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

1 February 2010

Report 18

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:

CONSTRUCTION OCCUPATIONS LEGISLATION AMENDMENT BILL 2009

This is a Bill for an Act to amend the *Construction Occupations (Licensing) Act 2004* and the *Unit Titles Act 2001* to the effect of creating a new construction occupation of works assessor that would be a vehicle for the outsourcing off elements of the unit title application process.

HEALTH LEGISLATION AMENDMENT BILL 2009 (NO. 2)

This is a Bill for an Act to amend the *Health Records (Privacy and Access) Act 1997* to provide for notice to be given to the community before closure or relocation of a health practice, and to regulate the transfer of health records upon a closure and also in circumstances where a consumer moves from one practice, or provider, to another.

SURVEYORS AMENDMENT BILL 2009

This is a Bill for an Act to amend the *Surveyors Act 2007* to address operational deficiencies and better align the legislation with recent developments in New South Wales. It would provide for continuing professional development of surveyors, the date for renewal of licences to practise and relevant fees, the provision for suspension, the definition of "survey", and the replacement of replaces of the title "Chief Surveyor" with "Surveyor General".

Bills—Comment

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2009 (NO 2)

This is a Bill for an Act to amend the *Children and Young People Act 2008* with respect to the provision of temporary standard exemptions for childcare licensees and information sharing.

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

Privacy issues: HRA section 12

Section 12 of the *Human Rights Act 2004* provides:

> **12 Privacy and reputation**
>
> Everyone has the right—

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

(b) not to have his or her reputation unlawfully attacked.

Clause 4 would add a new subsection 365 (2) to information gathered following receipt of a prenatal report to be included within the definition of a prenatal report. All prenatal report information is sensitive information and is further regulated by the Act to protect the reporter of the information and the privacy of the pregnant woman. Some of these provisions would be amended in consequence of the redefinition of a prenatal report.

The Committee notes that this amendment simply extends a definition in an appropriate way and maintains the existing provisions concerning the protection of the reporter of the information and the privacy of the pregnant woman. It does not recommend that the Minister make any response.

Clause 13 would insert into the Act a new section 865A to provide an authority and discretion to the Chief Executive to provide protected information, including the names of reporters, to the Australian Federal Police when conducting a criminal investigation when (1) requested following a referral made by the Chief Executive to Police under section 360(4)(c); or (2) when the provision of the information is in the best interests of a child or young person or children and young people.

The Committee notes that this provision does extend the range of persons to whom protected information may be disclosed, and that the consequence of such disclosure could result in a criminal investigation and more particularly in criminal proceedings. These consequences would impact on the privacy and reputation of the persons subject to the investigation or proceeding. On the face of it, the right to privacy and reputation in HRA section 12 is engaged, and the issue is whether the extent of derogation is "arbitrary" (or, alternatively, is justifiable under HRA section 28).

The evident purpose of proposed section 865A is to balance the value for privacy against the value of effective law enforcement directed to the protection of children and young people. Whether that balance is achieved is a matter for the Assembly to address.

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

DOMESTIC ANIMALS AMENDMENT BILL 2009

This is a Bill to amend the *Domestic Animals Act 2000* to (1) assist people who have suffered injury or other loss as a result of a dog attack or an incident of harassment, where the relevant dog owners refuse to provide their names to the victims, by enabling the Registrar to provide that information to the victim, and (2) accommodate the fact that threats of violence are made against authorised officers (and their families) while they are carrying out their duties, by relaxing the requirement for officers' names to be included on their identity cards.

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

Privacy issues: HRA section 12

The first object of the Bill would be carried into effect in the way carefully explained in the Explanatory Statement:

> Currently section 55 of the principal Act provides that a keeper of a dog must compensate a person injured by, or who suffers damage caused by their dog. Generally, the majority of owners of offending dogs that have been involved in attacks willingly provide their names and addresses to other parties without the involvement of the Registrar or authorised officers. However, a small minority of dog owners refuse to provide their names to victims, thwarting their ability to obtain compensation for their injury or loss.
>
> Where an incident involving a domestic animal has been reported to the Registrar and an investigation is carried out by authorised officers, the identity of the owner of the offending dog may become known to the officers, either through their enquiries or by recourse to details kept on the ACT Domestic Animals Register.
>
> This Bill provides a simple mechanism to enable victims to have access to that information to help them identify the owner of the dog that was responsible for the attack or harassment.
>
> Given that such information is personal information, the Bill includes safeguards to ensure information is only released in appropriate circumstances.

The Committee has reviewed these provisions and is satisfied that no issue of incompatibility with the Human Rights Act arises.

HEALTH PRACTITIONER REGULATION NATIONAL LAW (ACT) BILL 2009

This is a Bill for an Act to adopt, with some modification, the ***Health Practitioner Regulation National Law Act 2009*** (Queensland) as law of the Territory, in implementation of Council of Australian Governments agreement of 26 March 2008.

Background

The Explanatory Statement notes that the Queensland Act:

> …establishes the following functions and processes to protect the public and enhance the Australian health workforce:
>
> - national registration standards and processes, including identity and criminal history checking, English language competence and currency of practice requirements to ensure a consistently high quality of registration occurs nationally;
> - national requirements for registered health practitioners to only practice with appropriate professional indemnity insurance arrangements in place and to complete the continuing professional development requirements for their profession;
> - national accreditation standards and functions that are largely independent of governments and will ensure a consistently high standard of accreditation occurs nationally;

- nationally consistent arrangements for receipt of complaints and notifications and dealing with the management of health, performance and conduct matters to ensure protection of the public;
- national mandatory reporting requirements obligating all registered health practitioners and their employers to report notifiable conduct on the part of a registered health practitioner to protect the public from harm;
- national requirements for the registration of students undertaking programs of study that lead to registration in a health profession;
- national mandatory reporting requirements obligating registered health practitioners and education providers to report a student who may place the public at substantial risk of harm in the course of undertaking clinical training in order to protect the public from harm;
- recognition of co-regulatory jurisdictions that will have jurisdiction specific arrangements for health, performance and conduct matters that are substantially equivalent to those of the National Scheme and ensure that decisions of co-regulatory authorities in those jurisdictions regarding registered health practitioners and students are implemented by the National Scheme to ensure protection of the public;
- privacy protections to ensure a nationally high standard of protection is provided to information related to functions under the scheme; and
- transitional arrangements for existing registrants to transition to the National Scheme while maintaining the protection of the public and continuity of health services.

Furthermore, it notes that "introduction of national law in a State or Territory Parliament for adoption by other participating States and Territories, is a standard approach to implementing national schemes in areas, like health, where Constitutional powers rest with the States and Territories, and not the Commonwealth", but acknowledges that "concerns about abrogating the rights of Parliaments tend to be greatest when, as in this case, the proposed law includes pre-determined legislative provisions based on an agreement between governments".

The Committee has reviewed the provisions for the adoption in the Territory of the Queensland Act as a national law and those for the making and operation of regulations under that law. The Committee will, in a future report, reflect on aspects of the scheme contained in this Bill. At this point, the Committee notes only that it should not be taken to have accepted any aspect of this scheme as a precedent for other national law schemes.

The Committee recommends that the Minister responsible for the administration of this national registration scheme advise the Assembly of any proposed change to the legislation or to the regulations.

In this latter respect, the Committee considers that the provisions of the Queensland Act must be assessed by the Committee against its terms of reference, and of course the *Human Rights Act 2004*. In two respects, the Bill (in Schedule 1) would modify provisions of the Queensland Act in order to accommodate HRA concerns. The Committee commends these amendments, but notes that there are many other provisions that engage the HRA. In some cases, there is a serious issue as to whether a provision of the Queensland Act is HRA compatible.

The Explanatory Statement notes that the Explanatory Statement to the Queensland Act is accessible on the internet. This is not however satisfactory, not least because there is no HRA in Queensland.

The Committee will note HRA issues that appear to it to arise, and recommends that the Minister respond to the questions raised.

The Committee has benefited from *Alert Digest No 13* of the Scrutiny of Acts and Regulations Committee (SARC) which commented on the Victorian Bill for an Act to adopt the Queensland Act. The Committee notes that the relevant Victorian Minister presented with the Victorian bill a statement of compatibility with the Victorian Charter of Rights that alerted the Victorian Parliament to a number of areas in respect of which there was a question whether a provision of the Queensland Act was compatible with the Charter

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

Privacy issues: HRA section 12

Criminal history checks

Referring to sections 5, 38(1)(b), 55(1)(b), 74(a), 77(3)(c), (d) and (4), 79, 109(b) and 231(g) of the Queensland Act , SARC observed that:

> the Act provides for mandatory criminal history checks for all health professionals and the require disclosure of records concerning convictions, a plea or finding of guilty (whether a conviction is recorded or not) and every charge for an offence made against the person. The checks apply on first registration and then by annual declaration made by the health professional. There is no limitation on the type of offence (conviction, charge or plea) that must be provided to or declared to the relevant board.
>
> Further the Committee notes that any relevant 'spent conviction scheme' of the Commonwealth, State or Territory does not apply to the obligations under the proposed law. Further the obligations apply to convictions, pleas or charges made before or after the commencement of the proposed National Law.

The proposed insertion of a section 35A into the text of the Queensland Act (by 1.1 of Schedule 1 of the Bill) accommodates the first concern raised, but so far the Committee can see the concern about the displacement of any applicable spent convictions scheme is not addressed.

The Committee recommends that the Minister advise the Assembly whether a spent convictions scheme would otherwise operate in the Territory and, if so, why it is justifiable to displace the scheme as is provided by the Queensland Act.

Referring to sections 77(3), 79, 109(1)(b), 135 and 231 of the Queensland Act, SARC noted that they:

> permit or require National Boards to request, check or record the criminal history of applicants and registrants. Clause 5 of that Law defines criminal history to include, not only convictions, guilty pleas and findings of guilt, but also:

> every charge made against the person for an offence, in a participating jurisdictions or elsewhere, and whether or after the commencement of this Law.
>
> This formulation covers charges that have not yet been adjudicated, charges that are dropped or quashed and charges that resulted in acquittals. Clause 38(1)(b) requires each National Board to develop guidelines about 'the matters to be considered in deciding whether an individual's criminal history is relevant to the practice of the profession'. Clauses 55(1)(b) and 74(a) permit National Boards to refuse registration having regard to relevant aspects of an applicant's criminal history.

It then commented:

> While the Committee considers that facilitating National Boards' access to unresolved criminal charges is not an arbitrary limit on applicants' right to privacy, it is concerned that the same cannot be said for access to charges that have been resolved in favour of the applicant.
>
> In addition, the Committee considers that a denial of registration on the basis of criminal charges that have been resolved in the applicant's favour may engage the Charter right of charged persons 'to be presumed innocent until proven guilty according to law'. While the Victorian Supreme Court has held that a health regulator can consider the subject-matter of unresolved charges when making registration decisions,[1] different considerations may apply in relation to finalised criminal charges, especially acquittals. In particular, the European Court of Human Rights has held that the presumption of innocence will be infringed if a government body acts in a way that casts doubt on the correctness of a verdict of acquittal.[2]
>
> The Committee notes that … an English judge … dismissed a claim based on the rights to privacy and the presumption of innocence.[3] However, late last year, a unanimous ruling of the European Court's Grand Chamber held, in a different context, that the indefinite retention on a state investigative database of data about unconvicted persons on the same basis as data on convicted persons is incompatible with the right to privacy.[4]

This Committee endorses these comments and recommends that the Minister advise the Assembly (1) why it should not be considered that sections 5, 77(3), 79, 109(1)(b), 135 and 231 of the Queensland Act, by permitting or requiring the gathering of information about criminal charges resolved in an applicant's favour, are an arbitrary interference with those applicants' privacy; and (2) why it should be considered that sections 5, 38(1)(b) 55(1)(b) and 74(a), by permitting National Boards to have regard to criminal charges resolved in an applicant's favour when making registration decisions, are compatible with the HRA right of those applicants to be presumed innocent until proven guilty.

[1] *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346.
[2] *Sekanina v Austria* [1993] ECHR 37, [30]: "The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final." See also *Rushiti v Austria* [2000] ECHR 106.
[3] *D v Secretary of State for Health* [2005] EWHC 2884 (Admin). Although the judge, citing the issue's uncertainty and importance, granted leave to the doctor concerned to appeal the ruling, no such judgment has eventuated.
[4] *S & Marper v UK* [2008] ECHR 1581, [122].

Mandatory reporting obligations

Section 140 of the Queensland Act defines "notifiable conduct" in relation to a registered health practitioner to include the practice of the relevant profession "while intoxicated by alcohol or drugs", and the engaging by the person "in sexual misconduct in connection with" the practice of the profession. ("Sexual misconduct" does not appear to be defined.) Section 141 requires a registered health professional to report another where the former forms a "reasonable belief" that the latter has engaged in notifiable conduct. Section 141 also requires reporting where the practitioner has formed a reasonable belief that a student has an impairment that, in the course of the latter undertaking clinical training, may place the public at a substantial risk of harm.

Sections 142 and 143 place similar mandatory reporting obligations on employers and education providers.

Section 144 provides that "any entity" (which, it appears from section 5, includes any person) may make a voluntary notification if it, he or she believes that a ground upon which such a notification may be made exists. These grounds are stated in subsection 144(1), and include that the practitioner the subject of the report may not be a "suitable person" to hold the relevant registration, or "has, or may have, an impairment", and, in relation to a student, that the latter "has, or may have, an impairment" (subsection 144(2)). The Committee notes that the belief of the reporter need not be a reasonable belief.

The Committee recommends that the Minister advise the Assembly why it may be said that these provisions, which engage the right to privacy, are not an arbitrary limitation on that right.

Public registers available for inspection

Referring to sections 222 to 228 of the Queensland Act, SARC noted that these provisions deal with registers of registered health practitioners that are required to be kept under the Act and the access to them by members of the public. SARC noted concerns that had been expressed by the Deputy Privacy Commissioner (DPC) of Victoria about the inclusion in these registers of a professional's unique identifiers and other matters. The Committee notes that under paragraph 225(p), the register must include "any other information the National Board considers appropriate". This broadly expressed and subjectively worded power might permit a wide range of personal information to be included. The Committee notes the protective provision in section 226, but that its operation is dependent upon the exercise of discretion by the National Board.

Similar provision is made in sections 229 and 230 concerning student registers.

The Committee recommends that the Minister advise the Assembly why the limitation of the right to privacy involved in these provisions is not an arbitrary limit on that right.

Health assessments

Referring to sections 5, 168 and 177, SARC noted that a National Board may require a registered health practitioner or a student to undergo a health or performance assessment which may consist of a medical, physical, psychiatric or psychological examination or test, if the board reasonably believes that the practitioner or student has, or may have, an "impairment" for the purposes of the Act.

The Committee recommends that the Minister advise the Assembly why the limitation of the right to privacy involved in these provisions is not an arbitrary limit on that right.

Administrative discretions that are not conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis

There are many provisions in the Queensland Act that condition the exercise of a discretion upon the holder of the power acting upon "reasonable grounds" or some equivalent basis. There are however many provisions that do not. The Committee has referred to some specifically, and a full list follows: subsection 49(2) (and compare to subsection 48(1)), paragraph 55(1)(a), subsections 67(2), 68(2), 69(2), paragraph 74(b), subsections 83(1), paragraphs 94(1)(a), 95(1)(a), 96(1)(a), 97(1)(a), 98(1)(a), 102(2)(b), subsections 103(1), 160(1), 186(3), and 218(2).

The Committee recommends that the Minister advise the Assembly why in each case the exercise of the relevant discretion could not be conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis.

Review of an administrative power

Section 48 provides for the accreditation of a program of study by an accreditation authority, and, in a case where the accreditation is refused, for the provider to obtain an internal review of the decision (see subsections 48(5) and (6)). Where a program is accredited by the authority, the National Board may then approve or refuse to approve the program as providing a qualification for the purposes of registration in the relevant health profession.

There appears to be no provision for the program provider to seek a review of a refusal by the National Board.

The Committee recommends that the Minister advise the Assembly why there could not be some provision for a program provider to have a review of a refusal by the National Board.

The qualifications of investigators

Section 160 empowers the National Board to investigate a health practitioner or student "if it decides it is necessary or appropriate" in certain circumstances, covering generally speaking issues of fitness or impairment. If it decides to investigate, the Board "must direct an appropriate investigator to conduct the investigation" (subsection 160(2)).

Subsection 163(1) provides that the National Board may appoint as an investigator "(a) members of the National Agency's staff; (b) contractors engaged by the National Agency".

The Committee notes that there appears to be no provision regarding the qualification or the disqualification of an investigator.

The Committee recommends that the Minister advise the Assembly why there is no provision regarding the qualification or the disqualification of an investigator.

Legal professional privilege and the powers of investigators and inspectors to acquire information

Schedule 5 of the Queensland Act governs the powers of an investigator. In three instances, there appears to be no protection afforded against the investigator acquiring information in respect of which a person might wish to claim client legal (or legal professional) privilege. See Schedule 5.2(1) (noting that the privilege against self-incrimination is specifically protected by Schedule 5.2(3)); and Schedule 5.9(2)(d).

Schedule 6 of the Queensland Act governs the powers of an inspector, and in this respect the relevant provisions are Schedule 6.2(1), 6.3(1)(a), and 6.9(2)(d).

The Committee recommends that the Minister advise the Assembly as to whether an investigator or inspector may obtain matter notwithstanding that a person might wish to claim client legal (or legal professional) privilege in respect of that matter and, if this be the case, provide a justification for the displacement of this privilege.

An investigator's findings and notice to a person affected thereby

By section 166, an investigator must, upon completing an investigation, give a written report to the National Board that includes "(a) the investigator's findings about the investigation; and (b) the investigator's recommendations about any action to be taken in relation to the health practitioner or student the subject of the investigation".

There is however no provision for providing the report to the person the subject of the investigation. (Allowing that these are different procedures, a comparison may still be made with subsection 176(3) in relation to health assessment reports and subsection 179(1) in relation to show cause matters).

The Committee recommends that the Minister advise the Assembly why, upon the completion of an investigation, the report should not be provided to the person the subject of the investigation.

Legal representation before a health panel

Division 11 of the Queensland Act provides for the establishment of a health panel to investigate whether a health practitioner or a student has an impairment. Section 186 governs the circumstances in which the subject of the inquiry may be represented by a legal practitioner. These fall short of a right to representation, for in the end whether legal representation is available falls within the discretion of the panel to determine whether it is "appropriate in the particular circumstances of the hearing" (subsection 186(3)).

The Committee recommends that the Minister advise the Assembly why section 186 does not amount to a denial of natural justice in the respect that there is no right to legal representation.

Where a "health" panel may proceed in the absence of a health practitioner or a student

Section 188 provides:

> At a hearing, a panel may proceed in the absence of the registered health practitioner or student the subject of the proceedings if the panel reasonably believes the practitioner or student has been given notice of the hearing.

There is a question whether this is a sufficient protection of the right in natural justice for the health practitioner or student to be present at the hearing. While there must be circumstances where it is reasonable for the panel to proceed in the absence of such a person, it might be asked why there should not be an obligation on the panel to make inquiries as to why the person is absent.

The Committee refers this matter to the Assembly and recommends that the Minister respond.

HUMAN RIGHTS COMMISSION LEGISLATION AMENDMENT BILL 2009

This is a Bill to amend the *Discrimination Act 1991*, the *Health Professionals Act 2004*, the *Human Rights Commission Act 2005*, and the *Mental Health (Treatment and Care) Act 1994* in relation to a number of matters dealt with in these Acts.

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

Privacy issues: HRA section 12

Clause 18 would insert into the *Human Rights Commission Act 2005* a new paragraph 45(3)(d) that would permit the Commission to close a complaint under subsection 45(3) if the complainant has withdrawn it before notice has been given to the person complained about.

The making of a complaint could affect the privacy and reputation of the person complained about, and there arises an issue as to what is to happen to documents that contain the detail of a complaint that is closed. If such documents are retained on files of government agencies, there is the potential that they may be later referred to for some purpose.

The Committee recommends that the Minister explain to the Assembly what is to happen to documents that contain the detail of a complaint that would be closed under new paragraph 45(3)(d).

PLANNING AND DEVELOPMENT AMENDMENT BILL 2009 (NO. 2)

This is a Bill to amend the *Planning and Development Act 2007* to address a number of concerns that have arisen in the process of the scheme introduced by that Act.

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

Amendment to the process of calling in a development application

Under existing subsection 158(1) of the Act, the Minister "may, in writing, direct the planning and land authority to refer to the Minister a development application that has not been decided by the authority". By existing subsection 158(3), "[if] the Minister gives a direction under subsection (1) in relation to an application, the planning and land authority must take no further action that would lead to a decision by the authority on the application".

By clause 19 of the Bill, existing subsection 158(3) would be replaced by a new provision that would add a provision that the authority "may continue to take procedural steps in relation to the application, unless the Minister's direction under subsection (1) directs the authority not to take a procedural step". Thus, by this amendment, a "call in" of a development application would not stop public notification and agency referral steps unless the Minister expressly requires this.

Two issues arise.

The first is that proposed subsection 158(3) does not state any grounds that condition an exercise of the power to require that public notification and agency referral steps should stop once a call-in is made. It is undesirable that administrative power be conferred in terms that are not expressly limited by reference to stated grounds. Of course, a court or tribunal would "read in" limitations by reference to the object and purpose of the Act, but, as the Committee has often pointed out, a person affected by an exercise of a power should not be put to the expense of finding out what a court or tribunal thinks are the limits of the power. At least some general indication of those limits should be apparent on the face of the statutory provision.

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

The second issue is whether the Minister should be vested with any power to stop public notification and agency referral steps. Exercise of the call-in power affects the ability of persons who may be affected by the particular development to participate in the decision-making process, and such an effect could extend to having an impact on property values and the like.

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

PLANNING AND DEVELOPMENT (NOTIFICATIONS AND REVIEW) AMENDMENT BILL 2009

This is a Bill to amend the *Planning and Development Act 2007* in relation to the notification by the ACT Planning and Land Authority (ACTPLA) of a development application; the range of matters that may be considered by ACTPLA and the ACT Civil and Administrative Tribunal (ACAT) when reviewing decisions, (such as Territory Plan Zoning and Objectives, as well as the Territory Plan Rules); and the standing of persons to appeal a decision on a development application.

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

The validity of a development approval where ACTPLA failed to properly notify the registered proprietor of an adjoining property – balancing the rights of adjoining proprietors against the interests of those who rely on the validity of a decision on a development application

Existing subsection 153(2) of the Act provides that ACTPLA give written notice of the making of certain development applications to the registered proprietor of the lease of an occupied place adjoining the place in respect of which the application is made. Existing subsection 153(5) provides that "[t]he validity of a development approval is not affected by a failure by the planning and land authority to comply with this section".

By clause 6 of the Bill, existing subsection 153(2) would be deleted, and new subsections (5), (6) and (7) inserted. Their effect is explained in the Explanatory Statement:

> [These amendments remove] a loophole which means that a failure of ACTPLA to correctly follow the public notification requirements to adjoining premises [does] not affect the validity of a development approval.
>
> The replacement clause ensures that the failure to correctly follow the public notification requirements is only acceptable if it has not:
>
> - unfavourably affected the person's awareness of the existence and nature of the application; or
> - denied or restricted the opportunity of the person to make representations about the application under section 156.
>
> ACTPLA may make a declaration stating that it is satisfied that the failure to notify a person has not resulted in a circumstance as outlined above. This declaration is a notifiable instrument.

Provisions such as existing subsection 153(5) of the Act are not uncommon, and their purpose is to provide protection to persons who rely on public authorities discharging their legal obligations in respect of the procedural steps that must be taken prior to the exercise of an administrative power. If the amendments are passed, a person applying for a development approval would need to check to see that ACTPLA had complied with section 153. This might or might not be seen as reasonable.

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

ROAD TRANSPORT (ALCOHOL AND DRUGS) (RANDOM DRUG TESTING) AMENDMENT BILL 2009

This is a Bill for an Act to amend the *Road Transport (Alcohol and Drugs) Act 1977* to allow for random roadside drug testing to be conducted alongside or independent of random roadside breath testing, and provides for testing requirements, procedures, offences and penalties applicable to the introduction of random drug testing.

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

Is it desirable to extend the current scheme of the Act for random testing in relation to alcohol consumption to provide for testing in relation to drug consumption?

The current scheme of the Act for random testing in relation to alcohol consumption engages various human rights and particular provisions of the Human Rights Act, such as the right to privacy and the right to liberty.

The Committee refers the Assembly the general question of whether this scheme also provide for testing in relation to drug consumption.

Drafting point: Should existing section 21 be amended as appropriate so that this defence is available to persons charged with offences in relation to drug testing?

SUBORDINATE LEGISLATION

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

Subordinate Legislation—No comment

Disallowable Instrument DI2009-226 being the Education (School Boards of School-Related Institutions) Early Childhood Schools Determination 2009 made under section 43 of the *Education Act 2004* **determines for the composition of the school boards of Early Childhood Schools.**

Disallowable Instrument DI2009-228 being the Radiation Protection (Fees) Determination 2009 (No. 1) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2008-284 and determines fees payable for the purposes of the Act.**

Subordinate Legislation—Comment

The Committee has examined the following item of subordinate legislation and offers the following comment on it:

Minor drafting issue

Disallowable Instrument DI2009-227 being the Independent Competition and Regulatory Commission (Investigation into Projected Costs of the enlarged Cotter Dam water security project) Terms of Reference Determination 2009 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **directs the Independent Competition and Regulatory Commission to conduct an investigation into the projected costs of the enlarged Cotter Dam project.**

The Committee notes that the formal part of this instrument suggests that it is made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997*. Section 15 of that Act provides that a "referring authority" may provide a reference to the Independent Competition and Regulatory Commission, in relation to various specified matters. Subsection 15(8) of the Act provides that the notice to the Commission that a reference has been provided is a *notifiable* instrument.

Subsection 16(1) of the Act provides that the referring authority may, by instrument in writing, determine the terms of a reference under section 15 of the Act. Subsection 16(3) provides that a determination of the terms of reference is a *disallowable* instrument. The fact that the instrument is disallowable brings it within the jurisdiction of the Committee.

As far as the Committee can determine, there is no *notifiable* instrument on the ACT Legislation Register relating to the Commission's investigation into the Cotter Dam project. While notice of the investigation may, in practical terms, have been given by way of this instrument, the Committee questions whether, in fact, the legislative requirements have been complied with by the inclusion of the requirements of both subsections 15(8) and 16(1) in this (disallowable) instrument.

The Committee would appreciate the Minister's views on this issue.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Industrial Relations, dated 9 December 2009, in relation to comments made in Scrutiny Report 16 concerning the Workers Compensation Amendment Bill 2009.
- The Minister for Planning, dated 22 December 2009, in relation to comments made in Scrutiny Report 15 concerning Disallowable Instruments:
  - DI2009-221, being the Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1); and
  - DI2009-205, being the Surveyors (Chief Surveyor) Practice Directions 2009 (No. 2).
- The Attorney-General, dated 9 January 2010, in relation to comments made in Scrutiny Report 15 concerning Subordinate Law SL2009-51, being the ACT Civil and Administrative Tribunal (Transitional Provisions) Amendment Regulation 2009 (No. 1)
- The Acting Minister for Industrial Relations, dated 29 January 2010, in relation to comments made in Scrutiny Report 15 concerning Subordinate Law SL2009-45, being the Work Safety Regulation 2009.

The Committee wishes to thank the Minister for Industrial Relations, the Minister for Planning, the Attorney-General and the Acting Minister for Industrial Relations for their helpful responses.

Vicki Dunne, MLA
Chair

February 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

Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1)

Report 8, dated 22 June 2009

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

Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009

Report 10, dated 10 August 2009

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

Subordinate Law SL2009-22 - Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1)

Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

Report 11, dated 24 August 2009

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009

Bills/Subordinate Legislation

Disallowable Instrument DI2009-132 - Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-133 - Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009
Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)
Crimes (Assumed Identities) Bill 2009
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Report 13, dated 12 October 2009
Education Amendment Bill 2009

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)
Education (Participation) Amendment Bill 2009

Report 15, dated 16 November 2009
Disallowable Instrument DI2009-210 - Attorney General (Fees) Amendment Determination 2009 (No. 3)
Disallowable Instrument DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)

Report 16, dated 7 December 2009
Fair Trading (Motor Vehicle Repair Industry) Bill 2009
Racing Amendment Bill 2009

Report 17, dated 9 December 2009
Civil Partnerships Amendment Bill 2009 (No. 2)

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 Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for the Scrutiny of Bills Report No. 16 of 7 December 2009. I offer the following response in relation to the Committee's comments on the Workers Compensation Amendment Bill 2009 (the Bill).

Penalties for non-insurance and under declaration of wages

The Bill introduces new civil penalties that apply in circumstances where an employer fails to obtain a compulsory workers' compensation insurance policy (s 149) or, in obtaining such a policy, under declares the quantum of wages for the period covered by the policy (s 162A).

Under both sections, the maximum penalty payable by the employer is the double avoided premium – twice the premium that would have been payable had the employer obtained a policy (s 149) or had the employer properly declared its wages (s 162A).

The Chief Executive is required to determine the value of the premium avoided and may determine that a reduced amount should be recovered in a particular case. The Bill neither authorises nor confers discretion upon the Chief Executive to apply a penalty that is greater than the double avoided premium.

Clear and certain boundaries for discretionary powers – s 149 and 162A

The Committee suggests that the discretionary power conferred on the Chief Executive under subsections 149(3)(viii) and 162A(3)(viii) is too broad. The Committee suggests that the boundaries of the discretionary power conferred upon the Chief Executive should be clear and certain on the face of the legislation.

It is submitted that, as drafted, the Bill addresses these suggestions.

Firstly, the Bill imposes an express upward limit on the Chief Executive's power to impose a penalty for non-insurance and under declaration of wages. The maximum penalty that the Chief Executive can impose is equal to double the avoided premium in any particular case. Hence,

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employers liable for a penalty under either s 149 or 162A are provided with certain assurance that, at most, their expression will be equal to this amount.

The boundaries of the Chief Executive's power are further informed by the express provisions made in ss 149(4)(viii) and 162A(3)(viii). The criteria set out in these subsections provides clear guidance on the nature of information that the Chief Executive may have regard to in determining whether to impose a reduced penalty.

It is submitted that the clear and express boundaries established by these provisions is neither undermined nor weakened by the inclusion of a 'catch-all' provision that entitles the Chief Executive to consider any other relevant information not otherwise specified. As discussed below, the inclusion of the 'catch-all' provision provides employers with an assurance that the exercise of Chief Executive's discretion will not occur in ignorance of relevant information provided by the employer because it is not of a kind specified in ss 149(4)(viii) or 162A(3)(viii).

Adherence to the law – relevant considerations

The administrative power conferred upon the Chief Executive by s 149 and 162A must be exercised in accordance with the law and for a proper purpose.

The inclusion of a 'catch-all' provision within s 149(4) and 162A(3) recognises these overriding limits to the exercise of the Chief Executive's discretion and the obligation to examine and weigh all evidence and information that is relevant to the exercise of the discretion to impose a **reduced** penalty.

Moreover, the 'catch-all' provision ensures that the Government is not forced to make a decision in error of the law by reason of the Chief Executive being unable to consider new information or evidence that amounts to a relevant consideration because it is not reflected in the express list of criteria set out in s 149(4) and 162A(3).

By extension, ss 149(4)(viii) and 162A(viii) ensure that employers have every possible opportunity to provide evidence that they consider is relevant to the question of why they should not have to pay the full value of the penalty created under the respective provisions.

A prescriptive list would limit the capacity and ability of the Regulator to consider evidence that has not, at the time of drafting the Bill, been contemplated, but is nonetheless, in a particular case, relevant to the exercise of the Chief Executive's discretion.

I trust the above comments address the Committee's concerns.

Yours sincerely

Katy Gallagher MLA
Minister for Industrial Relations

9 December 2009

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Response to Scrutiny Report No. 15

I refer to Scrutiny Report No. 15 of 16 November 2009 and the Committee's comments regarding Disallowable Instrument DI2009-205, being the *Surveyors (Chief Surveyor) Practice Directions 2009 (No 2)* and Disallowable Instrument DI 2009-221 being the *Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1).*

Disallowable Instrument DI 2009-221 being the Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1)

The Committee noted that the Explanatory Statement for this instrument stated that the disallowable instrument was being re-made as a result of its repeal under subsection 428(2) of the *Planning and Development Act 2007* (the Act) and that section 2 of the instrument gives the instrument retrospective effect to 31 March 2008.

The Committee indicated that it had been unable to identify the repealed instrument on the ACT Legislation Register and asked for my assistance in locating that instrument. A copy of the instrument is attached and can be accessed on the Legislation Register at http://www.legislation.act.gov.au/di/2004-207/20040909-16334/pdf/2004-207.pdf.

The Committee also requested my assistance in explaining the relationship between the repealed instrument and the re-made instrument. The policy behind both instruments remains the same, that is, a remission of a change of use charge is available if the increase in gross floor area (GFA) is less than 10% and the increase in GFA is necessary by operation of the *Smoking (Prohibition in Enclosed Public Places) Act 2003.*

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There is additional wording in the re-made instrument as a result of advice from the ACT Government Solicitor about the drafting of the repealed instrument.

It was considered appropriate to backdate the re-made instrument to the start of the operation of the Act, that is, 31 March 2008, as the instrument provides a benefit (a remission of a change of use charge) and because the re-making of the instrument was only necessary because of the repeal of the previous instrument by operation of the Act. There is presently only one application with the Planning and Land Authority for a remission of a change of use charge in accordance with the re-made instrument and the instrument expires on 1 December 2009.

I trust this information answers the Committee's enquiry about the relationship between the repealed instrument and the re-made instrument.

Disallowable Instrument DI2009-205, being the Surveyors (Chief Surveyor) Practice Directions 2009 (No 2)

The Committee noted that the Explanatory Statement for this instrument stated that minor errors and forms had been corrected however did not explain what the 'minor errors' were.

The justification for the new instrument was to amend forms. These forms made reference to the 'Surveyors (Chief Surveyor) Practice Directions 2009 No 1'. While not incorrect, it was decided that using a more generic term, being 'Surveyors Practice Directions' would mean that future amendments to the directions would not necessitate subsequent changes to forms.

The 'minor errors' included one spelling mistake and a reformatting of a table which displayed poorly when converted to a .pdf format.

The Committee also noted that the formal part of the instrument indicates that it is made under "section no 55" of the *Surveyors Act 2007*. The Committee notes that the "no" is superfluous. This will be removed when the directions are next updated.

I would like to thank the Committee for their careful attention to the two disallowable instruments.

Yours sincerely

Andrew Barr MLA
Minister for Planning

22 DEC 2009

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

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Chair
Scrutiny of Bills and Subordinate Legislation Committee
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Committee's Scrutiny Report No. 15, dated 16 November 2009. The report commented on subordinate law SL2009-51, being the ACT Civil and Administrative Tribunal (Transitional Provisions) Amendment Regulation 2009 (No 1). I offer the following response to those comments.

The Committee was concerned that new section 52A of the *Magistrates Court Act 1930*, dealing with references in documents to the now defunct Small Claims Court, has prejudicial retrospective operation. The purpose of new section 52A is to preserve the original intent of the parties, which was to give authority to act in relation to a small claims matter, irrespective of whether the claim is heard in the Magistrates Court or in the ACT Civil and Administrative Tribunal (ACAT). The provision avoids the inconvenience of requiring affected documents to be refiled, removing an avoidable transaction cost for tribunal clients. New section 52A does not have retrospective effect, it only applies to matters heard after the date the amendment regulation came into force.

The Committee also commented on the Explanatory Statement relating to new section 432A of the *Legal Profession Act 2006*, being the reinstatement of a provision restricting publication of lawyers' names subject to disciplinary proceedings. Specifically, the Committee expressed concern that the policy reasoning for reinstating this provision was not adequately addressed in the Explanatory Statement. I draw the Committee's attention to page 5 of the Explanatory Statement for the *Legal Profession Amendment Act 2007*, containing an explanation for former section 426A, now reinstated as section 423A:

"In relation to the new section 426A, which prohibits publication of the names of parties to disciplinary proceedings until the proceedings (including any appeal) have concluded, section 21 of the Human Rights Act 2004 requires hearings to be public, although there is an exception for the purposes of protection of the private lives of the parties. Under the new provision, publication is allowed after a finding of guilt. The section seeks to protect the right to privacy and reputation contained in section 12 of the Human Rights Act 2004."

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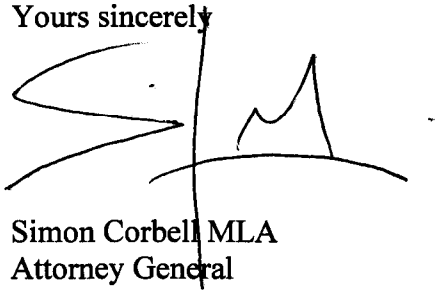
I can confirm that the policy reasoning for reinstating this provision remains the same as when the section was originally introduced in 2007.

The potential for these protections to be eroded was an unintended consequence of its removal. I note that in the interim the ACAT has routinely taken the precaution of making orders to prevent inappropriate disclosure in each case. Such orders will no longer be required.

I thank the Committee for its helpful analysis and commentary. I trust that the above response addresses your concerns.

Yours sincerely



Simon Corbell MLA
Attorney General

9.1.12

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

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Mrs Vicki Dunne MLA
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Dear Mrs Dunne

Thank you for your Scrutiny of Bills report No.15 of 16 November 2009. I am responding to you in my capacity as the Acting Minister for Industrial Relations, and offer the following response in relation to the Standing Committee on Justice and Community Safety comments on the *Work Safety Act 2008* and the Work Safety Regulation 2009.

I am pleased to note the positive comment made by the Committee on the development of the Work Safety Regulation 2009, particularly in respect of the consideration given to the incorporation of Strict Liability offences. The Government shares the Committee's view that where for reasons of public safety, the public interest requires the sanction of criminal penalties to ensure that regulatory schemes are observed.

The Committee's comment on the minor drafting issue with the Attorney-General (Fees) Amendment Determination 2009 (No.3) has been noted and referred to the Office of Regulatory Services in the Department of Justice and Community Safety for their further action.

The Committee's comments on the Regulatory Impact Statement for the Work Safety Regulation have also been noted and will be taken into account in the development of any future such Statements.

Again, I thank the Committee for its comments.

Yours sincerely

Jon Stanhope MLA
Acting Minister for Industrial Relations

29 JAN 2010

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