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

22 MARCH 2010

Report 21

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—Comment

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

In *Report 20*, the Committee included detailed preliminary comments on the Crimes (Surveillance Devices) Bill 2010 and the Crimes (Serious Organised Crime) Amendment Bill 2010. The Committee thanks the Attorney-General for his prompt response (see elsewhere in this Report). The Committee now adopts its Preliminary Reports with the addition of the matters below.

CRIMES (SURVEILLANCE DEVICES) BILL 2010

Except as otherwise indicated, this report adopts the comments in the Preliminary Report, and adds some general comments designed to pinpoint critical human rights issues.

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 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.

The Committee concluded its analysis of these provisions by posing 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?

It commented that "[t]here is very little in the Explanatory Statement that addresses this critical and difficult issue". In this document, under the heading Human Rights Considerations, the only reference to this scheme is in a series of dot point "protections and safeguards", where one such measure is

> [t]he prescription of procedures to seek emergency authorisations which still require law enforcement officers to apply to a Supreme Court judge for approval of the use of the emergency powers.

On the issue of HRA section 28 justification, the Attorney referred to decisions of the European Court of Human rights, noting in particular that:

> At a minimum the ECHR expected that the law would empower a judicial officer to make an order[1]

On the face of it, as this principle appears to be contradicted by the emergency authorisation provisions of the Bill. However, an Australian court may not hold that a warrantless search, involving as it does a breach of the right to privacy, could never be justified under HRA section 28.[2]

The Attorney appears to accept this, given that a justification is offered:

> The Committee makes a number of enquiries relating to emergency authorisations.
>
> The appropriateness or otherwise of powers included in Part 3 Emergency Authorisations of the SD Bill as well as in the model bill was the subject of detailed consideration by the Joint Working Group (the JWG) on National Investigative Powers November 2003 Report.[1] The JWG concluded that 'there are limited circumstances when it may be impracticable for law enforcement agencies to apply for a warrant, even by telephone'[2].
>
> The type of situations where these powers are likely to be used include a siege situation, a terrorist incident, an act of deprivation of liberty in which a victim's life may be in danger, or an act of extortion involving a threat of imminent injury.
>
> Although I agree that the emergency authorisation powers engage the right to privacy, I am of the view the very limited circumstances where they can be used and the safeguards in place following their use make them proportionate in all the circumstances.

(The footnote references are to Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigative Powers, *Report on Cross-Border Investigative Powers for Law Enforcement* (November 2003) – henceforth referred to as JWG Report).

In the relevant parts of the JWG report, there is no reference to human rights standards, or of how a departure from them might be justified in terms that parallel those on HRA section 28.

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[1] In the Explanatory Statement, this is sourced to the decision in *Valenzuela Contreras v Spain* (1999) 28 EHHR 483. Whether this case is authority for this proposition may be doubted, given that in that case a judge had issued a warrant. A thorough review of he 'international jurisprudence' would reveal that some courts applying human rights standards (such as the right to privacy and/or against unreasonable search and seizure), do permit warrantless searches; such as, for example, the United states Supreme Court: see *Vernonia v School District 47J* ((1995) 515 US 646 at 652-653 and *Illinois v Mc Arthur* (2001) 121 S Ct 946 at 949, and generally the analysis in **http://www.justice.gov/opa/documents/memoforeignsurveillanceact09252001.pdf** These cases (and others discussed in the reference cited) are not qualified by anything said by the majority in *Arizona v Gant* (2009) 556 US 542, a case quoted by Civil Liberties Australia Inc in their submission.

[2] See ibid.

The Committee considers that the Attorney should provide the Assembly with a justification for the proposition that the provisions in the Bill for emergency authorisation for the use of a surveillance device are, in terms of HRA 28, justifiable. Each element of that analysis needs to be addressed. To repeat what the Committee said in the Preliminary Report (concerning the Crimes (Serious Organised Crime) Amendment Bill 2010, the inquiry has a number of elements:

> *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"? ; 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?".[3]

In answering this last question, regard must be had to the factors set out in HRA subsection 28(2).

A justification in these terms will have two beneficial effects. Firstly, it will better inform both the Assembly and the public of the reason for the legislation and, secondly, it will form part of the legislative history and thereby assist the courts when they deal with cases where there is a question of how the Human Rights Act impacts on some provision of the Act that is consequent on the passage of the Bill.

It must also be noted that use of a data surveillance device, a listening device, an optical surveillance device or a tracking device impacts very directly and potentially severely on the right stated in paragraph 12(a), that is, "not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily".[4] It is fair to say that a major objective of the Bill is to interfere with this right. This being so, it can be expected that the courts will require clear justification in terms of HRA section 28.

The Committee received a copy of a letter to the Attorney-General from Civil Liberties Australia Inc, dated 16 March 2010.

The letter makes a number of salient points and the Committee sees force in the observations concerning the possible availability of a procedure for authorisation of an emergency search by an on-call duty magistrate.[5]

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

[4] The question of whether a particular interference is unlawful or arbitrary is not substantially different to the issue that arises under HRA section 28.

[5] This point was also made by the Human Rights and Discrimination Commissioner.

> It needs to be remembered that in the ACT there is always an on-call duty Magistrate available at all times precisely so that they can deal with emergency applications, such as the issue of an emergency authorisation. They are on call for this very purpose.
>
> Clearly, in order for Part 3 to be shown to be a proportionate limitation on section 12 of the Human Rights Act, the Government would need to convincingly demonstrate why it is necessary that the emergency authorisation must be made by a member of a law enforcement agency, as opposed to the on-call duty Magistrate. CLA would argue that this cannot be shown, and any attempt to do so would be disingenuous.
>
> CLA would note that in the same amount of time that it would take for an investigating officer to locate and make their submissions to a deputy Chief Police Officer or Director of the National Crime Authority on why an emergency authorisation should be made, they could, in the same amount of time, if not more quickly, get an emergency authorisation from the duty Magistrate.

These comments are relevant in particular to the application of that part of the proportionality assessment that addresses the question whether there are less restrictive means to achieve the object of the restriction on the HRA right in issue.

CRIMES (SERIOUS ORGANISED CRIME) AMENDMENT BILL 2010

Except as otherwise indicated, this report adopts the comments in the Preliminary Report, and adds some general comments designed to pinpoint critical human rights issues.

The lack of certainty inherent in key concepts

Many of the particular queries raised by the Committee are not addressed in the Attorney's response. It acknowledges that it did not refer to the definition of "material benefit" in the Criminal Code, but its concern about the vagueness of that concept remains.

Generally, the Committee considers that there is a question whether the looseness of some key concepts is such that in these respects the relevant provisions:

- are not sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law, and thus breach the principle of legal certainty; and/or

- delegate of legislative power to a court called upon to interpret the vague term, or, at least, will require the court to make 'political' or 'value' judgements.

The mental element of "ought to have known"

The Attorney states that he will cause a further Explanatory Statement to be issued to clarify this matter. The Committee draws attention to a decision on the High Court in *Boughey v The Queen*,[6] where it was concerned with the expression "likely to cause death" in paragraph 157(1)(c) of the Criminal *Code Act 1924* (Tas). The majority held:

[6] [1986] HCA 29; (1986) 161 CLR 10.

> 32. The words "ought to have known" are included in s.157(1)(c) as an alternative to "knew". … The starting point of the inquiry on the question whether an accused ought to have known that his or her actions were likely to cause death must be the knowledge, the intelligence and, where relevant, the expertise which the particular accused actually possessed. The relevant question is not whether some hypothetical reasonable person in the position of the accused would have appreciated the likely consequences of the applicant's act. It is what the particular accused, with his or her actual knowledge and capacity, ought to have known in the circumstances in which he or she was placed. Inevitably, the word "ought" requires the making of a subjective judgment by a jury. The jury must be persuaded, on the criminal onus in the context of a murder trial, that the established circumstances were such that the particular accused, with the knowledge and the capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action. They must also be persuaded, again on that onus and in the context of such a trial, that if the particular accused had stopped to think to the extent that he ought to have, the result would, as a matter of fact, have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death.

This holding supports the Committee's view that the test for the application of this standard on the mental element is lower than the concept of "recklessness". [7]

The specification of the "ought to have known" standard on the mental element in section 652 brings it close in its effects to the older consorting offence. This kind of offence is open to the objection that liability turns on the defendant's status – that is, as an associate (in a loose senses) of persons who are criminals – rather than upon any acts or omissions of the defendant. It may be expected that the courts will scrutinise this offence closely.

Is section 652 a proportionate limitation on human rights?

In this respect, the Attorney comments:

> Finally, the Committee raises a concern that it may be difficult to limit any human right under the HRA on the grounds that such a limitation is proportionate. These Bills were scrutinised by the Department of Justice and Community Safety's Human Rights, Coordination and Scrutiny Group. Any potential limitation of a right under the HRA was examined alongside section 28 of this Act. I am satisfied that all potential human rights limitations are proportionate and issued Human Rights Compatibility Statements accordingly.

The Committee considers that the Attorney should provide the Assembly with a justification for the proposition that proposed section 652 is, in terms of HRA section 28, justifiable, addressing the questions that arise in the application of HRA section 28 (see above). Scrutiny within the Department is not sufficient, although the Committee would welcome a practice whereby it is provided with advice from that quarter.

[7] In *Stevens v The Commonwealth* (1977) 15 ACTR 11 at 13, (in a torts context) Blackburn J held that "ought to have known" means "would have become aware if reasonable care had been taken to ascertain whether the premises were safe".

Another reason to expect close scrutiny by the courts is that section 652 is a significant extension of the traditional concepts of criminal liability. In this respect, as adapted to the Territory legal context, observations of the NSW Committee, on a provision similar to proposed section 652, are in point:

> 17. Traditionally, the boundaries of criminal responsibility relating to criminal activity by groups have been set by the common law doctrines of conspiracy and complicity (liability of accessories to criminal offences).
>
> 18. The offence of conspiracy requires a specific agreement by at least two persons to commit a particular crime or crimes. The offence is committed at the point in time at which such an agreement is made: it does not have to be completed, nor need there be any overt actions to carry it out.
>
> 19. The Bill's concept of a criminal group is akin to a permanent, or at least long-term, conspiracy, which lasts for as long as three or more people maintain an association in pursuit of at least one of the criminal objectives listed in [section 652]. However, [section 652] is broader than the traditional crime of conspiracy, in that it is the general criminal objectives of the group which provide the basis for criminal liability, rather than any specific agreements to commit particular crimes.
>
> 20. Although complicity extends liability to those who simply provide assistance or encouragement with respect to an offence, it is limited to those persons who are connected with that specific offence. The prosecution must prove that the accused intentionally provided assistance or encouragement to the person or persons who actually committed the offence, in circumstances where he or she had knowledge of the "essential matters" which constitute the offence.
>
> 21. The offence defined by [section 652] criminalises conduct that is currently beyond the reach of the rules relating to accessory, in that:
>
> • there is no requirement that the accused must have intended to provide assistance or encouragement to others. Instead, the offence relies simply on the concept of participation with knowledge or recklessness about whether assistance will be derived; and
>
> • it does not appear to be necessary for the prosecution to prove that the accused knowingly or recklessly contributed to the commission of a *specific crime*. It necessarily follows that the "knowledge of essential matters" threshold required to prove accessory under the traditional common law is not a relevant factor [footnotes omitted].

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

PROPOSED GOVERNMENT AMENDMENTS

FAIR TRADING (MOTOR VEHICLE REPAIR INDUSTRY) BILL 2009 (Version J2010-103 D03)

In accordance with standing order 182A, the Committee has received advice from the Attorney-General of proposed Government amendments to this Bill, together with a supplementary explanatory statement.

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

Clause 22 of the Bill provides:

> It is a condition of a licence that motor vehicle repair work performed by the licensee or an employee of the licensee on a motor vehicle, part or system be performed *with the equipment, materials and skill necessary to carry out the work satisfactorily, having regard to the age and make of the vehicle, part or system.*

The proposed amendment would recast the clause into three subclauses. Subclause 22(1) would read:

> (1) It is a condition of a licence that motor vehicle repair work performed by the licensee or an employee of the licensee on a motor vehicle, part or system be performed *in accordance with any directions under subsection (2).*

The remaining two subclauses would read:

> (2) The Minister may give directions about the equipment, materials and skill necessary to perform work on a motor vehicle, part or system satisfactorily.
>
> (3) A direction is a disallowable instrument.

The Explanatory Statement notes some circumstances in which this legislative power might be exercised. This is however a very broad power, and the question arises whether a power to in effect regulate in detail the conduct of vehicle repair work is more appropriately conducted by way of amendment to the Act.

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

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 10 February 2010, in relation to comments made in Scrutiny Report 15 concerning Disallowable Instrument DI2009-210, being the Attorney General (Fees) Amendment Determination 2009 (No. 3).

- The Attorney-General, dated 10 February 2010, in relation to comments made in Scrutiny Report 16 concerning the Fair Trading (Motor Vehicle Repair Industry) Bill 2009.
- The Attorney-General, dated 9 March 2010, in relation to comments made in Scrutiny Report 19 concerning the Justice and Community Safety Legislation Amendment Bill 2010.
- The Minister for Health, dated 15 March 2010, in relation to comments made in Scrutiny Report 18 concerning the Health Practitioner Regulation National Law (ACT) Bill 2009.
- The Minister for Industrial Relations, dated 15 March 2010, in relation to comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2009-256, being the Long Service Leave (Portable Schemes) Employers Levy Determination 2009.
- The Minister for Gaming and Racing, undated, in relation to comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2009-266, being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2009 (No. 1).
- The Attorney-General, dated 16 March 2010, in relation to preliminary comments made in Scrutiny Report 20 concerning the Crimes (Surveillance Devices) Bill 2010 and the Crimes (Serious Organised Crime) Amendment Bill 2010.
- The Chief Minister, dated 17 March 2010, in relation to comments made in Scrutiny Report 20 concerning the Animal Welfare Amendment Bill 2010.
- The Minister for Education and Training, dated 18 March 2010, in relation to comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2009-253, being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 5).
- The Attorney-General, dated 16 March 2010, in relation to comments made in Scrutiny Report 19 concerning the Personal Property Securities Bill 2010.

The Committee wishes to thank the Attorney-General, the Minister for Health, the Minister for Industrial Relations, the Minister for Gaming and Racing, the Chief Minister and the Minister for Education and Training 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
Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Bills/Subordinate Legislation

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 DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)

Report 17, dated 9 December 2009

Civil Partnerships Amendment Bill 2009 (No. 2)

Report 18, dated 1 February 2010

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)
Education (Suspensions) Amendment Bill 2010 (PMB)

Report 20, dated 15 March 2010

Disallowable Instrument DI2010-10 - Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-18 - Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-19 - Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-21 - Nature Conservation (Flora and Fauna Committee) Appointment 2010

Bills/Subordinate Legislation

Subordinate Law SL2009-55 - Environment Protection Amendment Regulation 2009 (No. 3)
Subordinate Law SL2009-56 - Court Procedures Amendment Rules 2009 (No. 3)
Subordinate Law SL2010-2 - Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No. 2)

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
Scrutiny of Bills and Subordinate Legislation Committee
Legislative Assembly for the ACT
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Dear Mrs Dunne

Thank you for your Committee's Scrutiny Report No. 15, dated 16 November 2009. The report commented on Disallowable Instrument DI2009-210, being the Attorney General (Fees) Amendment Determination 2009 (No.3). I offer the following response to the comment.

The Committee noted that the instrument contained an instruction to Parliamentary Counsel, being that the Parliamentary Counsel is authorised to reprint DI 2009-116 (the principal instrument) together with this amendment.

The Committee observed that an instruction to Parliamentary Counsel would ordinarily be included as a separate section in the instrument, rather than included in the section containing the amendments to the principal instrument.

I note the Committee's comment, and accept that the provision is an instruction rather than an amendment. It is convenient to include the instruction in the instrument, however there may be an advantage to separating the instruction from the amendments by way of a separate section within the instrument.

I thank the Committee for its observation.

Yours sincerely

Simon Corbell MLA
Attorney General

10.2.10

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Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 16 of 7 December 2009. I offer the following response in relation to the Committee's comments on the Fair Trading (Motor Vehicle Repair Industry) Bill 2009 (the Bill).

Section 2 – Commencement Date

The Committee has raised concern over the appropriateness of the Minister fixing the commencement date of the Act by written notice. The provision was included to allow sufficient flexibility in the timing of the commencement of the Act to ensure a smooth transition from the registration scheme operating under the existing Fair Trading (Motor Vehicle Service and Repair Industry) Code of Practice 1999 to the new business licensing scheme provided for under the Bill. This flexibility ensures that the legislation will only commence once the Office of Regulatory Services has been able to raise awareness in the industry of the new scheme.

Sections 6 and 12 – Prescription by Regulation

The Committee also raised concern over the appropriateness of delegating power to the Executive to make a regulation to prescribe certain work not to be 'motor vehicle repair work' (section 6) and to prescribe 'anything else' to be a condition of obtaining a motor vehicle licence (section 12).

Sections 6 and 12 of the Bill are good examples of appropriate delegations of power to the Executive which ensure that regulatory schemes can operate effectively. Enabling the Executive to deal efficiently with issues that arise during, and that affect, the day-to-day operation of a regulatory scheme can prevent timely and costly disruptions to the regulation of that industry, and to all parties participating in that industry.

Section 6 sets out a comprehensive definition of the type of work performed on a motor vehicle which would be considered 'motor vehicle repair work' for the purposes of the regulatory scheme. The policy intent behind what types of repair work are to be regulated by the legislation is clear from this definition. The purpose of delegating power to the Executive, to make a regulation which

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would prescribe certain work not to be 'motor vehicle repair work', is to ensure that any work which falls within the definition but which was not intended to be captured can be efficiently dealt with, until such time as appropriate amendments can be made to the legislation.

Section 12 provides the conditions under which the Commissioner for Fair Trading must issue a licence to an applicant. In addition to requiring an applicant to be eligible for a licence and being able to comply with the conditions under the licence, the section enables the Executive to prescribe by regulation any other requirement or condition that must be satisfied by an applicant. As above, this allows the Executive to impose an additional requirement or condition on all applicants to address issues that have arisen during the day-to-day operation of the scheme until such time as appropriate amendments can be made to the legislation.

Section 46 – Exemption by Application

The Committee raised concern over the process in section 46 whereby a person may apply to the Minister for an exemption from the operation of the Act. In my opinion, the exemption power in section 46 meets the requirements the Committee has previously stated would be necessary if it is desirable to confer a dispensing power on a Minister.

The scope of the Minister's power to make an exemption in section 46 is limited by a clearly defined and objective test, i.e. satisfaction on reasonable grounds that the exemption is not likely to cause a substantial detriment to consumers. While the detriment to consumers is the sole test for the exercise of the power, this measure is unambiguous and also clearly corresponds with one of the main policy justifications for imposing regulation of the motor vehicle repair industry. Applicants are required to clearly set out the grounds for an exemption and must use a form if one is approved under the Act. If the exemption is granted, it is a disallowable instrument, and if the exemption is subject to conditions, these conditions would be expressed in the instrument. The disallowable nature of the exemption acts as an effective safeguard on the appropriate exercise of the power, and this should not be trivialised by the Committee.

The test of 'substantial detriment to consumers' is appropriate to enable the decision maker to properly measure and assess the extent of the harm caused to consumers and then appropriately balance this against the interests in favour of granting the exemption. While an exemption may cause some detriment to consumers, the exemption may also have demonstrable benefit to consumers which outweighs the detriment.

The power in section 46 for the Executive to make a regulation prescribing other criteria to be taken into account in granting an exemption is necessary for the same reasons I have already addressed above in relation to sections 6 and 12 of the Bill.

Section 32 – Grounds for Occupational Discipline

The Committee has suggested that the grounds for disciplinary action contained in paragraph 32(1)(c) should be qualified by adding that the breach of the law 'must be directly related to the fitness of the person to continue to hold a licence as a motor vehicle repairer', or words to that effect.

I understand that the Committee seeks to limit the grounds for disciplinary action to contraventions relevant to a person's fitness to hold a licence. I consider that it is sufficiently clear that paragraph 32(1)(c) already has the effect of linking any relevant contravention with the licensee's occupation. It may even be that the additional wording proposed by the Committee would be too narrowing, as contravention of a wide range of Territory laws may be considered to relate to the fitness of a person to hold a licence depending on the way the contravention reflects on the person's integrity and character in certain circumstances.

In any event, it does not necessarily follow that if a person contravenes any Territory law, they will automatically be brought before the ACAT on occupational discipline grounds. Section 32 does not compel the Commissioner to make an application for occupational discipline, even if the Commissioner considers that any of the grounds exist. The Commissioner will consider the full circumstances of each individual case before making an application to ACAT for occupational discipline. The ACAT maintains the discretion to make, or not make, an order for occupational discipline if satisfied that a ground for occupational discipline exists (*ACT Civil and Administrative Tribunal Act 2008*, subsection 65(2)).

Section 10 – Disqualified Person Test

Finally, the Committee has raised concern over the exercise of the power of the Commissioner for Fair Trading to determine that a person is not to be regarded as a disqualified person.

Allowing the Commissioner to have regard to matters additional to those specified in subsection (3) is important to the appropriate exercise of the Commissioner's power in making the decision. The potential effect of the Commissioner's decision in section 10 is that an individual, despite having committed a disqualifying act, can participate in the motor vehicle repair industry. Subsection (3) specifies those considerations that the Commissioner must have regard to in making such a decision, but as the Committee would recognise no legislation or regulations could be expected to anticipate all of the considerations that may be relevant to ensuring a decision of the kind in section 10 does not have harsh and unintended consequences for individuals. The exercise of the Commissioner's discretion is not unfettered, but remains constrained by ordinary administration law principles, for example including a requirement not to take into account irrelevant considerations and not to fail to take relevant considerations into account.

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

Yours sincerely

Simon Corbell MLA
Attorney General

10.2.10

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
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Committee's scrutiny report dated 22 February 2010, containing comments on the Justice and Community Safety Legislation Amendment Bill 2010. I offer the following response to those comments.

Amendments to the *ACT Civil and Administrative Tribunal Act 2008* to ensure certainty with respect to planning appeals

The report focuses on reforms to the jurisdiction of the ACT Civil and Administrative Tribunal (ACAT) with respect to planning reviews. The proposed amendments remove internal appeals from an initial decision of the ACAT in relation to administrative reviews under the *Planning and Development Act 2007*, the *Heritage Act 2004* and the *Tree Protection Act 2005*. Appeals to the Supreme Court will be confined to questions of law. This restores the process that formerly applied to decisions under these Acts when reviewed by the Administrative Appeals Tribunal. It was not the Government's intention that the change from AAT to ACAT should have affected the previously clearly defined arrangements for the timely handling of appropriate review rights of planning matters. The provisions removing internal appeals, correction requests and internal rulings on questions of law are accompanied by provisions to clarify the requirements for standing to join applications and introducing powers for the ACAT to award costs against vexatious litigants. The effect of these changes is to ensure certainty in relation to the process of planning appeals, consistent with section 22P of the ACAT Act, which provides that the ACAT must decide applications under these Acts within 120 days after the day the application is made.

Standing to join an application for review and the number of reviews available can be a matter for statute, and need not only be regulated by the common law. It is open to government to restrain these rights according to the subject matter and outcomes sought. In relation to planning appeals, it is the Government's policy that after a merits review in the ACAT, further appeal rights should be restricted to questions of law, to be decided by the Supreme Court. The new regime for planning

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appeals follows that standard. The proposed system strikes an appropriate balance between appeal rights and certainty for developers.

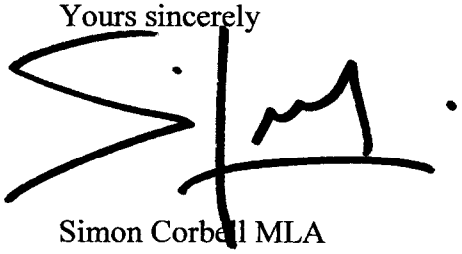
Reasons statements

The scrutiny report also commented on provisions clarifying that the ACAT is not required to produce a statement of reasons with respect to interim orders, including orders of a procedural nature. On introduction of the ACAT Act, it was not the government's intention to require tribunal members to produce written statements of reason in relation to interim orders, or other orders of an ancillary nature. Requiring statements of reasons for every interim decision would place an undue burden on the operation of the ACAT and lead to unnecessary delays. Such delays potentially conflict with the object of the ACAT Act under section 6(c), being to ensure that applications to the tribunal are resolved as quickly as is consistent with achieving justice. There is also potential for litigants to take advantage of any perceived uncertainty in this regard, and seek written decisions for all manner of orders to delay a final decision. The proposed amendment seeks to clarify Government policy in this regard, balancing the right of a party to seek reasons to a substantive decision without unduly burdening or delaying the tribunal in carrying out its duties. It remains possible, of course, for the tribunal to produce written reasons for interim and interlocutory decisions if it considers it appropriate to do so.

Defining 'reasonable costs'

As for defining 'reasonable costs' for the purposes of proposed paragraph 48(2)(d), statutory interpretation principles would dictate that the definition which applies to 48(2)(c) would likely apply to 48(2)(d). Further, it is unnecessary to explicitly define 'holding costs', as a list of examples is already given in the legislation, and an exhaustive list would be inappropriate.

Yours sincerely



Simon Corbell MLA
Attorney General

9.3.10

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Vicki Dunne

I refer to the Scrutiny Report No 18 dated 1 February 2010. The report commented on the *Health Practitioner Regulation National Law (ACT) Bill 2009* (Bill C). I offer the following response to those comments.

The Committee has commented on whether the *Health Practitioner Regulation National Law Act 2009* (QLD) (the National Law) as adopted by Bill C unduly trespasses on personal rights and liberties as required by section 38 of the *Human Rights Act 2004*. The National Law engages a number of human rights.

Bill C applies the National Law as set out in schedule one to the Queensland Act as Territory law. Consequently, the law would be interpreted in the Territory in the context of the *Human Rights Act 2004*. The obligation on public authorities to act consistently with human rights and a citizen's right to initiate proceedings against public authorities on human rights grounds would apply to the National Law.

The National Law via Bill C engages the right to be presumed innocent (Section 22(1) *Human Rights Act 2004*) and the right to be treated equally before the law (section 8 *Human Rights Act 2004).*

The National Law includes a number of provisions that enable National Boards to obtain and consider the criminal history of applicants and registrants. For example sections 77, 79, 109, 135 and 231. Criminal history is defined in section 5 as including charges laid against the person.

Section 79(3) expressly excludes the application of 'criminal history law' to these checks. In otherwords, the normal checks and balances of criminal history statutes, such as the Territory's *Spent Convictions Act 2000* are excluded.

Several provisions of the National Law enable the National Board to decide an individual is unsuitable to hold registration as a health practitioner on the basis of the individual's criminal history. These include sections 55(1)(b) and 74(a).

The consideration of charges raises the right to a presumption of innocence, especially if charges are considered by the Board after a person has been acquitted or found not guilty of the charge.

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To enable these criminal history provisions to be a reasonable limitation on protection against discrimination and the presumption of innocence in the *Human Rights Act 2004* Bill C includes provisions to require National Boards to turn their minds to relevant factors when they are considering individuals' criminal histories.

The Board must undertake case-by-case assessment of:

(a) a person's particular criminal record;
(b) the inherent requirements of the particular job; and
(c) the tight correlation between the criminal record and the inherent requirements of the particular job.

The National Law also engages the right not to incriminate one's self (self-incrimination) (Section 22(2)(i) *Human Rights Act 2004*). The investigator powers in schedule 5, part 1, section 3, and the inspector powers in schedule 6, part 1, section 3 engage the right not to self-incriminate as the power requires a person to provide information, answer questions etc on pain of being prosecuted for a criminal offence.

The issue was recently examined at great length in the case of *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381. In that case the Chief Justice of the Supreme Court of Victoria gives a clear exposition of the right and a clear answer on what would be proportionate.

To resolve the issue, the empowering Bill includes a qualification on schedule 5, clause 2 and schedule 6, clause 2 that provides a direct use immunity of evidence derived from compelled testimony from criminal prosecution and a derivative use immunity of evidence derived from compelled testimony from criminal prosecution. As decided by the Victorian case, the derivative use immunity only applies to evidence that could only have been discovered as a result of testimony from the individual. Evidence that could have been discovered without the testimony would still be admissible.

The National Law also includes a number of provisions that require a person to attend an assessment via notification for assessment. This raises an issue of fair trial (section 21 *Human Rights Act 2004*) because the Board is a quasi-judicial body and has powers that affect the person. The issue is primarily one of natural justice as the notification provisions do not require the notice to inform the person required to be on notice of what powers the Board might exercise and any procedural rights the person might have.

To remedy this Bill C requires an approved form to be made for any notice that requires a person to attend for assessment and that the form must include any powers the Board might exercise and any procedural rights the person has under the law.

The National Law also engages the right to privacy (section 12(a) of the *Human Rights Act 2004*). Everyone has the right not to have arbitrary or unlawful interference with their privacy, family, home or correspondence. The terms of the National Law are not arbitrary.

The United Nations Human Rights Committee unlawful interferences includes conduct governed by legislation that fails to:

> specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis (United Nations Human Rights Committee, United Nations Human Rights Committee, *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)* (1988) at [8]).

The provisions requiring persons to disclose their criminal histories and requiring the National Board to obtain and assess persons' criminal histories specify in detail the precise circumstances in which such interferences may be permitted. They also apply to all applicants for registration with a National Board. Further, the interferences with privacy that these provisions allow are proportionate to the National Law's objective at section 3(2)(a): 'to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered'.

The Committee has sought further advice as to whether the content of public registers are appropriately limited or sufficiently circumscribed to achieve no more than their legitimate policy objectives. Specifically, the Committee was concerned with the inclusion of health professional's unique identifiers and other matters.

The Schedule to the National Law provides in section 225 for specific information to be held on a Board's public register. I believe that the information that may be included on a public register is reasonable for the purposes of registration. I note that the list includes a person's principal practice address. ACT supported the nationally agreed position that a practitioner's place of residence should not be part of the information stored on the public register. The information held on the register will identify suburb and practice postcode. This would assist a member of the public in making a specific notification in relation to a practitioner. The Committee should note a further safeguard contained in section 226 of the National Law, which provides that where a practitioner requests this, the Board can choose not to record certain information in the register where it reasonably believes that the information would present a serious risk to the health and safety of the practitioner.

It is essential for a registration number to be linked to a particular registrant to ensure there is differentiation between registrants with similar names. The 'unique identifier' is a separate number, allocated to registrants for the purposes of linkage to national e-health systems, and will not be included on the public register.

Any additional information held on the public register in relation to conditions of registration, dates of suspension and reasons for decisions regarding conduct matters are all essential for the protection of the public.

I thank the Committee for raising these important matters.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

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
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne Vicki

I refer to the Scrutiny of Bills Report No. 19 of 22 February 2010 and the Committee's comment on the Long Service Leave (Portable Schemes) Employers Levy Determination 2009 regarding the matter of a minor typographical error in the Explanatory Statement of the Disallowable Instrument.

I appreciate the Committee's comments and advise that the typographical identified does not impact on the legality of the Instrument.

Thank you for bringing this matter to my attention. I will ensure better departmental quality control in the future.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Industrial Relations

15 March 2010

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Mrs Vicki Dunne MLA
Chair
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C/- Scrutiny Committee Secretary
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Dear Mrs Dunne

I am writing in response to comments in Scrutiny of Bills and Subordinate Legislation Report No. 19 of 22 February 2010 regarding Disallowable Instrument DI 2009-266 which was notified by the Gambling and Racing Commission on 23 December 2009.

You sought clarification of the availability of certain soccer events as approved events under section 20 of the *Race and Sports Bookmaking Act 2001*.

Specifically, you sought information on whether the FA Cup, the League Cup, the Premier Cup and the Championship were approved events for sports bookmaking.

Event 25(4) contained in Schedule 1 to DI2009-266 identifies approved classes of events as: "***Each event sanctioned*** by the Football Association or the Scottish Football League ***together with*** the scheduling and co-sanctioning Leagues, comprising of:..." (emphasis added). As the classes of permitted events include both sanctioned events together with (i.e. as well as or in addition to) events scheduled and co-sanctioned by the five mentioned Leagues, it is considered that the high-profile events mentioned in the Scrutiny of Bills and Subordinate Legislation Report are approved events on the basis that they are events sanctioned by the Football Association.

It is noted, however, that the Scrutiny of Bills and Subordinate Legislation Committee has indicated that there may be a different interpretation of the description of approved classes of events for Event 25(4) in the instrument which may impact on the scope of approved events.

While there have been no industry, consumer or regulatory issues raised in relation to the scope or interpretation of this Event, it is acknowledged that another interpretation may be possible. In this context I am advised by the Gambling and Racing Commission that the opportunity will be taken, when this instrument is next amended, to clarify the meaning of this Event (and any other similarly worded Events).

I thank the Committee for raising this issue and trust that these comments address its concerns.

Yours sincerely

Andrew Barr MLA
Minister for Gaming and Racing

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
Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (Committee) has issued preliminary comments on the Crimes (Serious Organised Crime) Amendment Bill 2010 (SOC Bill) and the Crimes (Surveillance Devices) Bill 2010 (SD Bill) and seeks a prompt response from the Government on the matters raised to enable the Committee to complete its examination of the proposed legislation.

While I must note that the process adopted by the Committee is most irregular, in the interest of assisting the Committee in its work I provide the following comments

Crimes (Surveillance Devices) Bill 2010
The Committee enquires as to whether the provisions of the SD Bill that permit the issue of warrants are justifiable under section 28 of the *Human Rights Act 2004* (HR Act).

The European Court of Human Rights (ECHR) has determined that covert surveillance by law enforcement agencies for criminal investigation is an acceptable interference with the right to privacy provided that legal safeguards are in place. The Explanatory Statement to the SD Bill sets out detailed commentary on this.

At a minimum the ECHR expected that the law would empower a judicial officer to make an order. The law would identify who would be liable to surveillance and the nature of the offences which may give rise to an order should be stipulated. The Court also expected that there should be a limit on the duration of an order.

The scheme contemplated by the Bill more than adequately meets the safeguards. To ensure that reasonable limits apply and privacy considerations are taken into account there are a number of important safeguards and accountability measures incorporated into the Bill. They ensure that surveillance powers are restrained and not abused.

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Further, I note that the Committee does not agree with the position put by the Human Rights Commissioner with respect to the threshold issue at which an officer may apply for and a judge or magistrate may issue a surveillance device warrant.

I do however accept that the question of thresholds for the exercise of powers by law enforcement and judicial officers warrants ongoing attention. I understand that officers from the ACT Human Rights Commission have been assisting in the preparation of a discussion paper on these issues in conjunction with other key criminal justice system stakeholders as part of the current review of police criminal investigative powers. I expect to be in a position to release the paper for public consultation in coming weeks.

The Committee makes a number of enquiries relating to emergency authorisations.

The appropriateness or otherwise of powers included in Part 3 Emergency Authorisations of the SD Bill as well as in the model bill was the subject of detailed consideration by the Joint Working Group (the JWG) on National Investigative Powers November 2003 Report.[1] The JWG concluded that 'there are limited circumstances when it may be impracticable for law enforcement agencies to apply for a warrant, even by telephone'[2].

The type of situations where these powers are likely to be used include a siege situation, a terrorist incident, an act of deprivation of liberty in which a victim's life may be in danger, or an act of extortion involving a threat of imminent injury.

Although I agree that the emergency authorisation powers engage the right to privacy, I am of the view the very limited circumstances where they can be used and the safeguards in place following their use make them proportionate in all the circumstances.

I do not believe it is necessary nor would it be appropriate to set a time limit to the validity of an emergency authorisation. The critical element is that an application is made within two working days. It is a matter for the Court, and indeed the relevant judicial officer, to dictate how that application progresses. Further, the broad powers available to that judicial officer under clause 29 empower the making of such orders as are thought appropriate and necessary by reference to the individual facts of the case.

The use of the word "may" in Clause 29(4) contemplates that the use of the surveillance device may have already ceased or may be subject to a separate application for a warrant – a judicial officer may not approve an application under the section as clause 25(f) may not have been satisfied (practicability) but otherwise may approve a fresh application for a warrant under clause 13. Use of the word "may" contemplates that an order that the use of the surveillance device cease may not be required.

As indicated, clause 29(5) empowers the judicial officer, regardless of approval or refusal of the emergency application to make orders relating to how the information or records of information are dealt with as appropriate. This is a broad discretionary power and it will be a matter for each judicial officer to consider in the context of the individual circumstances of the case. Clause 30 does not circumscribe the judicial officer's discretion. As set out in the explanatory statement to the SD Bill, this clause does not prevent the court from excluding evidence which was obtained as a result of criminal conduct if another reason recognised by law exists which would also justify the exclusion of the evidence. For example, if in addition to being the result of criminal activity, it could otherwise be unfairly prejudicial or otherwise unfair to the defendant to admit the evidence, it would continue to be open to the court to exclude that evidence under sections 135, 137 or 138 of the *Evidence Act 1995 (Cwlth)*. Further, it would not prevent evidence obtained as a result of

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[1] *Cross-border investigative powers for law enforcement Report* - November 2003, Members of the Joint Working Group as an initiative of the Leaders Summit on Terrorism and Multijurisdictional Crime. Available at URL: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Cross-borderinvestigativepowersforlawenforcementReport-November2003

[2] Ibid. p 435.

criminal activity from being excluded if it would otherwise be open to the court to exclude it under Part 3.4 of the *Evidence Act 1995 (Cwlth)* on the basis that the evidence constitutes an improperly obtained or unreliable admission. It also does not prevent the court from excluding evidence or staying proceedings in cases that involve entrapment or inducement. In any prosecution where it is alleged that evidence is the result of inducement or entrapment, it remains open to the court to exercise its discretion to exclude evidence or stay proceedings in light of the right to a fair trial under section 21 of the HRA.

The Committee enquires as to whether there should be a generally worded exception that would permit disclosure of information to a court.

I am of the view that relevant proceeding is sufficiently defined and this matter was carefully considered and consulted on by the JWG.

The Committee raises issues concerning evidentiary certificates available under clause 43(1). The issue of certificates does not prevent witnesses being called, nor cross-examined. Certificates are commonly used to save the time of the Court and witnesses for routine matters where otherwise the hearsay rule would require the calling of a number of witnesses. A most common example of the use of evidentiary certificates relates to the production of phone records or transcripts relating to recorded evidence. These are only used for non contentious issues and do not in any way reverse the onus of proof or derogate from the presumption of innocence or the right to a fair trial.

I note the Committee raises issue with a number of administrative provisions that are not conditioned upon the holder of the power acting upon reasonable grounds or some equivalent basis. I believe that there are already sufficient protections currently in place in the proposed legislation, together with the normal exercise of judicial discretion, to afford sufficient protection. This is particularly relevant given the administrative nature of the provisions the Committee refers to and the context thereof. The SD Bill has numerous safeguards and protections. When this is viewed together with the strong reporting and record keeping requirements no further strengthening of the provisions is warranted.

The Committee enquires as to whether the SD Bill should displace the operation of the *Freedom of Information Act 1989* and the *Territory Records Act 2002*. As I previously indicated when this issue was raised in the context of assumed identities legislation, the Government considers that the exclusion of these Acts provides police and other operatives involved with the use of surveillance devices with increased protection from disclosure. Disclosure prior to any trial of an offence is an occupational health and safety issue for police and potentially jeopardises investigations and operational issues and methods relating to the use of surveillance devices.
I prefer to be absolutely clear on the imperative to protect officers and investigations at the outset and exclude surveillance devices from the application of these Acts. Any disclosure at all of the use of surveillance devices that is not already public knowledge runs the risk of exposing an investigation. The Government certainly supports accountability of the actions of the Executive arm of Government which is why the SD Bill contains its own record-keeping requirements and its own accountability measures via the Ombudsman.

Finally, I believe the delegations referred to by the Committee are appropriate. Similar provisions exist in other pieces of legislation with respect to a broad range of matters. For example, with respect to prohibited firearms under the *Firearms Act 1996* and with respect to the range of offences victim impact statements can be made in respect to under the *Crimes (Sentencing) Act 2005*. The delegations contemplate future offences and, particularly relevant with respect to the definition of surveillance device, future advances in technology which will provide flexibility to ensure the objectives of the legislation are met.

Crimes (Serious Organised Crime) Amendment Bill 2010
The Committee has requested an expanded definition of 'criminal group'. I do not accept that the proposed definition in the SOC Bill is 'vague'.

I refer the Committee to section 650, which contains the definition of criminal activity. Criminal activity means 'conduct that constitutes an indictable offence'. The intention is to capture criminal activity, regardless of whether or not the person has been convicted of the indictable offence. That is evidenced by the construction of the definition.

Section 651 defines a criminal group. To participate in a criminal group, a person must have either or both of the objectives, to obtain a material benefit, and/or to commit a serious offence.

The concept of 'participation in a criminal group' is defined at section 651 (2) of the SOC Bill. Further, it is explored in the explanatory statement at page 10. It states that a person will be participating in a criminal group 'even if only some of the people in the group participate in the planning, organising or carrying out a particular activity.' Page 10 further explores conduct that may be tantamount to participation in a criminal group.

The Committee is concerned that the definition of 'material benefit' is too wide. In the ACT Criminal Code, 'benefit' is to 'include any advantage and is not limited to property'. I believe the current proposed definition is sufficient.

The Committee drew to my attention the "apparent extent of the extraterritorial reach" of the proposed definition of a 'criminal group'. In doing so the Committee referred to a similar provision in a Queensland Bill and associated comments from the Queensland Scrutiny Committee that stated the provision may be struck down as being beyond the legislative competence of the Queensland Parliament.

The *Criminal Code 2002* extends the application of a territory law that creates an offence beyond territorial limits of the ACT (and Australia) if the necessary geographical nexus for the offence exists. Under the Code, a geographical nexus exists if:

- an offence is committed wholly or partly in the ACT whether or not the offence has any effect in the ACT; or
- an offence is committed completely outside the ACT (and Australia) but has an effect in the ACT.

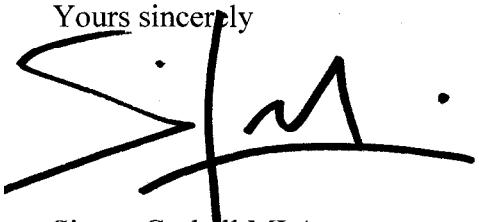
I believe this adequately addresses the Committee's concern.

The Committee queries the drafting of the proposed section 654(3). This was included in the SOC Bill to ensure consistency a similar provision in s.407(2) of the *Criminal Code 2002.*

The Committee queries the interchange of the use of the phrases "ought to have known" with "recklessness". The requisite mental element for this offence is known or ought to have known. I intend to table an amended Explanatory Statement for this Bill to clarify the necessary mental element for this offence.

Finally, the Committee raises a concern that it may be difficult to limit any human right under the HRA on the grounds that such a limitation is proportionate. These Bills were scrutinised by the Department of Justice and Community Safety's Human Rights, Coordination and Scrutiny Group. Any potential limitation of a right under the HRA was examined alongside section 28 of this Act. I am satisfied that all potential human rights limitations are proportionate and issued Human Rights Compatibility Statements accordingly.

Yours sincerely



Simon Corbell MLA
Attorney General
16.3.10

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

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

Dear Mrs Dunne Vicki

I refer to Scrutiny Report No. 20 prepared by the Standing Committee on Justice and Community Safety (the Committee) on the Animal Welfare Amendment Bill 2010 (the Bill).

In its report on the Bill, the Committee asked "What section will govern where the person intends to fail to comply with a mandatory code?" Section 24A will cover intention because of section 20(4) of the *Criminal Code 2002*. Section 20(4) states:

> "If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element."

In relation to the Committee's comments on the breadth of the mandatory code making power, the Government acknowledges that it could be seen to be wide ranging. However, the Government does not consider this to be an inappropriate delegation of legislative power.

The Government considers that the following aspects of the *Animal Welfare Act 1992* (the Act) or the Bill provide sufficient checks on the operation of the power—

- the ACT Animal Welfare Advisory Committee has a legislated role in relation to the consideration of codes of practice – see section 109 of the Act (as amended by clause 10 of the Bill);
- the Minister cannot make a code of practice without being satisfied that there has been adequate consultation – see clause 6 of the Bill; and
- codes are disallowable by the Assembly – see clause 6 of the Bill.

In addition, the Government notes that the limitation on the operation of the strict liability offence (in sections 24B and 24C of the Bill) provides a further check on what might be seen as unfair operation of future codes.

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In relation to the Committee's comment on the lack of clarity in the expression "non-business activity", the Government considers that the phrase (or similar phrases) have been considered judicially and sufficient clarity can be drawn from case law. The Government does not consider that the phrase would benefit from being defined in legislation.

Could you please convey my appreciation to the Committee for its comments.

Yours sincerely

Jon Stanhope MLA
Chief Minister

17 MAR 2010

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

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CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to concerns raised by the Scrutiny Committee in its Report No. 19 dated 22 February 2010, requesting assurance that the required consultation was undertaken in regards to the appointment of Mr Michael Fitzgerald to the ACT Accreditation and Registration Council (ARC).

I would like to assure the Committee that consultation with the Trades and Labour Council of the ACT did occur. I have attached a copy of the letter from the Trades and Labour Council nominating Mr Fitzgerald as their representative.

For any future appointments to ARC the explanatory statement will indicate where appropriate that pre-requisites for appointment have been met.

I trust this letter satisfies the committee that the appointment of Mr Fitzgerald to ARC in the position that represents the interests of employees has been made following due process.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

18 MAR 2010

ACT LEGISLATIVE ASSEMBLY

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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. 19 of 22 February 2010. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on the Personal Property Securities Bill 2010 (the Bill).

The Committee draws attention to the regulation making power in clause 8 of the Bill. The Committee implies that clause 8 is effectively invalidated by Section 22(1) of the *Australian Capital Territory (Self-Government Act) 1988* (Cwlth) (the Self-Government Act).

I acknowledge that transitional regulations cannot restrain the authority of the Legislative Assembly to legislate. While the regulation making power in this Bill is subject to the authority of the Legislative Assembly, it is also the case that regulations may modify legislation in accordance with a specific grant of power from the Legislature.

In the present instance, the purpose of having a broadly worded regulation making power is to allow the ACT to participate meaningfully in the national reform project on the law of personal property securities. The regulation-making power will be used to aid in the transition to the new system, and to avoid dispute where there is the appearance of a conflict between Territory legislation and the Commonwealth scheme. The power is therefore limited in scope, and will be limited in time by the operational commencement of the Commonwealth system, after which the regulation-making power will expire.

Matters that are addressed through regulation under clause 8 of the Bill will, as a general rule, be submitted for consideration by the Legislative Assembly through further consequential amendments bills. Under the terms of the Inter-Governmental Agreement on Personal Property Securities Law (the IGA), the Territory is required to amend its legislation to reflect all changes consequent to the Commonwealth's legislation. The IGA has the effect that, if the regulation making power is used to address some unforeseen situation involving existing ACT law, the Government will introduce a Bill subsequently to reflect the necessary change.

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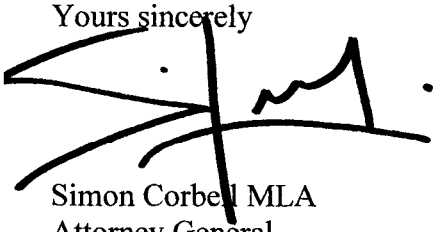
Notwithstanding the IGA, it has been Government practice to introduce and debate bills to reflect changes to the statute book brought about by transitional regulations in the past.

The Committee also commented on clause 14 of the Bill, querying whether the provision might trespass on individual liberties. Although these provisions affect only commercial transactions, I draw the committee's attention to clauses 15 and 16 of the Bill, which preserve the effect of instruments executed before the commencement of the Commonwealth legislation.

I trust that this response addresses the Committee's concerns, and I thank the Committee again for its comments and review.

Yours sincerely



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Attorney General

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