Legislative Assembly for the ACT

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

Scrutiny Report

28 MAY 2007

Report 41

TERMS OF REFERENCE

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

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (i) is in accord with the general objects of the Act under which it is made;

  (ii) unduly trespasses on rights previously established by law;

  (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

  (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (iv) inappropriately delegate legislative powers; or

  (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

Mr Zed Seselja, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

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

ROLE OF THE COMMITTEE

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

BILLS:

Bills—No comment

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

ANIMAL WELFARE AMENDMENT BILL 2007

This is a Bill to amend the *Animal Welfare Amendment Bill 1992* to ban the keeping of hens in a battery cage system in the ACT.

ENVIRONMENT PROTECTION (FUEL SALES DATA) AMENDMENT BILL 2007

This is a Bill to amend the *Environment Protection Act 1997* to facilitate the collection of ACT fuel sales data, for the purposes of calculating greenhouse gas emissions for the ACT transport sector.

FINANCIAL MANAGEMENT AMENDMENT BILL 2007 (NO. 2)

This is a Bill to amend the *Financial Management Act 1996* to require the Treasurer to prepare and submit to the Legislative Assembly a quarterly capital works program progress report.

GAMING MACHINE AMENDMENT BILL 2007

This is a Bill to amend the *Gaming Machine Act 2004* to amend the eligibility requirements in relation to gaming machine licences.

STATUTE LAW AMENDMENT BILL 2007

This is a Bill to amend a number of Acts and regulations for statute law revision purposes only.

Bill—Comment

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

WATER RESOURCES BILL 2007

This Bill would repeal the *Water Resources Act 1998* and provide for a new scheme for the management of the Territory's water resources

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

The search and entry powers

The Bill would confer on officials a number of entry and search powers. A question arises in relation to the power conferred by clause 77, which permits the power of entry to be exercised without the consent of the occupier, as to whether it is compatible with the right to privacy and/or the right to property.

By clauses 68, 77 and 79, the authority or an authorised officer (as the case may be) may enter premises without having obtained a warrant from a judicial officer. On the face of it, these provisions engage HRA section 12:

> **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; .. .

This right might be modified in terms of the proportionality test that inheres in HRA section 28.

In addition, regard may be had to the right to property stated in Article 17 of the *Universal Declaration of Human Rights* (the foundational document of the international human rights framework):

> **Article 17**
>
> 1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property.

In terms of Article 17, consideration of a countervailing public interest is probably justified by reason of the word "arbitrarily" in Article 17(2), although a proportionality test would limit the extent to which the right could be modified.

The rights to privacy and/or property are also engaged by clauses in the Bill relating to the powers of an authorised officer upon entry to seize things (clause 83), and to require a person to state their name and home address (clause 84).

The Committee has reviewed these powers, and with one reservation, does not consider that any trespass on personal rights is undue, or that any provision is incompatible with the HRA. It has, in particular, noted that

- excepting entry pursuant to a warrant issued by a magistrate (Division 10.3), the power to enter premises cannot, without the consent of the occupier, be exercised in relation to part of the premises used for residential purposes (subclauses 68(6) and 79(2)), and

- the power to require a person to state their name and home address may be exercised only where "the authorised officer believes, on reasonable grounds, that the person is committing or has just committed an offence against this Act".

The Committee does draw attention to clause 77. First, it is to be noted that the Minister "may, by written notice, prohibit or restrict the taking of surface water or groundwater" (subsection 71(2)) in any of the circumstances stated in subsection 71(1), which include a case where temporary water restrictions are in force under the *Utilities (Water Conservation) Regulation 2006.* Then, as explained in the Explanatory Statement:

> Clause 77 – Action by authority if notice or direction contravened – provides that this section applies if the authority has reasonable grounds for believing that a person has engaged in conduct that contravened a prohibition or restriction under a notice given to the person under section 71, or a direction given to the person under this part. An authorised officer or someone else authorised by the authority for this section such as an environment protection officer with delegated powers, may enter the land and take any action stated in the notice or direction and do anything else necessary to give effect to the notice or direction.

This power may be exercised in relation to residential premises irrespective of the consent of the occupier. The rights issue is whether, in terms of HRA paragraph 12(a), clause 77 would permit an 'arbitrary' interference with the "home" of the occupier of the premises. (If it is, it is unlikely that it could be justified under HRA section 28.) The Committee has accepted[1] that answering this question requires that:

> an assessment must be made as to whether in a particular situation the public's interest to be left alone by government must give way to government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement: *Hunter et al v Southam Inc* [1984] 11 D.L.R. (4th) 641 at 652-3 per Dickson J, a Canadian case cited by the Constitutional Court of South Africa in *Bernstein v Bester* [1996] ZACC 2 [76].

The Committee has also noted that "it may also be relevant to assess the extent to which the interference affects the freedom and dignity of the person concerned. A high value may be placed on an expectation of privacy in relation to matters such as bodily integrity, private correspondence, and in relation to her or his residence; see N Jayawickrama, The Judicial Application of Human Rights Law (2002) at 606".[2]

The Explanatory Statement does not address this issue. The Committee notes that the public interest lies in the government being able to quickly ensure that a direction designed to prevent loss of water is put into effect in a situation where the land occupier has contravened the direction. The privacy interest lies in the occupier's interest in the integrity of the borders of her or his "home", an interest which the Committee considers worthy of some weight.

The Committee is not convinced that requiring that entry be pursuant to a warrant issued by a magistrate would not be an effective means to balance the competing interests.

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

Strict liability offences

In each case, is the provision for offences of strict liability in subsections 28(2) and (4), 57(1), 58(1), 59(1), (2), (3), (4) and (5), 76(4), and 84(1) a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1))?

On the face of it, these provisions derogate from the statement of rights in the *Human Rights Act 2004*; in particular from "the right to liberty and security of person" stated in subsection 18(1), and/or presumption of innocence stated in subsection 22(1); (see below for comment on the basis for concern). There is thus raised the question of whether the derogation is justifiable under HRA section 28.

[1] See *Scrutiny Report No 2* of the *Sixth Assembly*, concerning the Water Efficiency and Labelling Standards Bill 2004.
[2] Ibid.

The Committee considers that all of the strict liability provisions are HRA compatible. The offences are 'regulatory' in nature, and in no case does the penalty exceed 50 penalty points.

While the Committee notes in appreciation that most explanatory statements do provide justification, it must, however, record its disappointment that, apart from summarising the legal effect of creating a strict liability offence, the Explanatory Statement does not address the issues the Committee has generally considered should be addressed in order to place the Assembly in a position whether it can determine whether to enact such provisions. In particular, no justification for the imposition of strict liability is offered.

Update on strict liability offences

Two Supreme Court Justices have addressed the impact of the *Human Rights Act 2004* on strict liability offences, and what they have to say suggests that the Committee should alter its position on just what rights are engaged by the creation of such an offence.

Hausmann v Shute [2006] ACTSC 54 concerned section 22 of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT), whereby a person commits an offence where he or she has been the driver of a motor vehicle on a public street or in a public place, and, on being required to provide a sample of breath for breath analysis, refuses to provide a sample of breath for analysis, or fails or refuses to provide a sample of breath in accordance with the reasonable directions of the police officer who made the requirement. If failure to provide a sufficient breath sample as directed is established, the Act does not provide for any defence. (On the date of the alleged offence, section 22 of the *Criminal Code 2002*, which prescribes intention as the fault element for the physical elements of an offence, was not in effect.) An offence may be punished in various ways depending in part on who was the offender, and imprisonment is an option in relation to all offenders.

It appears that Higgins CJ and Connolly J characterised the offence as one of strict liability so that the prosecutor need prove beyond reasonable doubt only that the defendant committed the physical elements of the offence – that is, that he or she refused or failed to provide a sample of breath for analysis. Their Honours indicated that the only limitation applicable was the principle stated by Dixon J in *Proudman v Dayman* (1941) 67 CLR 536 at 540: "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence". Their Honours held that "in interpreting implicit matters of excuse allowed by s 22 (RT (A & D) Act)", which is presumably a reference to *Proudman v Dayman*, "if a defendant discharges the evidential burden of pointing to or adducing evidence which, if it were accepted, would constitute a reasonable and lawfully acceptable excuse for non-compliance, then the prosecution has the legal onus to exclude that hypothesis beyond reasonable doubt".

In reaching this view, their Honours cited the non-operative provisions of the Code that stipulate that in such a case, a defendant bears only an evidential burden in relation to a matter of defence; (see section 58, and note that they referred at paras 34-35 to other Code defences applicable in relation to a strict liability offence). They may also have been influenced by the *Human Rights Act 2004* (HRA). They acknowledged that "[t]here is … nothing in the HR Act which prevents the legislature from enacting offences of strict liability" but then cited subsection 18(1):

> Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

What their Honours said about this statement bears directly on the question of whether a strict or absolute liability offence will be compatible with the HRA, and indeed on other kinds of criminal laws. They said:

> 39. That provision would be inconsistent with disproportionate punishments or the imposition of punishment for conduct for which the actor is not, on any rational view, responsible.
>
> 40. There are offences, such as occupational health and safety offences, which call for a high degree of foresight on the part of the responsible person. It is no affront to justice to impose strict or even absolute liability for such offences particularly where public safety is involved. Examples which spring readily to mind are food manufacturing and occupational health and safety.
>
> 41. Liability for the offence in question here, would, consistently with the public policy underlying the legislation, not be avoided simply because the subject failed successfully to undertake the test by reason of intoxication, whether as a result of lack of comprehension of instructions or of lack of physical coordination.

Given that their Honours' reasoning appears to be an application of orthodox common law interpretation,[3] the above comments may not form part of the binding elements of their Honours' reasoning (or, in technical language, are not part of the *ratio decidendi* but merely *obiter dicta*), The comments are, however, of considerable significance for three reasons.

First, they indicate that their Honours will find in HRA subsection 18(1) a limit to the extent to which the Legislative Assembly can, compatibly with the HRA, provide for offences of strict or absolute liability. They reason that the words "the right to liberty and security of person" carry the consequence "that disproportionate punishments or the imposition of punishment for conduct for which the actor is not, on any rational view, responsible" derogate from section 18(1), and, consequently, some strict liability offences may be HRA incompatible unless qualified by provision for the defendant to rely on some defence. This approach contrasts with the Committee's recent[4] preference to see strict and absolute liability offence provisions as engaging the presumption of innocence in HRA section 22(1).

Secondly, the comments suggest that the question whether a law imposes a disproportionate sentence is better addressed under subsection 18(1) than (as the Committee has suggested) under HRA section 10.

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[3] Although they might have done so, their Honours did not invoke HRA subsection 30(1): "(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred". With respect, Lander J was in error in asserting (at para 127) that the HRA was "not relevant", for clearly HRA subsection 30(1) was relevant.

[4] In *Scrutiny Report No 2* of the *Sixth Assembly*, concerning the Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004, the Committee suggested that "a court may see the issue as being whether an offence of strict or absolute liability … is compatible with a person's 'right to liberty and security of the person'" (though mistakenly citing HRA subsection 24(1) rather than subsection 18(1). It also suggested that "a rights objection may be founded on s 22(1) of the HRA: 'Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'". The Committee has more recently invoked subsection 22(1), but in the light of *Hausmann v Shute* [2006] ACTSC 54, per Higgins CJ and Connolly J, subsection 18(1) may be the more obvious basis. Just how much turns on the debate is unclear. The Attorney-General accepts that "strict and absolute liability engage the right to fair trial [in HRA subsection 21(1)]"; see Government Submission to the Standing Committee on Legal Affairs Inquiry into Strict Liability Offences in the ACT at 6 (cite in footnote below).

Thirdly, while their Honours do not refer explicitly to HRA section 28 as a basis to justify a law that derogates from the right stated in subsection 18(1), they appear to do so by allowing that there may a "rational view" open that would justify imposition of strict or absolute liability. This appears to be a quite generous view of what may be justified under section 28, and one broader than is often adopted by courts in other jurisdictions.

Does the vesting in the environment protection authority of a power to investigate and make findings about whether a permission-holder has contravened any kind of law in any Australian jurisdiction

- make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? and/or
- is this power either or both an undue trespass on personal rights, or a breach of the Human Rights Act 2004?

The Bill makes provision for the grant of various kinds of permission to use water – in particular, a water access entitlement, a "surviving allocation" and a licence. Clause 60 states a number of grounds upon which the holder of a permission may be disciplined, in the ways stated in clause 61, by the environment protection authority (see clause 62). The grounds stated in clause 60 are:

(a) the person gave information to the Minister or authority in relation to the application for, or an application for amendment of, the entitlement, allocation or licence that was false or misleading in a material particular;

(b) the person has contravened, or is contravening, a condition of the entitlement, allocation or licence;

(c) the person has contravened, or is contravening, this Act (or a requirement made under this Act), whether or not the holder has been convicted or found guilty of an offence for the contravention;

(d) the person has contravened, or is contravening, a territory law (other than this Act) or a law of the Commonwealth, a State or another Territory, whether or not the holder has been convicted or found guilty of an offence for the contravention.

Does para 60(d) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

On its face, when read with subsection 62(1), para 60(d) permits the authority to investigate and make findings in relation to whether the permission-holder has contravened or is contravening *any kind of law* in force in the Commonwealth, or in any State or Territory. Inasmuch as it seems unreasonable to take the view that mere breach of any law operative in any Australian jurisdiction is a sufficient basis for disciplinary action, it might thus be said that the law does not sufficiently define the basis on which the authority could act.

While a court might find that such laws must be of a kind that their breach has some bearing on the fitness of the permission-holder to hold the relevant kind of permission, this still leaves it open to the authority to investigate a very wide range of activity. Moreover, such judicial control comes after the authority has investigated a particular case, and it is a very expensive and uncertain means of placing some limit on the authority.

The Explanatory Statement does not explain why it is necessary to confer this power on the authority, and the Committee recommends that the Minister provide an explanation to the Assembly.

Is this power either or both an undue trespass on personal rights, or a breach of the Human Rights Act 2004?

There is a specific rights issue thrown up by para 60(d) which arises out of the power of the authority to make a finding that a person has contravened or is contravening some kind of law in force in the Commonwealth, or in any State or Territory. Where this law is criminal in character, then the finding might be argued to engage the right of a person not to have their "privacy … interfered with unlawfully or arbitrarily" (HRA paragraph 12(a)) and/or the right "not to have his or her reputation unlawfully attacked" (HRA paragraph 12(b)).

HRA paragraph 12(a) may *not* be engaged. It could be argued that the question of whether a person has contravened the law is not a matter within the sphere of individual autonomy that marks out the zone of privacy since unlawful behaviour cannot be said to be a "field of action [that] does not touch upon the liberty of others".[5]

But HRA paragraph 12(b) may be engaged. In many cases, the mere fact of an investigation by the authority into whether a person has contravened the law will affect that person's reputation, and a finding of contravention will of course be more likely to have that effect. Thus, the issue becomes whether it can be argued that an investigation may be said to amount to an *unlawful* attack on the person's reputation.

In General Comment 16[6], the former Human Rights Committee (HRC) of the United Nations said:

> 3. The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

Concerning the nature of this law, the HRC said:

> 8. [R]elevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.

In particular cases, the HRC has been critical of laws that did not clearly specify the basis upon which the state could interfere with some aspect of privacy, and by parity of reasoning, this would apply to action that affected the reputation of a person.[7]

Turning to paragraph 60(d), while the basis for the authority to act is stated clearly enough, that statement in effect confers a very wide discretion on the authority to determine whether or not to make the investigation that will constitute the "attack" on the relevant person's reputation. In this way, it may be argued that paragraph 60(d) is incompatible with HRA paragraph 12(b).

[5] S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) at 477.
[6] http://www1.umn.edu/humanrts/gencomm/hrcom16.htm
[7] See S Joseph, et al, at 481.

Incompatibly might also be placed on another basis. While HRA paragraph 12(a) proscribes unlawful or arbitrary interferences with a person's privacy, paragraph 12(b) proscribes only unlawful attacks. In this way, section 12 mirrors article 17 of the International Covenant on Civil and Political Rights. This creates a problem in the interpretation of paragraph 12(b), for it suggests that a person's reputation may be attacked "arbitrarily" so long as that attack is lawful. This is critical, for the HRC has said that "the prohibition on 'arbitrary' interferences with privacy incorporates notions of reasonableness into article 17" – that is the interference "must be proportional to the end sought and be necessary in the circumstances of the case". [8] It may not be possible to make this argument where HRA paragraph 12(b) is concerned.

If the Territory Supreme Court were to accept that the notion of an unlawful attack on reputation encompassed a law that was not a proportionate response to the object of the law, then it might be argued that this is so in relation to paragraph 60(d) of the Bill. On the face of it, the mere fact that a permission-holder contravened any kind of law found in any Australian jurisdiction should not be a ground for disciplinary action.

The Committee also considered whether paragraph 60(d) might be said to offend HRA section 22's statement of the rights of persons who have been "charged with a criminal offence". It concluded that the answer is "no", for the reason that notice to the permission-holder that the authority would investigate whether he or she had contravened the law could not be said to amount to a charge of a criminal offence.[9]

Nevertheless, the values that underpin the provisions of section 22 are relevant to an assessment of whether paragraph 60(d) might be said to amount to an undue trespass on the personal rights and liberties of the permission-holder. Two points might be made:

(i) that the authority's investigation of whether a criminal offence has been committed will occur under conditions in which it might be expected that there will not be available to the person many of the particular protections stated in HRA subsection 22(2) that are applicable on a criminal trial; and

(ii) that the presumption of innocence, a right stated in subsection 22(1), incorporates the notion that it is "improper to speak of someone as a criminal until all aspects of liability for a crime have been proven in a court of law".[10]

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

The privilege against selfincrimination

Is the displacement by clause 105 of the common law privileges against selfincrimination and exposure to the imposition of a civil penalty an undue trespass on personal rights and/or incompatible with HRA paragraph 22(2)(i)?

[8] Ibid at 483.
[9] See A Butler and P Butler, The *New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) at 714ff.
[10] L Zedner, *Criminal Justice* (2005) at 58.

Clause 105 provides:

105 Selfincrimination etc

(1) This section applies if a person is required to give information or produce a document under this Act.

(2) The person can not rely on the common law privileges against selfincrimination and exposure to the imposition of a civil penalty to refuse to give the information or produce the document.

Note The Legislation Act, s 171 deals with client legal privilege.

(3) However, any information, document or other thing obtained, directly or indirectly, because of the giving of the information or producing of the document, is not admissible in evidence against the person in a criminal proceeding, other than a proceeding for—

(a) an offence in relation to the failure to give the information or produce the document; or
(b) any offence in relation to the falsity or the misleading nature of the information or document.

The effect of clause 105 will be to create a situation where a person may be compelled to answer questions, or to produce material, where those answers or material might be useful in the prosecution of that person for a criminal offence. The information might be useful directly in the sense that the statement made by the person or the document or thing they produce, by itself is useful information. The information might alternatively or also be useful as a basis on which the police of the prosecuting authorities might pursue a line in inquiry which then yields evidence useful against the interests of that person. This second kind use is described as a derivative use.

The common law recognises that there is a breach the privilege against self-incrimination where a person is compelled in any context – that is, in *any* context that precedes a person being charged with a criminal offence, as well as after charge – to give information or produce documents or things, where on the basis of the information, etc the prosecution on a criminal proceeding against that person could make a direct or derivative use of the information towards proof that the person was guilty.

The privilege is stated in an apparently narrower way in HRA paragraph 22(2)(i):

22 Rights in criminal proceedings

…

(2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:

…

(i) not to be compelled to testify against himself or herself or to confess guilt.

However, were the privilege to be limited to questioning and the like that occurs after a person has been charged with a criminal offence, the right could easily be circumvented by reason that a person could be compelled to incriminate themself in advance of a hearing, and their answers then tendered by the prosecution at trial to prove their guilt".[11]

It was thus that at common law the privilege is applicable in any context where a person is compelled to answer questions or to produce documents and things. It is arguable that paragraph 22(2)(i) will be understood in the same way. The Fifth Amendment to the Constitution of the USA provides that no person "shall be compelled in any criminal case to be a witness against himself". In *Counselman v Hitchcock* (1892) 142 US 547, the Supreme Court held that the reference to compelled testimony was to the eventual use of the testimony and not to the nature of the proceeding in which the testimony was compelled. Thus, the Fifth Amendment applied to a witness in any proceeding who is being compelled to give testimony that might be incriminating in a subsequent criminal prosecution. It is also significant that the Human Rights Committee applied ICCPR article 14.3(g) – which is the direct precursor to HRA paragraph 22(2)(i) – in the same way.[12]

In *Scrutiny Report No 16* of *1999*, the Committee stated a policy in respect of provisions in bills that displaced the privilege against selfincrimination. After setting out the nature of the privilege, its scope, those factors relevant to displacement of the privilege, and the notion of a derivative use of information coercively obtained over a claim of the privilege, the Committee said:

1. Should the privilege should be displaced?

   A proponent of a Bill which would displace the privilege should provide adequate justification in this respect. …

2. If there is displacement, what level (if any) of protection should be afforded to a person who is compelled to self-incriminate?

   The Committee's view is that the starting point should be that there is protection against immediate and derivative use of the information provided by the person except in relation to a proceeding based on the falsity of the information provided.

…

If the Bill proposes a lesser degree of protection, then its proponent should provide adequate justification in this respect.

The Committee notes that in relation to clause 105, the Explanatory Statement says only:

> Clause 105 – Selfincrimination etc – provides that this section applies if a person is required to give information or produce a document under this Act.

This is deficient in that it does not reveal that the point of clause 105 is to displace the privilege, and thus obscures the rights issue. It does not moreover attempt any justification for the displacement.

[11] P Rishworth, et al, *The New Zealand Bill of Rights* (2003), 658.
[12] See S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) at 449-451, and A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) at [23.15.10].

The Committee notes that displacement is matched by the provision for derivative use immunity, and on this basis it is unlikely to be found to be incompatible with HRA paragraph 22(2)(i).

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2007-64 being the Public Sector Management Amendment Standards 2007 (No. 1) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards with regard to executive vehicles.**

Disallowable Instrument DI2007-65 being the Independent Competition and Regulatory Commission (Regulated Water and Sewerage Services) Terms of Reference Determination 2007 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the matter of an investigation into, and the making of a price direction for, regulated water and sewerage services provided by ACTEW.**

Disallowable Instrument DI2007-66 being the Road Transport (Public Passenger Services) Exemption 2007 (No. 1) made under section 127 of the *Road Transport (Public Passenger Services) Act 2001* **exempts a specified taxi network from the requirement to provide a booking and dispatch service to the public for a three week period.**

Disallowable Instrument DI2007-67 being the Animal Welfare (Welfare of Cats in the ACT) Code of Practice 2007 made under section 22 of the *Animal Welfare Act 1992* **revokes DI1996-8 and determines general guidelines on the minimum standards of accommodation, management and care of cats in the ACT.**

Disallowable Instrument DI2007-69 being the Land (Planning and Environment) (Further Rural Lease Grant Conditions) Determination 2007 (No. 1) made under subsection 171A(2) of the *Land (Planning and Environment) Act 1991* **revokes DI2005-74 and determines the conditions applying to the grant of a further rural lease.**

Disallowable Instrument DI2007-70 being the Education (Government Schools Education Council) Appointment 2007 (No. 1) made under subsection 57(1) of the *Education Act 2004* **appoints a specified person as chair of the Government Schools Education Council.**

Disallowable Instrument DI2007-71 being the Education (Non-government Schools Education Council) Appointment 2007 (No. 1) made under paragraph 109(1)(c) of the *Education Act 2004* **appoints a specified person as an education member, chosen from nominations of organisations representing parent associations of non-government schools, to the Non-government Schools Education Council.**

Disallowable Instrument DI2007-72 being the University of Canberra Council Appointment 2007 (No. 1) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-73 being the University of Canberra Council Appointment 2007 (No. 2) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-74 being the University of Canberra Council Appointment 2007 (No. 3) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-75 being the University of Canberra Council Appointment 2007 (No. 4) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-76 being the University of Canberra Council Appointment 2007 (No. 5) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-77 being the University of Canberra Council Appointment 2007 (No. 6) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-78 being the University of Canberra Council Appointment 2007 (No. 7) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-79 being the University of Canberra Council Appointment 2007 (No. 8) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2007-82 being the Public Place Names (Duffy) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of specified roads in the Division of Duffy.**

Disallowable Instrument DI2007-84 being the Nature Conservation (Threatened Ecological Communities and Species) Action Plan 2007 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **revokes DI2005-87 and NI1999-59 and determines the Action Plan for specified aquatic species and zone conservation.**

Disallowable Instrument DI2007-86 being the Road Transport (Public Passenger Services) (Defined Rights Conditions) Determination 2007 (No. 1) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* **determines the conditions for a ballot of defined rights for non-transferable leased taxi licences.**

Disallowable Instrument DI2007-87 being the Long Service Leave (Contract Cleaning Industry) Board Appointment 2007 (No. 1) made under the *Long Service Leave (Contract Cleaning Industry) Act 1999* **and the** *Financial Management Act 1996* **appoints a specified person as Chair of the Board.**

Disallowable Instrument DI2007-88 being the Long Service Leave (Contract Cleaning Industry) Board Appointment 2007 (No. 2) made under the *Long Service Leave (Contract Cleaning Industry) Act 1999* **and the** *Financial Management Act 1996* **appoints a specified person as a member of the Board and a specified person to act in that position when the appointee cannot, for any reason, exercise the functions of the position.**

Disallowable Instrument DI2007-89 being the Long Service Leave (Contract Cleaning Industry) Board Appointment 2007 (No. 3) made under the *Long Service Leave (Contract Cleaning Industry) Act 1999* **and the** *Financial Management Act 1996* **appoints a specified person as a member of the Board and a specified person to act in that position when the appointee cannot, for any reason, exercise the functions of the position.**

Disallowable Instrument DI2007-91 being the Public Sector Management Amendment Standards 2007 (No. 2) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards by limiting the method of payment of Independent Reviewers to an hourly rate.**

Disallowable Instrument DI2007-92 being the Public Sector Management Amendment Standards 2007 (No. 3) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards by updating rates for motor vehicle allowances.**

Disallowable Instrument DI2007-96 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2007 (No. 1) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the provision of a price direction for the supply of electricity to franchise customers.**

Disallowable Instruments—Comment

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

No Explanatory Statement – Are these appointments valid?

Disallowable Instrument DI2007-68 being the Electoral Commission (Chairperson and Member) Appointment 2007 (No. 1) made under section 12 of the *Electoral Act 1992* **appoints specified persons as chairperson and member of the ACT Electoral Commission.**

This instrument appoints 2 named persons as chairperson and as a member of the ACT Electoral Commission, respectively. No Explanatory Statement is provided in relation to the instrument.

Section 12A of the *Electoral Act 1992* sets out detailed requirements in relation to a person's eligibility for appointment as a member. It provides:

12A Eligibility for appointment as member

The Executive must not appoint a person as a member if the person—

(a) is or has, in the 10 years immediately before the day of the proposed appointment, been a member of—

(i) the Legislative Assembly; or

(ii) the Parliament of the Commonwealth; or

(iii) the legislature of a State or another Territory; or

(b) is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—

(i) a registered party; or

(ii) a political party registered under a law of the Commonwealth, a State or another Territory; or

(iii) a political party.

In the absence of an Explanatory Statement, there is no indication that the person appointed meets these compulsory requirements.

Similarly, section 12B sets out detailed requirements in relation to a person's eligibility for appointment as chairperson. It provides:

12B Eligibility for appointment as chairperson

(1) The Executive may appoint a person as the chairperson of the electoral commission only if the person—

(a) is or has been a judge; or

(b) has been a justice of the High Court; or

(c) has been a chief executive of an administrative unit; or

(d) has been a chief executive officer (however described) of a territory instrumentality; or

(e) has been a statutory office-holder; or

(f) has been a Commonwealth agency head; or

(g) has been a member of—

(i) the electoral commission; or

(ii) an authority of the Commonwealth, a State or another Territory that the Executive is satisfied corresponds to the electoral commission; or

(h) is a person who—

(i) is a lawyer; and

(ii) has been a lawyer for at least 5 years; and

(iii) the Executive is satisfied has held a senior position in the legal profession; or

(i) is a person who the Executive is satisfied—

(i) has held, for at least 5 years, a senior position—

(A) as an academic; or

(B) in business; or

(C) in a profession; and

(ii) has the knowledge and experience to exercise the functions of chairperson.

(2) In this section:

Commonwealth agency head means an agency head under the *Public Service Act 1999* (Cwlth), section 7 (Interpretation).

Note The *Public Service Act 1999* (Cwlth), s 7, defines ***agency head*** as—

(a) the secretary of a department; or

(b) the head of an executive agency; or

(c) the head of a statutory agency.

Similarly, in the absence of an Explanatory Statement, there is no indication that the person appointed meets these compulsory requirements.

Parental consent – Is the consent of both parents required?

Disallowable Instrument DI2007-80 being the Tobacco (Compliance Testing Procedures) Approval 2007 (No. 1) made under section 42D of the *Tobacco Act 1927* **approves the Tobacco Compliance Testing Procedures.**

This instrument prescribes procedures in relation to the carrying out of compliance testing under the *Tobacco Act 1927*. The particular compliance issue is the sale of cigarettes to persons under 18 years of age.

In its *Scrutiny Report No 32* of the *Sixth Assembly*, the Committee commented on the Tobacco (Compliance Testing) Bill 2006, which (when enacted) inserted into the Tobacco Act the amendments that authorise these procedures. Among other things, the Committee commented on proposed subsection 42E(2) of the Tobacco Act. The Committee noted that this proposed subsection required that at least 1 person who has parental responsibility for a young person must give his or her informed consent to the young person acting as a "purchase assistant" under the proposed amendments. The Committee suggested that this proposal needed careful consideration.

The Minister for Health responded to the Committee's comments in a letter dated 16 November 2006. In that letter (which is reproduced in the Committee's *Scrutiny Report No 34* of the *Sixth Assembly*, Ms Gallagher advised the Committee that the provision in question

> was specifically drafted to be consistent with the requirements of the *Children and Young People Act 1999*.

Ms Gallagher went on to state:

> In addition, the Bill was developed in consultation with the Department of Justice and Community Safety and the Office for Children, Youth and Family Support.

The provision was enacted by the Legislative Assembly, in the form in which it was originally presented. It provides:

> **42E Carrying out of compliance testing**
>
> **(1)** An authorised officer may carry out a compliance test in accordance with an approved program and the approved procedures.
>
> **(2)** An authorised officer may use a young person as a purchase assistant in a compliance test only if the young person, and at least 1 person who has parental responsibility under the *Children and Young People Act 1999* for the young person, have given informed consent to the young person being a purchase assistant.
>
> *Note* If 2 or more people have parental responsibility for a young person, each of the people may act alone in discharging the responsibility (see *Children and Young People Act 1999*, s 19 (2)).

As indicated at the outset, this instrument approves procedures for compliance testing. The approved procedures are set out in Schedule 1 of the instrument. Appendix 1 to Schedule 1 contains guidelines in relation to the engagement and training of personal assistants. Paragraph 2 of Appendix 1 states:

> The young person and the person(s) with parental responsibility for the young person, prior to undertaking the training for the purpose of being a PA for CTs, must sign a Consent form (at **Appendix 3**). If two people have parental responsibility then both signatures will be required.

This seems to be at odds with the Explanatory Statement to the instrument, which states:

> The procedures stipulate that before a young person can be used as a purchase assistant the authorised officer must have obtained in writing the informed consent of the young person and at least one of the person(s) with parental responsibility for the young person, as defined in the *Children and Young People Act 1999.*

It also appears to be at odds with the Note to section 42E of the Tobacco Act, subsection 19(2) of the Children and Young People Act and the Minister's response to the Committee's original comments on the Bill.

The Committee would appreciate the Minister's advice as to meaning and effect of the statement in Appendix 1 to Schedule 1 of the instrument.

Imprecise designation of appeal rights

Disallowable Instrument DI2007-81 being the Road Transport (Driver Licensing) Driving Instruction Code of Practice 2007 (No. 1) made under section 118 of the *Road Transport (Driver Licensing) Regulation 2000* **revokes DI2006-269 and determines the Code of Practice for Accredited Driving Instructors.**

This instrument amends the Code of Practice that applies in relation to the Competency Based Training and Assessment Scheme that applies in relation to driving instructors. In particular, it amends section 13 of the Code of Practice, to reflect the fact that certain positions are no longer relevant to the appeal process. The new section 13 provides:

> **13. Appeals**
>
> 13.1 An instructor has the right to appeal to the Authority on any matter related to the issuing of a Notice of Unsatisfactory Audit. A Notice of Unsatisfactory Audit will contain information on appeal rights.
>
> 13.2 An instructor has the right to seek a review of any suspension or cancellation decision imposed by the Authority under section 112 of the *Road Transport (Driver Licensing) Regulation 2000.* A decision to suspend or cancel an instructor's accreditation will be in writing and will provide information on internal review and appeal rights to the Administrative Appeals Tribunal.

The Committee notes that the notification of appeal rights is an important mechanism in ensuring that instructors' rights are protected. That being so, it would be more appropriate for subsection 13.1 above to provide that a Notice of Unsatisfactory Audit **must** contain information on appeal rights, rather than providing that it *will* provide such information.

Inadequate Explanatory Statement

Disallowable Instrument DI2007-83 being the Housing Assistance (Public Rental Housing Assistance Program) Review Committee Appointment 2007 (No. 1) made under the *Housing Assistance Public Rental Housing Assistance Program 2006 (No. 2)* (DI2006-178) **and the** *Housing Assistance Act 1987* **appoints specified persons as chair and members of the Housing Review Committee.**

This instrument appoints a Housing Review Committee, under clause 26 of the Housing Assistance Public Rental Housing Assistance Program 2006 (No 2). The Committee that is appointed consists of a Chair and 5 members. The Explanatory Statement to the instrument states:

> Clause 26 of the Housing Assistance Public Rental Housing Assistance Program 2006 (No 2) allows the Minister to establish the Housing Review Committee to consider decisions under the said program to be reviewed by the Commissioner for Housing and to make recommendations to the Commissioner about these decisions. The Committee consists of a Chairperson plus 5 members.

Clause 26 of the relevant Program states:

> **26 Housing review committee**
>
> **(1)** The Minister may establish an advisory committee (the ***housing review committee***) to consider decisions under this Program to be reviewed by the commissioner and to make recommendations to the commissioner about those decisions.
>
> **(2)** Members of the committee must be selected from the general community.

It is not clear to the Committee what is the basis of the statement in the Explanatory Statement that the Committee consists of 5 members. The Committee cannot identify any provision that sets the membership of the Committee. That said, it may be that the statement in the Explanatory Statement merely indicates that the Committee that is appointed by the instrument consists of a Chair and 5 members. The Committee would appreciate the Minister's clarification of this matter.

Inadequate Explanatory Statement

Disallowable Instrument DI2007-85 being the Nature Conservation (Threatened Ecological Communities and Species) Action Plan 2007 (No. 2) made under section 42 of the *Nature Conservation Act 1980* **revokes DI2005-210, NI1999-206, NI1998-216 and NI1998-7 and reinstates revoked Action Plans Nos. 5, 6, 22, 23 and 30.**

This instrument makes an Action Plan for the protection of various species and communities, under section 42 of the *Nature Conservation Act* 1980. The Explanatory Statement to this instrument states:

> Disallowable Instrument DI2007-84 made a new Action Plan No. 29, which superseded six separate Action Plans previously prepared. This necessitated the revocation of a previous instrument for Action Plans (DI2005-87). However DI2005-87 also includes Action Plans not covered by the new Action Plan No. 29.
>
> These plans therefore are required to be retained in their own right. This Instrument reinstates the revoked Action Plans for those species:
>
> • Action Plan No. 5. A subalpine herb (*Gentiana baeuerlenii*)
>
> • Action Plan No. 6. Northern Corroboree Frog (*Pseudophryne pengilleyi*)
>
> • Action Plan No 22. Brush-tailed Rock Wallaby (*Petrogale penicillata*)
>
> In addition, this Instrument reinstates:
>
> • Action Plan No 23-Smoky Mouse (*Pseudomys fumeus*)
>
> which was previously made under DI1999-244, repealed by DI 2004-52 and due to an administrative omission, not reinstated at that time.

As the Committee reads this explanation, DI2007-84 inadvertently revoked Action Plans in relation to 3 species and DI2004-52 inadvertently revoked an Action Plan in relation to a further species. This instrument reinstates those 4 Action Plans. Assuming that this is the case, the Committee would appreciate the Minister's advice as to the effect of the inadvertent revocation of the 4 Action Plans referred to and, in particular, the consequences of the revocation in the period prior to their reinstatement.

Incorrect reference to empowering provision?

Disallowable Instrument DI2007-90 being the Cultural Facilities Corporation Appointment 2007 (No. 1) made under Part 2, Division 2.2 of the *Cultural Facilities Corporation Act 1997* **appoints a specified person as a member of the Cultural Facilities Corporation Board.**

This instrument appoints a named person as a member of the governing board of the Cultural Facilities Corporation. Both the instrument and the Explanatory Statement state that it is made under "Part 2, Division 2.2" of the *Cultural Facilities Corporation Act 1997*.

Division 2.2 of Part 2 of the relevant Act provides:

> **Division 2.2 Governing board of corporation**
>
> **9 Establishment of governing board**
>
> The corporation has a governing board.
>
> **10 Governing board members**
>
> The governing board has 7 members.
>
> *Note 1* The chair and deputy chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.
>
> *Note 2* The chief executive officer is a member of the governing board (see *Financial Management Act 1996*, s 80 (4)).
>
> **11 Chief executive officer of corporation**
>
> The chief executive officer of the corporation must be a public servant.
>
> *Note* A chief executive officer must be appointed under the *Financial Management Act 1996*, s 80 (3).

Though it is not clear from the face of the Act, it seems likely that the power to appoint members of the relevant governing board is, in fact, section 78 of the *Financial Management Act 1996*. The Committee would appreciate the Minister's confirmation that this is the case.

Is the ACT Legislation Register reference to the principal statute correct?

Disallowable Instrument DI2007-93 being the University of Canberra (Student Conduct) Amendment Statute 2007 made under section 40 of the *University of Canberra Act 1989* **amends the Principal Statute by substituting the words "assessment item" for the word "examination" to avoid confusion arising from a narrow interpretation of that word.**

This instrument amends the *Student Conduct Statute 1992*. It relates to student conduct at the University of Canberra. The Committee notes, however, that the Principal Statute appears on the ACT Legislation Register as the ***University of Canberra*** *Student Conduct Statute 1992*.

Minor typographical error

Disallowable Instrument DI2007-94 being the University of Canberra Election of Staff Members of Council Statute 2007 made under section 40 of the *University of Canberra Act 1989* **revokes DI1991-117 and DI1991-115 and provides for changes made to the Act which reduced the number of members of academic staff elected from three to one.**

The Committee notes that section 1 of this instrument states that it may be cited as the *University of Canberra Election of Staff Members of Council Statute 2007*. The Committee also notes that the ACT Legislation Register entry relating to this instrument helpfully includes brackets around the words "Election of Staff Members of Council".

Absence of Principal Statute from the ACT Legislation Register

Disallowable Instrument DI2007-95 being the University of Canberra (Courses and Awards) Amendment Statute 2007 made under section 40 of the *University of Canberra Act 1989* **amends the Principal Statute to provide for new awards reflecting new courses approved for accreditation by the University.**

The Committee notes that the *Courses and Awards Statute 1995* (the **Principal Statute**), which is amended by this statute, does not appear on the ACT Legislation Register. Though the Committee notes that the Principal Statute does appear on the University of Canberra Secretariat website, the Committee also notes that there is nothing on the ACT Legislation Register to advise readers that this is where the Principal Statute can be found. Further, the Committee notes that neither the Principal Statute nor this instrument are included in the list of disallowable instruments made under the *University of Canberra Act 1989* that appears on the ACT Legislation Register.

Subordinate Laws—No comment

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

Subordinate Law SL2007-5 being the Unlawful Games Regulation 2007 made under the *Unlawful Games Act 1984* **determines the game of poker to be an unlawful game for the purposes of the Act.**

REGULATORY IMPACT STATEMENT

The Committee has examined the regulatory impact statement prepared in relation to the *Unlawful Games Regulation 2007* and offers no comment on the statement.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Police and Emergency Services, dated 29 March 2005, in relation to comments made in Scrutiny Report 4 concerning Disallowable Instrument DI2005-1 being the Emergencies (Strategic Bushfire Management Plan) 2005
- The Attorney-General, dated 1 May 2007, in relation to comments made in Scrutiny Report 37 concerning the Corrections Management Bill 2006.

- The Minister for Education and Training, dated 2 May 2007, in relation to comments made in Scrutiny Report 40 concerning the Training and Tertiary Education Legislation Amendment Bill 2007.
- The Chief Minister, dated 3 May 2007, in relation to comments made in Scrutiny Report 40 concerning Disallowable Instrument DI2007-61, being the Duties (Stock Exchanges) Declaration 2007 (No. 1).
- The Attorney-General, dated 21 May 2007, in relation to comments made in Scrutiny Report 40 concerning Subordinate Law SL2007-4, being the Legal Profession Amendment Regulation 2007 (No. 1).
- The Minister for Police and Emergency Services, dated 21 May 2007, in relation to comments made in Scrutiny Report 15 concerning the following Disallowable Instruments:
  - DI2005-127, being the Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1); and
  - Disallowable Instrument DI2005-133 being the Emergencies (Bushfire Council Members) Appointment 2005 (No. 2).

The Committee wishes to thank the Chief Minister, the Minister for Police and Emergency Services, the Attorney-General and the Minister for Education and Training for their helpful responses.

Zed Seselja, MLA
Chair

May 2007

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

REPORTS—2004-2005–2006–2007

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

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

Report 4, dated 7 March 2005

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

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

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

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

Report 6, dated 4 April 2005

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

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

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

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

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Bills/Subordinate Legislation

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

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

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

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

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

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

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

Bills/Subordinate Legislation

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

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

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

Report 37, dated 12 February 2007
Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Disallowable Instrument DI2007-27 - Land (Planning and Environment) Criteria for the Direct Grant of a Crown Lease for the National Zoo and Aquarium Determination 2007
Disallowable Instrument DI2007-28 - Public Place Names (Belconnen) Determination 2007 (No. 1)
Subordinate Law SL2006-53 - Gas Safety Amendment Regulation 2006 (No. 1)
Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 39, dated 12 March 2006
Disallowable Instrument DI2007-41 - Health Professionals (Fees) Determination 2007 (No. 10)

Report 40, dated 30 April 2007
Disallowable Instrument DI2007-53 - Government Procurement Appointment 2007 (No. 1)
Disallowable Instrument DI2007-62 - Public Health (Drinking Water) Code of Practice 2007 (No. 1)
Utilities (Energy Industry Levy) Amendment Bill 2007

COPY

JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR URBAN SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
Canberra ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills report No 4 of 7 March 2005. I offer the following response to the matters raised by your Committee.

Disallowable Instrument DI2005-1 being the Emergencies (Strategic Bushfire Management Plan) 2005 made under section 72 of the *Emergencies Act 2004* sets the strategic bushfire management plan.

The Committee notes that section 75 of the Act requires that, before making the strategic bushfire management plan, the Minister must prepare a 'consultation notice', stating that copies of the plan are available for [consultation] and inviting written comments. The Committee has also noted that neither the plan nor the Explanatory Statement indicate whether the requirements of section 75 have been met, and that the consultation notice does not appear on the Legislation Register (as required by the *Legislation Act 2001*).

While it may be beneficial to have future editions of the plan state that section 75 has been complied with, it is not necessary to do so to meet the requirements of either the *Emergencies Act 2004* or the *Legislation Act 2001*.

The consultation notice to which the Committee refers (NI 2004-410) was notified on the Legislation Register on 22 October 2004, and was automatically repealed when it ceased to have effect.

I trust this information is of assistance.

Yours sincerely

John Hargreaves
Minister for Police and Emergency Services
21 March 2005

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Australian Capital Territory

Emergencies (Strategic Bushfire Management Plan) Consultation Notice 2004

Notifiable Instrument NI 2004-410

made under the

Emergencies Act 2004, s 75 (Public consultation for strategic management plan)

1. Name of Instrument

This instrument is the Emergencies (Strategic Bushfire Management Plan) Consultation Notice 2004.

2. Commencement

This instrument commences on the day after it is notified in the legislation register.

3. Consultation Notice

In accordance with section 75(1) of the *Emergencies Act 2004* I hereby give notice that copies of the draft strategic bushfire management plan are available for inspection, during the period beginning on 25 October 2004 and ending on 12 November 2004, at the following places:

1. All ACT Government Shopfronts,
2. All ACT public libraries;
3. ACT Emergency Services Authority Headquarters, 123 Carruthers Street, Curtin, ACT;
4. The Emergency Services Authority website www.esa.act.gov.au.

Interested people are invited to give written comments about the draft plan by sending them to the ACT Emergency Services Authority at PO Box 104, Curtin, ACT 2605, or by emailing them to fireplan@act.gov.au, during the period from 25 October 2004 to 3 December 2004.

Bill Wood MLA
Minister for Police and Emergency Services
21 October 2004

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for the Australian Capital Territory
GPO Box 1020
Canberra ACT 2601

Re: Scrutiny Report Number 37 — 12 February 2007

Dear Mr Seselja

I write in reply to the Committee's report on the Corrections Management Bill 2006 and thank the Committee for its thorough consideration of the Bill.

For your convenience, I will structure my reply to each issue in the same order as the Committee's report.

Strict liability offences: clauses 145 and 147

I agree with the Committee's interpretation of the defence provisions in clauses 145(4) and 147(5). It is the Government's intention that a person has a defence to the offence if the person proves to the evidential standard of proof that the person took reasonable steps to comply with the direction.

The Government is of the view that these strict liability offences are justified, as the critical aspects of the offences are the physical elements. Examination of the intention of a person, or any other mental element, of this particular offence has little bearing on the purpose of the offence. The purpose of the offence is to create a cause for all visitors to abide by reasonable directions.

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

Clause 16

I would like to point out that the Bill does not use the term 'commissioner' or create a statutory office called commissioner. The Bill is purposely silent on the management structure that may occur between the Chief Executive and a corrections officer. The reason is to allow the normal delegations powers to be exercised in a manner that meets

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the needs of the corrections service at any time. This approach is more flexible and accounts for the ever-changing needs and experience of the criminal justice system.

The extent of the power in clause 16 is discussed in the explanatory statement:

> Clause 16 provides an overarching power for the chief executive to give directions to detainees. Under (3) the direction can be verbal or written. The direction can be to one detainee, or all detainees.
>
> The items in (2) provide for the most likely rationale that would inform a direction from the chief executive. However, the power is not limited to the three purposes in (a), (b) and (c).
>
> Clause 16(4) ensures that the substance of any lawful direction given by the chief executive is upheld if there is something wrong with the form of the direction. For example, if a direction is normally issued by way of a standard form the fact that the form was not used would not render the direction invalid. However, if the chief executive was required by the Act to use a prescribed form, or a prescribed set of words, the direction may be unlawful. [p.11]

Clause 16(1) has to be read in the context of the Bill as a whole, consistent with the interpretative provisions of the *Legislation Act 2001.* Section 140 of the Legislation Act is of particular relevance:

> In working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole.

Clause 16(1) is an unqualified power, but it is not a power that is intended to be interpreted to over-ride any specific function, obligation or limitation of power set out in the rest of the Bill.

One of the inherent problems of drafting statutory law is the impossibility of articulating a rule for every eventuality that may occur in the future. While it is possible to set out provisions that account for the most likely eventualities, based on accrued knowledge, it is impossible to predict everything that might happen.

Based on conventional interpretation, the powers in clause 16 could not be exercised to go beyond a power explicitly provided for in the terms of the Bill:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied on for the same power. [Gavan Duffy CJ and Dixon J, *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, at 7.]

Clause 16(1) provides the Chief Executive with a power to respond to a situation that is not contemplated by the rest of the provisions in the Bill. The Chief Executive would have to turn their mind to the powers in the Bill and reach the conclusion that the power in 16(1) is the only power they could appropriately use.

I acknowledge that the criteria of 16(2) are obvious criteria for a correctional centre, but it is possible that decisions will need to be made that do not fit easily to 16(2)(b). If 16(1)

was omitted the Chief Executive would have no power to deal with unpredictable circumstances.
Clause 16(2) provides a general power that can be exercised on the basis of welfare, security or compliance with ACT law. Again, the Chief Executive would have to consider that there is not an appropriate explicit power in the remainder of the Bill to rely upon.

It is not the Government's intention that the powers in clause 16 would over-ride the exercise of any other power, function or obligation provided for explicitly in the Bill. It is the Government's intention that the power in clause 16 may be exercised if no other power in the Bill can be exercised to remedy something unexpected in a corrections centre.

Clause 52

The Committee's question cites clause 52(2)(d) but talks of exposure to risks of infection. I believe the Committee intended to refer to clause 52(1)(d).

Clause 52(1)(d) is an obligation the Government aims to impose upon itself to ensure that the risk of infection in a corrections centre is managed at a standard commensurate to community standards.

In any institutional context, whether it be a prison, hospital, school etc it is not possible to eliminate every risk. Clause 52(1)(d) articulates the degree that the Chief Executive must manage the risk by using the phrase 'as far as practicable'. This term is known to human rights instruments and is not equivalent to administrative inconvenience, or convenience.

The Government's view is that the provision will require the Chief Executive to take steps to prevent risks of infection to the point where it is not practicable to do so. *The Macquarie Dictionary* [2001 ed] definition of practicable is "capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible". So if the Chief Executive has the means to do so, or it is feasible to do so, the risk must be managed.

Managing the risk of infection involves far greater variables than the obligations in 52(1)(a) to (c), consequently the extent of the obligation is expressed in different terms.

Clause 98

Clause 98(g) is not a 'catchall' in abstract, it must be a factor that is relevant to an exercise of a function under part 9.3 and it must be a consideration that joins the criteria in (a) to (f). It cannot be anything that enters the head of a decision maker, it must be relevant and it must be considered against the criteria.

Section 30(1) of the *Human Rights Act 2004* states how Territory laws are required to be interpreted in the context of human rights:

> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

This informs the Government's view on what the *Human Rights Act 2004* means for ACT public servants:

"In practice, public servants, statutory office holders and judges must observe and act consistently with human rights standards when exercising their duties under a Territory law unless the law clearly authorises otherwise." [*Human Rights Act 2004,* Plain English Guide, ACT Department of Justice and Community Safety, 2004, p.9]
The Explanatory Statement states that clause 98:

> . . . requires the application of the human rights principle of proportionality. In this case, proportionality requires the exercise of powers must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies. [p.45]

The Government is of the view that clause 98 requires a proportionate decision to be made, which must inherently be reasonable.

Clause 129

In terms of the potential for property rights to be affected, the critical power is foreshadowed in clause 129(1). Clause 129(1) is the power that would forfeit property to the Territory on reasonable grounds.

Clause 129(2) does not affect rights, as it is a discretion in relation to property already forfeited.

The right to liberty and the right to humane treatment when deprived of liberty

I thank the Committee for its compliment in relation to the standard the Government proposes to uphold in relation to the treatment of detainees.

I will address the matters the Committee raises in relation to obscurity and the right to liberty and life in the same order as the Committee.

Clause 66

I believe there is a misreading by the Committee of the terms of clause 66, as opposed to clause 67. The committee cites the explanatory statement for clause 67 when discussing clause 66.

The explanatory statement for clause 66 says:

> Clause 66 directs the chief executive to assess each detainee admitted to a centre for any risks and needs associated with the detainee's health, safety or security.
>
> Clause 66(b) requires the chief executive to act upon any immediate risks or needs identified.
>
> Any ongoing risks and needs must be addressed in the case management plan. [p.33]

Clause 66 is about an initial assessment of a detainee. It creates an obligation for an assessment "as soon as practicable" of a detainee's risks and needs in relation to health, safety or security. Clause 66 is not just about the detainee's health, it may be some other risk.

Clause 66 creates an obligation for immediate steps to be taken if there is any risk arising from the assessment. For example, if the detainee arrives with an obvious injury that injury must be treated. If a detainee is at risk of being harmed by another detainee being admitted, then that risk must be addressed. If a detainee poses a risk of violence, then that risk must be addressed.

Clause 67 is an obligation to conduct a health assessment within 24 hours of a detainee being admitted. The explanatory statement for clause 67 is:

> Principle 24 of the United Nation's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) states:
>
> > A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after [their] admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.
>
> Clause 67(1) creates a statutory requirement for health assessments to occur within 24 hours of a detainee's admission into a corrections centre.
>
> Clause 67(2) enables an initial assessment by a nurse and subsequent review by a medical officer, who must be a doctor appointed under clause 21. Alternatively, the assessment may be conducted by the doctor in the first instance.
>
> Clause 67(3) ensures that an assessment of the risk of self harm is inherently part of every initial assessment.

The Committee correctly points out that principle 24 cited above has two arms, the first arm is a prompt medical examination, the second arm is medical care and treatment when ever necessary. Clause 67 deals with the first arm of principle 24. Clause 52 addresses the second arm of principle 24.

For the sake of clarity, the obligation created in clause 66 is an obligation to deal with any immediate health risks, as well as any other immediate safety or security risks. Clause 67 is an obligation that specifically requires a health assessment within 24 hours. The overarching obligation to provide health care is in clause 52.

Clause 137

Clause 137 does not operate in abstract from clauses 136 and clause 138. Clause 136 obliges a policy or operating procedure to be made that sets out the circumstances when force may be used and the kinds of force that may be used. Clause 138 obliges officers to apply the procedure in 138(1) unless in urgent circumstances there is a risk of injury.

An essential ingredient, for which the Bill is not a substitute, is training in the use of force: not training in sense of how to use a weapon etc, but training in the sense of the methods

of de-escalation, minimising harm, managing violence etc. The application of training and drilling will reduce the potential for undue force by corrections officers.

In *McCann and Others v United Kingdom* (1996) 21 EHRR 97, the European Court of Human Rights examined various aspects of the use of force. Citing earlier precedent the Court said that the reasonableness of the use of force should be decided on the basis of the facts which the user of the force honestly believed to exist. "[T]his involves the subjective test as to what the user believed and an objective test as to whether [the user] had reasonable grounds for that belief." [at para 134.]

The Court decided in *McCann* that the individuals who actually used lethal force had not breached human rights as they genuinely believed they had reasonable grounds to use the force. However, the Court decided that those responsible for managing the individuals had breached human rights because they created a context for the use of force that was disproportionate to the actual situation.

The Court said that it "considers that the use of force by agents of the State in pursuit of one of the aims delineated in [the European Human Rights Convention] may be justified . . . where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others." [at para 200.]

The Government is of the view that clause 137 is consistent with *McCann* and hence consistent with the *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

Clause 139(5)

Clause 139(5) is not cast in terms of risk or possibility: the threat to a particular life, or lives, must be actual rather than theoretical; armed resistance must be actual rather than potential.

The Committee's comments presumes that firearms will be permanently carried by all, or some, corrections officers. There are many ways the Chief Executive could meet the obligation in 139(5), including an operating procedure that limits the deployment of firearms to particular circumstances that warrant the deployment.

The Government believes that an orthodox interpretation of clause 139(5) creates an obligation that limits the use of firearms to actual circumstances rather than potential circumstances.

Clause 26

I disagree with the Committee's interpretation of this provision. The formulation in clause 34 is broader than clause 26. The Committee's suggestion would broaden the power to declare an emergency. The Government has been careful to construct a provision that may be used for a range of unforeseen situations while requiring accountability and proportionality.

An emergency is undefined as it is impossible to predict all of the situations that may create an emergency in a corrections centre. It could be a natural disaster; it may be a set of circumstances in the centre itself; it may be caused by a major health crisis in the community.

The emergency contemplated by the Chief Executive must be in relation to a correctional centre. The emergency must threaten — or be likely to threaten — security or good order at the centre. Alternatively, the emergency must threaten — or be likely to threaten — the safety of anyone at the centre or elsewhere. The power in clause 26 can only be exercised if the criteria I have just mentioned are met.

Clauses 122 and 123

Clause 122 provides a detainee with the opportunity to protect their interests by taking advantage of the separation of legally privileged material from the rest of the contents of their cell. This can be achieved by enabling the detainee to take the material with them when they leave their cell, or enabling a separate place in the centre to be used to store legally privileged material.

If in the course of a search under clause 122 a corrections officer finds material which the officer suspects is legally privileged, then clause 123 applies. The threshold for clause 123(1) is suspect, not know. The Committee is right to point out that an officer cannot form any view without engaging in some inspection or some reading. However, the obligation in clause 123(1) applies as soon as an officer forms a suspicion that material is legally privileged.

The Government does not intend to create a system whereby every piece of material that is suspected of being legally privileged is read and scrutinised to ascertain if the material is actually legally privileged within a legal definition. The Bill contains no provision that would enable that to happen. Consequently, the identification of legally privileged material is not an abstract determination: there has to be some human interaction to raise the issue, whether it be the detainee, a corrections officer or some other party.

Clause 132(2)

Clause 132 sets out what makes a test sample 'positive' in terms of drug and alcohol testing. The consequences of a positive test sample are set out in clause 134. A positive test sample in 132(1)(a) would not constitute a criminal offence.

The committee's discussion in relation to 'reasonable excuse' is in the context of criminal law jurisprudence. The use of reasonable excuse in clause 132 is in the context of administrative law. The consequence of a positive test sample is set out in clause 134. In making a decision under 134, the Chief Executive would have to consider any reasonable excuse given by a detainee for failing to provide a test sample. Examples of a reasonable excuse are given in 132(2), such as a medical condition that prevents the person from providing a test sample. Specifically, it may be a medical condition that prevents a urine sample being given within a particular time.

Clause 172 and 177

Critical to any disciplinary system for a corrections centre is the ability to address breaches of discipline quickly. A system that enables delay and extension of time inevitably undermines the whole purpose of the system itself.

It is the Government's intention that the disciplinary action determined by the presiding officer could commence, or continue, during the review period.

It is also the Government's intention that review of decisions would also be undertaken within a short time frame. The timing of reviews will be set out in an operating procedure for the discipline process.

As noted in the explanatory statement, decisions made (or not made) by adjudicators will be subject to the *Administrative Decisions (Judicial Review) Act 1989.* Section 16 of that Act enables the Supreme Court to suspend the operation of a decision upon its own initiative or upon application.

Clause 178

Clause 178 requires the adjudicator to give a statement of reasons for refusing to review. The Bill enables the adjudicator's decision and the reasons to be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989,* consequently it is expected that the adjudicator would not make a decision to refuse to review a decision that would attract a ground of review in section 5 of the *Administrative Decisions (Judicial Review) Act 1989.*

At this stage the Government does not intend to restrict the ambit of reasons an adjudicator may give for refusing to review a decision. Conversely, the Government does not intend to oblige the adjudicator to refuse to review a decision for any particular criteria.

A privative clause?

Subclause 16(4) is not a privative clause by stealth. Clause 16(4) is directing any examination of the Chief Executive's direction to the substance of the direction in 16(2). A direction can spoken or written: the selection of the mode would depend upon the circumstances and the need.

Clause 16(4) speaks of the form of the direction rather than the substance of the direction. If there is something technically wrong with the actual written direction, then the direction as intended can still be implemented. For example, if a written direction required detainees not to enter a particular wing and corridors around wing that were described in the direction at a certain time because of renovations, and the description of the corridors was inaccurate, the direction as intended can be carried out. This does not mean that the lawfulness of the direction and implementation of the direction are not subject to judicial review.

It is the Government's view that any attempt to draft a privative clause would have to specify the legal aspects the clause intended to exempt from judicial review.

The right to privacy

I thank the Committee for pointing out the lack of discussion in the explanatory statement on the rights issues associated with clause 76.

Clause 76 engages two fundamental human rights: the right to life and the right to privacy.

The *Plain English Guide to the Human Rights Act 2004* notes that:

> The right to life has also been interpreted to include an obligation to protect a person's life where it is known or ought to be known that the person is at risk of harm. This obligation applies where, for example, a person is in care of the state in a prison or mental health facility. It also requires effective investigations of deaths in custody and is relevant to coronial inquiries. [p. 13, hard copy]

The right to privacy is a protection against unlawful and arbitrary interference with a person's privacy, family, home or correspondence.

Human Rights jurisprudence also recognises that where rights and interests clash there needs to be a rational and consistent way of working out limitations using the test of proportionality. Section 28 of the *Human Rights Act 2004* enables limits to be set on human rights in Territory laws where those limits meet the test of proportionality.

In *R (Daly) v Secretary of State for the Home Department* 2 AC 532 2001, Lord Steyn cited the test of proportionality as:

> whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than necessary to accomplish the objective. [para 27.]

On the first criteria of proportionality, the right to life is a fundamental right and the justification for managing risk to life and health is evident in the number of coronial cases cited on page 36 of the explanatory statement.

On the second criteria, the Government believes the measure proposed in clause 76 is rationally connected to the obligation upon the Government to uphold the right to life. In this sense the proposal aims to create a means for dealing with medical emergencies quickly and with as much relevant information at hand. Not knowing a detainee's medical risks, or not being able to find out fast enough, has often a criticism made by coronial inquiries into deaths in custody.

On the third criteria, the Government advocates that the means used to qualify the right to privacy in the context of managing health risks faced by detainees is no more than necessary to ensure that relevant corrections officers have access to pertinent information if a medical emergency occurs. The provision limits access to primary medical information to the doctor, and only allows the health schedule prepared by the doctor to be accessed by authorised people.

Comment on Explanatory Statement

The reference in clause 52(2)(e) in the explanatory statement relates to clause 52(2)(d)(ii). At some point there was minor renumbering of the clause which caused the difference in reference between the explanatory statement and the Bill.

Subclause 52(2)(d)(ii) uses the term rehabilitation in the medical sense. The subclause contemplates medical rehabilitation after an accident or other medical trauma. For example, after a burn injury or stroke.

The principle of proportionality in legislation

Thank you for raising this important issue. Whether the test of proportionality should be codified in legislation is a threshold issue for drafting. The Government's view is that section 28 of the *Human Rights Act 2004* invokes the test of proportionality as evolved in human rights jurisprudence.

The concept of proportionality as the means of accepting how and when human rights may be limited is a well accepted principle in international law and comparable domestic legal systems.

The proportionality test involves two closely related concepts:

First to be 'demonstrably justified in a democratic society', there must be a legitimate objective, that is one of sufficient importance to justify overriding human rights; and

Secondly the measure must be proportional. There must be a rational connection between the public policy objective that a particular measure pursues and the means which the state uses to pursue that objective: *James v UK* (1986) 8 EHRR 123 at 50. The measure must strike a fair balance between the demands of the general interest of the community and the protection of the individual's human rights. The measures must not go beyond what is necessary to achieve that objective. As a means of testing proportionality the court may enquire whether the state could have achieved the same objective by other means: *Campbell v UK* (1993) 15 EHRR 394 at para 44.

The main elements of the proportionality test are established by the Canadian case of *R v Oakes* [1986] 1 SCR103. The *Oakes* case held that to be proportionate:

- 'the limitation/s must be carefully designed to achieve the relevant objective, not be arbitrary, unfair, or based on irrational considerations;
- the limitation or interference should impair as little as possible the right in question; and
- even if the objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups the measure will not be justified by the purpose it is intended to serve'.

The ECtHR, the UK courts and the New Zealand courts have also taken a similar approach: *Sunday Times v UK* (1979-80) 2 EHRR 245; *Ministry of Transport v Noort* [1992] 3 NZLR 260; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

A similar approach has been endorsed by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 WLR 675, as cited by *Daly* discussed in the previous section of this letter.

The explanatory statement mentions this test as a reminder that functions or powers that affect rights will be subject to the test upon review on a human rights ground.

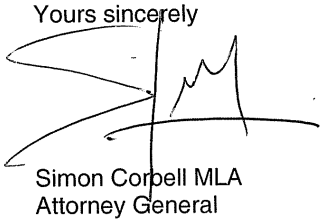
As a matter of convenience, it would seem tempting to simply codify proportionality in the *Human Rights Act 2004* or within individual Acts. The danger of taking that path is that it will change the test to a matter of statutory interpretation rather than application of precedent. If the test is codified, then it is that test that will apply until amended or an appropriate court determines that the test cannot be read to be compliant with human rights. Codifying it might exclude important nuances and changes expressed in case law.

Including the test by reference in Acts also poses the interpretative conundrum of whether mention of the test in one clause implies an exclusion of the test in other clauses. It could also raises the problem of whether the test is intended to be modified by the specifics of the clause.

The expression of natural justice in statutory form is an example of this conundrum: the effect of codifying natural justice at one time potentially limits later case law developments.

Rather than codifying proportionality, I believe it may be more prudent to maintain the focus on how Bills engage rights.

Yours sincerely



Simon Corbell MLA
Attorney General

1·5·07

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs Performing the Duties
of Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr ~~Seselja~~ Zed

Thank you for your Scrutiny of Bills Report no. 40 of 30 April 2007. I offer the following response in relation to the Committee's comments on the *Training and Tertiary Education Legislation Amendment Bill 2007.*

1.	Is proposed subsection 99A(5) of the *Tertiary Accreditation and Registration Act 2003* [*sic*] which creates a power to enter premises without there being notice given to the employer in possession of the premises, a proportionate means of meeting the objective of the power, or does it 'go too far' and amount to a disproportionate means?

Firstly, I ask the Committee to note that trainees and apprentices, by the nature of their registered traineeship or apprenticeship, occupy a different status in the workplace to ordinary workers. While most employers are ethical in their treatment of trainees and apprentices, there are some employers who take advantage of their status. The Department of Education and Training has a formal dispute management procedure to manage instances of reported abuse and mistreatment of trainees and apprentices by unethical employers.

Secondly, trainees and apprentices are usually young, with the majority being under 21 years of age. Many trainees and apprentices are also under 18 and are legally regarded as a child or young person under the *Children and Young People Act 1999.* This Act makes it an offence to employ a young person (under 15) except in certain circumstances. While this Act deals with employment of young people generally, there is no provision under this Act for the Chief Executive or any other person to enter employment premises where young people might be working. A young person who is also an apprentice or trainee could be regarded to have a double disadvantage, being young and occupying a different status to ordinary workers while they are undertaking their apprenticehip. I put it to the Committee that such employees require additional protection. There have been occasions in the recent past on which the Department has made mandated reports of abuse to child protection authorities.

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Finally, I suggest that this is a matter of conflicting rights, ie. the employer's right to privacy versus the apprentice or trainee's right to health and safety. In situations where rights conflict, it is assumed that the obligation to safeguard life is paramount. In situations where the authorised person has grounds to believe that a serious danger to safety may exist, or that a situation is urgent and cannot wait for the 7 day notice period, there will be a need for the Chief Executive/delegate to enter the private premises of the employer. These situations are extremely rare, but it is important to have a provision for it if the need arises. The visit without notice in 99A(5) is intended to enable the 7 day warning provided for in 99A(2)(d) to be waived in situations of danger or urgency. It does not proscribe giving the employer written notice containing 99A(2)(a), (b) and (c) at the time of the unannounced visit, and this could be done to safeguard the rights of the employer.

2.	Does proposed subsection 103A of the *Tertiary Accreditation and Registration Act 2003* [*sic*] authorise the chief executive to suspend or cancel the approval of, amend, any approved training contract to which the employer is a party in circumstances where the employer is not able to claim the benefit of the common law privileges against self-incrimination and exposure to the imposition of a civil penalty, or the common law privilege in relation to client legal privilege (or legal professional privilege)?

I draw to the Committee's attention the fact that there are no civil penalties attached to this provision, and that the employer's rights are protected insofar as decisions under s103A (2) are reviewable decisions. However, I take the Committee's suggestion that it may be appropriate when this legislation is next amended that a note referring to subsection 170(1) and 171(1) of the *Legislation Act 200,* making it clear that an employer could claim the benefit of common law privileges, be inserted in the *Training and Tertiary Education Act 2003* at this point.

These provisions have been operating (under the *Vocational Education and Training Act 2003)* effectively for some years and, importantly, without any concerns being expressed by the business community.

I note that the Committee has made no comment on the subordinate legislation associated with the introduction of *Training and Tertiary Education Legislation Amendment Bill 2007*. I trust that this information addresses the concerns raised by the Committee, and I thank you for bringing them to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

- 2 MAY 2007

Jon Stanhope MLA

CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE
MINISTER FOR THE ARTS

MEMBER FOR GINNINDERRA

Mr Zed Seselja
Chair
Standing Committee on Legal Affairs
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Dear Mr Seselja,

I am writing in response to comments in the Scrutiny of Bills Report No. 40 of 30 April 2007 in relation to Disallowable Instrument 2007-61. DI 2007-61 was necessitated by the change of name of the Stock Exchange of Newcastle Limited, which is now known as the National Stock Exchange of Australia Limited.

The Committee sought advice as to whether the name change meant that, as of 20 December 2006, the Stock Exchange of Newcastle was no longer a "recognised" stock exchange and if so whether any legal consequences were engendered by the commencement of DI 2007-61 on 1 March 2007.

I am happy to advise the Committee that the *Legislation Act 2001* states in section 183 (2) that:

> *If the name of an entity is changed, a reference in a law to the entity by its previous name is taken, after the change, to be a reference to the entity by its new name.*

I understand that this would operate to ensure that the stock exchange in question was recognised for the purposes of the *Duties Act 1999*, despite its change of name. As such, there are no legal consequences arising from the commencement of DI 2007-61 on 1 March 2007.

Yours sincerely

Jon Stanhope MLA
Chief Minister
- 9 MAY 2007

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Dear Mr Seselja

Thank you for the comments of the Standing Committee on Legal Affairs regarding subordinate law SL2007-4, being the Legal Profession Amendment Regulation 2007 (No 1) made under the *Legal Profession Act 2006*. That subordinate law changes the date of commencement of parts 3.1 and 3.2 of the above Act.

In the Committee's comments it noted that this subordinate law relies on a "Henry VIII" clause, and that the use of such provisions is generally disapproved of. The Committee also noted that in this particular instance the exercise of this clause was expressly authorised by the Legislative Assembly. The Committee also raised the fact that the subordinate law delays the commencement of various provisions, in circumstances where their commencement was specifically provided for in the primary legislation.

I note, as did the Committee, that this delay is a relatively minor delay, though it is occurring for a second time. The Government is reluctant to resort to the use of such provisions but, because of the nature of parliamentary process, it is sometimes necessary to build into complex legislation an ability to adjust its implementation schedule if certain circumstances change.

In this particular case, the implementation of the *Legal Profession Act 2006* is dependent to a significant degree on finalisation of the national model law and, consequently, the capacity of the local legal profession to prepare itself for an effective commencement. Delays in finalising model provisions have continued until very recently, so unfortunately it is anticipated that one further amendment to the start date will be required to allow the profession to receive adequate training prior to the commencement of the Act.

I thank the committee for these comments.

Yours sincerely

Simon Corbell MLA
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21.5.07

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Dear Mr Seselja

I refer to the Scrutiny of Bills Report No.15 tabled on 22 August 2005. I offer the following response to the matters raised by your committee and apologise for the delay in my response.

Disallowable Instrument DI2005-127 being the Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1) made under section 201 of the Emergencies Act 2004 determines the fee payable for the purposes of Act.

I note the committee's comments about the incorporation of an explanatory statement into the instrument. The incorporation of the explanatory statement within the instrument does not affect its validity. My understanding is that the (then) Emergency Services Authority prepared the instrument in accordance with current widespread practice, the intent being to simplify the presentation of the instrument by incorporating the explanatory statement (in the form of Explanatory Notes) into the instrument itself. This avoids the need to refer to a separately registered instrument.

Disallowable Instrument DI2005-133 being the Emergencies (Bushfire Council Members) Appointment 2005 (no. 2) made under section 129 of the Emergencies Act 2004 appoints specified persons as members of the ACT Bushfire Council.

I note the committee's comments in relation to the second paragraph of the instrument. It is agreed that this paragraph is confusing, and I can clarify that there are no public servants appointed as members of the Bushfire Council. The committee's comments have been noted for future reference in relation to Bushfire Council appointments.

Yours sincerely

Simon Corbell MLA
Minister for Police and Emergency Services
21.5.07

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