



HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

ACT Human Rights Commission

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Via email

Dear Dr Lloyd

 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
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Crimes Legislation Amendment Bill 2011 ('the Government Bill')
Crimes (Offences against Police) Amendment Bill 2012 ('PM Bill')

Thank you for your letter of 5 March 2010 inviting submissions to the Standing Committee on Justice and Community Safety's Inquiry into the above two bills. I note your reference to public hearings on 4 April 2012. Unfortunately, I will be overseas on leave at this time and so cannot attend.

Nonetheless, I would like to make the following comments on the two bills. In relation to the Government Bill, in summary, my view is that the existing law strikes the correct balance in protecting police officers performing their duties by providing for the current defence of self-defence, where proportionate and reasonable force is used, and when detention is reasonably perceived as unlawful.

I have also made some brief comments regarding the PM Bill.

Government Bill

Removal of Self-Defence

I note that primary purpose of the Government Bill is to remove the defence of self-defence for defendants charged with criminal offences,¹ while under police restraint even where that restraint may be unlawful. I note that s.42(1) of the *Criminal Code 2002* currently provides a defence of self-defence where a person is seeking to 'prevent or end the unlawful imprisonment to himself or herself or someone else'. There is also a requirement that the 'conduct is a reasonable response in the circumstances as the person perceives them.'

I note the comments of the Scrutiny Committee that the defence would only remain available when a defendant acts to achieve 'some other purpose (such as preventing a harm or threatened harm)'.² This is also reflected in the Explanatory Statement to the Bill. As the Committee noted such a proposal may engage the right to liberty and security of the person under s.18 of the *Human Rights Act 2004*. As The Explanatory Statement notes, s.9 (right to life) and s.8(3) (right to equality) may also be engaged.

¹ Including under the *Crimes Act 1900* and *Criminal Code 2002*

² In Scrutiny Report 47

Pursuant to s.28, limiting human rights must be reasonable and demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, the following must be considered under s.28(2):

- (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.

I welcome the detailed human rights analysis in the Bill, which considers a proportionality assessment for each of the three rights engaged.

1. Right to Equality (s.8)

The right to equality may be engaged as the proposed amendments seek to provide different defences, depending on the status of the victim. In particular, the aim of the amendment is to remove the defence in cases where a defendant may have been unlawfully detained by police, in order to reduce the risk of an assault on police. I note the Explanatory Statement does not provide any statistical analysis of the number assaults on police in the ACT compared to interstate or national data, or cite local examples of where the existing law has been deficient in protecting police. I think the arguments for this amendment would be enhanced by such data. This is particularly so given I understand no common law jurisdiction has removed the defence in this manner, apart from the United States.

The Explanatory Statement notes one form of inequality may be the distinction drawn between police exercising arrest powers compared to a private citizen.³ However, I think the more serious engagement of this right concerns the types of defendants who would be generally unable to plead this defence. The amendments may disproportionately impact on defendants who are more likely to come into contact with police, or be unlawfully detained. The nature of the discrimination in the Bill would be 'indirect' on the basis that the provisions do not seek to directly discriminate on the basis of a particular attribute, but rather imposes a universal condition that has the effect of disadvantaging people because they are at a socio-economic disadvantage.⁴ There is authority from the European Court of Human Rights that a measure which disproportionately affects a particular group may be discriminatory, even if not specifically aimed at that group. For example, in *DH v Czech Republic* the Court suggested that once an applicant had established a rebuttable presumption of indirect discrimination, the onus would shift to the respondent State to justify it.⁵

International and national research suggests that groups more apt to be targeted include Aboriginal and Torres Islander People,⁶ poly-drug users,⁷ young people with disabilities,⁸ and those with mental

³ For example utilising s.218 of the *Crimes Act 1900* to make a citizen's arrest.

⁴ See s.8(1)(b) of the *ACT Discrimination Act 1991* for a definition of indirect discrimination.

⁵ (2008) 47 EHRR 3.

⁶ Western Australian Research drawn from local and national data has found that among offenders Aborigines are 9.2 times more likely to be arrested. See Richard W. Harding, Roderic Broadhurst, Anna Ferrante and Nini Loh, 'Aboriginal Contact With the Criminal Justice System and the Impact of the Royal Commission Into Aboriginal Deaths in Custody', University of Western Australia, 1995: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=184282>.

⁷ The Australian Institute of Criminology has suggested that 'The findings presented so far have demonstrated that poly drug users are not only more likely to be unemployed and have gambled in the 30 days prior to their arrest, but also more likely to have had recent contact with the criminal justice system. Yet, it is unclear whether being a poly drug user is, in and of itself, a significant factor in producing adverse criminal justice outcomes or

illness are more likely to come into contact with the criminal justice.⁹ Evidence from the USA also suggests that same-sex attracted young people report higher rates of surveillance and harassment from police.¹⁰ The Human Rights Commission's 2011 *Review of the Youth Justice System* noted that in the ACT, Aboriginal young people were 35 times more likely to be detained than non-Indigenous young people.¹¹

I note that the WA Law Reform Committee Report 97 reviewed the law of homicide and concluded that self-defence ought not be limited in the manner proposed by the ACT Bill.¹² The WA Report provides a specific example involving a police officer to argue why self-defence should be maintained where the conduct of the police is unlawful; or where the accused is unaware the conduct of police is lawful, such as:

An accused may be mistaken about the lawfulness of an attack and if the mistake is both honest and reasonable the accused should be entitled to rely on self-defence.

For example, an accused who is deaf may be lawfully arrested by a police officer, but not hear the police officer identify himself or explain that he is being arrested. This accused should be entitled to rely on self-defence if his response to the physical application of force by the police officer was reasonable.

The Commission is of the view that it should be expressly stated that the defence of self-defence does not apply if the defensive force was used in response to lawful conduct. The Commission emphasises that if the accused was not aware the conduct was lawful he or she may be able to rely on the defence of mistake.¹³

However, I have no specific local evidence to suggest that people with certain attributes in the ACT more likely to come into contact with ACT police, or be unlawfully detained. I also note the Bill's Explanatory Statement suggests that if the right to equality is limited, then this limitation is reasonable due to the critical role police play in protecting public safety. The Bill's goal of reducing the number and severity of assaults on police is an important one. However, I query whether the amendment will lead to certain marginalised groups in our community being held criminally responsible for anti-social or other behaviour disproportionately to others, because they are more likely to come to the notice of, and into contact with, police.

2. Right to Life (s.9)

The Explanatory Statement suggests the right to life is not engaged, as self-defence remains available in situations where a suspect reasonably believes their actions were necessary to defend themselves or someone else, against physical harm. The defence is only restricted where the person is responding to perceived unlawful imprisonment. I also note that the amendments are seeking to

whether poly drug use is a proxy for other factors with potentially greater influence'. See Josh Sweeney and Jason Payne, 'Poly drug use among police detainees', Australian Institute of Criminology, August 2011, <http://www.aic.gov.au/en/publications/current%20series/tandi/421-440/tandi425.aspx>

⁸ Mary Quinn, Robert Rutherford, Peter Leone, David Osher and Jeffery Poirier, 'Youth with a disability in Juvenile Corrections: A National Study', 2005, *Exceptional Children* 71 (3) 339-345.

⁹ See for example the Canadian Mental Health Commission's Report 'A Study of How People with Mental Illness Perceive and Interact with the Police', 2011, <http://www.mentalhealthcommission.ca/English/Pages/ThePoliceProject.aspx>.

¹⁰ Angela Dwyer, 'Visibly Invisible: Policing queer young people as a research gap', 2007, Paper presented to the TASA Conference 4-7 December 2007 Auckland, New Zealand.

¹¹ Citing Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2008-09, 2011, 99.

¹² Available at: <http://www.lrc.justice.wa.gov.au/097g.html>

¹³ Ibid at p.172 Chapter 4.

protect the right to life of police officers who may be subject to unreasonable threats of violence by virtue of their occupation.

To address any misunderstanding regarding the use of the term 'restraint' in the Bill, I suggest that a note be added to clarify that a defendant retains the ability to plead self-defence in certain circumstances, including to resist harm. Even then, this may not be an easy distinction to draw when courts apply the amendments to factual situations. For example, the following list of cases are some of the common law authorities for the proposition that private citizens are entitled to use reasonable and proportionate force in responding to what may be perceived as unlawful detention by police.¹⁴ The situations all involve varying degrees of force, and raise different issues about the level and lawfulness of the detention and the risk to harm of the suspect. Generally, the courts have examined whether police officer was acting in the execution of his or her duty at the time of the alleged assault, rather than whether the suspect was responding to a risk of harm. However, in undertaking such an analysis, the courts have frequently considered whether the police officer's conduct constituted 'battery', which implicitly assumes that the suspect was responding to a risk of harm as well as the lawful or unlawful detention.

- In *Ludlow v Burgess*¹⁵ – an off-duty police officer was kicked by a man, who disputed that the kick was deliberate. During their verbal exchange, the man swore at the police officer. The police officer instructed him to stop using such language, and informed him that he was a police officer, but was not able to produce any proof such as identification. The suspect attempted to walk away and the off-duty police officer responded by putting his hand on his shoulder. The suspect retaliated with a kick. The Constable claimed his action was not to arrest the suspect, but detain him for future enquiries. The Court of Appeal found the defendant not guilty of assaulting the police officer since there had been "a detention of a man against his will without arrest", which was "unlawful and a serious interference with the citizen's liberty, and in those circumstances it cannot be an act performed in the execution of a police officer's duty."¹⁶
- Similarly in *Kenlin v Gardner*,¹⁷ a police officer detained a young person by grabbing his arm, without the intention of arresting him. The charge of assault was overturned against the officer by the Queen's Bench Divisional Court on the basis the young person was acting in self-defence.
- In contrast in *Donnelly v Jackman*,¹⁸ a constable who touched the defendant on the shoulder several times, not for the purpose of formal arrest, but only to speak to him, was found by the Queen's Bench Divisional Court not to be acting outside his duties. It has been suggested that this case is precedent for the concept that a 'trivial trespass' by a police officer against a suspect is not sufficient to render the actions of the police officer outside their duty. This view was supported by the Supreme Court of New Zealand in *Pounder v Police*¹⁹.
- The UK Divisional Court applied different reasoning in *Collins v Wilcock*,²⁰ finding that a tap on the shoulder was acceptable conduct in the ordinary conduct of life and therefore did not constitute battery or trespass. In that case, a female police officer suspected that the defendant was soliciting for prostitution. The defendant refused to speak to the police officer and walked away. The officer took hold of the defendant's arm to restrain her, and

¹⁴ This case law and summaries are drawn from Gilbert Kodilinye, 'Trespass to the Person and Assaults on the Police', in *The Trent Law Journal*, Journal of the Department of Legal Studies, Volume 12, 1988.

¹⁵ (1971) 75 Cr App R 227

¹⁶ Ibid at 228.

¹⁷ [1966] 3 All ER 931

¹⁸ [1970] 1 All ER 987

¹⁹ [1971] NZLR 1080

²⁰ [1984] 3 All ER 374

the defendant assaulted the officer. The Court found that a police officer in the conduct of her duties, including to prevent and investigate crime, may tap a person on the arm. However, if this conduct was more excessive, for example gripping a shoulder or arm, then absent a lawful exercise of the power of arrest, the Court found the action would be a battery, and self-defence could be successfully pleaded. Gaff CJ suggested,

'...physical contact by a police officer may be battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman'

This approach appears to imply that the lawfulness of arrest will turn on the whether a police officer has committed a battery against the suspect. The decision in *Collins* was approved by the UK Court of Appeal in *Wilson v Pringle*.²¹

- The UK High Court 1996 case of *Mepstead v DPP* sought to follow *Collins*.²² In this case, a police officer held a suspect by the arm to encourage them to listen to what the officer was saying, but not to arrest him. This Court found the conduct was within the officer's duties, but may not have been if the restraint had continued for longer.
- There is also a line of UK authorities that suggest s.18(3) of the HR Act might particularly be engaged by the proposed amendments. Subsection 18(3) requires that a person be told at the time of their arrest of the reasons for that arrest. In *R v Lowe*,²³ a defendant was arrested merely with the words 'That's enough, you're locked up'. The defendant was found not guilty by way of self-defence on the basis that at the time of the assault, the Constable was not acting in the execution of his duty because he had failed to inform the defendant of the reason for the arrest. I note that s.32D of the *Crimes Act 1914* also places this obligation on police to provide reasons for arrest, but provides an exception where it is impracticable for the officer to inform the other person of the reason for the arrest.

I believe the above cases demonstrate the difficulties a court may find seeking to differentiate between a suspect using force to resist arrest (whether lawful or otherwise), and in responding to a risk of harm, particularly as many courts have considered whether the actions of the police have constituted 'battery', more so than unlawful imprisonment.

Nonetheless, the human rights of police officers must also be considered. The amendment is seeking to enhance and protect these rights, particularly a police officer's right to life in the course of exercising their duties, which are paramount in framing laws of this kind.

3. Right to Liberty and Security of the Person (s.18)

As noted by the Scrutiny Committee and the Explanatory Statement, the right to liberty and security of the person under s.18 of the HR Act is engaged by the proposed amendments. I note the Explanatory Statement's discussion that the reasonableness of the amendments is demonstrated by satisfying the elements of the s.28(2) proportionality test:

- The restriction on the right is proportionate, as a defendant can still plead self-defence if police officer's claim that they believed arrest was lawful was made in bad faith (s.28 (2)(c) of the HR Act)
- The relationship between the limitation and the purpose is reasonable because everyone, even those detained, should be dissuaded from committing unlawful acts.

²¹ [1986] 3 WLR 1

²² (1996) 160 JP 475

²³ [1981] Crim LR 49

I do not disagree with this intention to protect police officers, although I also note that the likely conduct leading to a criminal charge in these circumstances might currently be found to be lawful utilising a defence of self-defence, but may be rendered unlawful by these amendments. It might also be argued that police should be dissuaded from committing unlawful acts, including unlawful arrests, and therefore the amendment might be contrary to this aim (s.28(2)(d)).

However, I also agree with the Explanatory Statement's analysis that a response of violence to an arrest made in good faith is not an appropriate response.

- The nature of police work means no other less restrictive option may be available to achieve the purpose (s.28(2)(e)). The Explanatory Statement states that the Bill restricts the limitation by requiring that the person being arrested must be reasonably aware that the individual is actually a police officer. The Explanatory Statement notes the current safeguards in place for those arrested or restrained by police, including that they must be charged within 4-8 hours and brought before a court. The Commission has already raised our concerns with the wide police powers in this area in our submission to the JACSD Police Powers Discussion Paper including:
 - Issues previously identified by the Ombudsman regarding rolling periods of 8-hour detention at the Watchhouse;
 - The extensive list of 'down time' (or 'stopping the clock') matters under s.23C(7) of the *Crimes Act 1914*, with no maximum period of 'down time'.
 - The period of 46 hours that a person arrested on a Saturday afternoon may face prior to being brought before a judicial officer on a Monday morning. We note that the human rights authorities in other jurisdictions have considered what is practicable in the particular jurisdiction,²⁴ but the period of 46 hours nonetheless seems high by international standards.

I share the Scrutiny Committee's concerns that the origin of the defence of self-defence in the 17th Century was to prevent a long period of imprisonment for unlawful arrest prior to trial.²⁵ The Explanatory Statement's suggestion that a person would in modern times only spend 'hours' in custody before becoming before a judicial officer does not adequately consider the situation of a person arrested for example on a Saturday afternoon when courts would not resume until Monday morning.

I note the detailed human rights analysis in the Explanatory Statement in relation to the right of security and liberty of the person. However, for the reasons outlined above, I remain concerned about the artificial distinction been drawn between responding to arrest and responding to a risk of harm.

²⁴ The New Zealand case of *R v Greenway* and United States case of *County of Riverside v McLaughlin* are precedents that human rights proportionality of prolonged detention will be determined by the practical options available to police in bringing a person before an judicial officer. In the case of *Greenway*, the accused was arrested on a Saturday morning and the relevant court did not sit until Monday morning. As there was an alternative option of seeking a special hearing before a justice of the peace, the Court found the continued detention of the person over the weekend was not justified. However, the court in *McLaughlin* recognised explicitly that 48 hours could be too long a period of detention. Twenty-four hours was also the preferred upper limit of the dissenting judgment of Scalia J in that case.

²⁵ Expressed in Scrutiny Report 47

Finally, I note that the *Model Criminal Code Review of Fatal Offences Against the Person* does not appear to recommend abolishing or limiting the right to argue self-defence where the victim is a police officer.²⁶

Conclusion

I appreciate the important objective of the amendments, in particular the need to protect police officers in the performance of their duty. Ultimately, it is for the Scrutiny Committee and Assembly to determine if the reasons given in the Explanatory Statement represent a reasonable and proportionate limitation on rights, even if the Supreme Court later issued a Declaration of Incompatibility in respect of the amended law. Given the existing defence of self-defence relies on proportionate and reasonable force being used, and that police detention may be reasonably perceived as unlawful, I question whether the goals of the legislation are sufficiently satisfied by the existing law. As Gillies notes in relation to the common law:

*'In most circumstances the arrest of the citizen for committing an offence, or on reasonable suspicion of this, by a police officer or other authorised person will be lawful, and the arrestee will have no legal basis for forcibly resisting this arrest or in escaping from the custody of the arrestee, whether with or without the use of force. Accordingly, the arrestee will be liable for assaulting or killing the would-be arrestee.'*²⁷

Further, a defendant would still need to show that the force used in self-defence was proportionate and reasonable, in order to successfully make out the defence, even in those situations where the arrest may have been unlawful.²⁸ Therefore, the current law arguably strikes the appropriate balance between protecting police, and upholding the right to liberty and security of those detained. Further, it is arguable that a police officer's ability to detain someone without the intention of the arresting them should be minimised, without risking an unreasonable limitation on the right to liberty and security of the person. While the proposed amendments give some examples where such detention may be reasonable (for example breath testing), the amendments seek to prevent all reasonable and proportionate responses to detention by police, even when the officer has no basis or intention to arrest.

I also remain concerned about how simple it will be for courts to distinguish between force used by a suspect in resisting unlawful arrest/detention, which will not permit a defence of self-defence, compared to use of force used to respond to unlawful or unreasonable force from a police officer. There is a question as to what extent the lawfulness of the arrest can and should determine the reasonableness of the force used in that arrest. Historically the case law which established self-defence for suspects in these situations has not drawn a simple distinction between those two elements.

Sentencing

Both the Crimes (Offences against Police) Amendment Bill 2012 ('the PM Bill') and the Crimes Legislation Amendment Bill 2011 ('the Government Bill') seek to amend the sentencing impacts of a

²⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General Discussion Paper Model Criminal Code Chapter 5 Fatal Offences Against the Person, 1998 available at:

[http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/MCLOC_MCC_Chapter_5_Fatal_Offences_Discussion_Paper.pdf/\\$file/MCLOC_MCC_Chapter_5_Fatal_Offences_Discussion_Paper.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/MCLOC_MCC_Chapter_5_Fatal_Offences_Discussion_Paper.pdf/$file/MCLOC_MCC_Chapter_5_Fatal_Offences_Discussion_Paper.pdf)

²⁷ Peter Gillies, 'Criminal Law', Fourth Edition, 1997, 329.

²⁸ For example, s.42(2)(b) of the *Criminal Code 2002* only permits self-defence to be successfully pleaded where the conduct is a reasonable response in the circumstances as the person perceives them.

finding of guilt of an offence involving a police officer, but in different ways.

The Government Bill does not seek to create new aggravated offences, but rather amends sentencing guidelines contained in s.33(1)(d) of the *Crimes (Sentencing) Act 2005* to take into a victim's occupational vulnerability, including because they are a police officer. I agree with the observation by the Scrutiny Committee that the change in sentencing guidelines engages s.18 of the HR Act.²⁹ For reasons outlined above, s.8 (right to equality) may also be engaged. As the Committee noted, the proportionality of this limitation is not discussed in the Explanatory Statement to the Government Bill. Absent this discussion, it is difficult to assess whether the proposed amendment is reasonable. I would urge the Government to amend their Explanatory Statement to provide a full proportionality justification under s.28(2).

Private Member's Bill

Sentencing

The PM Bill goes a step further, by adding new aggravated offences in respect of a number of existing offences, where they are committed against a police officer. This list is derived from existing provisions that create aggravated specifically offences against pregnant women. The Explanatory Statement attempts to justify the amendments, although it does so on the initial premise that:

'...the Bill does not limit the human rights of offenders, it establishes a higher penalty range once the offence has been established in the normal manner.'

As already noted, the Scrutiny Committee has stated that such amendments to sentencing do engage human rights of offenders, in particular s.18 of the HR Act.

I note that the Explanatory Statement to the PM Bill also cites the Scrutiny Committee's prior reference to the Canadian case of *R v Oakes* in assessing the human rights issues of the 2005 amendments creating aggravated offences against pregnant women.³⁰ As the Scrutiny Committee stated recently, that discussion pre-dated amendments to s.28 of the HR Act, which inserted s.28(2).³¹ I agree with the Committee that these legislated considerations in s.28(2) should be preferred to the Canadian *Oaks* test.

While the existing provisions regarding pregnant women may indicate that harsher penalties for aggravated offences may not be unreasonable per se, it does not mean that exactly the same offences should likewise carry a harsher penalty if committed against police. I do not believe the Explanatory Statement in its current form provides adequate explanation for why these particular offences should carry harsher penalties when committed against police. I agree that police officers should be protected given the particular risks they face in protecting public safety and investigating crime, but also caution that such reasoning could equally be applied to other both vulnerable and powerful members of our community. This could result in a significant increase in the number of aggravated offences, potentially weakening the justifications about the special status of those protected by such offences. I suggest that the Explanatory Statement provide specific justification for why these particular offences should have aggravated equivalents when they are committed against police officers.

²⁹ In Scrutiny Report 47

³⁰ Citing Report 20 of the 6th Assembly

³¹ In Scrutiny Report 49 of the current Assembly

Legal Burden

As noted by the Scrutiny Committee the combination of sub-clauses 48C(3) and (5) of the PM Bill seek to place a legal burden on the defendant to show that they were not aware that the victim was a police officer in order to escape the aggravated (but not the simple) offence.³² I note the Scrutiny Committee's view that this raises the question of whether a less restrictive means is reasonably available to achieve the purpose of the limitation, for example to require a defendant to discharge only an evidential burden of proof in relation to the matters of amelioration stated in proposed subclause 48C(3).

In either case, the Explanatory Statement offers no discussion of why this proposed amendment is a reasonable limitation on the presumption of innocence under s.22 of the HR Act. Absent such a discussion it is very difficult to analyse the reasonableness of the proposition. As already noted, such an analysis is also hampered by the Explanatory Statement's assumption that if an offence may carry a higher penalty when committed against a pregnant woman, it can equally be reasonably classified as 'aggravated' when committed against a police officer.

I further note that the Scrutiny Committee earlier applied the former *Oakes* test to the amendments in the 2005 Bill involving aggravated offences against pregnant women.³³ The Explanatory Statement to the PM Bill makes only a brief summary of this discussion. In assessing whether the limitation was rationally connected to the purpose (a requirement now codified in s.28(2)(d) of the HR Act) the Scrutiny Committee stated,

'It is arguable that the removal of a fault element so far as concerns the proposed subsection 48A(2) elements of an aggravated offence is not rationally connected to the objective of punishing "malicious acts", for the reason that an offender could not, for example, be said to have wounded a pregnant women maliciously if he was unaware that the woman was pregnant.'

On the other hand, the Committee accepts that there is a rational connection between proposed subsection 48A(2) and the pressing and substantial objective of affording special protections for pregnant women from acts of violence. The Committee also notes that proposed subsection 48A(4) provides protection to "the right to liberty and security of the person" (HRA, subsection 18(1)). To the extent that the "special protection" is incompatible with HRA section 8 (in its right to equality before the law aspect), the provision is justifiable under HRA section 28.'

In applying the final elements of the *Oakes* test (now codified in s.28(2)(e) of the HR Act) that is whether there is a less restrictive way of achieving the purpose, the Committee contrasted two groups of offences aggravated by the amendments. The first group were culpable driving offences, and the 2005 Explanatory Statement suggested that the aggravated offence would be 'unworkable' if the prosecution were required to show that the defendant knew the occupant of a car was a pregnant woman. I note that these offences are not included in the PM Bill, implying that there has been some selective consideration of which offences should be specifically aggravated when involving police as victims.

In relation to the other offences aggravated by the 2005 Bill, the Scrutiny Committee noted that these hurdles faced by the prosecution in culpable driving offences would not exist. It questioned whether the justification in the 2005 Explanatory Statement provided sufficient argument to show

³² In Scrutiny Report 49,

³³ In Report 20 of the Sixth Assembly

whether the result struck an appropriate balance between the objective of the law and the presumption of innocence. The Committee queried if a more proportionate approach would be to provide a defence to the aggravated offence where the defendant shows that a factor of aggravation did not exist, such as that he or she or should did not know (and could not reasonably be expected to know) that a person who was injured by what he or she did was a pregnant woman. I note that this defence was added to the 2005 Bill as enacted, and the PM Bill also includes this defence, suggesting that the PM Bill has considered such a proportionate limitation. However, as noted above, I support the comments of the Scrutiny Committee that the Explanatory Statement should include a discussion as to why the burden placed on the defendant is a legal, and not an evidentiary one.

Finally, I welcome the clarification in the Explanatory Statement to the PM Bill that s.48C(5)(b) does not seek to negate the common law (or other statutory) versions of these defences being pleaded. I note the discussion of the legislative history of these defences by the Scrutiny Committee,

*'The effect of proposed subsection 48A(5) would be made clearer if the position concerning common law and non-Code statutory defences was explained.'*³⁴

A note to this effect in subclause 48C(5)(b) of the PM Bill could provide such an explanation.

Thank you for the opportunity to provide these comments.

Yours sincerely



Dr Helen Watchirs
Human Rights and Discrimination Commissioner
30 March 2012

³⁴ Scrutiny Report 20 of the Sixth Assembly.