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

7 DECEMBER 2009

Report 16

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 comment on them:

FINANCIAL MANAGEMENT (BUDGET REVIEW) AMENDMENT BILL 2009

This Bill would amend the *Financial Management Act 1996* to provide that the Treasurer must prepare a budget review for each financial year that takes into account the first 6 months of the financial year.

HEALTH LEGISLATION AMENDMENT BILL 2009

This Bill would amend the *Drugs of Dependence Act 1989* to consolidate the laws regarding alcohol and drug rehabilitation, and the *Health Records (Privacy and Access) Act 1997* to allow the destruction of health records when they are replaced by an electronic copy.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2009 (NO. 4)

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

RATES AND LAND TAX LEGISLATION AMENDMENT BILL 2009

This Bill would amend the *Rates Act 2004*, the *Land Tax Act 2004*, and the *Land Titles (Unit Titles) Act 1970*.

REVENUE LEGISLATION AMENDMENT BILL 2009

This Bill would amend the *First Home Owner Grant Act 2000* and the *Taxation Administration Act 1999*.

Bills—Comment

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

FAIR TRADING (MOTOR VEHICLE REPAIR INDUSTRY) BILL 2009

This is a Bill for an Act to provide for the licensing and regulation of people in the motor vehicle repair industry, and would replace the *Fair Trading (Motor Vehicle Service and Repair Industry) Code of Practice 1999* established under the *Fair Trading Act 1992*.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)

Commencement of the Act

Is it justifiable in the circumstances to permit the Minister to fix by written notice the date for the commencement of the Act?

Clause 2 provides that the proposed Act is to commence on a day to be fixed by written notice by the Minister. This is in effect a delegation to the executive of a power to choose a time for commencement which is within the 6 months following the notification day.[1]

The Committee recommends that the Explanatory Statement provide a justification for this provision.

Executive power by the making of regulations to modify or displace the operation of provisions of the scheme

There arises in relation to a number of provisions of the Bill the question whether power should be conferred on the Executive, by the making of regulations, to modify or displace the operation of provisions of the scheme.

Clause 6 – definition of "motor vehicle repair work"

The definition of "motor vehicle repair work" in subclause 6(2) of the Bill is clearly a key element of the scheme of regulation. By subclause 6(3), the Executive would have the power by making a regulation to alter this element by prescribing that certain work not be "motor vehicle repair work".

Should power be conferred on the Executive to make a regulation prescribing that certain work not be "motor vehicle repair work"?

Clause 12 – the conditions under which a person may obtain a motor vehicle licence

By subclause 12(2), the commissioner must issue a licence where satisfied that the applicant is eligible under clause 9; can comply with any conditions to which the licence is subject; and "(c) can satisfy anything else prescribed by regulation".

The exercise of this power under subclause 12(2)(c) by the Executive to make a regulation could result in a major alteration to the scheme of the Act as it appears on the face of the Bill.

Should power be conferred on the Executive to make a regulation prescribing "anything else" that is a condition of obtaining a motor vehicle licence?

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

[1] This is the effect of section 79 of the *Legislation Act 2001*. See section 28 concerning the day of Notification.

The Committee has noted that it has been common for Ministers to respond to queries about whether a subject matter is appropriately dealt with by a subordinate law by argument that (where, as is often the case, this is possible) the Legislative Assembly may adopt a resolution to disallow the law. If accepted in every instance, this argument negates substantially the point of the Committee's term of reference to consider whether a clause of a Bill "inappropriately delegate(s) legislative powers".

The Committee considers that the rationale for this term of reference is the recognition that debate about the policy of a bill should occur when the bill is debated in the Assembly. Once the Act operates, and a subordinate law is made to introduce significant new elements into the scheme of the Act, it is more difficult to promote a debate about the policy of those elements. An MLA must persuade the Assembly to devote time to debating a resolution of disallowance.

In addition, unless some other regime is adopted in relation to the particular subordinate law-making power, disallowance of such a law operates only from the time of disallowance.

Ministerial dispensing power to grant to a person an exemption from all or any of the provisions of the Act

The objection to dispensing provisions

The Committee has often drawn attention to the problem that arises when a Minister or other body is given a power to dispense with the operation of an otherwise generally applicable law in favour of a particular person. In *Scrutiny Report No 47* of the *Fifth Assembly*, concerning the Health Professionals Bill 2003, the Committee said:

> It is fundamental that the law apply equally to all citizens. Any dispensation should be justified. Dispensing clauses are also objectionable on the ground of their being an inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined. As a general principle, a law should state a principle according to which persons might apply for an exemption, rather than simply empower a Minister or an executive officer to grant a dispensation.

Dispensing powers are in tension with the provision in subsection 8(3) of the *Human Rights Act 2004* that "Everyone is equal before the law and is entitled to the equal protection of the law without discrimination".

If it is desirable to confer a dispensing power on a Minister or other official, then it can be expressed in terms that are more limited than an open-ended power to dispense. In *Scrutiny Report No 12* of the *Seventh Assembly*, concerning the Dangerous Goods (Road Transport) Bill 2009, the Committee commended a scheme for dispensation that specified:

(a) the boundaries of the scope of the power to exempt, by reference to objective and closely defined criteria;

(b) the detail of what must be contained in an exemption, including its duration; and

(c) that certain kinds of exemption are notifiable instruments.

The Committee recommended that the dispensing authority should have power to grant an exemption "if satisfied on reasonable grounds" (rather than just "satisfied") of the specified matters relevant to an exercise of the power.

The objections to open-ended discretionary power

The objections to conferring a power to dispense (and any other kind of power) in open-ended terms are noted below in the comment on the proposal in clause 4 of the Racing Amendment Bill 2009 to insert a new subsection 61L(2) of the *Racing Act 1999*. In short, it is preferable that the law conferring the discretionary power should state the boundaries of the power. Resolution of this matter, which is of vital importance to a person potentially or actually affected by an exercise of the power, should not be in effect delegated to the administrative decision-maker and then ultimately to tribunals and/or courts.

The dispensing provision in this Bill

By subclause 46(1), a person may, in writing, apply to the Minister for exemption from all or any of the provisions of this Act. By subclause 10(3), "[t]he Minister must **not** grant the exemption unless satisfied on reasonable grounds that the exemption is **not** likely to cause a substantial detriment to consumers". By subclause 10(4), in exercising this power, "the Minister must also take into account any criteria prescribed by regulation".

In the light of the discussion above, a number of questions arise.

Should the Minister be granted a power to exempt a person from all or any of the provisions of this Act?

Should the "detriment to consumers" (rather than "substantial detriment") be a sufficient ground to refuse exemption?

The Committee considers that there should be an explanation of why it should not be sufficient that there is simply "detriment to consumers", or something less than "substantial detriment".

Should power be conferred on the Executive to make a regulation prescribing other criteria to be taken into account by the Minister in granting an exemption?

The exercise of this power by the Executive to make a regulation could result in a major alteration to the scheme of the Act as it appears on the face of the Bill.

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

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

Strict liability offences

The Bill would create a number of strict liability offences. The Committee commends the Explanatory Statement for its comprehensive comment on this matter.

The Committee has reviewed the provisions and considers that the strict liability offence provisions are compatible with the *Human Rights Act 2004*.

The right to reputation, the presumption of innocence, and the grounds for disciplinary action – subclause 32(1)

Subclause 32(1) states the grounds for occupational discipline in relation to a licensee. Grounds (b) and (c) are:

> (b) the licensee has contravened, or is contravening, this Act, whether or not the licensee has been convicted or found guilty of an offence for the contravention; [and]
>
> (c) the licensee has contravened, or is contravening, a territory law (other than this Act) or a law of the Commonwealth, a State or another Territory, whether or not the licensee has been convicted or found guilty of an offence for the contravention; … .

It is to be noted that ground (c) is not limited to breaches of the law that have some connection with fitness to hold a licence as a motor vehicle repairer.[2]

The ACT Civil and Administrative Tribunal (ACAT), an administrative body that is not constituted as a court, would thus need to decide whether a licensee had contravened another law, including a law that provided that the contravention was a criminal offence. ACAT would determine this question according to the civil standard of proof, albeit taking into account the gravity of what was alleged against the licensee.[3]

The effect of a finding that one or other of grounds (b) and (c) were established would not of course expose the licensee to any criminal penalty, but would mark the person, in a public way, as a person who had committed an offence. In many cases, and in particular in the application of paragraph 32(1)(c), the public declaration that a person had breached the law would have a damaging effect on the person's reputation.

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[2] In relation to the fitness of a person to be a legal practitioner, it is accepted that the mere fact of a conviction for a criminal offence (such as assault) is not a disqualifying factor; see for example (2003) *In the Matter of Robert Arthur Allen* **http://www.lsc.qld.gov.au/documents/Allen.pdf**, where the assault took place in the office but not over a matter of business or professional activity. The leading case, involving a conviction for manslaughter, is *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46. A majority of the High Court held that the conviction was not a bar to continuing to practise.

[3] See subsection 140(2) of the *Evidence Act 1995*, which restates the common law principles stated in cases such as *Briginshaw v Briginshaw* [1938] HCA 34.

The Human Rights Act provides in paragraph 12(b) that

> Everyone has the right –
>
> …
>
> (b) not to have his or her reputation unlawfully attacked;

and in subsection 22(1) that

> Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

There is room for debate about whether one or both of these provisions is engaged by paragraphs 32(b) and (c) of the Bill.[4] From a scrutiny perspective, the outcome of this date is not crucial, for it is open to a Member of the Assembly to consider whether these provisions "unduly trespass on personal rights and liberties", whether or not there is a breach of the limited range of rights protected by the HRA.

As the Committee sees it, the problem arises in particular in regard to paragraph 32(1)(c), and the Assembly might consider that if it is retained, this ground might be qualified by adding that the breach of the law "must be directly related to the fitness of the person to continue to hold a licence as a motor vehicle repairer". Such a limitation might (or might not) be implied by the ACAT or a court, but it is preferable to spell it out clearly for the guidance of those who would initiate disciplinary proceedings and those who are affected by them.

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

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

Open-ended administrative discretion

Clause 10

Should the exercise of the power of the commissioner in subclause 10(4) to determine that a person is **not** to be regarded as a "disqualified person", (notwithstanding that the person falls within the definition of that term in subclause 10(1)), be conditioned, in addition to having regard to a list of specific factors stated in subclause 10(3), on having regard to any other relevant matter (see subclause 10(4))?

[4] The debate would turn on just what is conveyed by the word "unlawfully" in paragraph 12(b), and the word "charged" in subsection 22(1).

A person who is a "disqualified person" is not eligible to hold a licence as a motor vehicle repairer (subclause 9(1)). A person is a "disqualified person" if they have "committed a disqualifying act" (subclause 10(1), and see definition in subclause 10(6)). However, a person is not disqualified "if the commissioner is satisfied that, in all the circumstances, it would be reasonable not to regard the person as a disqualified person" (subclause 10(2)). By subclause 10(3), the commissioner, must, in making this judgement, have regard to a list of specific matters. Subclause 10(4) then provides: "(4) Subsection (3) does not limit the matters to which the commissioner may have regard in making the decision".

This raises the issue discussed below in relation to the proposed subsection 61L(2) of the *Racing Act 1999*. In short, it is preferable that the law conferring the discretionary power should state the boundaries of the power. Resolution of this matter, which is of vital importance to a person potentially or actually affected by an exercise of the power, should not be in effect delegated to the administrative decision-maker and then ultimately to tribunals and/or courts.

The Committee recommends that consideration be given to rephrasing or deleting subclause 10(4).

RACING AMENDMENT BILL 2009

This Bill would amend the *Racing Act 1999* to enable Territory racing controlling bodies to charge for the use of their race field information.

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

Criminal liability of the officers of corporations

By clause 4, proposed section 61I of the Act would state the circumstances in which an officer of a corporation (as defined broadly in subsection 61I(4)) would commit an offence. Apart from matters going to the personal conduct of the officer,[5] the prosecution would need to prove beyond reasonable doubt that:

(a) the corporation contravenes a provision of this Act; and

(b) the contravention is an offence against this Act (the ***relevant offence***): …

Proposed subsection 61I(2) provides: "This section applies whether or not the corporation is prosecuted for, or convicted of, the relevant offence".

Considering the situation at this point, it would appear that on a prosecution of an officer, the prosecution would need to prove that the corporation had no defence, for otherwise a contravention by it could not be an offence.

[5] Cumulatively, the officer must be reckless about whether the contravention would happen; in a position to influence the conduct of the corporation; and have failed to take all reasonable steps to prevent the contravention (subsection 61I(1)).

But proposed subsection 61I(3) provides: "However, this section does not apply if the corporation has a defence to a prosecution for the relevant offence". On the face of it, the result would be that the prosecution would **not** need to prove that the corporation had no defence. This is so because the words "does not apply" have the effect that the defendant officer would carry an *evidential* burden to prove that the corporation had a defence; (see subsection 58(3) of the *Criminal Code Act 2002*). That is, the defendant would need to present or point to evidence that suggested a reasonable possibility that the corporation had a defence; (see subsection 57(3) of the *Criminal Code Act 2002*). This could present a severe difficulty for a defendant officer if the corporation decided that it would not assist the officer, by providing her or him with information, not available or known to the officer, which would support a defence.

The Explanatory Statement states that the policy objective is, in the interest of fairness, to enable the penalty of imprisonment to apply to an officer of a corporation in a situation where, if the offence was committed by an individual, imprisonment would apply. There may however be cases where the individual would be better placed to rely on a defence than the officer of the corporation who is dependent on assistance from the corporation. This seems unfair to the officer.

The Committee asks whether the policy objective could be attained by deleting proposed subsections 61I(2) and (3).

Could the policy objective of proposed subsections 61I(1) be attained by deleting proposed subsections 61I(2) and (3), with the consequent removal of potential unfairness to an officer of a corporation who is prosecuted under subsection 61I(1)?

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

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

Open-ended administrative discretion

Should the power of the commission in proposed subsection 61L(2) to determine whether an applicant for approval to use race field information "is a suitable person to hold an approval" by reference to "any other relevant matter" be more narrowly expressed?

In proposed division 5B.2 of the Act, (see clause 4), there is a scheme for the approval by the ACT Gambling and Racing Commission for a person to use race field information. The commission must determine whether the person is "suitable" to hold an approval, and proposed subsection 61L(1) states a number of matters to which the commission must have regard. Proposed subsection 61L(2) then states:

> (2) In deciding whether an applicant is a suitable person to hold an approval the commission may have regard to any other relevant matter.

It is generally undesirable that an administrative power be stated in such an open-ended way. This is a recurring issue and it bears repeating that the desirability of stating criteria according to which whether it may be assessed whether a particular matter is "relevant" lies in providing (1) clearer guidance to a person who seeks approval, and (2) a much firmer basis upon which an unsuccessful applicant for approval could challenge a refusal based on a decision of the commission made under subsection 61L(2).

The Committee notes that it is true that any discretion conferred on an administrative decision-maker must be exercised in accordance with the scope and purpose of the legislation in which it is located, and, unless that legislation is sufficiently specific to the contrary, in accordance with the *Human Rights Act 2004*. A citizen should not however be put to the expense of a legal suit to find out the boundaries of an administrative power. To the extent of what is feasible, these boundaries should be stated in the law conferring the power.

Moreover, in *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee explained how it might be that a widely drawn administrative power could result in the scheme for the exercise of that power being incompatible with subsection 21(1) of the Human Rights Act.[6]

If a "catch-all" provision such as proposed subsection 61L(2) is thought necessary, it might be recast in the form:

> (2) In deciding whether an applicant is a suitable person to hold an approval the commission may have regard to any other matter that on reasonable grounds is relevant to an assessment of suitability.

The Committee recommends that consideration be given to rephrasing or deleting proposed subsection 61L(2).

WORKERS COMPENSATION AMENDMENT BILL 2009

This Bill would amend the *Workers Compensation Act 1951* and related legislation to improve the delivery of rehabilitation services to injured workers, to enhance the offence provisions of the Act, and to provide for civil penalties.

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

Open-ended administrative discretions

Proposed paragraph 149(4)(viii) of the Act

Should the power of the chief executive in proposed paragraph 149(4)(b) to determine an amount to be recovered from an employer who failed to maintain a compulsory insurance policy be conditioned, in addition to having regard to a list of specific factors stated in paragraph 149(4)(i) to (vii), on "any other factor the chief executive considers relevant" (paragraph 149(4)(viii))?

[6] The Committee notes that this explanation has been adopted (although not by reference to *Scrutiny Report No 32*) by the ACT Civil and Administrative tribunal in *Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at [83]ff.

By proposed subsection 149 (see clause 12), if an employer fails to maintain a compulsory insurance policy with an approved insurer, the chief executive may determine an amount (a recovery amount) for the employer equal to "double the avoided premium" or a lesser amount determined having regard to on a list of specific factors stated in paragraph 149(4)(i) to (vii), and also to "any other factor the chief executive considers relevant" (paragraph 149(4)(viii)).

The Explanatory Statement makes no comment on the need for the "catch-all" provision in paragraph 149(4)(viii). It is objectionable on the grounds stated above in regard to proposed subsection 61L(2) of the *Racing Act 1999*. In short, it is preferable that the law conferring the discretionary power should state the boundaries of the power. Resolution of this matter, which is of vital importance to a person potentially or actually affected by an exercise of the power, should not be in effect delegated to the administrative decision-maker and then ultimately to tribunals and/or courts.

In addition, paragraph 149(4)(viii) is cast in language ("considers relevant") that leaves the matter to the subjective opinion of the chief executive. This will make it harder to challenge an exercise of the discretion, whether by the chief executive, or on a subsequent review.

The Committee recommends that consideration be given to rephrasing or deleting proposed paragraph 149(4)(viii).

Proposed paragraph 162A(3)(viii) of the Act

The issue just raised applies also to proposed paragraph 162A(3)(viii) of the Act (see clause 28).

Should the power of the chief executive in proposed paragraph 162A(3)(b) to determine a recovery amount be conditioned, in addition to having regard to a list of specific factors stated in paragraph 162A(3)(i) to (vii), on "any other factor the chief executive considers relevant" paragraph 162A(3)(viii)?

PROPOSED GOVERNMENT AMENDMENTS

CRIMES (BILL POSTING) AMENDMENT BILL 2008 (Version J2009-207 D08)

In accordance with standing order 182A, the Committee has received advice from the Chief Minister of proposed government amendments to this Bill, together with a Supplementary Explanatory Statement. The Committee reported on this Bill in *Scrutiny Report No 2* of the *Seventh Assembly*,[7] and the Bill was also considered in *Report No 3* of the Standing Committee on Planning, Public Works and Territory and Municipal Services, *Inquiry into the Crimes (Bill Posting) Amendment Bill 2008*[8] (henceforth "Planning Committee Report").

The "Act" referred to below is the *Crimes Act 1900*.

[7] http://www.parliament.act.gov.au/downloads/reports/7scrutiny02.pdf

[8] http://www.parliament.act.gov.au/downloads/reports/PPW03%20Bill%20Posting%20final%20with%20app%20D.pdf

To understand what follows, it is first to be noted that the government does not intend to amend clause 6 of the Bill which would insert a new section 120 of the Act. By section 120, a person commits an offence where he or she "unlawfully affixes a placard or paper, or makes a mark with chalk, paint or any other material":

- on *private premises*, without (as the case may be) the consent of the occupier, or owner or person in charge of the premises – proposed subsection 120(1); or
- on *public property* - proposed subsection 120(2).

This strict liability offence would be punishable by 10 penalty units.

Amendment 3

This amendment would amend clause 6 of the Bill to the extent of amending proposed subsection 121(1), which currently provides:

> 121 **Duty to ensure clean event promotion**
>
> (1) This section applies to a person promoting an event as part of a business or undertaking.
>
> **Examples** … .
>
> (2) The person has a duty to ensure that the event is promoted cleanly by taking precautions.
>
> (3) An event is promoted cleanly unless a placard or paper promoting the event is affixed in contravention of section 120, whether or not someone has been convicted or found guilty of an offence against that section.

The effect of amendment 3 would be to insert in subsection 121(1) the word "commercial" before the word "undertaking". It appears to respond to a suggestion in paragraph 3.16 of the Planning Committee Report that "[t]he Committee notes the Chief Minister's comments to the Assembly about the problems with commercial enterprises promoting commercial events via illegally posted bills and suggests that the Bill can target posters that are commercial in nature without placing too heavy an onus on political activists, community groups and non-profit groups" (footnote omitted).

The Committee notes that the effect of the amendment will be avoid the burdens placed on promoters by proposed sections 121, 121A and 121B being placed on community groups and the like.

These groups will however be affected by the offence in proposed section 120 (see above).

Amendment 6

The government proposes (by amendment 6) to insert a new subdivision 6.3.3 into the Crimes Act, containing sections 124 to 128. These provisions are aimed at ameliorating the potential effect of proposed section 120. Concerns about the effect of this provision on freedom of expression were noted by this Committee in *Scrutiny Report No 2* of the *Seventh Assembly* and in paragraph 3.26 of the Planning Committee Report.

Proposed section 125. The purpose of this provision is stated in the Supplementary Explanatory Statement:

> Currently the *Magistrates Court (Crimes Infringement Notices) Regulation 2008* requires an authorised person to witness the commission of an offence under section 120 of the Act before an infringement notice can be issued for that offence. That regulation also does not permit the issuing of infringement notices to people under 16.
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> New section 125 will further limit the circumstances under which infringement notices can be issued for offences under section 120 of the Act. The section will require authorised people to issue official warnings to individuals caught putting marks on, or affixing posters to property, rather than issuing them with infringement notices for their first offence. Official warnings must be in writing.

The Committee notes that the effect of this scheme will be to reduce the possibility of persons being prosecuted for an offence under section 120.

Proposed section 126. The Supplementary Explanatory Statement states:

> This section will enable authorised people to require the name and home address of a person who is committing, or has just committed an offence against section 120 of the Act. The authorised person must have reasonable grounds for believing that the person is committing or has just committed an offence. Typically, this belief would be based on the authorised person witnessing the commission of the offence.
>
> The section will facilitate the giving of warnings under new section 125 or the issuing of directions under new section 127.

A law that requires a person to provide their name and address to authorities does engage the right to privacy in HRA paragraph 12(a), but in circumstances it may not be an "arbitrary" interference. The Committee notes that it is common that such a requirement is linked to a belief by the requiring authority that the person has committed an offence, and, as the Explanatory Statement points out, in this circumstance the requirement is linked to the application of the beneficial provision in proposed sections 125 and 127.

The Committee considers that, in these circumstances, a requirement that a person provides their name and address to an authorised person is not an arbitrary interference with the right to privacy.

Proposed section 127. The Supplementary Explanatory Statement states:

> This section will provide authorised people with the power to issue directions to remove a placard, paper or mark. The directions will be able to be given to a person whom the authorised person believes has committed an offence under section 120 (for example, a person who has put up a poster, or marked property with graffiti) or section 121B (for example, the organiser of a commercial event whose posters have been affixed over numerous sites). Directions must be in writing.
>
> …

> It is a strict liability offence to fail to comply with a direction. The maximum penalty for the offence is 10 penalty units (currently $1,100). The offence does not carry a penalty of imprisonment.

This provision most obviously engages the right to freedom of expression (HRA subsection 16(2)), and the provision for a strict liability offence engages the presumption of innocence (HRA subsection 22(1)) and/or the right to liberty and security (HRA subsection 18(1)).

The Supplementary Explanatory Statement addresses the latter issue, and the Committee refers members of the Assembly to this statement.

The Committee notes that the effect of this scheme will be to reduce the possibility of persons being prosecuted for an offence under section 120.

Proposed section 127. The Supplementary Explanatory Statement states:

> Both sections 119 (2) and 120 (2) of the Act make it an offence to unlawfully mark public property or to affix posters on public property. "Unlawfully" in this context is generally taken to mean "without authority", or "without permission". Authority or permission for such activity may be given through legislation (for example an Act may authorise the posting of notices on private property). Authority or permission may also be given on a case by case basis or more generally, for example, through the publication of policies, such as the Government's current policy on graffiti and street art (which is available on the Department of Territory and Municipal Services web site).
>
> New section 128 provides an additional method of informing the community about the availability of public sites where it is permitted to place posters. The section will require the Chief Executive responsible for the administration of the *Litter Act 2004* (currently the chief executive of the Department of Territory and Municipal Services) to provide a notice, in the form of a notifiable instrument, listing public sites where it is lawful to affix posters.

This provision responds to comments and recommendations in paragraphs 2.8 to 2.22 of the Planning Committee Report.

The Committee commends the proposal to require the chief executive responsible for the *Litter Act 2004* to maintain by notifiable instrument a list of places where notices, etc may be affixed.

The Committee queries the view expressed in the Supplementary Explanatory Statement that lawful authority to affix notices etc may be conferred by means of a publication of a policy or the like by some government instrumentality. It is a fundamental of our constitutional system that, without authority conferred by law, an executive body cannot change the law or set it aside in a particular case.[9]

[9] *O\'Donoghue v Ireland* [2008] HCA 14 at [46]: " … the executive cannot dispense with or suspend the operation of those laws. In the latter regard reference was made to the decision of Wild CJ in the New Zealand Supreme Court in *Fitzgerald v Muldoon* [[1976] 2 NZLR 615 at 623]. The Chief Justice made a declaration that a public announcement by the Prime Minister of New Zealand that the operation of a statutory superannuation scheme was to cease forthwith, was "illegal as being in breach of s 1 of the Bill of Rights [of 1688]"; per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

It would be preferable (and more effective) were a person (such as a Minister) to be specifically empowered to make a subordinate law stating the circumstances when it would be lawful for a person to affix notices, etc, in addition to whatever is conveyed by the meaning of "lawfully" in its ordinary meaning.

Conferral of such a power is of course a delegation of legislative power to a Minister, and in these circumstances, given that the exercise of the power would have a significant effect on the right to freedom of expression, and the right to take part in public life (HRA section 17), this might be a case where the Bill should require a positive resolution of the Assembly as a condition of the subordinate law taking effect.

The Committee offers these comments as a contribution to a consideration of how it might be more clearly and constitutionally determined that it is "lawful" to affix a notice, etc.

The Committee recommends that further consideration be given to how it might be determined that it is "lawful" to affix a notice, etc.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2009-223 being the Long Service Leave (Building and Construction Industry) Governing Board Appointment 2009 (No. 1) made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Building and Construction Industry) Governing Board, representing employer organisations.**

Disallowable Instrument DI2009-224 being the Public Place Names (Pearce) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a park in the Division of Pearce.**

Disallowable Instrument DI2009-225 being the Independent Competition and Regulatory Commission (Premium Rate—Electricity Feed-in) terms of Reference Determination 2009 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers the determination of the premium rate to be paid for electricity supplied by compliant renewable energy generators to the Independent Competition and Regulatory Commission.**

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Treasurer, dated 16 November 2009, in relation to comments made in Scrutiny Report 13 concerning Disallowable Instrument DI2009-194, being the Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 2).
- The Minister for the Environment, Climate Change and Water, dated 17 November 2009, in relation to comments made in Scrutiny Report 13 concerning Disallowable Instrument DI2009-193, being the Nature Conservation (Flora and Fauna Committee) Appointment 2009 (No. 2).
- The Minister for Disability, Housing and Community Services, dated 17 November 2009, in relation to comments made in Scrutiny Report 14 concerning Disallowable Instruments:
  - DI2009-214—Housing Assistance (Affordable and Community Housing Providers) Registration Determination 2009 (No. 1);
  - DI2009-215—Housing Assistance (Community Housing Providers) Standards 2009 (No. 1);
  - DI2009-216—Housing Assistance (Affordable and Community Housing Providers) Monitoring Guidelines 2009 (No. 1); and
  - DI2009-217—Housing Assistance (Affordable and Community Housing Providers) Intervention Guidelines 2009 (No. 1).
- The Treasurer, dated 25 November 2009, in relation to comments made in Scrutiny Report 14 concerning Subordinate Law SL2009-44, being the Taxation Administration Amendment Regulation 2009 (No. 1).
- The Minister for Gaming and Racing, dated 2 December 2009, in relation to comments made in Scrutiny Report 14 concerning the Unlawful Gambling Bill 2009.
- The Minister for Health, undated, in relation to comments made in Scrutiny Report 14 concerning the Smoking (Prohibition in Enclosed Public Places) Amendment Bill 2009.

The Committee wishes to thank the Treasurer, the Minister for the Environment, Climate Change and Water, the Minister for Disability, Housing and Community Services, the Minister for Gaming and Racing and the Minister for Health for their helpful responses.

Vicki Dunne, MLA
Chair

December 2009

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

REPORTS—2008-2009

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 DI2009-205 - Surveyors (Chief Surveyor) Practice Directions 2009 (No. 2)
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
Disallowable Instrument DI2009-221 - Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1)
Subordinate Law SL2009-45 - Work Safety Regulation 2009, including a regulatory impact statement
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)
Subordinate Law SL2009-51 - ACT Civil and Administrative Tribunal (Transitional Provisions) Amendment Regulation 2009 (No. 1)

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee)
ACT Legislative Assembly
CANBERRA ACT 2600

Dear Ms Dunne

You may recall the Government tabled the *Crimes (Bill Posting) Amendment Bill 2008* (the Bill) in the Assembly on 11 December 2008. The Bill was referred to the Standing Committee on Planning, Public Works and Territory and Municipal Services (the Planning Committee) on 10 February 2009 and the Committee reported to the Assembly on its inquiry into the Bill on 18 August 2009.

The Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee) (the Scrutiny of Bills Committee) also reviewed the Bill in February 2009.

Following on from the work of the Planning Committee, the Government is now proposing amendments to the Bill.

As a result of the Assembly's Standing Order 182A, which requires proposed government amendments to Bills to be submitted to the Scrutiny of Bills Committee at least 14 days prior to consideration of the amendments by the Assembly, I am enclosing a copy of the amendments together with a supplementary explanatory statement for your Committee's consideration in accordance with its terms of reference.

Yours sincerely

Jon Stanhope MLA
Chief Minister

23 NOV 2009

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DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

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

Dear Vicki Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 13 of 2009 in relation to Disallowable Instrument DI2009-100 and DI2009-194 Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No 1) made under subsection 53(1) of the *Betting (ACTTAB Limited) Act 1964.*

I am advised that ACTTAB reviewed its administrative records to assess if there were any issues arising as a result of the drafting errors in Disallowable Instrument DI2009-100. ACTTAB's review confirmed that there were no problems resulting from the drafting errors. ACTTAB also confirmed that there have been no transitional issues as a result of the revocation of Disallowable Instrument DI2009-100 and the introduction of Disallowable Instrument DI2009-194.

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

Yours sincerely

Katy Gallagher MLA
Treasurer
16 NOV 2009

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Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the *Scrutiny of Bill Report No 13* of 12 October 2009 in relation to Disallowable Instrument DI2009-193 being the Nature Conservation (Flora and Fauna Committee) Appointment 2009 (No.2).

I note the Committee's comments and assure you care will be taken to ensure these errors are not repeated.

I thank the Committee for bringing these matters to my attention.

Yours sincerely

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

17-11-09

cc Deputy Clerk, ACT Legislative Assembly

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Joy Burch MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR AGEING
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR WOMEN

Member for Brindabella

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

Dear Mrs Dunne

The Standing Committee on Justice and Community Safety in Scrutiny Report No.14 of 9 November 2009, commented on the four Disallowable Instruments - DI2009 - 214, DI2009 - 215, DI2009 – 216 and DI2009 - 217.

I have noted the comments of the Committee on the use of *will* and *should* in these Disallowable Instruments.

The intent of the wording in the Disallowable Instruments is consistent with the examples provided for the use of *will*. The intent of the use of *should* is consistent with the intent to be directory, rather than imposing a duty. There is no basis in the related clauses of the *Housing Assistance Act 2007* for creating obligations with criminal or direct civil consequences or a substantive legal effect.

I will ensure that any future explanatory statements clarify whether or not there is an intention to have criminal or civil consequences or a substantive legal effect.

Yours sincerely

Joy Burch MLA
Minister for Disability, Housing and Community Services
17 November 2009

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne, MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly

Dear Mrs Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 14 of 9 November 2009 in relation to Subordinate Law SL2009-44 being the *Taxation Administration Amendment Regulation 2009 (no. 1)*.

The Committee commented that paragraphs from the Explanatory Statement for this subordinate law did not explain as well as they might what the subordinate law actually does.

I would like to thank the Committee for its suggested clarification of the subordinate law, and advise that your comments have been noted and will be taken into account in the future.

I trust that the above response addresses the Committee's concerns.

Yours sincerely

Katy Gallagher MLA
Treasurer
25.11.09

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Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 14 of 9 November 2009 in relation to the *Unlawful Gambling Bill 2009* and the suggestion that given the significance of the concept of "dishonestly" in clause 23, it would assist if examples were provided in a Note to the provision.

Clause 23 is an offence provision that relates to a person dishonestly obtaining an advantage in a gambling activity. It is intended to capture scenarios such as where a person deliberately marks cards or tampers with dice so that they can obtain an unfair advantage over other players. This offence provision is similar to the offences of fraud and theft in that it includes an element that deals with the intent of the person to act dishonestly in order to obtain a gain or benefit. As such, the concept of "dishonestly" is used reasonably widely in criminal law and I do not believe it is necessary to add an example to this offence provision.

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

Yours sincerely

Andrew Barr MLA
Minister for Gaming and Racing
- 2 DEC 2009

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

Dear Ms ~~Dunne~~ Vicki

I refer to Scrutiny Report No. 14, prepared by the Standing Committee on Justice and Community Safety (the Committee). I thank the Committee for its comments on the Smoking (Prohibition in Enclosed Public Places) Amendment Bill 2009 and offer the following response.

I have noted the Committee's report under section 38 of the *Human Rights Act 2004* (HRA) and the right to privacy, protected by section 12. However, as the Committee may appreciate, the restrictions relate to a public place and non-smoking members of the public also have the right to be protected by section 12. I also note that the Committee is of the opinion that members of the Assembly or the public should not need assistance from the Committee in assessing whether section 28 applies, and therefore does not conclude the Bill cannot be demonstrably justified under section 28 of the HRA.

I thank the Committee for its comments on the strict liability offences. I wish to advise the Committee, however, that with respect to proposed section 6 (clause 9) and section 9B (clause 11), the Bill provides for 'no smoking' signs to be displayed, providing notice to members of the public of the offences.

The Committee has requested clarity concerning the explanation of proposed section 9F in the extrinsic materials. It is suggested that the explanations do not marry up with section 9F(4).

Section 9F provides for the designating of outdoor smoking areas by licensed premises. The policy for this section is that an area can only be 50% of a licensed outdoor area. However, if an area is off a gaming area (off-gaming area), it is not included in the 50% calculation. The presentation speech highlighted that the off-gaming area had to be part of the licensed outdoor area on 1 November 2009 by using the word "existence". It also made reference to "immediately proposed". The point that was trying to be made was that if a licensed premise had already undertaken the building of an off-gaming area, but it was not in use on 1 November 2009, it would be taken to be part of the licensed outdoor area.

As the Committee may appreciate, the effect of section 9F(4)(a)(ii) is to ensure that any new licensed premises after 1 November 2009 will not have the benefit of declaring an off-gaming area a smoking area. It will form part of the 50% calculation.

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I agree that a clearer explanation could have been included in both documents to avoid the confusion created by the use of the words "existed" and "existence" in relation to off-gaming areas. This confusion was further compounded by the explanatory statement referring to 1 October 2009 rather than 1 November 2009.

I thank the Committee again for its comments.

Yours sincerely

Katy Gallagher MLA
Minister for Health