



Legislative Assembly for the ACT

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

## Scrutiny Report

17 FEBRUARY 2005

**Report 3**



## **TERMS OF REFERENCE**

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

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

## ***HUMAN RIGHTS ACT 2004***

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

## **MEMBERS OF THE COMMITTEE**

**MR BILL STEFANIAK, MLA (CHAIR)**  
**MS KARIN MACDONALD, MLA (DEPUTY CHAIR)**  
**DR DEB FOSKEY, MLA**

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**LEGAL ADVISER: MR PETER BAYNE**  
**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—Comment

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

<b>Dangerous Substances (Asbestos) Amendment Bill 2005</b>
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This is a Bill to amend the *Dangerous Substances (Asbestos) Amendment Act 2004*. The effect would be to impose on the owner or occupier of premises a duty of care to a relevant person to tell the person, in writing, what the owner or occupier knows about the asbestos at the premises. The owner or occupier would not be required to find out whether there is asbestos, or anything about the location or condition of any asbestos, at the premises. This law would commence to operate from 4 April 2005.

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

<p><b>Summation</b></p> <p>The Assembly might see resolution of the question as to whether the Bill should be enacted as requiring a comparative assessment of whether:</p> <ul style="list-style-type: none"> <li>• on the one hand, the Bill diminishes the legal protection to the rights of relevant persons to their life: <i>HRA</i> section 9; or to their security of person: section 18(1);</li> <li>• or, on the other hand, whether, if there is any diminution of those rights, that diminution is a reasonable limit that is demonstrably justifiable in a free and democratic society: <i>HRA</i> section 28.</li> </ul>
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### *Introduction*

To simplify matters a little, the Bill would amend the existing section 47J of the *Dangerous Substances Act 2004*. This section was inserted by the *Dangerous Substances (Asbestos) Amendment Act 2004*, but has not yet commenced to operate. Its planned commencement date is 1 March 2005, and one effect of this Bill would be to put this date back to 4 April 2005.

As it stands, section 47J provides:

- (1) This section applies to an owner or occupier of premises if the owner or occupier knows, or ought reasonably to know, that there is asbestos at the premises.
- (2) The owner or occupier has a duty of care to a person at risk to give the person, in writing, the required information about the asbestos.

The main thrust of the Bill is to delete the words “ought reasonably to know” from section 47J(1), and to delete existing section 47J(2), and in its place insert the following:

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(2) The owner or occupier has a duty of care to a relevant person to tell the person, in writing, what the owner or occupier knows about the asbestos at the premises.

(2A) To remove any doubt, this section does not require an owner or occupier of premises to find out whether there is asbestos, or anything about the location or condition of any asbestos, at the premises.

**Example**

An owner or occupier is not required to obtain an asbestos report for the premises.

(The substitution of the concept of “relevant person” (see below) for “person at risk” is not a material change.)

The Explanatory Statement states that the object of the amendments is to “remove any doubt that section 47J does not establish a discovery requirement for an owner or occupier of premises in relation to the presence, location or condition of asbestos”. It is said that

The words “ought reasonably to know”, in section 47J(1), have raised the concern that the obligation of an owner or occupier of premises may go beyond giving information based on actual knowledge, requiring the owner or occupier to conduct an investigation of the premises under section 47K to discover the “required information” about asbestos at the premises.

The amendment puts beyond doubt that it is not the intention of section 47J to require the owner or occupier to obtain an inspection report or to provide information beyond what he or she currently knows. The amendment does not displace the common law rules about the liability of owners or occupiers in relation to their premises.

It is to be noted that there is no relevant Explanatory Statement in respect of the *Dangerous Substances (Asbestos) Amendment Act 2004*. The Bill for this Act was originally called Residential Property (Awareness of Asbestos) Amendment Bill 2004. The name change was made by Assembly Amendment in August; see Minutes of Proceedings No 117 of 25 August 2004.

*Comment*

The effect of the words “ought reasonably to know”, in existing section 47J(1) would appear to oblige an owner or occupier of premises to conduct an investigation of the premises to discover information about asbestos at the premises.

The effect of the amendments proposed would be to reduce this obligation to one that applied to what the owner or occupier knows about asbestos at the premises. There is thus an argument that an effect of the Bill would be to diminish the legal protection to the rights of relevant persons to their life: *HRA* section 9; or to their security of person: section 18(1).

On the other hand, to discharge the obligation stated in the existing section 47J, an owner or occupier (the latter concept being far more extensive than that of owner), would probably need to employ the services of experts, probably at a significant cost (in terms, that is, of the financial resources of the average home-owner).

Regard might also be had to the proposed definition of “relevant person”:

relevant person, for premises, means—

- (a) a person doing relevant work at the premises; or
- (b) a person who is, or is likely to be, a purchaser of the premises; or
- (c) a person who is a tenant of the premises.

It might also be argued that such persons will be as much aware of the risks of asbestos as an owner or occupier, and, if concerned, could make their own inquiries. Furthermore, the existing law (see sections 47K and 47L) imposes on owners and occupiers more specific obligations to inspect for the presence of asbestos which will afford some protection to a “relevant person”.

In the end, and assuming that an effect of the Bill would be to reduce the existing level of legal protection to rights, the question will be whether this reduction is a reasonable limit that is demonstrably justifiable in a free and democratic society: *HRA* section 28.

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

### Health Records (Privacy and Access) Amendment Bill 2005

This is a Bill to amend the *Health Records (Privacy and Access) Act 1997* primarily to insert a new section 14A, with the object of protecting the identity of persons making child protection reports to Care and Protection Services under the *Children and Young People Act 1999*.

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

#### **Summation**

The Assembly might see resolution of the question as to whether proposed section 14A of the *Health Records (Privacy and Access) Act 1997* should be enacted as requiring a comparative assessment of:

- on the one hand, the rights of the informant (right to life: *HRA* section 9; security of their person: section 18(1)), and privacy: section 12), taken together with the interests of the child (the rights just stated, and protection of the child: section 11(2)), and the government agencies to whom the information is given; and
- on the other, the rights of the person whose personal information is contained in the information (privacy and protection of reputation: *HRA* section 12).

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A number of rights and interests may be said to be promoted by the Bill. The interests of the informer may be said to lie in their right to life (*HRA* section 9), or to security of their person (section 18(1)), and to their privacy (section 12).

The interests of the child may also be said to lie in these rights, and, in addition, in section 11(2): “Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind”.

Related to the interests of the child are those of the government agencies charged with the protection of the child. In *Cain v Glass* (1985) 3 NSWLR 230 at 247, McHugh J said:

The justification for the exalted position of the informer rule in the spectrum of public interest immunity is that, unless the anonymity of informers is protected, the flow of intelligence about planned crime for its perpetrators will stop ... . Although the need to protect the safety of informers may have played a part in creating the principle, the existence of a threat to the informer is not a condition preceding to its operation.

The paramount position of the informer rule produces the result in civil proceedings that the identity of an informer in a criminal case is not admissible in any circumstances.

This may put the position too strictly. The English and European courts have read the ‘fair trial’ guarantee (see 21(1) of the *Human Rights Act 2004*) as requiring a court to make a case-specific judgment as to whether a party might be denied access to information that would assist their case. The courts held that the rigidity of the common law position must be softened “so as to permit a balance of competing public interests in a case specific manner”. This was “part of a wider jurisprudential move away from near absolute protection of various categories of public interest in non-disclosure”, and, “with the advent of Human Rights to our law, this move has the force of European jurisprudence behind it”: *Chief Constable of the Greater Manchester Police v McNally* [2002] EWCA Civ 14 [21], per Auld LJ.

These matters are indirectly relevant to a rights analysis of proposed section 14A. It is clear that our legal tradition has attached a very high value to the protection of confidential sources of information given to the police and other law enforcement bodies.

On the other hand, there are persons, and, in particular, the person who is the subject of the allegations contained in the information, with an interest in obtaining the identification information to which proposed section 14A refers. The *Health Records (Privacy and Access) Act 1997* contains a scheme designed to enable persons (described as consumers) in relation to whom a health record has been created, to obtain access to that record, and to seek its amendment. (A health record is one that contains personal health information.) The consumer/requester might have an interest in ensuring that the privacy principles stated in section 5 of this Act have been observed, or in seeking amendment of the record, or in taking some action (including seeking compensation) to remedy for breach of the privacy principles.

The principles underlying the *Health Records (Privacy and Access) Act 1997* may be seen to give legislative effect to the right stated in *HRA* section 12:

**Privacy and reputation**

12. Everyone has the right—

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

In weighing up whether the limitation stated in proposed section 14A is justified, it must be borne in mind that it is limited to information such as would reveal the identity of the informant, or other information which would permit the informant's identity to be ascertained.

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

**SUBORDINATE LEGISLATION**

There is no matter for comment in this report.

**INTERSTATE AGREEMENTS**

The Committee has not been advised of any negotiations in respect of an Interstate Agreement.

**REGULATORY IMPACT STATEMENTS**

There is no matter for comment in this report.

**GOVERNMENT RESPONSES**

The Committee has received responses from:

- The Treasurer, dated 14 February 2005, in relation to comments made in Scrutiny Report 2 regarding the Government Procurement Amendment Bill 2004.
- The Minister for Urban Services, dated 22 December 2004, in relation to comments made in Scrutiny Report 1 regarding Disallowable Instrument DI2004-258, being the Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1).

The Committee thanks the Treasurer and the Minister for Urban Services for their helpful responses.

Bill Stefaniak MLA  
Chair

February 2005

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

**REPORTS—2004-2005**

**RESPONSES**

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
<b><u>Report 1, dated 9 December 2004</u></b>	
Disallowable Instrument DI2004-180 - Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1) .....	<b>No. 2</b>
Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004 .....	<b>No. 2</b>
Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1) .....	
Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2) .....	
Disallowable Instrument DI2004-220 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1).....	
Disallowable Instrument DI2004-221 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2).....	
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) .....	
Disallowable Instrument DI2004-232 - University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2).....	
Disallowable Instrument DI2004-246 - Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1) .....	
Disallowable Instrument DI2004-258 - Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1) .....	<b>No. 3</b>
Subordinate Law SL2004-41 - Health Professionals Regulations 2004.....	<b>No. 2</b>
Subordinate Law SL2004-48 - Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1) .....	<b>No. 2</b>

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
<p style="text-align: center;"><b><u>Report 2, dated 14 February 2005</u></b></p> <p>Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 .....</p> <p>Fair Work Contracts Bill 2004 .....</p> <p>Government Procurement Amendment Bill 2004 .....</p> <p>Justice and Community Safety Legislation Amendment Bill 2004 (No. 2) .....</p> <p>Water Efficiency Labelling and Standards Bill 2004 .....</p>	<b>No. 3</b>



**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  
London Circuit  
CANBERRA ACT 2601

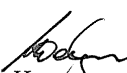
Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 1 of 9 December 2004. I offer the following response in relation to the matter raised by your Committee.

**1. Disallowable Instrument DI 2004-258 – Road Transport (Offences)  
(Declaration of Holiday Period) Determination 2004 (No 1)**

The Committee noted that the regulation under which the instrument has been made should be singular and not plural. The Regulation was notified prior to the Department of Urban Services being advised of new titling protocols for Regulations.

Yours sincerely

  
John Hargreaves  
Minister for Urban Services 22/12/04

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**Ted Quinlan MLA**

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM

MINISTER FOR SPORT, RACING AND GAMING

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
CANBERRA ACT 2600

Dear Bill

I am writing in response to your Committee's comments in Scrutiny Report No 2 of 14 February 2005 in relation to whether or not the proposed provisions in the *Government Procurement Amendment Bill 2004* represent an undue trespass on rights and liberties.

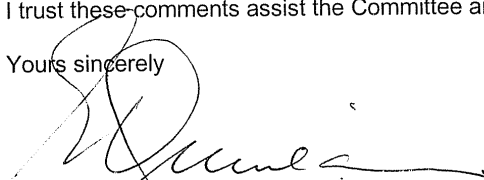
In response, the Government notes that the proposed provisions will have no impact on the nature of information that members of the public may obtain under the *Freedom of Information Act 1989*. The proposed provisions will also not unduly restrict the public disclosure of information about individual contracts, particularly in respect of the parties to the contract, the terms and duration of the contract or the general nature of the services or facilities being procured under relevant contracts.

The Government also noted the Committee's comments in relation to striking a balance between the competing objectives of Sections 16 and 28 of the *Human Rights Act 2004*. The Government considers that the proposed provision strikes an appropriate balance between allowing public disclosure of information on government contracts and protecting public safety and the security of sensitive public infrastructure.

Your Committee also commented on the proposed power in the Bill that would enable the Executive to make regulations to prescribe other information that may be protected from disclosure. The Committee questioned whether or not it is appropriate for laws restricting information about government contracts to be made by regulation. The Government notes that any such regulation would be subject to consideration and possible disallowance by the ACT Legislative Assembly. Hence the proposed provision is appropriate and has adequate safeguards attached to the exercise of the proposed regulation making power.

I trust these comments assist the Committee and address their concerns.

Yours sincerely



Ted Quinlan MLA  
Treasurer  
14.2.05

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