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

15 MARCH 2012

Report 49

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: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

APPROPRIATION BILL 2011-2012 (NO. 2)

This is a Bill for an Act to appropriate additional money for the purposes of the Territory for the financial year that began on 1 July 2011.

COMMISSIONER FOR THE ENVIRONMENT AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Commissioner for the Environment Act 1993* to amend the name of the Act and the title of the commissioner to include the term 'sustainability'; to require the commissioner to prepare a sustainability report; and to improve the process through which the commissioner's reports must be tabled and the manner of a response from government.

ELECTRONIC TRANSACTIONS AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Electronic Transactions Act 2001* to clarify the traditional rules on contract formation to address the needs of electronic commerce, including the recognition of automated message systems, clarification of an invitation to treat, rules to determine the location of the parties, updating the electronic signature provisions and default rules for time and place of dispatch and receipt.

EMERGENCIES (COMMISSIONER DIRECTIONS) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Emergencies Act 2004* to provide that the Emergency Services Commissioner with the express authority to give directions to the chief officers of the emergency services to undertake response or recovery operations in relation to an emergency, but not so as to direct the chief officer to undertake an operation in a particular way.

FINANCIAL MANAGEMENT (COST OF LIVING) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Financial Management Act 1996* to require the proposed budget for the Territory for a financial year to include a statement giving an analysis of the impact of the proposed budget on the cost of living of ACT residents.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2012

This is a Bill for an Act to amend legislation about justice and community safety.

LIQUOR AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Liquor Act 2010* in relation to the notice period prior to a change in fees payable under the Act.

WORKERS COMPENSATION (TERRORISM) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Workers Compensation Act 1951* to remove any time based limitation on the operation of the Temporary Reinsurance Fund provisions.

Bills—Comment

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

ANIMAL WELFARE LEGISLATION AMENDMENT BILL 2012

This Bill would amend the *Animal Welfare Act 1992*, *Domestic Animals Act 2000*, *Domestic Animals Regulation 2001*, and the *Magistrates Court (Domestic Animals Infringement Notices) Regulation 2005* for the purpose of improving the welfare of animals in the ACT, with a particular focus on companion animals.

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

The application of the Human Rights Act to business and commercial entities

The Committee notes that the Explanatory Statement states that "[t]he Bill primarily affects business and commercial entities that do not have human rights (see section 6 of the *Human Rights Act 2004*)." HRA section 6 does not have this effect, for it makes the more limited statement that "[o]nly individuals have human rights". Many businesses and commercial entities are conducted by individuals, as sole traders or in partnerships, and this may apply to many of the businesses that would be affected by the scheme proposed in this Bill.

Moreover, the "human rights" affected by section 6 are only those rights stated in HRA part 3, and it is to be noted that by section 7 the HRA "is not exhaustive of the rights an individual may have under domestic or international law". It is relevant to note that under some other human rights instruments, both of a domestic[1] or international or trans-national character, and possibly at common law, a corporate person may claim the protection of what would be considered to be an element of the right to privacy.

The Committee makes these remarks to point out that an Explanatory Statement should not confine its rights discussion to those rights stated in the Human Rights Act.

[1] Section 8(4) of the *Constitution of the Republic of South Africa* (1996) provides that "[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person". The Supreme Court of the United States has recognised that certain rights in the Bill of Rights may be claimed by corporations. The principle underlying such provisions is often stated in terms that legal persons are simply organizations of natural persons.

The right to privacy and the regulation of the means of obtaining cats and dogs (HRA paragraph 12(a))

As expressed in the Human Rights Act, the right to privacy protects individuals from intrusions into their personal affairs, including their choice of lifestyle, in particular where the conduct occurs in the individual's home. Just what choices are protected, and the degree of protection the right affords to those choices that are, is a matter of much debate. There are probably many in the community who would argue that the choice to have a companion animal such as cat or a dog is a choice central to their lifestyle, and to be deprived of the ability to make that choice, or even to have the making of that choice more difficult, is, in terms of HRA paragraph 12(a), an "arbitrary" limitation.[2] The Explanatory Statement addresses this concern as follows:

> One general issue that could be raised is whether or not an arbitrary limitation on the right to privacy and personal affairs is created by the provision of the Bill. This is not the case and any limitation is proportionate on the basis that animals have a special status as sentient creatures and there is a long standing and well accepted basis for controlling how people may treat them. Animals are not the same as other regular goods or chattels, which would more clearly engage the right to privacy. What an individual does with his or her own clothes or furniture for example may be considered their own private business. However an animal has competing rights, and a person cannot treat an animal however they wish, even if they are the legal owner. A variety of laws - such as those governing animal cruelty – already place restrictions on how a person can treat an animal, and the new provisions under the Bill are only minor extension of these limitations.

In this respect, one particular issue should be highlighted. A person must obtain a breeders licence to sell cats and dogs, and the registrar must not issue such a licence unless satisfied of a number of matters, including "that the applicant does not intend to breed malformed or aggressive dogs or cats"; (see clause 23, proposed paragraph 73E(4)(c) of the *Domestic Animals Act 2000*). The practical effect of this provision will turn on how the registrar understands the concepts of "malformed" and "aggressive". Neither the current Act nor the proposed amendments in this Bill appear to offer any guidance on this matter. For example, if a particular breed of dog is thought to be generally aggressive in nature, or had a physiological defect due to inbreeding, (and might thus be thought to be malformed), would in either or both cases the registrar be obliged to refuse a licence? The way such questions are answered will have a bearing on the way the provisions of the Bill would impact on the choices a person may make with respect to the companion animals they may choose. This is a matter for clarification.

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

The presumption of innocence and strict liability offences (HRA subsection 22(1))

The Bill would create a number of strict liability offences. The Explanatory Statement provides a justification, and notes the low penalties attaching.

[2] In relation to the proposal in the Crimes Legislation Amendment Bill 2010 to re-introduce a crime of bestiality, the Explanatory Statement said that it "may raise some concerns over the interference with the [HRA] section 12 right to privacy; see *Scrutiny Report No. 32*, concerning the Crimes Legislation Amendment Bill.

The Committee makes no further comment.

The presumption of innocence and the imposition of a legal burden to prove a matter of defence (HRA subsection 22(1))

Proposed subsection 94(1) of the *Domestic Animals Act 2000* would create an offence where a person:

(a) sells an animal to a person who is under 18 years old; and

(b) is reckless about whether the person to whom the animal is sold is under 18 years old.

Subsection 94(2) would provide for "a defence to a prosecution for an offence against subsection (1) if the defendant proves" a number of matters. Given paragraph 59(b) of the *Criminal Code 2002*, the use of the word "proves" results in the defendant being obliged to discharge a legal burden of proof of these matters, although the standard of proof is "on the balance of probabilities". Such provision limits the presumption of innocence, and thus requires justification. In particular, there is the question of whether the defendant should only carry an evidential burden of proof.

The same issue arises in respect of the proposal in clause 24, which would add a new subsection 75(5), with the aim, in the words of the Explanatory Statement, of ensuring "that anyone who rescues a dog or cat that is pregnant at the time has additional time before needing to de-sex the animal".

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

The right to the equal protection of the law and the prohibition on the sale of an animal to a person who is under 18 years old (HRA subsection 8(3))

Clause 32 proposes to insert a new part 4A into the *Domestic Animals Act 2000*. The basic element of this part is the creation of an offence of selling an animal to a person who is under 18 years old, and it is arguable that HRA subsection 8(3) is engaged.

The Committee draws attention to the comprehensive discussion of this issue in the Explanatory Statement.

Does clause 6 inappropriately delegate legislative power?—Committee term of reference (c)(iv)

Under this term of reference, the Committee notes that when (under proposed section 20F of the *Animal Welfare Act 1992*, see clause 9), the Minister determines (by disallowable instrument) "basic care information for an animal", "the Minister must consult with an expert in the care of an animal of that kind". In contrast, when (under proposed section 73C of the *Domestic Animals Act 2000*, see clause 23), the Minister determines (by disallowable instrument) ethical breeding standards, there is no similar obligation to consult. It is not obvious why there should be this difference in approach.

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

CRIMES (CHILD SEX OFFENDERS) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Crimes (Child Sex Offenders) Act 2005* to introduce a child protection prohibition order scheme to prohibit some registrable offenders from engaging in certain conduct for a period of time, and in relation to all registrable offenders, to extend existing obligations under the Act by increasing the penalty for failing to comply with reporting obligations, by including new offences, by extending the information that a registrable offender is required to report to ACT Police and by clarifying when a registrable offender's reporting obligations commence.

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The Committee commends the Explanatory Statement for its careful and thorough exposition of the manner in which provisions of the Bill both engage human rights in the sense of limiting a right, and also enhance the protection of rights. It is sufficient in this instance for the Committee to refer members of the Assembly to the Explanatory Statement, subject to the following comments:

The need for more to be said about whether there are less restrictive means for achieving the object of a limitation on a right

Whether a particular provision in the Bill that limits a right is a proportionate response to the problem the provision regulates, (taking that question as a short-hand way of encapsulating the multi-factor analysis indicated in HRA subsection 28(2)), is a matter of forming what is ultimately a social, economic or political opinion based on assumptions about the factual substratum upon which the opinion is based. Thus, a Member of the Assembly might accept the legal framework adopted in the Explanatory Statement yet come to form a different opinion as to whether a particular limitation of a right is a proportionate response because he or she proceeds on a different view of the underlying facts.

In practice, the aspect of a proportionality analysis that will give rise to most difficulty is that which requires the proponent of a provision to demonstrate that there is "no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve" (paragraph 28(2)(e)). (Failure to so demonstrate does not mean that the limit is not "reasonable", but is a factor pointing to this conclusion.) The Explanatory Statement carefully conducts a proportionality assessment in relation to each of the provisions of the Bill that limit a right, but only sometimes does it do more than assert that the limitation is the least restrictive means reasonably available. This does not take the matter very far, if at all. What is required is an indication that other particular less restrictive alternative means were considered and rejected on some basis.

Should the procedure stated in proposed section 132C apply to adult offenders?

A particular example of the problem concerns the manner in which the Magistrates Court proceeds when deciding whether to make a prohibition order in respect of an adult. Two preliminary comments need to be made.

The first is that the task of sentencing an offender is one which requires attention to the personal circumstances of the person, including the impact of a sentence on the offender's family; (see *Crimes (Sentencing) Act 2005*, subsection 33(1)). Reports from experts of various kinds about these matters are often considered by the court. Secondly, and in line with the policy evident in subsection 33(1), where the Magistrates Court considers whether to make a prohibition order in respect of a young offender, it must consider a CYP director-general's report that has, in compliance with proposed section 132C of the Act, been sought and obtained by the chief police officer. In particular, this report must address the questions of "whether there are other reasonably appropriate ways of managing the young person" (paragraph 132C(2)(b)), and of "what impact a prohibition order may have on the best interests of the young person, including the young person's accommodation, educational, health, cultural, family or other social needs".

An issue arising here is whether it would be more appropriate for the ACT Children and Young People Commissioner to provide this report.

It is apparent that the intention lying behind section 132C is to bring about the result that a prohibition order will be made less frequently where the offender is a young person; that is, it may be seen as a less restrictive means of achieving the purpose of the Bill so far as concerns prohibition orders. ***The question is why section 132C should not apply to all kinds of offenders.*** A prohibition order may impact on an adult's accommodation, educational, health, cultural, family or other social needs. In particular, the Explanatory Statement acknowledges that "the new prohibition order scheme which may limit the rights of certain registrable offenders to contact with a child or children from their family" (at 12), and thus engage the right in HRA subsection 11(1).[3]

The Committee appreciates that in making an order concerning an adult the court may have regard "to anything else the court considers relevant" (subsection 132E(2)), and may tailor a particular order to the circumstances of the offender (see Explanatory Statement at 25-26). However, in exercising its functions so far as concerns an adult, the court would benefit from having before it a report of the same nature as it has in the case of a young person. The appropriate person to make this report would be a matter for consideration.

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

Should a Magistrate be required to have reasonable grounds for being satisfied of the circumstances that justify the making of a prohibition order?

By proposed subsection 132B(1), the chief police officer must believe on reasonable grounds that there exist the circumstances that warrant making an application to the Magistrates Court for a prohibition order. In contrast, the court need only be satisfied that the relevant circumstances exist as a condition of making the order. It is difficult to understand why there should be a difference. The Committee notes that the exercise of a power by a court is often conditioned on it having a belief based on reasonable grounds. Moreover, this particular function of a court probably involves the exercise of an administrative function rather than a judicial one.

[3] "The family is the natural and basic group unit of society and is entitled to be protected by society".

A similar point arises in relation to proposed subsection 132H(1).

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

Should an offender's criminal history include evidence that he or she has merely been charged with an offence?

One matter that the Magistrates Court must take into account is "the seriousness of the person's criminal history" (paragraph 132E(1)(c)). This is then defined to include "a charge made against the person for a registrable offence or relevant offence, other than [a charge withdrawn or disposed of by verdict]" (paragraph 132E(3)(b)). This provision may not directly limit the presumption of innocence as it is stated in HRA subsection 22(1), (as argued in the Explanatory Statement at 24-25). In terms however of the concept of "personal rights and liberties" employed in the Committee's terms of reference, a limit to the presumption of innocence more widely and sensibly understood, (and which is one of those rights), may be said to encompass a case where a legislative provision provides that the mere laying of a charge suggests that the accused has done something that warrants the charge being laid. This is the effect of paragraph 132E(3)(b). The laying of the charge is evidence that someone thinks that the accused has committed the offence, but this is a very different matter. Beyond establishing this fact, any probative value that might be thought to attach to evidence of the mere laying of a charge must be very little. Of course, the police might put to the court evidence of the facts that were considered to justify the laying the charge, without mentioning that a charge had been laid.

The prohibition order scheme would be less restrictive of the person's rights were paragraph 132E(3)(b) to be omitted, and arguably without having a great if any effect on the operation of the scheme.

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

Why must a person against whom a protection order is made need to seek the leave of the Magistrate's Court to make an application for the amendment or revocation of the order?

The Explanatory Statement notes that "[s]ection 132K (3) provides that other than for an order that was made in the registrable offender's absence, a registrable offender may only make an application to amend or revoke a prohibition order with the Magistrates Court's leave. This section ensures that applications are only made where the Magistrate Court is satisfied of the matters at section 132K (4)." This is so, but there is no justification for providing for a leave requirement. An appeal to the Supreme Court is possible, but the cost of this form of redress is so expensive that for most people it is an unrealistic option. An application for leave will consume the time of the Magistrates Court, and of others, and it is arguable that there is little to be gained from preventing the applicant from having the court proceed directly to the merits of the application for the amendment or revocation of the order.

The issues just raised apply also to the procedure for seeking amendment or cancellation of a registered corresponding prohibition order.

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

The ability of the chief police officer to give information about a prohibition order to prescribed entities

This ability would be conferred by proposed section 130ZN, outlined at Explanatory Statement 54-55 with reference to the potential impact of an exercise of this power on the privacy (and the Committee would add, the liberty and security) of a person in respect of whom a protection order has been made.

The Committee notes that the scope of this power will turn on what persons or bodies are by regulation a "prescribed entity". It is apparent that the object of the provisions of the Bill designed to restrict the disclosure of the identity of a person in respect of whom a protection order has been made (see the Explanatory Statement discussion (at 47-48) of proposed section 132ZH) will be defeated if disclosure by the chief police officer is to a prescribed entity that does not or cannot ensure restricted disclosure.

In this instance, there is a question whether any regulation should be subject to approval by the Assembly before it can operate, in order to provide a further check of the appropriateness of the prescription of a particular person or body for the purpose of proposed section 130ZN.

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

CRIMES (OFFENCES AGAINST POLICE) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Crimes Act 1900* to create a number of "aggravated" offences in circumstances where an existing offence is committed against a police officer.

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

By clause 23 it is proposed to insert a new section 48C into the *Crimes Act 1900* ("the Act"), and the key provision is subclause 48C(2):

> The offence is an aggravated offence against a police officer if the offence was committed against a police officer—
>
> (a) while the police officer was exercising the officer's functions as a police officer; or
>
> (b) because of, or in retaliation for, anything done by the police officer or any other police officer in the exercise of the officer's functions as a police officer.

The offences referred to are listed in subclause 48C(1), and range over various offences against the person, threats of harm, stalking and affray. Where an offence against one of these offences is an aggravated offence, the result is that the penalty for that offence is greater than is the case where the offence is not aggravated. Many other provisions of the Bill make provision for the penalty to apply in the case of the aggravated offences. The Explanatory Statement notes that "[t]he penalties for the aggravated offences have been set approximately 25 per cent higher than the penalties for the simple offences".

It is useful to distinguish between the elements of a simple (non-aggravated) offence, and an aggravated offence. To take advantage of section 48C the Crown must in the first place prove beyond reasonable doubt that the elements of the simple offence exist. Then the Crown must prove beyond reasonable doubt that there exist those facts which establish that the offence is "aggravated" in the way described in proposed subsection 48C(2). The human rights issue arises out of the way proposed section 48A makes provision concerning proof of these circumstances.

In the first place, the result of proposed subsections 48C(4) is that the Crown must state in the charge the particular factors of aggravation (as stated in proposed paragraph 48C(3)(a) and paragraph 48C(3)(b)) it alleges exist. Secondly, the Crown must prove beyond reasonable doubt that in the circumstances of the case these factors charged do exist.

Thirdly, and contrary to what would normally be the case, proposed paragraph 48C(5)(a) provides that "[i]t is not necessary to prove that the defendant had a fault element in relation to any factor of aggravation." The concept of a "fault element" is defined in subsection 17(1) of the *Criminal Code 2002* to mean "intention, knowledge, recklessness or negligence", (and then those terms are further defined). This definition cannot be imported directly into the Bill because proposed subsection paragraph 48C(5)(b) provides in effect that section 17 does not apply to an offence to which section 48C(1) applies. Perhaps, however, as a matter of ordinary language, this is what the concept of "fault element" in proposed paragraph 48C(5)(a) would be taken to mean.

The effect of proposed paragraph 48C(5)(a) is that the Crown need not prove that the defendant had any knowledge that the victim was a police officer, etc. On the face of it, there thus arises a significant issue concerning the compatibility of proposed paragraph 48C(5)(a) with the presumption of innocence stated in HRA subsection 22(1).[4]

The effect of proposed paragraph 48C(5)(a) is ameliorated by proposed subclause 48C(3), which provides:

> However, the offence is not an aggravated offence against a police officer if the defendant proves, on the balance of probabilities, that the defendant did not know, and could not reasonably have known, that the person was a police officer.

Given paragraph 59(b) of the Criminal Code, the use of the word "proves" results in the defendant being obliged to discharge a ***legal burden of proof*** of these matters, although the standard of proof is "on the balance of probabilities". This provision limits the presumption of innocence, and requires justification.

The Explanatory Statement offers a justification for the changes proposed by reference to some elements of the framework adopted by the Committee in *Scrutiny Report No. 20* of the *6th Assembly*, concerning the Crimes (Offences Against Pregnant Women) Amendment Bill 2005. Given that subsequent to this Committee report HRA subsection 28(2) has been inserted, it is preferable to offer an assessment in these terms.

[4] This is explained in more detail in *Scrutiny Report No. 20* of the *6th Assembly*, concerning the Crimes (Offences Against Pregnant Women) Amendment Bill 2005.

The particular issue the Committee raises is whether a "less restrictive means reasonably available to achieve the purpose the limitation [to the relevant right] seeks to achieve". In particular, would it be reasonable to require a defendant to discharge only an ***evidential burden of proof*** of the matters of amelioration stated in proposed subclause 48C(3)?

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

ELECTORAL AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Electoral Act 1992*, and to make consequential amendments to the *Electoral Regulation 1993* and the *Referendum (Machinery Provisions) Act 1994* with respect to the financing of electoral campaigns, and in particular by setting caps on electoral expenditure and gifts.

(The *Electoral Act 1992* is referred to herein as "the Act".)

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

In *Scrutiny Report No. 46* of the *7th Assembly*, concerning the Electoral (Election Finance Reform) Amendment Bill 2011, the Committee set out a framework for evaluating, from a rights standpoint, the provisions of a bill concerning the topics of the Bill under discussion here. The Committee refers to this discussion, and notes that the Explanatory Statement addresses the same topic under the heading "Human Rights implications". The Committee also notes that the Explanatory Statement discussion makes no reference to the potential application of the implied freedom of political communication, a restriction that has been found by the High Court to be embedded in the Commonwealth Constitution. It is difficult to understand why this right is not acknowledged in the Explanatory Statement, unless this is on the basis that an Explanatory Statement need only consider the application of the *Human Rights Act 2004*. As the Committee has often pointed out, this position does not meet the standards required of an Explanatory Statement.

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

The Committee also notes that the reference to subsection 21(1) at page 3 of the Explanatory Statement is incorrect; the correct reference is to section 22(1). There is also no reference to HRA subsection 22(1) in the context of it being engaged by the imposition of a legal burden on a defendant to establish a defence; see proposed subsections 205B(2) and subsection 205C(2).

As in the case of the Electoral (Election Finance Reform) Amendment Bill 2011, the Committee can do no more than to raise rights issues that arise out of each major element of the Bill.

Limitation on election expenditure

The relevant provisions of the Bill are found in clause 19, which propose to insert a new division 14.2B into the Act. The provisions are summarised in the Explanatory Statement, and centre on prescribing a cap on the amount of money that may be spent on an election campaign by the candidates. The provisions distinguish between a "party grouping", a non-party MLA, "a non-party candidate grouping" – that is, a candidate who is not a party candidate (for definitions, see clause 12), and a third-party campaigner (for definition, see clause 14). Monetary caps (an excess of which is punishable for an offence – proposed paragraph 205F) are prescribed in relation to these categories. The cap for an individual candidate is $60,000, but in respect of a party grouping the cap is more complicated (see proposed paragraph 205F(1)).

The Committee refers to the relevant discussion in *Scrutiny Report No. 46* at 4, and to the Explanatory Statement at 2-3.

Limitations on gifts and other payments

The Explanatory Statement provides an overview of proposed 205G of the Act (see clause 19).

> This section provides that a party grouping, a non-party MLA and an associated entity of the MLA, a non-party candidate grouping, a non-party prospective candidate grouping, and a third-party campaigner (a receiver) must not deposit in an ACT election account one or more gifts from a person in a financial year that total more than $10 000.
>
> If a receiver contravenes this provision, an amount equal to twice the amount by which the gift or gifts exceed $10 000 is payable to the Territory. [See proposed subsection 205G(2)].
>
> However, if a receiver returns the amount by which the gift or gifts exceed $10 000 within 30 days after the amount is received, then no amount to the Territory is payable.
>
> If someone takes all reasonable steps to return the amount by which the gift or gifts exceed $10 000, but is unable to identify or find the donor, then the amount by which the gift exceeds $10 000 is payable to the Territory.
>
> This is a civil enforcement scheme that allows the Electoral Commissioner to recover money on behalf of the Territory. If people and entities do not get a benefit from receiving gifts over the $10 000 cap, they are less likely to seek them out. It is expected that this provision will lead to behavioural changes in those involved in the electoral process, rather than raising money for government.

A general rights perspective was stated in *Scrutiny Report No. 46* at 4 and 5, and see too the Explanatory Statement at 2-3. The Committee notes two more specific issues.

Does proposed subsection 205G(3) create a criminal offence?

At least in respect of proposed subsection 205G(3), the provision might be characterised as a criminal offence within the meaning of the Human Rights Act, and in particular of section 22.

The courts are likely to give the notion of a criminal offence in this context an autonomous definition; that is, its scope cannot be controlled by another statute (unless that statute is an amendment of the HRA). Otherwise, the process guarantees in section 22 could easily be avoided. A court is likely to adopt a multi-factor approach to assessment of whether a penalty provision is criminal in nature.[5] Concerning proposed subsection 205G(3), there are some indications that this creates a criminal offence. For example, the penalty applies upon a finding of culpability, and the provision has a deterrent or punitive effect. That the Bill does not treat a contravention of subsection 205G(2) as an offence is not decisive, and is probably of little weight.

If proposed subsection 205G(3) is classified as a criminal offence, a court might not (if asked) make a declaration that the provision is incompatible with the HRA, but would find that the defendant is entitled to all of the process guarantees in HRA section 22. If the view is taken in the Assembly that subsection 205G(3) is to be classified as a criminal offence, it would be preferable that it be made explicit that this is the case.

(The same issue arises in relation to proposed section 205I.)

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

Is the definition of "gift" too vague in any respect?

The general rights principle that a rule be not so vague as to make it too difficult for a person to assess how it will operate has a particular application where a criminal offence is created. It applies more broadly, and arises in relation to proposed subsection 205G(2) owing to the vagueness of the definition on "gift" in proposed section 198AA of the Act and about how there could be a "deposit" of some forms of gift as this word is used in subsection 205G(2).

Subsection 205G(2) requires that a receiver "must not deposit in an ACT election account 1 or more gifts from a person in a financial year that total more than $10 000". The definition of "gift" includes "the provision of a service (other than volunteer labour) for no consideration or inadequate consideration" (proposed paragraph 198AA(1)(b)(i)). Assuming a case where a person provides a service that is not volunteer labour, how does the receiver deposit that service in the ACT election account?

(A similar issue arises where the gift is one within the meaning of paragraph 198AA(1)(a); in relation to the application of proposed subsection 205H(1); proposed section 216A (clause 26); and proposed subsections 222(2A) and (2B)).

There is a problem in understanding just when paragraph 198AA(1)(b)(i) (see above) will apply. What is the distinction between "the provision of a service ... for no consideration or inadequate consideration", and "volunteer labour"? The two concepts appear to be the same.

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

[5] See the discussion in Emmerson and Ashworth, *Human Rights and Criminal Justice* (1st ed, 2001) at 149ff.

Entitlement to funds

This matter is addressed in proposed section 207 of the Act (see clause 20). The Committee refers to the comment it made in *Scrutiny Report No. 46* at 7, and the comment in the Explanatory Statement at 15.

Administrative expenditure funding

The Bill proposes that a new division 14.3A of the Act provide for public funding of the administrative expenditure of (only) parties and of non-party MLAs. The provisions are outlined in the Explanatory Statement.

The Committee refers to the relevant discussion in *Scrutiny Report No. 46* at 7.

LEGISLATIVE ASSEMBLY (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2012

This is a Bill for an Act to create an Office of the Legislative Assembly, to state its role and function, and in various respects make provision for its independence of the executive.

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

Ending the appointment of the Clerk

The matter for comment concerns the provisions proposed for ending the appointment of the Clerk, but it will be helpful to outline the process of appointment and dismissal.

Clause 9 governs appointment, and provides that the Speaker appoints the Clerk of the Legislative Assembly "on the advice of the administration and procedure committee", and "in consultation with" both (although probably separately) the Chief Minister and the Leader of the Opposition. An appointment must be in accord with public service merit principles, and the Speaker "must not appoint a person as clerk unless satisfied that the person has extensive knowledge of, and experience in, relevant parliamentary law, practice and procedure".

Point regarding clarity. Is the Speaker bound to follow the advice of the administration and procedure committee? It appears that this is not the case, but the issue might be clarified by the Speaker (as the proponent of this Bill).

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

The Speaker may suspend the Clerk under subclause 13(1) (and only by virtue of this power) on one or other of two grounds, being

(a) misbehaviour; or

(b) physical or mental incapacity, if the incapacity substantially affects the exercise of the clerk's functions.

The Speaker may (but is not obliged to) seek advice from the commissioner for public administration; the auditor-general; and "anyone else the Speaker considers appropriate" (subclause 13(2)). By subclause 13(3):

> [i]f the Speaker suspends the clerk, the Speaker must give written notice of the suspension and a copy of a statement of the reasons for the suspension to the clerk.

Point of clarity. The Committee assumes that the nature of the reasons to be given is governed by the principle stated in subsection 179(2) of the *Legislation Act 2001* that they must "set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based".[6] On this basis, the Committee recommends that a note to subclause 13(3) record this fact.

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

By subclause 14(1), "the Speaker must give written notice of the suspension and a copy of the statement of the reasons for the suspension to each other member of the administration and procedure committee not later than the next business day (the ***notice day***)". This committee must then, by subclause 14(2), "meet in relation to the clerk's suspension"

(a) not later than 3 business days after the notice day; and

(b) at subsequent intervals of not longer than 30 days while the clerk is suspended (a ***regular meeting***).

By subclause 14(4), at each regular meeting the committee

> must review the clerk's suspension and may at any time pass a resolution about the suspension, including a resolution—
>
> (a) recommending to the Speaker that the Speaker end the suspension; or
>
> (b) to make a statement to the Legislative Assembly recommending that the Speaker end the clerk's appointment.

Points of clarity:

(1) Is the Speaker obliged to accept a recommendation?

(2) The committee must review a clerk's suspension at each regular meeting and "may at any time pass a resolution ...". This suggests that the resolution of either kind need not be passed at a regular meeting. Is this the case?

(3) Could a resolution of either kind be passed at the meeting referred to in paragraph 14(2)(a)?

[6] Section 179 applies where a tribunal "or other entity" is obliged by a law to give reasons. The word "entity" is defined in part 1 of the Dictionary to this Act to include "a person (including a person occupying a position)".

(4) In any case where the Speaker ends a suspension, should the Speaker be required to give reasons for this action? The Committee has in mind that this course would offer a measure of protection to the reputation of the clerk.

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

An indefinite period of suspension and the right to reputation

The committee is not obliged to pass a resolution within any time period, and so long as it met at a regular meeting at intervals of not longer than 30 days, the clerk would remain indefinitely suspended. The Committee notes that the clerk "is entitled to be paid salary and allowances while suspended". Suspension also might be considered to damage the clerk's reputation. If so, this result engages the right of a person "not to have his or her reputation unlawfully attacked" (HRA paragraph 12(b)). (If this statement is thought to be too narrow to encompass this situation,[7] a right to protection against damage to reputation may be considered to fall within the notion of a personal right as that concept is employed in the Committee's terms of reference).

The issue is whether a clerk's reputation is better protected by placing some limit on the power of the administration and procedure committee to delay decision on whether to pass a resolution of a kind specified in subclause 14(4).

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

A point of clarity. Relevant to this discussion is whether the Speaker could, during the period the matter is under consideration by the committee, simply reverse her or his decision to suspend the clerk. In the Bill there is a note to clause 13 which states that "[p]ower given by a law to make a decision includes power to reverse or change the decision. The power to reverse or change the decision is exercisable in the same way, and subject to the same conditions, as the power to make the decision (see Legislation Act, s 180)". It remains the case, however, that an Act might make specific provision to the contrary, and it might be argued that once consideration of the matter is vested in the administration and procedure committee, the Speaker cannot change her or his earlier decision.

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

Procedural fairness (or natural justice) for the clerk

By clause 14(3), "[t]he clerk may make an oral or written submission (or both) to the committee about the clerk's suspension". An issue arising is whether the clerk may make more than one written or oral submission. The answer is probably "yes" for paragraph 145(b) of the Legislation Act provides that "words in the singular include the plural" (and vice versa). On this basis, there is a question whether the clerk should be notified in advance of the date of each regular meeting of the administration and procedure committee, inasmuch as this would provide a fuller measure of procedural fairness.

[7] Given that the word "unlawfully" might be held to rob this protection of any real worth.

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

Ending a suspension by ending the appointment of the clerk

On any review of the clerk's suspension, the committee may at any time pass a resolution "to make a statement to the Legislative Assembly recommending that the Speaker end the clerk's appointment" (paragraph 14(4)(b)). If the Committee does so, then by subclause 15(4)(a), "the Legislative Assembly may resolve to require the Speaker to end the clerk's appointment".[8] By paragraph 16(1)(a), the Speaker must end the clerk's appointment if the Assembly passes a resolution under section 15(4)(a). Given the process that has preceded this step, the Assembly would have available at least the Speaker's reasons for suspending the clerk, and any submission made by the clerk to the committee. It would probably also have the benefit of advice from members of the committee.

It is however critical to note that paragraph 16(1)(b) provides another basis for the ending of the clerk's appointment. Paragraph 16(1)(b) provides:

> (1) The Speaker must end the clerk's appointment if the Legislative Assembly—
>
> (a) ...; or
>
> (b) ***otherwise resolves*** to require the Speaker to end the clerk's appointment—
>
> (i) for misbehaviour; or
>
> (ii) for physical or mental incapacity, if the incapacity substantially affects the exercise of the clerk's functions (emphasis added).

On a plain reading of this provision, it provides an alternative means for the ending of the clerk's appointment, and need not be preceded by any notice to the clerk or to members of the Assembly; any obligation to provide reasons to the clerk; or any obligation to afford procedural fairness to the clerk.

If this result is intended, it may engage various HRA rights (such as paragraph 12(b) and/or subsection 21(1)), or may more simply be seen as an undue trespass on the personal rights of the clerk.

An issue for the Assembly is whether there should be an alternative means of ending the appointment of the clerk. Should the Assembly consider that there should, the Committee points, by way of assistance, to some less restrictive means for ending a clerk's appointment otherwise than by the unrestricted process stated in paragraph 16(1)(b):

[8] By subclause 15(4)(b), "if the Legislative Assembly does not, within 3 sitting days, pass a resolution mentioned in paragraph (a)...the suspension ends at the end of the 3rd sitting day".

(1) The Clerk of the House of Lords (the upper chamber of the Parliament of the United Kingdom) "is appointed by the Crown by letters patent under the Great Seal. He must exercise his powers in person, and can be removed from office only by the Sovereign upon an Address by the House of Lords for that purpose".[9] This process would afford some check on the power of the Lords given that there would be a delay between a Lords resolution and sanction by the Sovereign, and an opportunity for the Sovereign to seek an explanation. While this procedure is not feasible in the Territory, it might be adapted in some fashion to suit the Territory form of government.

(2) Concerning the Commonwealth Parliament, Section 60 of the *Parliamentary Service Act 1999* empowers the Senate, or the House of Representatives, (as the case may be), "by resolution passed pursuant to a motion of which notice was given at least 6 sitting days before the day on which the resolution is passed, terminate the appointment" of the Clerk of the Senate or Clerk of the House of Representatives (as the case may be). Any such resolution:

> must state the ground on which the appointment is terminated, which must be one of the following:
>
> (a) the Clerk has been guilty of misbehaviour;
>
> (b) the Clerk is incapable, because of physical or mental incapacity, of performing his or her duties;
>
> (c) the Clerk has become an insolvent under administration.

The requirement that there be at least 6 sitting days before the day on which the resolution is passed would afford time for the clerk to make a response to the proposal that he or she be dismissed, and in the event that the relevant House refused to accept a submission, to seek a legal remedy. The delay would also enable members or Senators to become informed about the matter. Again, this scheme might be adapted in some fashion to suit the Territory form of government.

(3) A more substantial protection is found in the *Constitution of the Independent State of Papua New Guinea*, which requires a high degree of protection be afforded to persons styled as "constitutional office-holders", a category that includes the Clerk of the National Parliament. Article 223(1) requires that an Organic Law[10] shall make provision for and in respect of the qualifications, appointment and terms and conditions of employment of constitutional office-holders, and article 223(2) provides:

> (2) In particular, Organic Laws shall make provision guaranteeing the rights and independence of constitutional office-holders by, amongst other things–
>
> a. specifying the grounds on which, and the procedures by which, they may be dismissed or removed from office, but only by, or in accordance with the recommendation of, an independent and impartial tribunal; and

[9] M Jack (ed), Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th ed, 2011) 115

[10] An Organic Law is one made by the Parliament by votes of the Members greater in number than a simple majority of those present and voting.

b. providing that at the end of their periods of office they are entitled, unless they have been dismissed from office, to suitable further employment by a governmental body, or to adequate and suitable pensions or other retirement benefits, or both, subject to such reasonable requirements and conditions (if any) as are laid down by an Organic Law.

Again, this scheme might be adapted in some fashion to suit the Territory form of government.

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

Comment on the Explanatory Statement

The explanation of clause 16 would be clearer were it to distinguish more fulsomely the various means by which a clerk's appointment might end. The reference to clause 18 should be to clause 17, and the powers of the Speaker conferred by subclause 16(2) means that it is not correct to state that "only the Assembly can cause the appointment of the clerk to be ended".

ROAD TRANSPORT (GENERAL) (INFRINGEMENT NOTICES) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Road Transport (General) Act 1999* so that the administering authority may in certain circumstances allow for flexible payment options for traffic infringement penalties, and for reinstatement of a person's drivers licence that was suspended for non-payment of fines.

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

The Committee draws attention to the discussion in the Explanatory Statement. Without identifying the relevant provisions of the Human Rights Act, there is offered a brief justification (at 3-4) of those provisions of the Bill that engage the right to privacy (HRA paragraph 12(a)), and the equal protection of the law (HRA subsection 8(3)).

The Committee refers the Assembly to this justification and makes no further comment.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2012-1 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2012 (No. 1) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **releases the first tranche of FiT capacity under the Act.**

Disallowable Instrument DI2012-2 being the Education (School Boards of Schools in Special Circumstances) University of Canberra High School Kaleen Determination 2012 made under section 43 of the *Education Act 2004* **determines the composition of the School Board of the University of Canberra High School Kaleen.**

Disallowable Instrument DI2012-3 being the Education (School Boards of Schools in Special Circumstances) University of Canberra Senior Secondary College, Lake Ginninderra Determination 2012 made under section 43 of the *Education Act 2004* **determines the composition of the School Board of the University of Canberra Senior Secondary College, Lake Ginninderra.**

Disallowable Instrument DI2012-4 being the Financial Management (Territory Authorities) Guidelines 2012 (No. 1) made under section 133 of the *Financial Management Act 1996* **revokes DI2011-170 and determines territory authorities for the purposes of the Act.**

Disallowable Instrument DI2012-5 being the Corrections Management (Indigenous Official Visitor) Appointment 2012 (No. 1) made under section 57 of the *Corrections Management Act 2007* **reappoints a specified person as an Indigenous Official Visitor.**

Disallowable Instrument DI2012-6 being the Children and Young People (Death Review Committee) Appointment 2012 (No. 1) made under section 727D of the *Children and Young People Act 2008* **appoints specified persons as members of the Children and Young People Death Review Committee.**

Disallowable Instrument DI2012-7 being the Children and Young People (Death Review Committee) Appointment 2012 (No. 2) made under section 727E of the *Children and Young People Act 2008* **revokes DI2011-258 and appoints a specified person as chair of the Children and Young People Death Review Committee.**

Disallowable Instrument DI2012-9 being the Public Sector Management Amendment Standards 2012 (No. 1) made under section 251 of the *Public Sector Management Act 1994* **amends the Public Sector Management Standards.**

Disallowable Instrument DI2012-10 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2012 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2011-275 and determines maximum fares payable on regular route services provided by ACTION.**

Disallowable Instrument DI2012-11 being the Nature Conservation (Species and Ecological Communities) Declaration 2012 (No. 1) made under section 38 of the *Nature Conservation Act 1980* **revokes DI2010-194 and determines specified species to be vulnerable species, endangered species and endangered communities.**

Disallowable Instrument DI2012-12 being the Radiation Protection (Fees) Determination 2012 (No. 1) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2010-283 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-13 being the Stock (Levy) Determination 2012 (No. 1) made under section 6 of the *Stock Act 2005* **revokes DI2005-178 and determines the number of animals making up a stock unit and the levy amount per stock unit.**

Disallowable Instrument DI2012-14 being the Food (Fees) Determination 2012 (No. 1) made under section 150 of the *Food Act 2001* **revokes DI2011-2 and determines fees payable for the purposes of the Act.**

Disallowable Instruments—Comment

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

Is this appointment valid??

Disallowable Instrument DI2012-8 being the Electoral Commission (Chairperson) Appointment 2012 (No. 1) made under section 12 of the *Electoral Act 1992* **appoints a specified person as chairperson of the ACT Electoral Commission.**

This instrument appoints a specified person as chairperson of the ACT Electoral Commission. The Committee notes that, while the title of the instrument clearly states that it is a "chairperson" appointment, the formal part of the instrument indicates both that it is made under section 12 of the *Electoral Act 1992* (which deals with the appointment of members of the ACT Electoral Commission) and that the relevant provision relates to the appointment of members. The Committee also notes that, in fact, it is section 12B of the Electoral Act that deals with the appointment of the chairperson of the ACT Electoral Commission.

The Committee also notes that section 12B of the Electoral Act provides:

12B Eligibility for appointment as chairperson

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

(a) is or has been a judge; or

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

(c) has been a director-general of an administrative unit; or

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

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

(f) has been a Commonwealth agency head; or

(g) has been a member of—

(i) the electoral commission; or

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

(h) is a person who—

(i) is a lawyer; and

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

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

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

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

(A) as an academic; or

(B) in business; or

(C) in a profession; and

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

(2) In this section:

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

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

(a) the secretary of a department; or

(b) the head of an executive agency; or

(c) the head of a statutory agency.

judge means—

(a) a judge of the Supreme Court; or

(b) a judge of the Supreme Court of a State or another Territory; or

(c) a judge of the Federal Court or Family Court.

(3) In this section, a reference to a person who was a ***director-general*** of an administrative unit includes a reference to someone who was a chief executive of an administrative unit.

Leaving aside the issue that both the face of the instrument and the Explanatory Statement for the instrument appear to cite the wrong empowering provision for the appointment, the Committee notes that the Explanatory Statement for the instrument does not address the detailed—and mandatory—criteria for appointment of a chairperson that are set out in section 12B of the Electoral Act. The Explanatory Statement merely states:

> Section 12 of the *Electoral Act 1992* provides for the Executive to appoint a chairperson to the Electoral Commission. This instrument appoints Mr Roger Beale AO as chairperson of the Electoral Commission. The appointment commences on 29 February 2012 and ends on the 28 February 2017.
>
> Section 12(3) of the *Electoral Act 1992* requires that, before a new chairperson is appointed, the Minister must consult the leader of each political party represented in the Legislative Assembly, and all members of the Legislative Assembly who are not also members of such a party about the proposed appointment. The Attorney General undertook this consultation and no objections to the proposed reappointment were received.
>
> The instrument of appointment is a disallowable instrument. Division 19.3.3 of the *Legislation Act 2001* does not apply to this appointment as the appointment is made by the Executive and not solely the Minister. There is therefore no requirement for consultation with a Standing Committee in relation to the appointment.

In the light of the detailed, mandatory requirements of section 12B of the Electoral Act, the Committee considers the Explanatory Statement for this instrument to be significantly deficient. **The Committee seeks the Minister's assurance that, in fact, this appointment has been properly made (by reference to the mandatory criteria set out in section 12B of the Electoral Act).** The Committee also draws the Legislative Assembly's attention to this

instrument, on the basis that it appears to be in breach of principle (b) of the Committee's terms of reference, in that the explanatory statement does not meet the technical or stylistic standards expected by the Committee. In doing so, the Committee notes that it does not consider the Committee's requirement that an instrument of appointment address any formal pre-requisites for an appointment either to be novel (see, for example, the Committee's document entitled *Subordinate legislation: technical and stylistic standards*—available at http://www.parliament.act.gov.au/committees/index1.asp?committee=119) or that this requirement is onerous.

Minor drafting issue

Disallowable Instrument DI2012-15 being the Electricity Feed-in (Renewable Energy Premium) Total Capacity Determination 2012 (No. 1) made under section 5E of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* **determines the total capacity of all micro and medium renewable energy generators.**

The Committee notes that the formal part of this instrument indicates that it is made under section 5E of the *Electricity Feed-in (Renewable Energy Premium) Act 2008*, which provides:

> **5E Meaning of *compliant***
>
> (1) For this Act, a renewable energy generator is ***compliant*** if—
>
> (a) the generator is installed on premises in the ACT; and
>
> (b) when connected to the electricity distributor's network, it complies with the service and installation rules; and
>
> (c) the total capacity of the generator, or the total capacity of all renewable energy generators installed on the premises, is not more than—
>
> (i) 200kW; or
>
> (ii) if the Minister determines another capacity under subsection (2)—the applicable determined capacity; and
>
> (d) if the generator is a micro or medium renewable energy generator—the generator is connected to the electricity distributor's network before the total capacity of all micro and medium renewable energy generators connected to the network reaches—
>
> (i) 30MW; or
>
> (ii) if the Minister determines another capacity under subsection (3)—the determined capacity.
>
> (2) The Minister may determine a total capacity for the following:
>
> (a) micro renewable energy generators installed on premises;
>
> (b) medium renewable energy generators installed on premises;
>
> (c) all renewable energy generators installed on premises.
>
> (3) The Minister may determine the total capacity for all micro and medium renewable energy generators connected to the electricity distributor's network.

While it is not as clear as it might be on the face of the instrument, the Committee notes, with approval, that the Explanatory Statement for the instrument makes it clear that the instrument is a determination under subsection 5E(3) of the Electricity Feed-in (Renewable Energy Premium) Act. The Explanatory Statement states:

> The *Electricity Feed-in (Renewable Energy Premium) Act 2008* is an Act to promote the generation of electricity from renewable energy sources.
>
> The Act supports the ACT Feed-in Tariff Scheme, which has a total installed capacity cap of 30MW for all micro and medium scale renewable energy generators connected to the electricity network.
>
> Extraordinary demand for new solar installations resulted in the 30MW cap being fully committed and the Scheme closed on 13 July 2011.
>
> Earlier provision made for householders who had entered into installation contracts prior to 1 June 2011, together with a further surge in applications in July 2011, will result in the total installed capacity cap being exceeded by up to 5MW if all eligible applications proceed to connection to the network.
>
> A risk exists that electricity retailers may not consider some eligible feed-in tariff recipients entitled to a feed-in tariff once the initial 30MW of capacity is connected to the network.

The Explanatory Statement then goes on to address the particular issue of what this instrument does:

> **The Determination**
>
> Section 5E(3) of the Act provides for the Minister to determine by Instrument another capacity.
>
> The purpose of this Determination is to increase the total capacity of all micro and medium renewable energy generators connected to the network from 30MW to 35MW.

This makes it clear that the instrument is made under subsection 5E(3) (ie rather than subsection 5E(2)).

This comment does not require a response from the Minister.

Subordinate Laws—No comment

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

Subordinate Law SL2012-1 being the Road Transport (Public Passenger Services) Amendment Regulation 2012 (No. 1) made under the *Road Transport (Public Passenger Services) Act 2001 and the Road Transport (General) Act 1999* **amends the Road Transport (Public Passenger Services) Regulation to establish an Independent Taxi Operator Pilot.**

Subordinate Law SL2012-5 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2012 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **amends the Medicines, Poisons and Therapeutic Goods Regulation by inserting an exemption related to Piper Methysticum (kava).**

Subordinate Laws—Comment

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

Positive comment—Explanatory Statement

Subordinate Law SL2012-2 being the Road Transport (Offences) Amendment Regulation 2012 (No. 1) made under section 233 of the *Road Transport (General) Act 1999* **makes a series of technical amendments to the Schedule to the Road Transport (Offences) Regulation.**

The Committee notes that the Explanatory Statement for this subordinate law states:

> The amendments made by this Regulation:
>
> - correct inadvertent errors and omissions in the Schedule;
> - ensure better alignment between the short description of certain offences and the elements of those offences;
> - repeal items that are no longer required as the offences to which they relate no longer exist.
>
> The amendments do not increase the amounts of any infringement penalties that are payable. None of the inadvertent errors or omissions corrected by this Regulation are known to have materially affected any action pursuant to the [*Road Transport (Offences) Regulation 2005*].

The Committee notes with approval the assurance provided by the last paragraph quoted above, that none of the errors or omissions corrected by this subordinate law are known to have materially affected any action under the *Road Transport (Offences) Regulation 2005*.

This comment does not require a response from the Minister.

Strict liability offences

Subordinate Law SL2012-3 being the Magistrates Court (Working with Vulnerable People Infringement Notices) Regulation 2012 made under the *Magistrates Court Act 1930* **determines infringement notice offences and penalties and authorised people to serve infringement notices.**

The Committee notes that the Explanatory Statement for this instrument states:

> The Part 3.8 of the *Magistrates Court Act 1930* provides that offences prescribed by a regulation made under the Magistrates Court Act can be dealt with by way of an infringement notice. The *Magistrates Court (Working with Vulnerable People Infringement Notices) Regulation 2012* is being made under Part 3.8 of the Magistrates Court Act and will enable infringement notices to be issued for the offences of the *Working with Vulnerable People (Background Checking) Act 2012* (the Act).
>
> Infringement notices are intended to provide an alternative to prosecution. Under the Magistrates Court Act a person authorised to issue an infringement notice for an offence has the discretion to decide whether or not to issue a notice.
>
> The offences to which this regulation applies are certain strict liability offences in the Act. Infringement notices may be issued to individuals and companies providing activities or services which are regulated under the Act. The Act is the primary law in the ACT which provides for background checking as part of a risk assessment of people working with, or wanting to work with, vulnerable people in the ACT.

The statement above expressly acknowledges that the infringement notices provided for by this subordinate law involve strict liability offences. However, the Committee also notes that the strict liability offences in question have already been provided for, in the *Working with Vulnerable People (Background Checking) Act 2012*, and, by necessary implication, adjudged by the Legislative Assembly to be appropriate, in all the circumstances.

This comment does not require a response from the Minister.

Human rights compatibility

Subordinate Law SL2012-4 being the Working with Vulnerable People (Background Checking) Regulation 2012 made under the *Working with Vulnerable People (Background Checking) Act 2011* **makes statutory rules under the Act with respect to the obligations of employers intending to engage a person issued with conditional registration in regulated activities.**

The Committee notes that the Explanatory Statement for this subordinate law states:

> The *Working with Vulnerable People (Background Checking) Act 2011* aims to reduce the incidence of sexual, physical, emotional or financial harm or neglect of vulnerable people in the ACT through the undertaking of a risk assessment on the backgrounds of people working and/or volunteering with vulnerable people.
>
> The object of these regulations is to make statutory rules under the Act with respect to the obligations of employers intending to engage a person issued with conditional registration, including role-based registration, in regulated activities.

The Committee notes that the Explanatory Statement for the subordinate law goes on to offer the following discussion of human rights issues that may be engaged by the subordinate law:

> Human Rights and Discrimination - Considerations
>
> Consideration of human rights and the obligations of public authorities, as provided in Section 28, 40A, and 40B of the *Human Rights Act 2004*; were integral to the development of the consequential amendments.

The regulations are being provided as a function of a public nature (s40A (1) (c)) and do not hinder an applicant's human rights arbitrarily (s40B (1)) as the obligations prescribed by regulation rest with employers, not employees or volunteers.

The purpose of the regulations is to ensure that the Commissioner has access to a broad range of information so that the inherent requirements of the employment role; the "risk factors" (behaviours or circumstances which indicate a risk); and the "mitigating factors" (behaviours or circumstances which reduce the level of identified risk) are known and can be considered during a determination of an applicant's risk to vulnerable people accessing a regulated activity.

The regulations will be made publicly available on the ACT legislation register as a subordinate law to the [*Working with Vulnerable People (Background Checking) Act 2011*].

This comment does not require a response from the Minister

PROPOSED GOVERNMENT AMENDMENTS—FREEDOM OF INFORMATION AMENDMENT BILL 2011

These amendments propose to elaborate the content of the objects of the Act as stated in Section 2.

The Committee has examined these amendments and has no comment to make.

Vicki Dunne, MLA
Chair

March 2012

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

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)

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

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

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

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

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

Bills/Subordinate Legislation

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

Report 38, dated 27 June 2011
Disallowable Instrument DI2011-75—Territory Records (Advisory Council) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-76—Territory Records (Advisory Council) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-77—Territory Records (Advisory Council) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-78—Territory Records (Advisory Council) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-79—Territory Records (Advisory Council) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-80—Territory Records (Advisory Council) Appointment 2011 (No. 6)

Report 39, dated 28 June 2011
Electoral (Donation Limit) Amendment Bill 2011 (PMB)

Report 40, dated 11 August 2011
Crimes (Penalties) Amendment Bill 2011 (PMB)

Report 43, dated 13 October 2011
Disallowable Instrument DI2011-194 - Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1)
Disallowable Instrument DI2011-228 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-229 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-231 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-232 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-233 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-234 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 6)
Disallowable Instrument DI2011-235 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7)

Disallowable Instrument DI2011-236 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8)

Bills/Subordinate Legislation

Disallowable Instrument DI2011-237 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9)
Subordinate Law SL2011-26 - Gene Technology Amendment Regulation 2011 (No. 1)

Report 46, dated 1 December 2011
Electoral (Election Finance Reform) Amendment Bill 2011 (PMB)
Gaming Machine Amendment Bill 2011
Retirement Villages Bill 2011 (PMB)

Report 47, dated 6 February 2012
Civil Unions Bill 2011
Crimes Legislation Amendment Bill 2011
Disallowable Instrument DI2011-288 – Climate Change and Greenhouse Gas Reduction (Climate Change Council) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-290 - Public Trustee (Investment Board) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-292 - Domestic Violence Agencies (Council) Appointment 2011 (No. 1)
Long Service Leave (Portable Schemes) Amendment Bill 2011
Public Unleased Land Bill 2011
Subordinate Law SL2011-32 - Road Transport Legislation Amendment Regulation 2011 (No. 2)

Report 48, dated 20 February 2012
Disallowable Instrument DI2011-322 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 6)
Disallowable Instrument DI2011-323 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 7)
Disallowable Instrument DI2011-324 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 8)
Education and Care Services National Regulations
Subordinate Law SL2011-36 - Work Health and Safety Regulation 2011