ACT Department of Justice & Community Safety

HUMAN RIGHTS UNIT

Memorandum of Compatibility

CRIMES (BILL POSTING) AMENDMENT BILL 2008

This memorandum advises on the compatibility of the *Crimes (Bill Posting) Amendment Bill 2008* (the Bill) with the *Human Rights Act 2004* (the HRA).

Overview

1. The Bill remakes the current offence in section 120 the *Crimes Act 1900* to create a strict liability offence to unlawfully affix a placard or paper, or mark with chalk, paint or any other material on public or private premises. The effect of the new section 120 is to broaden the operation of the offences already contained in the section. Section 120 currently deals with the marking of private or public property without the consent of the owner or occupier (in the case of private property), or unlawfully (in the case of public property). The new section broadens the operation of the offences to include the affixing of placards or paper to such property.

2. The Bill also amends the *Crimes Act 1900* to create an obligation on a person promoting an event as part of a business or undertaking to ensure that the event is promoted cleanly. This obligation requires the promoter to take reasonably practicable steps to ensure that the offence in section 120 of the *Crimes Act 1900* is not committed in relation to any promotional material which may be produced in connection with the event. That is to say, the obligation requires an event promoter to take reasonably practicable steps to ensure any promotional materials produced in relation to the event are not unlawfully affixed to public or private premises.

3. The Bill creates an offence of failing to comply with the statutory duty to take reasonably practicable steps to ensure the event is promoted cleanly, which is punishable by 100 penalty units.

Human Rights Implications

4. After having examined the Bill, we are of the view that the offence in section 120 of the *Crimes Act 1900* engages two rights in the *Human Rights Act 2004* (the HRA); the right to freedom of expression in section 16(2), and the presumption of innocence in section 22(1).

The right to free expression — section 16(2) of the HRA

5. section 16(2) of the HRA provides that:

> (2) *Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.*

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6. The precise boundaries of this right are not specified, and the jurisprudence of superior courts of other countries is instructive. We note that section 31 of the HRA provides that international law, and the judgments of foreign and international tribunals, may be considered when working out the nature and extent of a right in the HRA. For the purpose of this memorandum, we will draw principally from the jurisprudence of the Canadian Supreme Court and the United States Supreme Court, both of which have a substantial body of case law dealing with the nature and limits of the right to free speech.

The use of public property in facilitating free speech

7. Section 120 of the *Crimes Act 1900,* as amended by the Bill, makes it an offence to unlawfully affix a placard or paper, or mark with chalk, paint or any other material on public property. For the purpose of assessing compatibility with the HRA, the following question arises: does the right to freedom of expression imply or require access to, or the use of, public property for the purpose of facilitating free expression? Put differently, does restricting the ability of people to use or access public property for the purpose of facilitating the expression of thought, opinion, or ideas amount to a limitation on the right to freedom of expression in section 16(2) of the HRA? If it does, then section 120 of the *Crimes Act* arguably engages section 16(2), as it restricts the use of public property for such purposes.

8. In *Canada v Committee for the Commonwealth of Canada* [1991] 1 S.C.R. 139, the Canadian Supreme Court considered whether limitations on using public space (in this case an airport) for the purpose of advertising, or carrying on a business or other undertaking, contravened section 2(b) of *Canadian Charter of Rights and Freedoms.* Section 2(b) of the *Charter* provides that everyone has "freedom of though, belief, opinion and expression, including freedom of press and other media of communication." In this case, the respondents distributed pamphlets in an airport whilst proselytisng about their particular political cause.

9. The Court undertook an extensive analysis of both Canadian and United States jurisprudence between the intersection of the right to free expression and the use of public property in the exercise of that right. All members of the Court agreed that the right to freedom of expression necessarily implied a right to access public property in order to exercise that right, subject to reasonable and proportionate limitations. L'Heureux-Dube J explained that:

> If members of the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression. Only those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated), would be able to engage in free expression. This would subvert achievement of the *Charter*'s basic purpose as identified by this Court, i.e., the free exchange of ideas, open debate of public affairs, the effective working of democratic institutions and the pursuit of knowledge and truth. These eminent goals would be frustrated if for practical purposes, only the favoured few have any avenue to communicate with the public.

10. His honour continued that:

> "…the government cannot have complete discretion to treat it's property as would a private citizen. If members of the public had no right whatsoever to engage in expressive activity on government-owned property, little opportunity would exist to exercise their freedom of expression.

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11. In reaching their conclusion, a number of members of the court, writing separate decisions, acknowledged the persuasiveness of the United States Supreme Court jurisprudence on the "public forum" doctrine, forming part of that Court's First Amendment jurisprudence. In *Hague v Committee for Industrial Organisation,* 307 U.S. 496 (39), the U.S. Supreme Court explained that the government holds public property 'on trust' for the benefit and use of the public, and as such, it should allow members of the public to use 'their' property for the furtherance of their fundamental rights :

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

12. In exploring this doctrine, Lamer CJ cited with approval the comments of Hugessen JA in the Canadian Federal Court where he observed that:

> The government … owns its property not for its own benefit but for that of the citizen. Clearly the government has a right, even an obligation, to devote certain property for certain purposes and to manage "its" property for the public good. The exercise of this right and the performance of this obligation may, depending on the circumstances, legitimize the imposition of certain limitations on fundamental freedoms. Of course the government may limit public access to certain places; of course it may also act to maintain law and order; but it cannot make its ownership right a justification for action the only purpose and effect of which is to impede the exercise of a fundamental freedom.

13. Lamer CJ then went on to accept that:

> an absolutist approach to the right of ownership fails to take into account that the freedom of expression cannot be exercised in a vacuum and that it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression. I therefore conclude that, as a consequence of its special nature, the government's right of ownership cannot of itself authorize an infringement of the freedom guaranteed by s. 2(*b*) of the *Charter*.

14. In *City of Peterborough v Ramsden* [1993] 2 S.C.R. 1084 the Canadian Supreme Court considered whether a local by-law which made it an offence to place or attach any bill, poster or other advertisement on public property contravened the right to free expression in the *Charter.* In that case a musician had attached pamphlets of an upcoming concert that he was to play in to a number of power poles. The Court affirmed its decision in *Committee for the Commonwealth of Canada,* and observed that:

> "Generally speaking, a poster does not interfere with the use of the utility pole as a utility pole. It does not deprive the public of the use of such a pole." Without considering other types of public property, it is clear that postering on <u>some</u> public property, including utility poles, is compatible with the primary function of that property.:

15. In reaching this conclusion the Court was cognisant of the role that postering in public has played in furthering free speech. It cited academic texts which have noted that:

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> …it was early recognized that posters were an effective and inexpensive way of reaching a large number of persons. In order to be effective, posters of course must be affixed to a surface and publicly displayed. Posters are traditionally used by minority groups to publicize new ideas or causes. Posters are both a political weapon and an educational device. According to Mr. Stacey, one measure of the openness of a democratic society has been the willingness of the authorities to allow postering. . . . Posters are an economic way of spreading a message. Utility poles have become the preferred postering place since the inception of the telephone system. . . . Posters have always been a medium of communication of revolutionary and unpopular ideas. They have been called "the circulating libraries of the poor." They have been not only a political weapon but also a means of communicating artistic, cultural and commercial messages. Their modern day use for effectively and economically conveying a message testifies to their venerability through the ages.

16. In *Guignard v R* [2002] 1 S.C.R. 472 the Canadian Supreme Court affirmed its decision in *Ramsden,* and struck down a by-law that prohibited the erection of advertising signs outside of a commercial zone. The Court also acknowledged that the right to freedom of expression encompassed the right to commercial expression. It accepted that the need for commercial expression "derives from the very nature of our economic system, which is based on the existence of a free market", and that "[t]he orderly operation of that market depends on consumers and businesses have access to abundant and diverse information."

17. It is instructive to note that the Court accepted that "the prevention of visual pollution is a reasonable objective" and "it is easy to understand the reasons that prompt municipalities not to allow any kind of sign, in any place at any time". The Court ultimately found, however, that notwithstanding that the prevention of visual pollution is an objective of sufficient importance to justify limitations on the right to free expression, in this case the by-law was disproportionate because of its arbitrary nature, and because it did not impair the right as little as possible, and was "disproportionate to any benefit that it secures for the municipality".

18. After considering these authorities we are of the view that the right to freedom of expression in section 16(2) of the HRA necessarily implies that people should have **some** degree of access to public spaces in order attach posters or flyers, or distribute other promotional material, in the furtherance of this right. As in the case law referred to, we do not propose to define with any precision the extent of the right to use public property for the purpose of exercising the right in section 16(2) of the HRA. Nor do we propose to identify what public buildings, places or thoroughfares may be used for this purpose and which cannot. Suffice to say that we are satisfied that, in order that the right contained in section 16(2) of the HRA be meaningful and effective, it will be necessary for government to make available, or at least not prevent, some public places from being used for the purpose of attaching posters or pamphlets.

19. We also acknowledge that this obligation is not absolute, being subject to limitations which are reasonable and proportionate. The considerations set out in page 5 of the Explanatory Statement to the Bill, including the fact that the government provides designated areas for posters to be attached, the cost of cleaning up expired posters, and the damage that postering can cause to some buildings, should be instructive in determining where those limits lie.

The interpretive provision in section 30 of the HRA

20. It follows that, if the offence in section 120(2) of the *Crimes Act 1900* prevent*s* people from affixing or attaching posters or pamphlets to public property in the exercise of their right to

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freedom of expression beyond that which is reasonable and proportionate, it will be inconsistent with the HRA.

21. We think that in light of section 30 of the HRA, the offence in section 120(2) of the *Crimes Act* would need to be interpreted in a manner consistent with the HRA. The use of the interpretive rule in section 30 will ensure that the offence is only applied in a manner consistent with section 16(2) of the HRA.

22. Section 30 provides that:

> *So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.*

23. We note that section 30 of the HRA was amended by the *Human Rights Amendment Act 2008.* The explanatory statement to that Act makes clear that section 30, as amended, makes it consistent with the approach taken to the interpretive provision in section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Human Rights Consultation Committee Report on the Victorian Charter of Human Rights, which was the document which recommended to the Victorian Parliament that a charter of human rights be enacted, and proposed a draft bill (which was subsequently enacted), explains that the interpretive provision in that Act was "consistent with some of the more recent cases in the United Kingdom where a more purposive approach to interpretation was favored.[1] The Committee Report referred to the House of Lords decision in *Ghaidan v Ghodin-Mendoza*[2004] UKHL 40 as an example of such a case. This case was also referred to in the Explanatory Statement to the *Human Rights Amendment Act 2008.*

24. In *Ghaidan,* Nicholls LJ observed that "it is now generally accepted that the application of section 3 [the interpretative rule] does not depend upon the presence of ambiguity in the legislation being interpreted." The House of Lords has also 'read down' legislation, and 'read in' words to legislative provisions to give them a meaning which is not inconsistent with a human right, provided that doing so is not inconsistent with the purpose or intention of the legislature: *R v A (No 2)* [2001] UKHL 25.

25. For the purpose of this Bill, we note that section 120(2) of the *Crimes Act* would not prohibit the act of affixing any placards or paper to a public building *per se*; rather, it is only an offence to <u>unlawfully</u> affix placards or paper on public property. The meaning of 'unlawfully' for the purpose of the offence is not defined, although given its plain and ordinary meaning, we would take it to include actions which would be contrary to the civil law (for example, the common law of tort as it applies to trespass to property). In *Lyons v Smart* (1908) 6 CLR 143, the High Court considered the meaning of the word 'unlawfully' as it applied to an offence under the *Customs Act 1901* (Cth). In that case O'Connor J observed that "'[u]nlawfully' is a term commonly used in the description of offences and with a wide variety of meaning depending on the context in which it is found".

[1] Rights, Responsibilities and Respect — The Report of the Human Rights Consultation Committee, November 2005, Victorian Department of Justice, p. 83.

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26. In light of section 30 of the HRA we think the word 'unlawfully' in section 120(2) can, and indeed must, be 'read down' such that it does not encompass the actions of people engaging in the prescribed conduct in the furtherance of their right in section 16(2) of the HRA. Alternatively, depending on one's perspective, section 30 of the HRA could be seen to 'read in' a qualification to the word 'unlawfully' such that the person will only be guilty of the offence where they (a) engage in the prescribed conduct in contravention of a statutory provision or a rule of common law (be it criminal or civil law rule); and (b) the person is not acting within the scope of the right contained in section 16(2) of the HRA. We see nothing of the wording of section 120(2) which suggests that the purpose of the offence is to limit altogether the ability of people to affix placards or papers to public property altogether; similarly, we do not see anything in the wording of the offence which conveys an express intention to curtail a person's rights under section 16(2) of the HRA.

27. Accordingly, in our view, section 120(2) of the *Crimes Act,* as interpreted in light of section 30 of the HRA, would not limit the ability of a person to engage in conduct which is protected by the right to freedom of expression in section 16(2) of the HRA.

The presumption of innocence

28. The two offences contained in section 120 of the *Crimes Act,* as amended by the Bill, are strict liability offences. We are of the view that strict liability offences engage the presumption of innocence in section 22(1) of the HRA.

29. Section 22(1) provides that:

> *(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.*

30. The Canadian Supreme Court has held that strict liability offences engage the presumption of innocence: *Travel Group Inc v R* [1991] 3 S.C.R. 154. This is because all strict liability offences provide the defendant with the defence of 'mistake of fact', and a consequence of this is that a person should not be held liable for a criminal offence where they were acting under a mistaken but reasonable belief about the existence of facts which, had they existed, would mean that no offence would have been committed.[2] In essence, the absence of a mistake of fact is an element of the offence which, if established, means the offence is not proved; however, the burden is on the defendant to establish the existence of this element, and not the prosecution to disprove it. In other words, the absence of a mistake of fact will be presumed to exist unless put in issue by the defendant.[3]

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[2] Section 36, *Criminal Code 2002.*

[3] See Andrew Ashworth, "Human Rights, Serious Crime and Criminal Procedure", (2002: London, Sweet & Maxwell), pp 14-17; Victor Tardos and Stephen Tiereny, "The Presumption of Innocence and the Human Rights Act", *The Modern Law Review,* 2004, Vol. 67, Issues 3, 402. This approach was accepted as correct by the ACT Government in its submission to the ACT Legislative Assembly's Standing Committee on Legal Affairs Inquiry into Strict and Absolute Liability Offences in the ACT. This view has also been advanced by the ACT Legislative Assembly Standing Committee on legal Affairs (Scrutiny of Bills): see *Scrutiny if Bills Report No. 38, October 2003,* p. 16.

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31. The presumption of innocence will be engaged wherever an accused may be convicted despite the existence of a reasonable doubt: *R v Whyte* [1988] 2 S.C.R. 3. That doubt may exist because a burden is placed on the defendant to disprove something, and the defendant has not, for whatever reason, sought to discharge that burden. The Canadian Supreme Court explained this concept succinctly in *Whyte v R* [1988] 2 S.C.R. 3. when it observed that:

> The distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry [into whether the presumption of innocence has bee breached]. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive.

32. With respect to strict liability offences, where a person does adduce or point to evidence which points to a mistake of fact, it is possible that they may be convicted despite the existence of a reasonable doubt: it cannot, as a matter of logic, be inferred that just because the defendant doesn't point to such evidence that a mistake of fact did not exist; it simply means that, for whatever reason, the defendant has not pointed to it. If the defendant does not raise the issue, it would be possible for them to be convicted of the offence, even though they may have been acting under a mistake of fact. Thus a defendant could be convicted notwithstanding the existence of a reasonable doubt.

33. Of course, the presumption of innocence is not absolute, and it will be possible for offences to be constructed using strict liability which would be reasonable and demonstrable justified: *R v The Corporation of the City of Sault St. Marie* [1978] 2 S.C.R. 1299. Similarly, there are a number of other defences which cast a burden on the defendant which therefore engage the presumption of innocence, but which nonetheless are reasonable and can be demonstrably justified. Self-defence is one such example. In assessing whether the limitation on the presumption of innocence occasioned by a strict liability offence is reasonable and demonstrably justified, regard must be had to a number of factors including:

- whether the accused was "put on notice" of a requirement to do an act, and a failure to do so will result in the commission of an offence;
- whether the accused can be reasonably expected to know, because of their admission to a particular profession or the requirements of a regulatory regime to which they are a part of, to know their legal obligations under that regime;
- whether the commission of the conduct constituting the offence is technical in nature, or whether it the commission of the conduct is "morally blameworthy" or "repugnant": see *Wholesale Travel Group Inc v R* [1991] 3 S.C.R. 154;
- whether the burden on the defendant to raise a mistake of fact is an evidential or legal one;
- whether requiring the prosecution to prove a subjective *mens rea* or higher level of fault would impose a difficult or impossible burden on it, thereby undermining the legitimate regulatory objectives of the state; and
- the severity of the penalty for the offence. A penalty of imprisonment is very serious, and requires exceptional justification.

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34. In *Travel Group Inc* a majority Court drew a distinction between 'true crimes', and regulatory offences. The Court observed the earlier distinction it had drawn in *R. v. City of Sault Ste. Marie*[1978] 2 S.C.R. 1299. In that case Dickson J (as he then was), writing on behalf of a unanimous Court , recognised:

> public welfare offences as a distinct class. .. such offences, although enforced as penal laws through the machinery of the criminal law, "are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application."

35. Cory J, writing for the majority in *Travel Group Inc,* observed that:

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

36. The Court recognized that strict liability offences would be more readily justified when applied to regulatory offences which do not imply the same degree of moral blameworthiness as 'true crimes'.

37. In the interest of completeness, we turn to the British jurisprudence on the intersection between the presumption of innocence and strict liability offences. The British High Court has taken a different approach to the Canadian Courts in assessing whether the presumption of innocence is engaged by strict liability offences. In *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418 the High Court held that presumption of innocence in the *Human Rights Act 1998* (UK) is "not a criterion against which the substance of an offence can be scrutinsed" and "does not impose any restrictions on the power of Parliament to create strict liability offences". With respect, we find the logic implicit in this position to be unsound, and note that it has been the subject of substantial criticism by academic commentators:

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> [the British approach] leads to the absurd conclusion that a reverse onus defence to an offence of strict liability may be held incompatible with Article 6(2) where the very same offence will be regarded as compatible as a whole if no defence exists at all.[4]

38. We find the jurisprudence of the Canadian Supreme Court to be more persuasive and coherent than that of the British High Court, and therefore prefer the Canadian jurisprudence as being the correct approach.

39. Applying the above principles to the strict liability offences in section 120 of the *Crimes Act,* as would be amended by the Bill, we believe that they impose reasonable and proportionate limitations on the presumption of innocence in section 22(1) of the HRA. We are of the view that the offence is essentially of a regulatory nature in that it does not regulate conduct which is 'inherently wrongful', or conduct that is 'so abhorrent to the basic values of human society that it ought to be prohibited completely'. Rather, it is intended to ensure that the aesthetic value of the public and private spaces is not unduly undermined, to protect buildings from damage, and to ensure that a person who attaches papers or placards to builders exercises care in making sure that they are acting lawfully. We also note that the defence of mistake of fact which is available to a defendant charged with this offence only imposes an evidential burden, as opposed to a legal or 'persuasive' burden, on the accused: it is only incumbent on the accused to present or point to evidence which suggests that there is a 'reasonable possibility' that they acted under a mistake of fact.[5] If the defendant discharges this onus, the burden is then put back on the prosecution to disprove beyond reasonable doubt that they did not act under a mistake of fact.[6]

40. Accordingly, we are of the view that the Bill is consistent with the HRA.

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[4] Victor Tardos and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act', *Modern Law Review,* 2004, Volume 67 Issue 3, p. 402; *cf* Paul Roberts, 'The Presumption of Innocence Brought Home? Kebilene Deconstructed', *Law Quarterly Review*, 2002, 118 (JAN), 41-71; see also the ACT Government Submission to the ACT Legislative Assembly Standing Committee on Legal Affairs Inquiry into Strict Liability Offences in the ACT, April 2006, p. 7.

[5] Subsections 58(4) and (7), *Criminal Code 2002.*

[6] Section 56(2), *Criminal Code 2002.*

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