeal.

[6] ALRC Interim Report 127; the relevant parts are at https://www.alrc.gov.au/publications/open-justice

The Committee also draws attention to a Model Court Suppression and Non-publication Orders Bill issued in 2010 by the Standing Committee of Attorneys-General.[7] In part, this document provides:

> **8. Grounds for making an order**
>
> (1) A court may make a suppression order or non-publication order on one or more of the following grounds:
>
> ...
>
> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency), ...[8]

This model provides support for a closed court provision such as section 78, but it raises another issue. Why should section 78 not also apply in favour of any witness on the trial, including the accused if they give evidence? Failure to make such provision might be viewed as a limitation of the entitlement of everyone "to the equal protection of the law without discrimination" stated in HRA subsection 8(3).

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

THE ADMISSIBILITY OF EVIDENCE OF A RECORDED STATEMENT MADE TO THE POLICE BY A COMPLAINANT IN A DOMESTIC VIOLENCE PROCEEDING

This topic is addressed in proposed division 4.3.3 of the Bill. In very general terms, these provisions are designed to allow for the admissibility of evidence of a recorded statement made to the police by a complainant in a domestic violence proceeding.

A key concept is that of a "recorded statement". This is defined in section 77 (and found in part 4.3.1). Its primary meaning is that it is an audiovisual recording (made by a police officer) of a complainant answering questions of a police officer in relation to the investigation of a domestic violence offence.

Comment: There is a potential difficulty lying in the apparent restriction to matter in the recording that may be described as "answering questions". This issue is further addressed immediately below.

Section 79 states additional characteristics of a recorded statement. It must be made "(a) as soon as practicable after the events mentioned in the statement happened; and (b) in the form of questions and answers" (subsection 79(1)). There are other conditions stated in section 79, and it is critical to note that in the statement the complainant must make a statement "about the truth of the representations made by the complainant in the recorded statement" (paragraph 79(2)(b)(ii)).[9]

[7] The Committee's source for this document is P D Cummins, "Open Courts: Who Guards the Guardians?" (2014), available at http://www.ruleoflaw.org.au/open-courts-suppression-orders/

[8] This model has been adopted, for example, in section 37AG of the *Federal Court of Australia Act 1979*.

[9] The statement will be worthless as evidence of the existence of any facts asserted in the statement to be true unless the complainant states that what is asserted is true. There might be a rare case where an untrue statement would have evidential value.

Comment: There is a potential difficulty lying in the requirement that the statement must be made "in the form of questions and answers". On its face, this excludes statements by the complainant that are made in narrative form; that is, that are not in response to a question asked by a police officer. On trial where the admissibility of a statement is put in question, a great deal of time could be spent debating and deciding how this limitation applied. **A matter for clarification** is whether this limitation is intended.

Sections 80 and 81 are the key provisions. Under subsection 80(1), a recorded statement may be played at the hearing of the relevant trial and be admitted as all or part of the complainant's evidence in chief as if the complainant gave the evidence in person. (The complainant may give further evidence orally in chief from the witness box; subsection 80(5)).

Section 80 does not indicate the evidential value of the evidence of what the complainant said in the recorded statement. Given that the complainant must make a statement "about the truth of the representations" in the statement, it appears that the intention is that to this extent the statement is evidence of the truth of those representations. As such, the statement is evidence in a hearsay form, and the starting point is that it is inadmissible under section 59 of the *Evidence Act 2011*.[10] Subsection 81(1) addresses this issue by providing that "[t]he hearsay rule ... [does] do not prevent the admission or use of evidence of a representation in the form of a recorded statement only because it is in that form". A Note to this provision states that "[t]he hearsay rule ... will apply to the content of the recorded statement to be admitted as evidence".[11]

Comment: A difficult question arising here is what is meant by the words "in that form" in subsection 81(1). "Form" seems to refer to the form as stated in section 79. If the Note is correct, to be admissible as evidence of the truth of the facts asserted to exist (or to not exist) in the statement, the contents of the statement must fall within an exception (to be found in the Evidence Act) to the prohibition on the admissibility of hearsay evidence that is stated in section 59.

It is, however, difficult to find any exception that would cover at least most of the representations that will be found in a recorded statement of the kind described in proposed section 79. Subsection 66(1) of the Evidence Act provides for an exception where "in a criminal proceeding (if) a person who made a previous representation is available to give evidence about an asserted fact". This would include a complainant of a kind under discussion here. By subsection 66(2), the complainant or another person (such as a police officer) "who saw, heard or otherwise perceived the representation being made" can give evidence of the fact that the representation was made (and the result is that the hearsay rule in section 59 will not apply to the statement).

But there are two critical limitations on the use of section 66. The first is that when the representation was made, "the happening of the asserted fact was fresh in the memory of the person who made the representation". This is a broader qualification than is found in proposed paragraph 79(1)(a), which speaks of a statement made "as soon as practicable after the events mentioned in the statement happened". (If this means as soon as it is practicable to make the statement to the police, in some cases, this could result in a gap in time of months or even of years.)

[10] Section 59(1) of the Evidence Act provides that "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation".

[11] A Note to subsection 791(1) makes the broader statement that "[i]f the recorded statement is to be admitted as evidence in a proceeding, the rules of evidence apply to the content of the statement".

The second (and probably more significant) qualification is found in subsection 66(4) of the Evidence Act, which states that:

> If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence presented by the prosecutor of the representation *unless the representation is about the identity of a person, place or thing.* [Emphasis added]

Assertions of facts in a recorded statement admissible under proposed section 80 will relate to matters much wider than those described in the exception to the operation of subsection 66(1) that is stated in subsection 66(4).

The point that emerges from the above analysis—assuming that it is correct—is that the limited displacement of the hearsay rule by proposed section 81 may result in the facility offered by section 80 being of little practical utility.

The Committee draws this matter to the attention of the Minister and calls for a response.

Rights issues arising from proposed section 80

For the purposes of further discussion, it will be assumed that the analysis above is incorrect, so that the assertions of fact made in a recorded statement by a complainant are admissible as evidence of the existence of those facts. The key rights issue arising are whether this result limits the right of the accused to a fair trial (HRA subsection 21(1)), and/or to the guarantee stated in HRA paragraph 22(2)(g) "to examine prosecution witnesses, or have them examined".

Concerning the guarantee stated in HRA paragraph 22(2)(g), there is nothing in proposed division 4.3.3 to prevent an accused cross-examining the complainant. It appears that the drafters of the Explanatory Statement understood that the accused would be able to cross-examine the complainant. At page 29 it is said:

> Section 22 provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. A person charged with a criminal offence is also entitled to a number of minimum guarantees, including the ability to cross-examine prosecution witnesses. The amendments in new part 4.3 will engage an accused's rights in criminal proceedings, but will not limit them, as the substantive changes affect how complainants give evidence in chief. The amendments will not limit the ability of an accused to examine witnesses or adduce evidence for their own submissions.

Perhaps the right to cross-examine is preserved because the admission into evidence of the recorded statement—which might perhaps be achieved without the need for the complainant to give any evidence to identify the document—stands in place of evidence in chief, and once admitted, the accused can exercise the right to cross-examine whether or not the complainant gives any oral evidence in chief.

The Committee draws this analysis to the attention of the Minister and calls for a response.

The argument that there is a limitation of the right to a fair trial might be put in this way. If a complainant is obliged to give oral evidence to the same extent as contents of the recorded statement, the accused (usually through their legal representatives) has the opportunity to observe the manner in which the evidence is given. These observations might then be a basis for cross-examination and/or the making of submissions as to the reliability of the complainant's evidence. Where the recorded statement stands in the place of the oral testimony, the accused is denied this opportunity.

The Committee refers the Members of the Assembly to the Explanatory Statement justification for the provisions in division 4.3.3 at pages 28 to 29, and at pages 32 to 34.

HEALTH (PATIENT PRIVACY) AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Health Act 1993* to prevent certain behaviours within a defined area and within defined times around relevant declared medical facilities.

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

Report under section 38 of the *Human Rights Act 2004*

The Explanatory Statement contains a careful statement of the human rights issues arising from the Bill and addresses justifications for limitations according to the framework stated in HRA section 28. The Committee refers Members of the Assembly to this statement.

LOTTERIES (APPROVALS) AMENDMENT BILL 2015

This is a Bill to amend the *Lotteries Act 1964* to extend the categories of lotteries to be conducted that do not require approval from the Commission.

THE LIMITATION OF FREEDOM OF EXPRESSION STATED IN PROPOSED PARAGRAPH 6A(1)(E)

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*

By proposed paragraph 6A(1)(e), an exempt lottery is subject to the condition that "the person conducting the lottery must not conduct the lottery or advertise the lottery in a way that, having regard to the lottery participants, could be considered inappropriate or offensive". This is a clear limitation on the freedom of the person to express her or himself by way of an advertisement.[12] The provision engages and limits the HRA right to freedom of expression, and must be justified in terms of the standards and framework stated in HRA section 28.

(**A point for clarification** is just what result where a person conducting an exempt lottery breaches the condition in paragraph 6A(1)(e). For this discussion It is assumed that some adverse consequence might follow.)

[12] That the speech is made in the course of commerce is not relevant to this issue, although in particular circumstances it might be relevant to whether the limitation is justifiable.

The first issue is whether this limitation is one that is set by law (subsection 28(1)). This is usually taken to require that there must be a sufficient degree of predictability and certainty about how the limit will apply. It is arguable that this requirement is not met in this instance. There is firstly the terms used to state what may amount to unlawful speech. In *Monis v The Queen* [2013] HCA 4 at [47] French CJ said that "[w]hether or not located in the eye of a reasonable beholder and whether or not narrowly defined, offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability". The concept of an "inappropriate" advertisement is even broader, and the observations of French CJ apply with more force.

Secondly, there is the question of the standpoint from which a breach of the standards is to be assessed. Although it is still a very uncertain test, it is often in instances such as this to require that whether a breach has occurred is to be assessed in terms of how a "reasonable person" who might read the advertisement might react. In paragraph 6A(1)(e) however, this limitation is not expressed. (Of course, a court might read it in,[13] but it is desirable to avoid the need for a court to rule on the issue.) In any event, insertion of a reasonable person standard does little to narrow the prohibition.[14] Moreover, the test is not whether any person would consider the advertisement inappropriate or offensive, but whether they "could" do so.

If it is accepted that paragraph 6A(1)(e) does prescribe a limit "set by law", it is arguable that in terms of subsection 28(1), this provision is not a "reasonable limit". In making this assessment, regard must be had to the factors stated in subsection 28(2). The right affected—being freedom of expression—is taken by the courts and political theorists to be of a high order.[15] The limitation is important, in that advertising can mislead and induce undesirable behaviour. This limitation is however very extensive and in terms of achieving its purpose, and may be said to be a disproportionate reaction, or, to put it another way, there is no reasonable relationship between the limitation stated and its object. It would appear that there are less restrictive means reasonably available to achieve the purpose of the limitation. It is arguable that what is required is a limitation that in the words of French CJ, states "a clear statutory purpose and other criteria of liability".

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

SPENT CONVICTIONS (HISTORICAL HOMOSEXUAL CONVICTIONS EXTINGUISHMENT) AMENDMENT BILL 2015

This is a Bill for an Act to amend the *Spent Convictions Act 2000* to extinguish convictions for certain homosexual offences, and for other purposes.

[13] *Ball v McIntyre* (1966) 9 Federal Law Reports 237 at 242-243 is an example.

[14] In *Monis v The Queen* [2013] HCA 4 at [70] French CJ said that "[t]he "reasonable persons" criterion, which is linked to imputed emotional reactions to the content of the communication, does not narrow the scope of the prohibition in its legal operation or effect".

[15] In *Coleman v Power* [2004] HCA 39 at [248] Kirby J spoke of "the great importance which the ICCPR assigns to free speech in the attainment of human rights and fundamental freedoms". The free speech right stated in the ICCPR was significantly influential in the drafting of the *Human Rights Act 2004*.

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

Report under section 38 of the *Human Rights Act 2004*

The Explanatory Statement contains a careful statement of the human rights issues arising from the Bill and addresses justifications for limitations according to the framework stated in HRA section 28. The Committee refers Members of the Assembly to this statement.

PROPOSED GOVERNMENT AMENDMENTS

The Committee has examined proposed amendments to the Building (Loose-fill Asbestos Eradication) Legislation Amendment Bill 2015 and has no comment to make in relation to them.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-245 being the Food (Regulated events) Declaration 2015 (No. 1) made under section 91 of the *Food Act 2001* **declares the National Multicultural Festival as a regulated event for the purposes of the Act.**

Disallowable Instrument DI2015-255 being the Government Procurement (Non-Public Employee Member) Appointment 2015 (No. 1) made under section 12 of the *Government Procurement Act 2001* **appoints specified persons as part-time non-public employee members of the Government Procurement Board.**

Disallowable Instrument DI2015-256 being the Utilities (Electricity Feed-in Code) Determination 2015 made under sections 61 and 63 of the *Utilities Act 2000* **and section 46 of the** *Legislation Act 2001* **revokes DI2012-154 and determines the Electricity Feed-in Code.**

Disallowable Instrument DI2015-257 being the Animal Welfare (Breeding Standard) Determination 2015 (No. 1) made under section 15B of the *Animal Welfare Act 1992* **determines the standard for the breeding of cats or dogs for the purposes of the Act.**

Disallowable Instrument DI2015-263 being the Electricity Feed-in (Renewable Energy Premium) Reporting Determination 2015 (No. 1) made under section 11B of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* **determines the information required from NERL Retailers and the electricity distributor to prepare a report under section 11A of the Act.**

Disallowable Instrument DI2015-264 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2015 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **revokes DI2013-76 and determines the method of measuring greenhouse gas emissions.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

ARE THESE DISALLOWABLE INSTRUMENTS?

Disallowable Instrument DI2015-251 being the Territory Records (Advisory Council) Appointment 2015 (No. 1) made under section 44 of the *Territory Records Act 2002* **appoints a specified person as a member of the Territory Records Advisory Council, representing professional organisations interested in records management and archives.**

Disallowable Instrument DI2015-252 being the Territory Records (Advisory Council) Appointment 2015 (No. 2) made under section 44 of the *Territory Records Act 2002* **appoints a specified person as a member of the Territory Records Advisory Council, representing ACT Government agencies.**

Disallowable Instrument DI2015-253 being the Territory Records (Advisory Council) Appointment 2015 (No. 3) made under section 44 of the *Territory Records Act 2002* **appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.**

Disallowable Instrument DI2015-254 being the Territory Records (Advisory Council) Appointment 2015 (No. 4) made under section 44 of the *Territory Records Act 2002* **appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.**

The instruments mentioned above appoint four specified persons as members of the Territory Records Advisory Council. The appointments are made under section 44 of the *Territory Records Act 2002*. The first and second instruments are new appointments and the third and fourth instruments are re-appointments.

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 Statements for the first, third and fourth instruments mentioned above. As the Committee has consistently pointed out, this is not an onerous requirement.

In the case of the second instrument, the person appointed is clearly a public servant. Indeed, the person is expressly appointed to represent ACT government agencies. That being so, the Committee assumes that the appointment could be made other than by disallowable instrument.

The Committee draws the Legislative Assembly's attention to the first, third and fourth instruments mentioned above 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 persons appointed by the first, third and fourth instruments mentioned above are not public servants.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 22 September 2015, in relation to comments made in Scrutiny Report 36 concerning the Government response to the Mental Health Bill 2015 (attached).
- The Treasurer, dated 1 October 2015 (attached), in relation to comments made in Scrutiny Report 37 concerning disallowable instruments:
  - DI2015-223—Land Rent (Total income of lessee—post-1 October 2013 leases) Determination 2015 (No. 1);
  - Disallowable Instrument DI2015-224 being the Land Rent (Total income of lessee—pre-1 October 2013 leases) Determination 2015 (No. 1);
  - Disallowable Instrument DI2015-225—Rates (Deferral) Determination 2015 (No. 1);
  - Disallowable Instrument DI2015-226—Taxation Administration (Amounts Payable—Over 60s Home Bonus Scheme) Determination 2015 (No. 3); and
  - Disallowable Instrument DI2015-230—Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2015 (No. 3).
- The Treasurer, dated 2 October 2015, in relation to comments made in Scrutiny Report 3 concerning disallowable instrument DI2013-5—Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2) (attached).

The Committee wishes to thank the Minister for Health and the Treasurer for his responses.

Steve Doszpot MLA
Chair

20 October 2015

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 36, dated 14 September 2015

National Regulation (2015 No. 317) - Rail Safety National Law National Regulations (Fees) Variation Regulations 2015

National Regulation (2015 No. 318) - Rail Safety National Law National Regulations Variation Regulations 2015

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

Dear Mr Doszpot

I write with reference to Scrutiny Report 36 released by the Standing Committee on Justice and Community Safety (the Committee) on 15 September 2015, which provides further comment in response to the Government Response to Scrutiny Report 34, and specifically in relation to the Mental Health Bill 2015 (the Bill).

I have taken into consideration the Committee's further comments while developing minor and technical amendments to the Bill.

I also wish to advise that the second paragraph of my letter to you of 1 September 2015 indicated that the Mental Health Act will become operational on 7 March 2016. This sentence referred to the wrong date in the commencement provision for the Act. I am proposing to introduce some minor and technical amendments during the debate of the Bill which proposes a minor variation to the commencement date for the Act.

I thank the Committee for its consideration of my letter of response.

Yours sincerely

Simon Corbell MLA
Minister for Health

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Andrew Barr MLA

CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR URBAN RENEWAL
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I am writing in response to the Committee's comments in Scrutiny Report 37 of 21 September 2015, which relate to the following disallowable instruments:

- the *Land Rent (Total income of lessee—post-1 October 2013 leases) Determination 2015 (No 1)* DI2015-223;
- the *Land Rent (Total income of lessee—pre-1 October 2013 leases) Determination 2015 (No 1)* DI2015-224;
- the *Rates (Deferral) Determination 2015 (No 1)* DI2015-225;
- the *Taxation Administration (Amounts Payable—Over 60s Home Bonus Scheme) Determination 2015 (No 3)* DI2015-226; and
- the *Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2015 (No 3)* DI2015-230.

The Committee has identified that each of these instruments has a retrospective effect. It seeks assurance that this retrospectivity does not operate to the disadvantage of any affected person pursuant section 76 of the *Legislation Act 2001.*

I assure the Committee that the instruments do not operate to the disadvantage of any applicant by adversely affecting their rights and are non-prejudicial provisions as defined under section 76 (4) of the *Legislation Act 2001*.

I provide further detail on each instrument below.

Land rent income thresholds

Under the Land Rent Scheme, eligibility to pay land rent at the discounted rate is subject to an income test.

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Income for land rent purposes is generally defined as 'income from all sources'. Under the previous instruments, this would have included a lump sum worker's compensation payment. Receiving such a large, one-off sum could have caused a lessee to exceed the income threshold for a financial year and thus lose land rent eligibility.

The new instruments, DI2015-223 (revoking DI2014-318) and DI2015-224 (revoking DI2013-246), were made in order to exclude worker's compensation payments from the income test for land rent eligibility. Retrospectivity ensures that any affected land rent lessees have their total income for previous years worked out with the exclusion of any worker's compensation payments.

The retrospectivity of the instruments therefore does not disadvantage any person as they have a beneficial effect on affected land rent lessees, who may have been disqualified from the Land Rent Scheme if such payments were counted as part of their income.

Rates deferral

The instrument for the Rates Deferral Scheme is reviewed every twelve months to take account of updated Australian Bureau of Statistics (ABS) data on ACT average yearly earnings. The relevant income threshold for the Rates Deferral Scheme is based on this data.

DI2015-225 revoked the *Rates Deferral Determination 2014* (No 1) DI2014-183, which was effective on 1 July 2014, and increased the relevant income threshold from $86,750 to $88,500, effective from 1 July 2015.

The new threshold does not operate to the disadvantage of any person or have any prejudicial effect, as the increase in the threshold reflects the increase in ACT average yearly earnings, and allows more ratepayers to access the Rates Deferral Scheme.

Pensioner Duty Concession Scheme and Over 60s Home Bonus Scheme

The disallowable instruments for the Pensioner Duty Concession Scheme (PDCS) and Over 60s Home Bonus Scheme (HBS) are renewed every six months in order to update the applicable income and property value thresholds.

The previous instruments that took effect on 3 June 2015 were updated to harmonise the property ownership criteria for the PDCS and HBS, providing an exception to the property ownership requirement for a property acquired by an applicant as an executor or trustee (but not a beneficiary) under a will.

However, when this update occurred, a new restriction making applicants ineligible if they had owned a property within two years was inadvertently introduced. This condition was never intended to apply to the PDCS or HBS.

The retrospective commencement of DI2015-230 (revoking DI2015-109) and DI2015-226 (revoking DI2015-107) corrected this error and restored the eligibility conditions for the PDCS and HBS to what was originally intended.

Retrospective commencement ensured that the ACT Revenue Office could determine all PDCS or HBS applications, received on or after 3 June 2015, under less restrictive property ownership requirements.

The instruments therefore do not operate to the disadvantage of any applicant by adversely affecting their rights to access either scheme, and are non-prejudicial provisions as defined under section 76 (4) of the *Legislation Act 2001*.

I note that the Committee generally prefers that the Explanatory Statement for an instrument with retrospective effect adheres to the Committee's *Subordinate legislation – technical and stylistic stands – Tips/Traps* by expressly addressing section 76 of the Legislation Act. I offer my apologies for this contravention.

I trust that the above adequately addresses the Committee's requests.

Yours sincerely

Andrew Barr MLA
Treasurer

Andrew Barr MLA

CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR URBAN RENEWAL
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
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GPO Box 1020
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Dear Mr Doszpot

I am writing in response to comments on disallowable instrument DI2013-5, the *Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2)*, made by the Standing Committee on Justice and Community Safety (the Committee) in its Legislative Scrutiny role in Scrutiny Report No 3 of 25 February 2013.

The Committee, in its comments in the Scrutiny Report, requested that I provide a response on two issues — the consistency of the instrument with the *Human Rights Act 2004* (HRA) and the appropriateness of clause 6.1 of the instrument for inclusion in subordinate, rather than primary legislation. The guideline which was the subject of the scrutiny comments was subsequently revoked and new guidelines issued. This guideline was subject to essentially identical comments in Scrutiny Report 10 as those raised in Scrutiny Report 3.

Given I responded to the scrutiny comments on 19 November 2013, I considered that this matter had been addressed. I have been advised that the Scrutiny Report 3 comments are still considered outstanding. In order to resolve this matter, I advise the attached response to Scrutiny Report 10 of 12 August 2013 is also applicable to the outstanding Scrutiny Report 3 of 25 February 2013.

I trust this now sufficiently addresses this outstanding response.

Yours sincerely

Andrew Barr MLA
Treasurer

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