Legislative Assembly for the ACT

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

Scrutiny Report

28 JULY 2008

Report 57

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 Bills and offers no comments on them:

CLIMATE CHANGE (GREENHOUSE GAS EMISSIONS TARGETS) BILL 2008

This is a Bill to create a regime for the setting of targets for reductions in greenhouse gas emissions for the medium and long-term and to provide a mechanism for reporting on and reviewing these targets.

COURT LEGISLATION AMENDMENT BILL 2008

This Bill would amend various pieces of Territory legislation concerning courts or entities whose operations impinge on courts.

EDUCATION (PARENTAL CONTROL) AMENDMENT BILL 2008

This Bill would amend the *Education Act 2004* to prescribe a rule to govern the circumstances under which a government school must obtain the informed parental consent of a parent of a child prior to the child receiving education about, or engaging in an activity involving, a matter of a political or sexual nature.

LONG SERVICE LEAVE LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Long Service Leave Act 1976* concerning access to long service leave in the private sector, and the *Long Service Leave (Building and Construction Industry) Act 1981* concerning employer reimbursements in the building and construction industry portable long service leave scheme.

PARENTAL LEAVE LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Discrimination Act 1991* to make it clear that parents in same-sex relationships cannot be discriminated against in relation to benefits associated with employment, and to repeal the *Parental Leave (Private Sector Employees) Act 1992*.

REVENUE LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Duties Act 1999* to clarify the duty liability on an application to re-register a motor vehicle in the ACT, and the *First Home Owner Grant Act 2000* to allow that a debt created by the requirement to repay the grant, which may include penalties and interest, can be collected from a third party.

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Road Transport (Driver Licensing) Act 1999* and the *Road Transport (Driver Licensing) Regulation 2000* in relation to suspending or cancelling driver licences when a driver incurs excessive demerit points, in particular in a situation where a driver incurs a demerit points suspension while her or his licence is already suspended.

STATUTE LAW AMENDMENT BILL 2008

This Bill would amend various pieces of Territory legislation for statute law revision purposes only.

Bills—Comment

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

ACT CIVIL AND ADMINISTRATIVE TRIBUNAL LEGISLATION AMENDMENT BILL 2008

This Bill would amend legislation related to the *ACT Civil and Administrative Tribunal Act 2008* to make changes consequent on the establishment of the tribunal, and in some cases simplify or standardise the language used in the legislation concerning the tribunal.

Does a clause of the Bill inappropriately delegate legislative power?

The commencement provisions

The Explanatory Statement acknowledges that while "[i]n general, the Act commences on the day section 6 of the ACT Civil and Administrative Tribunal Act 2008 commences", subclause 2(6) of the Bill[1] "provides that, despite these commencement provisions, the Minister may determine another day for the commencement of the amendment. This provision will provide some additional capability to choose the time at which various jurisdictions will come into the ACT Civil and Administrative Tribunal".

This power enables the Minister to in effect amend a provision of the Act[2] that makes provision for commencement. Such a provision – sometimes known as a "Henry VIIIth clause" - is generally considered to be undesirable. It is perhaps evident that there is a need for some flexibility concerning the times at which various jurisdictions will come into the new Tribunal.

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

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 right to a fair trial

Part 1.1 of Schedule 1 would insert into the ACT Civil and Administrative Tribunal Act provisions that are generally considered necessary to the operation of a tribunal. In *Scrutiny Committee Report No 55*, concerning the ACT Civil and Administrative Tribunal Bill 2008, the Committee drew attention to the critical issue of the extent of protection of a witness in a tribunal proceeding, and it notes that this is one of the matters that has been addressed by these amendments – see proposed section 41A of the Act (Part 1.1.4).

[1] The Explanatory Statement refers incorrectly to "the Act" making this provision.
[2] That is, the Act that would result from the passage of this Bill.

Comment on the Explanatory Statement

There is however very little in the way of explanation of these provisions. This legislation will be of very great significance to the practice of law in the Territory, and both lawyers and members of the public would be greatly assisted by an Explanatory Statement in the usual form. The provisions are not in any sense merely consequential or minor amendments to the scheme and are no less significant than the provisions of the ACT Civil and Administrative Tribunal Bill 2008. These latter provisions were fully explained.

In particular, the Explanatory Statement should have addressed any human rights issues that arise from the provisions of this Bill. One such issue will now be identified by the Committee.

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 right to a fair trial – *Human Rights Act 2004* subsection 21(1)

There should be justification offered for the restriction on the right to a fair trial involved in the provision for a Minister to make a non-disclosure certificate.

There will be occasions on which a party will claim that information it wishes the tribunal to consider in making its decision should nevertheless not be disclosed to another party. Proposed Divisions 4A.3 and 4A.4 of the Act make provision for some rules to govern this situation, although only, it would seem, in relation to an exercise by the tribunal of its administrative review jurisdiction.[3] These provisions engage subsection 21(1) of the *Human Rights Act 2004* (HRA):

> (1) Everyone has the right to have … rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The Committee notes that the Explanatory Statement makes no reference to this human rights issue, and merely states that the amendments "deal with … the issuance of non-disclosure certificates (where disclosure about a stated matter would not be in the public interest)".

The rules stated in proposed Divisions 4A.3 and 4A.4 are quite complex and no attempt will be made here to explain them. The central aspect of them is the provision in subclause 22I(1).

> The Minister may certify in writing that the disclosure of information about a stated matter, or a matter stated in a document, is not in the public interest—

[3] This is a question the answer to which is not abundantly clear. The amendments are contained within a proposed Part 4A of the Act, which is headed "Administrative review". There are no similar provisions in Part 4 (Civil disputes) or Part 5 (Tribunal procedures). If the answer is that the Part 4A provisions do not apply in civil matters, there then appears to be no means for the government to procure the issue of a non-disclosure certificate under proposed section 22I where the matter is in the civil jurisdiction. There may also be an occasion in a civil matter for any kind of party to seek non-disclosure of information to another party, such as where information has a commercial value that would be reduced if disclosure was made to another party. The tribunal might perhaps under its powers in Part 5 to control its procedure make a non-disclosure order, but if the specific non-disclosure provisions of proposed Part 4A are enacted, there might be some doubt about this. All these issues should be clarified.

(a) because it would involve the disclosure of deliberations or decisions of the Executive or an Executive committee; or

(b) for any other reason stated in the certificate that could form the basis for a claim by the Territory in a judicial proceeding that the information or matter should not be disclosed.

On the face of it, HRA subsection 21(1) (fair trial) is engaged by a rule that permits one party to a matter before the tribunal to procure a Ministerial certificate, with the result that while the tribunal will receive and consider the information affected by the certificate, the other will not.

There needs to be a justification for this restriction on the right to a fair trial.

One matter that requires explanation is the intended effect of proposed subsection 22H(2), which provides that " … this division does not exclude the operation of the *Human Rights Act 2004*". Does this mean that a party could argue that a Ministerial certificate has no effect if its result would be that the party did not receive a fair trial as required by HRA subsection 21(1)?

CIVIL PARTNERSHIPS AMENDMENT BILL 2008

This Bill would amend the *Civil Partnerships Act 2008* for various purposes, including making provision for persons to enter into a partnership by making a declaration before a civil partnership notary.

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 right to equality before the law and to the equal protection of the law without discrimination

Proposed section 6A provides that 2 adults who are in a relationship as a couple, regardless of their sex, and who meet the eligibility criteria in section 6, may enter into a civil partnership by either (a) having their relationship registered under section 8, or (b) making a declaration before a civil partnership notary under proposed section 8B.

Under existing section 8, the registrar general registers the relationship as a civil partnership by simply making an endorsement to that effect on the application for registration. No ceremony of any kind is involved.

The Bill would enable 2 adults who wish to enter into a civil partnership to do so by making a declaration before a civil partnership notary and at least one other witness (see proposed subclause 8B(1)). Apart from this requirement, no ceremony of any kind need be involved, but there is nothing to preclude other persons being in attendance, nor to preclude other activities – such as some form of celebration – accompanying the making of the declaration. Nor is there any limitation concerning the place where a declaration may be made.

The issue that arises under the *Human Rights Act 2004* is whether these amendments are necessary to place persons seeking to enter into a civil partnership in a position similar to persons whose marriage is solemnized by authorised celebrant under the *Marriage Act 1961* (Commonwealth) (see section 40 and following), and in this way enhance the fulfilment of the rights to equality before the law and to the equal protection of the law without discrimination stated in HRA section 8.

There may be debate about whether HRA section 8 has any direct application where the inequality arises out of a comparison between Territory and Commonwealth law. The HRA does not of course control the content of human rights for the purposes of Assembly debate, and the issue could be posed as one of general principle in the sense that some may accept that in this context an issue of equal treatment under the law arises whether or not any law is the source of this principle.

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

Privative clause

Does proposed subsection 12A(1) amount to a privative clause, and if so is it incompatible with HRA subsection 21(1) and/or inconsistent with section 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth)?

The Committee has long been concerned about the privative clause, and in recent reports the Committee has buttressed its long-standing concern that a privative clause is an undue trespass on rights by pointing to HRA subsection 21(1). It has also pointed to the possibility that the power of the Assembly to restrict judicial review is limited by subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*; see generally *Scrutiny Report No 11* of the *Sixth Assembly*, concerning the Water Resources Amendment Bill 2005.

By proposed subsection 8A(1), the 2 people who propose enter into a civil partnership by making a declaration must give notice to a civil partnership notary of their intention to enter into a civil partnership. Proposed subsection 8A(2) stipulates that the notice must be accompanied by a declaration stating certain matters (such as that there is no prohibition on the partnership by reason of marriage or partnership to another, or by reason of the 2 people being in a prohibited relationship), and by evidence of age and identity.

The evident purpose of proposed section 8A is to ensure compliance with the requirements of the Act concerning who may enter into a civil partnership. However, proposed subsection 12A(1) provides:

> (1) A civil partnership is not invalid only because a requirement of section 8A was not complied with.

This may be viewed as a privative clause in that, on its face, it precludes any judicial review of the question of the legality of a civil partnership on the basis that there was no compliance with proposed section 8A.

This clause may be compared to the more limited form of protection in clause 17 of the Crimes (Controlled Operations) Bill 2008. Under that Bill, the chief officer of an agency may grant (and later amend) an authority to conduct a controlled operation on an application being made to the officer. Clause 17 provides:

> **Defect in authority**
>
> An application for an authority or amendment of an authority, and any authority or amendment of an authority granted on the basis of an application, is not invalidated by any defect, other than a defect that affects the application, authority or amendment in a **material particular** (emphasis added).

Another way to limit the effect of a provision such as proposed 12A(1) is to make it clear that it applies only to "any informality or lack of form" – see *Scrutiny Report No 37* of the *Sixth Assembly*, concerning the Corrections Management Bill 2006.

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

CRIMES (CONTROLLED OPERATIONS) BILL 2008

This is a Bill to provide for the authorisation, conduct and monitoring of controlled operations, being operations conducted for the purpose of obtaining evidence that may lead to the prosecution of people for particular offences, and that involve or may involve conduct for which law enforcement participants in the operation would otherwise be criminally responsible.

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"?

Background

As put in the Explanatory Statement:

> A controlled operation is an investigative method used by law enforcement agencies to identify suspects and obtain evidence for criminal prosecution. The aim of a controlled operation is to gather evidence and intelligence against those who organise and finance crime, rather than merely focusing on couriers and intermediaries.
>
> In a controlled operation, instead of seeking to terminate immediately a criminal scheme, law enforcement officers allow the scheme to unfold under controlled conditions. During the process of allowing this to occur, an informant, agent or undercover police officer may himself or herself need to commit acts that would be regarded as offences unless protected by law. For example, participating in the possession or sale of illegal drugs.

The conduct of an operation gives rise to 2 problems: (1) that the police, etc involved may commit criminal offences, and (2) that the evidence gathered by an operation might not be admitted into evidence on a relevant trial. As to (1), the Explanatory Statement notes that "police operatives … liable to be charged with criminal offences … relied on other police and prosecutors to refrain from charging and prosecuting those offences". As to (2), the decision of the High Court in *Ridgeway v The Queen* (1995) 184 CLR 19 made it more likely that a trial judge would exclude evidence obtained in consequence of a controlled operation.

This Bill proposes a reform of the law to accommodate the need for controlled operations. The proposals are based closely on a model bill proposed by a Joint Working Group (JWG) established by the Standing Committee of Attorneys General and the Australasian Police Ministers Council.

In essence, the Bill would provide protection from civil and criminal liability for people who take part in an authorised controlled operation, and "clarify the status of evidence obtained by participants in authorised operations" (paragraph 6(f)).

There are detailed provisions concerning the process for the grant by a chief officer of an agency of an authority to conduct a controlled operation on behalf of the agency; see clauses 9 to 17. Clause 18 then provides:

18 Protection from criminal responsibility for controlled conduct during authorised operation

Despite any other territory law, a participant who engages in conduct (whether in the ACT or elsewhere) in an authorised operation in the course of, and for the purposes of, the operation is not, if engaging in that conduct is an offence, criminally responsible for the offence if –

(a) the conduct is authorised by, and is engaged in in accordance with, the authority for the operation; and

(b) the conduct does not involve the participant intentionally inducing a person to commit an offence against a law of any jurisdiction or the Commonwealth that the person would not otherwise have committed; and

(c) the conduct does not involve the participant engaging in any conduct that is likely to –

(i) cause the death of, or serious injury to, any person; or

(ii) involve the commission of a sexual offence against any person; and

(d) if the participant is a civilian participant - the participant acts in accordance with the instructions of a law enforcement officer.

In clause 19 there is similar provision concerning civil liability. [4]

Some human rights issues arise.

Having regard to the rule of law, and/or to HRA subsection 8(2), is it appropriate that a participant in an authorised operation is, if engaging in that conduct is an offence, and in defined circumstances (see clause 18), granted an immunity from both criminal and civil responsibility?

The first is the general issue of whether it is appropriate to grant criminal or civil liability to a public official in respect of their actions performed in the course of their duties. On its face, such immunity contravenes one dimension of the rule of law as that concept was stated by A V Dicey, a writer whose views – first published in 1885 - have long been taken as providing a guide, at least in some of its dimensions, as to what the “rule of law” means. This passage states two of the meanings that Dicey attributed to the rule of law:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power ... . It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[5]

On its face, a law granting to state officials an immunity from the application of the criminal and civil law in respect of their official duties violates this second aspect of the rule of law. It might also be seen to derogate from the rights stated in subsection 8(3) of the *Human Rights Act 2004* “Everyone is equal before the law and is entitled to the equal protection of the law without discrimination”.

---

[4] In this latter case, any liability that would, apart from this protection, attach to a participant attaches to the Territory; see subclause 19(3).

[5] A.V. Dicey, *Introduction to the study of the law of the Constitution* (10th ed, 1959) at 202-203.

The granting of immunity from prosecution also violates the basic constitutional principle that "[t]he Executive branch of government cannot dispense its officers from the binding effect of the laws prescribed by the Parliament".[6]

The Explanatory Statement does not address these issues other than to remark that in *Ridgeway* the High Court acknowledged "sometimes law enforcement officers need to engage in illegal activities as part of investigations". There is no reference to support this statement, and it overstates the position. The High Court did not speak with one voice, for there were 4 separate judgments, and only some judges stated what a view about appropriate policy. It may assist the Assembly to note some of these views. Brennan J was very guarded:

> [17] … As a technique of law enforcement, the so-called "controlled" importation of prohibited imports may be an acceptable technique for the detection and breaking up of drug rings but, if that be so, the law enforcement agencies must address their concerns to the Parliament.[7]

Gaudron J was concerned with the effect of police illegality on the administration of justice:

> [38] … the administration of justice is inevitably brought into question, and public confidence in the courts is necessarily diminished, where the illegal actions of law enforcement agents **culminate** in the prosecution of an offence which results from their own criminal acts. Public confidence could not be maintained if, in those circumstances, the courts were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents or persons acting on their behalf (emphasis added).
>
> [39] So far as public confidence in the administration of justice is concerned, the position is even worse if, as is usually the case, the law enforcement agents or those acting on their behalf are not brought to account for their criminal acts. In cases of that kind, the courts are brought into greater disrepute because they give the appearance of sanctioning illegality. And that appearance is given even if criticism is made of the police conduct involved. Indeed, criticism may well appear to be mere humbug and, itself, lead to a further erosion of confidence in the courts.

McHugh J did make allowance for a "controlled operation" police activity:

> [17] … in their increasingly difficult battle against crime - particularly organised crime - law enforcement authorities cannot be criticised for taking initiatives to apprehend those who make a business of crime or are about to embark on a course of criminal activity. Where there are no "victims" or there is none who is willing to co-operate with the law enforcement authorities, the taking of steps to apprehend such persons is often a social necessity. The State is entitled to protect itself against likely criminal activity. Merely setting a trap for and consequently apprehending and charging a person whose business is criminal activity or who is about to commit a criminal offence does not in my view offend the community's sense of justice. Provided there is some basis for the entrapment and the means used have not induced the person to commit an offence that that person would not otherwise have committed, the public interest does not require the condemnation of methods of entrapment that result in the apprehension of those who make a business of crime or are about to embark on a course of criminal activity (footnotes omitted).

[6] *Ridgeway v The Queen* [1995} HCA 66, Brennan J judgment at [17], citing *Clough v Leahy* [1904] HCA 38; (1904) 2 CLR 139 at 155-156; *A v Hayden (No 2)* [1984] HCA 67; (1984) 156 CLR 532 at 540, 562, 580-582, 588-589, 592.

[7] *Ridgeway v The Queen* [1995} HCA 66, Brennan J judgment at [17].

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

Does the Bill make adequate protection to guard against the danger that an authorised controlled operation could be conducted in such a way as to entrap a person into committing a breach of the criminal law, and in this way derogate from the right to a fair trial stated in HRA subsection 21(1)?

The Explanatory Statement notes this rights issue:

> It is now well established in the case law of international courts and tribunals that "entrapment, and the use of evidence obtained by entrapment, may deprive a defendant of the right to a fair trial", and "the fairness of a trial is violated if the crime for which the defendant is prosecuted has been incited or instigated by police officers": *Loosely v R* [2001] UKHL 53, also *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

The Bill makes two kinds of provision to guard against this danger.

The first is to provide that a participant will gain immunity from the law only where "the conduct does not involve the participant **intentionally** inducing a person to commit an offence" (paragraph 18(b)). There is room for debate here as to the adequacy of this provision. The use of the word "intentionally" casts the rule in a subjective form, so that the question is whether the participant *intended to induce* a person to commit an offence. If the participant lacked this intention, it would not matter that, looked at objectively, what the participant did was likely to cause a person to be induced to commit an offence.

On the other hand, the rule could be stated so that the participant would not gain immunity if, looked at objectively, the result of what the participant did was likely to cause a person to be induced to commit an offence. A rule stated in this way might be thought to afford a greater degree of protection against the danger of entrapment.

The Explanatory Statement draws attention to this debate in its explanation of clause 18, and deals with it by adopting the preference of the JWG for the subjective approach. It is noted that the JWG considered "that in practice any difference between an objective and subjective test may be small. It would be unusual for a court to find that a law enforcement officer's conduct satisfied the objective criteria listed by McHugh J, but that the officer had not subjectively intended to entrap the suspect by that conduct".

The second way the Bill guards against the danger of entrapment is explained in this way:

> It is intended that in any prosecution involving evidence obtained by the powers exercised under the Bill, where it is alleged that the evidence is the result of inducement or entrapment, the court retains its discretion to receive and exclude evidence or stay proceedings consistent with the right to fair trial.

(Presumably the appropriate word is "established" rather than "alleged", in that an allegation that something occurred does not establish that it did.)

The Committee must observe that the Explanatory Statement is not correct in its assertion that "clause 7(3) gives effect to the policy discussed in the *JWG Report* that the Bill does not seek to limit a court's discretion to admit or exclude evidence in proceedings or to stay criminal proceedings in the interests of justice". Indeed, the Explanatory Statement then notes that:

> Clause 7(4) requires the court to disregard the fact that evidence was obtained as a result of criminal conduct when exercising a discretion to exclude evidence. The Court is only to disregard the fact that the evidence was obtained as a result of criminal activity if the criminal activity was undertaken by a participant or corresponding participant acting in the course of an authorised operation, or a corresponding authorised operation, and the activity was controlled conduct authorised under the Act, or a corresponding law.
>
> Clause 7(4) does not prevent the court from excluding evidence which was obtained as a result of criminal conduct if another reason recognised by law exists which would also justify the exclusion of the evidence.

It may however be anticipated that where a person was induced to commit an offence a trial judge would consider seriously excluding evidence or even staying the criminal proceeding. This could include a case where the participant who induced the crime is immune from prosecution because he or she did not intend to induce.

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

Will the provision that a controlled operation cannot be authorised unless the relevant chief officer is satisfied on reasonable grounds that any conduct involved in the operation will not endanger the health or safety of any person (paragraph 10(2)(h)(i)) unduly restrict the ability of an officer to grant an authorization?

Subclause 10(2) states a number of matters in respect of which the chief officer of an agency must be satisfied on reasonable grounds before the officer can authorise a controlled operation. The ground stated in paragraph 10(2)(h)(i) is that "any conduct involved in the operation will not – (i) endanger the health or safety of any person".

This is to be compared to the provision in the Model Bill proposed by the JWG that requires satisfaction that any conduct etc will not "*seriously* endanger the health or safety of any person" (emphasis added).

It may well be that many proposed operations will create a risk of some degree of danger to the health or safety of any person, (including, in particular, the police officers, etc who are authorized to participate in the operation). Thus, on the face of it, when compared to what might be the case under the JWG model, it will thus be less likely – perhaps to a significant degree – that a relevant chief officer in the Territory will grant an authorisation.

In evaluating paragraph 10(2)(h)(i) from a rights perspective regard must be had not only to the danger to the health and safety of particular persons that may arise from a particular controlled operation, but also to the danger to the life, liberty and security of those members of society whose interests in these regards are endangered by the criminal activities of others who commit the crimes that planned operations are designed to detect and suppress. The HRA provides a basis to assert that the Territory has an obligation to protect the right to life (section 8) and the right to liberty and security (section 18).[8]

---

[8] Compare to McHugh J in *Ridgeway*: "The State is entitled to protect itself against likely criminal activity" (quoted above).

Of course, the extent of this obligation is modified by HRA section 28, which in effect allows that a law may derogate from an HRA right where the limitation or restriction pursues a legitimate objective, and there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised. The objective of paragraph 10(2)(h)(i) is to protect the health and safety of particular persons that may arise from a particular controlled operation, but if this is seen as a restriction on the right of others to life, liberty and security, the question than is whether this is a disproportionate limitation. In that assessment, regard has to be had to the object of paragraph 10(2)(h)(i).

Thus, the rights issue arising out of this aspect of the Bill may be posed in terms of whether the restriction on the ability to authorise an operation stated in paragraph 10(2)(h)(i) strikes an appropriate balance between:

- on the one hand, the need to ensure that criminal law enforcement is capable of affording protection to members of the public, and,
- on the other, the need to protect the health and safety of particular persons that may arise from a particular controlled operation.

This is a question for the Assembly to consider.

The Committee notes that the Explanatory Statement justified the departure from the JWG Model Bill in the following terms:

> The model Bill included the word "serious", which suggested that some kind [of] pre-conceived harm could be authorised. This would have raised the issue of the appropriate, planned, use of force, as considered in *McCann and Others v United Kingdom* (1996) 21 EHRR 97. The European Court of Human Rights determined that the individuals who actually used lethal force had not breached human rights, as they genuinely believed they had reasonable grounds to use the force. However, the Court decided that those responsible for managing the individuals had breached human rights because they created a context for the use of force that was disproportionate to the *actual situation* (emphasis added).

It is hard to see how the JWG model "would have raised the issue of the appropriate, planned, use of force, as considered in *McCann*".[9] In that case, the European Commission of Human Rights, and then the European Court of Human Rights, was not, in terms of protecting the right to life as stated in the European Convention on Human rights, concerned with the adequacy of a rule to govern future cases in which lethal force could be employed. There was in effect a "hindsight" review of how a particular operation to arrest terrorists had been planned. Moreover, in undertaking this review, the Court applied a much stricter test (that is, a test of what was "absolutely necessary") than that stated in HRA section 28. It is hard to see how much if anything said in this judgment assists in an evaluation, in the light of the HRA, of paragraph 10(2)(h)(i) and the competing JWG model provision.[10]

---

[9] These comments on the case are based on the extracts in S Farran, *The UK before the European Court of Human Rights* (1996), at 39ff.

[10] It might also be noted that it was by a majority of 10 to 9, and disagreeing with a report of the Commission, that the European Court held that the UK authorities had not planned the particular operation in a manner that was "absolutely necessary" to protect the life of members of the public.

An authorisation to conduct a controlled operation does not authorise conduct that creates a risk of harm to a person's health of safety. A controlled operation is one "conducted, or intended to be conducted, for the purpose of obtaining evidence that may lead to the prosecution of a person for a relevant offence" and which involves or may involve "controlled conduct" (*Dictionary*). The latter is "conduct for which a person would, apart from [provisions of the Bill] be criminally responsible".

It is the case that an authorisation may be granted even though the chief officer of the relevant agency can foresee that the conduct of the operation involves a risk that some person's heath of safety will be endangered. This is not however an authorisation to engage in such conduct. In many cases, the danger of such conduct will arise from the actions of the targets of the operation, and not the police.

The Committee draws this to the attention of the Assembly.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2008 (NO 2)

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

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"?

Is the proposal in clause 1.26 of Schedule 1 to amend the *Legal Profession Act 2006* to empower a judicial member of a disciplinary tribunal to issue a warrant for the arrest of a person who has not appeared pursuant to a subpoena, and for the person to be brought to the tribunal, compatible with HRA subsection 18(1) (right to liberty and security) and/or is this power inconsistent with separation of powers doctrine?

The Explanatory Statement notes that

> [a]mendments have been [proposed] to the *Legal Profession Act 2006* to insert new sections 428, 428A and 428B into the Act. The new sections provide the disciplinary tribunal with powers to require witnesses to attend the tribunal to give evidence and issue arrest warrants where such witnesses fail to attend, consistent with the powers in the ACT Civil and Administrative Tribunal Bill.

In *Scrutiny Report No. 55* of the *Sixth Assembly* the Committee reported on the human rights issues arising out of such a proposal when it considered very closely similar provisions of the ACT Civil and Administrative Tribunal Bill 2008. The Committee refers the Assembly to that discussion.

SEXUAL AND VIOLENT OFFENCES LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Evidence (Miscellaneous Provisions) Act 1991* and the *Magistrates Court Act 1930* in relation to sexual and violent offences, and in relation to the evidence given in any proceeding by a witness with a disability.

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 provisions of the Bill are very complex and in the time available to it the Committee can do little more than identify in a general way the significant rights issue that appear to it to arise from the provisions.

The Committee must emphasise that its comments must be read in conjunction with the Explanatory Statement in order for a balanced view of the way the rights issues should be evaluated.

The right of an accused to defend himself or herself personally and to cross-examine prosecution witnesses

Is the prohibition on the ability of a self-represented accused to cross-examine certain classes of witness a justifiable restriction on the HRA rights stated in paragraphs 22(2)(d) and (h)?

This right arises out of a combination of the rights stated in HRA paragraphs 22(2)(d) and (g):

> 22 (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
>
> (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
>
> ...
>
> (g) to examine prosecution witnesses, or have them examined; … .

The rule in proposed section 38C(2) of the Evidence (Miscellaneous Provisions) Act – that "[a] self-represented accused person must not personally cross-examine a witness" – in effect negates this right in relation to a witness for the prosecution who is, in a sexual or violent offence proceeding, the complainant, a child, a similar act witness, or a witness with a disability.

On some judicial views, which may or may not be adopted by a court having jurisdiction to review compliance with the HRA, the negation of a right cannot be justified under HRA section 28. If this approach is regarded as too strict, justification under section 28 nevertheless requires a showing by the proponent of the law that the limitation or restriction on the fight pursues a legitimate objective, and that there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

In this case, the provisions of proposed subsections 38C(3)-(5) will be relied upon as affording justification under HRA section 28. The Explanatory Statement summarises and comments upon these provisions:

> New section 38C sets out a special procedure to enable the self-represented accused to cross-examine the above witnesses. The accused will be provided with a reasonable opportunity to obtain legal representation for the purposes of the cross-examination. If the accused remains unrepresented, the court must order that the accused be legally represented for the cross-examination, and may make any other orders necessary to secure this representation. This procedure is similar to the procedure in the *Family Law Act 1975* (Commonwealth) which, in practice, results in the court requesting the relevant Legal Aid body to provide legal representation.

> A legal practitioner provided to the accused for the purpose of conducting the cross-examination is obliged to act in the best interests of the accused. However, if the accused refuses the legal representation provided, or otherwise fails to co-operate, the court must then warn the accused that he or she will not be allowed to cross-examine the witness. The warning must also explain that a failure to cross-examine the witness will mean that the accused may not adduce evidence from another witness, in relation to a fact in issue, with the intention of contradicting the evidence of the witness who the accused is unable to cross-examine, [if] the fact has not been put to the witness during cross-examination. [See proposed paragraph 38C(4)(b)].
>
> The court is required to warn the jury that this procedure is a usual practice, and that they must not draw any adverse inferences against the accused, or give the evidence more or less weight.

The Explanatory Statement offers an extensive justification for the application of HRA section 28.

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

The right of an accused to adduce evidence on a criminal trial

Is the prohibition on the ability of a self-represented accused to adduce evidence in defined situation a justifiable restriction on the HRA rights stated in paragraphs 22(2)(g) and/or subsection 212(1)?

The Committee notes that a rights issue arises out of the proposed rule that a self-represented defendant cannot adduce evidence in relation to a fact in issue, with the intention of contradicting the evidence of the witness who the accused is unable to cross-examine, if the fact has not been put to the witness during cross-examination (see proposed paragraph 38C(4)(b)).[11]

This is a limitation on the right of an accused stated in HRA paragraphs 22(2)(g):

> to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses.

It is also a limitation on the more basic right to a fair trial (HRA subsection 21(1)).

This rule imposes on the accused a very heavy penalty that will compromise her or his ability to adduce evidence probative of their innocence. It requires a strong showing of justification. This might be difficult in that it may be argued that the objective of the rule – which is presumably to discourage the accused from refusing to cooperate with a legal representative – might as well be achieved by imposing on the accused a lesser penalty, such as requiring the trial judge to direct the jury (or self-direct) to the effect that the accused "did not challenge the witness' evidence in cross-examination, when that could have occurred", or that the evidence of some other witness called by the accused "should be treated as a 'recent invention' because it 'raises matters that [the accused] could have, but did not, put in cross-examination [of the witness]'".[12]

---

[11] This rule applies only to evidence that *contradicts* the evidence of the witness not cross-examined. On its face, the rule does not preclude evidence that throws doubt on the reliability of the witness.

[12] See ALRC *Uniform Evidence Law ALRC Report No 102* (2005) at 5.144. These are some of the penalties that may be imposed where a part breaches the rule in *Browne v Dunn*. This rule operates in a situation analogous to that addressed by these provisions.

The right of an accused to have criminal charges decided by a court after a fair and public hearing

Is the provision that a trial judge may exercise a discretion to close the court to the public while a complainant or similar act witness in a sexual or violent offence proceeding is giving evidence a justifiable restriction on right to a "fair and public hearing" (HRA subsection 21(1))?

HRA subsection 21(1) provides in part that:

> Everyone has the right to have criminal charges … decided by a … court or tribunal after a fair and public hearing.

It is possible that proposed section 39 of the Evidence (Miscellaneous Provisions) Act has the effect of severely qualifying this right. As put in the Explanatory Statement:

> New section 39 provides the court with the discretion to order the court to be closed to the public while a complainant or similar act witness in a sexual or violent offence proceeding is giving evidence. [This refers to proposed subsection 39(2).]
>
> The court must consider whether the complainant or similar act witness wants to give their evidence in open court, and whether this would be in the interests of justice, before they exercise this discretion. [This refers to proposed subsection 39(3).] The court is also referred to section 21(2) of the *Human Rights Act 2004* which lists circumstances in which the public may be excluded without infringing on the accused's right to a fair and public hearing. [This refers to the note appended to proposed subsection 39(2).]

One issue of interpretation is whether, in the exercise of the judge's discretion, he or she may refer to matters other than those stated in proposed subsection 39(3). The Explanatory Statement appears to assume so, but the matter is not abundantly clear.

Another problem is that the point of the note appended to proposed subsection 39(2) is obscure. A court may have regard to the note, but what is its effect? One view is that the court may only exercise its discretion to close the court when there exists one of the circumstances started in HRA subsection 21(2). That is, where closure of the court would "protect morals, public order or national security in a democratic society", or be "the interest of the private lives of the parties", or "the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice".

This view is probably not correct, given proposed subsection 39(3). The fact that a witness wants to give evidence in open court seems hardly relevant to the application of HRA subsection 21(2). Thus, on its face, proposed section 39 derogates from the right stated in HRA subsection 21(2).

The Explanatory Statement, at page 10, offers a justification for the application of HRA section 28.

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

In proposed Part 4A of the Evidence (Miscellaneous Provisions) Act, the Bill also makes provision for closed court provisions in relation to evidence given by a witness with a disability. This raises the same issues as just noted.

Equal application of the law

In the light of the "equal before the law" right in HRA subsection 8(3), is it appropriate that proposed subsection 39(4) should enable a prosecution witness giving evidence in a closed court to nevertheless choose that persons should remain in the court?

The effect of proposed subsection 39(4) is stated in the Explanatory Statement:

> Where an order is made to close the court to the public, the order does not prevent a person nominated by the complainant or similar act witness from remaining in the court. For example, this could include a support person under new sections 38D and 81C.

It is not apparent why it is felt desirable to permit the witness to possess an untrammelled power to decide that despite the closure of the court by the trial judge, a particular person should remain in the court. (This power could be exercised from time to time during the period the witness gives evidence.) It is noted that such a person need not be a support person as described in proposed sections 38D and 81C.

This rule places the accused on an unequal footing to the prosecution, and on its face derogates from the right of the accused to the equal application of the law (HRA subsection 8(3)).

The Explanatory Statement does not address this issue.

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

The right to a fair trial and the provision for admission of evidence in chief of some complainants in the form of an audiovisual recording and/or a written statement

HRA subsection 21(1) provides in part that:

> Everyone has the right to have criminal charges … decided by a … court or tribunal after a fair and public hearing.

It is arguable that an indication of the fairness of a trial of an accused is that the evidence presented by the prosecution is adduced from witnesses who give their evidence orally. This consideration is reflected in the rule against the admission of evidence in a hearsay form. Evidence is in a hearsay form where it is presented in the form of a statement made out of court by a person, including a person who is called as a witness, and is adduced as evidence of the truth of the assertions of fact made in the statement.

The provisions of proposed Divisions 4.2A and 4.2B of the Evidence (Miscellaneous Provisions) Act permit the prosecution to adduce evidence from a witness in the form of a statement made out of court by the witness, and thus engage the right of an accused to a fair trial. The scheme will be briefly described by adoption and slight modification of the Explanatory Statement.

Is it consistent with the right to a fair trial (HRA subsection 21(1)) that the prosecution should be permitted to adduce evidence from a witness in the form of a statement made out of court by the witness?

Proposed Division 4.2A

Proposed subsection 40E(1) defines audiovisual recording for division 4.2A to mean an audiovisual recording that is of a complainant (who is also a child or intellectually impaired person) answering questions of a prescribed person in relation to the investigation of a sexual or violent offence.

Proposed subsection 40F provides that an audiovisual recording of such a complainant answering questions in relation to the investigation of a sexual or violent offence is admissible in evidence as the complainant's evidence-in-chief in a proceeding.

Proposed sections 40G to 40J provide the procedure for giving notice which must be followed for the audiovisual recording to be admissible as evidence.

A point to note is that audiovisual recording will only be admissible if notice has been given by the prosecutor, a copy of the transcript has been provided at a reasonable time before the start of the proceeding in which the recording will be tendered, and the accused and their lawyer have been given a reasonable opportunity to view and hear the recording.

If the prosecution fails to provide notice, the court may still admit the recording into evidence if a copy of the transcript has been provided at a reasonable time before the start of the proceeding, the court is adjourned to enable the accused and their lawyer a reasonable opportunity to view and hear the recording, and it is in the interests of justice to admit the recording. The recording will also be admitted, where notice has not been given, if the parties consent to the recording being admitted.

The Committee notes that the scheme is a limited one, and none of its provisions restrict the right of an accused to cross-examine the witness. Nor could the prosecution invoke the scheme as a form of re-examination.

At pages 3 to 5 the Explanatory Statement offers a justification for any derogation of an HRA right only by general observations on the position of witnesses in sexual offence and violent offence proceedings, and on the position of children and persons with intellectual or physical disabilities who give evidence.

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

Proposed Division 4.2B

Proposed section 40Q provides that a witness giving evidence at a **pre-trial hearing**, must give this evidence in a room separate to the courtroom, but connected to it by audiovisual link. The witness must be a child, an intellectually impaired person, or a complainant in respect of whom the court has considered must give evidence as soon as practicable because the complainant is likely to suffer severe emotional trauma, or be intimidated or distressed (see proposed paragraph 40P(1)(c)). The evidence of the witnesses in chief given at a pre-trial hearing may include an audiovisual recording under division 4.2A.

Proposed section 40R provides that the only people authorised to be in the courtroom at a pre-trial hearing include the presiding judicial officer, the prosecutor, the accused, the accused's lawyer, and anyone else the court considers appropriate.

Proposed section 40S provides that the entire evidence (evidence-in-chief, cross-examination and re-examination evidence of a witness (as defined) which is taken at a pre-trial hearing, must be recorded. The audiovisual recording of the entire evidence recorded at the pre-trial hearing must be played at the sexual offence proceeding and admitted into evidence as a substitute for the witness giving oral evidence at this proceeding.

Proposed section 40T provides that where an audiovisual recording of a witness's evidence is played as the witness's evidence in a sexual offence proceeding, the accused may make an application to the court for an order that the witness attend the proceeding to give further evidence. Where the court makes such an order, the witness must give their further evidence in a room separate from the courtroom, but linked to it by audiovisual link. The court may only make such an order where satisfied that (a) if the witness had given evidence in person at the hearing of the sexual offence proceeding, the witness could be recalled, and (b) it is in the interests of justice to make the order.

The requirement that the judge must be satisfied that the witness could be **recalled** may limit the scope of this power. Does it include a case where the accused wishes to cross-examine the witness?

The Explanatory Statement does not offer a justification for any derogation of a HRA right other than general observations at pages 1 to 3 and some more specific justifications at pages 4 to 5.

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

The amendments to the *Magistrates Court Act 1930*

The effect and purpose of these amendments is described in the Explanatory Statement:

> Amendments to the *Magistrates Court Act 1930* permit the admission of a transcript of an audio or visual recording of an interview between police and children or intellectually impaired witnesses, as these witnesses' evidence-in-chief in a committal proceeding. The amendments will reduce the number of times children and intellectually impaired witnesses are required to give evidence throughout the criminal justice system, which will help mitigate the problems that result from inconsistencies and omissions which are unavoidable when a child is forced to recount their story repeatedly. They will also alleviate similar difficulties which can be faced by the intellectually impaired. The defence will be provided with a copy of the transcript and an opportunity to hear and view the recording in order to prepare its case.
>
> Other amendments to the *Magistrates Court Act 1930* prohibit absolutely the calling and cross-examination of alleged victims of sexual offences at a committal proceeding. A written statement or a transcript of a police interview will be admissible as the alleged victim's evidence-in-chief, and there will be no requirement for the victim to attend the committal proceeding to give alternative evidence-in-chief or cross-examination evidence. Cross-examination of alleged victims at committal, which is often more rigorous and intimidating, in the absence of a jury, leads many alleged victims to seek to have the proceedings discontinued for fear of having to go through additional trauma at trial.

It is apparent that these provisions engage a number of the HRA rights that have been identified above. The Assembly will note the general observations in the Explanatory Statement at pages 1 to 3, and the more particular justification in the passages just quoted.

It may be argued that from the perspective of an accused, these amendments will reduce the utility of a committal proceeding as a means to ensure that unmeritorious prosecutions do not proceed to trial.

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

The similar act witness

The Committee draws attention to the limited scope of the protective provisions of the Bill arising out of the limited meaning of the concept of a "similar act witness".

Many of the proposed provisions will apply to a person who is "a similar act witness" as defined in proposed section 37 of the Evidence (Miscellaneous Provisions) Act , that is,

> a witness in a sexual or violent offence proceeding who gives, or intends to give, evidence in the proceeding that -
>
> (a) relates to an act committed on the witness by the accused; and
>
> (b) is tendency or coincidence evidence under the *Evidence Act 1995* (Cwlth).

This definition will be far from easy to apply. There will be many occasions on which a witness will not fall within this definition and yet will give evidence of having been sexually and/or violently assaulted. The problem lies in the limitation stated in paragraph (b) of the definition, that the evidence must be "tendency evidence or coincidence evidence".

In many trials of sexual or violent assaults a witness – who may or may not be the complainant - will give evidence that he or she has on some occasion, other than an occasion for the charge, been sexually or violently assaulted, and yet that evidence will not be "tendency evidence or coincidence evidence". That is, the evidence is relevant to proof of the guilt of the accused on some basis other than that it tends to prove guilt by showing that the accused had a tendency to sexually or violently assault, or that it is beyond mere coincidence (and thus likely to be the case) that the accused sexually or violently assaulted someone.[13]

A witness who gives evidence that is not "tendency evidence or coincidence evidence" cannot be a "similar act witness".

WORKERS COMPENSATION AMENDMENT BILL 2008

This Bill would amend the *Workers' Compensation Act 1951* to permit a claim for compensation to extend to the cost of alteration to the worker's place of residence.

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"?

The right to workers compensation

Could the scope of the right of a worker to claim compensation for the cost of alterations to the worker's home be more clearly expressed?

[13] There is some discussion of such cases in ALRC *Uniform Evidence Law ALRC Report No 102* (2005) at 11.76ff.

It may be argued that international law – in the form of International Labour Office treaties – recognises that a worker has a right to adequate compensation in respect of work-related injury.[14] It is thus important that a law not only provide for compensation, but do so in a way that clearly states the scope of the entitlement.

In this light, the Committee notes a lack of clarity in some key expressions used in the proposed amendments and that some degree of confusion is introduced by the Explanatory Statement comment on these expressions.

Section 70 of the *Workers' Compensation Act 1951* provides that an employer is liable to pay for various kinds of medical expenses incurred by a worker, and clause 4 of the Bill would insert a new head of liability by inserting a new paragraph (aa) in subsection 70(1). The effect is that the employer:

> is liable to pay –
>
> (aa) in relation to the cost of alteration to the worker's place of residence - the cost of the alteration if -
>
> (i) the worker has an impairment as a result of the injury; and
>
> (ii) the worker has received, or is receiving, medical treatment in relation to the injury; and
>
> (iii) the alteration is reasonably required by the worker in relation to the worker's impairment; … .

Proposed 73A then states a rule for the working out of the costs of alterations to residences.

> The following matters must be considered when working out the amount of compensation payable in relation to a worker under section 70 (1) (aa):
>
> (a) the likely period for which the alteration will be required;
>
> (b) any difficulty faced by the worker in gaining access to, or enjoying reasonable freedom of movement in the worker's place of residence;
>
> (c) if the worker previously received compensation under section 70 (1) (aa) in relation to an alteration to the worker's place of residence and later disposed of the place—whether the value of that place increased as a result of the alteration.

A number of points of uncertainty may be identified.

First, it is not clear whether this is an exhaustive statement of the range of matters that are relevant to working out of the costs of alterations. It appears to be, but this may not be intended.

Secondly, it is not clear how "the likely period for which the alteration will be required" is relevant to an assessment. For example, if the period is say 6 months, how does this affect the assessment?

[14] A number of ILO conventions relate to workers' compensation, including the Workman's Compensation (Accidents) Convention 1925, the Social Security (Minimum Standards) Convention 1952 (Parts VI, XI and XIII), the Employment Injury Benefits Convention 1964, the Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934 and the Sickness Insurance (Industry) Convention 1927.

Thirdly, while paragraph (b) is reasonably clear, the Explanatory Statement considers that it permits reference to a much wider range of matters. It states:

> 73A specifies the things that should be taken into account when a worker seeks compensation for the costs of making home alterations, including … (b) the environment that the injured worker currently faces and what would be reasonably required in making their life more comfortable, *including things like* improved freedom of movement, increased usability and facilitating greater independence; (emphasis added).

It is hard to see how paragraph (b) can be a basis to take into account "the environment that the injured worker currently faces and what would be reasonably required in making their life more comfortable".

Fourthly, it is not clear how the matter stated in paragraph (c) bears on an assessment. The Explanatory Statement does give a clear indication, and the Committee suggests that the example given in the Explanatory Statement might be incorporated in proposed section 73A as an Example.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-87 being the Race and Sports Bookmaking (Fees) Determination 2008 (No. 1) made under section 97 of the *Race and Sports Bookmaking Act 2001* **revokes DI2007-122 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-116 being the Health Professionals (Fees) Determination 2008 (No. 2) made under section 132 of the *Health Professionals Act 2004* **revokes DI2007-302 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-118 being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2008 (No. 1) made under subsection 7(3) of the *Legal Aid Act 1977* **appoints a specified person as a part-time Commissioner of the Legal Aid Commission, nominated by the Executive Committee of the Council of Social Service of the ACT.**

Disallowable Instrument DI2008-121 being the Nature Conservation (Flora and Fauna Committee) Appointment 2008 (No. 2) made under section 17 of the *Nature Conservation Act 1980* **appoints specified persons as chairperson and deputy chairperson of the Flora and Fauna Committee.**

Disallowable Instrument DI2008-122 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Office-holders' Staff 2008 (No. 1) made under subsection 6(2) of the *Legislative Assembly (Members' Staff) Act 1989* **determines the variable terms of employment, including rate of pay and other employer provided benefits, for the position of Executive Chief of Staff.**

Disallowable Instrument DI2008-123 being the Tree Protection (Advisory Panel) Appointment 2008 (No. 1) made under subsection 69(1) of the *Tree Protection Act 2005* **appoints specified persons as members of the Tree Advisory Panel.**

Disallowable Instrument DI2008-124 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2008 (No. 1) made under subsections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2007-165 and determines the conditions under which Members may employ staff and engage consultants and contractors for the 2008-2009 financial year.**

Disallowable Instrument DI2008-125 being the Casino Control (Fees) Determination 2008 (No. 1) made under section 143 of the *Casino Control Act 2006* **revokes DI2007-123 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-126 being the Gaming Machine (Fees) Determination 2008 (No. 1) made under section 177 of the *Gaming Machine Act 2004* **revokes DI2007-121 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-127 being the Adoption (Fees) Determination 2008 (No. 1) made under section 118 of the *Adoption Act 1993* **revokes DI2006-114 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-128 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2008 (No. 1) made under subsections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2007-166 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors from 1 July 2007.**

Disallowable Instruments—Comment

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

Is this a disallowable instrument?

Disallowable Instrument DI2008-99 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2008 (No. 1) made under section 29 of the *Cemeteries and Crematoria Act 2003* **appoints specified persons as members of the ACT Public Cemeteries Authority governing board.**

This instrument appoints 2 named persons as members of the ACT Public Cemeteries Authority Governing Board. The Explanatory Statement to the instrument states:

> These appointments are disallowable instruments.

It is not clear to the Committee that this is the case. Division 19.3.3 of the *Legislation Act 2001* sets out certain requirements in relation to statutory appointments. Paragraph 227(1)(a) provides that Division 19.3.3 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.

Minor drafting issue

Disallowable Instrument DI2008-101 being the Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2008 (No. 1) made under subsections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2005-289 and determines the arrangements under which Members may agree to employ staff or engage consultants and contractors.**

Disallowable Instrument DI2008-102 being the Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2008 (No. 1) made under subsections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2005-290 and determines the arrangements under which office-holders may agree to employ staff or engage consultants and contractors.**

The Committee assumes that the references to "the clerk" of the Assembly in section 8 of the first of the instruments listed above should, in fact, be a reference to "the **C**lerk" of the Assembly. Alternatively, the references to "the Clerk" of the Assembly in section 8 of the second of the instruments listed above should, presumably, be a reference to "the **c**lerk" of the Assembly.

Drafting issue

Disallowable Instrument DI2008-120 being the Nature Conservation (Flora and Fauna Committee) Appointment 2008 (No. 1) made under section 17 of the *Nature Conservation Act 1980* **appoints specified persons as members of the Flora and Fauna Committee.**

This instrument appoints 6 named persons as members of the Flora and Fauna Committee. The Explanatory Statement to the instrument states:

> Section 17 of the Act provides that the Minister shall appoint members, two of whom shall not be public servants.
>
> This instrument reappoints six members. Five non-public servants and one public servant. Dr Margaret Kitchin is a public servant.

Division 19.3.3 of the *Legislation Act 2001* sets out certain requirements in relation to statutory appointments. Paragraph 227(1)(a) provides that Division 19.3.3 does not apply to the appointment of a public servant to a statutory position. As a result, the Committee considers that the appointment of Dr Kitchin should not be made by way of a disallowable instrument.

Subordinate Laws—No comment

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

Subordinate Law SL2008-22 being the Education Amendment Regulation 2008 (No. 1) made under the *Education Act 2004* **amends the *Education Regulation 2005* to remove the names of schools that no longer exist and to include the names of new schools.**

Subordinate Law SL2008-23 being the Road Transport (Offences) Amendment Regulation 2008 (No. 1) made under the *Road Transport (General) Act 1999* **amends the *Road Transport (Offences) Regulation 2005* determines the meaning of a holiday period for the purpose of the application of double and additional demerit points for driving offences.**

Subordinate Law SL2008-24 being the Territory-owned Corporations Regulation 2008 made under the *Territory-owned Corporations Amendment Act 2006* **amends the Act to delay the default commencement date of when Rhodium Asset Solutions Limited is removed from Schedule 1 of the Territory-owned Corporations Act 1990.**

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 25 June 2008, in relation to comments made in Scrutiny Report 52 concerning Disallowable Instrument DI2008-19, being the domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1).
- The Minister for Health, dated 26 June 2008, in relation to comments made in Scrutiny Report 55 concerning the following Disallowable Instruments:
  - DI2008-47, being the Health Professionals (Psychologists Board) Appointment 2008 (No. 1);
  - DI2008-48, being the Health Professionals (Pharmacy Board) Appointment 2008 (No. 2); and
  - DI2008-49, being the Health Professionals (Dental Technicians and Dental Prosthetists Board) Appointment 2008 (No. 1).
- The Chief Minister, dated 30 June 2008, in relation to comments made in Scrutiny Report 55 concerning Disallowable Instrument DI2008-50, being the Cultural Facilities Corporation (Governing Board) Appointment 2008 (No. 1).
- The Minister for Housing, dated 30 June 2008, in relation to comments made in Scrutiny Report 55 concerning the Housing Assistance Amendment Bill 2008.
- The Minister for Planning, dated 4 July 2008, in relation to comments made in Scrutiny Report 55 concerning Disallowable Instrument DI2008-57, being the Planning and Development (Fees) Determination 2008 (No. 3).

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Health, the Minister for Housing and the Minister for Planning for their helpful responses.

Bill Stefaniak, MLA
Chair

July 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)
Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

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 43, dated 13 August 2007
Disallowable Instrument DI2007-105 - Public Place Names (Forde) 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
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)

Bills/Subordinate Legislation

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)
Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)
Long Service Leave (Private Sector) Bill 2007 (PMB)

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008
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)
Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Report 53, dated 7 April 2008

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2008
Disallowable Instrument DI2008-20 - Territory Records (Advisory Council) Appointment 2008 (No. 1)
Disallowable Instrument DI2008-23 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 3)
Disallowable Instrument DI2008-24 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 4)
Disallowable Instrument DI2008-25 - Emergencies (Bushfire Council Members) Appointment 2008

Report 54, dated 5 May 2008

Crimes (Forensic Procedures) Amendment Bill 2008
Protection of Public Participation Bill 2008 (PMB)
Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2008 (PMB)
Subordinate Law SL2008-10 - Magistrates Court (Building Infringement Notices) Regulation 2008
Subordinate Law SL2008-8 - Planning and Development Amendment Regulation 2008 (No. 1), including a regulatory impact statement

Bills/Subordinate Legislation

<u>Report 55, dated 10 June 2008</u>

ACT Civil and Administrative Tribunal Bill 2008
Disallowable Instrument DI2008-54 - Legal Profession (Bar Council Fees) Determination 2008 (No. 1)
Disallowable Instrument DI2008-58 - Major Events Security Declaration 2008 (No. 1)
Disallowable Instrument DI2008-59 - Major Events Security Declaration 2008 (No. 2)
Projects of Territory Importance Bill 2008
Waste Minimisation (Container Recovery) Amendment Bill 2008 (PMB)

<u>Report 56, dated 23 June 2008</u>

Disallowable Instrument DI2008-104 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2008 (No. 1)
Disallowable Instrument DI2008-70 - Heritage (Council Deputy Chairperson) Appointment 2008 (No. 1)
Subordinate Law SL2008-18 - Domestic Animals Amendment Regulation 2008 (No. 1)
Subordinate Law SL2008-21 - Dangerous Substances (Explosives) Amendment Regulation 2008 (No. 1), including a regulatory impact statement

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Bill Stefaniak, MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to the Standing Committee on Legal Affairs Scrutiny Report No. 53 of 7 April 2008. I offer the following response in relation to Disallowable Instrument DI2008-19 being the Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1) made under section 11 of the *Domestic Violence Agencies Act 1986.*

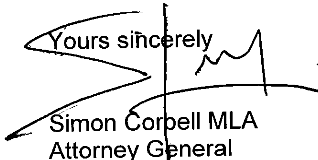
At the time of appointing the Coordinator, it was considered that retrospective commencement would not adversely affect the rights of any person or impose a liability, as her role under the *Domestic Violence Agencies Act 1986* is purely advisory.

The Coordinator's functions are set out in section 12 and comprise solely of providing assistance and encouragement services to government agencies and non-government organisations. It is indeed fanciful to suggest, as the Committee recognises, that the Coordinator might incur a liability in performing such a function.

No reasonable circumstance can be envisaged where legal rights might have accrued to government agencies, non-government organisations or members of the public dealing with such entities as a result of the actions of the Coordinator in the period between the effective commencement of her duties and the instrument appointing her. In any event, it is clearly in keeping with the spirit of the legislation that, if a person could identify a breach of duty that gave rise to an actionable liability on the part of the Coordinator, she should be regarded as immune from it in the same way she would have been if the instrument had been executed prior to the date of commencement. It would be more appropriate for any such action to lie against either the Territory or relevant non-government organisation with whom the person is directly interacting. You will observe that section 16(2) preserves the Territory's liabilities.

I trust this information addresses the Committee's concerns.

Yours sincerely



Simon Corbell MLA
Attorney General

25 JUN 2008

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

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
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ~~Stefaniak~~ Bill

I am writing in regard to the Standing Committee on Legal Affairs Scrutiny Report 55, dated 10 June 2008.

Your comments in relation to Disallowable Instruments DI2008-47, DI2008-48 and DI2008-49, regarding appointment of members of the Psychologists Board, the Pharmacy Board, and the Dental Technicians and Dental Prosthetists Board, have been noted and ACT Health will endeavour to ensure that future Explanatory Statements will state if the person appointed fulfils the relevant requirements.

Thank you for bringing these matters to my attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
26/6/08

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

Jon Stanhope MLA
CHIEF MINISTER
TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE
MINISTER FOR THE ARTS
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee Report No. 55 of 2008, where the Committee has noted typographical errors in the Disallowable Instrument DI2008-50, to appoint Professor Don Aitkin AO as chair of the Cultural Facilities Corporation's board.

While the instrument is not invalid, the Government intends to revoke the instrument and replace it with a corrected version. More care will be taken in future instruments.

Yours sincerely

Jon Stanhope MLA
Chief Minister

30 JUN 2008

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433 Email stanhope@act.gov.au

John Hargreaves MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

Mr Bill Stefaniak
Chair
Standing Committee on Legal Affairs
(Performing the functions of the Scrutiny of Bills Committee)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr ~~Stefaniak~~ Bill

I am writing with regard to Scrutiny Report No. 54, dated 5 May 2008.

I thank the Committee for its comments concerning the Housing Assistance Amendment Bill 2008 made under the *Housing Assistance Act 2007*.

I have addressed the Committee's concerns below:

The first question is: "Do the provisions that permit or require the housing commissioner to make several kinds of subordinate law amount to an appropriate delegation of legislative power?"

This Committee noted that the process for registration, and the monitoring guidelines are disallowable. The Assembly will have some control over these.

It further notes that that the Assembly will not have control over the content of the standards for community housing providers which will be notifiable rather than disallowable.

It is common to have provisions in an Act for some instruments under the Act to be disallowable and others to be notifiable.

In deciding whether an instrument should be notifiable or disallowable consideration needs to be given as to whether the subject matter is something that needs to be accessible or whether it both needs to be accessible and is something that the Assembly would have an interest in being able to amend or disallow.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495 Email hargreaves@act.gov.au

In relation to the standards, it is critical that an entity be able to access the standards that it must satisfy and it is desirable that these be available to the public, so they need to be notifiable. As the standards are essentially technical rather than legal in character, it is considered appropriate for them to be notifiable rather than disallowable.

The second question "Is there adequate provision concerning an obligation to provide reasons for decisions that will affect the interests of persons?", relates to whether a person has a right to reasons for a decision.

The intent of the regulatory framework is to support the development of not for profit housing providers. Refusal of registration would come after a process of negotiation about how the organisation could satisfy the criteria. Refusal to register must be on the basis that the organisation does not satisfy the criteria.

The registration and monitoring guidelines will contain more detailed information on these processes. As noted above, the Assembly will have an opportunity to comment on these, as they will be disallowable instruments.

If, following that process, an appeal to the Administrative Appeals Tribunal was pursued, the expense incurred would currently be $237 to lodge an appeal.

The third question is "Is there adequate definition of the scope of the discretion of the housing commissioner or another Territory entity in sub-section 25Q?"

The purpose of this section is not to provide examples to set the scope of the discretion in terms of considerations to be taken into account when exercising the discretion, but merely to illustrate the types of assistance that could be linked to registration under the regulatory framework.

Provision of assistance by any Territory entity is bound by a range of provisions in this and other Acts. For example, the Housing Assistance Act 2007, Part 2, Section 6 (1) includes objectives that direct resources to the provision of: affordable, secure and appropriate housing; that maximises value for money; promotes choice of forms of housing assistance and promote the growth of the community housing sector. Other constraints on the provision of assistance are the Financial Management Act 1996, the Government Procurement (Principles) Guideline 2002 (No 2), various Acts under which Departments operate as well as the requirements of various funding programs.

The Committee has also suggested a note be included in relation to the privilege against self incrimination. However, the Parliamentary Counsel's Office has suggested including this in a future Statute Law Amendment Bill.

The final question put by the Committee is "Should there be provision for review by the administrative appeals Tribunal of a decision under proposed subsection 25T(1) to "remove a registered housing provider from the register if the provider breaches a condition of registration"?".

The registration and monitoring guidelines will contain more detailed information on these processes. As noted above, the Assembly will have an opportunity to amend or disallow these.

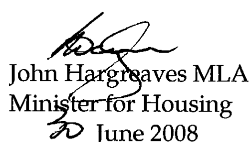
Since there will be negotiation with an agency in the course of monitoring their continued satisfaction of the conditions of registration, followed by written reasons as to why removal from the register is occurring, there should be ample opportunity for the organisation to put its case to remain on the register. Therefore, there is no need for the decision to be reviewed further internally.

Should an organisation wish to lodge an appeal with the Administrative Appeals Tribunal, there is a small cost payable on lodgement. This is currently $237, with a proviso that, if payment of the fee will cause hardship, a waiver may be granted.

The Department has noted the Committee's concern and will ensure that in future, similar issues are addressed in the Explanatory Statement.

Thank you for the opportunity to respond to this matter.

Yours sincerely



John Hargreaves MLA
Minister for Housing
20 June 2008

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR INDUSTRIAL RELATIONS

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

I refer to Scrutiny Report No 55 of the Standing Committee on Legal Affairs with respect to Disallowable Instrument DI2008-57 – Planning and Development (Fees) Determination 2008 (No3) made under section 424 of the *Planning and Development Act 2007*. The instrument determined fees payable for the purposes of the Act and revoked DI2008-42

The Committee noted the instrument, but observed that neither the instrument nor the accompanying Explanatory Statement indicated the magnitude of any fees increases or the reasons for those increases.

The instrument was one of four that were determined in the period leading to and immediately following the launch of the new planning and development system on 31 March 2008. Given the different legal structure and formulations of the new legislation, some uncertainties existed as to which activities were, and which were not, covered by certain determinations.

The changes to fee structures contained in the subject determination were as follows:

Section 137 Applications for development approval in relation to use for otherwise prohibited development

Previously omitted from the fee schedule. The sliding scale (related to cost of works) is the same as sliding scales applied to more general applications for development, but a "flag fall" cost is also included representing the otherwise prohibited nature of the development.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Section 141 Further information in relation to a development application is required

Initial determination of fees for the Act had included fees, of $300 (when supplementary information was required) and $600 (when a major deficiency in application was identified). Practical experience in the early days of the new system indicated that these differentiations were difficult to make in practice. The subject determination therefore retained the fee on the schedule but determined the charges as Nil in each case (ie for the time being no fees are being levied for this purpose). This matter will be reviewed further at a later date.

Section 153 Public notice to adjoining premises

Sectional reference and description were both changed to correct an error. The prescribed fee did not vary.

Section 197 Applications to amend development approvals

Fee was not originally included in the initial determination for charges under the Act with reliance instead on the charge under section 144 relating to the amendment of a development application. It later became clear that a specific fee for this purpose was necessary. In specifying the fee the subject determination applied the same fee as that under section 144.

I note the Committee's observation that details should be provided to the Legislative Assembly when fees are changed or varied as to the magnitude of any fees increases and the reasons for those increases. I agree with the Committee's view.

The ACT Planning and Land Authority has indicated that it will ensure that more comprehensive information is provided in future determinations of this kind.

I thank the Committee for raising the issue and trust that the information provided above is helpful and addresses the matter adequately.

Yours sincerely

Andrew Barr MLA
Minister for Planning

- 4 JUL 2008