



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
(performing the duties of a Scrutiny of Bills and  
Subordinate Legislation Committee)

## Scrutiny Report

11 AUGUST 2011

**Report 40**



## **TERMS OF REFERENCE**

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - (i) is in accord with the general objects of the Act under which it is made;
  - (ii) unduly trespasses on rights previously established by law;
  - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
  - (i) unduly trespass on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (e) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

## **MEMBERS OF THE COMMITTEE**

**Mrs Vicki Dunne , MLA (Chair)**  
**Mr John Hargreaves, MLA (Deputy Chair)**  
**Ms Meredith Hunter, MLA**

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**Legal Adviser (Bills): Mr Peter Bayne**  
**Legal Adviser (Subordinate Legislation): Mr Stephen Argument**  
**Secretary: Mr Max Kiermaier**  
**(Scrutiny of Bills and Subordinate Legislation Committee)**  
**Assistant Secretary: Ms Anne Shannon**  
**(Scrutiny of Bills and Subordinate Legislation Committee)**

## **ROLE OF THE COMMITTEE**

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

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**BILLS****Bills—No comment**

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

<b>A.C.T. TEACHER QUALITY INSTITUTE AMENDMENT BILL 2011</b>
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This Bill would amend the *ACT Teacher Quality Institute Act 2010* to permit a criminal history check, for the purposes of teacher registration, to take into account any relevant spent convictions, in line with the policy evident in the *Spent Convictions Act 2000*.

<b>CORONERS AMENDMENT BILL 2011</b>
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This Bill would amend the *Coroners Act 1997* to add an objects clause to the Act; to clarify the criteria for appointment of counsel assisting the coroner and setting out the function of that role; to regulate arrangements for procedures for inquests, inquiries and the hearings; to permit the Chief Coroner to make practice directions; to amend provisions concerning formal reporting by a Coroner to the Attorney General; to regulate the procedure to be followed when a Coroner finds evidence of an indictable offence; and for information to be given to the immediate family of a deceased person whose death is the subject of an inquest.

<b>JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2011 (NO 2)</b>
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This Bill would amend a number of laws administered by the Justice and Community Safety Directorate.

<b>LAND TAX AMENDMENT BILL 2011</b>
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This Bill would amend the *Land Tax Act 2004* to require the owner of a residential property to notify the commissioner of a land tax liability where they hold the property as trustee.

<b>UNIT TITLES (MANAGEMENT) BILL 2011</b>
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This is a Bill for an Act to provide a framework for the management of housing units.

**Bills—Comment**

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

<b>CRIMES (PENALTIES) AMENDMENT BILL 2011</b>
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This Bill would amend the *Crimes Act 1900* to increase the maximum penalty applying to offences of manslaughter and culpable driving.

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

The Explanatory Statement states that “[t]he *Human Rights Act 2004* is limited on the question of the rights of a person convicted of a crime and the adequacy of their sentence”, and approaches the issue in terms of the right to liberty stated in HRA section 18. It is probably preferable to approach it as an issue of whether the penalty is so disproportionate to a “high end” offence that it is cruel, in terms of HRA paragraph 10(1)(b).

The Committee refers the Assembly to the discussion in the Explanatory Statement.

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

<b>EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2011</b>
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This Bill would amend the *Evidence (Miscellaneous Provisions) Act 1991* to update, consolidate and reorganise the Act and, more substantively, restrict access to sexual assault counselling communications in civil proceedings.

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

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

**The proposed amendments in relation to the protection of sexual assault counselling communications**

Division 4.5 of the Act establishes an immunity for counselling notes about a person against whom a sexual offence was, or is alleged to have been, committed. It provides a framework for an ACT court to apply when a party seeks the relevant counselling notes be disclosed for a proceeding. The scope of the immunity is set out in sections 54 and 55. A protected confidence is a counselling communication made by, to, or about a person against whom a sexual offence was, or is alleged to have been, committed. A counselling communication remains a protected confidence even if it was not made in relation to a sexual offence or made before the happening or alleged happening of a sexual offence.

If it were amended as proposed in the Bill, section 58 would provide that a court dealing with the proceeding may give leave, in accordance with this division, for a protected confidence to be disclosed in both a civil and a criminal proceeding. Section 59 sets out the mechanism for applying for leave to disclose protected confidence evidence. The decision to disclose is to be made on the basis of a public interest test. The Bill would amend the statement of this test to accommodate the fact that it would be applied in both civil and criminal proceedings. It is for the court to weigh a set of factors relevant to the question of whether the public interest in ensuring a fair trial outweighs the public interest in preserving the confidentiality of the protected confidence.

These provisions engage the right to a fair trial. The Explanatory Statement advances a justification for limiting this right to which the Committee refers the Assembly. It also refers readers to the Explanatory Statement for the Evidence (Miscellaneous Provisions) Amendment Bill 2003, which established division 4.5 in relation to criminal proceedings.<sup>1</sup>

The Committee made an extensive examination of the 2003 Bill (see *Scrutiny Report No 36* of the 5<sup>th</sup> Assembly), and refers Members to the report. The comments which follow emphasis perhaps the critical consideration. This report elaborated at length on the way in which a counselling communication could be of considerable probative value towards either the prosecution proving the guilt of the accused, or for the accused throwing doubt on the prosecution case. This analysis would hold true if the Act is amended as proposed, except of course the two standpoints would be that of the plaintiff on the one hand and the defendant on the other. In particular, the probative value of a counselling communication is that it may be made at a point of time very close to the occurrence of the events the communication represents as having occurred. Although in most cases the communication would be adduced for the hearsay purpose of proving that the events occurred, the Evidence Act permits such a statement to be admitted on a wide basis, and some judges have said that, given the time at which it was made, such a statement has significant probative value.<sup>2</sup> The exclusion of a counselling communication might thus have a significant detrimental effect of the ability of a party to prove their case.

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

## LAW OFFICERS BILL 2011

This is a Bill to create the *Law Officers Act 2011* to establish the separate offices of the Attorney-General, the solicitor-general and the government solicitor, and to confer on the Attorney-General the power to issue legal services directions relating to the performance of Territory legal work.

*Does a clause of the Bill inappropriately delegate legislative powers? Committee term of reference (c)(iv)*

Clause 38 confers on the executive a power, stated in a form now commonly found in Territory Acts, to make transitional regulations. It provides:

**38 Transitional regulations**

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

<sup>1</sup> [http://www.legislation.act.gov.au/es/db\\_5400/default.asp](http://www.legislation.act.gov.au/es/db_5400/default.asp).

<sup>2</sup> See for example, *Graham v The Queen* (1998) 195 CLR 606 at 608, per Gaudron, Gummow and Hayne JJ.

- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.
- (4) This section expires 2 years after the day it commences.

A “Henry VIII” clause is usually a provision in an Act which allows that a regulation may validly change some provision of the Act or of some other law of the Territory. These provisions derogate from the authority of the Legislative Assembly and should not generally be included in an Act without justification. The justification should be offered in the relevant explanatory statement so that the Assembly may consider whether its legislative power should be diminished.

To a limited extent subclause 38(2) is a “Henry VIII” clause in that it permits a regulation to amend part 6 of the Bill, which contains three transitional clauses. It is thus a quite limited power, and is further limited by time. Subclause 38(2) provides that clause 38 expires two years after the day it commences.

The Committee also notes that subclause 38(3) is misleading in that a provision of a Territory statute cannot limit the power of the Legislative Assembly to enact a later statute to amend an earlier statute. The public should be able to rely on what a plain reading of a statute suggests, and this is clearly not the case with subclause 38(3). It once again recommends that such clauses not be stated in a bill.

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

<b>RESIDENTIAL TENANCIES (DATABASES) AMENDMENT BILL 2011</b>
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This Bill would amend the *Residential Tenancies Act 1997* to insert a new part dealing with residential tenancy databases.

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

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

Clause 5 would insert a new Part 7 into the Act, to replace the existing and similar Part 6A. In general terms, Part 7 creates a privacy and access to information regime in relation to tenancy databases. The scheme applies to personal information about an identified or identifiable individual which is on a database, and which relates, broadly speaking to the person’s occupation of premises under a residential tenancy agreement.

It is critical to note, however, that the operative provisions of Part 7 “do not apply to a residential tenancy database kept by an entity for use only by the entity or by its officers, employees or agents” (proposed section 88 of the Act). In effect, this means that Part 7 will not apply to a database kept by a real estate agency where the purpose of the database is to inform the agency or its employees about the tenancy history of an ex-tenant. The critical issue would be whether the database was “kept by an entity” for the purpose stated. The fact that a database might at times be used for some other purpose would be relevant, but not determinative, of whether it was kept for that purpose.

Part 7 is designed to promote the rights stated in section 12 of the *Human Rights Act 2004*:

## 12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

From a rights perspective, the scheme has a beneficial operation. The Committee offers comments on three points of detail.

1. There is however one respect in which the scheme might operate to the detriment of a person's privacy. By proposed subsection 90(2), a lessor, or the lessor's agent, must, as soon as possible but within seven days after using the residential tenancy database, give the applicant written notice of certain matters, including "(c) the name of each person who listed personal information in the database and is identified in the database".

It may well be that the provision of the name of the listing person will reveal personal information about that person. There appears to be, however, no means to ensure that this person will be informed of the disclosure of her or his name, nor any means to correct any aspect of that information.

2. In a critical respect, there appears to be a point of significant uncertainty in proposed paragraph 91(1)(c)(i). This provides that a lessor must not (unless the alternative situation in paragraph 91(1)(c)(ii) is the case) list personal information unless the tenant has breached the tenancy agreement and because of that breach "the person **owes** the lessor an amount that is more than the rental bond for the agreement" (emphasis added). However, how could a lessor be sure that an amount was owed unless a court or tribunal had made a binding order to this effect? Is it intended that a lessor must obtain such an order?

3. Proposed section 95 requires a lessor etc who has listed a former tenant in a database, and/or the database operator, to give the person a copy of the information if requested to do so in writing. Any fee charged by the lessor, etc or database operator must not be "excessive". This provides no useful guidance to the lessor or database operator, and there appears to be no means whereby the former tenant can challenge the level of a fee.

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

### *Comment on Explanatory Statement*

In relation to proposed section 90, the Explanatory Statement states that it requires "that if a lessor or lessor's agent **finds** a listing about a tenancy applicant in an RTD, notice must be given to the applicant" (emphasis added). Subclause 90(2) refers however to the lessor, etc "**using**" the database, and thus has a more limited operation.

<b>ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT BILL 2011</b>
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This Bill would amend the *Road Transport (Safety and Traffic Management) Act 1999* and makes consequential amendments to the *Road Transport (General) Act 1999* to establish a legislative basis for the use of average speed detection (point-to-point camera) systems in the ACT.

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

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

The provisions of the Bill engage the right to privacy in HRA paragraph 12(a). The Committee refers to and commends the justification in terms of HRA section 28 that is contained in the Explanatory Statement.

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

<b>SECURITY INDUSTRY AMENDMENT BILL 2011</b>
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This Bill would amend the *Security Industry Act 2003* to make provision in relation to: use of criminal intelligence in licensing decisions; mandatory fingerprinting; the inclusion of unverifiable backgrounds as a consideration for the regulator; exclusionary offences; and suspension and cancellation powers for the Commissioner for Fair Trading.

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

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

*The HRA rights engaged by the bill and the inadequacy of the Explanatory Statement*

The Explanatory Statement notes that “[a] number of human rights are engaged through these reforms, including the right to privacy and reputation; right to recognition and equality before the law without discrimination of any kind; and right to a fair trial”.

There follows a very brief discussion that provides a bare minimum of context in which the Assembly might consider whether any provision of the Bill is incompatible with the *Human Rights Act 2004*. There is no reference to the relevant sections of the HRA that create the relevant rights, and no attempt to use the framework of HRA section 28 to provide a justification. As the Committee has often stated, this approach to a compatibility analysis significantly undermines the point of the HRA as a yardstick for pre-enactment scrutiny, and will be of little value to the courts. The failure to offer a proper justification will indeed make the statute more vulnerable to a finding of incompatibility by a court.

The Committee does not generally have the time or resources to make its own analysis, and in any event this is a task for the Member or Minister proposing the bill.

*The Committee draws these matters to the attention of the Assembly and recommends that the Minister cause a replacement Explanatory Statement to be prepared.*

*Proposed section 9E (clause 4)—how will the Supreme Court convey that it “proposes” to find that the information is not criminal intelligence?*

Proposed section 9E provides that an applicant mentioned in proposed subsection 9(2) (being the commissioner or chief police officer) must be told if a “court proposes to find that [certain] information is not criminal intelligence” (see too proposed section 9D in relation to ACAT).

It is generally considered improper for a judicial body, or a tribunal such as ACAT, to convey to any party or person what it proposes to do by way of making a decision.<sup>3</sup> At least one particular problem with taking such a course is that a party might wish to challenge or criticise the proposal; another is that the proposed decision could become the subject of public discussion.

***The Committee draws these matters to the attention of the Assembly and recommends that the Minister explain how it is intended that a court “convey” that it “proposes” to find that the information is not criminal intelligence.***

*Proposed subsection 9G(4)—the confidentiality of criminal intelligence in a court*

Proposed subsection 9G(3) provides that, on a proceeding, the court may take any steps it considers appropriate to maintain the confidentiality of the information, and by subsection 9G(4):

The court must not give any reason for making a finding in relation to the information, other than the public interest.<sup>4</sup>

The hallmark of judicial reasons is that they are reasoned, and do not simply consist of assertions of opinion. To compel a court to refuse to issue reasons might be argued to be incompatible with the essential functions of a court, on the basis of the doctrine in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24.

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

<b>TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2011</b>
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This Bill would amend the *Terrorism (Extraordinary Temporary Powers) Act 2006* to extend its operation to 2016; to provide for a review of the Act; and to make a number of amendments to adopt some recommendations of the *Review of the Terrorism (Extraordinary Temporary) Powers Act 2006*.

<sup>3</sup> There is perhaps a possibility that a court might find this provision invalid on the ground that it is incompatible with the essential functions of a court, on the basis of the doctrine in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24.

<sup>4</sup> This presumably means the public interest in non-disclosure of the relevant intelligence.

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

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

Then Explanatory Statement notes that the Bill does not propose any substantive amendment to the provisions of the Act. The critical issue then is whether an extension of its provisions is justifiable in terms of HRA section 28. The Explanatory Statement states a justification and the Committee refers the Assembly to it.

Members of the Assembly who wish to consider the rights issues raised by particular existing provisions of the Act (which would be revived on the expiry of the Act in its present form), may wish to consult *Scrutiny Report No 25* of the 6<sup>th</sup> Assembly, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. At page 17 of that report, the Committee said:

... a critical issue for the Assembly is whether it would be feasible, and, if so, less restrictive of the right to liberty and other HRA rights to deal by other means with the threat of terrorist activity. If so, the question would then be whether it was nevertheless reasonable for the law-maker to have chosen the means stated in the Bill. These are matters for the Assembly to address, and the following comments are designed to assist in this task.

One possible alternative means is to make greater use of conventional criminal prosecution under the existing or an extended range of terrorism-related offences.

In considering this point, the Committee notes that the Explanatory Statement for this Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011 records that:

[t]he most serious activity identified by ASIO [in its 2008-2009 report to the Commonwealth Parliament] was the alleged planning by a Melbourne based group of extremists of an armed suicide assault on an Australian military facility.

The Committee understands that some, at least, of this group were convicted of criminal offences through the use of processes applicable to the prosecution of any crime.

The Explanatory Statement also records that:

the Commonwealth Government's '*Counter-Terrorism White Paper 2010*' states that terrorism 'is a persistent and permanent feature of Australia's security environment, with intelligence agencies assessing that further terrorist attacks could occur at any time'. Further, the paper states that 'thirty-eight people have been prosecuted or are being prosecuted as a result of counter-terrorism operations, with thirty-five of these prosecutions for offences against the Commonwealth *Criminal Code Act 1995*'.

An issue for the Assembly is whether these matters give support to an argument that the general criminal law and its processes for its enforcement are adequate to deal terrorist activity in the Territory.

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

<b>WORK HEALTH AND SAFETY BILL 2011</b>
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This Bill would repeal the *Work Safety Act 2008* and create a similar scheme to protect the health and safety of workers.

The Explanatory Statement provides a clear statement of the background to the presentation of the Bill, a summary of its main parts and divisions, and clause by clause notes.

The operation of an Act based on the bill would affect the daily lives of many of the Territory's inhabitants, and deserves close scrutiny. The provisions of the Bill engage several of the rights stated in the *Human Rights Act 2004*, and some other common law rights. Various international law instruments are also relevant, although the Committee points to them only to underscore the right of every worker to a safe place of work. This right could also be understood to be an element of the "right to life" (HRA subsection 9(1)), and the right to "security of the person" (HRA subsection 18(1)).

There are many choices that may be made in the way this right is recognised, and those choices should respect other kinds of rights. Various provisions of the Bill engage the HRA rights to privacy, freedom of expression, fair trial, and some rights in criminal proceedings, parallel common law rights, and the common law and internationally recognised right to property. Other provisions engage several of the Committee's terms of reference.

Given the length of the Bill, and the large number of matters to be mentioned, the Committee will examine the Bill primarily by the numerical sequence of its provisions.

### ***Part 1***

#### ***Subclause 5(3) – the possible criminal liability of partners***

Subclause 5(3) provides:

If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.

Does this mean that if one partner's actions constitute the elements of an offence, any other partner may be prosecuted for that offence? If so, the provision offends the generally accepted proposition that "[e]xcept in very limited circumstances, the criminal law rejects the imposition of vicarious liability, on the sound principle that one should only be held criminally responsible for one's own criminal wrongdoing and not that of others".<sup>5</sup> This principle might be seen as an element of the right to "security of the person" (HRA subsection 18(1)), and/or of a "fair trial" (HRA subsection 21(1)).

***The Committee requests the Minister explain the operation of subclause 5(3), and that if it does affect criminal liability, justify, in terms of HRA section 28, why it is necessary.***

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<sup>5</sup> Scottish Law Commission, *Discussion Paper on Criminal Liability of Partnerships*, May 2011, <http://www.bailii.org/scot/other/SLC/DP/2011/150.html>, at 19. This paper is a valuable discussion of the various alternative ways in which criminal liability of a partner might be imposed, in particular to a lesser extent than by imposing vicarious liability.

Subclause 5(6) and paragraph 6(3)(b)—exemption from the operation of the Act by regulation

Subclause 5(6) and paragraph 6(3)(b) in effect permit a regulation to alter the generally applicable operation of the relevant provisions of the Bill, and it may thus be argued that they “inappropriately delegate legislative powers” (Committee Terms of Reference paragraph (c)(iv)).

In the final comment on this Bill in relation to clause 276, the Committee states its objection to a regulation, by its own force, or by conferring power on some person, to exempt some person from the operation of a statutory provision.

***The Committee requests the Minister justify these provisions.***

Subclauses 9(1), (2) and (3)—an example or note at the foot of a provision forms part of the Bill

This provision would displace section 127 of the *Legislation Act 2001*, and displacement of this Act is generally undesirable.

***The Committee requests the Minister explain why the Legislation Act is displaced.***

Subclause 12(2)—an ineffective provision

As the Committee has explained many times, and as the relevant Minister has often accepted, a provision of a Territory statute cannot prevail over a clearly inconsistent provision in a later statute. Subclause 12(2) is inconsistent with this fundamental principle, and might mislead a reader.

***The Committee requests the Minister justify this provision.***

## ***Part 2***

### *Introduction*

As the Explanatory Statement states, “[t]his Part (clauses 13-34) contains the principal health and safety duties of persons under the Bill, including penalties if those duties are not complied with” (at 4). In clause 19, “the Bill provides a broad scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work”, and “division 2.3 sets out the work health and safety duties of a person conducting a business or undertaking who is involved in specific activities that may have a significant effect on work health and safety. These activities include the management or control of workplaces, fixtures, fittings and plant, as well as the design, manufacture, import, supply of plant, substances and structures used for work” (at 21).

In most cases, failure to conform to the duty imposed constitutes the elements of a specified criminal offence. The three major offences are stated in clauses 31, 32 and 33. Clause 32 contains an element of strict liability, and clauses 32 and 33 are strict liability offences.

*Offences under the Bill—general human rights observations*

The Bill would in other parts create criminal offences (such as in clause 70), and many if not all of these occasions the HRA right to liberty (subclause 18(1) and/ to a fair trial (subclause 21(1)), and/or common law principle, is engaged. The following points apply to many of these provisions.

*Vagueness in the language of an offence*

Many offences are stated in very vague language that provides little guidance to persons as to how to conduct themselves to avoid breaching the provision. This problem is particularly acute where there is (as is the case with almost all these offences) no fault element.

The phrase “reasonably practicable” in the context of those duties designed to ensure health and safety is defined in clause 18, but not so as to provide much assurance to a person that he or she can know what to do to avoid breaching the duty. There is much vagueness in other respects. For example, the duty stated in paragraph 70(1)(a) is to “**consult, so far as is reasonably practicable**, on work health and safety matters with any health and safety representative for a work group of workers ...” (emphasis added). There must be great uncertainty in the mind of the relevant person conducting a business or undertaking as to what is required in a particular situation.

The Committee has previously identified two objections to vaguely worded offences, these being that they:

- do not permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law, and thus breach the principle of legal certainty; and/or
- delegate legislative power to a court called upon to interpret the vague term, or, at least, will require the court to make “political” or “value” judgements.<sup>6</sup>

The right to “liberty and security” (HRA subsection 18(1)) is a basis to allege that an offence provision is incompatible on the grounds of its vagueness, and many of the provisions of the Bill might well be vulnerable. The Explanatory Statement to the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011 refers to the Canadian matter of *R v Ahmad*,<sup>7</sup> where it was held that “a law that imperils a person’s right to life, liberty or security of the person may... be declared invalid if it is found to be vague or overbroad”. The principle is argued to be an element of international law principles, and the International Commission of Jurists has summarised it in the following words:

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<sup>6</sup> See in particular *Taikato v R* [1996] HCA 28: “If the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different. Consequently, even if in some circumstances a well-founded fear of attack is a necessary but not decisive criterion of “reasonable excuse”, courts will have to formulate various conditions which disqualify some, but not all, individuals or groups from taking advantage of the “reasonable excuse” protection afforded by s 545E(2). That means that, under the label “reasonable excuse”, the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing”.

<sup>7</sup> 2009 CanLII 84774 (ON S.C.)- 2009-03-31.

The legal definition of criminal offences must comply with the principle of legality of criminal offences (*nullum crimen sine lege*), which is absolute and non-derogable. The principle of *nullum crimen sine lege* is closely linked to the right to “security of person” since it seeks to safeguard people’s right to know for which acts they may be punished and which not. Indeed, “[c]riminal law provides a standard of conduct which the individual must respect”. The principle of legality of offences is a fundamental element of the right to a fair trial as far as criminal matters are concerned.

The principle of legality of criminal offences means that, in order to be termed a criminal offence, the specific type of behaviour to be punished needs to be strictly classified in law as an offence and the definition of all criminal offences must be precise and free of ambiguity.

...

Definitions of criminal offences that are vague, ambiguous and imprecise contravene international human rights law and the “general conditions prescribed by international law”.<sup>8</sup>

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

#### *Overreach of the criminal law*

Leaving aside the vagueness issue, most of those who will be a “person conducting a business or undertaking” (PCBU) will be in a good position to at least make a realistic attempt to satisfy the duty that will be imposed on them. In other cases this is not so clear. For example, paragraph 24(1)(a) “applies to a person (the importer) who conducts a business or undertaking that imports—(a) plant ...”, and by paragraph 24(2)(f), the importer “must ensure, so far as is reasonably practicable, that the plant, substance or structure is without risks to the health and safety of persons—(f) who are **at or in the vicinity** of a workplace and who are exposed to the plant, substance or structure at the workplace or whose health or safety may be affected by a use or activity referred to in paragraph (a), (b), (c), (d) or (e)” (emphasis added). Paragraph (c), for example, refers to the activity of “storing” that plant at the workplace.

To require an importer to know who was at or in the vicinity of a workplace at any particular time seems unrealistic. The duty is qualified by the phrase “so far as is reasonably practicable”, but it cannot have been intended that this would protect all failures to comply with the terms of subclause 24(2).

The question is why it was thought necessary to extend the reach of the criminal law so far, taking paragraph 24(2)(f) as an example.

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

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<sup>8</sup> International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings* (2009) at 102 (copious footnotes omitted)  
<http://www.icj.org/dwn/database/FinalElectronicDistributionPGNo5.pdf>

*Strict liability offences*

The Bill would create many strict liability offences, and at page 11 the Explanatory Statement provides a very brief justification, pointing to the regulatory nature of the offences, and arguing that

people who owe work safety duties such as persons conducting a business or undertaking, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

The imposition of strict liability offence engages the presumption of innocence (HRA subsection 22(1)), and requires an adequate HRA section 28 justification (which may of course be stated to apply to more than one particular offence). In a critical respect, the statement in the Explanatory Statement is clearly inadequate.

At a minimum, the Committee has required that an explanatory statement provide a justification for the imposition of a penalty in excess of 50 penalty points for contravention of a strict liability offence (see too Department of Justice and Community Safety, *Guide for Framing Offences*, version 2, April 2010, at 29). The financial penalties attached to many of the strict liability offences are grossly in excess of that level thought justifiable (without more explanation) by the Committee and by JACS. The most egregious example is clause 32, which prescribes a penalty of \$1,500,000 as the maximum where the offender is a corporation, and \$150,000 in the case of an individual. There are very few instances where the maximum recommended by the Committee and JACS is observed.

The Explanatory Statement refers to “the National review into OHS laws to strengthen the deterrent effect of certain penalties, extend the ability of the court to impose meaningful penalties and emphasise the seriousness of some offences”, and asserts that “maximum penalties set in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence”. This justification falls well short of what is required for such high levels of penalties for no-fault crime.

An explanatory statement commonly refers to the Criminal Code defences available in respect of a strict liability offence, and notes that this practice has not been followed here (see Explanatory Statement pages 10-11).

The Committee also adheres to the view it expressed in *Scrutiny Report No 36* of the 7<sup>th</sup> Assembly (in connection with the Road Transport Legislation Amendment Bill 2011) that the Explanatory Statement should refer to both the “mistake of fact” defence (Criminal Code section 36), the “intervening conduct or event” defence (section 39). The reason for the express reference to the latter is that it may provide the basis for a “reasonable steps” defence, a matter which the Minister for Environment, Climate Change and Water drew attention to in a response to the Committee on another bill.<sup>9</sup>

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

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<sup>9</sup> See *Scrutiny Report No 31*, letter from the Minister for the Environment, Climate Change and Water of 2 December 2010.

Legal and evidential burdens

The Committee refers to the discussion of these issues in to the Explanatory Statement.

Omission of a “reasonable grounds” condition to the exercise of some discretionary powers***Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?***

In this connection, the Committee notes that, while the valid exercise of some discretionary powers is conditioned on the repository of the power believing in a state of affairs “on reasonable grounds”, (see subclauses 155(1) and 175(1)), this is not so in relation to several other comparable provisions (see paragraph 139(1)(b), subclause 140(1), paragraph 140(2)(b), paragraph 174(1)(b), and subclause 220(3)). As the Committee has often explained, it is generally desirable that discretionary powers be conditioned on the repository of the power believing in a state of affairs “on reasonable grounds”.

***The Committee recommends that the Minister explain why the powers noted above could not be conditioned on the repository of the power believing in a state of affairs “on reasonable grounds”.***

Clause 84—uncertainty surrounding aspects of its operation

The Explanatory Statement states:

A worker has the right to cease, or refuse to carry out, work if:

- they have a reasonable concern that carrying out the work would expose them to a serious risk to their health or safety; and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

This right is subject to the notification requirements in clause 86 and the worker’s obligation to remain available to carry out suitable alternative work under clause 87.

The Committee has not been able to ascertain from reading the Bill and the Explanatory Statement an answer to the question of when such a worker would be obliged to resume work.

***The Committee requests the Minister address this question.***

The vesting of powers in persons who are not agents of the state

The Bill would create two kinds of non-state actors in whom it would vest a wide range of powers, the exercise of some of which would limit the rights of others. These two kinds are (1) the HSR (clause 60), and (2) the WHS (work, health and safety) entry-permit holder (WHS-EPH).

The Committee acknowledges that the issue of vesting state power in non-state actors was debated at length when similar provisions were inserted into a Territory law in 2004, in particular in relation to category (2).<sup>10</sup> It also refers to the response of 27 August 2008 of the then Minister for Industrial Relations to a Committee report (in *Scrutiny Report No 59* of the 6<sup>th</sup> Assembly) on the Work Safety Bill 2008. Members of the Assembly are referred to this material.

Some brief comments on these 2 kinds of non-state actors and some of their powers will now be provided. These comments draw on the Explanatory Statement, which of course provides much more detail. Apart from drawing attention to some specific issues, the comments are designed to provide context in which an MLA may assess whether these non-state actors should be vested with state power. The Committee encourages a reader to consult the Explanatory Statement for its description and comment on the powers of the two categories of non-state actors.

Category (1)—the HSR (and any person appointed to assist the HSR)

The Explanatory Statement states that “[t]here is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Bill this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work”.

By clause 50, a worker may ask a person conducting a business or undertaking (PCBU) for whom they carry out work to facilitate the conduct of an election for one or more HSRs to represent workers who carry out work for the business or undertaking. This request will trigger the PCBU’s obligation to facilitate the determination of one or more work groups. There is a detailed process for determining the work groups. The procedures for the election of HSRs are determined by the workers in the work group for which elections are being held (clause 61).

Specific issue: Clause 66—very wide immunity from legal action

Clause 66 confers immunity on health and safety representatives (HSRs) so they cannot be personally liable for anything done or omitted to be done in good faith while exercising a power or performing a function under the Bill, or in the reasonable belief that they were doing so.

Such provisions require justification because they qualify a critical element of the rule of law. In effect, they provide that the relevant class of persons (here a HSR) is immune from the obligation that attaches to all others to observe the law. It is common for state officials to be accorded a legal immunity of this kind, and that might be justified on the bases that any avoided liability attaches to the state, and that a state actor is subject to discipline for violation of codes of conduct. Neither factor appears to have any operation here.

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

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<sup>10</sup> See Legislative Assembly for the ACT, Fifth Assembly, *Debates*, 22 June 2004, concerning the Occupational Health and Safety Amendment Bill 2004.

The powers and functions of an HSR are set out in clause 68, and from the standpoint of the concern about vesting state power in an HSR, the Committee notes that the HSR need not obtain a judicial warrant to inspect the workplace, in some circumstances without notice to the owner and/or occupier of the relevant premises (subclause 68(2)(a)). The exercise of this power limits the owner or occupier's right to possession of the premises. It also notes subclause 68(2)(a), that the HSR may "whenever necessary, request the assistance of any person".

The extent of these powers is in effect further defined by clause 70, which imposes a range of obligations on the PCBU which correspond to the entitlements in clause 68. Clause 70 makes clear that the HSR, and a person assisting the HSR (who may, as noted, be "any person"), has a right to access to the premises on broadly stated bases. The PCBU must provide certain information to the HSR, (subject to clause 71), and provide resources to the HSR, on broadly stated bases.

**Specific issue:** Concerning an "assistant" to an HSR, it is not clear whether this person must have been at some time an HSR. It might be inferred from subclause 71(4) that this is the case, but the statement in the Explanatory Statement in relation to this paragraph (page 47) might suggest otherwise.

***The Committee requests the Minister clarify this point.***

**Specific issue:** Paragraph 71(5) permits a PCBU to refuse an assistant access to the workplace "on reasonable grounds". This is undefined, and the Explanatory Statement states that "it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper matter". Whether a court would understand the provision to be so narrowly understood is problematic, for they are increasingly making it clear that they will not read a particular provision in a statute by reference to an explanatory statement.<sup>11</sup> It is to be noted that it appears<sup>12</sup> that a PCBU who mistakenly relies on paragraph 71(5) will commit the strict liability offence in clause 70.

***The Committee draws this particular issue to the attention of the Assembly and recommends that the Minister respond.***

**Specific issue:** Paragraph 70(1)(f) allows the regulations to prescribe the resources, facilities and assistance to an HSR that must be provided by the PCBU. Paragraph 70(1)(i) allows the regulations to prescribe further assistance that may be required to enable HSRs to fulfil their representative role. The issue is whether these are topics that are more appropriately provided by the parent Act.

***The Committee draws this particular issue to the attention of the Assembly and recommends that the Minister respond.***

The scheme also imposes (or might impose) costs on a PCBU, in relation to allowing time off work on pay in certain circumstances, and the obligation to train the HSRs.

<sup>11</sup> See *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118, per Gray J.

<sup>12</sup> Perhaps some doubt on this score arises from subclause 71(6), for it may suggest that this is the only avenue of redress.

A health and safety representative also has power under division 5.6 to direct work to cease in certain circumstances. Clause 85 specifies circumstances in which an HSR may “direct a worker who is in a work group represented by the representative to cease work”, in some circumstances without consulting the PCBU. There are restrictions on the exercise of these powers, and the Committee notes that an HSR cannot give a direction unless they have completed certain training (subclause 85(6)).

**Specific issue:** An issue arising is what penalty, if any, might be suffered by a worker who refuses to obey a direction from the HSR.

***The Committee requests the Minister address this issue.***

An HSR also has power under division 5.7 to issue provisional improvement notices. Subclause 90(1) sets out the circumstances when an HSR may issue a provisional improvement notice - that is if the representative reasonably believes that a person is contravening a provision of the Bill, or has contravened a provision of the Bill in circumstances that make it likely that the contravention will continue or be repeated. A notice may require a person to remedy the contravention, prevent a likely contravention from occurring, or remedy the things or operations causing the contravention or likely contravention (subclause 90(2)). There are restrictions on the exercise of these powers, and the Committee notes that an HSR cannot give a direction unless they have completed certain training (subclause 90(4)). By subclause 93(1), a notice may specify certain kinds of directions about ways to remedy or prevent the contravention that is the subject of the notice.

Clause 99 makes it an offence of strict liability for a person to not comply with a provisional improvement notice within the time specified in the notice. The result is that the relevant HSR is given power to state the critical elements of a criminal offence. The HSR ceases to have this power if the PCBU requests the regulator to appoint an inspector to review the notice, in which case the inspector would in effect have power to define these elements (unless he or she decided to cancel the notice) (see clause 102). A decision of the inspector is reviewable by ACAT (see clause 223, and item 4 in column 1 of the table). The PCBU must make the request within 7 days of being issued with the notice, and there is no provision for any extension of time.

**Specific issue:** An issue arising is whether the regulator should have power to extend the time for making a request.

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

**Category (2)—the WHS (work, health and safety) entry-permit holder (WHS-EPH)**

Part 7 of the Bill confers rights on a person who holds an office in, or is an employee of, a union (a WHS entry permit holder) to enter, without obtaining a judicial warrant, workplaces and exercise certain powers while at those workplaces.

Clause 117 allows a WHS entry permit holder to enter a workplace and exercise any of the rights contained in clause 118 in order to inquire into a suspected contravention of the Bill at that workplace. These rights may only be exercised in relation to suspected contraventions that relate to, or affect, a relevant worker (as defined in clause 116). Subclause 117(2) requires the WHS entry permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring. The exercise of this power limits the owner or occupier's right to possession of the premises.

The WHS-EPH is not obliged to give notice prior to entry, but "as soon as is reasonably practicable after [entry]" (subclause 119(1)), and need give no notice at all in certain broadly stated bases (subclause 119(2)).

Clause 118 states the powers of a WHS-EPH upon entry. Of significance from a rights perspective is subclause 118(1)(d), (backed up by an offence provision in subclause 118(3)), which permits the WHS-EPH to require the relevant PCBU to allow the WHS entry permit holder to inspect and make copies of any document that is directly relevant to the suspected contravention that is kept at the workplace or accessible from a computer at the workplace, other than an employee record.

**Specific issue:** There is a critical point of obscurity in subclause 118(1)(d). What is meant by "directly relevant"? Would it include an instance where the document alone did not provide a basis for a suspicion of contravention, but if taken with other information would? If the answer to this question is "yes", in what circumstances could a document not be "directly relevant"?

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

Access to employee records is governed by clause 120, which authorises a WHS entry permit holder, after notice, to enter a workplace to inspect, or make copies of, employee records that are directly relevant to a suspected contravention or other documents directly relevant to a suspected contravention that are held by someone other than the relevant PCBU. The exercise of this power will impinge on the privacy interest of the relevant employee.

Clause 121 states the powers of an WHS-EPH upon entry (in this case after notice). It provides that a WHS entry permit holder to enter a workplace to consult with and advise relevant workers who wish to participate in discussions about work health and safety matters.

While at a workplace for this purpose, a WHS-EPH may warn any person of a serious risk to his or her health or safety that the WHS entry permit holder reasonably believes that person is exposed to. This power implies that the WHS-EPH will have access to any such employee.

By clause 128, a PCBU has some control over the exercise of the power of entry of a WHS-EPH. It requires a WHS-EPH to comply with any reasonable request by the relevant PCBU or the person with management or control of the workplace to comply with a work health and safety requirement, including a legislated requirement that is applicable to the specific type of workplace. Clause 142 would allow the regulator to deal with a dispute about whether a request was reasonable.

Part 7.6 of the Bill regulates the dealing by the regulator of disputes about the exercise, or purported exercise, by a WHS-EPH of a right of entry under this Act. A critical matter is the power of the regulator to deal with the dispute by arbitration, in respect of which the regulator may make any order it considers appropriate and specifically may make an order revoking or suspending a WHS entry permit, imposing conditions on a WHS entry permit or about the future issue of WHS entry permits to one or more persons.

The scope of this power is not clear. Does it permit the regulator to “stand in the shoes” of the WHS-EPH and exercise any power of the WHS-EPH?

Specific issue: A regulator’s power has all the hallmarks of judicial power: a dispute is heard, and binding orders affecting the rights of persons may be made. A strict separation of powers doctrine probably does not apply in the Territory, but it is unusual to vest judicial power in a person such as the regulator (who is the “director-general”) and might be found to breach the “fair trial” requirement of HRA subsection 21(1),<sup>13</sup> and/or of a more limited separation of powers doctrine. It is also noted that there is no review by ACAT of any exercise of these powers.

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

The Committee’s comment on the powers of the two non-state actors identified is now complete. Given that the exercise of these powers may limit the rights of persons, the general issue is whether it is appropriate to proceed in this way.

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

*An inadequate justification in terms of HRA section for the derogations brought about by many clauses of the right to privacy (HRA paragraph 12(a))*

The Committee notes with disappointment that the Explanatory Statement makes very little attempt to offer a justification, in terms of HRA section 28, for the creation of powers the exercise of which will limit the rights of persons. The drafters were aware of the issue. In relation only to the Part 7 powers, the Explanatory Statement states only that:

[p]rovisions within this Part have the potential to engage section 12(a) of the *Human Rights Act 2004*, which protects the right of individuals not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. As such, rights under this Part are subject to explicit protections in the Bill (such as notice requirements) and must also be read and applied in the context of the Privacy Act.

A matter requiring particular attention is that these non-state actors may exercise their rights of entry to premises without warrant. Even in the case of state actors, this is regarded as exceptional.

<sup>13</sup> See International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings* (2009) at 41 <http://www.icj.org/dwn/database/FinalElectronicDistributionPGNo5.pdf>

***The Committee draws these matters to the attention of the Assembly and recommends that the Minister identify the ways in which HRA paragraph 12(a) might be limited, and provide a justification in terms of HRA section 28.<sup>14</sup>***

*Part 8—the role of the regulator*

The Explanatory Statement notes that division 8.1 “sets out the regulator’s functions and allows additional functions to be prescribed by regulations. This Division also establishes the regulator’s ability to delegate powers and functions under the Bill and to obtain information”. Each of these three matters requires comment.

*Paragraph 152(i)—the regulator’s powers may be given by “this Act or another Territory law”*

This provision permits powers to be conferred by subordinate law, and the issue is whether, given the significance of the regulator’s role, any additional powers should be conferred only by another Act.

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

*Clause 154—the regulator’s power to delegate*

By clause 154, the regulator “may delegate the regulator’s powers and functions under this Act, or another Territory law, to another person”. A delegate of state power is usually a state actor, typically just described as a public servant.

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

*Clause 155—the regulator’s power to obtain information*

The Explanatory Statement states:

Powers under this Division are intended to facilitate the regulator’s function of monitoring and enforcing compliance with the Bill and ensure effective regulatory coverage of work health and safety matters (paragraph 152(b)). Provisions have been designed to provide robust powers of inquiry and questioning subject to appropriate checks and balances to ensure procedural fairness.

Powers under this Division are only available if the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance under the Bill. These powers are only exercisable by way of written notice, which must set out the recipient’s rights under the Bill (e.g. entitlement to legal professional privilege and the ‘derivative use immunity’).

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<sup>14</sup> The Minister might choose to see the issue being whether the limitations are arbitrary (see paragraph 12(a)), but in this event a claim that they are not must amount to a section 28 justification.

Additionally, powers to require a person to appear before the regulator to give evidence are only exercisable if the regulator has taken all reasonable steps to obtain the relevant information by other means available under the clause but has been unable to do so. The time and place specified in the notice must be reasonable in the circumstances, including taking into account the circumstances of the person required to appear.

Again, this statement is not an adequate HRA section 28 justification for the creation of powers that limit HRA and common law rights. The exercise of these powers could also impose significant costs (in terms of time and money) on persons.

***The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide a justification in terms of HRA section 28.<sup>15</sup>***

### ***Part 9—the role of the inspector***

Division 9.3 of the Bill contains 28 clauses setting out general powers of entry and makes special provision for entry under warrant and entry to residential premises. Inspectors also have access to a range of powers to support their compliance and enforcement roles.

At no point does the Explanatory Statement recognise that the exercise of these powers could limit HRA rights and common law rights.

***The Committee draws these matters to the attention of the Assembly and recommends that the Minister identify the rights that might be limited under Part 9 and provide a justification in terms of HRA section 28.***

There are some particular matters requiring attention.

#### ***Clause 163—warrantless entry to a workplace***

Subclause 163(1) provides for warrantless entry at any time by an inspector into any place that is, or the inspector reasonably suspects is, a workplace, with or without the consent of the person with management or control of the workplace, and (see clause 164), without prior notice to any person. An obligation to give after the event notice is qualified.

This is a very extensive, and very unusual, power of warrantless entry.

#### ***Clause 165—an inspector's powers on entry under paragraph 165(1)(f)***

An unusual power in the list is that in paragraph 165(1)(f), which allows an inspector to require a person at the workplace to provide reasonable help to exercise the inspector's powers in paragraphs 165(1)(a)–(e). The Explanatory Statement notes:

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<sup>15</sup> The Minister might choose to see the issue being whether the limitations are arbitrary (see paragraph 12(a)), but in this event a claim that they are not must amount to a section 28 justification.

This clause provides, in very wide terms, for an inspector to require any person at a workplace to assist him or her in the exercise of their compliance powers. Although this could include an individual such as a self-employed person or member of the public at the workplace, the request would have to be reasonable in all the circumstances to fall within the scope of the power.

Moreover, subclause 165(2) makes it an offence for a person to refuse to provide reasonable help required by an inspector under this clause without a reasonable excuse. The maximum penalty is \$10 000 in the case of an individual or \$50 000 in the case of a body corporate.

This is a very extensive, and very unusual, power, and its exercise could limit rights to freedom of movement (HRA section 13), freedom of expression (HRA subsection 16(2)), liberty (HRA subsection 18(1)), and perhaps even to freedom from forced labour (HRA section 26).

*Paragraph 171(1)(c)—an inspector’s powers on entry to put questions to a person*

Paragraph 171(1)(c) authorises inspectors to require “a person at the workplace” (who may of course be any person) to answer any questions put by the inspector in the exercise of the latter’s powers. By subclause 171(6), “A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section”. The maximum penalty is \$10 000 in the case of an individual or \$50 000 in the case of a body corporate. A note at the foot of subclause 171(6) clarifies that strict liability applies to each physical element of this offence.

The person questioned (the interviewee) might refuse to answer on the basis that the information “is the subject of legal professional privilege” (clause 269). It should be noted that it is not necessary that it be the interviewee who is entitled to claim that privilege; it appears it would be sufficient if any (even unidentified) person could. It is odd that there is no reference to “client legal privilege”, a privilege created by the Evidence Act and which has a different coverage to the common law of legal professional privilege.

By subclause 172(1) an interviewee may not claim the benefit of the privilege against self-incrimination, but by subclause 172(3), there is both a “use” and “derivative” bar on the use of the information on a prosecution of the interviewee, except in relation to false answers. This is justification offered:

These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors’ or the regulator’s ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

The Explanatory Statement makes no reference to the HRA, and in particular to clause 22(2)(i). Limitation of the privilege against self-incrimination might be justifiable when accompanied by both a “use” and “derivative” bar, but a justification should be offered having regard to HRA section 28.

An interviewee might rely on some other kind of “reasonable excuse” for not answering a question. Given the vagueness of this expression, and the penal consequences that might follow from a refusal to answer, an interviewee might exercise great caution in so refusing.

The power to question “any person” is very unusual, and requires strong justification.

***The Committee draws these three matters to the attention of the Assembly and recommends that the Minister provide an adequate justification.***

*Clauses 172 and 269 and the advice that must be given to a person concerning their rights to claim privileges*

The Committee commends the provisions in clause 173 that require an interviewee to be informed of clauses 172 and 269. It is unusual to find such clauses and they serve as a model for other laws.

The question arises however as to why a similar provision does not apply in relation to other powers to require documents or information to be provided.

The Committee notes that the Explanatory Statement is in error in stating that “subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill”. The clause is limited to part 9 of the Bill (and subclause 155(7)).

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

*Division 13.1—prosecutions for offences*

*Clauses 230 and 231—the bringing of prosecutions*

These clauses do not permit private prosecutions for offences under the Bill. Instead, they would create a unique procedure for “a person” to intervene (see clause 231) in the process of decision-making by the regulator and the Director of Public Prosecutions, by seeking a review of a decision by the regulator not to commence a prosecution by referring a matter to the Director of Public Prosecutions. (Notwithstanding the time and cost it may take to work a request through the process established, the Director of Public Prosecutions retains the ability to bring a proceeding (subclause 230(5)).

***The Committee recommends that the Minister address the issue whether it is intended that any person, whatever their interest, or lack of it, in commencing the relevant proceeding, may make an application to the regulator.***

*Clause 232—limitation period for criminal prosecutions*

Perhaps the most generally applicable rule will be that an offence against the Act may be brought within two years after the offence first came to the regulator’s attention (paragraph 232(1)(a)).

***The Committee recommends that the Minister advise the Assembly as to the limitation period generally applicable to summary proceedings in the Territory, and that if it is a period less than two years, of the reason for extending the period by paragraph 232(1)(a).***

Subclause 232(2) applies only to a category 1 offence, (being the offence stated in clause 31), in respect of which an offender (apart from a body corporate) may be sentenced to a term of imprisonment of not more than five years. It provides that in relation to such offences, proceedings may be brought after the end of the applicable limitation period if fresh evidence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period. It is to be noted that the court is not required to consider whether the prospect of the defendant receiving a fair trial would be prejudiced.

At common law, and generally under statute, there is no limitation period in respect of an offence analogous to a category 1 offence. On the other hand, where there has been a long delay between the time of an alleged offence and the date that the trial takes place, a court has jurisdiction to order a permanent stay of proceedings on the basis that it is impossible for a fair trial to take place by reason of significant prejudice having arisen because of the delay.<sup>16</sup>

The question arises whether the effect of subclause 232(2) is to displace this jurisdiction of the courts so that the only circumstance relevant to an extension of time is that stated in the subclause. If this is so, then the provision might be incompatible with a defendant's right to a fair trial under HRA subsection 21(1).

There is no provision concerning the costs to a defendant of defending a proceeding commenced under subclause 232(2).

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

*Clause 233—modification of the criminal law rule against duplicity*

Subclause 233(1) provides that two or more contraventions of a health and safety duty provision by a person in the same factual circumstances may be charged as a single offence or as separate offences. The Explanatory Statement notes that it “modifies the criminal law rule against duplicity. This rule means that, ordinarily, a prosecutor cannot charge two or more separate offences relating to the same duty in one count of an indictment, information or complaint”.

This rule may be seen as an element of the HRA statement of rights in criminal proceedings, and in particular of the right “to be told promptly and in detail ... about the nature and reason of the charge” (paragraph 22(2)(a)).<sup>17</sup>

<sup>16</sup> See the discussion at <http://netk.net.au/CrimJustice/Criminal4.asp>

<sup>17</sup> United States courts view the rule as a protection of the “due process” right: see *United States v Tanner* (1971) 471 F.2d 128 at 139.

The justification offered in the Explanatory Statement makes no reference to the HRA and does not recognise the interests of a defendant.

***The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide an adequate justification in terms of HRA section 28.***

*Clause 236—an adverse publicity order and freedom of speech*

The Explanatory Statement states: “Subclause 236(1) sets out the kinds of adverse publicity orders that a court may make. For instance, the court may order an offender to publicise the offence or notify a specified person or specified class of persons of the offence, or both”.

To require a person to speak engages the person’s freedom of expression (HRA subsection 16(2)). This issue is exacerbated in that the defendant is in effect being required to diminish their reputation, an interest protected by HRA paragraph 12(b).

***The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide an adequate justification in terms of HRA section 28.***

*Clause 238—work health and safety orders*

Subclause 238(1) allows the court to make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within a certain period. It is arguable that this clause engages the right stated in HRA subclause 26(2) that “No-one may be made to perform forced or compulsory labour”.

***The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide an adequate justification in terms of HRA section 28.***

*Civil offences – are they in substance criminal proceedings as that term is employed in the Human Rights Act?*

The Bill would create a large number of what each relevant clause states is a “WHS civil penalty provision”.

Clause 257 states that it is not a criminal offence to contravene a WHS civil penalty provision, and clause 258 requires a court to apply the rules of evidence and procedure for a civil proceeding when hearing a proceeding for a contravention of a WHS civil penalty provision. Subclause 259(1) provides that in a proceeding for a contravention of a WHS civil penalty provision, if the court is satisfied that a person has contravened a WHS civil penalty provision, it may order the person to pay a monetary penalty (within the limit indicated in relation to each offence: subclause 259(2)) and make any other order it considers appropriate, including an injunction.

The notion of a criminal charge or proceeding is employed in the Human Rights Act to attach to them a number of process rights thought necessary to guarantee a fair trial. Moreover, what amounts to a “fair trial” within subsection 21(1) will depend on whether the particular matter is a criminal proceeding.

If the approach taken in relation to various domestic and international human rights instruments is followed, it is fundamental to the application of the HRA that the notion of a criminal proceeding will be given an autonomous interpretation. The question whether, as a matter of substance, the relevant proceeding is criminal in nature cannot be answered simply by reference to how some other law (such as a Territory statute) defines the term in relation to the relevant proceeding. The value of the HRA as a protection of rights in criminal proceedings could be set at nought if a statute could simply provide that a certain kind of proceeding was civil and not criminal, whatever in substance was the character of the proceeding.

A commentator has recorded that:

The [European Court of Human Rights] has set out three criteria in order to assess whether the allegation [in the relevant charge] is in fact of a criminal nature:

- the categorisation of the allegation in domestic law;
- whether the offence applies to a specific group or is of a generally binding character; [and]
- the severity of the penalty attached to it.<sup>18</sup>

This quotation cannot be regarded as an exhaustive statement as to how an Australian court might approach the matter, for a decision in a particular context is very much determined by that context. In this instance, given that the “civil” offences are framed in the same way as those that are criminal in nature, and given the heavy financial penalties attaching to most of them, it is arguable that all or at least most of the “civil penalties” are, in substance, criminal.

Clause 258—the rules of evidence and procedure for a civil proceeding and the HRA right to a fair trial (subsection 21(1))

If the “civil penalties” are regarded as being in substance criminal, or even close in nature a criminal proceeding, there is an issue as to whether a trial for such an offence would be fair. It might be argued that any such trial would not be fair given that clause 258 requires a court to apply the rules of evidence and procedure for a civil proceeding when hearing a proceeding for a contravention of a WHS civil penalty provision. In brief, on a civil proceeding the defendant would not have the benefit of rules of evidence that (without being exhaustive) (i) require the case against the defendant to be proved beyond reasonable doubt; (ii) limit quite significantly the kinds of hearsay evidence that may be adduced against her or him, including in particular such evidence in the nature of an admission by the defendant; and (iii) allow the court a much wider discretion to exclude prejudicial evidence. Given these effects, it is arguable that the trial would derogate from the HRA right to a fair trial (subsection 21(1)).

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

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<sup>18</sup> R Clayton and H Tomlinson, *The Law of Human Rights* (2000) vol 1, at 11.174.

Clause 265—criminal proceedings after civil proceedings and the HRA right in section 24 not to be tried or punished more than once (the rule against double jeopardy)

Clause 265 provides that, regardless of any court order made under clause 259 for a contravention of a civil penalty provision that a person has found to have made, a criminal proceeding may be commenced against the person for conduct that is substantially the same as the conduct constituting the civil contravention.

If a civil penalty provision is in substance a criminal proceeding, clause 265 is clearly incompatible with HRA section 24, which provides:

No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

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

Does clause 276 inappropriately delegate legislative power?—Committee term of reference (c)(iv)

Clause 276 vests power in the executive to make regulations and taken in combination with the non-exhaustive list of topics in schedule 3, the executive would be vested with considerable legislative power. There is no attempt in the Explanatory Statement to justify the need for such an extensive power.

There are some particular aspects of the regulation-making power that are unusual and on their face contradict a fundamental aspect of the rule of law. Subclause 276(3) provides that a regulation may:

- (e) prescribe exemptions from complying with a regulation on the terms and conditions (if any) prescribed; or
- (f) allow the regulator to provide exemptions from complying with a regulation on the terms and conditions (if any) prescribed or, if a regulation allows, on the terms and conditions (if any) determined by the regulator; or
- (h) prescribe a penalty for any contravention of a regulation not exceeding \$30 000.

In *Port of Portland Pty Ltd v Victoria* [2010] HCA 44 at [13] a unanimous Full Bench of the High Court held that “[i]n Australia the absence of a power of executive dispensation of statute law, what Dixon CJ called a “general constitutional principle” [*Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258], became an aspect of the rule of law ...”. The principle can be set aside by contrary statutory provision,<sup>19</sup> but to do so is to contradict the basic principle.

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<sup>19</sup> It is assumed here that this is the case in respect of the powers of the Legislative Assembly, although it is not beyond reasonable argument that the Assembly cannot validly enact a law that contradicts the principle.

Paragraphs 276(3)(e) and (f) contradict the principle. The vesting of power in the Executive may not be so offensive, given that it is responsible to the Assembly. The permission given by paragraph 276(3)(f) for regulation to vest an unconfined discretionary dispensing power in the “regulator”, which it seems might be exercisable on a case-by-case basis, represents a significant departure from the principle.

The Committee has often drawn attention to the problem that arises when a Minister or other body is given a power to dispense with the operation of an otherwise generally applicable law in favour of a particular person. In *Scrutiny Report No 47 of the Fifth Assembly*, concerning the Health Professionals Bill 2003, the Committee said:

It is fundamental that the law apply equally to all citizens. Any dispensation should be justified. Dispensing clauses are also objectionable on the ground of their being an inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined. As a general principle, a law should state a principle according to which persons might apply for an exemption, rather than simply empower a Minister or an executive officer to grant a dispensation.

Dispensing powers are in tension with the provision in subsection 8(3) of the *Human Rights Act 2004* that “Everyone is equal before the law and is entitled to the equal protection of the law without discrimination”.

If it is thought desirable to confer a dispensing power on a Minister or other official, then it can be expressed in terms that are more limited than an open-ended power to dispense. In *Scrutiny Report No 12 of the 7th Assembly*, concerning the Dangerous Goods (Road Transport) Bill 2009, the Committee commended a scheme for dispensation that specified: (a) the boundaries of the scope of the power to exempt, by reference to objective and closely defined criteria; (b) the detail of what must be contained in an exemption, including its duration; and (c) that certain kinds of exemption are notifiable instruments.

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

## SUBORDINATE LEGISLATION

### **Disallowable Instruments—No comment**

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

**Disallowable Instrument DI2011-114 being the Public Place Names (Molonglo Valley District) Determination 2011 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of a creek in the District of Molonglo Valley.**

**Disallowable Instrument DI2011-115 being the Attorney General (Fees) Determination 2011 made under the Agents Act 2003, Associations Incorporation Act 1991, Births, Deaths and Marriages Registration Act 1997, Business Names Act 1963, Civil Law (Wrongs) Act 2002, Civil Partnerships Act 2008, Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, Cooperatives Act 2002, Court Procedures Act 2004, Dangerous Substances Act 2004, Emergencies Act 2004, Fair Trading (Motor Vehicle Repair Industry) Act 2010, Firearms Act 1996, Freedom of Information Act 1989, Guardianship and Management of Property Act 1991, Hawkers Act 2003, Instruments Act 1933, Land Titles Act 1925, Machinery Act 1949, Partnership Act 1963, Pawnbrokers Act 1902, Prostitution Act 1992, Public Trustee Act 1985, Registration of Deeds Act 1957, Sale of Motor Vehicles Act 1977, Scaffolding and Lifts Act 1912, Second-hand Dealers Act 1906, Security Industry Act 2003, Workers Compensation Act 1951, Work Safety Act 2008 revokes DI2010-107 and determines fees payable for the purposes of the Acts.**

**Disallowable Instrument DI2011-116 being the Public Place Names (Casey) Determination 2011 (No. 1) made under section 3 of the Public Place Names Act 1989 determines the names of six roads in the Division of Casey.**

**Disallowable Instrument DI2011-119 being the Domestic Animals (Fees) Determination 2011 (No. 1) made under section 144 of the Domestic Animals Act 2000 revokes DI2010-115 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2011-120 being the Roads and Public Places (Fees) Determination 2011 (No. 1) made under section 9A of the Roads and Public Places Act 1937 revokes DI2009-146 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2011-122 being the Waste Minimisation (Landfill Fees) Determination 2011 (No. 1) made under section 45 of the Waste Minimisation Act 2001 revokes DI2010-118 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2011-130 being the Financial Management (Periodic and Annual Financial Statements) Guidelines 2011 made under section 133 of the Financial Management Act 1996 prescribes the level of reporting required in the periodic and annual financial statements.**

### **Disallowable Instruments—Comment**

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

#### *Minor drafting issue*

**Disallowable Instrument DI2011-117 being the Animal Diseases (Fees) Determination 2011 (No. 1) made under section 88 of the Animal Diseases Act 2005 revokes DI2010-113 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2011-118 being the Animal Welfare (Fees) Determination 2011 (No. 1) made under section 110 of the Animal Welfare Act 1992 revokes DI2010-114 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2011-121 being the Stock (Fees) Determination 2011 (No. 1) made under section 68 of the Stock Act 2005 revokes DI2010-117 and determines fees payable for the purposes of the Act.**

The first instrument mentioned above determines fees payable under section 88 of the *Animal Diseases Act 2005*. The second instrument determines fees payable under section 110 of the *Animal Welfare Act 1992*. In both cases, section 6 of the instrument provides:

**6. Goods and services tax**

Where applicable, GST inclusive fees are marked with a double asterisk (\*\*).

The third instrument mentioned above determines fees under section 68 of the *Stock Act 2005*. Section 7 of that instrument is in similar terms to section 6 of the first two instruments.

The Committee notes that no fees in any of the instruments are marked with a double asterisk. In fact, the first instrument determines only one fee. While the “where applicable” formulation means that, ultimately, there is little scope for real confusion, the Committee suggests that these instruments provide another example of the possible pitfalls of using earlier instruments as “precedents”, without checking the precedent instrument against the particular situation in which it is being used.

This comment does not require a response from the Minister.

*Are these instruments all valid?*

**Disallowable Instrument DI2011-123 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 1) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-124 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 2) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-125 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 3) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-126 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 4) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-127 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 5) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-128 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 6) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

**Disallowable Instrument DI2011-129 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2011 (No. 7) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.**

The seven instruments mentioned above appoint seven specified persons to the ACT Accreditation and Registration Council. The instruments state that they are made under subsection 12(2) of the *Training and Tertiary Education Act 2003*. Section 12 of that Act provides:

**12 Membership of council**

- (1) The council consists of the following members:
  - (a) a chairperson;
  - (b) 4 people with expertise in vocational education and training;
  - (c) 3 people with expertise in higher education;
  - (d) 1 person appointed, after consultation with employer organisations, to represent the interests of employers;
  - (e) 1 person appointed, after consultation with the trades and labour council, to represent the interests of employees;
  - (f) 1 person who, in the Minister's opinion, represents the interests of providers of industry training advisory services.
- (2) The Minister must appoint the council members.

*Note 1* For the making of appointments generally, see the Legislation Act, div 19.3.

*Note 2* Certain statutory appointments made by a Minister require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

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

The Committee notes that the Explanatory Statements for the various instruments contain no indication of what categories of appointment mentioned in subsection 12(1) each of the specified persons represents. While it may be assumed that, in making these instruments, the Minister has considered the requirements of subsection 12(1), the Committee generally prefers to see the Explanatory Statement for an instrument of appointment in this sort of situation spell out the category that the person appointed represents. This assists the Committee (and the Legislative Assembly) in being satisfied that an appointment has been properly made, by reference to the requirements of the empowering section. The Committee does not consider this to be an onerous requirement.

In making this comment, the Committee also notes that, in each case, the Explanatory Statement for the instrument of appointment states:

The Standing Committee on Education, Training and Youth Affairs was consulted and has no objections to the appointment.

Again, it might be assumed that the Standing Committee on Education, Training and Youth Affairs considered the requirements of subsection 12(1) as part of the consultation process. It might also be assumed that that Committee's lack of objection to the various appointments indicates that the Standing Committee on Education, Training and Youth Affairs was satisfied that the formal requirements for the appointments had been met. It would be preferable, however, if this was explicitly stated, in the Explanatory Statement, as is the case for other, similar instruments of appointment.

This comment does not require a response from the Minister.

*Drafting issue*

**Disallowable Instrument DI2011-131 being the Health (Fees) Determination 2011 (No. 1) made under section 192 of the Health Act 1993 revokes DI2010-298 and determines fees payable for the purposes of the Act.**

This instrument determines numerous fees under the *Health Act 1993*. Clause (1) of the instrument defines various terms for the instrument, including:

*After Hours* means the hours outside of ‘Business Hours’;

.....

*Business Hours* means the hours between 8:00am and 5:00pm Monday to Friday, excluding public holidays;

The Committee notes that the terms “After Hours” and “Business Hours” are only used in the capitalised form in paragraphs T 2 (b) and T 2 (a) of the instrument, respectively. Elsewhere, the relevant terms are not capitalised, except in the case of “After” and “Business, where those terms start a provision.

*The Committee seeks the Minister’s advice as to whether the capitalisation (and not capitalisation) is intended and whether the definitions are intended to operate only in relation to paragraphs T 2 (a) and T 2 (b).*

**Subordinate law—No comment**

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

**Subordinate Law SL2011-15 being the Road Transport (Offences) Amendment Regulation 2011 (No. 1) made under the Road Transport (General) Act 1999 determines the prescribed infringement notice penalties for offences against the road transport legislation dealt with by infringement notice.**

**Subordinate law—Comment**

**The Committee has examined the following subordinate law and offers these comments on it:**

*Drafting issues—Explanatory Statement*

**Subordinate Law SL2011-16 being the Education Amendment Regulation 2011 (No. 2) made under the Education Act 2004 amends the Education Regulation 2005 to include the updated names of two schools and a college.**

The Committee notes that this short subordinate law contains only 5 substantive provisions. The Explanatory Statement for the subordinate law is similarly short. The Explanatory Statement does not, however, appear to relate to the provisions of the subordinate law to which it refers.

Section 4 of the subordinate law provides:

**4            Schedule 1, part 1.1, item 10**

*omit*

In relation to clause 4, the Explanatory Statement states:

**Clause 4 Schedule 1, part 1.1**

This provision substitutes a new table in Schedule 1, Part 1.1, of the *Education Regulation 2005* that updates the names of the P-10 School for Kambah and Kaleen High School to their respective current names, the Namadgi School and University of Canberra High School Kaleen.

Clause 4 of the subordinate law does not, in fact, “substitute a new table”. It omits table item 10 from Part 1.2 of Schedule 1, ie the reference to “Kaleen High School”. Clause 6 then inserts into the table, at the appropriate place (if alphabetical order is to be maintained), a reference to the “University of Canberra High School Kaleen”.

Clause 5 of the subordinate law provides:

**5 Schedule 1, part 1.1, item 16**

*substitute*

16 Namadgi School

For clause 5, the Explanatory Statement provides:

**Clause 5 Schedule 1, part 1.2**

This provision substitutes a new table in Schedule 1, Part 1.2, of the *Education Regulation 2005* that updates the name of Lake Ginninderra College to its current name – the University of Canberra Secondary College Lake Ginninderra.

Again, clearly, clause 5 of the subordinate law does not substitute a new table, updating the name of Lake Ginninderra College.

Clauses 6, 7 and 8 of the subordinate law are not dealt with in the Explanatory Statement at all.

It appears to the Committee that the Explanatory Statement was, perhaps, drafted by reference to a previous version of the subordinate law.

Despite the evident defects in the Explanatory Statement, however, the effect of the subordinate law is otherwise clear. As a result, the Committee makes no further comment on the subordinate law.

This comment does not require a response from the Minister.

## **GOVERNMENT RESPONSES**

The Committee has received responses from:

- The Chief Minister, dated 12 July 2011, in relation to comments made in Scrutiny Report 37 concerning Disallowable Instrument DI2011-49, being the Public Sector Management Amendment Standards 2011 (No. 3).
- The Minister for Health, dated 12 July 2011, in relation to comments made in Scrutiny Report 38 concerning Subordinate Law SL2011-14, being the Mental Health (Treatment and Care) Amendment Regulation 2011 (No. 1).

- The Minister for Education and Training, dated 12 July 2011, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instrument DI2011-34, being the University of Canberra (Academic Board) Statute 2011.
- The Minister for Education and Training, dated 12 July 2011, in relation to comments made in Scrutiny Report 38 concerning Disallowable Instrument DI2011-89, being the ACT Teacher Quality Institute Board Appointment 2011 (No. 1).
- The Minister for Education and Training, dated 13 July 2011, in relation to comments made in Scrutiny Report 38 concerning Disallowable Instrument DI2011-90, being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 5).
- The Minister for Education and Training, dated 18 July 2011, in relation to comments made in Scrutiny Report 38 concerning Disallowable Instrument DI2011-88, being the Education (Government Schools Education Council) Appointment 2011 (No. 1).
- The Minister for the Environment and Sustainable Development, dated 27 July 2011, in relation to comments made in Scrutiny Report 37 concerning Disallowable Instrument DI2011-48, being the Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011 (No. 1).
- The Minister for Community Services, dated 29 July 2011, in relation to comments made in Scrutiny Report 37 concerning the Education and Care Services National Law (ACT) Bill 2011.

The Committee wishes to thank the Chief Minister, the Minister for Health, the Minister for Education and Training, the Minister for the Environment and Sustainable Development and the Minister for Community Services for their helpful comments.

#### **PRIVATE MEMBER'S RESPONSE**

The Committee has received a response from Ms Bresnan, dated 22 July 2011, concerning comments made in Scrutiny Report 36 concerning the Food (Nutritional Information) Amendment Bill 2011 and thanks her for her helpful comments.

Vicki Dunne, MLA  
Chair

August 2011

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

**REPORTS—2008-2009-2010-2011**

**OUTSTANDING RESPONSES**

**Bills/Subordinate Legislation**

**Report 1, dated 10 December 2008**

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill  
2008

**Report 2, dated 4 February 2009**

Education Amendment Bill 2008 (PMB)

**Report 8, dated 22 June 2009**

Disallowable Instrument DI2009-75—Utilities (Consumer Protection Code)  
Determination 2009

**Report 10, dated 10 August 2009**

Disallowable Instrument DI2009-93—Utilities (Grant of Licence Application Fee)  
Determination 2009 (No. 2)

**Report 12, dated 14 September 2009**

Civil Partnerships Amendment Bill 2009 (PMB)

**Report 14, dated 9 November 2009**

Building and Construction Industry (Security of Payment) Bill 2009  
Disallowable Instrument DI2009-58—Heritage (Council Chairperson) Appointment  
2009 (No. 1)

**Report 18, dated 1 February 2010**

Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

**Report 19, dated 22 February 2010**

Education (Suspensions) Amendment Bill 2010 (PMB)

**Report 22, dated 27 April 2010**

Infrastructure Canberra Bill 2010 (PMB)  
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

**Report 24, dated 28 June 2010**

Disallowable Instrument DI2010-65—Auditor-General (Standing Acting Arrangements)  
Appointment 2010

**Bills/Subordinate Legislation****Report 30, dated 15 November 2010**

Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)  
Discrimination Amendment Bill 2010 (PMB)

**Report 34, dated 24 March 2011**

Disallowable Instrument DI2011-17—Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1)  
Road Transport (Third-Party Insurance) Amendment Bill 2011

**Report 38, dated 27 June 2011**

Disallowable Instrument DI2011-61—Nature Conservation (Special Protection Status) Declaration 2011 (No. 1)  
Disallowable Instrument DI2011-75—Territory Records (Advisory Council) Appointment 2011 (No. 1)  
Disallowable Instrument DI2011-76—Territory Records (Advisory Council) Appointment 2011 (No. 2)  
Disallowable Instrument DI2011-77—Territory Records (Advisory Council) Appointment 2011 (No. 3)  
Disallowable Instrument DI2011-78—Territory Records (Advisory Council) Appointment 2011 (No. 4)  
Disallowable Instrument DI2011-79—Territory Records (Advisory Council) Appointment 2011 (No. 5)  
Disallowable Instrument DI2011-80—Territory Records (Advisory Council) Appointment 2011 (No. 6)

**Report 39, dated 28 June 2011**

Electoral (Donation Limit) Amendment Bill 2011 (PMB)



## Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH

MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Ms Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety—Scrutiny of Bills  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Ms <sup>Nicki</sup> Dunne

Thank you for the Standing Committee on Justice and Community Safety—Scrutiny of Bill's comments in the Committee's Scrutiny Report of 16 June 2011 concerning the Public Sector Management Amendment Standards 2011 (No.3) (the Standards).

The Committee has requested clarification on whether the consumption of alcohol by officers is permitted (without the prior approval of a senior manager) outside of special occasions under section 7 - consumption of alcohol. It should be noted that this section was reproduced without alteration given that there was no agreement to make substantive changes to the provision.

Whilst I note that the Committee does acknowledge that this situation is a far-fetched interpretation, I am advised that officers and employees who wish to consume alcohol whilst on duty or on government premises during core hours would be required to seek approval from a senior manager regardless of occasion. Officers and employees are required to act with probity under section 9 of the *Public Sector Management Act 1994*, and as such consumption of alcohol on government premises without prior approval on any occasion would be regarded as breaching this section.

The Committee also raised a question regarding how sections 8 and subsection 541(3) are intended to interact with one another. Subsection 541(3) relates to drivers not consuming alcohol or carrying alcohol in a government vehicle (unless they have special approval). Section 8 has broader operation applying not only to drivers, but also passengers.

The other matters raised regarding the capitalisation of the "G" in government in section 8, and the italicising and numbering of the note in Part 5.3 have been noted and will be amended at the next scheduled amendment.

Yours sincerely

Katy Gallagher MLA  
Chief Minister

12 JUL 2011

ACT LEGISLATIVE ASSEMBLY

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## Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH

MINISTER FOR INDUSTRIAL RELATIONS

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MEMBER FOR MOLONGLO

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

Dear Mrs Dunne <sup>Vicki</sup>

### **Amendment to Subordinate Law SL2011-14**

In the Scrutiny Report of 27 June 2011 for the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) the Committee has noted a change to the Mental Health (Treatment and Care) Regulation which amends the date of a previous Interstate Agreement between the ACT and Victoria to provide for the interstate application of mental health laws.

The Committee has requested confirmation that the date of the Interstate Agreement with Victoria has been amended in the Regulation from 25 July 2002 to 8 July 2002.

I can confirm that the 2003 Regulation included an incorrect date and that this is now corrected by the Mental Health (Treatment and Care) Regulation Amendment 2011 (No 1).

Yours sincerely

*Katy Gallagher*

Katy Gallagher MLA  
Minister for Health

12 July 2011

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ACT LEGISLATIVE ASSEMBLY



## Andrew Barr MLA

DEPUTY CHIEF MINISTER

MINISTER FOR ECONOMIC DEVELOPMENT  
MINISTER FOR TOURISM, SPORT AND RECREATION  
MINISTER FOR EDUCATION AND TRAINING

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MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to the Standing Committee on Justice and Community Safety (the Committee) Scrutiny Report No 34 of 24 March 2011. I note the query on Disallowable Instrument DI2011-13 being the University of Canberra (Academic Board) Statute 2011 related to the *University of Canberra Act 1989*.

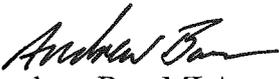
The University of Canberra has advised me that the opinion and concern of the Committee is noted and to ensure that there is no doubt about the validity of the rules, the current rules were revoked and new replacement rules have been approved by the University of Canberra Council at their meeting 142 on 15 April 2011. The new rules are made under the authority of Section 6 of the University of Canberra (Academic Board) Statute 2011.

I am also advised that no elections have been held for members of the Academic Board during the period when the validity of the rules has been in doubt.

I have written separately to Mr John Mackay, the Chancellor of the University of Canberra thanking him for the prompt resolution of the matter.

Thank you and the Committee for drawing my attention to the matter and for the work of the Committee generally. I apologise for the delay in responding to the issues raised in the report of the Standing Committee.

Yours sincerely

  
Andrew Barr MLA  
Minister for Education and Training

12 JUL 2011

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601



## Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT

MINISTER FOR EDUCATION AND TRAINING

MINISTER FOR TOURISM, SPORT AND RECREATION

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
Legislative Assembly  
London Circuit  
CANBERRA ACT 2600

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No 38 of 27 June 2011 concerning the appointment of the Chair of the Board of the ACT Teacher Quality Institute (TQI).

The Committee has sought my assurance that the appointment of the Chair of the Board of the TQI has validly been made as it did not refer to the *Financial Management Act 1996* in the head of Disallowable Instrument DI2011-89.

I have been advised that although section 15 of *ACT Teacher Quality Institute Act 2010* states that the chair must be appointed under the *Financial Management Act 1996* that not referring to this Act in the head of the instrument would not affect its validity. It would be regarded more as a mistake of a formal nature and something that is within the scope of the *Legislation Act 2001*, section 212.

**212 Appointment not affected by defect etc**

An appointment, or anything done under an appointment, is not invalid only because of a defect or irregularity in or in relation to the appointment.

I note the Committee's comments and thank the Committee for its observations. In response to the Committee's feedback, the ACT Teacher Quality Institute will ensure that future appointment instruments will include all legislation referred to in the *ACT Teacher Quality Institute Act 2010*.

Yours sincerely

Andrew Barr MLA  
Minister for Education and Training

12 JUL 2011

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

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## Andrew Barr MLA

DEPUTY CHIEF MINISTER

MINISTER FOR ECONOMIC DEVELOPMENT  
MINISTER FOR TOURISM, SPORT AND RECREATION  
MINISTER FOR EDUCATION AND TRAINING

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA  
Chair  
Scrutiny of Bills and Subordinate Legislation Committee  
Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to the Scrutiny of Bills and Subordinate Legislation Committee's Scrutiny Report No. 38 of 27 June 2011. I note that the Committee seeks my assurance that Disallowable Instrument DI2011-90, being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No.5), has been validly made.

I can advise the Committee that I have sought advice on this matter and I am satisfied that citing the wrong section in the heading of the instrument, while regrettable, does not affect the instrument's validity. The advice I have received is that this error falls within the scope of the Legislation Act, s.212. I note also that the explanatory statement with the instrument correctly refers to Section 31 of the Canberra Institute of Technology Act.

Thank you for your comments on this matter.

Yours sincerely

Andrew Barr MLA  
Minister for Education and Training

13 JUL 2011

ACT LEGISLATIVE ASSEMBLY



## Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT

MINISTER FOR EDUCATION AND TRAINING

MINISTER FOR TOURISM, SPORT AND RECREATION

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
c/- Scrutiny of Bills and Subordinate Legislation Committee  
ACT Legislative Assembly  
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to Scrutiny Report No 38 dated 27 June 2011 in which the Standing Committee on Justice and Community Safety raised concerns about the Explanatory Statement for Disallowable Instrument DI2011-88. The Disallowable Instrument re-appoints Ms Jill Burgess as a community member of the Government Schools Education Council.

I wish to clarify for the Committee that Ms Burgess is not currently a public servant and was not a public servant when she was previously appointed to the Government Schools Education Council in 2008. The instrument (DI2008-83) appointed Ms Burgess to the Council for a period of three years. I have attached a copy of the Instrument which is held on the ACT Legislation Register for the Committee's information (Attachment A).

I note the Committee's request that Explanatory Statements for Disallowable Instruments should indicate whether or not a member being appointed is a public servant. I will ensure this information is provided for future appointments and re-appointments.

Yours sincerely

Andrew Barr MLA  
Minister for Education and Training

18 JUL 2011

ACT LEGISLATIVE ASSEMBLY

Australian Capital Territory

## **Education (Government Schools Education Council) Appointment 2008 (No 1)**

**Disallowable Instrument DI2008 - 83**

made under the

*Education Act 2004*, Section 57 Members of Council (government)

### **Explanatory Statement**

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The *Education Act 2004* governs the establishment, functions and membership of the Government Schools Education Council.

Section 57 of the Act deals with appointment of members and requires such appointments to be made by the Minister.

This instrument reappoints Ms Jill Burgess for three years from 22 June 2008 as a community member. The appointee is not a public servant and the determination is a disallowable instrument for the purpose of division 19.3.3 of the *Legislation Act 2001*.

The Legislative Assembly Standing Committee on Education, Training and Young People was consulted and has no objections to the appointment.



## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER  
MINISTER FOR POLICE AND EMERGENCY SERVICES  
MINISTER FOR ENERGY

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MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I am writing in response to comments in the Standing Committee on Justice and Community Safety's Scrutiny Report No 37 of 16 June 2011, in relation to the Explanatory Statement of Disallowable Instrument DI2011-48, that being, *Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011*.

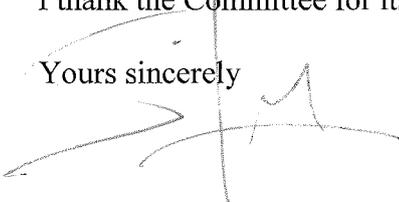
The Committee notes that both the Instrument and its associated Explanatory Statement do not indicate that advice was sought from the Independent Competition and Regulatory Commission (ICRC) under s 10(3)(a) of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* (the Act).

Any advice received must be tabled in the Legislative Assembly under s 10(4) of the same Act. I tabled the ICRC advice on 6 April 2011, in company with the relevant Instrument.

As all Committee Members would have already received this advice it was considered unwarranted to further detail the advice in the Instrument. The Explanatory Statement, as required, details the effect of each clause of the Instrument.

I thank the Committee for its comment.

Yours sincerely



Simon Corbell MLA  
Minister for the Environment and Sustainable Development

27.7.11

cc Deputy Clerk, ACT Legislative Assembly

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601  
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## Joy Burch MLA

MINISTER FOR COMMUNITY SERVICES  
MINISTER FOR MULTICULTURAL AFFAIRS

MINISTER FOR AGEING  
MINISTER FOR WOMEN

MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS  
MINISTER FOR THE ARTS

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MEMBER FOR BRINDABELLA

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

Dear Mrs Dunne

I am writing in regard to comments by the Standing Committee on Justice and Community Safety in Scrutiny Report No 37 of 16 June 2011 on the *Education and Care Services National Law (ACT) Bill 2011*. I thank the Committee for its comments. I offer the following response in relation to the matters raised by the Committee.

The *Education and Care Services National Law (ACT) Bill 2011* and the *Education and Care Services National Law (ACT) Bill 2011* Explanatory Statement were modelled on the *Education and Care Services National Law (VIC) 2010* and the Victorian Bill's Explanatory Memoranda. This approach has also been taken by other jurisdictions to ensure national consistency in the explanation of the Law. Where appropriate the explanatory statement makes reference to compliance with the *Human Rights Act 2004*.

The Committee raised the following issues:

- 1. The Committee noted discrepancies in the paragraphs that refer to 'Human Rights compliance with the ACT Human Rights Act 2004'.**

The discrepancies have been noted and amendments will be made to the *Education and Care Services National Law (ACT) Bill 2011* Explanatory Statement to ensure that the specific sections of the National Law referred to relate to the topics indicated in the relevant paragraphs.

A revised explanatory statement will be tabled prior to debate of the *Education and Care Services National Law (ACT) Bill 2011* in October 2011.

- 2. The Committee noted that the paragraphs that refer to human rights compliance with the Human Rights Act 2004 do not make specific reference to the Human Rights Act, Section 28. It is the Committee's view that section 28 is a valuable tool for an analysis of whether a limitation is arbitrary.**

The view of the Committee has been noted and will be considered when making amendments to the *Education and Care Services National Law (ACT) Bill 2011* Explanatory Statement. It is acknowledged that the Explanatory Statement would benefit from further analysis on the application of Section 28 of the *Human Rights Act 2004* and this will be addressed in a revised Explanatory Statement.

- 3. The committee considers that the explanatory statement should identify all respects in which a provision of the Bill affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of territory laws. If there are no such provisions, then this should be indicated.**

The *Education and Care Services National Law (ACT) Bill 2011* excludes a number of ACT Laws so far as they apply to the Education and Care Services National Law or to the instruments made under that Law. The underlying rationale for this exclusion is to achieve and maintain national consistency in the administration and interpretation of the National Law, this being one of the key objectives for introducing a national scheme.

Section 7 (1) (a) of the *Education and Care Services National Law (ACT) Bill 2011* proposes to exclude the application of the *Criminal Code 2002* to the National Law and to any instruments made under it. The *Criminal Code 2002* codifies the general principles of criminal responsibility that apply under territory law. As such, the *Criminal Code 2002* has an effect on the way a court in the ACT is required to interpret legislation, including the offence provisions in the National law. This means that the offence provisions in the National Law could take on a different meaning when interpreted in the ACT, as compared to other jurisdictions that do not have a codified approach to criminal law. Currently the only jurisdictions that have a codified approach for the application of the criminal law are the ACT, the Commonwealth and the Northern Territory. The Bill proposes that the *Criminal Code 2002* be excluded in its application to the National Law so that the approach to the interpretation of the offence provisions in the ACT will be consistent with the other jurisdictions that are implementing the National Law.

In the other circumstances where ACT Laws are excluded the following will operate in their place. In place of the *Freedom of Information Act 1989*, the *Education and Care Services National Law* provides for the application of the *Commonwealth Freedom of Information Act*. In place of the *Legislation Act 2001*, the *Education and Care Services National Law* contains provisions that relate to the interpretation of this Law.

- 4. The explanatory statement should also explain whether any amendment to the adopted national law will apply in the Territory, and also whether any regulation made under that law will apply. There should also be an explanation of what capacity there will be for the Legislative Assembly to be made aware of any amendment or regulation and for the Assembly to make an amendment or reject any amendment to the national law or regulation.**

One of the key objectives of the National Quality Framework is to ensure that regulatory requirements for education and care service providers are consistent across Australia. The approach to making and amending regulations is intended to ensure that the regulations are universally applied across all participating jurisdictions and that any future amendments are agreed by participating jurisdictions and adopted and implemented consistently.

The *Education and Care Services National Law* provides for the development of national regulations, the publication of national regulations, parliamentary scrutiny of national regulations and the effect of disallowance of national regulations.

The *Education and Care Services National Law* (part 14, division 8) allows the Ministerial Council to make regulations for the purposes of this Law. Once regulations are made the Law provides for a process whereby the regulations are subject to parliamentary scrutiny in each participating jurisdiction. The regulations are to be tabled in each house of parliament and may be disallowed in the same way as that of regulations made under the Acts of that jurisdiction. For the disallowance to have effect they would have to be disallowed in the majority of participating jurisdictions.

The Law also provides that among the functions of the Ministerial Council it is responsible for making regulations in accordance with the *Education and Care Services National Law*. Implicit in this function is the ability to amend or make changes to the regulations. The same parliamentary process as outlined above for the adoption of the regulations applies in circumstances where amendments or changes are required to a regulation.

The *National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care* outlines the process for making amendments to any aspect of the National Quality Framework or legislation. This includes the *Education and Care Services National Law* and the *Education and Care Services National Regulations*. This process provides that any member of the Ministerial Council or the National Authority may propose amendments to the legislation. Endorsement of any changes is required to be made by the Ministerial Council.

At the request of the Ministerial Council the National Authority (the Australian Children's Education and Care Quality Authority) will examine and consider any proposed amendments in accordance with the objectives and principles as specified in the National Partnership Agreement and legislation. This will include consideration of the impact on the following:

- educational and developmental outcomes for children attending education and care services under the National Quality Framework;
- costs to parents and carers and impact on their workforce participation;
- costs and regulatory burden for education and care providers; and
- costs to government.

The National Authority is required to facilitate assessment and discussion with all jurisdictions. The national body on behalf of all jurisdictions is to provide advice to the Ministerial Council about the proposed amendments and their justification. Agreement by the Ministerial Council must be by consensus.

The host jurisdiction, in this case being Victoria, will pass agreed amendments through Parliament. Once passed, the legislation will automatically be amended in the ACT and other participating jurisdictions.

In response to the Committee's comment an explanation of these provisions will be outlined in a revised *Education and Care Services National Law (ACT) Bill 2011* Explanatory Statement.

Yours sincerely



Joy Burch MLA  
Minister for Community Services  
July 2011



Amanda Bresnan MLA

ACT Greens

Spokesperson for Health, Transport, Disability and Housing, Ageing, Multicultural Affairs, Industrial Relations, Corrections.

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MEMBER FOR BRINDABELLA

Mrs Vicki Dunne  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

Dear Mrs Dunne,

I refer to Scrutiny of Bills Report No. 36 of 29 April 2011 and offer the following response in relation to the Committee's comments on the *Food (Nutritional Information) Amendment Bill 2011*.

**Strict liability offences**

The Committee's report raised a concern about the strict liability offences and the proposed maximum penalty of 100 penalty units in subsections 110(5) and 111(2) of the Bill.

The need for strict liability

The appropriateness of strict liability offences is evaluated against the criteria set out in the Department of Justice and Community Safety 'Guide for Framing Offences' (2010) and where relevant further reference has been made to the Commonwealth equivalent; 'A guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers' (2007).

*There must be a demonstrable and legitimate aim for creating a strict liability offence.*

The Bill creates a positive obligation for food business to ensure that they provide the required information so that the community is aware of the nutritional content of the food they are choosing to purchase. This is the approach that has been consistently adopted by the Assembly and other Australian Parliaments for enforcing regulatory schemes of this nature and it is appropriate to put the onus on businesses to ensure that they meet their obligations. This onus requires the imposition of strict liability offences so that there is a positive obligation for businesses to proactively ensure compliance.

The consumer right to know is a well established principle evidenced through both the long standing labelling laws applied to packaged food,<sup>1</sup> and more generally through a very broad range of consumer protection mechanisms including the *Competition and Consumer Act 2010 (Cth)*, the *National Consumer Credit Protection Act 2009 (Cth)* and the existing *Food Act 2001*. There is clear community support for measures that allow consumers to make informed choice and in this case it is reasonably necessary to create a strict liability offence to ensure that this is done consistently and correctly. To ensure that the requirements of the Bill can be enforced it is reasonably necessary that the offences are strict liability.

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<sup>1</sup> Australia New Zealand Food Standards Code - Standard 1.2.8 - Nutrition Information Requirements.

There are no reasonable alternatives available that would achieve the same outcome. There is no alternative construction or other mechanism by which the necessary stringent obligation to ensure compliance can be achieved and the scheme balances the rights of those affected and does not unnecessarily derogate from those rights any more than is reasonably necessary for the effective operation of the scheme.

*Strict liability offences can only be created in a context where a person or body corporate is on notice that the behaviour is prohibited. It must be demonstrable that a person ought to know the obligation placed on them. A clear example is a licensing scheme, where the licence holder would be expected to know of their legal obligations.*

There are legitimate grounds for penalising food business even though they may be lacking intention or fault. All food businesses must be registered under the *Food Act 2001* Section 91. Whilst not strictly a licensing scheme it effectively operates in the same way and ensures that businesses are informed of their obligations and are on notice that there are an extensive range of requirements that they must fulfil in order to carry out the food business.

It should also be noted here that as the proposed offence applies to corporations, the operation of the mistake of fact defence is varied under Section 53 of the *Criminal Code 2002*. Businesses will be placed on notice to guard against the possibility of any contravention and an appropriate defence is available to them where there is a legitimate reason for non-compliance.

Any breach of the requirements will be solely the responsibility of the food business and liability depends on the actions or lack of action of the food business. The only respect where this could be challenged is in relation to the working out of the nutritional content of the food. As this presumably will be done by a third party, a legitimate question can be raised here about whether it is appropriate it impose such a penalty on a person who must by necessity rely on information from a third party.

It is essential for the integrity of the scheme that the information is correct and consistently derived at so that consumers can confidently rely on the information provided to them. Whilst there is a degree of reliance on a third party it is appropriate to place the ultimate burden on the food business because they are ultimately the ones using it for commercial gain and asserting that it has been obtained correctly. It should again be noted that the *Criminal Code 2002* varies the mistake of fact defence such that where the relevant agent of the business was under a mistake of fact and the error was the responsibility of the third party, if the food business has taken the appropriate measures to ensure that the law was complied with they will not be guilty of the offence.

To be captured by the scheme the food business must have at least 7 outlets within the ACT or 50 outlets nationally. This ensures that only larger companies where it is reasonable to impose this type of regulatory burden are affected.

The scheme is not overly complex or onerous and it will be relatively easy for businesses to comply. Whilst the detail is included in the regulation; in this case the regulations are being set by the ACT Legislative Assembly and an amendment will be proposed to ensure that the Assembly has the opportunity to reject any changes proposed by the Executive before they come into effect (see below for discussion on the appropriateness of the delegated power). There can be no doubt that business will be well aware of their obligations, either through the direct information provided during the registration process or because of the public prominence of the scheme once it is implemented.

*Strict (and absolute) liability offences are usually employed in cases where it is necessary to ensure the integrity of a regulatory scheme, or some context where the behaviour is regulated.*

In order to ensure the integrity of the scheme it is necessary to provide that failure to comply with the requirements is a strict liability offence. In the absence of strict liability proving the requisite intention on the part of the business not to display the information would be very difficult if not impossible;

with no prospect of securing a conviction for breach the integrity of the scheme would be severely limited.

Further it is necessary and desirable to allow for infringement notices to be issued for non-compliance. This is of course only appropriate for strict liability offences and it will ensure a much more efficient scheme. The regulatory nature of the offence means that most, if not all, breaches should be able to be easily disposed of through an infringement notice and it will be much more efficient if inspectors are able to issue fines to ensure compliance.

The issue of regulatory efficiency was considered by the Senate Scrutiny of Bills Committee in the Sixth Report of 2002, 'Application of Absolute and Strict Liability Offences in Commonwealth Legislation' at page 265 which found:

One factor in deciding whether strict liability is appropriate is the prospect the prosecution would have of establishing that a breach of the provision was intentional. Another test is whether the defendant is well-placed to take extra care to ensure that the offence is not committed. It may be that the requirement for proof of intention would make a provision unenforceable. It is damaging to the credibility of the legal system if offences are incapable of enforcement.<sup>2</sup>

It should be noted here that the provisions are not being included for mere administrative simplicity or to save resources, but rather because it is required for the integrity of the regulatory scheme and it will significantly enhance the effectiveness of the enforcement regime in deterring offences.

#### The appropriate maximum penalty

The Department of Justice and Community Safety 'Guide for Framing Offences' April 2010 states on page 29 that:

As these offences [strict liability offences] are 'primarily aimed at conduct on the less serious side of the criminal spectrum, the maximum penalty is usually limited to a monetary penalty (maximum 50 penalty units)."

The Commonwealth equivalent 'A guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers 2007' states on page 25 that strict liability is generally considered appropriate where the offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units.

The *Food (Nutritional Information) Amendment Bill 2011* proposes a maximum penalty of 100 rather than 50 or 60 penalty units for breaches of subsections 110(5) and 111(2) because it is reasonably necessary and proportionate in the context of the scheme and given the nature of the particular offence.

Whilst the relevance can be limited it is instructive to look to other strict liability offences where parliaments both in the ACT and other Australian jurisdictions have agreed that it is appropriate to exceed the general limit. The first relevant example is the equivalent NSW law. The penalties proposed in the Bill replicate the existing NSW scheme created by the *Food Act 2003*(NSW) section 106N. The NSW provisions are also, by implication, strict liability.

Section 155 of Schedule 2 of the *Competition and Consumer Law 2010* (Cth) provides that a person who misleads consumers as to the nature of goods has committed a strict liability offence with a maximum penalty of (the equivalent of) 220 penalty units.

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<sup>2</sup> See also p285.

An obvious distinction does exist between an offence where potentially active deception is involved and the failure to disclose certain information, however to some extent there is a clear overlap as not displaying information that may dissuade a consumer from purchasing the product may have the same effect. The commensurate reduction in the proposed maximum penalty reflects the broader scope of the Commonwealth law and the particular nature of the respective offences.

The *National Credit Code* (Cth) section 22 provides that a credit provider must not enter into a credit contract that contravenes any of the form provisions of the Code. This is a strict liability offence with a 100 penalty unit penalty. This is very much akin to the proposed offences in the *Food (Nutritional Information) Amendment Bill 2011* in that it ensures businesses meet their obligations which are designed to inform and protect consumers.

Some relevant examples from the ACT are section 28 of the *Dangerous Goods (Road Transport) Act 2009* and section 31 of the *Medicines, Poisons and Therapeutic Goods Act 2008*. Section 31 of the *Medicines, Poisons and Therapeutic Goods Act 2008* imposes a 100 penalty unit strict liability offence for failing to comply with the administrative requirement of providing required information to the chief health officer. Again a strong analogy can be drawn between this offence and the offence of failing to correctly disclose nutritional information to a consumer proposed in the Bill.

It is necessary to impose this level of penalty to ensure that there is a sufficient deterrent from non-compliance for what are reasonably large businesses. The penalty appropriately reflects the nature of the offence and the importance the community places on the need for consumers to be able to make informed choices about what they are purchasing and what they are eating.

### **Delegation of legislative powers**

The Committee raised two concerns regarding the delegation of legislative powers.

#### Content of an offence may be proscribed by regulation

The Bill does provide for the details of an offence to be proscribed by regulation. There are two main reasons for this, firstly it acknowledges that what is being proposed is a new scheme and a level of flexibility to adjust parts of it may be required as it is implemented in practice, and secondly it is appropriate that such a scheme is nationally consistent and therefore changes may need to be made to provide for this. It should be noted that national consistency will lead to the significant reduction in compliance costs for businesses affected by the new laws.

The Bill attempts to find the right balance by ensuring that the underlying nature of the offence is set out clearly within the Act, but allowing sufficient flexibility to modify the particular requirements so that these two issues can be responded to if that is appropriate.

In response to the Committee's concern an amendment will be moved so that any future changes to the regulations proposed by the Executive will again be subject to Assembly approval before they can be implemented.

#### The exemption provision and the power to alter the operation of the Act

The Committee was concerned that the Minister could make an exemption for any people, food businesses, premises, food or activities from the operation of the Act (see subsection 113(1)). As this is a new scheme across Australia, it is appropriate to allow a high level of flexibility so that it can accommodate any unforeseen circumstances. It is certainly not the intention that this provision would be used routinely, however it is reasonable to anticipate that there will be circumstances where a business could quite legitimately and consistent with the intention of the Bill be exempt from the display requirements. To proscribe the circumstances when or preconditions upon which the Minister may exercise the power is very difficult. For these reasons it is appropriate that a broad discretion be

given to the Minister to allow a judgement to be made by Minister and then the Assembly on the merits of the particular matter. The Assembly will have the opportunity to disallow any exemption if the Assembly feels that it is not appropriate.

I thank the Committee for raising these issues and I trust the information above has addressed the concerns raised. I have also provided a copy of the amendments I propose to move, some of which I have referred to above. I would welcome any additional comments the Committee might have.

Yours sincerely,



Amanda Bresnan MLA  
ACT Greens Health Spokesperson

22 July 2011