Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Scrutiny Report

7 APRIL 2008

Report 53

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (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 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.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, 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.

BILLS

Bill—No comment

The Committee has examined the following Bill and offers no comments on it:

RATES (FIRE AND EMERGENCY SERVICES LEVY REPEAL) AMENDMENT BILL 2008

This is a Bill to amend the *Rates Act 2004*.

Bills—Comment

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

CHILDREN AND YOUNG PEOPLE BILL 2008

This is a Bill for an Act to provide for the protection, care and wellbeing of children and young people in the Australian Capital Territory. It regulates matters such as: children and young people using childcare services; in employment; in the criminal justice system; and for whom there are care and protection concerns.

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

Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

The Committee's review of the Bill and of the Explanatory Statement allows it to say that on the part of the architects of the Bill there has been a systematic and thorough attempt to have its provisions conform to the rights stated in the *Human Rights Act 2004*, various international rights instruments, and the common law.

The Committee commends the Explanatory Statement for the care taken and the detail of its consideration of rights issues.

HRA subsection 38(1) requires the Committee to "report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly". While this is not its only concern, this aspect of its work is critical and in this report is placed at the forefront.

The statement in the Explanatory Statement of the ways in which provisions of the Bill engage the HRA

In this part of the report, the Committee will list those instances where the Explanatory Statement has identified that a question arises as to whether a provision of the Bill is compatible with the HRA. In these instances, the Committee has little to add to the way the Explanatory Statement has posed and dealt with the matter. Unless otherwise indicated by matters enclosed in square brackets, the matter in this section of the report is taken from the Explanatory Statement.

Page 12 – Clause 10 – Aboriginal and Torres Strait Islander children and young people principle

(See below for further detail.)

This principle engages the right to equal protection of the law without discrimination, at section 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004* because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in the child protection and criminal justice systems.

Page 55 – Clause 180 – Chief Executive's consent to medical treatment for young detainees

This clause allows the Chief Executive to consent to the medical treatment in these circumstances if delaying the treatment would be detrimental to the child or young person's health. This upholds the child or young person's right to protection under section 11(2) and the right to life under section 9 of the *Human Rights Act 2004*.

Page 58 – Clause 188 – Transgender and intersex young detainees—sexual identity

Sub-clause (5) therefore introduces a power for the Chief Executive to obtain a report by a health professional about the young detainee's sexual identity, if the Chief Executive reasonably believes the report is in the best interests of the young detainee and is necessary to make a decision in relation to the young detainee's placement or case management. This power engages human rights law, in particular sections 10(1)(b) (inhuman or degrading treatment), 11(2) (protection of the child), 12 (privacy), and 19(1) (humane treatment) of the *Human Rights Act 2004*. However the limitation on these rights is proportionate as the power is necessary to protect the safety and emotional wellbeing of the young detainee and other young detainees.

Page 59 – Clause 192 – Mandatory reporting of threats to security etc at detention place

This requirement engages human rights law, in particular sections 11(2) (protection of the child), and 12 (privacy) of the *Human Rights Act 2004*. However the limitation on these rights is proportionate as the power is necessary to protect the safety of everyone in the detention place.

Page 60 – Division 6.6.2 – Monitoring

Section 12 of the *Human Rights Act 2004*, provides that everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

A consequence of lawful detention is the inevitable displacement of that right to a degree necessary to secure the person in custody and to run a safe detention place.

[*Committee note*: the Explanatory Statement does not elaborate, but on their face, the limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 65 – Division 6.6.4 – Use of force

This division authorises the use of force and prescribes for the proportionate use of force. The inappropriate use of force could potentially cause injury to the young detainee, limits the ability of individuals to move freely and is inherently degrading. It therefore engages human rights law, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the *Human Rights Act 2004*.

[*Committee note*: the Explanatory Statement does not elaborate, but on their face, the limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 67 – Division 6.6.6 – Maintenance of family relationships

The Standing Committee on Community Services and Social Equity's report, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence* recommended that young people, whether on remand or sentenced, who are primary caregivers for their children should be allowed to maintain their children up to pre-school age with them in a place of detention, where that is assessed as being in the younger child's best interests. The ACT Human Rights Commissioner in the *Human Rights Audit of Quamby Youth Detention Centre* endorsed this recommendation.

In response to these recommendations, this division allows a young detainee who is a primary caregiver for their child aged up to 6 years old, to have contact with, or care for their child, in a detention place subject to directions and any youth detention policy or operating procedure in place. This division upholds the human rights to protection of the family and children outlined at section 11 of the *Human Rights Act 2004*

Page 68 – Division 6.7 – Alcohol and drug testing

The powers to conduct alcohol and drug testing outlined in this division, engages the right to privacy and reputation at section 12 of the *Human Rights Act 2004*, however it is a reasonable and proportionate limitation as it is necessary to protect the safety of all people in the detention place.

Page 71 – Chapter 7 – Criminal matters—search and seizure at detention places

The provisions in this chapter re-enact provisions introduced as part of the *Children and Young People Amendment Act 2007*. New provisions include those that relate to searches of other people and use of search dogs.

Searches of young detainees are necessary to prevent the entry of unauthorised items that may harm any person within a youth detention place, including young detainees. The *Human Rights Act 2004* provides at section 9 that everyone has the right to life. Public authorities have a positive duty to protect the life of a person in care or custody of the Territory. This search and seizure scheme, involving the use of force in certain circumstances, will protect against the unlawful admittance of contraband which could threaten the safety of young detainees.

Strip searches and searches of body cavities are inherently degrading, and therefore engage human rights law, in particular sections 10(1)(b) (inhuman or degrading treatment), 11(2) (protection of the child), 12 (privacy), and 19(1) (humane treatment) of the *Human Rights Act 2004*.

To ensure that searches of young detainees are proportionate to the necessary aim of the searches, the chapter introduces a number of obligations on persons conducting or assisting with a search. These obligations (outlined below) are introduced to ensure that young detainees who are searched are treated humanely and with respect for their inherent dignity, and are protected from unlawful or arbitrary interferences with their privacy.

Some of the primary obligations include:

- Searches must be conducted in an area providing reasonable privacy;
- The degree of visual inspection is limited to that which is strictly necessary;
- A requirement to consider any information known about the young detainee's individual characteristics such as age, maturity, developmental capacity and history (for example - history of abuse, impairment, sexuality, and religious or spiritual beliefs) in deciding whether an invasive search is necessary and in how that search is conducted; and
- A requirement to consider the individual circumstances of the young detainee to determine if it is necessary and prudent for a person with parental responsibility (or support person for young detainees over 18 years) to be present during a strip search on admission or a body search.

Page 79 – Clause 277 – Searches – use of force

This clause explicitly enables the use of force to carry out a search or secure anything seized, or that needs to be seized, in a search. The effect of this clause is that reasonable force can be used to secure a young detainee's compliance with the search.

The inappropriate use of force could potentially cause injury to the young detainee, limits the ability of individuals to move freely and is inherently degrading. It therefore engages principles of human rights, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the *Human Rights Act 2004*.

[*Committee note*: the Explanatory Statement does not elaborate, but on their face, the limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 83 – Clause 288 – Meaning of privilege

This clause provides that a 'privilege' is any benefit a young detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6. In this chapter, loss of privilege can be imposed as an administrative penalty in response to a behaviour breach or minor behaviour breach.

The meaning of privilege is not intended to include using common areas at a detention place for mixing with other young detainees, or participating in activities other than those forming part of a young detainee's case management plan. Freedom of association is a fundamental human right, the application of which is reinforced by section 15 of the *Human Rights Act 2004*.

Page 96 – Chapter 10 – Care and protection—general

This chapter includes general matters relating to care and protection such as principles and considerations and overarching concepts.

Section 11(1) of the *Human Rights Act 2004* provides that the family is the natural and basic group unit of society and is entitled to be protected by society. The care and protection principles outlined at clause 349 emphasise that the primary responsibility for providing care and protection for children and young people rests with their parents and family members (clause 349(1)(a)) and support should be given to parents and family members to provide for the care, protection and wellbeing of children and young people (clause 349(1)(b)). However, the care and protection chapters place reasonable limits on this right in circumstances where a child or young person has been abused or neglected or is at risk of abuse or neglect and is in need of some form of protective intervention from the State through reporting, appraising and care and protection orders tailored to meet the child or young person's protective needs. This gives effect to section 11(2) of the *Human Rights Act 2004* which provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The care and protection chapters include cultural plans and a placement principle for Aboriginal and Torres Strait Islander children and young people at clause 512. This engages the right to equal protection of the law without discrimination, at section 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004*, because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians separated from families[1] and their over-representation in the child protection system.

Page 99 – Clause 349 – Care and protection principles

A new principle has been included to emphasise that the safety and wellbeing of children and young people who have been removed from their parents is paramount over the interests of their parents. This principle seeks to balance the right of the child or young person to protection at section 11(2) of the *Human Rights Act 2004* with the interests of parents and the right to protection of the family at section 11(1) of the *Human Rights Act 2004*.

[*Committee note*: the Explanatory Statement does not elaborate, but on their face, the limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

[1] Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997, HREOC

Page 106 – Division 11.1.3 – Prenatal reporting of anticipated abuse and neglect

The prenatal reporting provisions may be considered to encroach upon the pregnant woman's rights and liberties, in particular, the right not to have her privacy (and family) interfered with unlawfully or arbitrarily (section 12, *Human Rights Act 2004*) and the right of the family to protection (section 11, *Human Rights Act 2004*). Section 28 of the *Human Rights Act 2004* provides that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

In considering the reasonableness of the intrusion on these rights, the following factors have been considered:

- child death reviews across Australia have consistently identified the need for legislative provisions that allow concerns about children (who may be born as a result of pregnancy) to be reported and responded to, in order to provide early support;
- the objective of these provisions is to reduce the likelihood the child will be in need of care and protection when born. This will be achieved through the Chief Executive providing or arranging the provision of appropriate support services to the pregnant woman with her consent; and
- to ensure that intervention by the Chief Executive is proportionate and least restrictive, the Bill does not enable the Chief Executive to take action to compel a pregnant woman to do or not do something.

Page 120 – Part 13.1 – Emergency action

This part outlines when a child or young person is in need of emergency care and protection or emergency therapeutic protection and confers powers on the Chief Executive and police officers to take action to ensure the child or young person's safety in emergency circumstances. …

Part 13.2 provides a mechanism for judicial oversight immediately after emergency action has been taken. Upon application by an affected person or the Public Advocate, the Childrens Court may, by order, reverse the decision or action of the Chief Executive or a police officer and make an order for the release of the child or young person from the Chief Executive or police officer's daily care responsibility and placement into the care of a person stated in the order.

The Government considers that, in these circumstances, the powers exercised under the Bill are adequately defined and subject to appropriate judicial review and are therefore proportionate under section 28 of the *Human Rights Act 2004.*

[*Committee note*: the Explanatory Statement does not identify the relevant rights, but by analogy with what has been said about similar provisions, it probably had in mind HRA subsections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), section 13 (freedom of movement) and subsection 19(1) (humane treatment).]

Page 135 – Clause 454 – What is a care plan?

[The Explanatory Statement earlier described a care plan as "a written document outlining the Chief Executive's proposals for the care and protection of the child or young person".]

This clause outlines the meaning of a care plan for a child or young person who is or proposed to be subject to a care and protection order or interim care and protection order.

Sub-clause (b)(ii) allows the Chief Executive to include cultural proposals in care plans for Aboriginal and Torres Strait Islander children and young people subject to, or proposed to be subject to interim or final care and protection orders. Under the 1999 Act, such proposals were limited to Aboriginal and Torres Strait Islander children and young people who were in out of home care. This proposed positive discriminatory measure is a justifiable limitation on the right to recognition and equality before the law under the *Human Rights Act 2004*, as it recognises the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in the child protection system and in out of home care.

Page 144 – Clause 476 – Short-term parental responsibility provision—extension

The intention of this clause is to limit the making of multiple short term parental responsibility provisions (of up to 2 years in duration) and to create a presumption for the child or young person to be subject to a long-term parental responsibility provision after being in out of home care for the 2 year period of a short term parental responsibility provision.

The clause creates a rebuttable presumption that it is in the best interests of the child or young person to be subject to a long term parental responsibility provision (until 18 years) when an application to extend a short term parental responsibility provision is made. This presumption can be rebutted by a parent or other person who has had parental responsibility during the term of the order by satisfying the Childrens Court that the person is likely to be able to resume care of the child or young person during the period of the extension and it also in the best interests of the child or young person for the person to resume care.

The reverse onus of proof contained in this clause engages the right to a fair trial at section 21 of the *Human Rights Act 2004*. This is a justified limitation on the right to a fair trial as it balances the need to promote stability for children and young people in out of home care with the rights of parents or persons with parental responsibility to demonstrate to the Court their circumstances have changed sufficiently to resume parenting responsibilities for the child or young person and that it is in the best interests of the child or young person to be returned to their care.

Page 147 – Part 14.9 – Drug use provisions

This part introduces new clauses related to drug use provisions in a care and protection order. These provisions engage human rights outlined in the *Human Rights Act 2004*, including the protection of the family and children (section 11), right to privacy and reputation (section 12), and protection from torture and cruel, inhuman or degrading treatment or punishment (section 10(1)), and no medical or scientific experimentation or treatment without consent (section 10(2)):

The limitations on these rights are proportionate on the basis that:

- The objective of drug use provisions is to protect children and young people, particularly vulnerable infants, from significant risk of abuse and neglect due to a primary caregiver's parenting capacity being impaired because of their use of substances;
- The provisions seek to objectively monitor and address the level of risk to a child or young person in order to avoid more intrusive intervention which may involve separating the child or young person from their caregiver/s;
- The provisions may also inform planning to return a child or young person to a former caregiver through objectively assessing the fomer caregvier's use of drugs and their effect on parenting capacity.

Page 155 – Clause 512 – Priorities for placement with out-of-home carer—Aboriginal or Torres Strait Islander child or young person

(See below for detail.)

Page 161 – Chapter 16 – Care and protection—therapeutic protection of children and young people

The provisions relating to therapeutic protection engage human rights law. The Bill seeks to build in safeguards that protect against unlawful and arbitrary interferences with rights contained in the *Human Rights Act 2004* and to ensure the child or young person is confined at a therapeutic protection place for the shortest necessary time to reduce the risk to the child or young person.

This chapter requires the application of the human rights principle of proportionality, where the period of confinement and exercise of powers in the place of therapeutic protection must be limited to that which is reasonably necessary to safeguard the child's or young person's wellbeing and interests.

Page 168 – Clause 572 – Transgender and intersex children and young people—sexual identity

This power engages human rights law, in particular sections 10(1)(b) (inhuman or degrading treatment), 11(2) (protection of the child), 12 (privacy), and 19(1) (humane treatment) of the *Human Rights Act 2004*. However the limitation on these rights is proportionate as the power is necessary to protect the safety and emotional wellbeing of the subject child or young person and other children or young people in therapeutic protection.

Page 169 – Division 16.3.4 – Use of force [under the therapeutic protection scheme]

This division authorises the use of force and prescribes for the proportionate use of force. The inappropriate use of force could potentially cause injury to the child or young person, limits the ability of individuals to move freely and is inherently degrading. It therefore engages human rights, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the *Human Rights Act 2004*.

[*Committee note*: the Explanatory Statement does not elaborate, but on their face, the limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 170 – Division 16.3.5 – Searches [under the therapeutic protection scheme]

Searches of children and young people who are confined in a therapeutic protection place are necessary to prevent the entry of items that may harm the child or young person or other people within the place. The *Human Rights Act 2004* provides at section 9 that everyone has the right to life. Public authorities have a positive duty to protect the life of a person in the care or custody of the Territory. This search and seizure scheme, involving the use of force in certain circumstances, will protect against the unlawful admittance of dangerous things that could threaten the safety of children and young people at a therapeutic protection place.

Strip searches and searches of body-cavities are inherently degrading, and therefore engage human rights law, in particular sections 10(1)(b) (inhuman or degrading treatment), 11(2) (protection of the child), 12 (privacy), and 19(1) (humane treatment) of the *Human Rights Act 2004*.

To ensure that searches of children and young people are proportionate to the necessary aim of the searches, the division introduces a number of obligations on persons conducting or assisting with a search. These obligations are introduced to ensure that children and young people who are searched are treated humanely and with respect for their inherent dignity, and are protected from unlawful or arbitrary interferences with their privacy.

Page 193 – Clause 700 – Parties—hearing in party's or other person's absence

This clause allows for the Court to grant leave for a care and protection application to be heard ex parte, if service of the application would place a child or young person at significant risk of significant harm.

This clause engages the right to a fair trial at section 21 of the *Human Rights Act 2004*, which is aimed at ensuring the proper administration of justice by upholding the right to a fair and public hearing. Hearing an application ex parte limits the respondent's right to a fair trial or a fair hearing. This may involve an acceptance at face value of the truth of the allegations, without the respondent having been given a full opportunity to contest the allegations.

Ordinarily, the Bill requires that an applicant is required to give certain people notice of any application in relation to a child or young person (see for example, clause 444 in relation to assessment orders). However, in certain limited circumstances, giving notice of an application, for example by the Chief Executive to a parent or person with parental responsibility, would endanger the child or young person. For example, the Chief Executive, after receiving a child concern report which is deemed to be a child protection report, may assess that a child has experienced severe physical abuse by a parent and the parent has made threats to harm the child if the child tells anyone. To protect the child or young person in these circumstances, the Chief Executive may apply for an appraisal order by telephone contact with the Childrens Court Magistrate. Giving notice to the parent of an application for an appraisal order in these circumstances may place the child at a significant risk of significant physical harm. In these circumstances, the Chief Executive may seek an order from the Court to dispense with service of the application under clause 722.

A person's right to fair trial needs to be balanced with the child or young person's right to protection from significant harm. This limitation on the right to a fair trial is therefore reasonable and proportionate to the risk to the child or young person.

Page 216 – Chapter 23 – Enforcement

Entry to premises without consent of the occupier or a warrant issued by a judicial officer in these limited circumstances is necessary to ensure the protection of a child or young person at risk of immediate and significant harm or to fulfil the Chief Executive's duty of care to children and young people for whom the Chief Executive has parental responsibility or to fulfil an inspectorate role for licenced childcare services.

The Government considers that the objective of protecting children and young people in these circumstances overrides the fundamental legislative principle that power to enter premises should be conferred only with a warrant issued by a judicial officer.

[*Committee note*: There is no reference to the HRA, but the issue raised and dealt with could well be seen as one arising under at least HRA paragraph 12(a) (right to privacy). The limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 224 – Chapter 25 – Information and secrecy and sharing

The collection and sharing of personal information about children and young people (and people involved in their care) engages human rights law, in particular sections 11(2) (protection of the child) and 12 (privacy) of the *Human Rights Act 2004*. The reforms set out in this chapter seek to improve the balance between the need for information sharing in protecting the interests of children and young people while still maintaining an appropriate level of privacy protection.

[*Committee note*: The limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 229 – Division 25.3.2 – Sharing safety and wellbeing information

Section 12(a) of the *Human Rights Act 2004* provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The proposed framework places limitations upon the right to privacy to a degree necessary to protect the safety and wellbeing of children and young people in recognition of their vulnerability and the need to ensure their protection.

[*Committee note*: The limitations on the relevant right or rights appear to be justifiable under HRA section 28.]

Page 238 – Schedule 1

[The Explanatory Statement states that "Schedule one of the Children and Young People Bill provides for modern criminal justice laws that apply to children and young people", and it does so by amendment of other legislation. It refers to HRA subsection 22(3): "(3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation". The introductory rights discussion refers primarily to international rights instruments and to common law.]

Further consideration of the ways in which provisions of the Bill engage the HRA

In this part of the report, the Committee identifies a number of provisions of the Bill in respect of which it considers that there arises an issue deserving of particular comment. In part, the somewhat different emphasis given by the Committee to these issues reflects the particular interests that this Committee has over time developed.

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

Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

Strict liability offences

Several provisions of the Bill propose to create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable limitation of the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).

Most of these strict liability offences to be created are regulatory in nature,[2] and the penalty within an acceptable range for a strict liability offence – that is, the maximum penalty is 50 penalty points or less.

There is however a significant rights issue posed by clauses 230 and 231. Clause 230 authorises the Chief Executive to give a visitor directions to ensure the visitor complies with any conditions in force or to uphold the security or good order of a detention place, and clause 231 empowers the Chief Executive to refuse a person entry to a detention place and to direct a person to leave a detention place. Non-compliance with any such direction is a strict liability offence, punishable by 50 penalty points and/or imprisonment for 6 months. The Explanatory Statement offers this justification:

> The Government is of the view that a strict liability offence is warranted. The physical element of the offence, a failure to comply, is the critical feature of the offence. Providing for mental elements of the offence would diminish the regulating purpose of the offence.

The Committee does not regard this as satisfactory. This line of justification could apply to those many offences where it is the commission of the physical elements that is the critical element. The criminal law is not often concerned primarily with the mental state of the accused. The argument that providing for a fault element "would diminish the regulating purpose" comes close to saying that it will be easier to establish guilt if there is no fault element. This is true, but not a justfication for overriding the right to liberty and security and/or presumption of innocence.[3]

These offences are not regulatory in nature in the way this concept is conventionally used by the Committee and in recent Explanatory Statements.

[2] See *Scrutiny Report No. 43* of the *Sixth Assembly*, concerning the Building Legislation Amendment Bill 2007.

[3] See *Scrutiny Report No. 50* of the *Sixth Assembly*, concerning the Gene Technology Amendment Bill 2007. In *R v Hansen* [2007] NZSC 7, Elias CJ put it simply: "[s]imply making it easier to secure convictions is not a principled basis for imposing a reverse onus of proof…".

That imprisonment is a potential punishment creates an arguable case for saying that these provisions cannot be justified under HRA section 28 as justifiable limitations on the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).[4]

In this case however, an important offsetting factor is that with respect to both offence provisions, the defendant may avoid guilt by proving, to the evidential standard of proof, that he or she took "reasonable steps to comply with the direction" (subclauses 145(3) and 147(5), and see *Criminal Code 2002* subsection 58(1)). The Committee has often suggested that consideration be given to ameliorating the effect of a strict liability offence by provision of a reasonable diligence defence, and it commends the provision made by subclauses 230(4) and 231(6).

The Committee draws this to the attention of the Assembly.

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

Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?

Discretionary powers

Should the exercise of discretions, or the making of judgements involving the exercise of choice, be qualified by an obligation to exercise the discretion, or to make the judgement, on "reasonable grounds"?

As a matter of controlling administrative or judicial discretion, or statutory judgements that will permit an area of choice, the Committee considers that where possible, its scope should be limited by means of the law spelling out the considerations relevant to the exercise of the power, or, at least by the insertion of a limit in terms that the repository of the power should have "reasonable grounds" for the exercise of the power.

In this Bill, many of the discretionary powers are conditioned on their being exercised or made on "reasonable grounds". Many, however, are not, but may, for example, be exercised simply if the decision-maker is "satisfied" of certain matters, or holds an "opinion" about certain matters.

There are several instances where comparable powers are treated differently. For example, by paragraph 116(2)(a):

> the chief executive may only make a transfer arrangement for the transfer of a young offender from the ACT to a State if –
>
> (a) the chief executive believes on reasonable grounds that the transfer is appropriate, having regard to all the circumstances, including –
>
> [three considerations are then specified in detail].

In contrast, paragraph 116(2)(b)(ii) confers power in terms that "the chief executive decides that the particular circumstances of the case indicate that the transfer should be arranged without the young offender's agreement".

[4] The Committee has often drawn attention to HRA compatibility issue where imprisonment is a potential penalty; see *Scrutiny Report No 37 of the Sixth Assembly*, concerning the Corrections Management Bill 2006; see too *Scrutiny Report No 46 of the Sixth Assembly*, concerning the Occupational Health and Safety Amendment Bill 2007.

Paragraph 116(2)(a) confers power in terms that require the chief executive to form a belief "on reasonable grounds" and in so doing to have regard to specified considerations. In this form, it permits effective oversight of an exercise of the power, including, in particular, judicial (or if available, tribunal) review. In this way, the provision enhances the requirements of HRA section 21.[5] Paragraph 116(2)(b)(ii) confers power in terms that permit the chief executive to simply decide to do something, and apart from providing little guidance to the decision-maker or to those affected by an exercise of this power, its exercise is less amenable to oversight.[6]

Paragraph 116(2)(a) provides a useful model for the conferment of administrative power and is of a kind that the Committee has many times commended as furthering human rights protection.[7]

The Committee invites the Minister to explain why it is that many discretionary powers, or statutory judgements that will permit an area of choice, are conditioned on their being exercised or made on "reasonable grounds", while many are not.

The Committee draws this matter to the attention of the Assembly.

Equality before the law (HRA subsection 8(3)) – the different regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people

Does provision for a separate regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people limit the right of all persons to the equal protection of the law without discrimination (HRA subsection 8(3)), and, if it does, is it "demonstrably justify[able] in a free and democratic society" (HRA section 28)?

The Bill proposes a separate regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people. This is reflected in several provisions - see paragraph 7(d), clause 10, paragraphs 13(b), 94(1)(d), 348(1)(g), 454(b)(ii), 456(1)(iv), subclause 455(5), paragraph 481(1)(g), subclauses 511(2), 512(1), 512(2), and paragraph 535(b)(iii).

For example, clause 10 is headed "Aboriginal and Torres Strait Islander children and young people principle", and in the words of the Explanatory Statement:

> outlines the additional matters that decision makers must consider when making decisions or taking action under the Act in relation to Aboriginal or Torres Strait Islander children and young people:
>
> - the need for the child or young person to maintain a connection with the lifestyle, culture and traditions of the child's or young person's Aboriginal or Torres Strait Islander community;

[5] See generally *Scrutiny Report No 45* of the *6th Assembly*, concerning the Legal Profession Amendment Bill 2007. The executive has at times accepted that discretionary powers should be limited to the greatest extent possible, as is implicit in the amendments to the *Public Health Act 1997* in the Health Legislation Amendment Bill 2006 (No 2) – see *Scrutiny Report No 34* of the *6th Assembly*. These amendments were apparently based on legal advice to the relevant Minister that unless a power vested in a Minister was qualified by provision that the Minister have "reasonable grounds" for taking action the law would not be HRA compatible.

[6] It is perhaps unlikely that a court would find that a power not conditioned by an obligation that it be exercised on "reasonable grounds" need not be so exercised, but a court may well say that it is less able to fix limits to the power and thus less able to review its exercise.

[7] See *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No 2).

- submissions about the child or young person, made by or on behalf of any Aboriginal or Torres Strait Islander people or organisations identified by the Chief Executive as providing ongoing support services to the child or young person or their family; and
- Aboriginal or Torres Strait Islander traditions and cultural values (including kinship rules) as identified by reference to the child or young person's family, kinship relationships and the community with which the child or young person has the strongest affiliation.

In relation to clause 10, (as in some other instances), the Explanatory Statement recognises that its provisions engage (in the sense of limiting) the right of persons who are not Aboriginal or Torres Strait Islanders to the equal protection of the law without discrimination as stated in HRA subsection 8(3):

> **8 Recognition and equality before the law**
>
> …
>
> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The Explanatory Statement than offers a very broad justification:

> [this limitation] is justifiable under section 28 of the *Human Rights Act 2004* because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in the child protection and criminal justice systems.

The question for the Assembly is whether this kind of limitation to the equal protection of the law principle can be demonstrated to be justifiable in a free and democratic society (HRA section 28). Of course, in making this judgement a Member of the Assembly will draw on her or his knowledge of the history of Aboriginal and Torres Strait Islanders.

There are some more particular aspects of the scheme in the Bill for a separate regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people that give rise to rights issues.

Should there be a stronger indication in the Bill that clause 8 (Best interests of children and young people paramount consideration) operates to qualify every other provision in the Bill?

1. This is an issue that arises not only with respect to the regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people, but is usefully illustrated by reference to clause 10.

The problem is that it is not clear whether or not clause 10 qualifies the 'best interests' principle in subclause 8(1). The latter provides:

> **8 Best interests of children and young people paramount consideration**
>
> (1) In making a decision under this Act in relation to a particular child or young person, the decision-maker must regard the best interests of the child or young person as the paramount consideration.

This provision is critical, and gives effect to the HRA right that "(2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind". Any qualification of subclause 8(1) will raise an issue of the compatibility of the qualification with HRA subclause 11(2) (and in relation to clause 10 and similar provisions, make it more difficult to justify a limitation to the equal protection of the law principle in HRA subclause 8(3)).

While it is far from clear, a court might regard clause 8 as subject to the more specific provisions of the Bill – such as clause 10 - that spell out how a decision-maker is to determine the interests of a child or young person. This reading of section 8 is supported by a general principle of statutory interpretation[8]. Moreover, in some provisions where there is a specific indication that a particular effect on a child is a matter relevant to the making of a decision, there is also specific provision that 'the best interests of the child or young person' are also relevant (see for example, paragraph 569(b)). It would be unnecessary to make such specific provision if section 8 was always applicable, and suggests that the drafter did not think it was.

The problem could be addressed by some stronger indication in clause 8 that it operates to qualify every other provision in the Bill, and the removal of provisions such as paragraph 569(b).[9]

The Committee draws this to the attention of the Assembly.

Is the breadth of the definition of Aboriginal such that it will complicate the administration of the regime for the making of decisions concerning Aboriginal or Torres Strait Islander children, and thus be to the detriment of their rights?

2. The breadth of the Bill's definition of who is an Aboriginal and Torres Strait Islander may give rise to problems in the application of the scheme. The Dictionary states:

> ***Aboriginal*** means a person who –
>
> (a) is a descendant of the indigenous inhabitants of Australia; and
>
> (b) regards himself or herself as an Aboriginal or, if the person is a child or young person, is regarded as an Aboriginal by a parent or other family member.

This definition omits any need for there to be a showing that some Aboriginal and Torres Strait Islander community has recognised the person as part of that community. On its face, the definition does not require that the person have any degree of attachment or connection to such a community.[10] This may make it difficult to apply some provisions of the scheme. For example, in criminal matters "in deciding what is in the best interests of a child or young person, a decision-maker must consider … (d) if practicable and appropriate, decisions about an Aboriginal and Torres Strait Islander child or young person should be made in a way that involves their community" (paragraph 94(1)(d)). The Bill provides no guidance as to how this "community" is to be determined.

[8] "[P]rovisions of general application give way to specific provisions when in conflict … An Act may well contain provisions of a general nature and also provisions relating to particular subject matter. It is commonsense that the drafter will have intended the general provision to give way should they be applicable to the same subject matter as is dealt with specifically …": D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th ed, 1996), paragraph 4.24.

[9] See too subclauses 239(1) and (2), subclause 432(2), paragraph 463(1)(c)(ii), subclause 463(2), paragraph 465(1)(b), paragraph 471(1)(c), paragraph 548(j), paragraph 561(1)(j), paragraph 568(d), and paragraph 572(5)(a). There are many other references to this concept that do not appear to be redundant if clause 8 always operates to qualify a provision of the Bill.

[10] The issue is perhaps more complicated than this, but this is a possible view of the meaning of the definition; see *Re Simon* [2006] NSWSC 1410 and the references therein.

Paragraph 94(1)(d) is one example of the very broad and general language employed in the provisions that create the separate regime for Aboriginal and Torres Strait Islander children and young people. For example, by paragraph 535(b)(vii) a "therapeutic protection plan" means a plan that includes details of the certain matters for the proposed period of confinement of the child or young person, including "(vii) for an Aboriginal or Torres Strait Islander child or young person - the proposed arrangements for the preservation and enhancement of the identity of the child or young person as an Aboriginal or Torres Strait Islander person". There is a high degree of vagueness about the concept of "the identity …", and the difficulty in giving it content is compounded by the nature of the definition of who qualifies as an Aboriginal and Torres Strait Islander child or young person.

The result of this vagueness may be to delay or even stultify decision-making in relation to Aboriginal and Torres Strait Islander children or young persons, to the detriment of their human rights.

The Committee draws this to the attention of the Assembly.

3. There are some particular issues arising from clause 512 (Priorities for placement with out-of-home carer—Aboriginal or Torres Strait Islander child or young person).

By subclause 511(1), where the chief executive has daily care responsibility for a child or young person, he or she may place the person with an out-of-home carer. By subclause 511(2) however, where the person is an Aboriginal or Torres Strait Islander, the placement must be in accordance with clause 512.

Clause 512(1) provides that the placement must be with the first of the options stated in subclause 512(2) that:

(a) is available; and

(b) to which the child or young person does not object; and

(c) is consistent with any Aboriginal or Torres Strait Islander cultural plan in force for the child or young person.

Such a plan is a care plan developed by the chief executive under clause 454 "that includes proposals for the preservation and enhancement of the identity of the child or young person" (subclause 512(3)).

Subclause 512(2) states a descending hierarchy of options.

(2) The chief executive may place an Aboriginal or Torres Strait Islander child or young person with any of the following out of home carers:

(a) a kinship carer;

(b) a foster carer who is a member of the child's or young person's Aboriginal or Torres Strait Islander community in a relationship of responsibility for the child or young person according to local custom and practice;

(c) a foster carer who is a member of the child's or young person's community;

(d) an Aboriginal or Torres Strait Islander foster carer;

(e) a non-Aboriginal or Torres Strait Islander foster carer who—

(i) the chief executive believes on reasonable grounds is sensitive to the child's or young person's needs; and

(ii) the chief executive believes on reasonable grounds is capable of promoting the child's or young person's ongoing contact with the child's or young person's Aboriginal or Torres Strait Islander family, community and culture; and

(iii) if family reunion or continuing contact with the child's or young person's Aboriginal or Torres Strait Islander family, community or culture is a consideration in the placement—lives near the child's or young person's Aboriginal or Torres Strait Islander family or community.

The Committee draws attention to two matters.

In clause 512 (Priorities for placement with out-of-home carer—Aboriginal or Torres Strait Islander child or young person), should there be specific reference to the principle that the decision-maker must regard the best interests of the child or young person as the paramount consideration?

Clause 512 is based on the recommendations of the Bringing them home report (*Report of the National Inquiry into the Separation of Aboriginal or Torres Strait Islander Children from their Families* (HREOC, 1977). The report, however, emphasised that decision-making concerning an Aboriginal or Torres Strait Islander should ultimately be in the best interests of the child. Its statement of when the "Indigenous Child Placement Principle" should be displaced made specific reference to the matter:

51c. The preferred placement may be displaced where,

1. that placement would be detrimental to the child's best interests,
2. the child objects to that placement, or
3. no carer in the preferred category is available.

In contrast, subclause 512(1) does not include a specific reference to the first of these matters.

It might of course be argued that clause 8 will operate to qualify the operation of clause 512. This is not, however, abundantly clear, as discussed above.

Should the reference to "the identity of the child or young person" in subclause 512(3) be clarified?

The content of any Aboriginal or Torres Strait Islander cultural plan in force in relation to the child or young person is clearly of great significance in the making of a decision as to her or his placement with an out of home carer. As noted, such a plan is developed by the chief executive under clause 454 "that includes proposals for the preservation and enhancement of the identity of the child or young person" (subclause 512(3)).

The Committee notes that it is not specified that this "identity" must necessarily reflect the Aboriginal or Torres Strait Islander ancestry of the child or young person. Read literally, proposals for the preservation and enhancement of the person's "identity" could be based on the person's non-Aboriginal heritage. This reading is not nonsensical given it could thus accommodate the case where the child or young person has a substantial, perhaps largely, non-Aboriginal family network. If a plan did recognise the child's connection to the non-Aboriginal family network, then a "kinship carer" (see paragraph 512(2)(a) above) might be drawn from this network.

On the other hand, it might be intended that the concept of "identity" must necessarily reflect the Aboriginal or Torres Strait Islander ancestry, in which case it could well be that a "kinship carer" must be an Aboriginal or Torres Strait Islander. This latter view is consistent with the recommendations of the Bringing them home report (*Report of the National Inquiry into the Separation of Aboriginal or Torres Strait Islander Children from their Families* (HREOC, 1977), see text at "Standard 6: Indigenous Child Placement Principle".

This is an issue that might be clarified.

Is clause 512 compatible with the HRA?

If it is intended that the HREOC view is reflected in clause 512, then there is an incompatibility with HRA subsection 8(3) that must be demonstrably justified under HRA section 28.

The Committee notes this statement in the Explanatory Statement:

> This [Indigenous placement] principle engages the right to equal protection of the law without discrimination, at subsection 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004*, because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians separated from families and their over-representation in the child protection and out of home care systems.

The Committee draws this matter to the attention of the Assembly.

The right to liberty (HRA subsection 18(2)) and the prohibition on retrospective laws (HRA subsection 25(1)) – vagueness of key concepts in an offence provision

Does the vagueness of the concept of "adverse finding" in paragraph 70(4)(b), which is a critical element of an offence provision, mean that the offence is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, is that incompatibility is demonstrably justifiable (HRA section 28)?

The Committee discussed the effect of HRA subsections 18(2) or 25(1) in relation to vaguely expressed offence provisions in *Scrutiny Report No 45* of the *Sixth Assembly*, concerning the Crimes (Street Offences) Amendment Bill 2007; see too *Scrutiny Report No 49* of the *Sixth Assembly*, concerning the Road Transport (Third-Party Insurance) Bill 2007. Subsection 18(2) provides:

> (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Subsection 25(1) provides:

> (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.

There may be some doubt whether HRA subsection 18(2) is relevant in that imposition of a fine may not amount to a deprivation of liberty; this issue is not further explored. If the case-law of the European Convention is followed, HRA subsection 25(1) will not apply only to retrospective laws, but will also encompass a principle of legal certainty – that is, that there can be no punishment without law.[11]

Subclause 70(4) provides:

> (4) The entity commits an offence if –
>
> (a) the chief executive gave the entity written notice that the suitability information under section 65 (1), definition of ***suitability information***, paragraph (e) was being considered in deciding whether the entity was a suitable entity; and
>
> (b) any of the following makes an adverse finding against the entity:
>
> (i) a court or tribunal;
>
> (ii) an authority or person with power to require the production of documents or the answering of questions; and
>
> (c) the entity does not tell the chief executive about the finding as soon as practicable, but not later than 7 days after the finding is made.
>
> Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

The notion of "adverse finding" in paragraph 70(4)(b) is very vague. Having regard to the reference to "suitability information" in paragraph 70(4)(a), it may be intended that the finding reflect on "the soundness of the entity's financial reputation and the stability of the entity's financial background" (paragraph 65(1)(d), or "the entity's reputation for honesty and integrity" (paragraph 65(1)(e)). If this is so, paragraph 70(4)(b) should reflect this intention. If this is not intended, the notion of "adverse finding" should otherwise be clarified.

The vagueness in paragraph 70(4)(b) as it stands gives rise to a question whether in this form the provision is HRA compatible. The Committee notes observations by the Supreme Court of Canada concerning this issue:

> … two things must be shown in order to refute a claim of vagueness and overbreadth: first, the provision must give adequate guidance to those expected to abide by it; and second, it must limit the discretion of state officials responsible for its enforcement. While complete certainty is impossible, and some generalization is inevitable, the law must be sufficiently precise to provide guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606. The trial judge and the majority in the Court of Appeal emphasized the need for flexibility and the impossibility of achieving absolute certainty, but Beauregard J.A. correctly insisted as well on the principle of providing citizens with substantive notice in order to guide their conduct. To ask only whether a trial judge will be able to apply the impugned law when a case comes before him or her provides an inadequate response to the concern that the law may in the future be applied in an overbroad way. In effect, it defers the critical question of actual overbreadth to another day.[12]

There is a real question whether paragraph 70(4)(b) is HRA compatible. If it is not, it is hard to see how it could be justified under HRA section 28.

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[11] See generally, B Emmerson, A Ashworth and A McDonald, *Human Rights and Criminal Justice* (2nd ed, 2007) chapter 10.

[12] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 (CanLII) at paragraph 79.

The Committee draws this matter to the attention of the Assembly.

Does the vagueness of the concept of "unreasonable discipline" in clause 740 mean that it is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, whether that incompatibility is demonstrably justifiable (HRA section 28)?

Clause 740 provides:

Offence—unreasonably discipline child

A person commits an offence if the person—

(a) is a responsible person for a childcare service; and

(b) subjects a child being cared for by the service to unreasonable discipline.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

The concept of "unreasonable discipline" is very vague, and in the light of the discussion above, there is a real question whether clause 740 is HRA compatible. If it is not, it is hard to see how it could be justified under HRA section 28.

The Committee draws this matter to the attention of the Assembly.

Does the vagueness of the concept of "light work" in subclause 792(1), which is a critical element of the offence provision in subclause 794(1) as qualified by clause 795, mean that the offence is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, whether that incompatibility is demonstrably justifiable (HRA section 28)?

Subclause 792(1) defines "light work" to be "work that is not contrary to the best interests of a child or young person". By subclause 794(1), a person commits an offence if they employ a child or young person who is under school-leaving age, subject to clause 795. By clause 795, subclause 794(1) does not apply if "(a) the employment is in light work; and (b) the child or young person is employed for 10 hours per week or less".

The concept of "light work" is very vague, and in the light of the discussion above, there is a real question whether clause 740 is HRA compatible. If it is not, it is hard to see how it could be justified under HRA section 28.

The Committee draws this matter to the attention of the Assembly.

A privative clause?

Do subclauses 646(1) and 646(3), in combination, amount to a privative clause, and if so are they incompatible with HRA subsection 21(1) and/or inconsistent with subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth)?

A provision that precludes a court from conducting a review of the legality of administrative action may be HRA incompatible and/or invalid by reason of subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth).[13]

[13] See *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No 2).

Subclause 646(1) provides that "[a] proceeding for judicial review of a decision of the chief executive to transfer a child welfare order to a participating State must be started, and originating process given to the chief executive, not later than 10 working days after the day the chief executive decided to transfer the order", and by subclause 646(3), "the Supreme Court must not extend the 10 working days mentioned in subsection (1)".

There must be a point where the shortness of the time available to seek judicial review so compromises the opportunity to seek review that it is not a realistic opportunity. Whether clause 646 has this effect is debateable.

A similar point may be made concerning clause 652 and the right to appeal to the Supreme Court from a decision of the Childrens Court.

Vagueness in key concepts and lack of clarity

In the points that follow, the Committee indicates instances where it may be possible to improve the clarity of the Bill. It does so recognising that the Bill is very long and complex, yet must be administered by lay people. It is also the case that the way it is administered will have significant consequences for the rights of persons.

1. The distinction between the concepts of "daily care responsibility" and "long-term care responsibility" is critical to the application of several provisions of the Bill. The Bill does not attempt to define these concepts, but in different places in the Bill provides by way of a note or examples lists of what they mean – see, concerning "daily care responsibility", subclause 19(1), and paragraph 473(b)(i), and concerning "long-term care responsibility", see subclause 20(1), paragraph 473(b)(iv), and clause 504.

The problem is that there are differences between these lists concerning "daily care responsibility", and likewise concerning "long-term care responsibility". The differences are not great, but they are puzzling and potentially productive of confusion. For example, "religion and observance of racial, ethnic, religious or cultural traditions" is mentioned in relation to subclause 20(1) and clause 504, but not in relation to paragraph 473(b)(iv).

The problem could be addressed by stating one list of examples and then making an appropriate cross-reference, or by providing definitions in the Bill.

2. Subclause 38(3) should perhaps contain a cross-reference to section 63.

3. Should the word "unreasonably" qualify the word "deprive" in subclause 172(4) in the same way that it does in subclause 174(3)?

4. There is great width to the statement in subclause 294(3) that "[a]fter considering the allegation report and the report of any investigation under subsection (2) (b), the administrator may take *any further action* the administrator believes on reasonable grounds is appropriate in the circumstances". Given the list of specific courses of action stated in subclause 294(4), is this necessary? The Explanatory Statement indicates that the subclause 294(4) list is exhaustive.

5. The definition of personal information in clause 525 should perhaps contain a cross-reference to clause 843 (definition of protected information).

6. The definition of "body search" in clause 524 should perhaps contain a cross-reference to clauses 608 to 617.

7. The definition of "strip search" in clause 525 should perhaps contain a cross-reference to clauses 605, 606 and 607.

8. Should clause 602 contain a provision similar to subclause 613(3)?

9. In relation to clause 614, what happens if the non-treating doctor and/or nurse is *not* of the same sex as the child or young person? There appears to be no rule about whether such a person can touch the child, etc. (Compare to clause 271, which states a rule for a different situation.)

10. In relation to subclause 617(2), what is to happen if the thing *would* be likely to cause injury to the child or young person or someone else? There appears to be no rule to govern this situation.

11. In clause 233, what is to happen once the child turns 6?

12. There should perhaps be a cross-reference to clause 875 at subclause 868(1).

13. Why is the word "lawful" inserted in proposed section 320J of the *Crimes (Sentence Administration) Act 2005* (see clause 1.29 of schedule 1)? Is it not axiomatic that only a lawful direction need be obeyed?

14. At subclause 773(5), there should perhaps be a cross-reference to sections 170 and 171 of the Legislation Act.

Possible errors in the drafting

1. In subclause 208(2), should there be a comma after "cultural identity"?

2. In subclause 436(4), the reference should be to subclause 436(3).

3. The heading to clause 710 should be to the *standard* of proof.

4. In clause 729, the word "and" should join the two paragraphs.

5. Paragraph 834(1)(a) appears unnecessary in that a person cannot appeal to the Supreme Court unless a statute makes specific provision for the right to appeal.

The Committee draws this to the attention of the Assembly.

CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) (ENFORCEMENT) AMENDMENT BILL 2008

This Bill would amend the *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* to give effect to the decision to integrate the Office of Film and Literature Classification into the Australian Government Attorney-General's Department, and to improve the functioning of the National Classification Scheme.

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

Strict liability offences

The amendments proposed by the Bill would, if enacted, create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provisions is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).

As explained in the explanatory statement, the offences are regulatory in nature and the penalties provided are within the range considered acceptable where there is provision for strict liability.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-14 being the Public Place Names (Macgregor) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes DI2007-316 and determines the names of new roads in the Division of Macgregor.**

Disallowable Instrument DI2008-16 being the Public Health (Chief Health Officer) Appointment 2008 made under section 7 of the *Public Health Act 1997* **appoints a specified person as the Chief Health Officer.**

Disallowable Instrument DI2008-21 being the Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 1) made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Building and Construction Industry) Governing Board representing employee organisations.**

Disallowable Instrument DI2008-22 being the Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 2) made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Building and Construction Industry) Governing Board representing employer organisations.**

Disallowable Instrument DI2008-26 being the Nature Conservation (Species and Ecological Communities) Declaration 2008 (No. 1) made under section 38 of the *Nature Conservation Act 1980* **revokes DI2005-39 and determines specified species and communities to be vulnerable species, endangered species and endangered communities.**

Disallowable Instrument DI2008-27 being the Dangerous Substances (Explosives) Importing Explosives Declaration 2008 (No. 1) made under paragraph 91(2)(f) of the *Dangerous Substances (Explosives) Regulation 2004* **authorises specified explosives as explosives which do not require an import licence.**

Disallowable Instrument DI2008-28 being the University of Canberra (Liquor) Statute 2008 made under section 42 of the *University of Canberra Act 1989* **repeals the Liquor Statute 1992 and regulates and consumption and sale of liquor in buildings and on land of the University of Canberra.**

Disallowable Instrument DI2008-29 being the Road Transport (Public Passenger Services) (Authorised Fixed Fare Hiring) Approval 2008 (No. 1) made under section 142A of the *Road Transport (Public Passenger Services) Regulation 2002* **approves hiring by Nightlink taxis between midnight Fridays and 6.00 am Saturdays, or between midnight Saturdays and 6.00 am Sundays, to be an authorised fixed fare hiring.**

Disallowable Instrument DI2008-30 being the Occupational Health and Safety (National Standard for Construction Work) Code of Practice 2008 made under section 206 of the *Occupational Health and Safety Act 1989* **approves the National Standard for Construction Work (NOHSC:1016 (2005)).**

Disallowable Instrument DI2008-31 being the Occupational Health and Safety (National Standard for Manual Tasks) Code of Practice 2008 made under section 206 of the *Occupational Health and Safety Act 1989* **approves the National Standard for Manual Tasks (ASCC 2007).**

Disallowable Instrument DI2008-32 being the Occupational Health and Safety (National Code of Practice for the Prevention of Musculoskeletal Disorders from the Performing of Manual Tasks at Work) Code of Practice 2008 made under section 206 of the *Occupational Health and Safety Act 1989* **approves the National Code of Practice for the Prevention of Musculoskeletal Disorders from the Performing of Manual Tasks at Work (ASCC 2007).**

Disallowable Instrument DI2008-33 being the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2008 (No. 1) made under subsection 19(1) of the *Animal Diseases Act 2005* **revokes DI2007-227 and declares the entire area of the ACT to be an Exotic Disease Quarantine area applying to horses, mules, donkeys and other animals in the equine family, or products of these animals, that have been in any area of Australia.**

Disallowable Instruments—Comment

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

Does the Council have a member representing agencies?

Disallowable Instrument DI2008-20 being the Territory Records (Advisory Council) Appointment 2008 (No. 1) made under section 44 of the *Territory Records Act 2002* **appoints specified persons as chair, deputy chair and members of the Territory Records Advisory Council.**

This instrument appoints 5 specified persons as members of the Territory Records Advisory Council. The Council is established by section 43 of the *Territory Records Act 2002*, which provides:

> **43 Membership of council**
>
> The council consists of—
>
> (a) the director; and
>
> (b) not less than 4, and not more than 8, members (the ***appointed members***) appointed by the Minister under section 44.

Section 44 provides:

> **44 Appointed members of council**
>
> (1) The Minister must appoint as a member at least 1 person to represent each of the following:
>
> (a) agencies;
>
> (b) professional organisations interested in record management and archives;
>
> (c) community associations interested in historical or heritage issues;
>
> (d) entities interested in Aboriginal and Torres Strait Islander heritage.
>
> *Note 1* For the making of appointments generally, see Legislation Act, pt 19.3.
>
> *Note 2* Certain statutory appointments made by a Minister require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

Note 3 A power to appoint a person to a position includes power to appoint a person to act in the position (see Legislation Act, s 209).

(2) The person appointed to represent entities mentioned in subsection (1) (d) must be an Aboriginal or Torres Strait Islander.

This instrument appoints:

- 2 persons representing professional organisations interested in record management and archives;
- 2 persons representing community associations interested in historical or heritage issues; and
- a person representing entities interested in Aboriginal and Torres Strait Islander heritage.

The Committee notes that none of the persons appointed represent agencies. In the absence of an indication to the contrary, the Committee (and the Legislative Assembly) must therefore assume that an existing member of the Council represents agencies.

The Committee also notes that the Explanatory Statement to this instrument does not expressly indicate that the requirement in subsection 44 (2) (ie that the person appointed under paragraph 44 (1) (d) be an Aboriginal or Torres Strait Islander) has been met. It states:

> [the person appointed] has been nominated to represent entities interested in Aboriginal and Torres Strait Islander heritage. The person nominated to this position must be an Aboriginal or Torres Strait Islander. [The person appointed] is appointed for a three year term.

Again, the Committee (and the Legislative Assembly) must assume that the person appointed is, in fact, an Aboriginal or a Torres Strait Islander. It would be simpler (and not especially onerous), however, if the Explanatory Statement accompanying the instrument contained a statement to this effect.

Are these acting appointments valid?

Disallowable Instrument DI2008-23 being the Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 3) made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981*, **section 78 of the** *Financial Management Act 1996* **and** section 209 of the *Legislation Act 2001* **appoints a specified person as an acting member of the Long Service Leave (Building and Construction Industry) Governing Board representing employee organisations.**

Disallowable Instrument DI2008-24 being the Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 4) made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981*, **section 78 of the** *Financial Management Act 1996* **and** section 209 of the *Legislation Act 2001* **appoints a specified person as an acting member of the Long Service Leave (Building and Construction Industry) Governing Board representing employer organisations.**

These 2 instruments appoint 2 specified persons to act as members of the Long Service Leave (Building and Construction Industry Governing Board. In each case, the instrument indicates that it is made under:

- sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981*; and
- section 78 of the *Financial Management Act 1996*; and
- section 209 of the *Legislation Act 2001*.

Section 13 of the Long Service Leave (Building and Construction Industry) Act establishes the Governing Board. Section 14 provides:

14 Governing board members

(1) The governing board has 4 members.

Note 1 The chair of the governing board must be appointed under the *Financial Management Act 1996* , s 79.

Note 2 The registrar is a member of the governing board (see dict, def *registrar* and *Financial Management Act 1996* , s 80 (4)).

(2) One member of the governing board must be appointed to represent employer organisations.

(3) One member of the governing board must be appointed to represent employee organisations.

(4) The chair of the governing board must not be the member mentioned in subsection (2) or (3).

(5) A member of the governing board must not be appointed for a term of longer than 5 years.

Note A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def *appoint*).

(6) The Minister may, under the Legislation Act, section 209, appoint a person to act as a member.

(7) The registrar is a non-voting member of the governing board.

Note The *Financial Management Act 1996* , s 95 (2) and s 96 (1) deal with non-voting members of governing boards.

Section 78 of the Financial Management Act provides:

78 Appointment of governing board members generally

(1) This section applies to the appointment of the members of the governing board of a territory authority, other than the CEO.

(2) The responsible Minister for the territory authority may appoint the members.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(3) The only criteria for deciding whether to appoint a person as a member are—

(a) the contribution the person can make to the goals and objectives of the governing board; and

(b) the criteria stated in applicable governmental policies (if any) relating to appointments.

(4) However, the establishing Act may prescribe other criteria for deciding whether to appoint a person as a member.

(5) An appointment of a member—

(a) must not be for longer than 3 years, unless the establishing Act allows a longer period; and

(b) is an appointment under the provision of the establishing Act that establishes the governing board.

(6) The conditions of appointment of a member (other than a member required under the establishing Act to be a public servant or statutory office holder) are the conditions agreed between the Minister and the member, subject to any determination under the *Remuneration Tribunal Act 1995* .

Finally, section 209 of the Legislation Act provides:

209 Power of appointment includes power to make acting appointment

(1) If the appointer's power is the power to make an appointment to a position, the power to make the appointment also includes power to appoint a person, or 2 or more people, to act in the position—

(a) during any vacancy, or all vacancies, in the position, whether or not an appointment has previously been made to the position; or

(b) during any period, or all periods, when the appointee cannot for any reason exercise functions of the position.

Examples for par (b)

1 the appointee is ill or on leave

2 the appointee is acting in another position

3 the appointee is outside the ACT or Australia

Note 1 ***Function*** is defined in the dict, pt 1 to include authority, duty and power.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

(2) The power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make the appointment.

Example

If the appointment power is exercisable only on the recommendation of a body, the power to appoint a person to act is exercisable only on the recommendation of the body.

(3) Without limiting subsection (2), if the law (or another law) requires—

(a) the appointee to hold a qualification; or

(b) the appointer (or someone else) to be satisfied about the appointee's suitability (whether in terms of knowledge, experience, character or any other personal quality) before appointing the appointee to the position;

a person may only be appointed to act in the position if the person holds the qualification or the appointer (or other person) is satisfied about the person's suitability.

Examples

1 If an Act requires the appointee to be a magistrate, a person can be appointed to act in the position only if the person is a magistrate.

2 If a regulation requires the appointee to be a lawyer of at least 5 years standing, a person can be appointed to act in the position only if the person is a lawyer of at least 5 years standing.

3 If an Act requires the appointee to have, in the Executive's opinion, appropriate expertise, training or experience in relation to the needs of a particular group of people, a person can be appointed to act in the position only if the person has, in the Executive's opinion, that expertise, training or experience.

Of the provisions set out above, section 209 of the Legislation Act is the key to the making of acting appointments. The Committee notes, however, that the power in subsection 209(1) is to appoint a person to act in a position:

- during any vacancy, or all vacancies, in the position, whether or not an appointment has previously been made to the position; or
- during any period, or all periods, when the appointee cannot for any reason exercise functions of the position.

The Committee notes that neither of these instruments gives any indication of the circumstances in which the specified persons are to act in the positions concerned. Nor do the Explanatory Statements to the instruments. That being so, the Committee is unclear as to how the power contained in subsection 209(1) is engaged. The Committee would appreciate the Minister's assistance in relation to this issue.

Is this a disallowable instrument?

Disallowable Instrument DI2008-25 being the Emergencies (Bushfire Council Members) Appointment 2008 made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the ACT Bushfire Council.**

This instrument appoints a specified person as a member of the ACT Bushfire Council. The Explanatory Statement accompanying the instrument states:

> The provisions of division 19.3.3 of the *Legislation Act 2001* are used for the appointment.

Division 19.3.3 of the Legislation Act includes paragraph 227(1)(a), which provides that the Division does not apply to the appointment of a public servant to a statutory position. As a result of paragraph 227(1)(a), the Committee considers that the Explanatory Statement to any appointment to which Division 19.3.3 applies should contain a statement that the person appointed is not a public servant. The Explanatory Statement to this instrument contains no such statement. As a result, there is nothing to indicate to the Committee (or the Legislative Assembly) that Division 19.3.3, in fact, applies and that this is, in fact, a disallowable instrument.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 28 March 2008, in relation to comments made in Scrutiny Report 50 concerning:
  - Human Cloning and Embryo Research Amendment Bill 2007; and
  - Gene Technology Amendment Bill 2007.

- The Minister for Health, dated 2 April 2008, in relation to comments made in Scrutiny Report 51 concerning Disallowable Instrument DI2007-297, being the Gene Technology Advisory Council Appointment 2007 (No. 1).

The Committee wishes to thank the Minister for Health for her helpful responses.

Karin MacDonald, MLA
Deputy Chair

7 April 2008

LEGAL AFFAIRS—STANDING COMMITTEE (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No 1)

Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No 4)

Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No 1)

Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**

Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No 1)

Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No 1)

Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No 1)

Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 **(PMB)**

Bills/Subordinate Legislation

Report 15, dated 22 August 2005
Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
Hotel School (Repeal) Bill 2005
Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September
Civil Law (Wrongs) Amendment Bill 2005 **(PMB)**

Report 18, dated 14 November 2005
Guardianship and Management of Property Amendment Bill 2005 **(PMB)**

Report 19, dated 21 November 2005
Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006
Registration of Relationships Bill 2006 **(PMB)**
Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Report 28, dated 7 August 2006
Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006
Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006
Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006
Crimes Amendment Bill 2006 (PMB)
Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007
Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 43, dated 13 August 2007
Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)
Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)
Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)
Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007
Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)
Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007
Crimes (Street Offences) Amendment Bill 2007 (PMB)
Legal Profession Amendment Bill 2007

Bills/Subordinate Legislation

Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

Report 47, dated 12 November 2007

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 48, dated 19 November 2007

Subordinate Law SL2007-33 - Poisons Amendment Regulation 2007 (No. 1)

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)
Sentencing Legislation Amendment Bill 2007 (PMB)
Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)
Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)
Disallowable Instrument DI2007-271 - Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1)
Disallowable Instrument DI2007-276 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1)
Disallowable Instrument DI2007-277 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2)
Disallowable Instrument DI2007-278 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3)
Disallowable Instrument DI2007-279 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4)
Disallowable Instrument DI2007-283 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2)
Disallowable Instrument DI2007-284 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3)
Disallowable Instrument DI2007-285 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4)
Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)
Long Service Leave (Private Sector) Bill 2007 (PMB)
Medicines, Poisons and Therapeutic Goods Bill 2007

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008

Bills/Subordinate Legislation

Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007
Disallowable Instrument DI2007-307 - Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1)
Planning and Development Legislation Amendment Bill 2008
Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement
Subordinate Law SL2007-42 - Public Health Amendment Regulation 2007 (No. 1)

Report 52, dated 31 March 2008

Disallowable Instrument DI2007-323 – Auditor-General Acting Appointment 2007
Disallowable Instrument DI2008-19 - Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1)
Justice and Community Safety Legislation Amendment Bill 2008
Subordinate Law SL2008-2 - Planning and Development Regulation 2008, including a regulatory impact statement
Subordinate Law SL2008-3 - Building (General) Regulation 2008, including a regulatory impact statement
Tobacco Amendment Bill 2008

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for the Scrutiny of Bills Report No 50 of 4 February 2008. I offer the following responses in relation to the matters raised by the Standing Committee on Legal Affairs about the *Human Cloning and Embryo Research Amendment Bill 2007* and the *Gene Technology Amendment Bill 2007*.

With regard to the *Human Cloning and Embryo Research Amendment Bill 2007*, I note that the Committee raised concerns about whether new sections 20, 21, 25A and 25B of the Act, if enacted, create strict liability offences which may "unduly trespass on personal rights and liberties". Section 23 of the Criminal Code states an offence is only strict liability if it is identified as such. As none of the proposed new sections are identified as strict liability, a fault element remains. Section 22 of the Criminal Code applies where no fault element is expressly stated, as is the case in sections: 21(b); 21(c); 25A(b); 25A(c); 25B(a) and 25B(b). I am advised that the application of s 22 of the Criminal Code to proposed new s 25B(a) renders the fault element intention, and for all other proposed paragraphs the fault element is recklessness. I believe this negates the Committee's concerns in relation to both the "undue trespass on personal rights and liberties" and concerns raised about whether criminal code defences would be available in relation to these provisions. As such the Government does not believe an amendment is required.

The report notes the Committee's concerns regarding compatibility with the *Human Rights Act 2004* (HRA) where imprisonment is a potential penalty and the consideration that the Explanatory Statement should state specific justifications in such instances. Thank you for your comments, however I am satisfied with the Human Rights Compatibility Statement issued by the Department of Justice and Community Safety with regard to the amending legislation. It is important to ensure consistency with the national regulatory scheme. Again, the Government does not believe an amendment is required.

Regarding the Committee's suggestion that a note be inserted referring to sections 170 and 171 of the *Legislation Act*, the Government agrees that a note would be appropriate and this will be included when a convenient opportunity arises.

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With reference to the *Gene Technology Amendment Bill 2007,* the report notes the Committee's concerns with sections 33 and 35B of the Act providing for offences of strict liability and the concern that the level of penalty may be "a disproportionate response to the problem addressed by the imposition of strict liability". However strict liability only applies to part of the offence. The key element in paragraph (a) contains a fault requirement and therefore the Government does not believe that the level of penalty is disproportionate. It is important that the ACT maintains conformity with national legislation in this matter.

I note that the Committee raised concerns about wording in clause 36 of the *Gene Technology Amendment Bill 2007* referring to the new subsection 72(8) which would provide that section 72 did not apply "to a variation of a licence if the regulator is satisfied that the variation is of minor significance or complexity". It is the responsibility of the regulator to determine the significance or otherwise of a proposed variation of licence and the risk assessment framework would be utilised by the regulator for this purpose. The wording mirrors the Commonwealth legislation, which the Government is required to do in order to satisfy requirements for compatibility. The same response applies to concerns raised by the Committee about clauses 42 and 47. Consequently the Government is happy with the clause as drafted. Thank you for raising these concerns.

The Committee made a comment on the Explanatory Statement, noting that new text was required for clause 25. This error has been noted and clause 25 should read as follows:

> **Clause 25: Omit everything after "earlier" and substitute "than-" and insert new subparagraphs 52(2)(d)(i) and 52(2)(d)(ii).**
> Clause 25 would provide for a longer consultation process where the Regulator considers that the GMO poses a significant risk to the health and safety of people or the environment and the RARMP contains a statement to that effect. The item proposes to insert two new subparagraphs into paragraph 52(2)(d) of the Act. The proposed subparagraph 52(2)(d)(i) would provide that the time period for submissions must be at least 50 days if the Regulator is satisfied that the dealings pose a significant risk. The proposed subparagraph 52(2)(d)(ii) would provide for a thirty day time period for all other dealings.

The Government will ensure that the Explanatory Statement is amended accordingly. The Committee's comment on this matter is appreciated.

Thank you for raising these matters with me. I hope this information addresses the Committee's concerns about the *Human Cloning and Embryo Research Amendment Bill 2007* and the *Gene Technology Amendment Bill 2007.*

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
28/3/08

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ~~Stefaniak~~ Bill

Thank you for the Scrutiny of Bills Report No 51 of 3 March 2008. I offer the following response in relation to the matter raised by the Standing Committee on Legal Affairs about Disallowable Instrument DI2007-297 being the Gene Technology Advisory Council Appointment 2007 (No. 1) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004*.

I note the Committee's comment that no Explanatory Statement was provided for this Instrument. This was an administrative oversight and more care will be taken in the future to ensure that this does not occur again. However, I can assure the Committee that this appointment did need to be made by Disallowable Instrument, as the appointees listed were not public servants. An Explanatory Statement is attached for your information. The Committee's comments on this matter are appreciated and the Explanatory Statement will be tabled in the Legislative Assembly and made available on the Legislation Register.

Yours sincerely

Katy Gallagher

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Minister for Health
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Explanatory Statement

ACT Gene Technology Advisory Council Appointments 2007 (No. 1)

Disallowable Instrument DI2007- 297

made under the

Gene Technology (GM Crop Moratorium) Act 2004 s 11 (Advisory council)

The ACT Gene Technology Advisory Council (the Council) is established under Section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* (the Act). Under subsection 11 (2) of the Act, the Council consists of eight (8) members, appointed by the Minister for Health.

Under subsection 11(3) of the Act, the Minister must try to ensure that the following people are appointed as members: a person nominated by the Chief Executive who is to be the chairperson; a person nominated by the Commonwealth Scientific and Industrial Research Organisation (CSIRO); a person nominated by a university based in the Act who has professional skills or experience in research in a field relevant to gene technology; a person nominated by the ACT Rural Lessees' Association; a person nominated by the ACT Sustainable Lands Group; a person nominated by the Canberra Region Branch Biotechnology Group of AusBiotech; a person who has professional skills or experience in the marketing of food crops; and a person to represent the community generally, nominated by the Health Care Consumers' Association.

The effect of the Act is to designate the ACT as an area in which certain genetically modified food plants may not be cultivated, in order to preserve the identity of GM and/or non-GM crops for marketing purposes.

This instrument makes appointments to which the *Legislation Act 2001*, division 19.3.3 applies. Accordingly, the instrument is a disallowable

instrument (see *Legislation Act 2001*, s 229) and applies to Council members Dr Mikael Hirsch (CSIRO), Professor Phillip Board (Australian National University), Dr Anthony William Griffin (President of the ACT Rural Landholders Association), Mr John Lowe (President of the ACT Sustainable Rural Lands Group Incorporated), Professor John Lovett (Member of the AgBio Advisory Group to AusBiotech), Ms Sally Rae Milner (co-owner and co-manager of Pialligo Estate Wines), and Mr Thoma van Dooren (consumer representative).

None of these appointees is a public servant. Dr Charles Guest, who is a public servant, did not require appointment according to this instrument to his position as Chair of the Council.

Consultation with the Standing Committee for Health and Disability has taken place in accordance with the *Legislation Act 2001*.