Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

15 MARCH 2010

Report 20

TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(a) 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):

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

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

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

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

(b) 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;

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

(d) 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*;

(e) 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.

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Ms Janice Rafferty
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE 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.

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BILLS

Bills—No comment

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

LITTER (SHOPPING TROLLEYS) AMENDMENT BILL 2010

This is a Bill for an Act amend the *Litter Act 2004* to deal with and regulate shopping trolleys left on public land.

WORKERS COMPENSATION (DEFAULT INSURANCE FUND) AMENDMENT BILL 2010

This is a Bill for an Act amend the *Workers Compensation Act 1951* to deal with the membership of the Default Insurance Fund Advisory Committee, and to clarify the role and functions of the Committee.

Bills—Preliminary comment

The Committee has conducted a preliminary review of the Crimes (Surveillance Devices) Bill 2010 and the Crimes (Serious Organised Crime) Amendment Bill 2010, offers the following preliminary comments and seeks a prompt response from the Government on the matters raised, to enable the Committee to complete its examination of the proposed legislation.

Attention is also drawn to the submission from the Human Rights and Discrimination Commissioner and the Committee's comments at the end of this report.

CRIMES (SURVEILLANCE DEVICES) BILL 2010

This is a Bill for an Act to provide the ACT with a legal framework for a scheme which will authorise the use of surveillance devices by law enforcement officers in the ACT; facilitate the use of the devices in other jurisdictions with corresponding laws; and enable other jurisdictions with corresponding law to use their surveillance devices warrants in the ACT.

Report under section 38 of *the Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

The first purpose of the Bill is "(a) to establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices in criminal investigations, including investigations extending beyond the ACT" (paragraph 6(a)).

Surveillance device and retrieval (of surveillance a device) warrants

Surveillance device warrants

Subclause 15(1) of the Bill provides:

(1) A surveillance device warrant may authorise, as stated in the warrant, 1 or more of the following:

(a) the use of a surveillance device on stated premises;

(b) the use of a surveillance device in or on a stated object or class of objects;

(c) the use of a surveillance device in relation to the conversations, activities or geographical location of a stated person or a person whose identity is unknown.

The Dictionary defines "surveillance device" to mean

(a) a data surveillance device, a listening device, an optical surveillance device or a tracking device; or

(b) a device that is a combination of any 2 or more of the devices mentioned in paragraph (a); or

(c) a device of a kind prescribed by regulation.

Some of these terms are further defined in the Dictionary.

Provisions in subclause 15(2) provide that a warrant may also authorise the entry, by force if necessary, onto premises to install, use or maintain a device; "premises" include land, buildings, vehicles, and "any place, whether built or not" (Dictionary). Provisions in subclause 15(2) provide that a warrant may also authorise a range of actions in connection with the installation or retrieval of a device, including "the breaking open of anything for the purpose of the installation, maintenance or retrieval …". By subclause 15(6), "[t]his section applies to a surveillance device warrant subject to any conditions stated in the warrant".

The rights issues. The issue of a warrant and the consequent exercise of power under it will clearly engage various HRA rights, such as the right to privacy in HRA paragraph 12(a). Non-HRA rights such as the right to property are also engaged. There is thus a question as to whether the provisions can be justified under HRA section 28, (assuming, as is reasonable, that the right to property may be similarly qualified).

The first step in the process for the issuing of a surveillance device warrant is an application in that respect by a law enforcement officer if the officer "suspects on reasonable grounds that" three conditions exist (subclause 11(1)). In brief, these are that:

- a relevant offence has been, is being, is about to be or is likely to be committed (paragraph 11(1)(a)). A "relevant offence" means "(a) an offence against an ACT law punishable by imprisonment of 3 years or more; or (b) an offence against an ACT law prescribed by regulation" (Dictionary); and

- an investigation into that offence is being, will be or is likely to be conducted in the ACT, and/or in a participating jurisdiction (paragraph 11(1)(b)); and

- the use of the device "is or will be necessary in the course of that investigation for the purpose of enabling evidence or information to be obtained of the commission of the relevant offence or the identity or location of the offender" (paragraph 11(1)(c)).

The concept that an officer "suspects on reasonable grounds that" certain conditions exist raises a drafting point, and a substantial issue as to whether this requirement is, in terms of HRA section 28, sufficiently rigorous to justify the derogations of HRA rights involved in the ultimate grant of a warrant.

First, as a drafting point, the Committee queries whether it was intended that the phrase be "suspects or believes", as is the case in several other comparable provisions in the Bill; see paragraphs 13(1)(a), 19(1)(b), 21(1)(a), and subclause 25(1).

Secondly, a requirement that a person "suspect" something is a less rigorous requirement that they "believe" that thing. This issue was discussed by Refshauge J in *In the matter of an application under s 73 of the Civil Laws (Wrongs) Act 2002* [2009] ACTSC 53, where his Honour referred to an earlier analysis by Connolly J:

> 7. … Connolly J considered the approach that a court should take to the test propounded by the section: that the insurer "has reasonable grounds to suspect a claimant of fraud". … .
>
> 8. His Honour then considered what the phrase might mean and cited the following passage from *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 where the High Court unanimously held that (at 112):
>
> > When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.
>
> 9. His Honour there cited further from *George v Rockett* where the High Court described the facts necessary to establish reasonable grounds for suspicion. The Court said (at 115):
>
> > Suspicion, as Lord Devlin said in *Hussien v Chong Food Kam* [1970] AC 942 at 948, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove''. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21; (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):
> >
> > > A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence' as Chamber's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. … .

> 10. This passage is not entirely easy to read, but it seems to me that what is suggested is that the facts must be sufficient to show to a reasonable person more than idle wondering or mere speculation. There must be some rational basis for holding [the relevant opinion].

Some further comments on this issue are necessary given that it will be argued that the Bill is not HRA compliant when in an number of places this Bill permits some action on the basis that a person has a "reasonable suspicion" (or some equivalent) that a particular situation exists.

First, as is noted in A Butler and P Butler:

> In both cases [that is, of a reasonable belief test and a reasonable suspicion test], it is not sufficient for the officer … to have a personal belief or suspicion in relation to the statutorily stipulated facts; rather, that personal belief or suspicion must also be reasonable held based on an objective assessment, an assessment which can, in turn, be undertaken by a reviewing court after the fact.[1]

This is borne out by the quotation above from *In the matter of an application under s 73 of the Civil Laws (Wrongs) Act 2002*.

Secondly, as the High Court held in *George v Rockett*, "[t]he facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown". These facts will need to be placed before a reviewing court, which may operate to cause the relevant officers to exercise restraint in the judgement they make that a reasonable suspicion exists.

Thirdly, the difference between the two tests is not a bright line, and a reviewing court will in effect have a wide area in which to choose whether to accept that the officer did have reasonable grounds for her or his suspicion. Where the factual basis is obviously weak, the judge may easily find that the suspicion was not reasonable.

Fourthly, it is not the case that case-law (or "jurisprudence") of jurisdictions where a bill of rights applies shows that a provision that empowers action on the basis of a reasonable suspicion will necessarily be found to constitute a non-justifiable breach of some right (such as to privacy). As A Butler and P Butler put it, "each statutory provision needs to be assessed in its own particular contextual setting", although

> a standard less than "reasonable grounds to believe" ought to be subject to a thorough assessment for justification under [HRA section 28]". Circumstances that might justify stipulating a lower suspicion standard such as "reasonable grounds to suspect" may include, for example, the nature of offending involved and the threat it poses; the nature of the invasion on privacy which the search power would authorise; whether the power was one exercisable only under warrant; and so on.[2]

[1] *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) par 18.27.2.
[2] Ibid at 18.27.3.

It is not for this Committee to make out a case for the Minister, and it may be said that a great deal more needs to be provided by the Minister by way of the factual basis for the claim that it is appropriate that a standard of "reasonable grounds to suspect" is appropriate. But it may point out the particular grounds stated in subclause 11(1) (see above) indicate that the issue of a warrant will occur in circumstances where there is some urgency about the matter, in that an offence has occurred or is imminent, and that the warrant will enable evidence to be gathered. It may be appreciated that a delay in gathering evidence could lead to its disappearance.

It might also be noted that the Senate Scrutiny of Bills Committee accepts that Commonwealth legislation should not generally confer entry, search and seizure powers broader than those in Part 1AA of the Commonwealth *Crimes Act 1914*.[3] In this law, the exercise of several powers are conditioned on an officer having only a reasonable suspicion that some situation exists; for example, subsection 3E(1) provides: "(1) An issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises".

It must be noted, however, that the key issue is not what the law enforcement officer suspects, but the grounds upon which the warrant may be issued by a judicial officer.

An application for a surveillance device warrant may be made to a judge; or for an application for a surveillance device warrant authorising the use of a tracking device only, to a magistrate (subclause 11(2)). The application "must be supported by an affidavit setting out the grounds on which the warrant is sought" (paragraph 11(3)(b)), but there are circumstances in which an affidavit need not be provided when the application is made, and for a remote application.

The second step the process for the issuing of a surveillance device warrant is the consideration and decision of the judge or magistrate in the application. The key provision is paragraph 13(1)(a):

> A judge or magistrate may issue a surveillance device warrant if satisfied that—
>
> (a) there are reasonable grounds for the suspicion or belief founding the application for the warrant; … .

Taking for example the lower test of suspicion, the judge will assess whether there are reasonable grounds for the grounds of the suspicion put forward by the law enforcement officer in her or his application for the warrant. Thus, paragraph 13(1)(a) may be objected to on the basis that it permits the grant of a warrant on the basis of a judge having only reasonable grounds for a suspicion that certain grounds exist.

[3] Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and search provisions in Commonwealth legislation* 6 April 2000, at 51.

However, this objection has much less force if regard be paid to the words "may issue" in subclause 13(1), from which it appears that the judge or magistrate is not bound to issue the warrant even where he or she is satisfied in terms of paragraph 13(1)(a). This is made clear by subclause 13(2):

> (2) In deciding whether a surveillance device warrant should be issued, the judge or magistrate must have regard to the following:
>
> (a) the nature and gravity of the alleged offence in relation to which the warrant is sought;
>
> (b) the extent to which the privacy of any person is likely to be affected;
>
> (c) the existence of any alternative means of obtaining the evidence or information sought to be obtained and the extent to which those means may assist or prejudice the investigation;
>
> (d) the evidentiary or intelligence value of any information sought to be obtained;
>
> (e) any previous warrant sought or issued under this division or a corresponding law (if known) in connection with the same offence.

This is not an exhaustive list, and on the face of it a judge could decline to issue the warrant by having regard (although not as an invariable rule) to the fact the warrant could be granted only on the basis of a suspicion.

Nevertheless an issue arises, and can be posed by the question:

Are the provisions of the Bill that permit a judge or magistrate to issue a surveillance warrant on the basis of the judge having only reasonable grounds for a suspicion that certain grounds exist, but qualified by a discretion in the judge to decline to issue the warrant, justifiable under HRA section 28?

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

Retrieval device warrants

The provisions of the Bill concerning warrants to retrieve a surveillance device parallel in many ways the provisions noted above. The discretion of the judge or magistrate to grant or refuse a warrant is stated in subclause 21(2):

> (2) In deciding whether a retrieval warrant should be issued, the judge or magistrate must have regard to—
>
> (a) the extent to which the privacy of any person is likely to be affected; and
>
> (b) the public interest in retrieving the device sought to be retrieved.

Emergency authorisation for the use of a surveillance device

Part 3 of the Bill contains clauses that permit the chief officer of the law enforcement agency[4] to authorise the use of a surveillance device without prior approval by a judge or magistrate. These provisions raise more acutely the issue of whether the grant of an approval is HRA compliant. Warrantless searches will certainly be harder to justify.

It might also be noted that while the Senate Scrutiny of Bills Committee recommended that:

> legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for failure to comply,[5]

it also recommended that:

> circumstances may arise which may make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer.[6]

In essence, the resolution of this issue will probably turn on whether a Member of the Assembly considers that the provision in clause 27 for judicial approval (or not) after the use of the device provides a basis for justification under HRA section 28.

Clause 25 provides:

> **25 Emergency authorisation—risk of serious personal violence or substantial property damage**
>
> (1) A law enforcement officer of a law enforcement agency may apply to the chief officer of the agency for an emergency authorisation for the use of a surveillance device if, in the course of an investigation, the law enforcement officer suspects or believes on reasonable grounds that—
>
> (a) an imminent threat of serious violence to a person or substantial damage to property exists; and
>
> (b) the use of a surveillance device is immediately necessary for the purpose of dealing with that threat; and
>
> (c) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and
>
> (d) it is not practicable in the circumstances to apply for a surveillance device warrant.

[4] That is, the chief officer of the Australian Federal Police or the Australian Crime Commission (Dictionary).
[5] Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and search provisions in Commonwealth legislation* 6 April 2000, at 50.
[6] Ibid.

(2) An application may be made orally, in writing or by telephone, fax, email or any other means of communication.

(3) The chief officer may give an emergency authorisation for the use of a surveillance device on an application under subsection (1) if satisfied that there are reasonable grounds for the suspicion or belief founding the application.

(4) An emergency authorisation given under this section may authorise the law enforcement officer to whom it is given to do anything that a surveillance device warrant may authorise the officer to do.

(Clause 26 provides for an emergency authorisation for the continued use of authorised surveillance device in a participating jurisdiction. In essential respects, it is worded similarly to clause 25, and the key issue in assessing HRA compliance concerns the extent of judicial review in clause 27.)

The critical elements of the scheme for judicial approval (or not) after the use of the device are now enumerated.

1. Within 2 working days after giving an emergency authorisation, the chief officer must apply to a judge for approval of the exercise of powers[7] under the emergency authorisation.

The Committee notes that it is necessary only to apply to a judge within two working days and it will be for the judge to determine when an application is heard and for how long. This raises the question of whether there should be a time limit to the validity of an emergency authorisation.

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

2. The application must be supported by an affidavit setting out the grounds on which the approval (and warrant, if any) is sought.

3. Before deciding an application for approval in relation to an emergency authorisation given under clause 25,

> "the judge must, in particular, and being mindful of the intrusive nature of using a surveillance device, consider the following:
>
> (a) the nature of the risk of serious violence to a person or substantial damage to property;
>
> (b) the extent to which issuing a surveillance device warrant would have helped reduce or avoid the risk;
>
> (c) the extent to which law enforcement officers could have used alternative methods of investigation to help reduce or avoid the risk;

[7] This means approval of an exercise of powers that has occurred under the emergency authorisation. If the chief officer wishes that the powers continue to be exercised, it appears that a warrant must be applied for, and the judge is empowered to issue a warrant (see subclause 29(3)).

(d) how much the use of alternative methods of investigation could have helped reduce or avoid the risk;

(e) how much the use of alternative methods of investigation would have prejudiced the safety of the person or property because of delay or for another reason;

(f) whether or not it was practicable in the circumstances to apply for a surveillance device warrant (subclause 28(1)); and

4. Finally,

"the judge may approve the application if satisfied that there were reasonable grounds to suspect or believe that—

(a) there was a risk of serious violence to a person or substantial damage to property; and

(b) using a surveillance device may have helped reduce the risk; and

(c) it was not practicable in the circumstances to apply for a surveillance device warrant" (subclause 29(1)).

By subclause 29(4): "If the judge does not approve an application under this section, the judge may order that the use of the surveillance device cease".

[Drafting query: why is the word "may" used in subclause 29(4)? On the face of it gives the judge a discretion to permit the continued use of the device.

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

Whether the judge approves or refuses to approve an application under clause 29, he or she

may order that any information obtained from or relating to the exercise of powers under the emergency authorisation or any record of that information be dealt with in the way stated in the order (subclause 29(5)).

The Committee notes that the judge, may by order, deal with any information obtained, but this power may not be sufficient to deal with a number of questions that appear to arise in consequence of a refusal to approve in particular:

- At what point will the person affected be informed that a judge did not approve?
- Will the person be entitled to any recompense for the breach of privacy involved in the exercise of the non-approved powers?
- Will the person be informed of the nature of the information that was obtained (in case that, for example, that information would assist them in a legal proceeding)?
- What is to occur where the result of the surveillance is to reveal the commission of some offence other than the offence which was the basis of the authorisation?

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

While the point of subclause 29(5) may be directed to the question of retention or destruction of information, it would also empower the judge to determine the use of any information in an investigation and in a subsequent legal proceeding. The judge's discretion appears however to be circumscribed by clause 30, which provides:

> **30 Admissibility of evidence**
>
> If the exercise of powers under an emergency authorisation is approved under section 29, evidence obtained because of the exercise of those powers is not inadmissible in any proceeding only because the evidence was obtained before the approval.

The critical issue can be posed by the question:

Are the provisions of the Bill that permit a warrantless surveillance in the circumstances described, subject to judicial approval (or not) within 2 working days, justifiable under HRA section 28?

There is very little in the Explanatory Statement that addresses this critical and difficult issue.

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

Restrictions on use, communication and publication of information

In the words of the Explanatory Statement, division 5.1 of the Bill contains provisions

> [t]o protect police and other operatives, [by creating] offences for communicating or publishing protected information. [Clause 33] defines protected information as all information relating to, or obtained from, the use of a surveillance device under warrant, emergency authorisation, and applications for issue of, existence of or expiry of all of the above things, applications for approval of powers exercised under emergency authorisation and all corresponding matters.

For example, under subclause 34(2) a person commits an offence if he or she "communicates protected information, and that communication is not permitted by clause 34, and the person is reckless about whether the communication of the information is not permitted by this section".

The rights issue of significance is whether this provision would prohibit the communication of protected information to a court where that information would be relevant to the fact-finding involved in the matter before the court. There is no limit to the kinds of matters in relation to which this question could arise.

A number of High Court cases have held that the words "divulge or communicate to another person" are inappropriate to refer to the giving of evidence before a court "which would hardly be called" another person,[8] but these cases might not apply given the wording of subclause 34(2). Subclause 34(7) provides a long (but far from exhaustive) list of the purposes for which a communication may be made, and some of these apply to certain kinds of proceedings in courts; (noting in particular paragraph 34(7)(c) and the definition of "relevant proceeding" in the Dictionary).

It may be then that it is intended that protected information cannot be communicated to a court in any kind of matter. This result would be to the detriment of a party to a matter, and derogate from the right to a fair trial in HRA subsection 21(1). It may also be argued that "a secrecy clause cannot inhibit a court in the exercise of judicial power, and, in particular, that it cannot interfere with the ability of a court to receive such information as it requires to discharge that function".[9]

Should there be a generally worded exception that would permit disclosure of information to a court?

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

Evidentiary certificates and the presumption of innocence – HRA subsection 22(1)

Provisions in criminal laws that impose a legal burden of proof on a defendant to establish the existence of a fact as a condition of establishing a defence engage the presumption of innocence (HRA subsection 22(1)). A provision of this kind that alters the normal rules about the burden of proof that would apply in any kind of legal proceeding engages the right to a fair trial in HRA subsection 21(1).

By subclause 43(1), "[t]he chief officer of a law enforcement agency … may issue a written certificate signed by the officer or person setting out any facts the officer or person considers relevant in relation to" certain matters. These matters are summarised in the Explanatory Statement as: "the actions of law enforcement officers in connection with the execution of surveillance devices warrants or information obtained by the use of surveillance devices under a warrant".

Where such provisions are used by the prosecution in a criminal matter, they have the potential to reverse the onus of proof by casting on the defendant an obligation to adduce evidence that the particular fact does not exist (which in many circumstances will be very difficult).

The effect of an evidentiary certificate is usually specified, but subclause 43(1) does not, and thus leaves open whether the setting out of facts is to be treated only as evidence of the facts, or as prima facie evidence of them, or as conclusive proof of them.

[8] See discussion in *Scrutiny Report No 10* of the *7th Assembly,* 27.
[9] See discussion in *Scrutiny Report No 10* of the *7th Assembly,* 26.

The Explanatory Statement does not attempt to justify clause 43 apart from stating that the clause "is based on a similar provision contained within the Telecommunications (Interpretation) Act 1979 (Cwth)", which hardly advances the case for justification. One consideration relevant to assessing justifiability is whether the matter of fact in issue is or is not contentious. If the latter, the provision is more easily justifiable. In relation to subclause 43(1), it is far from apparent that it would only apply in this circumstance.

Does the provision for evidentiary certificates in subclause 43(1) derogate from the presumption of innocence in HRA subsection 22(1), and/or of the right to a fair trial in HRA subsection 21(1), and, if so, is it justifiable under HRA section 28? The Committee considers there should be in the way of justification for this provision.

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

Administrative discretions that are not conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis

There are some provisions in the Bill that condition the exercise of a discretion, or the making of a judgement, or the holding of a belief etc, upon the holder of the power acting upon "reasonable grounds" or some equivalent basis. There are however many provisions that do not, and the Committee has noted subclauses 11(4), 25(3), 26(3), paragraph 35(1)(b), subclauses 36(2), 36(5) (in two places), and 43(1).

The Committee recommends that the Minister advise the Assembly why in each case the exercise of the relevant discretion could not be conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis.

Displacement of the *Freedom of Information Act 1989* and the *Territory Records Act 2002*

Clause 7 of the Bill provides simply that these Acts "do not apply in relation to activities, documents, and records under this Act". In this way the provision may engage elements of the right to freedom of expression in HRA subsection 16(2).

The Explanatory Statement justifies clause 7 in these words: "The Government is of the view that the public interest in protecting the identity of people authorised under the Bill and protecting the criminal intelligence involved in the scheme for use of surveillance devices outweighs the public interest in disclosing information under the Acts listed".

An alternative view is that the exemptions in the *Freedom of Information Act 1989* are sufficiently wide to protect the interests identified, noting in particular section 37 (documents affecting enforcement of the law and protection of public safety). The processes of review under that Act also ensure that there is an external check on claims that disclosure of documents would harm the interests identified.

Should the Bill displace the operation of the *Freedom of Information Act 1989* and the *Territory Records Act 2002*?

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

Do any clauses of the Bill "inappropriately delegate legislative powers"?

The concept of "relevant offence" is of critical significance. For example, a law enforcement officer may apply for a warrant under subclause 11(1) only in respect of a relevant offence that the officer "suspects on reasonable grounds … has been, is being, is about to be or is likely to be committed". The Dictionary defines "relevant offence" to mean an offence against an ACT law punishable by imprisonment of 3 years or more; or an offence against an ACT law prescribed by regulation.

Another key concept is that of a "surveillance device", and the Dictionary stipulates some specific kinds of devices and also "a device of a kind prescribed by regulation".

Is it appropriate to delegate to the Executive a power to legislate on these topics?

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

CRIMES (SERIOUS ORGANISED CRIME) AMENDMENT BILL 2010

This is a Bill for an Act to amend the to amend the *Crimes Act 1900* and the *Criminal Code 2002* to create offences of affray, participation in a criminal group and recruiting persons to participate in criminal activity, and to extend the existing offences relating to the protection of people involved in legal proceedings contained in Division 7.2.3 of the Criminal Code.

Report under section 38 of the *Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

Participation in criminal groups

The Bill creates new offences (in proposed sections 652, 653 and 654 of the Criminal Code) relating to participation in criminal groups.

The concept of a "criminal group"

A "criminal group" is a group of 3 or more people who have either or both of the following as their objectives:

- to obtain a material benefit from conduct that would constitute an indictable offence under Territory law; or
- to commit serious violence offences (proposed subsection 651(1)).

One question that arises is whether it is necessary that the group have any ongoing activities or substantial planning or organisation?

In this connection, it is relevant to note the comparable provisions in California law.[10] This law employs the concept of a "gang", and stipulates that the prosecution must prove:

> that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.[11]

Another issue arises from the lack of definition of "material benefit".

The Committee adopts the observations of the Scrutiny of Legislation Committee of the Queensland Parliament that

> 17. Unlike the New Zealand legislation from which this provision was obviously taken, there is no definition of "material benefit". In the *Crimes Act 1961* (NZ), "material benefit" is defined as:
>
> > "obtain a material benefit in relation to doing a thing, means obtain, directly or indirectly, any goods, money, pecuniary advantage, privilege, property, or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing".
>
> 18. In the absence of a definition the ordinary meanings of "material" and "benefit" would apply to the Queensland provision. This would likely be even broader than the NZ definition. Therefore, offences that could be generally described as "petty offences" would be caught by the definition, for example, stealing small sums of money.[12]

Is it feasible to provide a definition of "criminal group"?

The Committee draws recommends that the Minister respond to these matters.

A group can be a criminal group whether or not:

- any of them are subordinates or employees of others;
- only some of the people involved in the group are involved in planning, organising or carrying out any particular activity; or
- its membership changes from time to time (proposed subsection 651(2)).

[10] This law pre-dates the NZ model and may have been the inspiration for those provisions, either directly or through their influence on the *UN Convention on Translational Organized Crime.*
[11] See (1996) *People v Gardeley*, Supreme Court of California; accessible via http://www.lexisnexis.com/clients/CACourts/
[12] *Alert Digest No 7 of 2007* at 10.

The vagueness of this definition might lead to a conclusion that the offence provisions which turn in part on its application lack a sufficient degree of certainty. This is referred to below.

The Committee draws to the Assembly's attention the breadth of the concept of "material benefit" recommends that the Minister respond.

Overview of the new offences

The new offences are:

- under section **652**, participation in a criminal group, knowing that it is a criminal group, and knowing, or being in a position that they ought to have known, that their participation contributes to any criminal activity [imprisonment for 5 years[13]];

- under subsection **653(1)**, participation (or an intention to do so) in a criminal group, in the course of which the person engages in conduct that causes harm to someone else, and is reckless about causing harm to that person or another person [imprisonment for 10 years];

- under subsection **653(2)**, participation (or an intention to do so) in a criminal group, in the course of which the person intentionally makes to someone else a threat to cause harm to the other person or a third person; and intends the other person to fear that the threat will be carried out [imprisonment for 10 years];

- under subsection **654(1)**, participation (or an intention to do so) in a criminal group, in the course of which the person engages in conduct that causes damage to property belonging to someone else, and is reckless about causing harm to that person or another person [imprisonment for 10 years]; and

- under subsection **654(2)**, participation (or an intention to do so) in a criminal group, in the course of which the person intentionally makes to someone else a threat to damage property; and intends the other person to fear that the threat will be carried out [imprisonment for 10 years].

By subsection **654(3)**, "[i] the prosecution of an offence against subsection [654](2), it is not necessary to prove that the person threatened actually feared that the threat would be carried".

[Drafting query: why is there no provision similar to subsection 654(3) in section 653 in relation to subsection 653(2)? The Explanatory Statement (see page 11) assumes that there is.]

The concept of "causing" harm is critical and reference must be made to the definition in section 400 of the Criminal Code:

> ***causes*** damage or another result—a person causes damage or another result if the person's conduct substantially contributes to the damage or other result.

[13] All the references to penalty are to the maximum.

Issues arising in respect of proposed section 652

Proposed section 652 provides:

> A person commits an offence if the person—
>
> (a) participates in a criminal group; and
>
> (b) knows that the group is a criminal group; and
>
> (c) knows, or ought to have known, that the person's participation in the criminal group contributes to criminal activity.[14]

Issues of interpretation

What does it mean to "participate" in a criminal group?

The Bill does not define what can constitute "participation". In usual parlance in this context, the notion of "participate" involves the taking part, or sharing in, some action or attempt by the criminal group (*The Macquarie Dictionary*, 3rd edition).

There are several points of obscurity:

- must the defendant be a member of the criminal group? The answer is probably "no", in that one can participate in the activities of a group without being a member of it;
- must the defendant intend to further or pursue the objects of the criminal group?;
- in an assessment of whether a defendant has participated, would a relevant fact be whether he or she knew the identity of any of the persons who made up the criminal group? On the face of it, the answer is "yes", but the matter could be made clearer;[15]
- is it the case that what the defendant does by way of participation may be quite innocuous and not in itself criminal (see the example below of the motorcycle mechanic)?; and
- is it the case that no specific criminal act or activity need be contemplated by the defendant?

[14] It is noted by the Scrutiny of Legislation Committee of the Queensland Parliament that "[An almost identical provision of a Queesland Bill of 2007] appears to have been taken directly from the amended s.98A of the *Crimes Act 1961* (NZ). This, and other amendments to the Crimes Act 1961 (NZ), were consequent upon the New Zealand government's ratification of the UN Convention on Translational Organized Crime and its associated Protocols on Trafficking in Persons and Smuggling Migrants. The amendments to s.98A were specifically to align the *Crimes Act 1961* (NZ) provisions more closely with the UN convention": *Alert Digest No 7 of 2007*. To the extent that section 652 gives effect to an international treaty obligation, this will assist in justification under HRA section 28.

[15] Under the comparable Canadian law, "the prosecution does not need to prove that the organisation facilitated or committed an indictable offence or that the accused knew the identity of any of the persons who constituted the organisation": Parliamentary Joint Committee on the Australian Crime Commission, *Legislative arrangements to outlaw serious and organised crime groups*, 17 August 2009, para 4.77.

The vagueness of the notion of "participation" might lead to a conclusion that the offence provisions which turn in part on its application lack a sufficient degree of certainty. There are many precedent cases that state a principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[16] The principle was expressed long ago by the United States Supreme Court thus:

> [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[17]

This principle might be found to be an element of one or more rights stated in the HRA.

Another way to state the objection is to see it as a delegation of legislative power to a court called upon to interpret the vague term, or, at least, as requiring the court to make "political" or "value" judgements.[18]

Is it feasible to provide a definition of "participates"?

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

The mental element in the participation that contributes to criminal activity

The person must know the nature of the group – that is, that it is a criminal group.

The person must *either* know that their participation in the group "contributes to criminal activity", or that the person "ought to have known" that such a contribution would occur.

An example discussed by the NSW Committee is illustrative of the potential reach of section 652. It noted that

[16] See generally the discussion in *Report No 6* of *2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20* of the *Fifth Assembly*, concerning the Criminal Code 2002, and *Report No 20* of the *Sixth Assembly*, concerning the Casino Control Bill 2005.

[17] *Lanzetta v New Jersey* (1939) 306 US 451, quoting *Connally v General Construction Co.*, 269 U.S. 385, 391.

[18] In *Taikato v R* [1996] HCA 28, the majority of the High Court said that "under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing".

> [a] mechanic specialising in motorcycle maintenance may have regular clients who are members of a "bikie gang" which satisfies the … definition of a criminal group, in circumstances where he or she in fact knows that the bikie gang is a criminal group. It is also conceivable that the mechanic would know, or [ought to know] that the effective maintaining of the motorcycles used by the gang members in the course of their criminal activities contributes to the occurrence of such activities.

Subject to the next comment, section 652 would apply if the court found that the maintenance and repair work amounted to *participation* in a criminal group. On the face of it, this is arguable.

There are some issues arising out of the element of the offence that the person knew (or ought to have known) that their participation "contributes to criminal activity".

First, suppose that the mechanic knew (or ought to have known) that the gang's bikes were used in the commission of more than one kind of indictable offence. Is this enough, or must the prosecution prove that the mechanic knew (or ought to have known) that the gang's bikes were to be used in the commission of a particular (specified) offence?

Secondly, must the prosecution prove that an indictable offence has been committed? "Criminal activity" is defined in section 650 to mean "conduct that constitutes an indictable offence", and this perhaps suggests that the answer to this question is "yes" (and in nay event a court might construe it this way).

The Committee recommends that the Minister respond to these two questions.

Thirdly, the concept "ought to have known" requires explanation. The Explanatory Statement (at 10) equates it to "recklessness". By subsection 20(1) of the Criminal Code:

> (1) A person is reckless in relation to a result if—
>
> (a) the person is aware of a substantial risk that the result will happen; and
>
> (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

On the face of it, the notion of "ought to have known" does not equate to "recklessness". The former is a lower requirement of culpability than the latter, in that a person who is unaware of a substantial risk that a result will occur nevertheless "ought to have known" that the result would occur.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister justify the assumption in the Explanatory Statement that "ought to have known" equates to "recklessness".

The equivalent provision in New Zealand law (subsection 98A(1) of the *Crimes Act 1961* (NZ)) refers expressly to "recklessness" as a mental element, and this aspect of the offence has generated controversy. A commentator has noted:

On this point, the New Zealand Law Society remarked:

> [T]he provisions may catch law-abiding adult family members or social or business contacts of a participant in an organised criminal group. Such innocent contacts might well be considered to be 'participants' simply because they were aware that the person with whom they had innocent dealings was a participant in an organised criminal group.

Others, in contrast, argue that the recklessness requirement is sufficient to limit liability to accused who

> deliberately run a known risk when it was unreasonable in the circumstance to do so. This is a high threshold. This clearly excludes from liability any unwitting associates, such as a secretary of a company, or those who have good reasons, such as social contacts and family members.[19]

Whether to include a mental element of "recklessness" at all, or at least in substitution for the concept of "ought to have known", is a critical issue in terms of HRA compliance, or in terms of whether the Bill in this respect is an undue trespass on personal rights and liberties.

In this connection, the Committee draws attention to article 5 of the *United Nations Convention Against Transnational Organised Crime*, which is clearly the basis for section 652 and, in the relevant respect, provides that the person should have knowledge that his or her participation will contribute to the criminal activities of the organised criminal group.

As they stand, the terms of section 652, by stipulating that an offence may be committed even though the defendant did not know that their participation would contribute to criminal activity, might be seen, in effect, to punish mere association in the criminal group. On this basis, if HRA subsection 15(2) (freedom of association) is engaged (see below) section 652's addition of a mental state in addition to knowledge might be seen not to be justified under HRA section 28.[20] If subsection 15(2) is not relevant, the objection might be that section 652 is in effect a "status" offence, (that is, the status of associating with a criminal group), and thus a "cruel" punishment under HRA paragraph 10(1(b).[21]

Should proposed section 652 include a mental element of "recklessness" at all, or at least in substitution for the concept of "ought to have known"?

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

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[19] Dr Andreas Schloenhardt, submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, at 43 (footnotes omitted)
http://www.aph.gov.au/SENATE/committee/acc_ctte/laoscg/submissions/sub01.pdf

[20] The California courts have emphasised that the California gang law does not punish association itself; see *People v Gardeley*.

[21] Compare *Robinson v California* (1961) 367 US 203 at 223.

Other human rights issues

The right to liberty and security – HRA subsection 18(1)

There are indications that at least some judges of the ACT Supreme Court will review the content of every criminal offence provision to assess whether it is compatible with the right in HRA subsection 18(1) that "[e]veryone has the right to liberty and security of the person".[22]

In relation at least to an offence where imprisonment is a potential penalty, (as is the case with section 652 and the aggravated offences), the question the court will address is whether the offence provision is a "proportionate" way of dealing with the social need sought to be achieved by criminalising the activities that fall within the elements of the crime.

Some general remarks on the application of section 28 may be helpful.[23] It provides:

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

  (a) the nature of the right affected;

  (b) the importance of the purpose of the limitation;

  (c) the nature and extent of the limitation;

  (d) the relationship between the limitation and its purpose;

  (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Of course, an inquiry under HRA section 28 will canvass many more matters than the common law approach to the definition of crime. In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. This test can be broken down into more specific questions.

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[22] See *Temoannui v Ford* [2009[ACTSC 69 at [39], per Refshauge J. In effect, this approach reads HRA subsection 18(1) as if it contained a requirement, such as is found in section 7 of the Canadian Charter of Rights, that all laws "be in accordance with fundamental justice", which "has been to include a requirement of proportionality,[*R v Heywood* [1994] 3 SCR 761]] which means that citizens may challenge legislation on the basis that it is not proportional to the end sought to be achieved": Parliamentary Joint Committee on the Australian Crime Commission, *Legislative arrangements to outlaw serious and organised crime groups* (2009) para 4.69. A similar approach was adopted in a *Memorandum of Compatibility* issued by the Attorney-General in relation to the Crimes (Murder) Amendment Bill 2008; see *Scrutiny Report No 2* of the *Seventh Assembly*, at paragraphs 7.6 – 7.7. This Committee has doubted this approach, but accepts it for the purpose of raising rights issues under its term of reference to report on clauses of bills that trespass on personal rights and liberties.

[23] There is a longer analysis in *Scrutiny Report No 25* of the *Sixth Assembly*, concerning the terrorism (Extraordinary Temporary Powers) Bill 2006.

Do the limitations on the HRA right pursue a legitimate objective?

Are the means provided in the Bill for the attainment of these objectives "proportionate"? In general terms, this analysis has three components:

- is there a rational connection between the means and the objective?;
- are there, in comparison to the means proposed in the Bill, "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve"?[24]; and
- is there is a proportionality between the effects of the measure that limits the right and the law's objective? "This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[25]

In a case such as this, it is very difficult to propose definitively one way or the other on the issue of whether the extent of the derogation of a HRA right is justifiable under section 28, for its application of section 28 will turn very much on the particular factual basis for a claim that any derogation is justifiable. The Explanatory Statement may be criticised for being sparse in its statement of the facts about organised crime, and Members of the Assembly will need to draw on their own knowledge unless this is supplemented by the Minister. Complicating the matter is that if the issue arises on a court review of justifiability, the government may well put to the court a much larger body of facts that might include information that cannot be disclosed to the public, or indeed to other parties to the litigation.

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

[24] HRA paragraph 28(2)(e). This aspect of the proportionality test is difficult to apply. The Canadian Supreme Court (above at para 43) qualified the similar Canadian test: " … a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (S.C.C.), [1986] 2 S.C.R. 713; *Irwin Toy": Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), para 43.

[25] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), para 45.

Freedom of association – HRA subsection 15(2)

The Explanatory Statement states "[i]t is likely that the offence of "participating in a criminal group" will engage the right to freedom of association under section 15(2) of the *Human Rights Act 2004*", refers to HRA section 28, quotes a Canadian case for the point that freedom of association is the "freedom to combine together for the pursuit of common purposes or the advancement of common causes",[26] and in justification for derogating from HRA subsection 15(1) argues:

> The offence of participating in a criminal group only seeks to limit freedom of association where a person knows that a group is a criminal group and knows, or ought to know, that their participation in the group contributes to criminal activity.
>
> The limitation of the right to freedom of association is important in this case as criminal groups, as defined in the Bill, are potentially responsible for serious organised crime within the Territory and other jurisdictions. The offence of participating in a criminal group assists the Territory in combating serious organised crime.
>
> The nature of the limitation of the right to freedom of association is to disrupt serious organised crime by targeting those who willingly participate in criminal groups that take part in criminal activity. The limitation of freedom of association goes no further than is necessary to combat organised crime groups. There is no declaration relating to either groups or individual members. Further, the conduct prohibited by the offence is conduct that constitutes criminal activity. Innocent association or social interactions, even if between members of a group who have fallen foul of the provisions and who may have been convicted under the provisions, will not amount to a criminal offence.

The Committee adopts the comments on the application of section 28 just made in relation to HRA subsection 18(1), and in addition notes that there may be argument that proposed section 652 does not engage HRA subsection 15(2) at all. The European Court of Human Rights has held recently in *Friend and Countryside Alliance v United Kingdom* [2009] ECHR 2068 that a ban on fox hunting with dogs in the United Kingdom did not impinge upon the human rights enshrined in the *European Convention on Human Rights*, including upon "the freedom of association with others" in article 11.1 of the Convention. The Court said:

> the primary or original purpose Article 11 was and is to protect the right of peaceful demonstration and participation in the democratic process. In recognition of that primary purpose, the Court has been led to observe that "the right to freedom of assembly is a fundamental right in a democratic society and like the right to freedom of expression, is one of the foundations of such a society" … . Nevertheless, it would, in the Court's view, be an unacceptably narrow interpretation of that Article to confine it only to that kind of assembly, just as it would be too narrow an interpretation of Article 10 to restrict it to expressions of opinion of a political character (see, for example, *Gypsy Council v. the United Kingdom* (dec.), no. 663366/01, 14 May 2002). While the Court is therefore prepared to assume that Article 11 may extend to the protection of an assembly of an essentially social character, it notes that the hunting bans in Scotland, England and Wales as they apply to the first applicant do not prevent or restrict his right to assemble

[26] *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211.

> with other huntsmen and thus do not interfere with his right of assembly *per se*. The hunting bans only prevent a hunt from gathering for the particular purpose of killing a wild mammal with hounds; as such, the hunting bans restrict not the right of assembly but a particular activity for which huntsmen assemble. The hunt remains free to engage in any one of a number of alternatives to hunting … .

Thus, it might be argued that subsection 652 does not ban association in itself (*per se)*, but only association for the particular purposes prescribed by this section. That is, (and unlike the older offences of "consorting"), a person may associate with a criminal group, but may not do so where that has the result stated in subsection 652.

The extraterritorial reach of the legislation – the definition of "criminal group"[27]

Having regard to the definition of "criminal group" the proposed offences appear to purport to extend to offences committed outside the Territory that have no nexus or connection whatsoever with the Territory or its citizens other than being "conduct engaged in in or outside the ACT (including outside Australia) that, if it occurred in the ACT, would constitute an indictable offence under a territory law".

As put by the Queensland Scrutiny Committee, with reference to a provision of a Bill identical in this respect to the ACT Bill, "[t]hus any person anywhere on the planet is purportedly caught by the offence provided that the offence that is actually committed would be an offence if it occurred in Queensland". It argued that "[t]his part of the provision, if it is intended to have that extraterritorial effect, would most likely be struck down as beyond the legislative competence of the Queensland Parliament to make laws for the peace, welfare and good government of Queensland".

A similar argument could be based on subsection 22(1) of the *Australian Capital Territory (Self-Government) Act 1988* which provides that (subject to immaterial exceptions) "the Assembly has power to make laws for the peace, order and good government of the Territory".[28]

The Queensland Committee further noted that "[t]he explanation for the inclusion of this part of the provision is perhaps the fact that this offence was uplifted directly from the *Crimes Act 1961* (NZ) s.98A without attempting to address, as the NZ act does, the extraterritorial reach of the legislation. [Section 7] of the New Zealand Crimes Act establishes that the offence can only be committed, where the offence is committed outside New Zealand, if some nexus or connection is demonstrated with New Zealand or New Zealand citizens".

The Committee draws to the attention of the Assembly the apparent extent of the extraterritorial reach of the proposed provision, and recommends that the Minister respond.

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[27] These comments rely heavily on comments of the Scrutiny of Legislation Committee of the Queensland Parliament, in *Alert Digest No 7 of 2007*, concerning the Criminal Code (Organised Crime Groups) Amendment Bill 2007.

[28] See generally *Pearce v Florentina* (1976) 135 CLR 507.

Bill—Comment

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

ANIMAL WELFARE AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Animal Welfare Act 1992* to provide that the Minister may declare a code of practice to be mandatory, and, except in relation to certain offences, that compliance with a code may be relied upon by a person as a defence to a prosecution for an animal cruelty offence.

Do any clauses of the Bill "inappropriately delegate legislative powers"?

By section 22 of the Act, Minister may approve a code of practice relating to animal welfare, and any such code is a disallowable instrument. Currently, there are no provisions in the Act that criminalise a failure to comply with a code. The Bill would amend the heading to section 22 so that a code made under section 22 is to be called an "approved code", and then to add a new section 23 that would permit the Minister to "approve a code of practice, or part of a code of practice, relating to animal welfare as mandatory".

The Bill would add two new sections specifying offences in relation to a failure of a person to comply with a mandatory code. Section 24A governs the case where the person "is reckless about whether the mandatory code is complied with", in which case the penalty in 100 penalty points.

Section 24B applies simply to a failure to comply and it is provided that the offence is one of a strict liability, in which case the penalty in 50 penalty points.

[Drafting point. What section will govern where the person intends to fail to comply with a mandatory code?]

This term of reference is raised because the code of practice is a kind of delegated legislation, and the Minister is thus empowered to in effect create a range of offences by making approving the code as mandatory. The only limit to what may be in a code is that the code is one "relating to animal welfare". This is a very broad power.

The Explanatory Statement states that

> [i]t is acknowledged that these offences rely upon a code of practice that is given legal effect by a disallowable instrument. However, in order to ensure compliance with a mandatory code of practice, this approach is unavoidable, as the alternative would be to replicate, word for word, nationally agreed codes of practice in regulations (or in amendments to the Act).

While in practice a mandatory code might be one that has been nationally agreed in some fashion, this limitation is not stated in proposed section 23. There may be some inconvenience in amending the Act each time a code is to be adopted, but this course of action preserves the principle that offences should be created by a statute and not by delegated legislation. It might be argued that this is particularly so where the range of offences might be large.

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

Strict liability offences

The Committee does not raise any issue of HRA incompatibility turning on this provision for strict liability. The Explanatory Statement justification is adequate, and the Committee notes that the penalty is limited to 50 penalty units. In addition, it is also pointed out that "the operation of section 24B is restricted where the offender might not reasonably be expected to know of his or her obligations under a code. Typically, this might be individuals not involved in a business or industry to which a mandatory code ordinarily applies". This restriction of section 24B is found in proposed section 24C, which is explained in the Explanatory Statement:

> Where [a person to whom the relevant code applies only in relation to a non-business activity engaged in by the person[29]] is reasonably suspected by an animal welfare inspector (or an authorised officer) of breaching a code, the person must first be served with a written direction to rectify the breach. They must be given a reasonable time to comply. The person only commits an offence if they fail to comply with the direction within the stipulated time. This will ensure that the person is made aware of the existence of the mandatory code.
>
> However, if the person subsequently breaches the same code, the strict liability offence can be applied without the need to first issue a direction to rectify the breach. If an inspector or authorised officer has issued a direction to rectify a breach of a mandatory code and subsequently determines that the person has already been convicted of an offence of breaching that code the inspector or authorised officer can withdraw the direction and seek to have the person prosecuted instead.

Lack of clarity in the expression "non-business activity"

The Committee notes that the scope of this expression is far from clear and raises the question of whether it is feasible to further refine its scope.

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

[29] See proposed paragraph 24C(1)(b).

SUBORDINATE LEGISLATION

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

Disallowable Instruments—No comment

Disallowable Instrument DI2010-9 being the Road Transport (General) (Vehicle Registration) Exemption 2010 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2009-61 and exempts a specified wheelchair accessible taxi from the provisions of paragraph 32B(2)(a) of the Road Transport (Vehicle Registration) Regulation 2000.**

Disallowable Instrument DI2010-11 being the Board of Senior Secondary Studies Appointment 2010 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the Australian National University.**

Disallowable Instrument DI2010-12 being the Board of Senior Secondary Studies Appointment 2010 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the ACT Council of Parents and Citizens Associations Inc.**

Disallowable Instrument DI2010-13 being the Board of Senior Secondary Studies Appointment 2010 (No. 3) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the Catholic Education Commission, Archdiocese of Canberra and Goulburn.**

Disallowable Instrument DI2010-14 being the Board of Senior Secondary Studies Appointment 2010 (No. 4) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the ACT and Region Chamber of Commerce and Industry.**

Disallowable Instrument DI2010-15 being the Board of Senior Secondary Studies Appointment 2010 (No. 5) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the ACT Trades and Labour Council Inc.**

Disallowable Instrument DI2010-16 being the Board of Senior Secondary Studies Appointment 2010 (No. 6) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the Board of Senior Secondary Studies, after consultation with the University of Canberra.**

Disallowable Instrument DI2010-17 being the Corrections Management (Official Visitor) Appointment 2010 made under subsection 57(1) of the *Corrections Management Act 2007* **appoints a specified person as an Official Visitor.**

Disallowable Instrument DI2010-20 being the Health (Interest Charge) Determination 2010 (No. 1) made under section 193 of the *Health Act 1993* **revokes DI2008-212 and determines fees payable for the purposes of the Act.**

Disallowable Instruments—Comment

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

Minor drafting issue

Disallowable Instrument DI2010-10 being the Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 1) made under section 8 of the *Exhibition Park Corporation Act 1976* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as deputy chair of the governing board of the Exhibition Park Corporation.**

This instrument appoints a specified person as the deputy chair of the governing board of the Exhibition Park Corporation. The Committee notes that the Explanatory Statement for the instrument states:

> [The specified person] is already an ordinary member the board, by virtue of DI2007-233 (the earlier instrument) until 25 October 2010. This instrument supersedes the earlier instrument, however the earlier instrument has not been revoked, owing to the operation of section 81 of the [*Financial Management Act 1996*].

Section 81 of the *Financial Management Act 1996* provides:

> **81 Ending board member appointments**
>
> (1) This section applies to a governing board member other than the CEO.
>
> (2) The responsible Minister may end the member's appointment—
>
> (a) if the member contravenes a territory law; or
>
> (b) for misbehaviour; or
>
> (c) if the member becomes bankrupt or executes a personal insolvency agreement; or
>
> (d) if the member is convicted, or found guilty, in Australia of an offence punishable by imprisonment for at least 1 year; or
>
> (e) if the member is convicted, or found guilty, outside Australia of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year; or
>
> (f) if the member exercises the member's functions other than in accordance with section 85 (Honesty, care and diligence of governing board members); or
>
> (g) if the member fails to take all reasonable steps to avoid being placed in a position where a conflict of interest arises during the exercise of the member's functions; or
>
> (h) if the member contravenes section 88 (Disclosure of interests by governing board members); or
>
> (i) if the member is absent from 3 consecutive meetings of the board, otherwise than on approved leave; or

(j) for physical or mental incapacity, if the incapacity substantially affects the exercise of the member's functions.

Note A person's appointment also ends if the person resigns (see Legislation Act, s 210).

(3) The Minister may also end the appointment of the member (the ***member concerned***) if the board tells the Minister in writing that it has resolved, by a majority of at least 2/3 of the members, to recommend to the Minister that the member's appointment be ended.

(4) The governing board may pass a resolution mentioned in subsection (3) only if—

(a) at least 3 weeks written notice of the intention to consider the proposed resolution has been given to the member concerned; and

(b) the member concerned has been given an opportunity to make submissions and present documents to a meeting of the board; and

(c) if the member concerned has used the opportunity mentioned in paragraph (b)—a summary of the member's submissions is recorded in the minutes of the board and a copy of any documents presented is included in the minutes.

The Committee seeks the Minister's advice as to how section 81 of the Financial Management Act applies in this particular case.

Drafting errors

Disallowable Instrument DI2010-18 being the Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 1) made under paragraph 8(1)(e) of the *Victims of Crime Regulation 2000* **appoints a specified person as the health professions member of the Victims Assistance Board.**

Disallowable Instrument DI2010-19 being the Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 2) made under paragraph 8(1)(g) of the *Victims of Crime Regulation 2000* **appoints a specified person as the psychiatrist/psychologist member of the Victims Assistance Board.**

The Committee notes that the formal parts of both of these instruments state that they are made under the *Victims of Crime Regulation**s** 2000*. The Committee also notes that, in each case, the error is not repeated in the Explanatory Statement for the instrument, which correctly indicates that the instrument is made under the *Victims of Crime Regulation 2000*.

Is this appointment valid?

Disallowable Instrument DI2010-18 being the Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 1) made under paragraph 8(1)(e) of the *Victims of Crime Regulation 2000* **appoints a specified person as the health professions member of the Victims Assistance Board. specified person as the health professions member of the Victims Assistance Board.**

This instrument appoints a specified person to the Victims' Assistance Board. The formal part of the instrument indicates that it is made under paragraph (8)(1)(e) of the *Victims of Crime Regulation 2000*. The Committee notes that that provision requires the Minister to appoint

(e) a person who, in the Minister's opinion, represents the interests of health professions (other than a doctor or dentist) (the ***health professions member***);

The Committee notes that the Explanatory Statement for the instrument contains no indication (other than the lack of the honorific "Dr") that the specified person is not a doctor or a dentist. The Committee also notes that it has consistently commented on instruments of appointment that do not (either in the instrument itself or in the Explanatory Statement) demonstrate that any pre-requisistes for the appointment have been met. The Committee has done so on the basis that in is not unreasonable for the Committee (and the Legislative Assembly) to receive some assurance that any pre-requisites for appointment have been met in relation to appointments to statutory positions.

In making this comment, the Committee also notes that the Explanatory Statement for this instrument states:

> Consultation has occurred with the Standing Committee on Legal Affairs regarding the appointment, as [the specified person] is not an ACT public servant. The Committee considered the proposed appointment and has made no comment.

That being so, it might be assumed that this particular issue has already been considered by the Committee (in its non-legislative scrutiny role). The Committee does not consider that this detracts from the general point (which the Committee has consistently made) that, for the benefit of the Committee (and the Legislative Assembly) instruments of appointment (or their Explanatory Statements) should expressly indicate that any pre-requisites for the appointment have been met. The Committee does not consider this to be an onerous requirement.

Is this a disallowable instrument?

Disallowable Instrument DI2010-21 being the Nature Conservation (Flora and Fauna Committee) Appointment 2010 made under section 17 of the *Nature Conservation Act 1980* **appoints a specified person as a member of the Flora and Fauna Committee.**

This instrument appoints a specified person as a member of the Flora and Fauna Committee.

The Committee notes that Division 19.3.3 of the *Legislation Act 2001* deals with the making of statutory appointments. Section 229 of the Legislation Act provides that an instrument making (or evidencing) an appointment to which Division 19.3.3 applies is a disallowable instrument. That provision gives the Committee the jurisdiction to scrutinise and report on instruments of appointment. It is important to note, however, that the Committee's jurisdiction is limited by section 227 of the Legislation Act, which excludes public servant appointments from the operation of Division 19.3.3 (including the requirement that appointments be made by disallowable instrument). As a result of this exemption, the Committee generally prefers that the Explanatory Statement to an instrument of appointment expressly indicate that the person appointed is not a public servant.

The Explanatory Statement for this instrument states:

> This instrument appoints one new member, Dr Richard Schodde, to the Flora and Fauna Committee.
>
> Existing members of the Flora and Fauna Committee are:
> - Professor Arthur Georges (Chairperson and Member)
> - Dr Penny Olsen (Deputy Chairperson and Member)
> - Dr Richard Norris (Member)
> - Dr Margaret Kitchin (Member)

- Dr Barry Richardson (Member)
- Mr Paul Stevenson (Member)

Dr Margaret Kitchin is a public servant and a member of the Flora and Fauna Committee. As a public servant Dr Kitchin's appointment is made under the *Legislation Act 2001*.

All the members have appropriate expertise in biodiversity or ecology as is required under the *Nature Conservation Act 1980*, and will hold office as part-time members for a period not exceeding three years.

The Standing Committee on Climate Change, Environment and Water was consulted during the appointment process.

This appointment is a disallowable instrument.

The Committee notes that, despite stating that this instrument is a disallowable instrument, the Explanatory Statement does not address the key issue that determines whether or not the instrument is, in fact, a disallowable instrument. That issue is whether or not *Dr Schodde* is a public servant.

As the Committee has pointed out previously, it is preferable that the Committee (and the Legislative Assembly) are able to be assured, on the face of an instrument of appointment or on the basis of the content of the Explanatory Statement, that the formal elements of an appointment have been met. Whether or not a person is a public servant is one of those elements. Only if an appointee is not a public servant is an instrument of appointment disallowable.

As the Committee has previously observed, the Committee considers that it is not an onerous requirement that the text of an instrument of appointment or its Explanatory Statement contain a statement to the effect that "this is not a public servant appointment"

In the present case, there is no indication as to whether or not the person appointed is a public servant. The fact that the person is being *re-appointed* may lead to an assumption that the person is not a public servant, on the basis that the person would not have been appointed (by disallowable instrument) in the first place if they were a public servant. This assumption is not able to be made with any great confidence, however. There is nothing in either the instrument or the Explanatory Statement to indicate the person was originally appointed by legislative instrument (and the Committee's examination of the ACT Legislation Register has not identified such an earlier instrument). In any event, there is no basis for assuming that the person's status has not changed since the original appointment. As a result, the Committee considers that, even for re-appointments, it is appropriate that the Explanatory Statement for an instrument of appointment expressly address the issue of whether or not the person appointed is a public servant.

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

Subordinate Laws—No comment

The Committee has examined the following subordinate law and offers no comment on it:

Subordinate Law SL2009-54 being the Environment Protection Amendment Regulation 2009 (No. 2) made under the *Environment Protection Act 1997* **amends the Environment Protection Regulation 2005, by replacing the term "building work" with "development" for sections 45, 46 and 47.**

Subordinate Law SL2009-57 being the Liquor Amendment Regulation 2009 (No. 1) made under the *Liquor Act 1975* **amends the Liquor Regulation 1979 to regulate the alcohol-free areas for Summernats 2010.**

Subordinate Law SL2009-58 being the Births, Deaths and Marriages Registration Amendment Regulation 2009 (No. 1) made under section 70 of the *Births, Deaths and Marriages Registration Act 1997* **amends the Births, Deaths and Marriages Registration Regulation 1998 to ensure proper registration of civil partnerships.**

Subordinate Law SL2009-60 being the Prohibited Weapons Amendment Regulation 2009 (No. 1) made under the *Prohibited Weapons Act 1996* **amends the Prohibited Weapons Regulation 1997 by inserting a specified archery club to the list of approved archery clubs.**

Subordinate Law SL2010-1 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **allows ACT medical practitioners with unconditional registration with the ACT Medical Registration Board to prescribe opioid maintenance treatment for up to five clients.**

Subordinate Law SL2010-3 being the Racing (Race Field Information) Regulation 2010 made under Divisions 5B.2 and 5B.3 of Part 5 of the *Racing Act 1999* **determines the conditions applying to an approval of a licensed wagering operator to use ACT race fields information and the requirements for the monthly returns to be made by approved licensed wagering operators.**

Subordinate Laws—Comment

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

Positive comment

Subordinate Law SL2009-53 being the Territory-owned Corporations Amendment Regulation 2009 (No. 1) made under the *Territory-owned Corporations Act 1990* **defers the commencement date for the removal of Rhodium Asset Solutions Limited from Schedule 1 of the Act until 12 December 2010.**

The Committee notes that this subordinate law amends the *Territory-owned Corporations Regulation 2008 (No. 2)*. The Explanatory Statement for the subordinate law states:

> This regulation is made in accordance with the *Territory-owned Corporations Act 1990* that provides for the removal of Rhodium Asset Solutions Limited from Schedule 1 of the Act on a date prescribed by regulation.
>
> Rhodium Asset Solutions Limited is being progressively wound down. The date for completing the wind down is uncertain and depends on whether Rhodium can dispose of the remaining leases before they reach maturity.
>
> The objective of this regulation is to defer the commencement date for removing Rhodium Asset Solutions Limited from Schedule 1 of the *Territory-owned Corporations Act 1990* until 12 December 2010.

The Committee notes with approval that, unlike a previous deferral of the relevant commencement date (dealt with by the Committee in *Scrutiny Report No 4* of the *Seventh Assembly*, in its comments on Subordinate Law SL2008-49), the Explanatory Statement for this instrument provides an explanation for the further deferral.

"Henry VIII" clause

Subordinate Law SL2009-55 being the Environment Protection Amendment Regulation 2009 (No. 3) made under the *Environment Protection Act 1997* **amends Schedule 1 of the Act by inserting a threshold of 100m^3 to the activity of the extraction of material (other than water) from a waterway.**

The Committee notes that this subordinate law amends Schedule 1 of the *Environment Protection Act 1997*. Schedule 1 of the Environment protection Act lists "activities requiring environmental authorisation". This subordinate law replaces the previous item 1 in table 1.2 of the Schedule. The effect of the amendment appears to be that the extraction of material (other than water) from a waterway only requires environmental authorisation if more than 100m^3 of material is removed.

The Committee notes that the amendment of primary legislation (ie an Act) by subordinate legislation (ie a regulation) is an exercise in law-making by "Henry VIII" clause. In this particular case, the "Henry VIII" clause is subsection 166(8) of the Environment Protection Act, which provides:

> (8) A regulation may amend schedule 1—
>
> (a) by adding activities to, or deleting activities from, that schedule; and
>
> (b) by making any other amendments of that schedule arising from, connected with or consequential on an amendment under paragraph (a).

The Committee notes that this particular amendment does not appear to add or delete an "activity" to Schedule 1. Rather, the amendment *amends* an existing "activity", by stating a volume threshold on the application of the requirement for environmental authorisation. This being so (and in the absence of any explanation in the Explanatory Statement), the Committee would appreciate the Minister's advice as to how this subordinate law invokes the power in subsection 166(8) of the Environment Protection Act.

Minor issue

Subordinate Law SL2009-56 being the Court Procedures Amendment Rules 2009 (No. 3) made under section 7 of the *Court Procedures Act 2004* **amends the *Court Procedures Rules 2006* by adding some new subrules to provide for a proceeding that has been dismissed under rule 76(2) to be reinstated if a party files any document in the proceeding before the end of 1 year after the day the proceeding is dismissed.**

The Committee notes that this subordinate law makes various amendments to the *Court Procedures Rules 2006*. The Explanatory Statement for the subordinate law states:

> A number of court forms have been amended to improve their operation within the working environment of the courts. In the Magistrates Court, warrant forms have been enhanced to make them more user-friendly and also to ensure that they are compliant with the *Human Rights Act 2004*. Form 2.13 (Notice claiming contribution or indemnity) has also been improved in line with suggestions from the profession.

The Committee would be grateful if the Minister could provide further information in relation to the enhancements that have been made to ensure compliance with the *Human Rights Act 2004*.

Minor typographical error / use of abbreviations

Subordinate Law SL2010-2 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No. 2) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **amends the Medicines, Poisons and Therapeutic Goods Regulation 2008 to allow the chief health officer to issue a standing order for the purposes of allowing the supply of medicines by registered nurses in a government-funded walk-in centre.**

The Committee notes that the "authority" part of the Explanatory Statement for this subordinate law refers to the "*Medicines, Poisons and **t**herapeutic Goods Act 2008*".

The Committee also notes that the "outline" part of the Explanatory Statement refers to nurses being located in a "government funded WiC". The Explanatory Statement later uses the term "walk-in-centre", for which the Committee assumes that "WiC" is an abbreviation.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 22 February 2010, in relation to comments made in Scrutiny Report 18 concerning the Human Rights Commission Legislation Amendment Bill 2009.
- The Minister for Education and Training, dated 5 March 2010, in relation to comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2009-236, being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 3).
- The Minister for Education and Training, undated, in relation to comments made in Scrutiny Report 19 concerning the Education Amendment Bill 2009 and the Education Amendment Bill 2010.
- The Minister for Health, dated 11 March 2010, in relation to positive comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2010-3, being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2010 (No. 1).

The Committee wishes to thank the Attorney-General, the Minister for Education and Training and the Minister for Health for their helpful responses.

Vicki Dunne, MLA
Chair

March 2010

JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009

Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1)

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009

Report 10, dated 10 August 2009

Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

Report 11, dated 24 August 2009

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009

Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009

Bills/Subordinate Legislation

Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)
Crimes (Assumed Identities) Bill 2009
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Report 14, dated 9 November 2009

Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)
Education (Participation) Amendment Bill 2009

Report 15, dated 16 November 2009

Disallowable Instrument DI2009-210 - Attorney General (Fees) Amendment Determination 2009 (No. 3)
Disallowable Instrument DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)

Report 16, dated 7 December 2009

Fair Trading (Motor Vehicle Repair Industry) Bill 2009

Report 17, dated 9 December 2009

Civil Partnerships Amendment Bill 2009 (No. 2)

Report 18, dated 1 February 2010

Health Practitioner Regulation National Law (ACT) Bill 2009
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)
Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010

Disallowable Instrument DI2009-235 - Attorney General (Fees) Amendment Determination 2009 (No. 5)
Disallowable Instrument DI2009-250 - Gambling and Racing Control (Governing Board) Appointment 2009 (No. 2)
Disallowable Instrument DI2009-253 - Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 5)
Disallowable Instrument DI2009-256 - Long Service Leave (Portable Schemes) Employers Levy Determination 2009

Bills/Subordinate Legislation

Disallowable Instrument DI2009-266 - Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2009 (No. 1)
Education (Suspensions) Amendment Bill 2010 (PMB)
Justice and Community Safety Legislation Amendment Bill 2010
Personal Property Securities Bill 2010

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
MINISTER FOR ENERGY
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 18 of 1 February 2010. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on the Human Rights Commission Legislation Amendment Bill 2009.

The comment relates to proposed new section 45(3)(d) of the *Human Rights Commission Act 2005*. The amendment would allow for a complaint under the Act to be closed without notifying the person complained about. The Standing Committee questioned whether records of closed complaints would be kept, and whether there could be consequences for the person named.

The Human Rights Commission (the Commission) is obligated to keep records of complaints both under the *Human Rights Commission Act 2005* and the *Territory Records Act 2002*. Record keeping is an important part of the Commission's functions, as it allows the Commission to monitor trends over time. The Commission takes a range of enquiries from members of the public that may not result in complaints. These enquiries, along with complaints that are withdrawn, are valuable for performance reporting and general statistical analysis, as well revealing patterns of complaints requiring further investigation.

However, as with all information obtained pursuant to the Commission's functions, records of complaints closed under this new amendment will be protected by section 99 of the *Human Rights Commission Act 2005*. Section 99 provides confidentiality to this kind of information that may only be breached in limited circumstances, all of which relate to further investigation of complaints.

I trust that the above response answers the Committee's concerns and I thank the Committee for its review.

Yours sincerely

Simon Corbell MLA
Attorney General
22-2-10

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

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

I write in response to comments made in the Scrutiny Report No. 19 of 22 February 2010, dealing with Disallowable Instrument DI2009-236, the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 3).

In the report, the Committee noted that the appointment was made under both section 31 and subsection 32(1) of the *Canberra Institute of Technology Act 1987*, but that only section 31 was cited in the instrument.

I appreciate the Committee's comments and will seek to ensure that future instruments of appointment for the chair and deputy chair positions under this Act refer to both relevant sections.

Yours sincerely

Andrew Barr

Andrew Barr MLA
Minister for Education and Training
5 / 3 / 10

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2610

Dear Mrs Dunne

I refer to both Scrutiny Report No 13 and Scrutiny Report No 19 in which the Committee provided comment on the Education Amendment Bill 2009 and the Education Amendment Bill 2010. I thank the Committee for its comments and provide my response.

The Committee asked whether "sufficient recognition has been given 'to the right of a child to the protection needed by the child because of being a child'. It is arguable that a right to education is a component of the HRA right."

A child can only be suspended from an ACT government school if the child is engaging in behaviour outlined under proposed section 36(1)(a). The need for suspension in these circumstances reflects the need to balance the human rights of the suspended student with those who are negatively affected by the child's conduct. In such circumstances, the behaviour of the child has the potential to compromise the learning environment and the safety of fellow students and the working environment of school staff. Students who are suspended will be given the opportunity to continue their education during the suspension, as required by section 36(5)(d) of the Act.

Suspended students are also provided with access to a comprehensive range of support services to assist in addressing their reintegration and ongoing individual learning and development needs.

The Committee commented that "a further consideration is that this amendment to the *Education Act 2004* will have the effect of reducing the period in which there will be a review of the need for a suspension and for arrangements to be made in consequence of the suspension."

The proposed amendment will remove the need for the Chief Executive to consider whether to give effect to a principal's recommendation that a student be suspended for

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

a period of 6-15 days, rather than any suspension over 5 days. However, all decisions made under proposed sections 36 will be reviewable decisions, subject to review by the ACT Civil and Administrative Tribunal. In addition, the Department's *Complaints Resolution Policy*, which is publicly available, has a specific process for responding to complaints about suspensions.

The Committee also suggested "that consideration be given to inserting the requirement that the opinion of the Chief Executive be based on 'reasonable grounds'."

In accordance with the principles of administrative decision-making it is not considered necessary to insert this requirement, as all decisions made under the *Education Act 2004* must be based on 'reasonable grounds,' meaning that decisions are well-founded in relevant evidence. The Department is currently reviewing its policy on suspensions to ensure it gives a comprehensive outline of the matters to which a decision-maker must give consideration in determining whether or not to suspend a student. In essence, this will form a guide to determining what may constitute 'reasonable grounds' for suspending a student, without fettering the discretion of the decision-maker.

I hope these responses address the Committee's concerns.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs ~~Dunne~~ Vicki

I refer to Scrutiny Report No 19 prepared by the Standing Committee (the Committee) on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), dated 22 February 2010.

The Disallowable Instrument DI2010-3 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2010 (No.1) made under subsection 121(1) of the *Mental Health Treatment and Car) Act 1994* appoints a specified person as an official visitor and sets out various criteria that make a person eligible and ineligible for appointment.

I note that the Committee makes positive comment about the completeness of the Explanatory Statement. Please convey my appreciation to the Committee for its comments.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
11.3.10

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee)
ACT Legislative Assembly
London Circuit
Canberra ACT 2601

Dear Mrs Dunne

Crimes (Surveillance Devices) Bill 2010 and Crimes (Serious Organised Crime) Amendment Bill 2010

I write to the Standing Committee on Justice and Community Safety, performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee, regarding your consideration of the *Crimes (Surveillance Devices) Bill 2010* and *Crimes (Serious Organised Crime) Amendment Bill 2010.* I believe the *Crimes (Surveillance Devices) Bill 2010* raises issues under the *Human Rights Act 2004* ('the HR Act'). I have also written to the Attorney-General raising these issues.

Crimes (Surveillance Devices) Bill 2010

As the Explanatory Statement notes, the legislation engages the right to privacy under s.12 of the HR Act. In my view some of the powers given may arbitrarily interfere with privacy and these restrictions would not be proportionate under s.28 of the HR Act. I note the lower threshold applying to authorising the use of surveillance devices under warrants in the Bill is lower level of 'suspect' on reasonable grounds (clause 11). The level of intrusion into an individual's privacy following the issuing of a warrant for surveillance, could in some circumstances be akin to the level of intrusion caused by a search warrant, if not more so, given it is a covert operation. In relation to search warrants, the balance of international human rights jurisprudence suggests the appropriate threshold is one of 'reasonable belief'.

The Canadian Supreme Court has laid down some principles on when a search will be reasonable. In *Hunter v Southam Inc* the Court suggested:

> *'The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as*

the threshold for subordinating the expectation of privacy to the needs of law enforcement.'[1]

The Court clarified in *Debot v The Queen* that 'credibly-based probability' could also be expressed as 'reasonable belief'.[2]

Further, the New Zealand *Crimes Act 1961* requires that a Judge can only issue a warrant for the interception of private communications if there is a 'reasonable belief' of a crime taking place. This covers a range of crimes including violence offences and threats to property. For example, even in relation to terrorism offences, the risk of which may proportionately limit rights to a greater degree than other criminal offences, s.312CC states:

> *(1) An application may be made to a Judge of the High Court for a warrant for any constable to intercept a private communication by means of an interception device if there are reasonable grounds for believing—*
> *(a) that a terrorist offence has been committed, or is being committed, or is about to be committed; and*
> *(b) if the offence has yet to be committed, that the use of an interception device to intercept private communications is likely to prevent its commission; and*
> *(c) that it is unlikely that without the granting of such a warrant the Police investigation of the case can be brought to a successful conclusion or, as the case may be, the commission of the offence can be prevented.*

A different threshold has been included in the *Search and Surveillance Bill 2009* recently introduced in New Zealand, which has been criticised on human rights grounds. Nonetheless, clause 46 requires that for a Judge to issue a surveillance device, there are reasonable grounds:

a) *to suspect that an offence has been committed or is being committed, or will be committed in respect of which this Act or any relevant enactment authorises an enforcement officer to apply for a search warrant; and*
b) *to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence.*

The existing threshold in the New Zealand Crimes Act and even the lesser threshold proposed in the new NZ Search and Surveillance Bill would appear to place a higher threshold that is currently contemplated in the *Crimes (Surveillance Devices) Bill 2010.*

It also appears the relevant United Kingdom legislation governing surveillance equipment, including the *Regulation of Investigatory Powers Act 2000* ('RIP Act') require a threshold of reasonable belief before a search warrant will be issued. The United Kingdom has different rules around the use of such information (i.e. it is not usually admissible) and so is not directly comparable, but it still refers to a 'belief'.

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[1] [1984] 2 SCR 145
[2] [1989] 2 SCR 1140

Given the nature of the surveillance equipment included in the Bill, it is likely to be used in situations where individuals would have a reasonable expectation of privacy. In particular, data, telephone and optical surveillance devices have the potential to impact upon an individual's privacy to a great degree and especially difficult to challenge. While the intrusion of privacy is one matter an independent 'judicial officer' must consider under the Bill before issuing a warrant, the threshold is also critical. It would seem 'reasonable belief' rather than 'suspicion on reasonable grounds' would be the appropriate standard. In the case of emergencies a confusing dual threshold is used – 'suspects or believes on reasonable grounds'. Presumably the lower threshold of suspicion would apply.

I further note that s.25 of the Bill would allow emergency applications to be made to the Chief Officer (defined as the chief police officer of the AFP or the chief executive officer of the Australian Crime Commission) for the use of a surveillance device when there is imminent risk of serious violence or serious damage to property. I have not had the opportunity to explore the international jurisprudence on this question, but the fact that such applications would be approved by a non-judicial officer, and only imminent damage to property would permit such an application (in addition to serious violence) would raise a question as to whether this element of the Bill is an unreasonable limitation on the right to privacy. I accept that the application must be approved by a judge within two days, however there appears to be adequate access to judicial officers out of hours in our small jurisdiction. Whilst the judge may order the destruction of evidence gathered, an individual's privacy has nonetheless being interfered with. At a minimum, this does not seem consistent with the rules set out by the European Court of Human Rights in *Valenzuela Contreras v Spain,* a case referred to in the Explanatory Statement. Professor Bronitt's 1997 article referred to in the Explanatory Statement, also questions whether this is appropriate:

> *In several respects, the present laws governing electronic surveillance in Australia fail to provide adequate protection for individual privacy and thus may constitute an arbitrary interference with privacy contrary to Article 17 of the ICCPR. As the European Court indicated in a case examining the legality of customs searches under Art 8, the proportionality question is most effectively addressed through a warrant procedure... Warrantless surveillance can take several forms. In situations of emergency, the relevant legislation may dispense with the requirement of a warrant or prior authorisation.*[3]

Professor Bronitt also suggests that issues like the notification to non-suspected persons of their inadvertent surveillance, compensation for unjustified violations of privacy and the rights of individuals to challenge such warrants must also be considered. Professor Bronitt has also questioned whether listening devices disproportionately limit the right to fair trial and right to remain silent (s.21).

Given these issues, I submit that the Attorney-General should table in the Legislative Assembly a detailed human rights compatibility statement with reasons in order to enable more informed debate.

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[3] Simon Bronitt, Electronic Surveillance, Human Rights, and Criminal Justice (1997) 3 *Australian Journal of Human Rights* 183

Crimes (Serious Organised Crime) Amendment Bill

I support the Government's position of rejecting the sort of Serious Organised Crime laws introduced in South Australia and New South Wales which I believe unreasonably and disproportionately limits human rights. In my brief consideration of the *Crimes (Serious Organised Crime) Amendment Bill* it seems a far more reasonable and measured response to the recent community concern regarding organised crime and 'bikie gangs'.

Yours sincerely

Helen Watchirs

Dr Helen Watchirs
Human Rights and Discrimination Commissioner
5 March 2010

RESPONSE TO SUBMISSION FROM THE HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

The Committee Chair and its Secretariat received via e-mail on 10 March a letter dated 5 March addressed to the Chair from the Human Rights and Discrimination Commissioner.

The Committee welcomes this contribution from the Commissioner, and to further assist the Assembly, its response follows. Unfortunately, the Committee has had less than 2 days to respond.

The Crimes (Surveillance Devices) Bill 2010

The "reasonable suspicion" test

The Commissioner noted "the lower threshold applying to authorising the use of surveillance warrants …. is the lower level of "suspect" on reasonable grounds (clause 11)".[30] Comparing, as is reasonable, a search to a surveillance, the Commissioner opines that "the balance of international rights jurisprudence suggest that the appropriate threshold is one of 'reasonable belief'".

The opinion justifies this proposition by reference to two Canadian Supreme Court decisions from the 1980s, and some recent New Zealand and United Kingdom legislative developments. With respect, these two latter sources have no bearing on what might be "the balance of international rights jurisprudence".

The Committee does not accept that Canadian law supports the proposition. Whatever might be drawn from the 1980s cases, more recent Canadian Supreme Court cases clearly indicate that the court does not proceed on a principle that a statute (or other source of law) is necessarily in breach of the Canadian Charter of Rights where it authorises a search based on some official's "reasonable suspicion" that a state of affairs exist.

In *Kang-Brown v The Queen* [2008] 1 SCR 456[31], and *The Queen v AM* [2008] 1 SCR 456[32], the same nine Justices considered a situation where the police had used sniffer-dogs to detect narcotics in the possession of school-children. The same four Justices stated an approach that is the highest point (in terms of limitation) of the doctrine that governs the constitutionally of a search power.[33]

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[30] Section 11 is not the source of power to issue a warrant; this is done by a judge under clause 13, who reviews the officer's judgement in the application of that standard under clause 11. The Commissioner's opinion later recognises this.

[31] http://scc.lexum.umontreal.ca/en/2008/2008scc18/2008scc18.html

[32] http://scc.lexum.umontreal.ca/en/2008/2008scc19/2008scc19.html

[33] It should be noted that they concern the application of section 8 of the Charter, which provides simply that "Everyone has the right to be secure against unreasonable search and seizure". No such right is stated in the *Human Rights Act 2004*, and it may be that the strictness of the Canadian approach may be influenced by the word "reasonable" in section 8. In the Territory, the issue arises in the application of HRA paragraph 12(a) (the right to privacy). Not much may turn on this, but care must be taken when transposing judicial decisions on a differently worded statute.

Writing for these four Justices, LeBel J said:

> … in the leading cases on s. 8, the courts imposed significant constraints on intrusions on personal privacy by state agents. … Those constraints were — and in general still are, since this Court has never resiled from them — that there be a legal basis for the search or seizure in a statute or at common law, prior judicial authorization, and reasonable and probable cause. *Departures from that constitutional framework had to be justified by the state*.[34]

He made it clear that a standard of "reasonable suspicion" fell short of the standard of reasonable and probable cause.[35]

What the italicised words allow of course is that a departure from these principles – such as the statement of a "reasonable suspicion" test - might be justified under section 1 of the Charter (the Canadian equivalent to HRA section 28). LeBel J also said that "[t]he standard for search and seizure operations in Canadian law has generally been reasonable and probable cause, with or without judicial preauthorization depending on the exigency of the circumstances",[36] and in reference to the fact situation before the court, said "[a] statutory provision on the appropriate use of sniffer dogs in law enforcement on grounds that fall short of the standard established in Hunter v. Southam might require justification under s. 1, but state action would not be foreclosed so long as the standard for justification was met under the relevant constitutional test".[37]

Thus, even if the high point of Canadian case-law is applied, a statute is not necessarily incompatible with the HRA where it authorises a search based on some official's "reasonable suspicion". If this view is transposed to the Territory, such a statute *might be* found to derogate from HRA paragraph 12(a), but it then might be justifiable under HRA section 28. The Commissioner's opinion does not recognise this approach, and did not address the issue of section 28 justification.

However, as the two cases noted above reveal, other Justices of the Canadian Supreme Court do not take a view that a "reasonable suspicion" test is necessarily derogates from section 8. In *The Queen v AM*, and reflecting the views of some other Justices, Binnie J said:

> [77] The suggestion that sniffer-dog searches be permitted on reasonable suspicion, based on objective grounds, rather than "reasonable belief" as laid down in the circumstances of *Hunter v. Southam* should, of course, be approached with caution. Reasonable "suspicion" has been used by this Court to authorize police action in the context of investigative detention (*Mann and R. v. Clayton*, [2007] 2 S.C.R. 725, 2007 SCC 32), entrapment (*R. v. Mack*, [1988] 2 S.C.R. 903, at pp. 964-65), and as justification for the search of a student by a school authority in *M. (M.R.)*, as already noted. The "reasonable suspicion" standard has been adopted by Parliament in [certain statutes].[38] …

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[34] Above n 2, at [10].
[35] Ibid at [16].
[36] Ibid at [13].
[37] Ibid at [14].
[38] Above n 3, [77]-[80].

> [78] Parliament has also used "reasonable suspicion" where it is of the view that the public importance of the objective outweighs the individual's privacy interest, as in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, including s. 15(1) (search of the person), s. 16(1) (search of conveyance), s. 16(2) (search of baggage) and s. 17(1) (opening of mail).
>
> [79] The validity of some of these legislative provisions is being challenged in the courts, and their particular circumstances will have to be considered at the relevant time. My point simply is that "reasonable suspicion" is a recognized legal standard that has been adopted where considered appropriate by both Parliament and the courts.
>
> [80] Of course if "reasonable suspicion" is construed as nothing more than a subjective standard, it may lead, as critics fear, to abuse in terms of arbitrary police action and racial profiling. Realistically, the possibility of after-the-fact accountability will not help a lot of innocent people who have been put to embarrassment by false positives. However, "reasonable suspicion" requires the police officer's subjective belief to be backed by objectively verifiable indications.

(It may be that more recent Supreme Court case-law will be relevant, but in the time available to it, the Committee has not been able to carry this research further).

The emergency application procedure

The Committee accepts that these provisions "raise a question as to whether this element of the Bill in an unreasonable limitation on the right to privacy".

The Commissioner is correct in pointing out that this scheme "does not seem consistent with the rules set out by the European Court of Human Rights in *Valenzuela v Spain*, a case referred to in the Explanatory Statement"; that is, as those rules are explained in the Explanatory Statement, and in particular with reference to the statement that "[a]t a minimum the Court expected that the law would empower a judicial officer to make an order".

The Committee recommends that the Minister explain the apparent inconsistency.

The Commissioner's quotation from an academic article seems, however, to provide some support for the emergency application procedure, for it notes that "[i]n situations of emergency, the relevant legislation may dispense with the requirement of a warrant procedure".

The Crimes (Serious Organised crime) Amendment Bill 2010

In her brief consideration, the Commissioner did not suggest any HRA issue. It is evident that the Committee raise a number of issues.