Legislative Assembly for the ACT

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

Scrutiny Report

6 DECEMBER 2010

Report 31

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

(d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2010 (NO 4)

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

LEGAL AID AMENDMENT BILL 2010

This Bill would amend the *Legal Aid Act 1977* to clarify a number of matters in relation to the operation of the legal aid scheme.

Bills—Comment

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

ACT TEACHER QUALITY INSTITUTE BILL 2010

This is a Bill for an Act to establish the Teacher Quality Institute, a statutory authority with responsibility for teacher registration, accreditation of pre-service teacher education programs, and certification of teachers against national standards.

Report under section 38 of the *Human Rights Act 2004*
Do any the clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers"?

A number of matters warrant comment, and will be addressed following the numbering of the clauses.

1. Subclause 28(1) is a key provision of the Bill. It provides that a person commits an offence if he or she "teaches in a school … and is not an approved teacher". The definition of "school" is therefore critical, yet the Dictionary to the Bill provides only that it "means a government school or non-government school". In substance, the term is not defined and questions may arise as to whether some particular activity (such as a Saturday morning language school) is or is not within the term "school" as used in the Bill.

This issue does not appear to be addressed in the explanatory statement, and the Committee recommends that the Minister address the problem created by the lack of definition in the Bill.

2. By paragraph 32(1)(e), a person is eligible for full registration as a teacher if the institute is satisfied that "(e) if the person has lived in another country as an adult for a continuous period of more than 1 year - the person has supplied a certified copy of the person's criminal history record from that country". The term "criminal history record" is defined in the Dictionary to mean "a written report about the person's criminal history from an entity in

another country that has access to records about the criminal history of people in that country". A person cannot be registered if they cannot supply the certificate. Given that in some instances it may not be feasible for the person to supply such a record, should there be some qualification to accommodate this circumstance?

The same point may be made concerning paragraphs 33(1)(d) and 35(1)(c).

3. Privacy issues arise in respect of the clauses concerning the register of teachers. Subclause 42(1) provides that "[t]he institute must keep a register (a ***teachers register***) of teachers". The Explanatory Statement states: "[a] purpose of the institute is to register teachers, therefore a register must be kept which contains all of the relevant details which, in a restricted form, are also available to anyone seeking to determine whether or not a teacher is registered in the ACT". The register will contain matter that relates directly to the personal affairs of a person (see clause 43) and, thus, warrant protection having regard to HRA paragraph 12(a)[1]. It is thus important to examine the circumstances in which information in the register might be disclosed.

3.1 The starting point is the protection offered by subclause 42(3):

> (3) The institute must not disclose any information in the teachers register to anyone else except in accordance with this Act or another law in force in the ACT.
>
> *Note* The Information Privacy Principles apply to the institute (see *Privacy Act 1988* (Cwlth), s 14 to s 16). The Principles deal with the collection, storage and exchange of personal information.

The exception in the terms "in accordance with this Act" requires examination of what disclosure is required or permitted by the Bill.

3.2 Subclause 42(4) provides that certain information relating to the nature of a teacher's registration, and "whether the teacher's registration or permit to teach is suspended or cancelled" (paragraph 42(4)(c)) "must be made available to a teacher's employer or prospective employer on request". Given the purpose of the register, this seems to be a reasonable basis for disclosure.

3.3 There is, however, no requirement that the relevant person be notified that a disclosure has been made under subclause 42(4). This person is therefore excluded from the process of decision-making in relation to information which is of direct concern to the person. Notification would also put the teacher on notice that the information is to be disclosed, in which case the teacher might then consider whether to obtain a copy of the matter in the register with a view to checking its accuracy (as is permitted by clause 46). The lack of a notification requirement raises the issue of whether subclause 42(4) is a justifiable limit to HRA paragraph 12(a).

[1] "Everyone has the right - (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; …".

3.4 Subclause 42(5) provides that most of the information just referred to, including, in particular, that covered by paragraph 42(4)(c) (above, 3.2), "may be made available to someone else on request" (see 42(5)(b)). This provision is open to the objection that it is an unjustifiable limitation to the right to privacy in HRA paragraph 12(a). Subclause 42(5) might be regarded as warranting an arbitrary disclosure in that it states no criteria to guide the exercise of the discretion to disclose.[2] (An open-ended discretion is also objectionable on other grounds.[3])

There is no justification offered for permitting disclosure to "someone else" which, on its face, embraces anybody, whatever their interest in knowing about the person's status as a teacher. This matter raises another possible basis for a finding that subclause 42(5) is not HRA compatible.

A justification should address the question of whether this aspect of the Bill is a departure from the practice that has been followed in relation to similar provisions in the schemes of professional registration. As a matter of principle, the schemes should be similar.

3.5 The lack of a notification requirement where disclosure under subclause 42(5) is proposed raises a separate issue of whether the provision is a justifiable limit to HRA paragraph 12(a). See above at 3.3. In this circumstance, given that disclosure can be to "someone else", the exclusion of the person affected from the decision-making process might be regarded as a more serious problem.

3.6 Subclause 43(1) states the details that must be entered in the teachers' register in relation to a teacher include "(c) the teacher's home address, preferred contact address and email address". Without any reference to the HRA, the Explanatory Statement does seek to justify inclusion of the home address, on the basis that "it is not always appropriate to list a school as their preferred contact address". But the Bill does not require that the preferred contact address must be a school; it might be some address (such as post office box) other than the home address, or the home address. It is difficult to see why it is not sufficient to require only that the preferred contact address be included. The requirement to include the home address may not be a justifiable limit to HRA paragraph 12(a).[4]

3.7 The details that must be entered in the teachers register in relation to a teacher include "(e) the teacher's gender", and "(f) whether the teacher identifies as an indigenous person". These provisions raise an issue of compatibility with HRA subsection 8(3) (the right to equal protection of the law), and again without any reference to the HRA, the Explanatory Statement does seek to justify their inclusion.

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[2] The United Nations Human Rights Committee, in a general comment on the equivalent article in the ICCPR to HRA paragraph 12(a), specified a law interfering with privacy "must be precise and circumscribed, so as not to give decision-makers too much discretion in authorizing" the interference; see S Joseph, et al, *The international covenant on civil and political rights*, 2nd edition (2004) at 481. See also *Scrutiny Report No 27* of the *7th Assembly*, at 27, in the section Comment on Government response – Liquor Bill 2010.

[3] See *Scrutiny Report No 25* of the *7th Assembly*, at 3-8, concerning the Liquor Bill 2010.

[4] A similar issue arises in respect of subclause 45(1).

> Aside from a need to maintain such records for the purpose of national consistency, in order that the underrepresentation of indigenous people, or the relative numbers of men/women be addressed in all or part of the ACT school system, records of registered or authorised (permit to teach) teacher (sic.) need to be kept on the teachers register.[5]
>
> While this information is on the register it *will be used only by the institute and for the purposes stated here* (emphasis added). Clause 86 provides penalties for the improper or reckless disclosure of any information.

There is however nothing in the Bill to limit the disclosure of these details for the purposes stated in the Explanatory Statement. The reference to clause 86 is wrong. It should be to subclauses 92(1) and (2).

The issue is whether the provisions considered here are a justifiable limitation of HRA subsection 8(3).

4.1 Part 7 provides for the accreditation by the institute of an education program, either on its own initiative under clause 72, or on application by an education provider under clause 73. In both cases, in deciding whether to accredit, the institute must comply with clause 76, which states the criteria for accreditation of education programs. Perhaps, in either case, or perhaps only when deciding an application,[6] the institute is not (see subclause 74(3)) limited to applying the clause 76 criteria, but might refuse to accredit on any other grounds.

No justification for permitting an open-ended discretion is offered. The criteria in paragraph 76(a) are quite comprehensive and, quite independently of these criteria, paragraph 76(b) requires the institute to apply any accreditation guidelines it may have made under clause 75.[7]

The Committee also notes that an accreditation may be suspended or cancelled only "if the institute is satisfied that the program no longer meets the criteria under section 76" (paragraph 81(a)) (or in the circumstances prescribed by regulation – paragraph 81(b)). It is not apparent why the grounds for suspension or cancellation should be narrower than the grounds for a refusal.

Justification of subclause 74(3) is called for.

4.2 Subclause 74(4) which provides simply that "[t]he institute may accredit a program on conditions" and is also open to the objection that the discretion is open-ended. (The Explanatory Statement states that "[clause 74] provides the criteria under which the institute may impose a condition". There appears to be no basis in clause 74 for this assertion.)

4.3 Under subclause 83(1), the institute must suspend or cancel the accreditation of an education program if (in addition to procedural requirements) it "(c) is satisfied that the ground for suspension or cancellation under section 81 exists"; (for clause 81, see above, at

[5] See the Explanatory Statement for fuller explanation of these points.

[6] This doubt arises because while subclause 72(2) (institute accreditation) refers only to the clause 76 criteria, clause 74 might be read as applying also to accreditation under clause 72. This matter should be clarified.

[7] Although it is not clear whether the guidelines could add to the criteria stated in clause 76.

4.1. Subclause 85(2) then confers on the institute a structured (and possibly limited) discretion to approve the provision by the provider, for not longer than 2 years, of an education program under an agreement, entered into before the suspension or cancellation takes effect, to provide the program to someone else (such as a student). The Explanatory Statement explains the policy objective.

The Explanatory Statement also asserts that subclause 85(2) does not apply "in the case where a provider has had their accreditation unconditionally withdrawn". Perhaps this is a reference to subclause 85(5), which states that "[t]he institute may, in exceptional circumstances, direct the provider to immediately stop providing the education program" and an example provided instances "serious incompetence in the delivery of the education program".

It is hard to see why this open-ended discretion is necessary, given that the institute could reverse its approval under subclause 85(2) (see section 180 of the Legislation Act) in any case where it considered that continuation of the program was no longer justifiable in the circumstances, having regard to the matters stated in subclause 85(3).

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

Comment on the Explanatory Statement

The Explanatory Statement fails to meet the standards expected. It (a) at points makes assertions about the content of a provision that appear (or are) wrong – some examples are noted above; (b) at no relevant point acknowledges that there might be an issue of HRA compatibility; and (c) at many points does not attempt to explain in plain English statement the contents of a clause.

BAIL AMENDMENT BILL 2010

This Bill would amend the *Bail Act 1992* to introduce new procedures in relation to the grant of bail and the review of bail decisions in the courts; modify the limitations on the power of the Magistrates Court to grant bail; and, more particularly, permit an accused to make two bail applications as of right in the Magistrates Court; require both the accused and the informant to exhaust the opportunities to obtain bail from the Magistrates Court before proceeding to the Supreme Court; and change the test for obtaining bail in some situations so that it is less onerous on the accused.

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

The Committee has often pointed to the serious effect on the right to liberty of a denial of bail.[8] Remand is a form of preventive detention without a prior finding of guilt of an offence. The Committee has drawn attention to observations of Hunt CJ at CL in *R v Kissner:*

[8] See for a general rights perspective on bail laws, *Scrutiny Report No 44* of the *5th Assembly*, concerning the Bail Amendment Bill 2003.

> the [remandee's] continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and to his family, and usually with severe effects upon the applicant's business or employment, his finances, and his abilities to prepare his defence and to support his family.[9]

The recent decision of Penfold J in *In the matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 indicates that the Supreme Court will examine a law permitting a denial of bail very closely to determine if it is compatible with section 18 of the *Human Rights Act 2004*.

The Explanatory Statement raises and discusses the issue of whether these amendments to the scheme for obtaining bail engage HRA subsections 18(1), 18(4) and 18(5). Undoubtedly they do, and the Explanatory Statement thus addresses briefly whether the derogations are justifiable under section 28.[10] The Explanatory Statement identifies one respect in which there might be argument that the derogation is not justifiable:

> The right of accused people to apply for bail or review of a bail decision in the Supreme Court is subject to some restrictions. For example, in a case that is proceeding in the Magistrates Court, an accused person must have made two applications for bail and had a review of bail heard in the Magistrates Court, before being able to make further application to the Supreme Court. Also, the change of circumstances test must be satisfied. Section 28 of the HR Act permits reasonable limitations on human rights and sets out in section 28(2) considerations in deciding on whether the limitation is reasonable. While introducing additional procedures before an accused may apply to the Supreme Court for bail, the Bill also relaxes restrictions on applications to the Magistrates Court.

The Explanatory Statement does not indicate why there might be an HRA compatibility problem with the provisions that have the effect described. Perhaps it might be argued that a denial of bail is such a serious derogation of the right to liberty that the law must provide for full merits review by the Supreme Court of an unsuccessful bail application before the Magistrates Court.

The problem with the Explanatory Statement is that it does not rise above the level of assertion that section 28 is satisfied.[11] It is not enough to note that subsection 28(2) sets out considerations in deciding whether the limitation is reasonable. It is necessary to take each of those considerations in turn and then provide a reasoned opinion as to how they apply to the particular provision sought to be justified.[12] It will also be necessary to identify what might be the basis for argument that derogation is not justifiable.

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[9] Supreme Court, NSW, 17 January 1992, unreported; quoted in *Chau v DPP (Commonwealth)* 132 ALR 430 at 433.

[10] The Explanatory Statement points out, correctly, that in some respects the amendments would enhance one or other of the rights in section 18. One such amendment responds to the Supreme Court decision in *In the matter of an application for bail by Rodrigues* [2008] ACTSC 50.

[11] This is a matter that the Committee has strongly emphasised in recent reports; see *Scrutiny Report No 27* of the *7th Assembly*, at 5-6, concerning the Working with Vulnerable People (Background Checking) Bill 2010, and *Scrutiny Report No 25* of the *7th Assembly*, at 12-13, concerning the Road Transport (Drink Driving) Legislation Amendment Bill 2010.

[12] See the extract from the Victorian statement of Compatibility that is contained in the comments below concerning the Fair Trading (Australian Consumer Law) Amendment Bill 2010.

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

FAIR TRADING (AUSTRALIAN CONSUMER LAW) AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Fair Trading Act 1992* to apply the Australian Consumer Law as a law of the Territory and to make amendments consequential on the application of that Law, and for other purposes.

Background

The key aspect of the Bill is that it would insert a new Part 2 in the *Fair Trading Act 1992* (the "ACT Act") which, among other matters, will apply the Australian Consumer Law (the "uniform law") as a law of the Territory from 1 January 2011.[13] This is achieved by clause 1.6 of schedule 1 of the Bill, which repeals existing part 2 of the ACT Act and inserts a new part 2 in its stead. New part 2 comprises what would be sections 5 to 20 of the ACT Act.

Proposed sections 6 and 7 provide:

> **6 The Australian Consumer Law text**
>
> The Australian Consumer Law text consists of—
>
> (a) the *Competition and Consumer Act 2010* (Cwlth), schedule 2; and
>
> (b) the regulations under that Act, section 139G.
>
> **7 Application of Australian Consumer Law**
>
> (1) The Australian Consumer Law text, as in force from time to time—
>
> (a) applies as a law of this jurisdiction; and
>
> (b) as so applying may be referred to as the *Australian Consumer Law (ACT)*; and
>
> (c) as so applying is a part of this Act.
>
> (2) This section has effect subject to section 8, section 9 and section 10.

Section 8 states a rule for the application in the Territory by virtue of section 7 of modification made by a Commonwealth law to the Australian Consumer Law text after the commencement of section 8; section 9 provides for the meaning of "court" and "regulator" in the *Australian Consumer Law (ACT*; and section 10 provides for the interpretation of the latter.

[13] The Commonwealth Parliament has passed two Acts that establish the new uniform law namely the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth) and *the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth) (the No. 2 Act). Schedule 1 of the No. 2 Act inserts a new Schedule 2 to the *Trade Practices Act 1974* (Cth) which provides for the uniform law. The No. 2 Act also renames *the Trade Practices Act 1974* (Cth) as the *Competition and Consumer Act 2010* (Cth).

The Explanatory Statement

The first comment to make is that the Explanatory Statement comment on clause 1.6 of schedule 1 of the Bill is thoroughly inadequate. In full, it states:

> ***Clause 1.6 Substitution of Part 2 of the Fair Trading Act 1992***
> Provides for the application of the ACL as a law of the Australian Capital Territory, including but not limited to definitions, application of Australian Consumer Law in the Territory and in other participating jurisdictions (sic.). The new part defines activities that are not "business" for the purposes of the Act.
>
> Clause 1.6 provides that a person cannot be punished for the same offence in more than one jurisdiction. This clause also contains amendments relating to enforcement of undertakings by application to the Magistrates Court.

As noted, clause 1.6 would insert 16 new sections into the ACT Act. Moreover, paragraph 7(1)(a) would adopt as law applying in the Territory the Australian Consumer Law text, which comprises 287 sections containing many complex rules relating to consumer law. The Explanatory Statement does not seek to explain these provisions, or refer to any document that does. In its "overview", there is only a very brief statement of "some of the changes being implemented through the ACL".

Apart from a brief reference to unspecified strict liability offences, the Explanatory Statement makes no effort to address the compatibility of the provisions of the ACL with the *Human Rights Act 2004*. There is no reason apparent to the Committee why this should not have been done. The relevant Minister of the Government of Victoria tabled a lengthy statement of compatibility in the debate on the Victorian equivalent to this bill before the Assembly.[14]

The national scheme dimension of the Bill

The Committee accepts that the passage of national co-operative laws is a matter for the Assembly, but it also considers that the explanatory statement to bills creating or enhancing such schemes should fully explain their human rights impact. That is, it should set out whether, and to what extent, the HRA's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national co-operative scheme.

The Committee also considers that the explanatory statement should identify all respects in which a provision of the Bill affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws. There appears to be some such provisions in this Bill.

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[14] This is the Fair Trading Amendment (Australian Consumer Law) Bill 2010. The Statement of Compatibility may be found at http://tex.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=5627&activity=Statement+of+Compatibility&title=FAIR+TRADING+AMENDMENT+%28AUSTRALIAN+CONSUMER+LAW%29+BILL&date1=12&date2=August&date3=2010&query=true%0a%09and+%28+data+contains+'Fair'%0a%09and+data+contains+'Trading'%0a%09and+data+contains+'Australian'%0a%09and+data+contains+'Consumer'%0a%09and+data+contains+'Law'+%29%0a%09and+%28+hdate.hdate_3+=+2010+%29%0a%09and+%28+house+contains+'ASSEMBLY'+%29%0a

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

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

This report will draw human rights issues to the attention of the Assembly in two ways. First, it will incorporate, with some amendment to take account of Territory law, those parts of the Victorian Statement of Compatibility that refer to and discuss provisions of the Victorian Charter of Rights and Responsibilities Act that were identified by the Victorian Minister as raising an issue of compatibility with the Charter. The length of these extracts reflects the complexity of the ACL. These extracts may also serve as a useful model of what a statement of compatibility should contain; (under subsection HRA 37(2), the Attorney-General "must prepare a written statement (the ***compatibility statement***) about the bill for presentation to the Legislative Assembly."). In particular, the Committee draws attention to the manner in which this Victorian statement addresses the Victorian Charter equivalent to HRA subsection 28(2) where the Minister considers whether provisions that place a legal onus of proof on a criminal defendant are a justifiable derogation of the presumption of innocence.

Secondly, this report will refer to and comment on the discussion in the Explanatory Statement to the Bill before the Assembly concerning the strict liability offences in the ACL.

Extracts from the Victorian Statement of Compatibility

> Mr Robinson (Minister for Consumer Affairs) tabled [the] following statement in accordance with Charter of Human Rights and Responsibilities Act:
>
> In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Fair Trading Amendment (Australian Consumer Law) Bill 2010.
>
> In my opinion, the Fair Trading Amendment (Australian Consumer Law) Bill 2010, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.
>
> …

The right to privacy – section 13 of the Charter [HRA paragraph 12(a)]

> Section 13 of the Charter provides that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with.
>
> …
>
> Section 129 of the Australian Consumer Law provides that a responsible minister may publish on the internet a safety warning notice about certain goods or services providing that the goods or services are under investigation to determine whether they will or may cause injury. Section 223 provides that the regulator may issue a public warning notice containing a warning about the conduct of a person if the regulator has reasonable grounds to suspect that the conduct may constitute a contravention of chapters 2, 3 or 4 and the regulator is satisfied that one or more persons may have suffered detriment as a result of the conduct and that it is in the public interest to issue the notice.

> The issuance of public warnings under these sections engages the right to privacy and reputation as such notices could impact on the reputation of an individual. As these sections do not authorise an unlawful attack on a person's reputation, and the power in sections 129 and 223 can only be used where there are reasonable grounds to suspect that a contravention has occurred, and in circumstances where members of the public may have suffered detriment, I consider that these sections do not limit section 13 of the charter. However, even if these sections did constitute a limit to section 13 of the charter, it would be justifiable on the basis that it is necessary to issue the notice in the public interest to prevent further detriment from occurring as a result of contraventions.
>
> …

The right to property -- section 20 of the Charter

> Section 20 of the charter provides that a person must not be deprived of his or her property other than in accordance with law. This right requires that powers which authorise the deprivation of property are conferred by legislation or common law, are confined and structured rather than unclear, are accessible to the public and are formulated precisely.

[NOTE. There is no equivalent to section 20 in the Human Rights Act. The Committee has however assessed provisions in Territory bills in terms of the stronger statement of the right to property in article 17 of the *Universal Declaration of Rights*. Article 17.2 provides "[n]o-one shall be arbitrarily deprived of his property", and has been taken to mean that a deprivation should not only be in accordance with law, (which is all that the Victorian Charter requires), but also that there must be a public interest justification for the deprivation. The Victorian Statement of Compatibility does not address this issue, and members of the Assembly should assess whether in the instances now to be noted there is such a justification.]

> … Sections 41, 42, 43, 85, 109, 114, 122 and 232, as well as part 3-5, of the Australian Consumer Law … engage the right to property.
>
> Section 41 provides that, if a person supplies unsolicited goods to another person, the other person is not liable to make any payment for the goods and is not liable for loss or damage to the goods, other than loss or damage arising from a wilful and unlawful act. Following the end of the recovery period, the sender is not entitled to take action to recover the goods.
>
> Section 42 provides that if a person supplies unsolicited services to another person, the other person is not liable to make any payment for the services. Section 43 provides that a person must not assert a right of payment from another person for placing an unauthorised advertisement in a publication. Both of these sections could lead to a loss of income.
>
> Section 85 provides that goods become the property of a consumer if the relevant supplier does not collect the goods from the consumer within 30 days after the termination of the contract where the consumer gives notice to the supplier.

Section 109 provides that a responsible minister may impose an interim ban on consumer goods or on product-related services. Section 114 provides that the commonwealth minister may impose a permanent ban on consumer goods or product-related services. Both of these sections may lead to the deprivation of property, since the issuance of a ban by a minister may lead to the loss of income.

Section 122 provides for the compulsory recall of consumer goods in certain circumstances. This could also potentially lead to a loss of income.

Part 3-5 of chapter 3 of the Australian Consumer Law contains provisions relating to the liability of manufacturers for goods with safety defects and provides for the circumstances in which persons may recover amounts for loss or damages against manufacturers.

Section 232 provides that the court may grant an injunction requiring a person to refund money, transfer property, and destroy or dispose of goods.

While these sections may result in the deprivation of property, any such deprivation will occur as a result of powers conferred by legislation and will not occur in an arbitrary manner, given that the provisions are confined and clearly formulated. Consequently, these sections and part 3-5 are compatible with the right to property.

…

The right to be presumed innocent -- section 25(1) of the charter [HRA subsection 22(1)]

Section 25(1) of the charter provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

…

Evidential onuses

Sections 151(1)(e) and (f) of the Australian Consumer Law provide that a person commits an offence if the person makes a false or misleading representation that purports to be a testimonial by any person relating to goods or services or makes a false or misleading representation concerning a testimonial by any person or a representation that purports to be such a testimonial. Section 151(2) provides that, for the purpose of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in subsection (1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary. Section 151(3) provides that section 151(2) does not have the effect of placing on any person an onus of proving that the representation is not misleading.

Accordingly, section 151 imposes an evidential onus on a defendant to adduce evidence that rebuts a presumption that a representation is misleading.

Sections 154(3), 158(8), 161(2), 166(3), 166(5), 170(2), 172(4), 189(2), 190(2), 194(4), 197(4), 205(2) and 206(2) are all exceptions to offences. These sections arguably place an evidential onus on a defendant to raise these exceptions to the relevant offences.

Section 163(1) provides that a person commits an offence if the person asserts a right to payment from another person of a charge for placing, in a publication, an entry or advertisement relating to the other person, or the other person's business. Section 163(6)

provides that a person is not taken for the purposes of section 163(1) to have authorised the placing of the entry or advertisement unless a document authorising the placing of the entry or advertisement had been signed off by the person and a copy of the document was given to the person before the right to payment is asserted, and the document specifies, amongst other things, the name and address of the person publishing the entry or advertisement.

In my view, none of the above sections impose a legal burden on a defendant. The provisions do not transfer the burden of proof, because once the defendant has adduced or pointed to some evidence, the burden is on the prosecution to prove beyond reasonable doubt the elements of the relevant offences.

Courts in other jurisdictions have generally taken the approach that an evidential onus on an accused does not limit the presumption of innocence. Additionally, the above exceptions and defences are based on matters which are peculiarly within the knowledge of the relevant defendant and which only a defendant would be cognisant of, given the fact that any defendant accused of committing a relevant offence would be participating in commercial activities regulated by the Australian Consumer Law. Consequently, even if these sections were found to limit the right to be presumed innocent in section 25(1) of the charter through imposing evidential onuses on defendants, the limitation would be reasonable and justifiable under section 7(2) of the charter.

For these reasons, I consider that it is appropriate for an evidential burden to be placed on a defendant in this instance.

There are also several civil penalty provisions which impose evidential onuses, namely sections 4 (where a person must adduce evidence that he or she had reasonable grounds for making a representation, otherwise the representation is taken to be misleading); 29 (where a representation is taken to be misleading unless evidence is adduced to the contrary); and 70 (which provides for circumstances where, in proceedings relating to a contravention, an agreement or proposed agreement is presumed to be an unsolicited consumer agreement). These provisions potentially impose pecuniary penalties on individuals. As the pecuniary penalties potentially imposed are civil debts in the form of orders made in civil proceedings against the person, a person will not be imprisoned for a failure to discharge the debt.

Accordingly, in my view these provisions do not relate to criminal offences and thus do not engage the right to be presumed innocent in the charter.

Legal onuses

The following sections of the Australian Consumer Law all place a legal onus on defendants by requiring them to prove, on the balance of probabilities, the relevant defences and exceptions:

section 157 (which is a defence to the offence of bait advertising);

section 162 (the offence provision will not apply if the person proves that he or she had reasonable cause to believe that there was a right to the payment or charge);

section 163 (the offence provision will not apply if the person proves that he or she knew that the other person authorised the placing of an entry or advertisement);

section 207 (which is a defence to a number of strict liability offence provisions in chapter 4 of the Australian Consumer Law);

section 208 (which is a defence in relation to a chapter 4 offence if the defendant proves that the contravention was due to the act or default of another person and the defendant took reasonable precautions and exercised due diligence to avoid the contravention);

section 209 (it is a defence in relation to a chapter 4 offence if the defendant proves that the defendant did not know that the publication of an advertisement would amount to a contravention);

section 210 (it is a defence in relation to a chapter 4 offence if the defendant proves that the defendant could not have known that the relevant goods did not comply with the relevant safety or information standard); and

section 211 (it is a defence in relation to a chapter 4 offence if the defendant proves that the defendant could not have known that the relevant services did not comply with the relevant safety or information standard).

Sections 157, 207, 208, 209, 210 and 211 require defendants to prove certain things in order to make out the relevant defence, and sections 162 and 163 require a defendant to prove something in order to be exempt from the application of the relevant provision.

By placing a burden of proof on a defendant, these provisions limit the right to be presumed innocent in section 25(1) of the charter. However, I consider that the limits upon the right are reasonable and justifiable in a free and democratic society for the purposes of section 7(2) of the charter having regard to the following factors.

(a) The nature of the right being limited

The right to be presumed innocent is an important right that has long been recognised well before the enactment of the charter. However, the courts have held that it may be subject to limits, particularly where, as here, the relevant offences are public welfare offences of a regulatory nature; and the defences and exceptions are enacted for the benefit of defendants so that they can escape liability in certain circumstances.

(b) The importance of the purpose of the limitation

The purpose of imposing a legal burden is to ensure the effectiveness of enforcement and compliance with the Bill by enabling the offences to be effectively prosecuted and to thus operate as an effective deterrent and protection of the public.

The defences and the associated legal burdens reflect a policy of imposing obligations upon persons who engage in consumer activity to ensure compliance with the act. It is intended to make persons responsible for any breaches that occur, not just deliberate breaches.

However, in order to avoid overly harsh consequences, defences are provided to enable persons to escape liability for breaches where they are able to establish that the breach genuinely occurred in circumstances beyond their control, such as where they did not and could not know of the facts or where they took all reasonable steps to prevent a breach.

The defendants seeking to rely on these defences will be persons who engage in trade or commerce, and who are in the business of providing consumer goods or services. Therefore, they should be well aware of the regulatory requirements and, as such, should have processes and systems in place that enable them to effectively meet these requirements, including maintaining proper financial records and associated documents which would enable defendants to prove the elements of the relevant defence, or to access the relevant exception. In addition, most of the defences relate to states of knowledge or belief that are solely within the knowledge of the accused, or establishing due diligence.

Conversely, it would be difficult and onerous for the Crown to investigate and prove these elements beyond reasonable doubt. Therefore, it is appropriate for the burden to rest with the defendant.

(c) The nature and extent of the limitation

The burden of proof is imposed in respect of defences and exceptions. The prosecution would first have to establish the relevant elements of the offences.

Additionally, the offences under chapter 4 of the Australian Consumer Law are not punishable by way of imprisonment -- the maximum penalty for offences under chapter 4 is $220 000, which is not unduly harsh given that the penalties are imposed for the purposes of protecting consumers.

(d) The relationship between the limitation and its purpose

The imposition of a burden of proof on the defendant is directly related to the purpose of enabling the relevant offence to operate as an effective deterrent while also providing suitable defences and exceptions in circumstances where the contravention was not deliberate. A legal burden is imposed to avoid evidentiary problems that may arise, particularly where the relevant facts are within the knowledge of the accused, and which may lead to a loss of convictions.

(e) Less restrictive means reasonably available to achieve the purpose

Although an evidential onus would be less restrictive upon the right to be presumed innocent, it would not be as effective because it could be too easily discharged by a defendant.

The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests.

There are also several civil penalty provisions which impose legal onuses, namely:

section 40 (where a person bears the onus of proving that the person had reasonable cause to believe that there was a right to the payment or charge);

section 43 (where a person bears the onus of proving that the person knew or had reasonable cause to believe that the person against whom a right to payment was asserted had authorised the placing of the relevant entry or advertisement);

section 106 (where a defendant bears the onus of proving that the defendant's manufacture, possession or control of goods was not for the purpose of supplying the goods (other than for export) in relation to proceedings under part 5-2 in contravention of a safety standard);

section 118 (where a defendant bears the onus of proving that the defendant's manufacture, possession or control of goods was not for the purpose of supplying the goods (other than for export) in relation to proceedings under part 5-2 in contravention of a ban);

section 136 (where a defendant bears the onus of proving that the defendant's manufacture, possession or control of goods was not for the purpose of supplying such goods);

section 251 (it is a defence if the defendant proves that the defendant did not know that the publication of an advertisement would amount to a contravention);

section 252 (it is a defence if the defendant proves that either the defendant did not know that the consumer goods did not comply with a safety standard or that the defendant relied on, in good faith, a representation by the person from who the defendant acquired the goods);

section 253 (it is a defence if the defendant proves that either the defendant did not know that the services did not comply with a safety standard or that the defendant relied on, in good faith, a representation by the person from who the defendant acquired the services from).

These provisions potentially impose pecuniary penalties on individuals.

As discussed above, the pecuniary penalties potentially imposed are civil debts in the form of orders made in civil proceedings against the person and thus do not engage the right to be presumed innocent in the charter.

Accordingly, the above sections of the Australian Consumer Law are compatible with the right to be presumed innocent in section 25(1) of the charter.

The right to freedom of expression -- section 15 [HRA section 16]

Section 15 provides that every person has the right to freedom of expression, which includes the freedom to impart information and ideas of all kinds. The right has also been held to include the right not to impart information.

Imparting information

…

Several sections of the Australian Consumer Law engage the right to freedom of expression, including:

section 66 (the commonwealth Minister may determine in writing that suppliers are required to display guarantees);

section 73 (a dealer must not call on a person for the purposes of negotiating an unsolicited consumer agreement on certain days and at certain times);

section 74 (a dealer must advise a person that the dealer is obliged to leave the premises on request and also provide to the person such information relating to the dealer's identity as is prescribed by the regulations);

section 75 (if a prospective consumer makes a request, the dealer must not contact the prospective consumer);

section 78 (the dealer must give a copy of an agreement to the consumer);

section 79 (the supplier must ensure that an unsolicited consumer agreement contains certain information);

section 88 (a person must not place a consumer's name on a list of defaulters);

section 96 (a supplier who is party to a lay-by agreement must give a copy of the agreement to the consumer);

section 100 (a supplier must provide a consumer with proof of a transaction for goods or services exceeding $75);

section 101 (a supplier must give a consumer an itemised bill when requested);

section 125 (a person who has supplied goods to a person outside of Australia must give that person written notice if the goods are compulsorily recalled);

section 128 (a person who has supplied goods to a person outside of Australia must give that person written notice if the goods are compulsorily recalled);

section 131 (if a supplier of goods becomes aware of the death, serious injury or illness of any person and that the death, serious injury or illness was caused or may have been caused by the use or misuse of the relevant goods, the supplier must give the commonwealth minister written notice that identifies the goods and includes information regarding the death, serious injury or illness);

section 132 (if a supplier of services becomes aware of the death, serious injury or illness of any person and that the death, serious injury or illness was caused or may have been caused by the use or misuse of the relevant goods, the supplier must give the

commonwealth minister written notice that identifies the services and includes information regarding the death, serious injury or illness);

section 132A (where a person is prohibited from disclosing any information in a notice issued under sections 131 or 132);

section 134 (the commonwealth minister may issue an information standard which requires the provision of information about goods or services, or provide that information about goods and services is not to be provided);

section 148 (a person seeking to defend a defective goods action, on the basis that there was compliance with a commonwealth mandatory standard for the goods, must give the commonwealth the prescribed notice);

section 171 (it is an offence to fail to clearly advise a person that a dealer's purpose is to seek the person's agreement to the supply of goods or services concerned and to advise the person that the dealer is obliged to leave the premises immediately on request and to produce relevant information regarding the dealer's identity);

section 173 (it is an offence to not provide a person with information regarding the person's right to terminate a consumer agreement);

section 174 (a dealer must provide a copy of a negotiated unsolicited sales agreement to a consumer);

section 175 (an unsolicited consumer agreement must set out certain information, including the supplier's name and address);

section 176 (agreements not negotiated by telephone must set out the supplier's name and address);

section 219 (the regulator may give a person notice requiring a person to provide information or produce documents); and

section 246(2)(c) and (d)(the court may order a person to disclose such information as specified in the order and the court may order the person to publish an advertisement).

The assistance of those engaged in a variety of commercial activities that are regulated by the … Australian Consumer Law is necessary to conduct investigations into whether or not the regulatory obligations on such persons are being complied with. This duty to assist is co-extensive with the other obligations imposed upon these individuals.

These provisions enable appropriate oversight and monitoring of compliance with the … Australian Consumer Law, and are reasonably necessary to ensure individuals who choose to participate in commercial activities regulated by the … Australian Consumer Law are acting in accordance with their obligations and responsibilities, which have been designed to protect consumers. Therefore, to the extent that freedom of expression is engaged, these provisions fall within the exceptions to the right in section 15(3) of the charter, as reasonably necessary to respect the rights of other persons, or for the protection of public order.

[The HRA does not contain a provision equivalent to subsection 15(3) of the Charter. The matters mentioned in that provision would fall to be considered in the application of HRA section 28.]

…

Other activities

Section 109 of the Australian Consumer Law … provides that a responsible minister may impose an interim ban on consumer goods or product-related services of a particular kind. Similarly, section 114 provides that the commonwealth minister may impose a permanent ban on consumer goods or product-related services of a particular kind. Section 118 provides that a person must not supply goods in certain circumstances which are subject to a ban and section 119 provides that a person must not supply product-related services in certain circumstances which are subject to a ban. Similarly, sections 106 and 107 provide that a person must not supply goods or services that do not comply with relevant safety standards, and sections 136 and 137 provide that a person must not supply goods or services where he or she has not complied with a relevant information standard.

Section 232 of the Australian Consumer Law provides that the court may grant an injunction restraining a person from carrying on a business.

Additionally, sections 47, 48, 49 and 50 of the Australian Consumer Law all place certain restrictions on the manner in which persons can engage in trade and commerce. Section 86 also provides that the supplier under an unsolicited agreement must not supply to the consumer under the agreement, or accept any payment, or require any payment in connection with those goods or services during the period of 10 business days starting from the day on which the agreement was made, which also impacts upon a person's ability to carry on his or her business. Section 93 restricts the supplier under an unsolicited agreement from enforcement of the agreement if a provision of division 2 of part 3-2 of the Australian Consumer Law has been contravened.

…

All of these sections may interfere with an individual's ability to carry on his or her business and related commercial enterprises, which could potentially limit an individual's right to freedom of expression, to the extent that such interferences restricted an individual's ability to communicate ideas and information.

Commercial expression has been found to be protected on the grounds that the right to freedom of expression does not apply solely to certain types of information or ideas or forms of expression (see *Markt Intern and Beermann v. Germany* (1989) 12 EHRR 161, paras 25-26). However, commercial expression is treated as being of less importance than either political or artistic expression. Restrictions on commercial expression will generally be subject to less scrutiny on the basis that commercial expression serves a private, rather than a public, interest.

In light of this, and the fact that the purpose of the above provisions is to protect consumers from dangerous goods or services, or from traders engaging in non-compliant trading activity, in my view the above provisions do not limit the right to freedom of expression. Rather, the provisions fall within the exceptions to the right in section 15(3)

of the charter, as reasonably necessary to respect the rights of other persons, or for the protection of public order.

[The HRA does not contain a provision equivalent to subsection 15(3) of the Charter. The matters mentioned in that provision would fall to be considered in the application of HRA section 28.]

The right to freedom of movement -- section 12 [HRA section 13]

Section 12 of the charter provides that every person lawfully within Victoria has the right to move freely within Victoria.

Section 172 of the Australian Consumer Law, which applies by virtue of clause 9 of the Bill, provides that a dealer commits an offence if the dealer calls on a person for the purpose of negotiating an unsolicited consumer agreement and does not leave the premises immediately on request of the occupier of the premises or the person with whom the negotiations were being conducted.

Given that section 172 relates to private premises, in my view it does not engage the right to freedom of movement.

The right to protection against self-incrimination -- sections 24(1) and 25(2)(k) [HRA subsection 21(1) and paragraph 22(2)(i)]

Section 25(2)(k) of the charter provides that a person who has been charged with a criminal offence has the right not to be compelled to testify against himself or herself or to confess guilt.

This right is also an aspect of the right to a fair trial protected by section 24 of the charter. The decision in *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 holds that this right, as protected by the charter, is at least as broad as the privilege against self-incrimination protected by the common law. It applies to protect a charged person against the admission in subsequent criminal proceedings of incriminatory material obtained under compulsion, regardless of whether the information was obtained prior to or subsequent to the charge being laid.

… Several sections of the Australian Consumer Law engage the right to protection against self-incrimination.

These include sections 205 (a person must comply with a substantiation notice unless the information or production of the document might tend to incriminate the person or expose the person to a penalty); 221 (a person who is given a substantiation notice must comply with it within the compliance period for the notice unless the information or production of a document might tend to incriminate the individual or to expose the individual to a penalty); and 225 (evidence of information given or evidence of the production of documents is not admissible in criminal proceedings against the individual if the individual previously gave the evidence or produced the documents in proceedings for an order under section 224 for a consumer protection breach and the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the consumer protection breach).

In my view, the protections contained in each of the above sections are sufficient to protect a person from being required to testify against himself or herself. Accordingly, these provisions do not limit the right to protection against self-incrimination in the charter.

Section 248 provides that a court may, on application of the regulator, make an order disqualifying a person from managing corporations for a period that the court considers is appropriate. Section 249 provides that a person cannot refuse to answer a question or refuse to produce a document on the basis that to do so would expose the person to an order under section 248. In my view, section 248 does not constitute a criminal penalty and therefore does not engage sections 24 and 25(2)(k) of the charter.

…

The right not to be punished more than once (section 26) [HRA section 24] and the right against retrospective criminal laws (section 27) [HRA section 25]

…

Sections 237 and 239 provide that a court may make compensation orders for persons who have suffered loss or damage due to conduct of another person who contravened a provision in chapters 2, 3 or 4, or by relying on an unfair contract term. An application can be made under either of these sections even if an enforcement proceeding has not been instituted (section 242). Section 243 provides for the types of orders which a court may make, including an order varying a contract, refusing to enforce the provisions of a contract and an order directing the respondent to pay the injured person the amount of the loss or damage (except if the order is to be made under section 239(1)).

Section 238 provides that if, in a proceeding instituted under a provision of chapter 4 or 5, a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of the conduct of another person who was engaged in a contravention of chapter 2, 3 or 4 or constitutes applying or relying on an unfair term of a contract, the court may make such orders as it thinks appropriate against the person.

Section 246 provides that a court may, on application of the regulator, make an order in relation to a person who has contravened chapter 2, 3 or 4 or who was involved in a contravention. The types of orders that can be made include an order directing the person to perform a service that is specified in the order, and that relates to the conduct, for the purpose of benefiting the community and an order directing the person to establish an education and training program for employees.

Section 247 provides that a court may, on application of a regulator, make an adverse publicity order in relation to a person who has contravened chapter 2, 3 or 4 or who has committed an offence against chapter 4.

Section 248 provides that a court may, on application of the regulator, make an order disqualifying a person from managing corporations for a period that the court considers is appropriate.

To the extent that the above provisions allow for the court to make an order following on from criminal proceedings under chapter 4 of the Australian Consumer Law, such orders will not constitute double punishment or amount to a retrospective application of criminal law since such orders will be made in civil proceedings and will not be punitive in nature.

The right to a fair hearing (section 24(1)) [HRA subsection 21(1)]

Under section 24(1) of the charter, a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right to a fair hearing includes a right to access a court.

…

Section 88 of the Australian Consumer Law, which will apply as Victorian law by virtue of clause 9 of the Bill, provides that if an unsolicited agreement is terminated in accordance with section 82, a person must not bring legal proceedings against the consumer.

Section 82 provides for the manner in which a consumer may terminate an unsolicited agreement, and imposes time limits for doing so.

A person will only be prevented from bringing legal proceedings in the limited circumstances of where an unsolicited agreement is terminated by a consumer within the specified time limits. Additionally, persons affected by this section will be engaged in trade and commerce and thus will be aware of the restrictions regarding making unsolicited agreements. Consequently, in my view, section 88 does not limit the right to a fair hearing.

Sections 143, 236 and 273 of the Australian Consumer Law

Section 143 of the Australian Consumer Law provides that a person may commence a defective goods action at any time within three years after the time the person became aware, or ought reasonably became aware, of the alleged loss or damage; the safety defect of the goods; and the identity of the person who manufactured the goods.

Section 236 provides that an action under this section may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued.

Section 239(6) provides that an action under this section may be made at any time within six years after the day on which the cause of action that relates to the contravening conduct accrued or the relevant declaration is made.

Section 273 provides that an affected person may commence an action for damages under division 2 of part 5-4 at any time within three years after the day on which the affected person first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates has not been complied with.

> The imposition of these time limits could impact on a person's right of access to a court. However, the right to access the courts is not absolute, and may legitimately be limited by the needs and resources of the community and individuals (*Kay v. Attorney-General* (Unreported, Court of Appeal, 3726/2009, 19 May 2009)).
>
> In my view, these sections do not unreasonably restrict the right of access to courts, as the time limitations are reasonable in the circumstances and necessary to ensure certainty.
>
> …

The Explanatory Statement references the strict liability offences in the ACL

Without identifying them, the Explanatory Statement notes that the majority of offences created by the ACL are strict liability offences, and noting that such offences engage HRA subsection 22(1) (the presumption of innocence), goes on to say:

> Strict liability offences engage section 22(1) of the *Human Rights Act 2004*, the right to be presumed innocent.
>
> Most[15] rights contained with the *Human Rights Act 2004* are not considered absolute. Section 28 of the Act provides that human rights may be subject to reasonable limitations that can be demonstrably justified. That is, the limitations are proportionate having considered the relevant factors as set out in section 28(2).
>
> The purpose of the ACL is to afford protection to consumers against unfair practices and ensure safety of consumer goods. The offences are contained within legislation that is widely known. It is reasonable to expect that a person operating within the scope of the ACL ought to be aware of their legal obligations. Given the regulatory nature of the ACL and the protection it is seeking to afford consumers, the limitations on human rights contained within the Bill are considered to be proportionate; that is, they are reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The Committee notes that no attempt is made to consider each of the factors stated in subsection 28(2). The Assembly may however consider that this is an adequate justification.

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

FIREARMS AMENDMENT BILL 2010

This Bill would amend the *Firearms Tax Act 1996* to provide for the temporary authorisation, by the Registrar of Firearms, of a resident of another State or Territory, who holds an interstate licence that corresponds to a category D licence, and who is employed by or in, or authorised by, a government agency for the purpose of controlling vertebrate pest animals in the ACT, to possess or use, for this purpose, a firearm of a kind to which the corresponding local licence applies.

[15] The Committee has noted on other occasions that it is clear that *all* of the HRA rights are not absolute, in that a law derogating from any one of the rights may be justifiable under section 28.

Report under section 38 of the *Human Rights Act 2004*
Do any the clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers"?

Upon the individual concerned telling the registrar in writing that he or she intends to come to the ACT for the relevant purpose, the registrar must grant an authority of the kind described above (proposed subsection 140A(2) – see clause 4 of the Bill). This is, however, qualified by proposed subsection 140A(3), which provides in paragraph 140A(3)(a) that the registrar must refuse authorisation if not satisfied that the individual has a special need to possess or use a category D firearm for the relevant purpose, and that the special need cannot be met in any other way.

In addition, the registrar must refuse authorisation if "the Minister does not approve the authorisation in writing". The Committee notes that this discretion is not expressly[16] confined in any way, and thus calls for comment under the term of reference noted above.

The Committee also notes that an authorisation is subject to compliance with any condition prescribed by regulation; or "that the Minister believes on reasonable grounds is in the public interest, stated in the approval" (proposed subsection 140A(4). While this formulation leaves a large measure of discretion to the Minister, it does state some limit to the Minister's power, and the question arises as to why a similar limit could not be placed on the Minister's power to refuse to permit the grant of an authorisation.

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

PAYROLL TAX AMENDMENT BILL 2010

This Bill would amend the *Payroll Tax Act 1987* to insert a provision that the threshold amount of $950,000 as published in schedule 2 of disallowable instrument DI2000-190, be replaced with the threshold amount of $1,250,000 for the financial year of 2001-02.

Does a clause of the Bill "unduly trespass on personal rights and liberties"?

The Committee notes that proposed section 102 of the Act would provide that the determination DI2000-190

> is taken to be, ***and always have been***, valid as if—
>
> (a) the amount of $950 000 in the determination, schedule 2 (Payroll Tax Rate for the 2001-2002 Financial Year) had been replaced with the amount of $1 250 000; and
>
> (b) a valid instrument determining the amounts and rates for the Act, sections 10 to 13 and section 16, stated in the determination, and modified by paragraph (a) had been properly [made, and notified, and laid before the Legislative Assembly in the respects stated] (emphasis added).

[16] The Committee has noted often that it is undesirable to leave it to the courts to spell out implied limitations to administrative powers; *Scrutiny Report No 25* of the *7th Assembly*, at 5, concerning the Liquor Bill 2010.

The Committee considers that the Minister should advise the Assembly whether the effect of this validation might be to affect adversely the interests of any person, and, if so, to justify this result.

PLANNING AND DEVELOPMENT (ENVIRONMENTAL IMPACT STATEMENTS) AMENDMENT BILL 2010

This Bill would amend the *Planning and Development Act 2007*, primarily to identify the circumstances in which an application for development will create the need for the preparation of an environmental impact statement (EIS) as a step in the consideration of the application. A central purpose of the Bill is to enable projects which are unlikely to have a significant environmental impact to be assessed in the merit track rather than the impact track.

Do any the clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers"?

Do any the clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions"?

The Committee offers a comment on the pre-application screening process to determine if certain matters listed in schedule 4 (development proposals requiring an EIS) can be taken out of the impact track and assessed in the merit track. The matters considered are those in respect of which a relevant agency (that is, is either, as appropriate to the particular item, the conservator of flora and fauna, or the heritage council) may provide an opinion that the proposed development is not likely to have a significant adverse environmental impact. The opinion must be sought and obtained by the proponent prior to the submission of an application for development approval.

These edited selections from the Explanatory Statement provide background.

> 6. This bill is about the identification of development applications that must be assessed in the impact assessment track. Development proposals which would require assessment in the impact track are listed in schedule 4 of the Act. The bill amends this schedule; specifically it deletes Parts 4.2 and 4.3 of the schedule and substitutes new parts 4.2, and 4.3. …
>
> 9. The amendments are aimed at ensuring that only development proposals which are likely to have a significant adverse impact on the environment will require an EIS. To this end, the bill amends schedule 4 and it does so through:
>
> …
>
> - the use of the concept of *significant adverse environmental impact* including as appropriate provisions to permit the proponent to obtain an opinion (an *environmental significance opinion*) from the relevant agency as to whether a proposal is *not* likely to have a significant adverse environmental impact; … .

18. The amendments will provide the flexibility for some development proposals which fall under schedule 4 to be assessed in the merit track, where the relevant agency provides an opinion that the proposal is not likely to result in a significant adverse environmental impact. …

[Items 3(c) and (d) in part 4.2, and items 1, 2, 3 and 6 in part 4.3 of schedule 4 confer on the "relevant agency" – which is either, as appropriate to the particular item, the conservator of flora and fauna, or the heritage council – the power to provide the opinion.]

20. The bill provides a mechanism for the proponent to apply to the relevant agency for an opinion that a development proposal is not likely to have a significant environmental impact. The relevant agency must only provide such an opinion if it considers that the proposal is not likely to have a significant adverse environmental impact, otherwise it must reject the application (i.e. the default position is always that the relevant development proposal remains one that must be assessed in the impact assessment track). In considering an application the onus is on the proponent to provide a reasonable argument backed by evidence as to why the proposal will not have a significant adverse impact.

The mechanism for the proponent to apply to the relevant agency for an opinion is to be found in clause 9 of the Bill, proposing sections 138AA to 138AD. These edited selections from the Explanatory Statement outline the essential features of the mechanism.

50. New s138AAA (2) permits applications to be made to the relevant agency for an opinion that a development proposal is not likely to have a significant adverse environmental impact. This can be used to have the development application assessed in the merit track under new s139 (2) (m). …

53. The relevant agency must only give an opinion if it considers that the proposal is not likely to have a significant adverse environmental impact (s138AB (4) (a)) otherwise it must reject the application. If it rejects an application the relevant authority must give a written notice of this to both the applicant and ACTPLA (s138AB (5)). The meaning of significant adverse environmental impact is set out in new s124A. …

58. If the relevant agency provides an opinion to an applicant under s138AB (4) it must at the same time give a copy of the opinion to ACTPLA. (s138AD (2)).

59. When ACTPLA receives a copy of an opinion from the relevant agency ACTPLA must:

- prepare a notice which includes the text of the opinion (s138AD(3)); and
- place a link to the notice on its website (s138AD(5));

60. The notice is a notifiable instrument (s138AD (4)), and both the notice and the environmental significance opinion expire 18 months from the date the notice is notified. (s138AD (6)).

Under the two terms of reference of the Committee referred to above, there arise a number of questions that go to the issue of whether there is a sufficient level of accountability of an opinion that is given by the relevant agency. In particular, should the Bill:

- require the agency to publicly notify any application for assessment in the merit track on the ground that the likely impact of the proposal will not be significantly adverse;
- provide an opportunity for public comment on this application and the likely impact of the proposal;
- require the agency to take into account public representations when making its decision whether to accept or refuse the application;
- set out the factors which the relevant agency will take into account when deciding whether to accept or refuse an application;
- provide a statement of reasons for the decision; and
- allow any person to seek merits review of the agency's decision to accept or refuse an application.

The Committee does not assume that any of these matters are not addressed in the Bill, (although it appears that there is no amendment to provide for merits review).

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2010-270 being the Juries (Payment) Determination 2010 made under section 51 of the *Juries Act 1967* **determines the scale of payments to jurors.**

Disallowable Instrument DI2010-275 being the Planning and Development (Change of Use Charge—GP Practice Clinics) Policy Direction 2010 (No. 1) made under section 177 of the *Planning and Development Regulation 2008* **determines the circumstances in which the Planning and Land Authority must remit 100% of the change of use charge paid for a lease variation relating to GP Practice Clinics.**

Disallowable Instrument DI2010-277 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2010 (No. 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **revokes DI2009-59 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2010-279 being the Utilities Water Conservation Measures Approval 2010 made under section 149B of the *Utilities Act 2000* **and Part 2, section 5 of the** *Utilities (Water Conservation) Regulation 2006* **revokes DI2006-59 and approves the Water Conservation Measures developed by ACTEW Corporation.**

Disallowable Instrument DI2010-280 being the Planning and Development (Jerrabomberra Wetlands Nature Reserve) Plan of Management 2010 made under section 330 of the *Planning and Development Act 2007* **approves the Jerrabomberra Wetlands Nature Reserve Plan of Management 2010.**

Disallowable Instrument DI2010-282 being the Road Transport (General) Application of Road Transport Legislation Declaration 2010 (No. 8) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2010 TRUSSME National Capital Rally.**

Disallowable Instruments—Comment

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

Exemption from the requirements of the Government Agencies (Campaign Advertising) Act 2009

Disallowable Instrument DI2010-272 being the Government Agencies (Campaign Advertising) Exemption 2010 (No. 4) made under section 23 of the *Government Agencies (Campaign Advertising) Act 2009* **exempts the *Save Water for Life: 'Get wise''* advertising campaign from the Act.**

The Committee notes that this instrument exempts a specified advertising campaign from the requirements of the *Government Agencies (Campaign Advertising) Act 2009*. The Committee notes that the Explanatory Statement for the instrument provides the following explanation for the exemption:

> The *Government Agencies (Campaign Advertising) Act 2009*(the Act) *Section 23 (1) (2) (c)* states the Minister may exempt a campaign from the Act only if satisfied it is appropriate because of other extraordinary circumstances.
>
> The failure of the Legislative Assembly to appoint an independent reviewer in accordance with the Act is an extraordinary circumstance and requires that any ACT Government advertising campaign exceeding $40,000 will require an exemption from the Minister before proceeding.
>
> In accordance with the Act I exempt the *Save Water for Life: 'Get wise'* advertising campaign and notify the Legislative Assembly in writing through this instrument.
>
> The *Save Water for Life: 'Get wise'* advertising campaign is an annual education program promoting sustainable water use practises. *Save Water for Life* runs most intensively across the ACT media during spring and summer when water use is at its highest. The campaign particularly targets garden watering, the area where Canberrans can make the biggest water savings by employing a commonsense approach.
>
> *Save Water for Life* comprises compliance and information components. It informs the community of what applies under water restrictions and of applicable fines, gives practical information on how to save water and meet seasonal water saving targets, and encourages long-term behavioural change.
>
> This year, the campaign will urge people to 'Get wise', particularly emphasising the importance of making water-wise choices in the garden.

The campaign has been scrutinised by an independent consultant and complies with the Act.

The Committee makes no further comment on this instrument.

This comment does not require a response from the Minister.

Exemption from the requirements of the Government Agencies (Campaign Advertising) Act 2009

Disallowable Instrument DI2010-278 being the Government Agencies (Campaign Advertising) Exemption 2010 (No. 5) made under section 23 of the *Government Agencies (Campaign Advertising) Act 2009* **exempts the ACTSmart *Business and Office* advertising campaign from the Act.**

The *Government Agencies (Campaign Advertising) Act 2009*(the Act) *Section 23 (1) (2) (c)* states the Minister may exempt a campaign from the Act only if satisfied it is appropriate because of other extraordinary circumstances.

The failure of the Legislative Assembly to appoint an independent reviewer in accordance with the Act is an extraordinary circumstance and requires that any ACT Government advertising campaign exceeding $40,000 will require an exemption from the Minister before proceeding.

Section 3 of the instrument exempts the ACTSmart *Business and Office* advertising campaign from the operation of the Act.

The ACTSmart *Business and Office* advertising campaign assists and educates organisations to implement recycling. The campaign's purpose is to build awareness of the programs in the broader community and enhance understanding of the programs in the business/office community, as measured through anecdotal feedback and/or surveys and, to increase the number of accredited business by 30 per cent by 30 June 2011.

The campaign has been scrutinised by an independent consultant and complies with the Act.

The Committee makes no further comment on this instrument.

This comment does not require a response from the Minister.

Minor drafting issues

Disallowable Instrument DI2010-274 being the Health (Fees) Determination 2010 (No. 4) made under section 192 of the *Health Act 1993* **revokes DI2010-179 and determines fees payable for the purposes of the Act.**

The Committee notes that this instrument revokes and re-makes the *Health (Fees) Determination 2010 (No. 3)* (DI2010-179), which was notified on 5 August 2010. The Explanatory Statement for this instrument states:

The Determination comes into effect on the day after notification and reproduces Determination DI2010-179 except for:

- an amendment to the definition of 'Eligible Tuberculosis Patient' and 'Nursing Home Type Patient';
- an amendment to the wording of clause 5 regarding the free health services tuberculosis patients;

- inclusion of a new clause (9) regarding non-charging for involuntary admissions;
- re-number of clause 9 to 10; and
- the date of effect.

As indicated above, the two (new) definitions set out below are included in this instrument:

> ***Eligible Tuberculosis Patient*** means a person who has is suspected of or has been diagnosed with active tuberculosis by a medical specialist based on the patient's presenting signs, symptoms and the results of investigations;
>
> **……..**
>
> **Nursing-home type patient** means a patient who has been in one or more approved hospitals (public or private) for a continuous period of more than 35 days, with a maximum break of seven days, and who is not deemed to be receiving acute care;

In relation to the first definition, the Committee notes that, while the definition is capitalised, the term appears as "eligible tuberculosis patient" (ie without capitals) in the text of the instrument.

In relation to the second definition, the Committee notes that, unlike the other definitions in subsection 4(1) of the instrument, the definition is bolded but not italicised.

Minor drafting issue

Disallowable Instrument DI2010-281 being the Road Transport (Offences) (Declaration of Holiday Period) Determination 2010 (No. 1) made under paragraph 22(1)(b)(v) of the *Planning and Development Act 2007* **declares Tuesday, 26 April 2011 to be a holiday period.**

The Committee notes that both the Explanatory Statement for this instrument and the instrument itself refer to it having been made under "subsection 22(1)(b)(v)". The Committee notes that, under the naming conventions used in relation to legislation in the ACT, the reference should either be to *section* 22(1)(b)(v) or *subparagraph* 22(1)(b)(v).

Subordinate Laws—No comment

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

Subordinate Law SL2010-41 being the Criminal Code Amendment Regulation 2010 (No. 1) made under the *Criminal Code 2002* **amends the *Criminal Code Regulation 2005* to substitute new definitions of "controlled drugs" and "controlled precursors".**

Subordinate Law SL2010-42 being the Magistrates Court (Dangerous Goods Road Transport Infringement Notices) Regulation 2010 made under the *Magistrates Court Act 1930* **creates a system of infringement notices for certain offences against the dangerous goods legislation.**

Subordinate Law—Comment

The Committee has examined the following subordinate law and offers the following comment on it:

Minor drafting issue

Subordinate Law SL2010-43 being the Health Professionals Amendment Regulation 2010 (No. 2) made under the *Health Professionals Act 2004* **amends the *Health Professionals Regulation 2004* for the purpose of deregulating dental technicians.**

The Committee notes that the cover page of the Explanatory Statement for this instrument refers to the "Health Professionals Regulation Amendment 2010 (No. 2), rather that the "Health Professionals Amendment Regulation 2010 (No. 2)". The Committee also notes, however, that the error is not repeated in the body of the Explanatory Statement.

REGULATORY IMPACT STATEMENT

The Committee has examined a regulatory impact statement for the following subordinate law and offers the following comments on it.

Failure to address the requirements of section 35 of the Legislation Act 2001

Disallowable Instrument DI2010-279 being the Utilities Water Conservation Measures Approval 2010 made under section 149B of the *Utilities Act 2000* **and Part 2, section 5 of the** *Utilities (Water Conservation) Regulation 2006* **revokes DI2006-59 and approves the Water Conservation Measures developed by ACTEW Corporation.**

The Committee notes that section 35 of the Legislation Act 2001 sets out the requirements for the content of regulatory impact statements. It provides:

> **35 Content of regulatory impact statements**
>
> A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) must include the following information about the proposed law in clear and precise language:
>
> (a) the authorising law;
>
> (b) a brief statement of the policy objectives of the proposed law and the reasons for them;
>
> (c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
>
> (d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
>
> (e) if the proposed law is inconsistent with the policy objectives of another territory law—
>
> (i) a brief explanation of the relationship with the other law; and
>
> (ii) a brief explanation for the inconsistency;
>
> (f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
>
> (g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs; and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

The Committee notes that the regulatory impact statement for this instrument contains no assessment of the consistency of the proposed law with the scrutiny committee principles. Nor does the Explanatory Statement for the instrument.

The Committee draws the Legislative Assembly's attention to this regulatory impact statement, under principle (b) of the Committee's terms of reference, as it does not meet the technical or stylistic standards expected by the Committee.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Transport, dated 17 November 2010, in relation to comments made in Scrutiny Report 30 concerning the Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2010.
- The Minister for Industrial Relations, dated 17 November 2010, in relation to comments made in Scrutiny Report 29 concerning Disallowable Instruments:
  - DI2010-210 being the Work Safety Council (Member) Appointment 2010 (No. 1);
  - DI2010-211 being the Work Safety Council (Employee Representative) Appointment 2010 (No. 1);
  - DI2010-212 being the Work Safety Council (Employee Representative) Appointment 2010 (No. 2);
  - DI2010-213 being the Work Safety Council (Employee Representative) Appointment 2010 (No. 3);
  - DI2010-214 being the Work Safety Council (Employee Representative) Appointment 2010 (No. 4);
  - DI2010-215 being the Work Safety Council (Acting Employee Representative) Appointment 2010 (No. 1);
  - DI2010-216 being the Work Safety Council (Acting Employee Representative) Appointment 2010 (No. 2);
  - DI2010-217 being the Work Safety Council (Employer Representative) Appointment 2010 (No. 1);
  - DI2010-218 being the Work Safety Council (Employer Representative) Appointment 2010 (No. 2);
  - DI2010-219 being the Work Safety Council (Employer Representative) Appointment 2010 (No. 3);

  - DI2010-220 being the Work Safety Council (Acting Employer Representative) Appointment 2010 (No. 1);
  - DI2010-221 being the Work Safety Council (Acting Employer Representative) Appointment 2010 (No. 2);
  - DI2010-222 being the Work Safety Council (Member) Appointment 2010 (No. 2);
  - DI2010-223 being the Work Safety Council (Member) Appointment 2010 (No. 3);
  - DI2010-241 being the Work Safety (National Standard for Occupational Noise) Code of Practice 2010; and
  - DI2010-242 being the Work Safety (National Code of Practice for Noise Management and Protection of Hearing at Work) Code of Practice 2010.

- The Treasurer, dated 17 November 2010, in relation to comments made in Scrutiny Report 29 concerning Disallowable Instrument DI2010-196, being the Taxation Administration (Amounts Payable—Land Rent) Determination 2010 (No. 1).
- The Attorney-General, dated 18 November 2010, in relation to comments made in Scrutiny Report 29 concerning:
  - Disallowable Instrument DI2010-273, being the Liquor (Fees) Determination 2010 (No. 1); and
  - Subordinate Law SL2010-40, being the Liquor Regulation 2010.
- The Attorney-General, dated 18 November 2010, in relation to comments made in Scrutiny Report 28 concerning Disallowable Instrument DI2010-191, being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2010.
- The Minister for the Environment, Climate Change and Water, dated 1 December 2010, in relation to comments made in Scrutiny Report 29 concerning Disallowable Instrument DI2010-248, being the Fisheries Prohibition and Declaration 2010 (No. 1).
- The Minister for the Environment, Climate Change and Water, dated 2 December 2010, in relation to comments made in Scrutiny Report 30 concerning the Plastic Shopping Bags Ban Bill 2010.

The Committee wishes to thank the Minister for Transport, the Minister for Industrial Relations, the Treasurer, the Attorney-General and the Minister for the Environment, Climate Change and Water for their helpful responses.

Vicki Dunne, MLA
Chair

December 2010

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

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008
Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009
Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009
Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Report 10, dated 10 August 2009
Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Report 11, dated 24 August 2009
Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Report 14, dated 9 November 2009
Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)

Report 18, dated 1 February 2010
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010
Education (Suspensions) Amendment Bill 2010 (PMB)

Bills/Subordinate Legislation

Report 22, dated 27 April 2010
Infrastructure Canberra Bill 2010 (PMB)
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010

Report 27, dated 20 September 2010
Children and Young People (Death Review) Amendment Bill 2010 (PMB)

Report 29, dated 25 October 2010
Disallowable Instrument DI2010-202 - Road Transport (Public Passenger Services) (Minimum Service Standards—Taxi Network) Approval 2010 (No. 1)
Disallowable Instrument DI2010-224 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 8)
Disallowable Instrument DI2010-265 - Plant Diseases (Phylloxera) Prohibition 2010 (No. 1)

Report 30, dated 15 November 2010
Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)
Discrimination Amendment Bill 2010 (PMB)

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

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

Dear Mrs ~~Dunne~~ Vicki

Thank you for your Scrutiny of Bills report No.29 of 25 October 2010. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on disallowable instruments made under the *Work Safety Act 2008.*

Work Safety Council – Appointment of Acting Members

In relation to Disallowable Instruments Nos. DI2010-215 through to 219 and DI2010-220 and 221, the Committee notes that the appointment of Acting Members of the Council have been made so that Acting Members of the Council can fulfill the role of any member representing the interests of the same class of persons. In relation to these appointments, the Committee has queried whether the power to make acting appointments has been correctly exercised as they have not been made in relation to particular substantive appointments.

As noted by the Committee, the drafting of section 209(1) of the *Legislation Act 2001* uses the singular form of particular terms, however, this provision must be read in light of section 145 of the same Act, which reads:

> ***145 Gender and number***
>
> *In an Act or statutory instrument—*
> *(a) words indicating a gender include every other gender; and*
> *(b) words in the singular number include the plural and words in the plural number include the singular.*

Given the operation of section 209(1) in light of section 145, acting appointments need not be made only in relation to particular substantive appointments. That said, I also note the Committee's concern that the explanatory statements made in relation to each acting appointment do not clearly reflect their intended operation. The Committee's comments will be taken into account and, in future, instruments and explanatory memoranda will be clearer in respect of this issue.

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Work Safety Act 2008 – Making of Codes of Practice on Noise

The Committee has requested advice in respect of the relationship between Codes of Practice made under the *Work Safety Act 2008* by Disallowable Instruments Nos. DI2010-241 and 242.

The *National Standard for Occupational Noise* (2000) is designed to significantly reduce the incidence and severity of occupational noise-induced hearing loss. The Standard sets out a framework for the achievement of this goal, including a national exposure standard for noise in the occupational environment. The *National Code of Practice for Noise Management and Protection of Hearing at Work* (2004) complements the National Standard by providing practical guidance on how compliance with the National Standard can be achieved.

Again, I thank the Committee for its Review.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Industrial Relations
17.11.10

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for the Committee Report No.30 and the comments made by the Committee in relation to the Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2010.

Application of different levels of alcohol concentration in the blood to special drivers as compared to other drivers

The Committee referred to the amendments that change the current prescribed concentration of alcohol for special drivers from 0.02g to 0.0g. The Committee stated:

> 'This change appears to engage the 'equal protection of the law without discrimination' element of HRA subsection 8(3). The issue then is whether the discrimination involved is justifiable under HRA section 28. The Explanatory Statement makes no mention of these matters, but does, in a comment to clause 6, offer reasons for creating a category of 'special driver'. The Presentation Speech also addresses the issue.
>
> **Notwithstanding that the HRA issues are not addressed specifically in the Explanatory Statement, the Committee does not consider that there is a question of the compatibility of these changes with the HRA.'**

The Government notes that the Act already provided for a different BAC for special drivers from that applying to other drivers. The Bill merely altered the applicable alcohol concentration and amended the categories of special drivers. While it is true that the Act - like other parts of the wider 'licensing' scheme for road users that comprise the whole of the ACT road transport legislation - draws distinctions between different categories of drivers, those differences do not necessarily amount to 'discrimination' as that term is generally understood in the human rights context.

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The requirement that a police officer suspend a person's licence where the officer believes on reasonable grounds that a person has committed an immediate suspension offence

The Committee has expressed the opinion that the immediate licence suspension provisions in new section 61B may engage the right to a fair trial: section 21(1) of the *Human Rights Act 2004*. This section provides that:

> 21 (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The Committee stated (at page 11):

> 'On its face, subclause 61B (1) requires a police officer to determine that a person *has committed* an immediate suspension offence; that is, in effect, to make a determination of guilt on a criminal charge. Given that penalties follow on this determination, it appears that there is a serious issue as to whether this provision is compatible with HRA subsection 21(1).'

The Committee appears to be suggesting that by using the words 'has committed' in proposed section 61B (1), the Bill is attempting give a police office the judicial function of determining whether or not a person has committed an offence. With respect, that is neither the purpose nor the effect of this provision. Contrary to what the Committee has suggested, section 61B neither purports nor requires the police officer to *determine* that the person has committed the offence. Instead, it applies where a police officer *believes on reasonable grounds* that a person has committed an offence. A belief is not the same as a determination of guilt. It should be noted that the driver's guilt or innocence of the relevant offence will ultimately be determined by a court. The issuing of an immediate suspension notice to the driver has no bearing on the outcome of those proceedings.

The Committee observed (at page 12) that with the exception of Victoria, there is no other Australian human rights jurisdiction. It may therefore be useful to consider the Canadian experience, as that country has a comparable human rights framework and also has immediate licence suspension schemes. These schemes, known in Canada as administrative driver license suspensions (ADLS), exist in every Canadian province. Despite several Charter of Rights challenges to Canadian drink driving laws, including breath testing provisions, the ADLS schemes have not been found to be inconsistent with section 11(d) of the Canadian *Charter of Rights and Freedoms*, which is the Canadian equivalent to section 21 (1) of the *Human Rights Act 2004*.

Section 48 of the *Highway Traffic Act* of Ontario is headed 'Administrative licence suspension for blood alcohol concentration above .05'. This provision applies where a person records a BAC of .05 or higher after a breath screening test. It should be noted that it is not actually an offence to drive with a BAC of .05 in Canada. A BAC of .05 to .08 is in the what is termed the 'warn' range - noting that the substantive drink driving offences are not committed unless a person records a BAC of .08 or higher. The result is that under Ontario's laws a person can have his or her licence suspended while undertaking what is, from the criminal justice perspective, a lawful activity. Section 48(4) requires a driver who records a reading of .05 or higher to surrender the person's

licence for the relevant period. The length of the suspension depends on whether the person has previously recorded a BAC of over .05. All review and appeal rights are expressly excluded. Section 48 (9) provides:

> 'There is no appeal from, or right to be heard before, the suspension of a driver's licence under this section.'

Significantly, the effect of section 48 (9) is to make the application of the sanction wholly dependent on the reading from the breath test required by the police officer. By contrast, the ACT's scheme provides for a stay application to be made to the Magistrates Court.

The Committee queried whether another form of review had been considered and indicated that the Explanatory Statement was silent on this matter. It may be that the Committtee inadvertently overlooked the explanation given on page 46 of the Explanatory Statement:

> 'New section 61E deals with applications to the Magistrates Court for an order to stay the operation of a suspension notice. The stay order mechanism has been included rather than a mechanism for internal review by a senior police officer because, given the statistically greater road safety risk posed by higher range and repeat drink drivers, it is considered more appropriate that a decision to return a driver licence to a person with a previous poor road safety record is taken by a judicial officer following a transparent judicial process than by a police officer following an internal administrative review.'

Strict liability offence - section 19 - possibility of imprisonment

The Committee has expressed concern that the offence in section 19, which is an offence of strict liability, includes imprisonment as a sentencing option in certain circumstances.

As the Explanatory Statement notes, the offence in section 19 of the *Road Transport (Alcohol and Drugs) Act 1977* is being remade for technical reasons following changes to the concept of prescribed concentration of alcohol. That offence has always been interpreted by the ACT Courts as a strict or even absolute liability offence: *Haussman* v *Shute* [2006] ACTSC 54, as have similar offences in other Australian jurisdictions. This has been the case notwithstanding that imprisonment was originally a sentencing option for all section 19 offenders, from under section 28 of the original *Motor Traffic (Alcohol and Drugs) Ordinance 1977* until 1997. Although not frequently used, imprisonment continues to be a sentencing option for high-range section 19 offenders under section 26 of the current Act.

It should be remembered that the risks of drink driving are well documented and have been well publicised. These risks increase exponentially with a rise in a person's alcohol concentration - by the time that a person has an alcohol concentration of 0.1 or higher, the person's risk of involvement in any accident is considerably greater than that of a sober driver under the same road conditions, and their risk of involvement in a fatal accident, either as a single vehicle accident or otherwise, is similarly far greater. Attached for the Committee's reference is a copy of the standard research reference work on driver fatalities associated with increases in BAC, which was sponsored by the United States Department of Transportation National Highway Safety Administration, entitled

'*Relative Risk of Fatal Crash Involvement by BAC, Age and Gender*', 2000, DOT HS 809 050. As this document indicates, the data from the study shows conclusively that drivers with a BAC towards 0.1 or higher clearly pose highly elevated risks both to themselves and to other road users.

It should be noted that imprisonment is a sentencing option that is available only for higher range offenders. These offenders statistically have a higher crash risk than lower range offenders, meaning that their conduct is inherently more dangerous both to themselves and to other road users. In this context, it is difficult to conceive what scope there could be for a 'due diligence' defence as proposed by the Committee. What steps could possibly constitute 'due diligence' so as to exculpate a driver with an alcohol concentration in the higher range who has nevertheless decided to drive? My department is not aware of any instant remedy for alcohol intoxication that makes it safe for the person to drive notwithstanding the person has a high-range alcohol concentration. The only safe option for such a person is not driving.

Accordingly, in remaking the section 19 offence, the Government does not intend either to reduce the sentencing options available to the Court to remove the option of imprisonment, or alter the elements of the offence so as to introduce a fault element to replace strict liability or to introduce a due diligence defence. To do any of these things could signal to the community that the Assembly is softening its attitude towards drink driving and undermine the reforms in the Bill. The same comments apply equally in relation to the new offence of driving with a prescribed drug in blood or oral fluid.

Evidentiary provisions

The Committee has raised an issue in relation to proposed section 20(1B) of the Road Transport (Alcohol and Drugs) Act 1977, which would be inserted by clause 42 of the Bill. Subsection 20(1) of the Act creates the offence of driving under the influence of drugs. The Committee is concerned that the words 'taken to have' in proposed section 20 (1B) may indicate that the defendant could not challenge the accuracy of the analysis. The Government certainly did not intend to preclude the possibility of challenges to an analysis and will move amendments to address the Committee's concerns.

Evidence for insurance purposes

At page 15 of the Report, the Committee expressed concern about clause 71 of the Bill and suggested that there is an issue regarding the compatibility of proposed section 41A with the HRA right to a fair trial (subsection 21(1)). The Committee stated:

> "To deny a party the opportunity to adduce evidence relevant to the proof of its case, or to the disproof of an opponent's case, is apparently unfair. A section 28 justification for this provision is required.
>
> **The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.**

It is possible that the Committee may have misunderstood the purpose or effect of existing section 41A. This section protects the interests of people from whom samples are taken under the Act, so that evidence derived from samples of blood, breath or body

taken under the Act cannot be used against tested persons in insurance proceedings. Essentially, it recognises that samples taken from people under the Act are exceptions to the common law privilege against self-incrimination. Accordingly, it ensures that evidence from those samples should be used only in relation to criminal proceedings relating to the Act, not in civil matters such as insurance litigation. As the Explanatory Statement noted, similar provisions exist in other jurisdictions' legislation, for this same protective purpose.

As presently drafted, section 41A of the *Road Transport (Alcohol and Drugs) Act 1977* refers to only evidence about alcohol-related tests. The amendments in clause 71 include references to evidence about the presence of prescribed drugs and associated drug driving offences. The amendments are intended to ensure that people who undergo drug tests are afforded the same level of protection as people who undergo alcohol-related tests.

The Government does not believe removing this important protection for tested persons in order to allow insurance companies access to evidence derived from these samples is appropriate, given that there are likely to be other ways in which relevant evidence can be obtained for insurance proceedings (including the direct examination of witnesses, published judgements and subpoenaed documents). The Government also notes that insurance companies are not entitled to the protection of the *Human Rights Act 2004*, as section 6 of that Act explains that it applies only to natural persons. Therefore, insurance companies do not have a right to a fair trial that requires protection under that Act. It is also difficult to see why third parties should be regarded as entitled to access what is, in essence, personal information relating to the tested person, particularly where that information is obtained in circumstances involving an exception to self-incrimination.

The Government further notes that clause 71 is entirely consistent with the policy intention of section 18B of the Act, inserted by Assembly amendments in June 2010. This provision restricts the purposes for which samples taken under the Act can be used, to prevent misuse or inappropriate disclosure of the results of analysis. Using evidence derived from samples taken under the Act for insurance purposes would be inconsistent with the intention of section 18B.

Exemption from alcohol awareness course

The Committee commented on 'an apparent contradiction between the provisions of the Bill and the statement in the Explanatory Statement' relating to clause 126 of the Bill. The Government has reviewed the Explanatory Statement, and agrees that it could have been phrased more precisely to reflect the wording used in the Bill.

I trust the above information assists the Committee.

Yours sincerely

Jon Stanhope MLA
Minister for Transport
17 NOV 2010

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

THE OFFICE OF
27 NOV 2010
VICKI DUNNE

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 29 of 25 October 2010 in relation to Disallowable Instrument DI2010–196, being the *Taxation Administration (Amounts Payable – Land Rent) Determination 2010 (No.1)* (the instrument).

The Committee requested advice as to the application of the general prohibition on subdelegation to this instrument.

The Minister has exercised the power to determine the 'relevant percentage' in the instrument as the annual percentage change in the data that is reported by the Australian Bureau of Statistics (ABS), not the actual data itself. It is not considered that the Minister's power is subdelegated to the ABS, but that the data reported by the ABS is only referenced by the instrument, which gives effect to a calculation to derive the 'relevant percentage' in the instrument.

However, while I do not consider that a subdelegation exists in DI2010–196, I do propose to clarify the instrument to specify the 'relevant percentage' rather than how it is derived, which would require the updating of the instrument on an annual basis.

The Committee also requested advice as to the application of section 47 of the Legislation Act to DI2010-196.

The instrument only involves a reference to a determination by the ABS and does not involve an incorporation of the determination as an instrument within the meaning of section 47. The annual percentage change in Average Weekly Earnings is a calculation carried out by my Department using the referenced ABS data. The reference to the ABS was included in the instrument rather than an actual figure so that the requirement to make a new instrument year after year was eliminated.

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As mentioned above, the 'relevant percentage' determination will be clarified in the instrument to remove any doubt as to the application of section 47 of the legislation Act.

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

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Treasurer
17.11.10

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 29 of 25 October 2010. I offer the following response in relation to the Committee's comments on the *Liquor (Fees) Determination 2010* and the *Liquor Regulation 2010.*

Liquor (Fees) Determination 2010 (No.1)
In response to the Committee's query about the meaning of the statement in the explanatory statement for the Determination that "GST on liquor fees under the *Liquor Act 2010* is exempt" I am happy to provide the Committee with the following explanation.

The Commonwealth Government, the States and Territories are all required to list those taxes, compulsory fees and charges, the payment of which should not be subject to GST. The Division 81 Determination is issued by the Commonwealth Treasurer twice yearly under the *A New Tax System (Goods and Services Tax) Act 1999 (Cwlth).*

The Division 81 Determination is based on the underlying principle that compulsory taxes and regulatory charges should not be subject to GST. Those taxes, fees and charges that are effectively payments for a service should not be on the Determination. Also, fines and penalties are not subject to GST and therefore do not require listing on the Determination. Accordingly, the statement in the explanatory statement relates to this process and exempts liquor fees from the goods and services tax.

Liquor Regulation 2010

I agree with the Committee's comment in relation to the definition of "approved RSA training course" and have asked Parliamentary Counsel to signpost the definition at the next appropriate opportunity.

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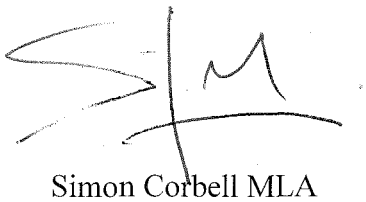
The reference in the heading to section 29 of the Regulation correctly refers to the Act, section 137 (5), as an amendment to the Act made by the *Liquor (Consequential Amendments) Act 2010* inserts an extra subsection in s 137.

The order of the definitions of ***public place permit*** and ***non-alcoholic drink*** is not alphabetical and will be changed as soon as practicable.

Finally, the definition of fortified wine is an inclusive definition to ensure that all fortified wines are captured by the definition. As port is a fortified wine, it would be included.

I trust that the above response answers the Committee's concerns and I thank the Committee for its observations.

Yours sincerely



Simon Corbell MLA
Attorney General

18/11/10

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

THE OFFICE OF
23 NOV 2010
VICKI DUNNE

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

Dear Mrs Dunne

Scrutiny Report No. 28 of 18 October 2010 comments on the appointment of the ACT Council of Social Service (ACTCOSS) nominee to the ACT Legal Aid Commission.

The Committee correctly assumes that I followed the law in making this appointment. The ACTCOSS nominee was chosen from a panel of 3 people nominated by the executive council of ACTCOSS, in compliance with section 16 of the *Legal Aid Act 1977*.

The Committee noted in report No. 28 that the Explanatory Statement for the instrument states:

> "This instrument appoints [the specified person] as a member of the Commission nominated by the ACTCOSS, **pursuant to** section 16(1)(c)(iv) of the Act for the period commencing on 20 August 2010 and ending on 20 August 2013." [bolding added]

The Committee commented that:

> "Though it is not expressly stated in either the Explanatory Statement or the instrument itself, the Committee assumes that the person appointed was, in fact, chosen (by the Minister) from a panel of not less than 3 people nominated by ACTCOSS."

Particularly in the context of this matter, the words "pursuant to" have the same basic meaning as "in accordance with". In other words, the appointment was made 'in accordance with' the provision.

An explanatory statement, for a bill or a disallowable instrument, is primarily intended to describe the effect and operation of the bill or instrument; not the process by which it came to be presented to me or to the Assembly for decision.

In relation to this particular kind of instrument, it is not customary to outline the specific details of the selection process for appointees in an explanatory statement when those are strictly prescribed by statute.

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Part 5.9 of the ACT Government's *Legislation Handbook*, published by the Chief Minister's Department, provides for the drafting of explanatory statements. It states:

> "5.9.1. An explanatory statement assists Members of the Legislative Assembly (MLAs) and the public to understand the objectives and intention of the operative clauses of a bill. It describes the policy objectives and the intended operation of the bill and its provisions. It is important that the explanatory statement is well drafted and that the minister has sufficient time to scrutinise the documents. It may also be used in a court to determine the intention of an Act and clauses in the Act. .....
> 5.9.4. An explanatory statement should explain but not simply paraphrase. It should outline the policy objectives and intended operation of the bill and its provisions, or the operation and provisions of the disallowable instrument."

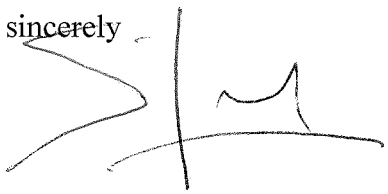
I appreciate that paragraph (b) of the Committee's Terms of Reference provides that the Committee shall, when scrutinising bills and subordinate legislation:

> "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".

I have not taken the view that an explanatory statement should describe in detail whether, and how, the process required in the lead up to the making of a statutory instrument has been observed, as this appears to be at odds with the generally understood role of explanatory statements.

In my view, the above response takes into account the proper role and function of explanatory statements, being mindful of the legal requirements and performance directions in relation to legal instruments, and the importance of maintaining an appropriate division between the legislative role of the Parliament and the administrative role of the executive.

Yours sincerely



Simon Corbell MLA
Attorney General

18 · 11 · 15

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I am writing in response to comments in the Standing Committee on Justice and Community Safety's Scrutiny Report No 29 of 25 October 2010 in relation to Disallowable Instrument 2010-248 being the Fisheries Prohibition and Declaration 2010 (No.1) made under the *Fisheries Act 2000.*

The Committee noted that the reference to section 16 of the *Fisheries Act 2000*, under section 1.6 of the Fisheries Prohibition and Declaration 2010 (No1) Schedule, is incorrect and unnecessary due to the fish quantity provision explicitly indicated under section 1.8 of the Schedule.

I thank the Committee for its vigilance and have asked my Department to exercise greater diligence in its checking of instruments.

Yours sincerely

Simon Corbell MLA
Minister for the Environment, Climate Change and Water

1·12·10

cc Deputy Clerk, ACT Legislative Assembly

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ATTORNEY GENERAL
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MINISTER FOR ENERGY

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Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
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Dear Mrs Dunne

I refer to the Committee's Scrutiny Report 30 of 15 November, in particular the Committees comments on the *Plastic Shopping Bags Ban Bill 2010.*

In preparing this response, the Department of Environment, Climate Change, Energy and Water has consulted with the Department of Justice and Community Safety.

The Committee has requested a response on whether criminalisation of the activity of a retailer supplying a plastic bag to a customer is justifiable and whether there is some other way the objectives of the scheme could be achieved.

Plastic bags have a significant impact on our environment and society. On average, an Australian will use 345 plastic bags per year. The majority of these bags are used once and then disposed of either in landfill or in the environment as litter.

There are a number of environmental impacts associated with consumption and disposal of plastic shopping bags in the ACT. The most common form of plastic bags used in Australia is polyethylene bags. They are derived from petroleum and use energy in their manufacture creating greenhouse gas emissions. These bags are problematic because they do not break down within the litter stream, and have the potential to severely pollute waterways, or be harmful to wildlife and farm animals.

In determining the most appropriate measures to reduce plastic bags an option of voluntary measures was considered. In 2002 the Environment Protection and Heritage Council resolved to reduce the environmental impacts of plastic bags through a voluntary retailer Code of Practice. While the Code reduced plastic bag use by about 40 per cent from 2002-2005, usage increased by 10 million bags between 2005-2007 reversing the initial trend. Given this experience, voluntary arrangements are not considered feasible as they have reached the limits of their effectiveness.

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The offences in the Bill arise in a regulatory context where there is public interest in ensuring that regulatory schemes are observed and require the sanction of criminal penalties. The provision is intended to ensure that retailers, that are shop owners, comply with the legislation. Criminalisation is justifiable as the offences are created to regulate society to achieve the desired outcomes.

The Bill has a number of safeguards, in that it does not provide for imprisonment, instead infringement notice regulations will be prepared. The Office of Regulatory Services, the regulator, will in the first instance aim to achieve compliance with the Bill through education and engagement. However, if retailers do not comply, the Office must have the ability to issue an infringement notice or prosecute to stop the supply of banned plastic bags.

The Committee has come to the view that where it is proposed to create a strict liability offence, it should always be asked whether there should also be provision of a due diligence defence.

I have come to the view that the references in the Committee Report are not appropriate for the ACT and Australian context, in particular with respect to the Model Criminal Code. Although the work drawn from *Appraising Strict Liability* is useful, it refers to the model for strict liability adopted in the European and Canadian contexts.

Before coming to the appropriateness of the exercise suggested in the Committee Report, I wish to draw to the Committee's attention to the existing application of appropriate diligence, as it is referred to in the *Criminal Code 2002*.

Section 53 of the Code confirms that a corporation may rely on the defence of mistake for strict liability offences. The Explanatory Statement provided the following for clause 53.

> This clause explains the mechanism by which a company can rely on the "mistake of fact defence" (clause 36). It provides that a company can only rely on the defence if the employee, agent or officer who carried out the conduct had a mistaken but reasonable belief about facts, which if they existed, would have meant that the conduct did not constitute an offence and the company proves that it exercised *appropriate diligence* to prevent the conduct. This is consistent with the general approach of this Part on corporate criminal responsibility.
>
> Again, this provision should be read with clause 55, which provides that the alleged failure of a company to exercise appropriate diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate management, control or supervision of the conduct of one or more of its employees, agents or officers or failure to provide adequate systems for providing relevant information to relevant people in the company.

In contrast, as the Committee has noted with respect to a natural person, the Code limits the availability of the defence of mistake to the circumstances set out in Section 36.

In addressing the AIJA Magistrates' Conference in July 2001, a recognised expert on the Model Criminal Code, Ian Leader-Elliott spoke about the Code position of 'due diligence' with regard to strict liability.

> The due diligence defence treats ignorance and mistake alike thereby excusing defendants who can demonstrate that they took appropriate care. [The Model Criminal Code Officers' Committee] recognised that the decision to exclude reasonable ignorance from the *Code* defence of mistake was contentious. It was however a calculated measure, meant to ensure that strict liability and negligence remain distinct forms of culpability.
>
> It is possible, however, that the *Code* – wittingly or unwittingly – has opened the door to the due diligence defence in another guise. The potential for injustice which might result from the restrictive definition of reasonable mistake is mitigated by the provision of a defence of *Intervening conduct or event*. No criminal responsibility if imposed for an offence, whether of strict or even absolute liability, if it resulted from events or the act of another, which it would be unreasonable to expect the defendant to guard against... [References omitted.]

The view I have taken is that a specific defence of 'due diligence' or 'reasonable steps' should only be considered where the offence requires a person to eliminate a hazard or minimise a risk of harm to people or the environment where the harm occurs in a regulatory context. Furthermore, it will be appropriate to consider the defence of reasonable steps in offences where the conduct targeted by the offence directly concerns itself with the harm caused or risk of harm created. Examples of schemes where consideration of this defence may be appropriate include occupational health and safety law, food handling and hygiene law and environmental and heritage law.

In its response to the Standing Committee on Legal Affairs of the Sixth Legislative Assembly *Report on Strict and Absolute Liability Offences*, the Government agreed that new strict liability offences drafted by the Government would not have a penalty of imprisonment without a defence of 'reasonable steps', 'due diligence' or other commensurate defence. This position is reflected in the Department of Justice and Community Safety *Guide for Framing Offences* available on the Department's website.

The offences in the *Plastic Shopping Bags Ban Bill 2010* are not offences that fall within the category of offences that directly deal with harm caused or risk of harm created. As the offences in the Bill do not satisfy the threshold I have described above, the consideration of a due diligence defence is not necessary.

I trust the above information assists the Committee.

Yours sincerely

Simon Corbell MLA
Minister for the Environment, Climate Change and Water

2.12.10