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

29 APRIL 2011

Report 36

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: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2011

This Bill would amend a number of laws administered by the Department of Justice and Community Safety.

PLANNING AND BUILDING LEGISLATION AMENDMENT BILL 2011

This Bill would amend the *Building Act 2004*, *Construction Occupations (Licensing) Act 2004 Electricity Safety Act 1971 Gas Safety Act 2000 Gas Safety Regulation 2001 Planning and Development Act 2007 Planning and Development Regulation 2008 Surveyors Act 2007 Unit Titles Act 2001* and the *Unit Titles Regulation 2001* to make amendments that are minor, technical and non-controversial, or reflect only a minor policy change.

Bills—Comment

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

ANIMAL WELFARE LEGISLATION AMENDMENT BILL 2011

This Bill would amend the *Animal Welfare Act 1992*, *Domestic Animals Act 2000*, *Domestic Animals Regulation 2001*, and the *Magistrates Court (Domestic Animals Infringement Notices) Regulation 2005* for the purpose of improving the welfare of animals in the ACT, with a particular focus on companion animals.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The right to privacy and the regulation of the means of obtaining cats and dogs (HRA paragraph 12(a))

As expressed in the Human Rights Act,[1] the right to privacy protects individuals from intrusions into their personal affairs, including their choice of lifestyle, in particular where the conduct occurs in the individual's home. Just what choices are protected, and the degree of protection the right affords to those that are, is a matter of much debate. There are probably many in the community who would argue that the choice to have a companion animal such as cat or a dog is a choice central to their lifestyle, and to be deprived of the

[1] Under some other human rights instruments, and at common law, the right to privacy may be claimed by corporate persons.

ability to make that choice, or even to have the making of that choice more difficult, is, in terms of HRA paragraph 12(a), an "arbitrary" limitation.[2]

The Explanatory Statement does not address this matter directly, but the Committee notes that it is replete with justifications for the various provisions in the Bill, and in substance, does address the matters relevant to an assessment of whether the limitations are arbitrary. The Committee considers this requires the same analysis as mandated by HRA section 28.

The Committee draws these matters to the attention of the Assembly.

The presumption of innocence and strict liability offences (HRA subsection 22(1))

The Bill would create a number of strict liability offences. The Explanatory Statement provides a justification, and notes the low penalties attaching.

The Committee makes no further comment.

The presumption of innocence and the imposition of a legal burden to prove a matter of defence (HRA subsection 22(1))

Proposed subsection 94(1) of the *Domestic Animals Act 2000* would create an offence where a person

(a) sells an animal to a person who is under 18 years old; and

(b) is reckless about whether the person to whom the animal is sold is under 18 years old.

Subsection 94(2) would provide for "a defence to a prosecution for an offence against subsection (1) if the defendant proves" a number of matters. Given paragraph 59(b) of the *Criminal Code 2002*, the use of the word "proves" results in the defendant being obliged to discharge a legal burden of proof of these matters, although the standard of proof is "on the balance of probabilities". Such provision limits the presumption of innocence, and thus requires justification.

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

The right to the equal protection of the law and the prohibition on the sale of an animal to a person who is under 18 years old (HRA subsection 8(3))

The Committee draws attention to the comprehensive discussion of this issue in the Explanatory Statement.

[2] In relation to the proposal in the Crimes Legislation Amendment Bill 2010 to re-introduce a crime of bestiality, the Explanatory Statement said that it "may raise some concerns over the interference with the [HRA] section 12 right to privacy; see *Scrutiny Report No 32*, concerning the Crimes Legislation Amendment Bill.

Do any the clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers"?
The right to a fair trial and procedural fairness (HRA subsection 21(1))

Clause 21 of the Bill would insert a new division 3.2 into the *Domestic Animals Act 2000* to regulate the breeding a dog or cat for sale. The Committee has identified one issue arising out of the scheme proposed.

The provision of procedural fairness to a licensee seeking renewal of a breeder's licence

By proposed section 73H of the *Domestic Animals Act 2000* (clause 21 of the Bill), a breeders licence is issued for not longer than three years. Prior to not less than 14 days before the end of the term of the licence, the licence-holder may apply for a renewal of the licence under proposed section 73D in the same way that a person may seek a licence for the first time. Proposed section 73J governs some aspects of renewal, but does not make provision for the affording of procedural fairness to the person seeking renewal. In contrast, the registrar may amend a licence on her or his own initiative (the only other circumstance being where the licence-holder makes application) only "where the licensed breeder is given a fair opportunity to respond, so the Registrar must give written notice and consider and comments from the breeder" (Explanatory Statement, explaining proposed 73L). Similarly, as the Explanatory Statement explains, "[s]ection 73P ensures that notice is given to a breeder before regulatory action is taken, that the person has the opportunity to respond, and that the Registrar must consider this response".

The situation where the registrar, having received an application for renewal, considers a refusal, appears to be analogous to the situations governed by sections 73L and 73P, and it is not apparent why there should be different treatment.

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

CRIMINAL PROCEEDINGS LEGISLATION AMENDMENT BILL 2011

This Bill would amend the *Crimes Act 1900* to increase penalties for the offences of "act of indecency without consent", "possession of child pornography" and "using the internet etc to deprave young people", and to amend the *Supreme Court Act 1933* to limit the types of offences for which an election for trial by judge alone can be made by an accused.

On invitation by the Committee, it received submissions from the University of Canberra and the Australian National University. The Committee thanks the academics concerned. The **submissions** are attached to this Report.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The amendments to the Crimes Act

The submission from the Australian National University discusses these amendments at length, and the Committee does not consider that there is any issue concerning the compatibility of the amendments with human rights standards.

The amendments to the Supreme Court Act

The Bill would amend the Supreme Court Act by limiting the types of offences for which an election for trial by judge alone can be made. It does so by specifying a class of offences where an election to be tried by judge alone cannot be made. The excluded offences include charges involving the death of a person and charges of a sexual nature.

The Explanatory Statement states that the amendment does not limit the right to a fair trial as stated in subsection 21(1) of the Human Rights Act. It takes the view that the amendment proposed:

> does not limit the right to a fair trial including the right to equal access, the right to legal advice and representation and the right to procedural fairness. A person accused of an excluded offence who is tried on indictment will have their criminal charges 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing' (section 21 (1), HR Act).

This approach is probably based on the statement in the Supplementary Explanatory Statement to the Courts Legislation Bill 2011[3] that "trial by jury is not a prerequisite component of the right to fair trial".[4]

Chief Justice Higgins of the Territory Supreme Court has, however, stated extra-judicially that, in some circumstances, provision for judge-alone trials may be required to satisfy some elements of HRA subsection 21(1). He said:

> To so limit [as proposed in the amendments in this bill] the existing right to choose trial by judge-alone clearly creates a real risk of offending the *Human Rights Act 2004* (ACT). In particular section 21 of that Act which provides the right to a fair trial. That is, the right to have criminal charges decided by a competent, independent and impartial court after a fair and public hearing. I do not deny that juries as finders of fact are competent. However, independence and impartiality can be affected by pre-trial publicity, community prejudice and complex and lengthy legal issues.[5]

As the law stands, an accused could exercise this right as described by the Chief Justice by opting for trial by judge alone. This is analogous to permitting the accused to waive a right to jury trial. In *Brown v The Queen* [1986] HCA 11 at [15] Dawson J noted that "the Canadian Charter of Rights and Freedoms in the Constitution Act 1982 provides in s.11(f) that any person charged with an offence has the right to the benefit of trial by jury where the

[3] http://www.legislation.act.gov.au/b/db_40367/relatedmaterials/supplementary_explanatory_statement.pdf

[4] This statement cited "communications" of the Human Rights Committee. This body is not a court, and an Australian court might interpret the scope of HRA section 21 by reference to the traditions of the Australian legal system. This issue cannot be regarded as settled.

[5] Message from the Chief Justice of the ACT Supreme Court, ACT Bar Association Bar Bulletin, 8 March 2011; (available from the chambers of the Chief Justice).

maximum punishment for the offence is imprisonment for five years or a more severe punishment. Quite clearly this provision is couched in terms of a personal guarantee and the courts have so regarded it, allowing an accused to waive trial by jury ...".[6] In Canadian law, section paragraph 11(f) of the Charter:

> gives an accused the right to the benefit of a jury trial but does not force a jury trial on an accused if it is not to his benefit. The accused in these circumstances may waive the right. The accused, and not the courts, will decide which course is in his best interests in any given case. This interpretation accords with this Court's intention to interpret Charter rights in a broad and generous manner designed to ensure that those protected receive the full benefit of the protection. Further, to prevent an accused from waiving his right to the benefit of a jury trial would be to elevate the interests of society over the interests of the individual.[7]

In *Brownlee v The Queen* [2001] HCA 36, Kirby J quoted with approval the decision of Frankfurter J in *Adams v United States; Ex rel McCan*, that to deny the right of waiver would "imprison a man in his privileges and call it the Constitution".[8]

It is not generally appropriate that the Committee undertake the kind of assessment for justification that HRA section 28 requires. This is a matter for the proponent of the bill.

In the absence of such an assessment in this case, it may assist the Assembly to appreciate that the debate may turn on which of two conflicting standpoints are adopted.

The accused's standpoint

From the accused's standpoint, a judge-alone trial may be a better guarantee of a fair trial in the way that is expressed on HRA subsection 21(1). This was recognized in *Cheng v The Queen* [2000] HCA 53, where McHugh J observed that:

> [m]any accused persons would not regard the mandatory requirement of a jury trial as conferring any benefit on them. Those charged with offences likely to arouse public indignation, such as cases involving sexual or other crimes against children, for example, of those accused who have raised mental illness as a defence, often prefer trial by judge to trial by jury when they are able to elect for trial by judge. To some accused, trial by jury is not a boon.

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[6] Dawson J's purpose was to contrast the notion of trial by jury as a personal right with the position under section 80 of the Commonwealth Constitution, in respect of which he held that while it stated that all trials for indictable offences under Commonwealth law must be tried by jury, an accused could not waive such mode of trial. He held that section 80 did not confer a personal right, but was rather to be seen as stating an element of the framework of the federal government. This approach is explained in James Stellios, "The Constitutional Jury - 'A Bulwark of Liberty'?" (2005) 27(1) *Sydney Law Review* 113. In *Brown*, a majority of a five member Court (Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting) held that section 80 mandated a trial by jury which could not be waived by the accused. In *Brownlee v The Queen* [2001] HCA 36 only Kirby J considered the issue of whether *Brown* should be overruled, and held that it should. His Honour relied upon a range of reasons, including the insistence of such a trial against the accused's interests and desires; the inefficiency of jury trials in the context of complex commercial and corporate offences; the availability of a 'larger effective facility for appeal against the reasoned decision of a judicial officer when compared with the much more limited facilities' available in the case of a jury verdict; and the personal nature of the privilege conferred by section 80. This passage is adapted from Stellios, above.

[7] This quote is from the headnote to *R v Turpin* [1989] 1 SCR 1296.

[8] [1942] USSC 159; 317 US 269 (1942), 280.

Extra-judicially, Higgins CJ observed of the amendment proposed in the Bill that:

> [t]he chosen categories of offences (death and sexual offences) seem somewhat random and target precisely the kind of issues which were considered to justify the option of a judge-alone trial in the first place. Namely, pre-trial publicity and community prejudice militating against an impartial and fair trial. There are many offences that rely upon community standards, for example, dishonesty, yet none of those categories are singled out for differential treatment.

In the March 2011 *Newsletter of the Bar Association of the Australian Capital Territory,* Mr F J Purnell SC stated:

> "Íf I were guilty I'd want a jury trial!" – said the NSW Director of Public Prosecutions Nick Cowdery on 12 August 2010. Mr Cowdery also said that if he was before the court and NOT guilty – he would prefer a judge" rather than risk a jury that could get it wrong".
>
> Among members Australia wide, of the criminal bar, would Nick's views be endorsed? I suspect they would! When I was a prosecutor, it was a commonly held view by other prosecutors and the police that judge alone trial would deliver a higher conviction rate than jury trials.

The legislative history of section 68B of the Supreme Court Act is not very informative. Mr Connolly, the Attorney-General, noted that "it has recently been accepted that there may also be criminal cases where an accused person would prefer to be tried by a judge alone rather than by judge and jury. Such cases might include those where extensive pre-trial publicity could be perceived as prejudicing jurors against the accused, and cases where there is a large amount of technical evidence that jurors might find difficult to comprehend".

The standpoint of advocates for jury trial

In *Scrutiny Report No 32*, at pages 3-4, concerning the Courts Legislation Amendment Bill 2010, the Committee quoted a long passage from the judgment of Deane J in *Kingswell v R* [1985] HCA 72 wherein his Honour elaborated on the advantages of trial by jury, and members are referred to this passage. In evidence to a recent inquiry by the Legislative Council of NSW,[9] Mr Odgers summarised the arguments that are advanced in support of the jury system:

> they involve the community in the process of criminal justice; they reflect democratic principles; they bring the collective sense and common sense of ordinary people into the criminal justice system; and they infuse community values into that system. They are also said to be a safeguard against arbitrary exercise of power by the state.

Note should also be taken of evidence given by Mr Cowdery, the NSW Director of Public Prosecutions.

[9] *Inquiry into judge alone trials under s.132 of the Criminal Procedure Act 1986*, report 44, November 2010 http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8532dcbfa13afcc7ca2577d400826cd1/$FILE/101108%20Final%20Report.pdf

3.112 Some Inquiry participants suggested that juries are able to resolve issues without allowing personal prejudices or beliefs to influence the application of objective community standards. When questioned on this perception, Mr Cowdery observed that juries are generally able to follow directions from the judge to set personal prejudices aside and determine a case on the facts being presented:

> … responsible counsel and judges in their directions, if it is suspected that some kind of prejudice or some kind of preconception might have some bearing on the outcome of the case, will make submissions about that and give directions about that. I have seen that done. By and large I think we can have confidence that juries do follow directions given by judges. Not always. There are some who cannot resist the temptation to go on the Internet and look up everything about everybody or to make inspections of crime scenes in the middle of the night, and that causes problems, but they are very rare. They are exceptions.

The NSW Legislative Council inquiry was not directed to the issue of whether an accused should have any ability to seek a judge-alone trial, but to the circumstances under which any such request should be granted, and by what process. The amendments proposed in the bill would remove the ability of some accused to request this mode of trial.

A critical issue in any justification for the amendments is whether it would be reasonably open to adopt measures that are less restrictive of the ability of a defendant to opt for trial by judge alone.[10]

The Committee draws these matters to the attention of the Assembly and recommends that the Minister provide a justification for removing the ability of some accused persons to request a judge-alone trial.

ELECTORAL (CASUAL VACANCIES) AMENDMENT BILL 2011

This Bill would amend the casual vacancy provisions of the *Electoral Act 1992*, and in particular provide that where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, the vacancy would be filled by the appointment by the Legislative Assembly as prescribed in section 195 of the Act. The Bill would also make consequential amendments to the *Aboriginal and Torres Strait Islander Elected Body Act 2008.*

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

Taking part in public life: HRA paragraph 17(a)

Laws regulating the election of members of the Legislative Assembly must be evaluated in terms of the right of "every citizen" to "take part in the conduct of public affairs, directly or through freely chosen representatives" (HRA paragraph 17(a)).

[10] This matter is raised in the submission from the University of Canberra.

The proposed amendments adopt a recommendation made by the Electoral Commission in its *Report on the ACT Legislative Assembly Election 2008* (at 77-78). The Explanatory Statement draws on this report, and submits that the proposed changes would provide better recognition of the will of the electorate that had been expressed at the relevant general election. The nub of the argument is expressed in these words of the Electoral Commission:

> Casual vacancies in the ACT Legislative Assembly are currently filled by conducting a count-back of the ballot papers used to elect the vacating member.
>
> The count-back method of filling casual vacancies serves to preserve the integrity of the proportional representation aspect of the ACT's Hare-Clark system, as it enables the voters who elected the vacating member to choose that member's replacement. In practice, this has always meant that a vacating member of a particular political party has been replaced by a member of the same party, thereby retaining the party balance in the Assembly, which in turn reflects the will of the electorate at the relevant general election.
>
> However, the Commission noted that the count-back method will only operate as intended to preserve the proportional outcome of the original general election where there is at least one candidate of the vacating member's party available to contest the vacancy. Should a party member resign, and at least one unsuccessful candidate from that same party is not available to contest the vacancy, under the current law that vacancy would be filled by a candidate from a different party, or by an independent candidate. Arguably, such an outcome would not deliver a representative result, and might serve to alter the balance of power in the Legislative Assembly.

The effect of the amendments will be that where there is **not** at least one candidate of the vacating member's party available to contest the vacancy, the vacancy would be filled by the appointment by the Legislative Assembly as prescribed in section 195 of the Act. The Committee notes that subsection 195(2) provides:

> If the name of the former MLA appeared on the ballot paper for the last election as a party candidate, the person chosen to hold the vacant office shall be a member of the party who is nominated by the party.

The Committee does not consider that an issue of incompatibility with HRA paragraph 17(a) arises.

ELECTORAL LEGISLATION AMENDMENT BILL 2011

This Bill would amend provisions of the *Electoral Act 1992,* and the *Electoral Regulation 1993,* primarily to adopt recommendations made by the Electoral Commission in its *Report on the ACT Legislative Assembly Election 2008,* and also makes consequential amendments to the *Aboriginal and Torres Strait Islander Elected Body Act 2008.*

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

Taking part in public life: HRA paragraph 17(a)

Some amendments are designed to limit the number of candidates that may be nominated for an election in an electorate to no more than the number of members of the Legislative Assembly to be elected for the electorate. The Explanatory Statement notes that:

> [t]he Commission noted that the main reason why a party may wish to nominate more candidates in an electorate than the number of vacancies would be where a party expected to win seats in the Assembly and the party wanted to ensure that it had a sufficient number of unelected candidates available to contest any subsequent casual vacancies. The Commission suggested that, rather than allow parties to nominate an unlimited number of candidates, it would be appropriate to deal with this issue by explicitly providing for the case where a casual vacancy occurs and a candidate from the party of the vacating MLA was not available to fill the vacancy using the current countback method. ...
>
> This amendment therefore complements the changes proposed to be made to the casual vacancy procedures by the Electoral (Casual Vacancies) Amendment Bill 2011. Should the amendments of that Bill be accepted, there will be no need for a party to nominate more candidates than there are vacancies in an electorate.

Clause 7 of the Bill proposes that a new subsection 105(2A) of the Electoral Act provide that "[t]he registered officer of a registered party must not nominate more people to be candidates for election in an electorate than the number of members of the Assembly to be elected for the electorate". This is supported by clause 8, which provides for a substituted section 106 of the Act, which would provide that one circumstance where the nomination of a person to be a candidate for election will be invalid is "if, at the hour of nomination for the election", "(c) the person is a party candidate for election in a particular electorate and the registered officer of the party has nominated more people to be candidates for election in the electorate than the number of members of the Assembly to be elected for the electorate".

That is, as the Explanatory Statement states, "if a party registered officer has nominated more candidates in an electorate than the number of vacancies in the electorate, then the nomination of all the candidates by that party for the electorate is made invalid".

It might be argued that this appears to be an unduly harsh result and is incompatible with the right stated in HRA paragraph 17(a). An issue arising is whether the relevant party should be afforded an opportunity to rectify a breach by its registered officer of proposed subsection 105(2A) within some period of time after the hour of nomination for the election.

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

FOOD (NUTRITIONAL INFORMATION) AMENDMENT BILL 2011

This Bill would amend the *Food Act 2001* to create a requirement for defined food retailers in the ACT to disclose the energy content (expressed in kilojoules) of the food items they sell.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?

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

The Explanatory Statement states that "[t]he Bill does not engage any human rights. Section 6 of the Human Rights Act 2004 sets out that only individuals have human rights. The provisions of the Bill regulate business activity and create obligations for defined food business rather than individuals".

There is however nothing in the amendments to limit their application to corporate bodies, and if an individual conducts a business then in that capacity the Human Rights Act applies to that conduct. In any event, this Committee is not limited to a focus on that limited range of rights stated in the *Human Rights Act 2004*, as it is required to report on whether a provision of a bill amounts to an "undue trespass" on personal rights and liberties. An Explanatory Statement must address those respects in which a bill might be seen to be an "undue trespass". This will include instances where the only persons who could seek to rely on an HRA right are corporate bodies. Analysis of whether a "trespass" is "undue" should be made according to the framework set out in HRA section 28.

Freedom of expression and the obligation to display or distribute statements – HRA subsection 16(2)

The creation of an obligation on persons to display or distribute statements of various kinds engages the right to freedom of expression, as that right embraces a right not to engage in expression.

The Committee does not consider that in this instance, the Member needs to address this issue, as it apparent that in terms of the policy of the Bill, a justification is available.

Strict liability offences

The Bill would create strict liability offences by proposed subsection 110(5) and subsection 111(2). In both cases, the maximum penalty would be 100 penalty points.

At a minimum, the Committee has required that an Explanatory Statement provide a justification for the creation of such offences, and for the imposition of a penalty in excess of 50 penalty points.[11]

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

Does a clause of the Bill inappropriately delegate legislative power?

This term of reference is engaged in two ways.

First, the content of the offences to that would be created by proposed sections 110 and 111 of the Act would be to a significant extent prescribed by regulation. It is generally considered undesirable that criminal offences be created by regulation. The Bill proposes to insert a new part in the *Food Regulation 2002* that would prescribe the relevant matters, but it must be noted that there is no (and could be no) restriction on the power to amend these regulations. Any such regulations would be disallowable.

Secondly, proposed subsection 113(1) provides that "[t]he Minister may exempt, with or without conditions, any people, food businesses, premises, food or activities from the operation of all or any provisions of this part". This amounts to a power to alter the operation

[11] And see Department of Justice and Community Safety, *Guide for Framing Offences*, version 2, April 2010, at 29.

of the Act and requires justification. The Committee notes that this power is qualified by an obligation to state reasons, and that an exemption is a disallowable instrument. On the other hand, the exemption will have legal effect until such time as it is disallowed.

The Committee draws these matters to the attention of the Assembly and recommends that the Member explain why it is desirable to delegate legislative power in these ways.

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2011

This Bill would make a range of technical and operational amendments to the road transport legislation, including the *Road Transport (Driving Licensing) Act 1999*, the Road *Transport (General) Act 1999*, the *Road Transport (General) Regulation 2000*, the *Road Transport (Offences) Regulation 2005* and the *Road Transport (Vehicle Registration) Act 1999*.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The right to privacy and the seizure of licences – HRA paragraph 12(a)

The Explanatory Statement identifies this issue in relation to clause 11 of the Bill, and discusses the human rights issue at pages 2 and 6 of the Explanatory Statement. The Committee refers the Assembly to this discussion.

The presumption of innocence and the imposition of strict liability – HRA subsection 22(1)

By clause 7, a new section 31A would be inserted into the Road Transport (Driving Licensing) Act.

> **31A Offence—driving while right to drive suspended**
>
> (1) A person commits an offence if—
>
> (a) the person's right to drive is suspended under a law of the territory; and
>
> (b) the person drives a vehicle in the ACT.
>
> Maximum penalty: 20 penalty units.
>
> (2) An offence against this section is a strict liability offence.

In justification for the limitation on the right to the presumption of innocence and (HRA subsection 22(1)), the Explanatory Statement says only that:

> This offence is expressed to be a strict liability offence. This is consistent with the offence that it replaces (section 44 (8) of the *Road Transport (General) Act 1999*). It should be noted that offence pre-dated the enactment of the Criminal Code and therefore did not expressly include a statement about the application of strict liability. The defence of mistake of fact is available for strict liability offences.

This falls short of a HRA section 28 justification, but in this instance the regulatory nature of the offence is clear and the penalty falls short of the generally accepted benchmark of a 50 penalty points maximum penalty for strict liability offences.[12] However, comment on the reference to the availability of the defence of mistake of fact is warranted.

This defence is stated in section 36 of the *Criminal Code 2002*:

> **36 Mistake of fact—strict liability**
>
> (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if—
>
> (a) when carrying out the conduct making up the physical element, the person considered whether or not facts existed, and was under a mistaken but reasonable belief about the facts; and
>
> (b) had the facts existed, the conduct would not have been an offence.[13]

This defence has a limited operation, as explained by a commentator:

> The defence of reasonable mistake is restrictive in its definition. Ignorance, no matter how reasonable in the circumstances, is no excuse. The defendant must have considered the facts, before it can be said that there was any mistake to provide a basis for the defence. ... [In contrast],[t]he due diligence defence treats ignorance and mistake alike, excusing defendants who can demonstrate that they took appropriate care.[14]

There is however another defence available to a person charged with a strict liability offence to be found in section 39 of the Code:

> **39 Intervening conduct or event**
>
> A person is not criminally responsible for an offence that has a physical element to which absolute or strict liability applies if—
>
> (a) the physical element is brought about by someone else over whom the person has no control or by a non-human act or event over which the person has no control; and
>
> (b) the person could not reasonably have been expected to guard against the bringing about of the physical element.[15]

The commentator observed:

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[12] See Department of Justice and Community Safety, *Guide for Framing Offences*, version 2, April 2010, at 29.
[13] A more limited defence is available to a corporation: see section 56 of the Code.
[14] Ian Leader-Elliott, "Elements of liability in the Commonwealth Criminal Code" http://www.aija.org.au/Mag01/Leader-Elliott.pdf
[15] A more limited defence is available to a corporation: see section 54 of the Code.

> It is possible, however, that the Code - wittingly or unwittingly - has opened the door to the due diligence defence in another guise. The potential for injustice which might result from the restrictive definition of reasonable mistake is mitigated by the provision of a defence of Intervening conduct or event. No criminal responsibility is imposed for an offence, whether of strict or even absolute liability, if it resulted from events or the act of another, which it would be unreasonable to expect the defendant to guard against. This is not a new defence, but a statutory formulation of South Australian common law, which has long recognised the defence of "act of a stranger". In the past it seems to have been rarely used and its potential significance has been eclipsed by reasonable mistake of fact.

Two points follow from the above.

First, an Explanatory Statement should make reference to both the "mistake of fact" defence, the "intervening conduct or event" defence.

Secondly, consideration should always be given to the express inclusion in the relevant bill of a defence of "reasonable ignorance" such as by a defence of "having taken reasonable steps" to avoid the conduct that is affected by the strict liability offence. In a response to an Committee report, the Attorney-General informed the Committee[16] that:

> [t]he view I have taken is that a specific defence of 'due diligence' or 'reasonable steps' should only be considered where the offence requires a person to eliminate a hazard or minimise a risk of harm to people or the environment where the harm occurs in a regulatory context. Furthermore, it will be appropriate to consider the defence of reasonable steps in offences where the conduct targeted by the offence directly concerns itself with the harm caused or risk of harm created. Examples of schemes where consideration of this defence may be appropriate include occupational health and safety law, food handling and hygiene law and environmental and heritage law.

An issue arising with respect to proposed section 31A is whether it is an offence of a kind that falls within the descriptions given by the Attorney-General. If so, there is a strong case for the inclusion of a defence of "reasonable ignorance".

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

ROAD TRANSPORT (ALCOHOL AND DRUGS) LEGISLATION AMENDMENT BILL 2011

This Bill would amend the *Road Transport (Alcohol and Drugs) Act 1977*, the *Road Transport (Driver Licensing) Regulation 2000*, the *Road Transport (General) Act 1999*, the *Road Transport (Offences) Regulation 2005*, the *Crimes Act 1900* and the *Spent Convictions Act 2000*.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

[16] See *Scrutiny Report No 31*, letter from the Minister for the Environment, Climate Change and Water of 2 December 2010.

The Explanatory Statement, which the Committee commends for its high quality, identifies two human rights issues arising out of the Bill.

The first concerns the proposals to extend alcohol and drug testing to driver trainers. The Committee has nothing to add to the discussion in the Explanatory Statement at pages 2 to 3.

The rights to privacy, liberty and the right to liberty and security of the person and the right to humane treatment when deprived of liberty, and the power to search a person taken into custody for alcohol or drug testing – HRA paragraph 12(a), section 18 and section 19

The second concerns proposed section 18C of the Road Transport (Alcohol and Drugs) Act (see clause 42). The Committee refers to the discussion in the Explanatory Statement at pages 3 to 4, and at 14 to 15. The basic point made in justification is that "[i]t is desirable for ACT Policing to have legislative authority for conducting preventative searches of this type so it can discharge its common law duty of care to drivers who are taken into custody for alcohol or drug testing under the Act". It is noted that the provision is modelled on the search power in section 5 of the *Intoxicated People (Care and Protection) Act 1994*.

There are some issues concerning the scope of this power. The Explanatory Statement (at 15) argues that "The Explanatory Statement and the Second Reading (Presentation Speech) for the Bill [that became the 1994 Act] for [the comparable] provision made it clear that provision was not an exhaustive search power". It may not however be safe to rely on what is said in an Explanatory Statement as a guide to how the courts might interpret a provision of an Act. In *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118, Gray J referred with approval to observations by Spigelman CJ in *Harrison v Melhem* [2008] NSWCA 67:

> 12 ... Statements of intention as to the meaning of words by ministers in a Second Reading Speech, let alone other statements in parliamentary speeches are virtually never useful. …
>
> 13 Of course, other statements in the course of a Second Reading Speech by a minister … will be of use on matters such as the purpose, which used to be referred to as mischief.
>
> 14 However, the subjective intention of the Parliament, let alone of Ministers or Parliamentarians, is not relevant. What is involved is the search for an objective intention of Parliament, not the subjective intention of Ministers or Parliamentarians. … [F]requently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anybody. Even if they were contemplated, a statement of intention in a Ministerial Second Reading speech will not prevail over the words of the statute.
>
> 15 The authoritative determination of the meaning of a statutory provision is an exercise of the judicial power, not of the legislative power, let alone of the executive power. In the Australian system of the separation of powers, it is the courts which determine what the legislative intention when enacting a particular provision was.

> 16 The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say. [Citations omitted]

On its face, the scope of the power in proposed section 18C is very wide.

1. The police officer who has taken the driver, etc into custody under the specified provisions of the law "may take possession of anything found in the person's possession". The Explanatory Statement states that "[t]he purpose of reception screening is to consider every item in the possession of person in custody and assess its risk potential". It is said that "it is not a forensic or evidentiary search provision. To state it another way, its purpose is not to find evidence to establish the person's involvement in the commission of any offence, but to contain the risk of injury or harm".

The question arises however as to what use may be made of an item found on a search that does reveal or point to the commission of a crime. It may be that the item itself would constitute a danger to the person detained and also indicates that the person has committed a crime (such as having possession of an amount of prohibited drugs). Or it may be that the item is not dangerous, but indicates that the person has committed a crime (such as an instrument for burglary which when taken with other evidence points to the person as having committed a particular burglary).

Even if the person is entitled to the return of the items, evidence that they were found and their nature might be adduced on a trial for the commission of the relevant offence. Will this be possible?

2. Proposed subsection 18C(3) requires that anything seized by the police must be returned to the person when he or she ceases to be in custody. There are two exceptions, the second being where the item seized "may otherwise be seized or retained under another territory law". The Committee considers that more explanation of what this exception may cover is required. In particular, would it permit the retention of an item that revealed or pointed to the commission of a crime?

3. The nature of the search that may be conducted is specified in proposed subsection 18C(4). It provides that "search":

> means a search **of a person** or of **anything in the person's possession**, and may **include**–
>
> (a) requiring the person to remove only the person's overcoat, coat, jacket or a similar article of clothing and any footwear, gloves or headwear; and
>
> (b) an examination of them [emphasis added].

The Explanatory Statement asserts that

> it is essentially an examination of the person's outer garments and possessions. As explained earlier, this provision is based on the power in section 5 of the *Intoxicated People (Care and Protection) Act 1994*. The Explanatory Statement and the Second Reading (Presentation Speech) for the Bill for that provision made it clear that provision

was not an exhaustive search power. The restriction to outer garments and possessions will reduce its impact on the privacy of the person being searched.

This explanation appears to significantly understate the scope of the kind of search that may be undertaken. It might also be said to undermine the policy objective of the section, that being to remove dangerous items. Drugs, for example, can be secreted otherwise than in garments and possessions.

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

PROPOSED AMENDMENTS—COURTS LEGISLATION AMENDMENT BILL 2010

Amendments to the Courts Legislation Amendment Bill 2010 proposed by Mrs Vicki Dunne

In essence, these amendments address the Supreme Court ‘‘backlog” problem by conferring on the prosecutor appearing on the matter in the Magistrates Court discretion to decide whether the particular offence with which the defendant is charged is to be tried summarily, or, alternatively, on indictment. The only material way in which these amendments differ from the amendments presented by Mr Rattenbury lies in the proposal that the amendments made to section 375AA of the *Crimes Act 1900* must be reviewed at the instigation of the Minister “as soon as practicable after the end of its 2nd year of operation”, and that the Minister must “present a report to the Legislative Assembly within 3 months after the review is started”.

It is not possible to assess how far a court would consider that this addition to the scheme would provide justification for the derogation of the right to trial by jury and/or the right to a fair trial in subsection 21(1) of the *Human Rights Act* 2004.

Comment on the response of Mr Shane Rattenbury to the comments of the Committee, in *Scrutiny Report No 35,* on his amendments to the Courts Legislation Amendment Bill 2010

The Committee thanks Mr Rattenbury for his comments, and notes that the Assembly is now better placed to assess whether the derogation of the right to trial by jury and/or of the right to a fair trial is justified. In particular, Mr Rattenbury states that it is not intended that the prosecutor should, when exercising the discretion, have regard to the backlog in the Supreme Court, but rather that a central factor will be the prosecutor’s assessment of whether the defendant would be likely to receive a sentence of no more than two years’ imprisonment and/or a fine of $5000.

The Committee suggests that in addition to the matters raised in support of the amendments, and to its report in *Scrutiny Report No. 35,* the Assembly should have regard to these matters:

- the discretion is open-ended and not limited to a consideration of the likely penalty;

- it is the prosecutor and not initially the defendant who determines whether the defendant will have the benefit of trial in the Supreme Court, either by jury or by judge-alone; and

- that the prosecutor's decision for summary trial would be made before any evidence is adduced to the court, with the result that whatever the evidence might reveal about the gravity of the defendant's conduct, the court could not impose a sentence of more than two years' imprisonment and/or a fine of $5000, and notwithstanding that the law creating the offence would have stipulated that the maximum penalty could be greater, and up to five years' imprisonment.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Disability, Housing and Community Services, dated 18 March 2011, in relation to comments made in Scrutiny Report 33 concerning proposed Government amendments to the Work with Vulnerable People (Background Checking) Bill 2010.

- The Minister for Health, dated 13 April 2011, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instrument DI2011-24, being the Health Professional (Veterinary Surgeons Board) Appointment 2011 (No. 1).

- The Minister for Transport, dated 19 April 2011, in relation to comments made in Scrutiny Report 34 concerning Subordinate Law SL2011-2, being the Road Transport Legislation Amendment Regulation 2011 (No. 1).

The Committee wishes to thank the Minister for Disability, Housing and Community Services, the Minister for Health and the Minister for Transport for their helpful comments.

PRIVATE MEMBER'S RESPONSE

The Committee has received a response from Mr Rattenbury, dated 5 April 2011, in relation to comments made in Scrutiny Report 35 concerning proposed amendments to the Courts Legislation Amendment Bill 2010, and wishes to thank Mr Rattenbury for his helpful comments.

Vicki Dunne, MLA
Chair

April 2011

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

REPORTS—2008-2009-2010-2011

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
Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009
Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Report 10, dated 10 August 2009
Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)
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)

Report 18, dated 1 February 2010
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010
Education (Suspensions) Amendment Bill 2010 (PMB)

Report 22, dated 27 April 2010
Infrastructure Canberra Bill 2010 (PMB)
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010

Bills/Subordinate Legislation

Report 30, dated 15 November 2010
Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)
Discrimination Amendment Bill 2010 (PMB)

Report 33, dated 3 March 2011
Health Amendment Bill 2011

Report 34, dated 24 March 2011
Disallowable Instrument DI2011-13 - University of Canberra (Academic Board) Statute 2011
Disallowable Instrument DI2011-17 - Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1)
Road Transport (Third-Party Insurance) Amendment Bill 2011
Subordinate Law SL2011-1 - Environment Protection Amendment Regulation 2011 (No. 1)

Joy Burch MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR WOMEN

MEMBER FOR BRINDABELLA

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

Dear Mrs Dunne

I am writing in relation to the Committee's comments concerning the proposed Government Amendments to the Working with Vulnerable People (Background checking) Bill 2010 (the Bill) in Scrutiny Report No 33.

Thank you for the Committee's comments on the Government amendments to the Bill and the explanatory statements. I acknowledge the Committee has noted the proposed Government Amendments to strict liability offences and imprisonment; internal reconsideration of a negative risk assessment; and surrendering of registration.

Yours sincerely

Joy Burch MLA
Minister for Disability, Housing and Community Services
15 March 2011

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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 Dunne

Thank you for the Committee's scrutiny report dated 24 March 2011 (Report 34) and the comments made regarding the drafting of DI2011-24.

The Committee has noted that DI2011 24, which is the Health Professional (Veterinary Surgeons Board) Appointment 2011 (No. 1), was made under sections 5 and 10 of the Health Professionals Regulation 2004 (the HPR). The Committee suggests that this is not necessary as nothing in section 5 of the HPR expressly requires that a person appointed as the president of a health profession board be a member of the board.

The Committee is correct that there is no express requirement within section 5 of the HPR that the president of a health profession board also be a member of the board. I will, however, direct the Committee's attention to section 12.6 in Schedule 12 of the HPR. That provision does expressly state that:

> The board is made up of the president and the following people:
> (a) 3 elected members;
> (b) 3 appointed members, 1 of whom is a community representative.

I trust this information is of assistance.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

13 April 2011

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

Dear Mrs Dunne

I refer to the Scrutiny of Bills Committee's Report No 34 of 24 March 2011 regarding Subordinate Law SL2011-2, the Road Transport Legislation Amendment Regulation 2011 (No 1) made under the *Road Transport (Public Passenger Services) Act 2001, Road Transport (Safety and Traffic Management) Act 1999 and Road Transport (Vehicle Registration) Act 1999.*

The Committee asked whether it was intended to preclude temporary visa holders, who are permitted to engage in some work by the terms their visas, from becoming accredited service providers. The Committee noted that these visa holders would be subject to the mandatory grounds of refusal of accreditation under the amendments.

I can confirm that this effect is intentional. This policy resulted from discussions between my agency and officials from the Department of Immigration and Citizenship (DIAC). DIAC confirmed that the amount of work a person on a temporary visa (such as an overseas student) is allowed to perform is strictly limited – that is, full-time work is not permitted.

Discussions with the public transport industry confirmed that the obligations of accredited transport operators cannot be undertaken satisfactorily on a part-time basis. Accordingly, a person on a student visa who proposes to become an accredited operator would either risk breaching the terms of her/his visa conditions by working for more than the hours permitted by the visa, or would risk failing to meet her/his obligations as an accredited operator under the *Road Transport (Public Passenger Services) Regulation 2002.*

Yours sincerely

Jon Stanhope MLA
Minister for Transport

19 APR 2011

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ACT Greens
Spokesperson for Attorney General, Environment, Climate Change and Water, Energy, Police and Emergency Services, Tourism, Sport and Recreation.

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne Vicki

Thank you for the Scrutiny of Bills Report number 35 of 4th April 2011. I offer the following response to the issues raised in relation to my amendments to the *Courts Legislation Amendment Bill 2010.*

Issue 1: the Report at page 7 states "there is no factual information provided to permit an assessment of the state of the backlog, and that the changes proposed are not limited in time to that period within which the Supreme Court might clear its backlog of cases"

Specific data on court backlogs in each Australian jurisdiction is provided every year in the Report on Government Services. Table 7.9 of the 2011 Report records that as at 30 June 2010, 9.5% of non-appeal cases in the ACT's Supreme Court have been waiting for more than 24 months to get to trial. This is the largest percentage of all Australian jurisdictions, in that category.

It is accurate to state that there is no defined time frame for which the amendments would operate. This was intentional as the amendments are, at this point in time, proposed to make a permanent change to the jurisdiction of the Magistrates Court. This of course will be open to review in the future by the Assembly, as is the case with all legislation.

There will be a number of changes made to the courts to reduce the backlog of cases, some of which have already passed the Assembly such as the bail reforms. Once all of these have been operational the impact on the backlog will able to be analysed. It would appear at this point in time that if any of the changes were reversed in the future, the backlog would be likely to slowly build back up over time. For this reason, the changes are proposed to be permanent, subject to the will of the Assembly in the future.

Since report number 35 was published, interested members of the Assembly have raised the possibility with me for a review clause to be inserted into the amendments. Such a review would allow for the operation of our amendments to be quantified after a specified time of operation. At the time of writing, such an amendment it is yet to be formally circulated but it is relevant to make note of it in reference to the Committee's comments on the time at which the backlog may be cleared.

Issue 2: the Report at page 7 includes a request for statistics on the number of defendants who would appear in the Magistrates Court charged in the three to five year range if the Greens amendments were put into effect.

Since the Greens finalised the amendments and submitted them to the Committee, the Attorney Generalhas provided data from the Department of Justice and Community Safety on the number of cases that would be covered by the amendments.

The JACS data indicates that in the 2009/10 financial year there were 21 cases heard in the Supreme Court in the 3 – 5 year maximum potential sentence range.

The Greens amendments would hand the DPP the discretion to elect for a summary hearing in each of these 21 cases. The departmental data also outlines the sentence outcomes for those instances where a finding of guilt was reached. It is important to note that there was no sentence of more than 6 months imposed and that it is highly likely that all of the cases would have been captured by the Greens amendments and diverted to the Magistrates Court for a summary hearing.

Issue 3: The Report at page 8 poses the question of whether the proposed discretion for the DPP to elect for summary hearing is of a much more fundamental character than existing discretions such as the decision whether to proceed with a prosecution at all in the first place, what charges to proceed with and whether to give an undertaking that particular evidence will not be used against a person in future prosecutions.

I think this is a useful question to have posed. However, I hold the view that the discretion proposed for the DPP is consistent with existing discretions. At the heart of the issue is whether it is right that the DPP can make a decision about whether a case against a defendant should proceed without access to a jury trial.

I do not believe this is fundamentally different to other discretions, most illustrative of which is the discretion of which charges should be pursued through the courts. Often police will lay multiple charges. It is then accepted practice for the DPP to decide which of these charges is most appropriate to continue with. In exercising this discretion the DPP may also ultimately be exercising discretion about access to a jury trial and maximum available sentence. This is because differing charges will have different penalties and will need to be pursed through different courts if they sit either side of the relevant threshold.

Seen in this light, I believe the amendments add a degree of formality and legislative backing to the scope of current accepted DPP practice. It is worthwhile noting at this point that there are two existing published guidelines from the DPP that cover the various discretion afforded to them (*Prosecution Policy* and the *Guidelines for Prosecutors*).

Issue 4: At page 9 the Report questions how the DPP would exercise the discretion and notes that it may be unlawful to apply the discretion in a rigid way

The discretion was deliberately afforded to the DPP in an open manner. A central factor in their decision will be the sentence they deem appropriate, if a guilty verdict is reached.

Particular note was made in the explanatory statement that the DPP could issue guidelines outlining how the discretion would be exercised. That is an option that the

Greens do think would be an appropriate step for the DPP to take. The DPP will be best placed to describe in published guidelines how the discretion will be exercised.

Issue 5: At page 9 the Report opens the question of whether the DPP can or should have regard to reducing the delays in exercising their discretion?

At the outset I should make clear that it was not the intent of the amendments to require or allow the DPP to take into account the court backlog when exercising the discretion. Nor do I believe, based on the guidelines the DPP has published to date, that this would be a factor taken into account in their discretion.

By virtue of the fact that likely sentence will be a central factor in the DPPs decision, this in and of itself will result in more cases being diverted to the Magistrates Court than currently occurs. For this diversion to occur and the objectives of the amendments to be achieved, the DPP does not have to have this effect in mind. Rather, they need only act in accordance with their existing published guidelines.

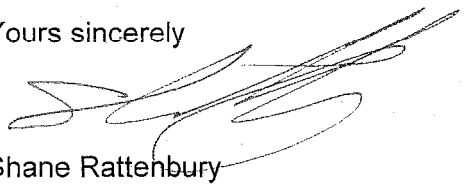
Both the published *Prosecution Policy* and the *Guidelines for Prosecutors* make clear that the DPP is bound by public interest requirements and is required to act in an even and fair manner. To quote from the Guidelines, this means that prosecutors do not have a duty to "obtain a conviction by all means necessary" and shall not "by language or conduct endeavour to inflame or prejudice the jury against the prisoner".

For the intent of the amendments to be achieved, these principles need to continue to be applied. In practice what this will mean is that the DPP, on an even and fair assessment of the seriousness of the case, will consent to a summary hearing where a sentence of less than two years is warranted.

The DPP will be prevented from withholding consent simply to leave open the possibility of an inappropriately large sentence being handed down in the Supreme Court. Such a decision would run completely counter to their public interest requirements and in moving these amendments I am satisfied it is not an issue for concern.

Thank you again for raising these issues and I trust the information above has answered the Committees questions.

Yours sincerely



Shane Rattenbury

5 April 2011

ACT Greens Attorney General spokesperson

UNIVERSITY OF
CANBERRA
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8 April 2011

Mrs V Dunne MLA (Chair)
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
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CANBERRA ACT 2601

Dear Chair,

We are responding to your letter of 9 March 2011, addressed to Professor Maree Sainsbury, Dean of the Faculty of Law at the University of Canberra, inviting submissions on the Criminal Proceedings Legislation Amendment Bill 2011.

We have concerns about the proposal in the bill to remove the ability for trial by judge along for a list of specified offences, including those resulting in death and offences of a sexual nature. We do not consider this to be good policy for the following reasons.

The impetus for the change would appear to be the comparatively high rates of judge alone trials in the Australian Capital Territory. As the ACT Attorney-General noted in the media release accompanying the Bill, the ACT has the highest rate of election for judge-alone trials in Australia with 56% of cases being heard without a jury. At the Attorney-General noted, the next closest jurisdiction, South Australia, had 15% of trials heard by judge alone. However, the small number of cases should be noted: in 2009/10 there were 36 defendants acquitted or found guilty (that is, had pleaded not guilty) in the ACT, compared with 350 in South Australia and 596 in NSW.

Trial by judge alone is currently available in four jurisdictions other than the ACT (where it is provided for by s 68B of the *Supreme Court Act 1933*), as follows:

- NSW: *Criminal Procedure Act 1986* (NSW), s 132. Subsection (5) provides that the court 'may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness'
- Queensland: *Criminal Code* (Qld), s 614

- South Australia: *Juries Act 1927* (SA), s 7
- Western Australia: *Criminal Procedure Act 2004* (WA), s 118. Subsection (4) provides that the court 'the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness'.

In a 1986 report, the NSW Law Reform Commission recommended that the NSW legislation 'should be amended to provide that, *in all criminal cases which are to be tried on indictment*, the accused person should have the right to make an application that the trial be conducted by a judge sitting without a jury' (emphasis added). The NSWLRC went on to comment that in some cases, 'it may be that publicity which is adverse to the accused person is so prolonged and widespread that it is clearly impossible to eliminate its impact upon potential jurors' (1986: [7.3]). Queensland introduced judge-alone trials in 2008, noting that 'in a small number of cases, it may be in the interests of justice to have a trial heard by a judge sitting alone. For example, a judge may be better placed to hear cases involving significant complexity or notoriety' (Shine 2008). Waye (2003) has also observed that 'Trial judges use techniques that avoid irrational decision-making.'

In light of the foregoing, there does not appear to be any sound basis for excluding cases resulting in death and sexual offences from the scope of offences which may be tried by judge alone, especially as such offences may often include cases attracting adverse publicity (especially in a jurisdiction the size of the ACT). If it is deemed necessary to restrict the use of judge-alone trials, other legislative amendments could be introduced to limit their use, for example, on the basis adopted in NSW (including that the Crown must consent to the application) and Western Australia. Such amendments could even go so far as to create a legislative presumption in favour of jury trials, so that the onus would shift to the defence to argue why a jury trial should not be held in the circumstances. Such an outcome would, in our view, be preferable to the proposed arbitrary assessment on the basis of offence type. In adopting any such modifications, the findings of the NSW Standing Committee on Law and Justice (2010) should be taken into consideration.

Finally, cost is also a relevant consideration. As the NSW Attorney-General noted in response to a question on notice in Parliament, 'Judge-alone trials are significantly less expensive to run than jury trials. Jury trials may impose significant costs on the taxpayer through extra organisation and legal expenses' (Hatzistergos 2010). It may therefore be the case that increasing the use of juries for trials for sexual offences and those resulting in death will have an adverse impact on funding for other justice initiatives.

We trust this submission will be of assistance, and would be happy to provide further detail if required.

Yours sincerely,

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References

Corbell S 2011. Reform to judge-alone trials. *Media release.* 11 February. http://www.chiefminister.act.gov.au/media.php?v=10450

Hatzistergos J 2010. *Judge-alone trials.* Question with Notice. 11 May. NSW Legislative Assembly. http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20100511025

NSW Law Reform Commission 1986. *Criminal procedure: The jury in a criminal trial.* Report no 48. Sydney: NSWLRC

NSW Standing Committee on Law and Justice 2010. *Inquiry into judge alone trials under s.132 of the Criminal Procedure Act 1986.* Sydney: NSW Legislative Council. http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8532dcbfa13afcc7ca2577d400826cd1/$FILE/101108%20Final%20Report.pdf

Shine K 2008. Criminal Code and Jury and Another Act Amendment Bill 2008. Second Reading Speech. 26 August. http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/spk/spk2008/Kerry%20Shine%20spk%20Toowoomba%20North%202008_08_26_61.pdf

Waye V 2003. Judicial fact-finding: Trial by judge alone in serious criminal cases. *Melbourne University Law Review*: 16. http://www.austlii.edu.au/au/journals/MULR/2003/16.html

Chair: Ms Vicki Dunne
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Criminal Proceedings Legislation Amendment Bill 2011 (ACT)

Invited comment (per letter circulated by Professor Michael Coper, Dean of Law, ANU College of Law, to ANU law academics) by:

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Dear Ms Dunne

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We thank you and the Standing Committee on Justice and Community Safety for the opportunity to comment on the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) currently before the ACT Legislative Assembly. As academic researchers based at the Australian National University (ANU) with particular interests in criminal law and issues affecting victims of crime, we are pleased to offer the following observations.

Increased penalties for child pornography offences

1. The Criminal Proceedings Legislation Amendment Bill 2011 (ACT) increases the maximum penalty for a number of offences in the *Crimes Act 1900* (ACT) relating to sexual abuse of children, including:

    - Act of Indecency without consent: s60(1) and (2);
    - Possessing child pornography: s65(1); and
    - Using the internet etc. to deprave young people: s66(1) and (2).

2. All of these offences apply to misuse of information and communications technologies (ICT), and in particular the Internet, in the exploitation of children. It should be noted that this kind of offending is viewed with great concern around the world, particularly in regard to the criminal exploitation of vulnerable members of the community. This concern is reflected in the Council of Europe's *Convention on Cybercrime*, which Australia is in the process of acceding to, and which lists online child pornography as one of the categories of technology-related offending which signatory countries must criminalise through their substantive criminal law.[1]

3. Possession, creation and distribution of child pornography are already criminal offences under Australian law at the Commonwealth level, and under State and Territory legislation. However, penalties (and some of the definitions involved)[2] vary considerably. In particular, use of a carriage service (e.g. the Internet) to access, transmit or solicit child pornography material is punishable by 15 years under s474.19 of the *Criminal Code Act 1995* (Cth); while production, dissemination or possession of child abuse material (which includes child pornography) is punishable by 10 years under s91H of the *Crimes Act 1900* (NSW). In the ACT, the maximum penalty for intentional possession of child pornography under s65(1) is 500 penalty units or 5 years or both. This is clearly out of line with the other jurisdictions mentioned.

4. The relative leniency with which child pornography offenders have often been dealt with in the ACT courts under s65(1) is evident from a glance at recent cases. For example:

    - In *R v Freestone* [2010] ACTSC 87 (20 August 2010), the offender was sentenced to 8 months with four months to serve before release on

[1] Council of Europe, *Convention on Cybercrime* (CETS No. 185): http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CL=ENG

[2] The most obvious definitional variation between Commonwealth and State / Territory offences is the definition of 'child pornography', which refers under the Commonwealth legislation to material that sexually depicts a person who 'is, or appears to be, under 18 years of age' (*Criminal Code Act 1995* (Cth), s473.1); similarly, the definition in the ACT refers to 'child' being 'a person who has not attained the age of 18 years' (*Crimes Act 1900* (ACT), Dictionary) while in NSW a 'child' is 'a person who is under the age of 16 years' (*Crimes Act 1900* (NSW), s91FA). Note that under this legislation, the 'depiction' or 'representation' that constitutes child pornography may include digitally created images and even cartoons: *McEwen v Simmons* [2008] NSWSC 1292 (8 December 2008).

a bond (946 images and one video file, some images depicting children aged as young as 6 months being sexually tortured);

- In *R v Bruce Ronald Ashman* [2010] ACTSC 45 (21 May 2010), the offender was sentenced to 9 months, wholly suspended (96 video files);

- In *R v Richard John Llewellyn* (unreported, ACT Supreme Court, 3 December 2008), the offender was sentenced to 8 months, with 3 months of full-time custody and 5 months of periodic detention (over 17,000 images including torture and bestiality images involving children as young as 4 months);

- In *R v John Desmond Thompson* (unreported, ACT Supreme Court, 5 December 2008), the offender was sentenced to 8 months by way of periodic detention (2000 images and 40 video clips, including children as young as 18 months).

5. While every case turns on its own facts (and it should be noted that the ACT child pornography charges involved in these cases were dealt with alongside other offences, including Commonwealth carriage service offences), the pattern that emerges is that a typical offender being sentenced in the ACT under s65(1) can expect to receive a sentence of less than 12 months, with all or some of that period suspended on a good behaviour bond. This is low compared to sentencing in NSW, for example, especially since that jurisdiction increased its maximum to 10 years in response to the perception of inadequate sentencing prior to 2008.[3]

6. In the sentencing remarks of *R v Mackenzie William Sutton* (unreported, ACT Supreme Court 2009), Refshauge J remarked:

> "There is no doubt that child pornography is a great social evil which undermines the essential underpinning of the modern liberal democratic state, namely that it should protect the vulnerable from harm. Children who are the subject of such sexual and violent activities are often victimised, traumatised, abused, their childhood stolen from them with often severe and long lasting damage to their mind, emotions and personality."

7. However, it is questionable whether the current maximum penalty of 5 years under s65(1) of the *Crimes Act 1900* (ACT), coupled with demonstrably lenient sentencing practices in ACT courts that typically impose no more than 20% of the maximum, reflects this harm to child victims. This is reflected in judicial attitudes to the statutory penalty, whereby a maximum of 5 years may

[3] The *Crimes Amendment (Sexual Offences) Act 2008* (NSW) raised the penalty for child pornography offences in NSW from 5 years to 10 years, partly due to the difficulties involved in concurrent sentencing of State and Commonwealth offences; for pre-amendment sentencing patterns, see Tony Krone, 'Child pornography sentencing in NSW' *AIC High Tech Crime Brief no. 8* (2009): http://www.aic.gov.au/publications/current%20series/htcb/1-20/htcb008.aspx (63 cases in sample, only 8 involving full-time custodial sentence).

be taken to indicate that the offence is not a particularly serious crime, as compared to others with higher penalties. In addition, we note that the amendments to the *Legislation Act 2001* (ACT) brought about by the Courts Legislation Amendment Bill 2010 (ACT) require that the penalty level be increased beyond 5 years to ensure that they remain indictable offences. For these reasons, we support the raising of the maximum penalty in s65(1) as provided in the Criminal Proceedings Legislation Amendment Bill 2011 (ACT). Indeed, there are potential arguments for a greater increase than is proposed, for example, to a 10-year maximum in line with child pornography offences in NSW.

8. We note, however, that research shows that harsher penalties are not necessarily supported by victims of crime themselves.[4] The tendency to exclude victims from participation in the sentencing process is often justified on the basis of perceived punitiveness. Child victims are often kept out of the sentencing process because of misguided fears about 'revictimisation'. However, both adult and child victims can and do bring a greater depth and nuance to sentencing deliberations.[5]

9. While outside the scope of the committee's enquiry, we would be supportive of measures that enabled greater participation of victims in the sentencing process. For those offences where a victim is not personally identified or identifiable, for example, some child pornography offences, there may be scope for the statutory victims advocate to present general victim impact information for the benefit of the court.[6]

Other child sex offences

10. As with child pornography crimes, offences involving the misuse of the Internet to procure or groom children, or to commit or encourage acts of indecency involving children, should be regarded as serious offences.[7] Again, comparisons can be made with the *Criminal Code Act 1995* (Cth), which imposes a maximum of 15 years under s474.25A (Using a carriage service for sexual activity with person under 16 years of age); 25 years for the aggravated offence under s474.25B (Aggravated offence--child with mental impairment

[4] Van Dijk, J.J.M., van Kesteren, J.N. & Smit, P. (2008). *Criminal Victimisation in International Perspective, Key findings from the 2004-2005 ICVS and EU ICS.* The Hague, Boom Legal Publishers; and ICM Research (2006). *Victims of crime survey.* London: Smart Justice and Victims Support.

[5] Doak, J., Henham, R. & Mitchell, B. (2009), "Victims & the Sentencing Process: Developing Participatory Rights?", *Legal Studies* vol.29.

[6] For example, s7B of the *Victims of Crime Act 2001* (SA) provides that the Commissioner for Victims' Rights may provide the court with a "neighbourhood impact statement" and /or a "social impact statement", which operate as forms of "community impact statement" in addition to any individual victim impact statements. Further, s16A provides that a public agency or official must, if requested to do so by the Commissioner, consult with the Commissioner regarding steps that may be taken by the agency or official to further the interests of— (a) victims in general; or (b) a particular victim or class of victim.

[7] G. Urbas, 'Look who's stalking: Cyberstalking, online vilification and child grooming offences in Australian legislation', *Internet Law Bulletin*, vol.10 no.6, 2008, pp 62-67; G. Urbas, 'Protecting Children From Online Predators: The Use of Covert Investigation Techniques by Law Enforcement', *Journal of Contemporary Criminal Justice*, vol.26, no.4, 2010, pp 410-425.

or under care, supervision or authority of defendant); 15 years under s474.26 (Using a carriage service to procure persons under 16 years of age); and 12 years under s474.27 (Using a carriage service to "groom" persons under 16 years of age).

11. By contrast, the maximum of 5 years under s66(1) of the *Crimes Act 1900* (ACT) for the analogous offence (Using the internet etc. to deprave young people) is inadequate. The Criminal Proceedings Legislation Amendment Bill 2011 (ACT) proposes to increase it to 7 years. This is also supported, but as noted above, a higher penalty would also be justifiable in line with penalty levels for similar offences in NSW.[8]

12. Finally, the penalties for offences in s60(1) and s60(2), relating to acts of indecency with children, should also be increased in line with the offences discussed above. We note that, although this offence makes no reference to computers or technology, it may be applicable to situations such as "sexting" where a child is coerced or pressured into sending explicit images of himself or herself to another person. At present, the ACT has no specific offence relating to sexting, but developments elsewhere suggest that this may need to be considered in the future.[9]

Trial by judge alone

13. The widespread use of judge alone trials for serious offences, including homicide, has been an area in which the ACT has been notably different in its legal practice and culture from other Australian jurisdictions. While there is no constitutional requirement for jury trials in indictable proceedings in the ACT (as opposed to federal indictable offences), the provisions allowing for election of trial by judge alone at the sole discretion of the accused appear to be unique.

14. Currently, s68B of the *Supreme Court Act 1933* (ACT) provides that a trial must be by judge alone where the accused elects this option freely and in writing, with advice from counsel. The Criminal Proceedings Legislation Amendment Bill 2011 (ACT) amends subsection (1) and adds a subsection (4), in effect excluding a range of serious offences (including homicide and related offences, as well as sexual offences) from the scope of s68B. This means that such offences would in future be tried before juries.

15. A number of cases in the ACT Supreme Court involving homicide and other serious offences have raised community concern about the prevalence of judge alone trials.[10] While we cannot say that any of the outcomes in these cases

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[8] See *Crimes Act 1900* (NSW), s66EB (Procuring or grooming child under 16 for unlawful sexual activity), where penalties for a range of offences run to 12 or 15 years (depending on a child's age).

[9] Some US States have specific "sexting" offences. In Australia, this activity may fall within existing child pornography or obscenity offences: see 'Kids could be charged with 'sexting' on mobiles' *The Australian* (18 March 2010): http://www.theaustralian.com.au/news/breaking-news/kids-could-be-charged-over-sexting-on-mobiles/story-fn3dxity-1225842527715

[10] For example, *R v Singh* [1999] ACTSC 32 (23 April 1999); *R v King* [2004] ACTSC 82 (3 September 2004); *R v Porritt* [2008] ACTSC 33 (22 April 2008).

would have been different had a jury been involved, the degree of public confidence in the courts' decision-making would arguably have been greater.

16. Criminal justice claims to represent the public and to 'do justice' in the public interest. Juries represent one of the few ways in which the public actually are involved in the justice process. Recent seminal research conducted on juries in Tasmania has demonstrated the critical importance of juries as informed opinion-givers and decision-makers.[11] This research shows that a number of potent myths are indeed false. Instead, the research confirms that juries, as representatives of the public, are generally not punitive and have views that are context specific and multi-dimensional.

17. The involvement of juries in the criminal justice system is therefore a critical element to its claim to legitimacy, a crucial means of bringing community opinion into the justice process, an important mechanism for informing public opinion, and a key platform for building community confidence in the fair administration of justice. We strongly support this amendment.

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[11] Warner, K., Davis, J., Walter, M., Bradfield, R. and Verney, R. (2011), 'Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study', *Trends & Issues*, No.407, February 2011, Australian Institute of Criminology, Canberra.