Legislative Assembly for the ACT

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

Scrutiny Report

5 MAY 2008

Report 54

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

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.

BILLS

Bill—No comment

The Committee has examined the following Bill and offers no comments on it:

ELECTRICITY FEED-IN (RENEWABLE ENERGY PREMIUM) BILL 2008

This is a Bill for an Act to encourage the uptake of renewable energy electricity generation, in particular to provide a framework that enables a capital investment into renewable energy electricity generation to be recouped within a 10 year period.

Bills—Comment

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

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY BILL 2008

This is a Bill for an Act to establish the ACT Aboriginal and Torres Strait Islander Elected Body to the end of ensuring the maximum participation by Aboriginal and Torres Strait Islander People in the ACT in the formulation, co-ordination and implementation of government policies that affect them.

Introduction

The Bill would establish a body to be known as the Aboriginal and Torres Strait Islander Elected Body (ATSIEB). It would consist of 7 members, each of whom would hold office for a 3 year term "on a part-time basis" (clause 14). The electorate would comprise those persons who qualify as an Aboriginal or a Torres Strait Islander[1] who are at least 18 years old, who are enrolled or entitled to be enrolled, for an electorate in the ACT, and who are not under a sentence of imprisonment for 1 year or longer for a conviction for an indictable offence (Schedule 1, 1.5). Voting is not compulsory.

The Bill also refers to a body called the United Ngunnawal Elders Council (UNEC), and it is accorded a significant status in that, by clause 9, "ATSIEB must, in exercising its functions, consult with and consider the views of UNEC". There is no provision as to matters such as what particular body of persons is to have this status, or as to how any consultation is to proceed.

The scheme of the Bill, as stated in its objects (clause 3), is based on the premise that Aboriginal people and Torres Strait Islanders living in the ACT are "disadvantaged". The general purport of the objects is described in the Explanatory Statement:

> The Objects sets out the how the Act empowers the Aboriginal and Torres Strait Islander (ATSI) community through the Aboriginal and Torres Strait Islander Elected Body (ATSIEB) to have a role in the decision making process within Government and Agencies. It also sets out how the ATSIEB is to engage with the ATSI community, government and its Agencies to further their economic, social and cultural development.

[1] The Dictionary provides: "*Aboriginal person or Torres Strait Islander* means a person who - (a) is a descendant of an Aboriginal person or Torres Strait Islander; and (b) identifies as an Aboriginal person or Torres Strait Islander; and (c) is accepted as an Aboriginal person or Torres Strait Islander by an Aboriginal or Torres Strait Islander community."

> The Objects set out ATSIEB responsibilities for the Aboriginal and Torres Strait Islander Community living in the ACT and to the ACT Government and its Agencies in terms of the policies, programs and services that impact on the ACT Aboriginal and Torres Strait Islander community.

Much of what ATSIEB may do in the exercise of its functions could be done by any person or body of persons who seek to engage with government and its agencies. In terms of the rights issues that arise out of the Bill (see below), it is to be noted however that:

- *some obligations are imposed on ATSIEB* – such as give the Minister advice when asked to do so (paragraph 8(h)), and to conduct a "forum on areas of interest to Aboriginal people and Torres Strait Islanders living in the ACT at least twice each financial year" subclause 11(1)); and
- *in some respects, ATSIEB and its members are placed in a position of advantage as compared to other persons or bodies that perform similar functions* – in particular, a chief executive of a government agency who is invited[2] to attend a meeting of ATSIEB to discuss any issues relating to the functions of ATSIEB or the government agency "must take reasonable steps to attend the meeting, and answer the questions and provide the information, as requested" (subclause 26(2)), and "[a]n ATSIEB member is not civilly liable for conduct engaged in honestly and without recklessness – (a) in the exercise of a function under this Act or another territory law; or (b) in the reasonable belief that the conduct was in the exercise of a function under this Act or another territory law" (subclause 35(1)).[3]

Rights issues

Would the creation of ATSIEB be incompatible with the provision in subsection 8(2) of the *Human Rights Act 2004* (HRA) that "(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind", and, if so, is that incompatibility justifiable under HRA section 28?

The general rights issue is whether the creation of a body such as ATSIEB is HRA compatible. HRA paragraph 17(a) states that "Every citizen has the right, and is to have the opportunity, to - (a) take part in the conduct of public affairs, directly or through freely chosen representatives: …", and this Bill gives effect to that right so far as it benefits the Aboriginal and Torres Strait Islander (ATSI) community.

On the other hand, HRA subsection 8(2) provides that "(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind". On the face of it, it may be argued plausibly that so far as concerns the right in HRA paragraph 17(a), the Bill makes a distinction between ATSI people and other kinds of people, and in terms of the Bill, the distinction is drawn according to a racial classification.

It may of course be argued that any degree of incompatibility of the Bill with HRA subsection 8(2) may be justified under HRA section 28. The question is whether the proponent of the Bill has shown that the limitation of the right in HRA subsection 8(2) is "demonstrably justified in a free and democratic society" under HRA section 28. In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

[2] There is no limit to the number of invitations that may be made.
[3] By subclause 35(2): "Any liability that would, apart from this section, attach to an ATSIEB member attaches instead to the Territory".

Very little justification is offered. The scheme of the Bill, as stated in its objects (clause 3), is based on the premise that Aboriginal people and Torres Strait Islanders living in the ACT are "disadvantaged". Of course, Assembly Members will draw on their own knowledge and experience of the history of ATSI people to form a view as to whether that is such as to provide a justification for the Bill.

The Committee draws this to the attention of the Assembly.

Drafting comment

The reference to consultation with UNEC in paragraph 8(i) seems unnecessary (but potentially confusing) given ATSIEB's general obligation to consult with UNEC with respect to the exercise of all its functions stated in clause 9.

CRIMES (FORENSIC PROCEDURES) AMENDMENT BILL 2008

This is a Bill to amend the Crimes *(Forensic Procedures) Act 2000* to facilitate the creation of a cross-jurisdictional DNA matching system throughout Australia, consistent with the national scheme, by enabling the ACT to use CrimTrac as its agent in handling the ACT's DNA data. The Bill also reduces practical inefficiencies and impediments surrounding the enforcement and implementation of the Act.

The right to privacy and the retention of forensic material

Are the new rules with respect to the destruction of forensic material compatible with the right of a person "not to have his or her privacy … interfered with unlawfully or arbitrarily" (HRA paragraph 12(a))?

By section 5 of the Act "*forensic material* is any of the following taken of or from a person's body: (a) a sample; (b) a handprint, fingerprint, footprint or toeprint; (c) a photograph or video recording; (d) a cast or impression". Under various provisions of the Act, such material may be taken from a person suspected to have committed a crime. The rules governing the disposition of this material are obviously a matter of private concern to the suspect.

The Explanatory Statement explains the effect of the existing rules and why it is thought they should be changed:

> The existing Act requires that all forensic material belonging to a suspect, including materials obtained through non-intimate processes such as photographs, casts and fingerprints, be destroyed after one year unless the Director of Public Prosecutions makes a successful application to the court for the material to be retained for a longer period. While this provision may have provided some protection for suspects it has proved to be a risky investigative tool for police, with important evidence being lost in some cases when an investigation has spanned over a long period of time, or has involved a number of suspects.

The effect of the new rules – contained in clause 65 of the Act, proposing a new section 92 of the Act - is then explained and justified:

> … the benefits of preserving forensic material as evidence needs to be balanced against the rights of an individual to have their privacy and DNA profile protected. … [Proposed section 92] allows police to retain forensic material for the life of the investigation. A provision enabling the suspect to apply for the destruction of the material after a year if no proceedings have been commenced affords the suspect protection against long term retention of their material in a case where they have no involvement. If an application is made for the destruction of the material the police will be required to establish why the material should be retained. This new provision provides police with greater certainty that they can retain evidence in ongoing investigations and prosecutions without fear that it will be destroyed part way through the process.

(On the other hand, the Bill does not change the existing rules relating to the *identifying information that is obtained from a person's forensic sample*, that is, their DNA analysis that can be placed on a DNA database and compared against all other DNA profiles on the database. "This material must be removed from DNA databases after 12 months, or if the person is acquitted of a charge relating to the information, in less than 12 months. The police still have the ability to apply to keep those samples on the database if there is a proper forensic purpose".)

The Committee draws this to the attention of the Assembly.

The right to privacy of the persons who provide forensic samples

The Committee has reviewed the several provisions of the Bill touching on this topic and accepts the statement in the Explanatory Statement that:

> A number of areas in the Bill contain amendments that address the human rights of people who may provide forensic samples under the Act. These include improving the manner in which victims of crime are empowered to make choices about how they participate in forensic procedures. There is also assurance that people of the same sex are present for the taking of intimate forensic samples.

The use of force to take a forensic sample

The Act as it stands authorises the use of force in the taking of a forensic sample, and the Committee has no comment on these existing provisions. It notes however that in a comment on clause 16, which proposes to insert new subsections 24(4) to 24(6), the Explanatory Statement offers a view as to how the notion of "reasonable force" will be understood by the police and the Chief Medical Officer. The Explanatory Statement states:

> The Bill refers to a suspect being informed in section 24(4)(b) that a police officer may use reasonable force to take a forensic sample. It should be noted that the concept of reasonable force in this context is limited by Commissioner's Order 3 that governs how police exercise their use of force, and the role of the Chief Medical Officer who is on record as saying that he would not take a blood based sample, whether a venous sample or finger prick sample, by force. It is not envisaged that the concept of reasonable force in this Bill overrides either of those two considerations in any way.

In case this statement might influence a Member's attitude to the Bill, the Committee should record that it may be in error. Unless it is a subsidiary law that has the effect of amending any provision of the Act that authorises the use of force in the taking of a forensic sample, "Commissioner's Order 3" cannot control the meaning of the concept of "reasonable force". The full context of the Chief Medical Officer's statement is not given, but again it is axiomatic that an executive officer's opinion about the meaning of the concept of "reasonable force" cannot have any effect on what a court might say that the concept meant.

The Committee draws this to the attention of the Assembly.

FIREARMS AMENDMENT BILL 2008

This Bill would amend the *Firearms Act 1996* and the *Prohibited Weapons Act 1996* in ways designed to give effect to resolutions contained in the National Firearms Trafficking Policy Agreement, and to recommendations of two reviews of firearms law and procedures carried out by the Firearms Consultative Committee and the Department of Justice and Community Safety. The Bill aims to modernise, streamline and simplify the legislation dealing with firearm ownership, and to regulate the paintball industry.

Do any clauses of the Bill inappropriately delegate legislative power?

Is it appropriate that a regulation might amend aspects of schedule 1 of the Firearms Act?

The definition of "prohibited forearm" in proposed subsection 4AB(1) of the Firearms Act includes "a firearm described in schedule 1". By subsection 4AB(3) a regulation might amend that schedule in various ways.

It is generally considered inappropriate that a regulation amend an Act,[4] and the Committee considers that the Minister should provide an explanation of why this provision is necessary.

The Committee draws this to the attention of the Assembly.

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"?

The presumption of innocence - burden of proof reversal

Does proposed subsection 66E(3) of the Firearms Act impose on the defendant a legal burden to prove the matters of defence stated in that provision, and, if so, is the provision, in terms of HRA section 28, a justifiable limitation of the presumption of innocence stated in HRA subsection 22(1)?

The Explanatory Statement states:

> Section 66E contains two offences related to prohibited people being involved in firearms dealing businesses. Subsection (1) makes it an offence for a licensed firearms dealer to employ a prohibited person or allow a prohibited person to be involved in a firearms dealership. Subsection (2) makes it an offence for a prohibited person to be employed or allowed to be involved in a firearms dealership. Each offence carries a maximum penalty of 10 years imprisonment. Subsection (3) provides a statutory defence to the offence against the firearms dealer. The firearms dealer will have an *evidential* burden to prove that he or she did not know, and could not reasonably be expected to have known, that the subject person was a prohibited person [emphasis added].

This may not be a correct reading of the defence provision. The words of proposed subsection 66E(3) are "[i]t is a defence to a prosecution for an offence against subsection (1) *if the licensed firearms dealer proves* that the dealer did not know …". Given the words emphasised, it appears the effect of paragraph 59(b) of the Criminal Code is that a legal[5] (and not an evidential[6]) burden of proof is placed on a defendant.

[4] The Committee has accepted that such a power is appropriate in transitional provisions.
[5] Subsection 56(3) of the Criminal Code provides: "*legal burden*, in relation to a matter, means the burden of proving the existence of the matter".

If this is correct, and taking into account the high penalty that may attach to a breach of proposed subsection 66E(1,) there arises more acutely the issue of the justifiability of this limitation by subsection 66E(3) of the presumption of innocence stated in HRA subsection 22(1).

The Committee draws this to the attention of the Assembly.

Proposed subsections 102(2) and (3) of the Firearms Act impose on the defendant a legal burden to prove the matters of defence stated in that provision, and there thus arises the issue of whether the provisions are, in terms of HRA section 28, a justifiable limitation on the presumption of innocence stated in HRA subsection 22(1).

Given that proposed subsections 102(2) and (3) of the Firearms Act use the words "if the defendant proves", and given paragraph 59(b) of the Criminal Code, these provisions clearly impose on the defendant a legal burden to prove the matters of defence stated in that provision.

Taking into account the high penalty that may attach to a breach of the offence provisions – in each case, 500 penalty units, imprisonment for 5 years or both - there thus arises the issue of whether the provisions are, in terms of HRA section 28, a justifiable limitation on the presumption of innocence stated in HRA subsection 22(1).

The Committee draws this to the attention of the Assembly.

Privilege against self-incrimination

The Committee suggests that a note to each of proposed subsections 20(2), 42F(2), 42W(2), 42ZPA(2), 51A(2) and 52BA(2) of the Firearms Act refer to sections 170 and 171 of Legislation Act.

Entry and search powers

The Bill would confer on officials a number of entry, search and seizure powers. The Committee considers that these provisions do not give rise to an issue of HRA compatibility. The Committee refers the Assembly to the discussion in the Explanatory Statement.

The right to liberty (HRA subsection 18(2)) and the prohibition on retrospective laws (HRA subsection 25(1)) – vagueness of key concepts in an offence provision

Does the vagueness of the concept of "reasonable in all the circumstances" in proposed paragraph 16AC(3)(b) of the Firearms Act, which is a critical element of an offence provision, mean that the offence is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, is that incompatibility demonstrably justifiable under HRA section 28?

The Committee discussed the effect of HRA subsections 18(2) or 25(1) in relation to vaguely expressed offence provisions in *Scrutiny Report No 53* of the *Sixth Assembly*, concerning the Children and Young People Bill 2008.

[6] Subsection 58(7) of the Criminal Code provides: "*evidential burden*, in relation to a matter, means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist".

In this Bill, the issue arises in relation to the scope of an exception to the offences provided for by proposed subsection 16AC of the Firearms Act. This provision sets out offences related to contraventions of a condition of a licence by a licensee, and the Explanatory Statement notes that "penalties associated with these offences have been significantly increased in line with other increases in the Bill. This increase reflects the public policy concern that where a person is the holder of a firearms licence, the observance of licence conditions is critically important". The maximum penalty in relation to the offence under subsection 16AC(1) is 1000 penalty units, imprisonment for 10 years or both, and for subsection 16AC(2) is 500 penalty units, imprisonment for 5 years or both.

Subsection 16AC(3) provides however that these offence provisions:

> do not apply to a condition that the licensee or permit-holder must allow a police officer to enter to inspect facilities if -
>
> (a) the contravention involved refusing to allow a police officer to enter or inspect facilities; and
>
> (b) the refusal was *reasonable in all the circumstances* [emphasis added].

The vagueness in paragraph 16AC(3)(b) as it stands gives rise to a question whether in this form the provision is HRA compatible. The Committee notes observations by the Supreme Court of Canada concerning this issue:

> … two things must be shown in order to refute a claim of vagueness and overbreadth: first, the provision must give adequate guidance to those expected to abide by it; and second, it must limit the discretion of state officials responsible for its enforcement. While complete certainty is impossible, and some generalization is inevitable, the law must be sufficiently precise to provide guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606. The trial judge and the majority in the Court of Appeal emphasized the need for flexibility and the impossibility of achieving absolute certainty, but Beauregard J.A. correctly insisted as well on the principle of providing citizens with substantive notice in order to guide their conduct. To ask only whether a trial judge will be able to apply the impugned law when a case comes before him or her provides an inadequate response to the concern that the law may in the future be applied in an overbroad way. In effect, it defers the critical question of actual overbreadth to another day.[7]

There is a real question whether paragraph 16AC(3)(b) is HRA compatible. If it is not, it is hard to see how it could be justified under HRA section 28.

Strict liability offences

The amendments proposed by the Bill would, if enacted, create strict liability offences and there thus arises an issue as to whether, in each case, the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).

The offences are regulatory in nature and the penalties provided are within the range considered acceptable where there is provision for strict liability.

[7] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII) at paragraph 79.

The Committee raises no issue of compatibility of these provisions with the HRA.

The right to life and the exclusion of a need for personal protection as a genuine reason to obtain an adult firearms licence

Does the right to life (HRA subsection 9(1)) include a right to own or possess firearms, and, if so, and in terms of HRA section 28, is the limitation proposed by the Bill to this aspect of the right to life demonstrably justifiable?

The point of the Bill is of course to create a detailed scheme regulating the circumstances in which it will be lawful for a person to own or possess a firearm. The rights issue as just posed may be examined by reference to proposed section 23A of the Act.

By proposed section 22, the registrar must refuse an application for an adult firearms licence unless satisfied on reasonable grounds about a number of matters, including that "the applicant has a genuine reason for possessing or using a firearm" (paragraph 22(1)(c)). Subsection 23(1) then provides that such an applicant has a genuine reason "if the registrar is satisfied that the applicant intends to possess or use the firearm for 1 or more of the reasons mentioned in table 23, column 2". A number of "genuine reasons" are then specified (including, for example, "business or employment"). It appears that this is not an exhaustive list of what might constitute a "genuine reason", for proposed section 23A provides specifically that some reasons that might be advanced as "genuine" cannot for the purposes of paragraph 22(1)(c) be so regarded. Section 23A would provide:

> **23A Adult firearms licences—no genuine reason to possess or use firearms**
>
> An applicant for an adult firearms licence does not have a genuine reason to possess or use a firearm if the applicant intends to possess or use the firearm for –
>
> (a) personal protection or the protection of anyone else; or
>
> (b) the protection of property (other than in circumstances constituting a reason of a kind mentioned in table 23, column 2).

How this provision might be seen to give rise to a rights issue is now explained.

HRA section 9 states that "(1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life." This provision is very similar to the right to life component of article 21(1) of the Constitution of India,[8] (and indeed to similar provisions of many other human rights instruments). In *Ganesh Chandra Bhatt v District Magistrate, Almora* [1993] All India Reporter All. 291, Katju J stated that article 21:

> (1) … confers positive rights to life and liberty … (2); [that the] word 'life' … means a life of dignity as a civilised human being and not just animal survival … and (3) the procedure for depriving a person of his life or liberty must be reasonable, fair and just … (at 295).

Proposition (1) rejects the view sometimes stated that there is a breach of the right only "in cases of deprivation [of life] in the sense of total loss".[9] Proposition (2) is the basis for the view that a right to life guarantee has a substantive content, and includes rights to such matters as livelihood and to shelter.[10]

[8] "No person shall be deprived of his life or personal liberty except according to procedure established by law".
[9] See cases noted in *Ganesh Chandra Bhatt* at 299, para 43.
[10] See cases noted in *Ganesh Chandra Bhatt* at 296, para 23.

This view of a right to life provision is generally consistent with the prevailing opinion of the "international jurisprudence" concerning such provisions.

In the *Bhatt* case, Katju J gave a substantive application to the right to life when he held that:

> … the right to bear arms is embedded in Article 21 … . No doubt the right … is subject to reasonable restrictions, but the reasonability of the restriction must be judged from the point of view of the prevailing social conditions, and not in the abstract. Hence, what may have been reasonable earlier may no longer be reasonable today (at 295).

In relation to what might be a reasonable restriction in the conditions in India in 1993, his Honour held that a law regulating the licensing of arms should, in the light of article 21, be understood to require that a licence to own or possess a non-prohibited weapon must be granted unless the applicant for some exceptional and strong reason might be disqualified. He noted that "law and order is breaking down everywhere, and anarchy and chaos is becoming rampant', so that "only an armed person can lead a life of dignity and peace". He further argued that a "liberal grant of arms will reduce crime, and not increase it (as some people imagine)" (at 300). Anticipating an objection on the lines that a citizen yields their right to arm themselves in return for state protection, Katju J argued that "when the State authorities are not properly discharging [this] function … the only reasonable view can be that citizens must defend themselves, and can effectively do so only if they are armed" (at 300).

The *Bhatt* case demonstrates that it is possible to construct an argument that the "the right to life" stated in HRA subsection 9(1) is capable of being given a substantive application, and that one such application is that it guarantees a right to carry firearms. Of course, the right to life in any aspect may be limited by a law that is, in terms of HRA section 28, reasonably justifiable.

Whether an Australian court would find that the "the right to life" stated in HRA subsection 9(1) guarantees a right to carry firearms is highly conjectural. Supposing that a court would so find, then, on the face of it, proposed section 23A of the Act gives rise to a human rights issue, and the Committee is bound to draw it to the attention of the Assembly. Of course, the social conditions currently prevailing in the Territory are very different to those described by Katju J as prevailing in India in 1993, and an Australian court would find it easier to find that a Territory law restricting firearms possession was justifiable under HRA section 28.

The precise question however is whether it is justifiable to preclude an applicant for an adult firearms licence from submitting in any circumstances that they have a genuine reason to obtain a licence for their own personal protection or for the protection of some other person, or for the protection of property in circumstances that fall outside those stated in table 23, column 2.

The Committee draws this to the attention of the Assembly.

Error in Bill

The third subsection in proposed section 36 of the Firearms Bill (clause 20) should be numbered (3) and not (2).

PROTECTION OF PUBLIC PARTICIPATION BILL 2008

This is a Bill for an Act to protect and encourage participation in public debate and matters of public interest, and discourage people and corporations from bringing or maintaining legal proceedings that interfere with another person's right to engage in public participation.

Introduction

The key provision is clause 10, which provides that "[a] person against whom a proceeding is begun (the *defendant***)** who considers that the proceeding (in whole or in part) is inconsistent[11] with the defendant's right to engage in public participation under this Act may apply to the Supreme Court for … (a) an order dismissing the proceeding (in whole or in part); [and/or] (b) an order for costs in relation to the proceeding" (subclause 10(1)).

A person's right to engage in public participation is a right to engage in "conduct aimed (in whole or in part) at influencing public opinion, or promoting or furthering action by the public, a corporation or government entity in relation to an issue of public interest" (subclause 7(1)).[12]

The immediate effect of the making of an application under subclause 10(1) is that "any further application, procedure or other step in the proceeding is suspended until the application under this section is decided" (subclause 10(3)). (The relevant proceeding is some other curial (or perhaps non-curial)[13] proceeding in which the applicant to the Supreme Court under subclause 10(1) is the defendant.) The Supreme Court may, however, make an order that would have some other effect on the proceeding, and although the Supreme Court must deal with the application to it under subclause 10(1) "as soon as reasonably practicable" (paragraph 10(2)(b)), there would necessarily be some gap in time between the making of the application under subclause 10(1) and any order of the Supreme Court.

After hearing the application, the Supreme Court may make an order of a kind stated in subclause 10(1) (see above)

> if satisfied that –
>
> (a) the conduct of the defendant constitutes public participation; and
>
> (b) the defendant honestly and reasonably believed that the conduct was justified.[14]

It is to be noted that the Supreme Court does not address the question whether the continuation of the proceeding against B would be inconsistent with B's right under this Act to engage in public participation. That this court may not consider this question is strongly suggested by the wording of subclause 10(1) – which states that this is a question for the applicant to consider – and the provisions of clause 9 – which, in another but closely similar context, empower the Magistrates Court to address this issue.

(This reading of clause 10 is perhaps unintended, for it produces the odd result that the Supreme Court cannot address the substantive issue of whether the proceeding against B would be inconsistent with B's right under this Act to engage in public participation.[15])

---

[11] There is no definition of when a proceeding would be "inconsistent". One view is that there is an inconsistency where the action amounts to an 'interference' with the defendant's right public participation – see subclause 5. But this may take the matter little further.

[12] Subclause 7(2) excludes certain conduct from this definition, including conduct that is "[a] communication by a party to an industrial dispute" that is related "to the subject matter of the dispute" (paragraph 7(2)(e)), and conduct "advertising goods or services for commercial purposes" (paragraph 7(2)(f)).

[13] The concept of "proceeding" in subclause 10(1) is undefined, but may be at least limited to a proceeding by a person (A) "against another person (*B*) in relation to the conduct of B" – see subclause 9(1). The concept might also be limited to a proceeding in a court, (and thus not embrace a proceeding in a tribunal), but this is not clear. It is also not clear whether a proceeding encompasses a criminal matter.

[14] The Supreme Court may also, "on application by the defendant or on its own initiative, … make an order for punitive or exemplary damages if satisfied that the proceeding (or part of the proceeding) was begun against the defendant for an improper purpose" (subclause 10(5)). The notion of "improper purpose" is defined in subclause 6.

The Magistrates Court is also given a role under clause 9(1), which provides:

> If a person (***A***) gives notice of an intention to begin a proceeding against another person (***B***) in relation to the conduct of B, B may apply to the Magistrates Court for a declaration that -
>
> (a) the conduct that would be the subject of the proceeding constitutes public participation; and
>
> (b) beginning a proceeding against B would be inconsistent with B's right under this Act to engage in public participation.

Person B (the potential defendant) could avail themselves of this procedure once they had some notice of the intention of A (the potential plaintiff) to begin a proceeding. The Magistrates Court may make the declaration if satisfied that the "issuing of a proceeding against B would be inconsistent with B's right under this Act to engage in public participation" and that B "honestly and reasonably believed that the conduct was justified" (subclause 9(3)).[16]

Rights issues

By subclause 8(1), it is stated that a person has "the right to public participation", and such a right may be seen as an aspect of HRA paragraph 17(a) - "Every citizen has the right, and is to have the opportunity, to - (a) take part in the conduct of public affairs, directly or through freely chosen representatives: …" .

On the other hand, the main thrust of the scheme in the Bill "engages" the fair trial right of the plaintiff whose proceeding may be stopped by Supreme Court order before the substantive elements of the plaintiff's cause of action is ever reached. HRA subsection 21(1) provides:

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

The question might be put – is it "fair" that only some plaintiffs – that is, those whose cause of action is based on circumstances that include action taken in exercise of the right to public participation – should be subject to the regime embodied in the Bill? (This argument might also be put in terms of HRA subsection 8(2), which provides that "(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind".) In other words, the issue is why conduct that can be brought within the definition of "public participation" should be protected in a way that other conduct cannot? In part at least, an answer might point to HRA paragraph 17(a) (see above).

The Committee draws this to the attention of the Assembly.

---

[15] It may be intended that a person such as B must first obtain a declaration from the Magistrates Court. The problem with this reading is that this court may have jurisdiction only so long as no proceeding has been commenced, and in some cases the potential defendant may not have time to resort to the court before the proceeding is commenced.

[16] Perhaps all that B would gain by obtaining a declaration is that A would be put on notice that B might subsequently apply to the Supreme Court for an order under subclause 10(1), unless B must obtain a declaration prior to making an application to the Supreme Court.

ROAD TRANSPORT (ALCOHOL AND DRUGS) (RANDOM DRUG TESTING) AMENDMENT BILL 2008

This Bill would amend the *Road Transport (Alcohol and Drugs) Act 1977* to the effect of introducing a scheme for testing whether a driver of a vehicle has in her or his oral fluid a certain concentration of a certain drug, and then providing for the consequences if such a level of concentration is found.

General comment

The Bill is not accompanied by an Explanatory Statement. The evident purpose of the Bill is to create a scheme for testing by the police of whether a certain concentration of a certain drug is present in the oral fluid of the driver of a vehicle. Where the concentration exceeds a certain level, penalties might be incurred by the driver.

In its essentials and much of its detail parallels the scheme for the testing by the police of drivers to ascertain the level of alcohol present in their blood.

Rights issues

It is clear that the administration of the tests will interfere with the privacy of a driver, and, in terms of HRA subsection 12(a), the question is whether that interference is unlawful or arbitrary. This is in essence the same question as is posed by HRA section 28. In this assessment, account must be taken of the right to life and personal security of those who use the roads and who may be affected adversely by a drug-affected driver.

The Committee draws this to the attention of the Assembly.

Drafting comment

Proposed subsection 12A(7) of the Act (see clause 8 of the Bill) provides:

> (7) The carrying out of an assessment of drug impairment must be videorecorded unless the prosecution satisfies the court that it was not practicable in the circumstances to make a video recording.

This seems to run together two distinct notions which might be better kept separate: (1) that the carrying out of an assessment of drug impairment must be videorecorded, and (2) that evidence of the results of an assessment that has not been videorecorded will not be admissible in evidence unless it was not practicable in the circumstances to make a video recording.

WATER RESOURCES (VALIDATION OF FEES) BILL 2008

This is a Bill for an Act to validate fees charged for water-related licences and fees under the *Water Resources Act 1998* from 1 July 2007 until 31 July 2007.

Introduction

The background to the Bill is explained in the Explanatory Statement:

> Between 1 July 2006 and 30 June 2007 fees under the *Water Resources Act 1998* (the former Act) were set by the Water Resources (Fees) Determination 2006 (No 1) (DI2006-138). However between 1 July 2007 and 31 July 2007 no valid fee determination operated under the former Act in the transition to the new *Water Resources Act 2007* (the new Act), which repealed and replaced the former Act on 1 August 2007. A new fee determination, made under the new Act, took effect from 1 August 2007. The resulting one month gap between valid fee determinations led to the collection of approximately $1,700,000.00 in licence fees (substantially water abstraction charges collected from ACTEW) without proper authority.

Thus, subclause 4(1) of the Bill "extends the operation of the Water Resources (Fees) Determination 2006 No 1 (DI2006-138) to cover the period between 1 July 2007 and 31 July 2007 in order to validate the licence fees that have been charged under the former Act for that period". It is also noted that "[t]he fees thus validated by this Bill do not differ from the fees set for financial year 2006-07 by DI2006-138".

Para 2(c)(i) – undue trespass on rights and liberties

Is it in these circumstances justifiable to provide for the retrospective operation of a law?

Section 25 of the *Human Rights Act 2004* states a principle against the retrospective application of criminal laws. It is, however, generally accepted, as a common law right, that a law should not have a retrospective operation, in particular where that would affect adversely the rights or interests of a person.[17]

One way in which a retrospective law is unfair is that it disappoints the expectations of those who assumed that the quality of their past acts would be assessed on the basis of the law as it then stood. It is important to keep this in mind when assessing whether a particular law having retrospective effect is unfair.

The Committee notes that there have been fees validation bills in the past, and that the approach taken has been that where a service has been provided for a fee, there should be later validation of the making of that charge.

The Committee advises the Assembly that there is no undue trespass on rights on the basis that:

- those who paid the fee probably did so in the belief that they were legally obliged to do so, and
- the fees charged are in substance amounts that are properly related to the services that were provided.

[17] *Scrutiny Report No 12 of the 6th Assembly*, concerning the Children and Young People Amendment Bill 2005. This legal policy is reflected in subsection 75B(1) of the *Legislation Act 2001*: "A law must not be taken to provide for the law (or another law) to commence retrospectively unless the law clearly indicates that it is to commence retrospectively". Concerning validation of fees, see *Scrutiny Report No 41 of the 5th Assembly*, concerning the Validation of Fees (Cemeteries) Bill 2003.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-34 being the Canberra Institute of Technology (Advisory Council) Appointment 2008 (No. 1) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member, representing industry, of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2008-35 being the Canberra Institute of Technology (Advisory Council) Appointment 2008 (No. 2) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member, representing industry, of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2008-36 being the Public Place Names (Kingston) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes the road name "Mundaring Drive" and determines the extension of the name "Eastlake Parade" in its place.**

Disallowable Instrument DI2008-37 being the Taxation Administration (Amounts payable—Utilities (Network Facilities Tax)) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2006-271 and determines a new rate for the calculation of the Utilities (Network Facilities) tax.**

Disallowable Instrument DI2008-38 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 3) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drivers competing in the timed special (competitive) stages of the Brindabella Motor Sport Club pace note training day.**

Disallowable Instrument DI2008-39 being the Road Transport (Public Passenger Services) (Authorised Fixed Fare Hiring) Approval 2008 (No. 2) made under section 142A of the *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2008-29, amends the definition of a Nightlink taxi and approves hirings by Nightlink taxis between midnight Fridays and 6.00 am Saturdays, or between midnight Saturdays and 6.00 am Sundays on 21 March 2008, to be authorised fixed fare hirings.**

Disallowable Instrument DI2008-40 being the Residential Tenancies Tribunal Selection 2008 made under subsection 112(5) of the *Residential Tenancies Act 1997* **selects a specified person as a member of the Residential Tenancies Tribunal.**

Disallowable Instrument DI2008-41 being the Gas Safety (Provision of Compliance Indicator and Certificate of Compliance) Code of Practice 2008 made under section 65 of the *Gas Safety Act 2000* **approves the Gas Safety (Provision of Compliance Indicator and Certificate of Compliance) Code of Practice 2008.**

Disallowable Instrument DI2008-42 being the Planning and Development (Fees) Determination 2008 (No. 1) made under section 424 of the *Planning and Development Act 2007* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-43 being the Planning and Development (Fees) Determination 2008 (No. 2) made under section 424 of the *Planning and Development Act 2007* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-44 being the Pest Plants and Animals (Pest Plants) Declaration 2008 (No. 1) made under section 7 of the *Pest Plants and Animals Act 2005* **revokes DI2007-228 and determines specified pest plants to be notifiable pest plants.**

Disallowable Instrument DI2008-45 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 4) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drivers while they are competing in timed special (competitive) stages of the Solartec Renewables Blue Range Rally (Light Car Club of Canberra).**

Disallowable Instrument DI2008-46 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2008 (No. 1) made under paragraph 174(1)(b) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as deputy chairperson of the Sentence Administration Board.**

Subordinate Laws—No comment

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

Subordinate Law SL2008-4 being the First Home Owner Grant Regulation 2008 made under the *First Home Owner Grant Act 2000* **allows a First Home Owners Grant applicant to gain access to the grant where they have entered into a shared equity financing mechanism.**

Subordinate Law SL2008-5 being the Road Transport (Driver Licensing) Amendment Regulation 2008 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* **amends the *Road Transport (Driver Licensing) Regulation 2000* and clarifies the eligibility requirements for obtaining a heavy vehicle driver licence.**

Subordinate Law SL2008-6 being the Births, Deaths and Marriages Registration Amendment Regulation 2008 (No. 1) made under the *Births, Deaths and Marriages Registration Act 1997* **prescribes the particulars required for change of name entries in the register.**

Subordinate Law SL2008-9 being the Magistrates Court (Occupational Health and Safety Infringement Notices) Amendment Regulation 2008 (No. 1) made under the *Magistrates Court Act 1930* **amends the *Magistrates Court (Occupational Health and Safety Infringement Notices) Regulation 2004* to bring it into line with the changes made by the *Occupational Health and Safety (General) Regulation 2007*.**

Subordinate Law SL2008-11 being the Magistrates Court (Planning and Development Infringement Notices) Regulation 2008 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for a number of offences under the *Planning and Development Act 2007*.**

Subordinate Law SL2008-13 being the Legal Profession Amendment Regulation 2008 (No. 1) made under the *Legal Profession Act 2006* **clarifies the responsibility of a law practice to pay the costs of an external examination of the trust records of law practices.**

Subordinate Laws—Comment

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

Explanatory Statement – Minor drafting issue

Subordinate Law SL2008-7 being the Housing Assistance Regulation 2008 made under the *Housing Assistance Act 2007* **clarifies that the Commissioner for Social Housing assumed the rights, obligations, assets and liabilities of the Commissioner for Housing, as established under the Act.**

The Committee notes that the Explanatory Statement to this subordinate law indicates that it is made under section 40 of the *Housing Assistance Act 2007*. As the subordinate law makes modifications of the Act that are (the Committee assumes) intended to address transitional issues, the Committee considers that it would have been helpful if the Explanatory Statement also referred to section 109 of the Act, which provides for the making of "transitional regulations".

Strict liability offence / Accessibility of material on which the legislation relies

Subordinate Law SL2008-8 being the Planning and Development Amendment Regulation 2008 (No. 1), including a regulatory impact statement, made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008*.**

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

> Section 17 creates a strict liability offence. Under section 17 (3), a person commits an offence if …..

There is no subsection 17 (3) in this subordinate law. The Committee assumes that the correct reference is to section 19 of this subordinate law, which inserts a new section 403 into the *Planning and Development Regulation 2007*. New subsection 403 (3) creates an offence that, in subsection 403 (4) is declared to be a strict liability offence.

Turning to the actual offence, as noted in *Scrutiny Report No 2* of the *Sixth Assembly*, strict liability offences are a recurring issue for the Committee. In *Scrutiny Report No 2* (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred (at p 9) to principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences.

In particular, the Committee noted that, in its *Scrutiny Report No 38* of the *Fifth Assembly*, it had proposed that where a provision of a bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Scrutiny Report No 38* of the *Fifth Assembly*, the Committee went on to say:

> The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged.

There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that the Explanatory Statement to this subordinate law addresses the first but not the second of the Committee's requirements in relation to strict liability offences. That is, it does not address the issue of what defences are nevertheless available. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a) (ii) of the Committee's terms of reference.

Section 16 of this subordinate law inserts a new section 400A into the Planning and Development Regulation. It provides:

> **400A Disapplication of Legislation Act, s 47 (6) for certain territory plan instruments—Act, s 422A (1)**
>
> An instrument mentioned in schedule 4 (Prescribed territory plan instruments) is prescribed.

This provision refers to subsection 422A (1) of the *Planning and Development Act 2007*, which provides:

> **422A References in territory plan to certain instruments**
>
> (1) A reference in the territory plan to an instrument prescribed by regulation is a reference to the instrument as in force from time to time.
>
> *Note 1* A statutory instrument may also apply, adopt or incorporate (with or without change) a law or instrument (or a provision of a law or instrument) as in force at a particular time (see Legislation Act, s 47 (1)).
>
> *Note 2* If a statutory instrument applies, adopts or incorporates a law or instrument (or a provision of a law or instrument), the law, instrument or provision may be taken to be a notifiable instrument that must be notified under the Legislation Act (see s 47 (2) to (6)).
>
> (2) The Legislation Act, section 47 (6) does not apply in relation to an instrument mentioned in subsection (1).

The effect of the new section 400A is that subsection 47 (6) of the *Legislation Act 2001* does not apply to the following instruments (which are specified in Schedule 4 of the Planning and Development Regulation (which is inserted by section 50 of this subordinate law):

> **Part 4.1 Australian standards**

- AS 1158.1 (*The lighting of urban roads and other public thoroughfares*)
- AS 1158.1.3 (*Pedestrian Lighting*)
- AS 1158.3.1 (*Road lighting - Pedestrian area (Category P) lighting - Performance and installation design requirements*)
- AS 1428.1 (*Design for Access and Mobility – General Requirements for Access - New Building Work*)
- AS 1428.2 (*Design for Access and Mobility - Enhanced and Additional Requirements - Buildings and Facilities*)
- AS 1428.3 (*Design for Access and Mobility - Requirements for Children and Adolescents with Physical Disabilities*)
- AS 1428.4 (*Design for Access Mobility - Tactile Indicators*)

- AS 1668.1 (*The Use of Ventilation and Air-conditioning in Buildings*)
- AS 1680.0 (*Interior Lighting - Safe Movement*)
- AS 1735.7 (*Lifts, Escalators and Moving Walks – Stairway Lifts*)
- AS 1735.12 (*Lifts, Escalators and Moving Walks - Facilities for Persons With Disabilities*)
- AS 1735.14 (*Lifts for people with limited mobility – restricted use - low rise platforms*)
- AS 1742.10 (*Manual of Uniform Traffic Control Devices – Pedestrian Control and Protection*)
- AS 2107 (*Acoustics - Recommended Design Sound Levels and Reverberation Times for Building Interiors*)
- AS 2220.2 (*Emergency Warning and Intercommunication Systems in Buildings - System Design, Installation and Commissioning*)
- AS 2700 (*Colour Standards for General Purposes*)
- AS 2890.1 (*Parking Facilities: Part 1 - Off Street Car Parking*)
- AS 2899 (*Public Information Symbol Signs - Part 1 General Information Signs*)
- AS 3671 (*Acoustics - Road Traffic Noise Intrusion, Building and Siting Construction*)
- AS 3769 (*Automatic Teller Machines - User access*)
- AS 4282 (*Control of the Obtrusive Effects of Outdoor Lighting*)
- AS 4299 (*Adaptable Housing*)
- AS 4586 (*Slip Resistance Classification of New Pedestrian*

Part 4.2 Computer modelling software

- *Aquacycle*, Cooperative Research Centre for Catchment Hydrology
- *DRAINS (ILSAX)*, Watercom Pty Ltd
- *MUSIC* (Model for Urban Stormwater Conceptualisation), Cooperative Research Centre for Catchment Hydrology
- *NSW BASIX* (New South Wales Building Sustainability Index), NSW Department of Planning
- *PURRS* (Probabilistic Urban Rainwater and Wastewater Reuse Simulator), University of Newcastle
- *RORB*, Monash University
- *WBNM* (Watershed Bounded Network Model), University of Wollongong
- *XP-AQUALM*, XP Software
- *XP-RAFTS* (Runoff and Flow Training Simulation), XP Software

Part 4.3 Other instruments

- *ACT Crime Prevention and Urban Design Resource Manual*, ACT Planning and Land Management, 2000

- *ACT Draft Noise Management Guideline*, ACT Planning Authority, 1996
- *ACT Government Strategic Plan - Contaminated Sites Management*, Department of Urban Services, 1995
- *Australia Post Terms and Conditions, Appendix 2: Street Mail Service - Conditions of Delivery*, Australia Post, 2001
- *Contaminated Sites Environmental Protection Policy*, Environment ACT, 2000
- *Design Standards for Urban Infrastructure*, Department of Urban Services
- *Development Control Code for Best Practice Waste Management in the ACT*, Department of Urban Services, 1999
- *Environment Protection Guidelines for Construction and Land Development in the ACT*, ACT Environment Protection Authority, 2007
- *Guide to Traffic Engineering Practice Part 13 - Pedestrians*, Austroads, 1995
- *Guide to Traffic Engineering Practice Part 14 - Bicycles*, Austroads, 1999
- *Neighbourhood Plans*, ACT Planning and Land Authority

The effect of subsection 47 (6) of the Legislation Act (in simple terms) is to make instruments that are incorporated by reference *as they apply from time to time* (and contrary to subsection 47 (3) of the Legislation Act) "notifiable instruments". This means that such instruments (and amendments to them) must be published on the ACT Legislation Register. The effect of disapplying subsection 47 (6) is that there is no requirement to publish such instruments on the Register. While the Committee notes that the prescribing of these instruments is expressly provided for by section 422A of the Planning and Development Act, the Committee also notes that the effect of these instruments being prescribed is to limit public access to instruments upon which the law relies (and in relation to which those affected by the law must conduct themselves).

Penalty for offence dealt with by way of infringement notice

Subordinate Law SL2008-10 being the Magistrates Court (Building Infringement Notices) Regulation 2008 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for prescribed offences under the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008*.**

The Committee notes that the effect of this subordinate law is to allow various offences under the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008* to be dealt with by way of infringement notices. The Committee notes that the Explanatory Statement to this subordinate law contains the following statement:

> The infringement notice penalty for the offence prescribed at Part 1.2 of Schedule 1, being section 49 of the *Building General (Regulation) 2008*, is $1000 for an individual, which corresponds with the respective full maximum penalty for the relevant offence. This penalty level is a departure from the principle that infringement notice penalties should be set at 20% of the maximum penalty for the offence. The departure is considered necessary for the following reasons:
>
> - An infringement notice penalty of 20% of the maximum would be $200, which is considered manifestly inadequate to deter against the commission of the offence;

- The offence prescribed by Part 1.2, being section 49 of the *Building (General) Regulation 2008*, is only intended to be contained in the Regulation as an interim measure. The offence mirrors the offence at section 50B (2) (b) (i) of the *Building Legislation Amendment Act 2007*, except that the section 49 offence provides more detail in the offence grounds. It is intended that the section 49 offence is more suited to infringement notices than the section 50B (2) (b) (i) offence, and the Government intends to remove the offence from the Regulation and place it in the Act proper, at which point the maximum penalty in the Act will be 50 penalty units, with an infringement notice of 20% of this figure (i.e. $1000);

- The offence can only apply to a surveyor, and not the public at large. After consultation with the relevant industry, the industry has expressed its strong support for inspectors being given the option to pursue alleged breaches of the section by way of infringement notice instead of a court based prosecution.

The Committee notes that, while the penalty provided for is, in this case, the same as the maximum penalty provided for by the relevant regulation, an explanation has been provided. In particular, the Committee notes that the present amendment is intended only as an interim measure and notes, with approval, that it is intended to move the relevant offence provision from *the Building (General) Regulation 2008* to the *Building Act 2004*.

REGULATORY IMPACT STATEMENT

The Committee has examined a regulatory impact statement in relation to the following subordinate law and offers these comments on it:

Subordinate Law SL2008-8 being the Planning and Development Amendment Regulation 2008 (No. 1), including a regulatory impact statement, made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008*.**

This subordinate law is accompanied by a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

> **35 Content of regulatory impact statements**
>
> A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) must include the following information about the proposed law in clear and precise language:
>
> ……
>
> (h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

The Committee notes that this regulatory impact statement contains the following statement:

> Section 19 creates a strict liability offence. Under section 19(3), a person commits an offence if:
>
> (a) the person interferes with a seized thing, or anything containing a seized thing, to which access has been restricted under subsection (2); and

(b) the person does not have an inspector's approval to interfere with the thing.

Under section 19(4) it is a strict liability offence with a maximum penalty of 10 penalty units. A penalty unit is defined in the *Legislation Act 2001* and is currently $100.

As section 19 is a strict liability offence, it engages sections 18(1) and 22(1) of the *Human Rights Act 2004*. The government notes the following features and characteristics of the offence, which it believes justify the imposition of strict liability:

The offence is regulatory in nature, and cannot be considered "truly criminal" in the sense that it does not involve conduct that is "morally wrong" or "reprehensible" (see *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 185). Also, the offence would only apply in situations where investigation by an inspector is required to determine whether a controlled activity is occurring or to determine whether an alleged offence has occurred or to determine whether an occupier has complied with an already issued compliance order (such as a rectification direction), and would not apply to members of the community at large (see *Engle v Netherlands* (1980) 1 E.H.R.R. 647). Further, the maximum penalty does not involve imprisonment and is relatively minor (10 penalty units), and is principally intended to act as a deterrent, and not be punitive or "extract retribution for wrong doing" (see *Ozturk v Germany* (1984) 6 E.H.R.R. 409).

The Government is of the view that when the totality of the above factors are considered together, the imposition of strict liability is reasonable and demonstrably justified under section 28 of the *Human Rights Act 2004*, especially when considered in light of relevant international jurisprudence concerning offences of a similar nature.

…….

Scrutiny Committee

The proposed provision is consistent with the scrutiny of bills and subordinate legislation committee principles. General principles of the authorising law, P&D Act 2007, have been assessed by the Human Rights Commissioner and all issues responded to. An explanatory statement has been tabled.

The Government notes that there is authority from the European Court of Human Rights and the Canadian Supreme Court holding that where the offence is not punishable by imprisonment considerations of "administrative efficiency" may be afforded some weight in determining whether the imposition of strict liability is justifiable (see *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486; and *R v The Corporation of the City of Sault Ste. Marie* [1978] 2 S.C.R. 1299,).

The Committee notes that, while the Explanatory Statement to this subordinate law refers to "section 17", the regulatory impact statement refers to "section 19". Neither reference appears to be correct.

The Committee has already indicated that the Explanatory Statement to this subordinate law does not address the 2 issues that it has consistently required that Explanatory Statements address when a subordinate law contains a strict liability offence. That being so, the Committee is perplexed as to the basis upon which this regulatory impact statement can assert that the provision in question is "consistent with the scrutiny of bills and subordinate legislation committee principles". That being so, the Committee draws the Legislative Assembly's attention

to this regulatory impact statement, under principle (b) of the Committee's terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

The Committee also notes, with approval, that the regulatory impact statement also contains the following statement:

> The provision, currently in regulation due to drafting timeframes, will be transitioned to the P&D Act to provide the appropriate legislative strength and will ensure consistency with the overall compliance framework of the Act. This will be consistent with advice from Justice and Community Safety (JACS) and the Human Rights Commissioner. This regulation is a temporary measure and will be presented to the Assembly in an amendment to the Act at the first opportunity.

The Committee commends this approach in relation to strict liability offences.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 8 April 2008, in relation to comments made in Scrutiny Reports No. 48 and 51 concerning Subordinate Laws:
  - SL2007-33, being the Poisons Amendment Regulation 2007 (No. 1); and
  - SL2007-42, being the Public Health Amendment Regulation 2007 (No. 1).
- The Attorney-General, dated 8 April 2008, in relation to comments made in Scrutiny Report 52 concerning the Justice and Community Safety Legislation Amendment Bill 2008.
- The Minister for Industrial Relations, dated 11 April 2008, in relation to comments made in Scrutiny Report 50 concerning Disallowable Instruments:
  - DI2007-271, being the Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1);
  - DI2007-276, being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1);
  - DI2007-277, being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2);
  - DI2007-278, being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3);
  - DI2007-279, being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4);
  - DI2007-283, being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2);

  - DI2007-284, being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3); and
  - DI2007-285, being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4).
- The Minister for Health, dated 24 April 2008, in relation to comments made in Scrutiny Report 52 concerning the Tobacco Amendment Bill 2008.
- The Minister for Health, undated, in relation to comments made in Scrutiny Report 50 concerning the Medicines, Poisons and Therapeutic Goods Bill 2007.

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

COMMENT TO THE RESPONSE OF THE MINISTER FOR HEALTH TO THE COMMITTEE'S COMMENTS ON THE TOBACCO AMENDMENT BILL 2008

The Minister's response criticises the Committee's report in two respects: (1) that the report did not offer sufficient detail in support of its statement that the Explanatory Statement did not meet requisite stylistic and technical requirements; while (2) it spent three pages of discussion of a human rights issue that does not arise.

To turn first to (1), the requisite stylistic and technical requirements were spelt out in a report of the Senate Standing Committee for the Scrutiny of Bills.[18] Generally,

> [a]n explanatory memorandum is a companion document to a bill. It is required to provide a statement of the purpose of the legislation, an outline of why it is required, the effect of the princip[al] provisions, an explanation of the policy background and notes on the clauses of the bill. The information provided in this document should be of such a quality that the committee, members of Parliament, the courts and the public are able to understand the overall objective and operation of the bill. [19]

The report quoted with approval a statement in the Commonwealth *Legislation Handbook* that the memorandum "must be written in plain English and should focus on explaining the effect and intent of the bill, or the amendments, rather than repeating the provisions. Information contained in the explanatory memorandum must be accurate and not misleading, and must reflect the final form of the bill ...".[20] The report added that "[t]he [Senate Scrutiny] committee expects that an explanatory memorandum will explain all aspects of the accompanying bill, including the effect of its individual clauses".[21]

The report also emphasised that a memorandum will explain "any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justifications for this".[22]

[18] Senate Standing Committee for the Scrutiny of Bills, Third Report of 2004, *The Quality of Explanatory Memoranda Accompanying Bills*. http://www.aph.gov.au/Senate/committee/scrutiny/bills/2004/b03.pdf
[19] Ibid at para 2.1.
[20] Ibid at para 2.7.
[21] Ibid at para 2.8.
[22] Ibid at para 1.2.

The enactment of the *Human Rights Act 2004* adds force to this last point in that it confers on the Committee the function of reporting about human rights issues arising out of a proposed law. In a speech in 2005 to open the 9th Australasian and Pacific Conference on Delegated Legislation and 6th Australasian and Pacific Conference on the Scrutiny of Bills, ACT Chief Justice Higgins said:

> The HRA ensures that rights issues are considered at the outset in the context of the development of a legislative proposal, as part of cabinet process providing the Legislative Assembly with information about the way any proposed bill deals with human rights. The HRA promotes rights discourse during every stage of a piece of legislation – from its genesis to its interpretation in the courtroom. For example, section 38 requires the Scrutiny of Bills committee to report to the Legislative assembly about human rights issues raised by bills presented to the Assembly. Also, s 37 HRA provides that the Attorney General must prepare a written statement for all bills presented to the Legislative Assembly. It must state whether in the AG's opinion, the bill is consistent with human rights, and if it is not consistent, how it is not consistent with human rights. Further, all new legislation begins as a bid by the Minister responsible for inclusion of the bill on the legislation program. All new legislation bids are required to state the human rights implications of the bill and all cabinet submissions seeking approval to present a bill must state whether or not it is compatible with the HRA. If a bill imposes a restriction on rights protected by the HRA, a statement to this effect must be made in the explanatory statement presented with the bill, including whether or not the restriction falls within permissible limits.[23]

This last statement draws attention to the two-step analysis involved in an inquiry as to whether a provision of a bill is HRA compatible. The first step is to ask whether the provision limits (or "engages" as it is often put) an HRA right. At the second step, the question is whether that limitation is nevertheless a justifiable limitation in terms of HRA section 28. It is critical that an Explanatory Statement always indicate whether (and why) a provision does limit an HRA right, and then, if it does, offer a reasoned justification (and not simply make an assertion) to support the enactment of the limitation. This justification involves a "proportionality" analysis familiar to students of human rights law. Just how much detail is necessary will depend on matters such as the nature of the provision, whether the issue has been raised and dealt with in other Explanatory Statements, and the complexity of the rights issue.

The point of this exercise is not simply to inform the Committee, the Assembly, the legal profession and the courts. An Explanatory Statement has the potential to be the vehicle for discourse between the promoter of the Bill and the general public, and thus enhance the growth of a human rights culture in the ACT. The work involved in writing an Explanatory Statement is tedious and difficult, but the outcome is of great value.

So far as concerns the Explanatory Statement to the Tobacco Amendment Bill 2008, the Committee provides more detail below.

[23] At 7-8. http://www.parliament.act.gov.au/conferences/scrutiny/opening.pdf

Turning to (2), the Minister's response argues that the Canadian case-law to which the Committee referred – which holds that the right to free speech stated in the Canadian Charter of Rights encompasses a right to speech (usually called "commercial free speech") that takes the form of advertisements and the like by persons (natural or artificial) engaged in commerce – has no relevance to the interpretation of the right to freedom of expression stated in HRA subsection 16(2).[24] The Minister states that she has been advised that "it is highly improbable that the ACT Supreme Court would find a similar right to commercial free speech in the light of [HRA] section 6".[25]

HRA section 6 provides:

> **6 Who has human rights?**
>
> Only individuals have human rights.

This clearly means that only natural persons ("individuals") can have the rights stated in the HRA. Any other kind of legal person – and in particular of course, a corporation - cannot claim the benefit of a right stated in the HRA.[26] With respect to the Minister's advisers, it is impossible to reason from the presence of section 6 in the HRA to a conclusion that the notion of "expression" in HRA subsection 16(2) does not embrace "commercial free speech". The argument may be the more limited one that since only corporations engage in commerce, no "individual" would have occasion to claim the benefit of HRA subsection 16(2), and thus as a practical matter the HRA does not protect commercial free speech. This is however clearly wrong. Much commerce, and much speech that occurs in the pursuit of commerce (as in the small business sector), is conducted by individuals and of course section 6 applies to them. The provisions of the Tobacco Amendment Bill 2008 that limit freedom of expression are not framed so that they could apply only to corporations.

The passage from the Report of the ACT Bill of Rights Consultative Committee provides no support for the advice given to the Minister. The Report pointed to a 1995 Canadian case that held that a corporation could, in respect of commercial free speech, claim the benefit of the free speech right stated in the Canadian Charter of Rights. The Report did so however merely to argue that the HRA should contain a clause that would preclude a corporation from claiming the benefit of any right stated in an ACT HRA. The Scrutiny Committee did not refer to this passage for the reason that it is of no relevance to an assessment of the scope of "freedom of expression" in HRA subsection 16(2).

It is not beyond doubt that a court in the ACT hierarchy will find that "expression" in HRA subsection 16(2) embraces "commercial free speech".[27] This is however the trend of the "international jurisprudence" if that is taken to refer to decisions of courts of the USA, Europe and the British Commonwealth.

---

[24] There is no practical difference between the concepts of "expression" and "speech".

[25] The Minister cites *Vosame Pty Limited and ACT Planning & Land Authority* [2006] ACTAAT 12, but that decision merely cites HRA section 6 for the proposition that the HRA "applies only to individuals" and had no application to a corporation. It has no bearing on the effect of section 6 on the scope of "free speech" in HRA subsection 16(2).

[26] It does not follow that an artificial legal person may not claim the benefit of a common law right in an appropriate setting. The HRA is not an exhaustive statement of the rights to which the Committee has regard under its long-standing terms of reference. The Committee did not however seek to make this kind of argument in its report on the Tobacco Amendment Bill 2008, and it will not be developed further.

[27] "The freedom of speech guaranteed by the [First Amendment to the USA Constitution] was long thought by the [Supreme Court] to be speech about ideas, but that is not the Court's view today": Robert Bork, *Slouching Towards Gomorrah* (1996) at 99. There is nothing to preclude an ACT court from taking the narrower view.

The Committee considers that its consideration of the freedom of expression issue in its report on the Tobacco Amendment Bill 2008 was warranted.

Deficiencies in the Explanatory Statement

The Committee will review the explanations given in respect of the major clauses of the Bill. By way of introduction, it should be said that at several key points, the Explanatory Statement does provide an explanation of why a change of the law is to be made, and includes reference to the policy objective sought to be obtained. Rarely do Explanatory Statements attempt to relate the proposed provision to the policy of the amending Bill, or otherwise explain why the change is being made, and in these respects, the Explanatory Statement is to be commended.

At several points, the explanation is very obscure.

Clause 6 is a good plain English explanation of proposed section 4 of the Act, but it does not explain why the current sections 3 and 4 are to be repealed and replaced.

It is technically more correct to say that "clause 6 repeals sections 3 and 4 of the Act and inserts in their place a new section 4".

Clause 8

In respect of proposed section 8, there is no statement about its content. This may be because it restates the content of existing section 21 of the Act. This is not however a sufficient reason to omit a description of section 8. The Explanatory Statement should stand alone and not require reference to some other document (in this case the Explanatory Statement to the Bill that inserted section 21 into the Act).

In respect of proposed section 9, there is a good statement about its content, and it relates section 9 to proposed section 4. The Committee suggest that the word "however" is awkward, and it would have been better to use the word "and".

In respect of proposed section 10, there is a good statement about its content, and it relates section 10 to the policy of the Bill and to other provisions. The Minister's response acknowledges that it should have been made clear that the reference to section 23(4)(d) of the Act is to the proposed section 24 (see clause 11).

In respect of both sections 9 and 10, it is noted that the offences are ones of strict liability, and in its Report the Committee noted that the Explanatory Statement did provide a justification. A reference to the fact that provision for a strict liability offence engages the presumption of innocence in HRA subsection 22(1) would assist a reader understand that a human rights issue is raised by the relevant provisions of the Bill.

Clause 9

The explanation of proposed subsection 14(2) is hard to follow. The current subsection 14(2) provides that "[i]t is a defence to a prosecution for an offence against subsection (1) if the defendant proves that immediately before the smoking product was sold, the person to whom it was sold had shown a document of identification to the defendant (or to an employee or agent of the defendant)". Proposed subsection 14(2) requires a defendant to prove the three matters stated in paragraphs (a), (b) and (c).

The Explanatory Statement says: "[r]ather than require the defendant to prove they were shown a document of identification, the defence requires the defendant to prove they had required the person to produce a document of identification. Additionally, the defence now requires the person to form a belief as to whether the document was genuine". This is not a good summary of the change proposed. A minor point is that the words "(subsection 14(2) currently provides)" might have been inserted after the word "identification" where it first occurs. Of more substance is the point that the proposed subsection 14(2)(b) does require the defendant to prove that they were shown a document of identification.

It is true that a defendant would, by virtue of paragraph 59(b) of the Criminal Code, be required to prove the three matters stated in paragraphs (a), (b) and (c) to the standard of the legal burden.

It would assist the lay reader to explain what that standard is. It is, by subsection 56(3) of the Code, "the burden of proving the existence of the matter", and it might also be added that by section 60 "A legal burden of proof on the defendant must be discharged on the balance of probabilities". (The Explanatory Statement has in effect stated the latter point.)

It is not correct to say that "[t]he defence is a legal burden defence (see section 59(b) of the Criminal Code) as it involves matters that would be within the peculiar knowledge of the defendant, as the defendant is the person who is required to ask for the document of identification". As a matter of law, the defence is a legal burden defence because subsection 14(2) uses the words "if the defendant proves" – see paragraph 59(b) of the Criminal Code. What the Explanatory Statement has – helpfully – explained why as a matter of policy these words have been used to produce the intended effect.

The Minister has acknowledged that there should have been a reference to HRA subsection 22(1).

Clause 10

The explanation of the reason why section 19 is to be repealed and a new section 19 inserted is a good example of the policy explanation of the reason for a change. It would have been clearer if it was explained that the current section 19, which prohibits the sale of cigarettes (including cigarettes made from a herbal product) in a quantity of fewer than 20, is to be retained in proposed subsection 19(1).

The explanations to proposed sections 20 to 22 are fine, and that to proposed section 21 another good example of the policy explanation of the reason for a change.

Clause 11 – proposed section 23

There are some problems here. The statement made at the outset that "section 23 prohibits smoking advertising but an exemption was included to exempt certain advertising from the prohibition" is largely correct (although technically, the Minister could grant an exemption). It should have been made clear that this is what the current section 23 provides, and that the proposed section 23 does not include provisions that would empower the Minister to grant an exemption.

There is then no comprehensive explanation of what proposed section 23 will provide. The reader has to guess that the provisions of existing section 23 are reproduced except as indicated by the Explanatory Statement. The Committee does not object to explanations of variations to the current provision.

Clause 13

The explanation of proposed section 25 is very hard to follow. It would be better to take each subsection in turn, say in plain English what the subsection provides (although this may require using the exact words of the provision), and then indicate how it varies from the existing provision and why it does so. (The Committee is not suggesting that this must always be done, but it seems that this is what was attempted here.)

The Explanatory Statement says:

> Section 25 is amended to remove subsection (3) and to harmonise the offence. This has included amending a provision that requires the prosecution to only prove what a reasonable person would believe and that the matter may be found to be promoted irrespective of the actual belief of the defendant.

This is very hard to follow. Existing section 25 is repealed, not simply amended, and it is not explained what "to harmonise the offence" means. What provision (presumably of the current section 25) is "amended"?

The next paragraph of the Explanatory Statement is also obscure. The Explanatory Statement referred to is presumably the one issued in respect of the Bill that led to the law that made the change in 1999. The point that is made is very obscure.

The problem may lie in the drafter of the Explanatory Statement assuming that a reader is fully acquainted with the existing law, and can thus follow what is in effect a limited commentary on the changes proposed. The Committee considers that an Explanatory Statement should stand alone.

Regarding proposed section 25A, the Explanatory Statement says:

> New section 25A amends current section 25(3) to provide explicitly that object or entitlements, such as customer reward schemes, cannot be offered in combination with the sale of smoking products. There is an exception to current subsection (3) that provides that if the scheme applies equally across a whole range of products in the store or supermarket, then smoking products can be included in a customer reward scheme.

This again is very obscure. Section 25A would not amend current subsection 25(3), but make a provision to stand in its place (and it would appear in the place of other provisions in current section 25). Referring to proposed section 25A as an amendment makes it hard to follow what is being said. The reference to an "exception to current subsection (3)" is probably a reference to subsection 25(5), which provides a legal burden defence to a charge under subsection 25(3).

The explanation of new section 25A is fine, and the policy is outlined.

The next paragraph attempts to explain the defence provision, subsection 25A(2). It is desirable to refer explicitly to the number of a provision. Its policy is well explained, but the legal position is not. The Explanatory Statement says:

> This is a legal burden defence because the matter is peculiarly within the knowledge of the defendant; [*comment* – this is not the correct way to state the position – see above]
>
> the defendant is required to show only that it was not reasonably practicable to discharge the defence [*comment* – this is a very obscure way to state the position, and it would be better to simply use the words of subsection 25A(2)]
>
> (it then falls to the prosecution to disprove this); [*comment* - "this" is very obscure, but would make sense if the words of subsection 25A(2) had been used]
>
> and no imprisonment is proposed, only a maximum penalty of 50 penalty units. To require the defendant to prove the defence, ie., on the balance of probabilities (see section 59(b), Criminal Code), is considered a permissible reasonable limitation under section 28, HRA. [*comment* – there is no reference to the presumption of innocence right in HRA subsection 22(1), which is the right being limited].

This sentence would have been better broken up into two or more sentences.

Clause 14 – proposed section 28

The substance of the section should have been outlined. It is not clear what "harmonisation" involved. This might be gathered from what is said later about Schedule 1. It is better to explain the matter the first time it arises.

Bill Stefaniak, MLA
Chair

May 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No 1)

Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No 4)

Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No 1)

Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**

Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No 1)

Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No 1)

Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No 1)

Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 **(PMB)**

Bills/Subordinate Legislation

Report 15, dated 22 August 2005
Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
Hotel School (Repeal) Bill 2005
Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September
Civil Law (Wrongs) Amendment Bill 2005 **(PMB)**

Report 18, dated 14 November 2005
Guardianship and Management of Property Amendment Bill 2005 **(PMB)**

Report 19, dated 21 November 2005
Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006
Registration of Relationships Bill 2006 **(PMB)**
Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Report 28, dated 7 August 2006
Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006
Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006
Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006
Crimes Amendment Bill 2006 (PMB)
Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007
Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 43, dated 13 August 2007
Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)
Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)
Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)
Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007
Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)
Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)
Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007
Crimes (Street Offences) Amendment Bill 2007 (PMB)
Legal Profession Amendment Bill 2007
Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

Bills/Subordinate Legislation

Report 47, dated 12 November 2007

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)
Sentencing Legislation Amendment Bill 2007 (PMB)
Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)
Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)
Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)
Long Service Leave (Private Sector) Bill 2007 (PMB)

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008
Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007
Disallowable Instrument DI2007-307 - Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1)
Planning and Development Legislation Amendment Bill 2008
Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Report 52, dated 31 March 2008

Disallowable Instrument DI2007-323 – Auditor-General Acting Appointment 2007
Disallowable Instrument DI2008-19 - Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1)
Subordinate Law SL2008-2 - Planning and Development Regulation 2008, including a regulatory impact statement
Subordinate Law SL2008-3 - Building (General) Regulation 2008, including a regulatory impact statement

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
C/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr ~~Stefaniak~~ Bill

I refer to the Standing Committee on Legal Affairs Scrutiny Report No. 51 of 3 March 2008 and comments concerning the Public Health Amendment Regulation 2007 (No. 1) (Subordinate Law 2007-42). I also refer to the Committee's Report No. 48 of 19 November 2007 on the Poisons Amendment Regulation 2007 (No. 1) (Subordinate Law 2007-33) and apologise for the delay in responding to the Committee's comments in Report No. 48.

The Committee has noted that both the Public Health Amendment Regulation (Public Health Regulation) and the Poisons Amendment Regulation (Poisons Regulation) provide for strict liability offences and comments on the explanation provided in the explanatory statements for the offences.

The Committee notes that the explanation for the Public Health Regulation addresses the Committee's first criterion for addressing the inclusion of strict liability but not the second. With respect to the Poisons Regulation, the Committee notes that the explanatory statement addresses the Committee's second criterion for the inclusion for strict liability but not the first. The comments reflect the Committee's view that a general statement be provided where it is proposed to create an offence of strict or absolute liability.

The Committee acknowledges with respect to the offence in the Public Health Regulation that strict liability was justified. It is acknowledged that there was no further explanation provided for the strict liability offences in the Poisons Regulation other than a reference to the *Criminal Code 2002* provisions. However, the four offences all concern matters that are clearly regulatory in nature and are not provisions that are unreasonably or unfairly detrimental to an individual. The offences in the Poisons Regulation are an offence on a seller for failure to comply with a requirement to tell a buyer the purpose of the record (section 5A); failure to make a record (section 5B); and failing to comply with a Chief Health Officer's direction to change a record (section 5E). Each of these offences are consistent with the need to ensure the integrity of a regulatory scheme. The individuals affected by the offences are individuals who can reasonably be expected to be aware of their duties and obligations.

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

With respect to the Committee's expectation that defences additional to the Criminal Code be included in legislation or that an explanation offered as to why additional defences are not. I note that the Committee has previously acknowledged that defences that require a judgement by the court, such as reasonable excuse or reasonable steps, are generally undesirable (Report No. 17, 17 October 2005). It would then seem unnecessary to state why an additional defence was not included in legislation, however, to assist the Committee an explanation is provided for the Public Health Regulation. For this offence, the person is supplied with a written direction and advised that failure to comply with the direction is an offence. Given these factors, a defence such as reasonable steps would not be appropriate. I also note that the Committee accepted the statement on defences for the Poisons Regulation.

I thank the Committee for its comments on the Public Health Amendment Regulation 2007 and the Poisons Amendment Regulation 2007.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
8/4/08

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 52 of 31 March 2008. I offer the following response in relation to the Committee's comments on the Justice and Community Safety Legislation Amendment Bill 2008.

I note the Committee's observation in relation to the cross referencing in paragraph 45(2)(c) to subsection 45(3) rather than section 45(4) and have requested my department to prepare a government amendment to reflect this minor amendment in the Bill. The Explanatory Statement will also been amended to elaborate on the full set of circumstances in which it is proposed that the Human Rights Commission (HRC) need not notify the person complained about.

Frivolous and vexatious complaints

I note the Committee's suggestion that a person should be given an opportunity to deal with allegations made about them to the HRC. While I fully support the principle that a person who is complained about should be notified about the substance of a complaint, I am advised by the HRC that the proposed discretion not to do so would only be exercised in situations where there are repeated complaints made against a person, or a matter is so trivial or fanciful, that it is a waste of public resources for the HRC to inquire into them.

The HRC is currently required to inform persons who are the subject of a complaint about all complaints made about them, whether or not they are repeat complaints, of basically the same subject matter. I am advised that it is a source of great annoyance for those respondents when they are required to continue to deal with matters, which they consider should simply be dismissed. I agree with the Committee that privacy and reputation are paramount, but in a practical sense, this needs to be balanced against a respondent's desire not to have their time wasted by HRC bureaucratic processes.

In these circumstances, the HRC would not have formed any view, which might affect the reputation of the person complained about. The HRC would keep a record of such

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

complaints, maintain them in the HRC, restrict access to them by any other person, and archive them in accordance with government record keeping procedures. The HRC is happy to provide examples of such complaints, if this would assist the Committee in its deliberations.

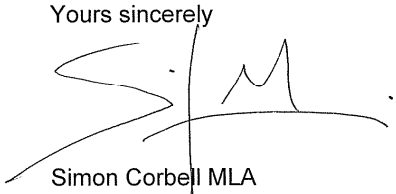
Complaints referred to other statutory office holders

In circumstances where the HRC refers a complaint to another statutory office-holder for consideration, the person complained about would be notified of the complaint by the other statutory office-holder. The HRC is seeking to address the situation where people simply send a complaint to the wrong place and the HRC basically acts as a post box to refer the complaint on to the appropriate agency. The HRC would, in accordance with the proposed legislative amendments, have already consulted with the receiving statutory office-holder and have formed the view that the receiving office-holder is the appropriate authority to investigate the matter. The person complained about would then be notified by the receiving office-holder about the nature of the complaint to facilitate proper investigation and resolution of the matter.

In relation to those complaints where some aspects of the complaint may be referred on, but other aspects are investigated by the HRC, a simple note of the referral would be kept on the HRC's records. The HRC would advise the respondent of the referral at the same time as it would seek a response on aspects of the complaint within the HRC's jurisdiction.

I trust that this information addresses the concerns raised by the Committee and I thank the Committee for its comments.

Yours sincerely



Simon Corbell MLA
Attorney General
8.4.08

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ~~Stefaniak~~ Bill

I refer to Scrutiny of Bills Report No. 50 2008 and offer the following responses in relation to matters raised by the Standing Committee on Legal Affairs performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee.

Occupational Health and Safety Council – Appointment of Deputy Chair
An oversight was made and no explanatory statement was provided for the appointment of the OHS Commissioner as Deputy Chair of the Council. As the committee rightly pointed out, the OHS Commissioner is a statutory office-holder and not a public servant, so the appointment was disallowable and should have included an explanatory memorandum.

I will be vigilant that future appointments do not include the same error.

Occupational Health and Safety Council – Acting Appointments
The appointments as they have been made are valid. However, the explanation about their operation could be clearer. The instruments enable the acting members for employee representatives or employer representatives to act for any of the actual members during a short absence such as an illness or conflicting work schedule or during a permanent vacancy for not longer than 12 months.

A quorum is required when the Council meets. The instruments have been drafted to ensure that the 'group' interests of employees and employers are represented on Council and that a quorum is achieved at each meeting. The committee's comments will be taken into consideration and in future the instruments and explanatory memorandum will be clearer.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Numbering of Appointments
The numbering of the instruments is done on an annual basis to ensure that where names of the instruments are similar they can be distinguished by a number. Earlier during 2007 an individual acting appointment had been made to the Council and so the numbering for the next Council appointments in November 2007 started at 2.

I appreciate the comments of the Committee, particularly in relation to the clarity of the acting appointments, and will ensure that future instruments are clearly explained.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

11 APR 2008

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair, Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your comments concerning the *Tobacco Amendment Bill 2008* (the Bill) in the Standing Committee on Legal Affairs Scrutiny Report No. 52 of 31 March 2008.

The Committee has suggested that a number of provisions in the Bill engage the right to freedom of expression stated in the *Human Rights Act 2004* (HRA), subsection 16(2), on the basis of a Canadian Supreme Court decision that the right includes 'commercial free speech'. I find it curious that Committee chose to take up almost three pages of discussion around the international jurisprudence on this point of law, given that unlike the Canadian Charter of Rights, the HRA expressly states that it applies only to individuals (section 6). Notably, section 6 was not mentioned at any point during your lengthy discussion.

In particular, I would remind the Committee of the *'Towards an ACT Human Rights Act'* Report of the ACT Bill of Rights Consultative Committee, which recommended the adoption of the current HRA. The Consultative Committee specifically included s 6 in its recommendations in response to the Canadian Supreme Court's decision in *McDonald Inc v Canada*[1], a decision regarding a precursor to the tobacco legislation ultimately upheld by the Canadian Supreme Court in the *Canada (Attorney-General) v JTI-Macdonald Corp* decision to which you referred. The Consultative Committee stated:

"The rights set out in bills of rights operating in other jurisdictions apply to corporations as well as individuals. This has allowed, for example, a tobacco company to challenge successfully Canadian legislation restricting the advertising and sale of tobacco products without health warnings....The UN Human Rights Committee has decided that the ICCPR rights may be claimed only by natural persons. The Consultative Committee recommends that the Human Rights Act similarly apply only to the rights of human persons and not to the more general category of legal persons, such as corporations."

[1] [1995] 3 SCR 199

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

I am advised that it is highly improbable that the ACT Supreme Court would find a similar right to commercial free speech exists in light of section 6[2]. However, I note that the Committee concludes that the provisions would likely be found proportionate under section 28 of the HRA..

I thank the Committee for its comment that there is no incompatibility with the HRA in respect of the strict liability offences contained in the Bill.

The Committee concludes with a comment on the explanatory statement. The Committee has suggested that the explanatory statement does not meet the technical and stylistic standards expected by the Committee. The Committee goes on to suggest that in some places the substance of the relevant clause is not explained or that it is inaccurate. However, in contrast to the Committee's lengthy discussion of subsection 16(2) of the HRA, the Committee did not identify which places are problematic, except for a reference to an HRA right not being stated. Due to an editing error the reference to section 22(1) of the HRA was omitted in the clause 9 discussion of the legal burden defence in section 14(2).

As the Committee has not elaborated further on its concerns, I am unable to provide clarification. If the Committee would like to provide me with more detailed comments, I would be pleased to provide an additional response addressing those specific concerns.

I am advised that there was an omission when reference was made to section 23(4)(d) in the discussion on page 3 about the removal of government health warnings at the point of sale. It was not made clear that this was new section 23. I apologise if there was any confusion caused.

I thank the Committee again for its comments on the Tobacco Amendment Bill 2008.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
24/4/08

[2] See for example the ACT AAT decision of *Vosame Pty Ltd and ACT Planning & Land Authority [2006] ACTAAT 12*

Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
C/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to the Standing Committee on Legal Affairs Scrutiny of Bills and Subordinate Legislation Report No. 50 of 4 February 2008 (the Report) and the comments in the Report concerning the Medicines, Poisons and Therapeutic Goods Bill 2007 (the Bill).

The Committee has noted that the Bill contains a number of strict liability offences. From the Report it would appear that the Committee is comfortable with the strict liability offences in the Bill save for clauses 64(4) and 107(4). Unlike other strict liability offences in the Bill, clause 107(4) has a maximum penalty of 100 penalty units. On this basis the general statement in the explanatory statement about strict liability offences does not accurately apply, and a separate justification for the higher maximum penalty level for the offence should have been provided. I thank the Committee for identifying this discrepancy.

The Committee observes that clause 64(4) is not a regulatory offence, and on that basis the Committee argues it should not be a strict liability offence. I am advised that clause 64(4) was inadvertently included in the general statement about strict liability in the explanatory statement whereas a separate justification for strict liability should have been provided.

Clause 64(4) is part of the regulatory scheme established by the Bill, although it is not one of the usual examples of regulatory offences generally cited, which is that a person's professional involvement would make that person aware of the legal requirements upon them and therefore appropriate for strict liability. However, in this instance the provision provides for an important part of the scheme that persons provide correct information. Clause 64 provides three levels of offences to adequately deter individuals from providing incorrect or false information. It is therefore appropriate to have a strict liability offence for circumstances where intent cannot be proved but the failure to provide the required information can be established. Furthermore, to require the prosecution to establish a fault element in regard to the proposed offence in clause 64(4) would be to make the offence unenforceable and a pointless inclusion.

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

The Committee has also commented upon the offences in clause 31 of the Bill. I am able to advise that strict liability only applies to a component of the offence, which does not make the whole of the offence a strict liability offence, and I believe the explanatory statement to this clause explains that fact.

I also note the Committee has expressed concern over the maximum penalty for the offence, specifically the availability of an imprisonment term, and contends that "where imprisonment is a potential penalty, the Explanatory Statement should state a specific justification". I understand the purpose of an explanatory statement is to explain the operation and effect of legislation and not to justify policy positions or the application of laws.

The Committee has suggested that a note referencing sections 170 and 171 of the *Legislation Act 2001* should be added to clause 83(1). The Committee has also suggested that a note referencing sections 170 and 171 of the *Legislation Act 2001* should be added to clause 83(1). Where appropriate, notes referencing sections 170 and 171 of the *Legislation Act 2001* have been included in the Bill, such as at clause 105. Clause 83(1) of the Bill relates to licensing and the power to ask for more information. The applicant does not have to provide the information and cannot be compelled to provide the information. However, if the information is not provided the Chief Health Officer may refuse to issue the licence. Accordingly, clauses 105 and 83 are very different in their application and a note referring sections 170 and 171 of the *Legislation Act 2001* is not necessary or appropriate for clause 83. Against this background I believe no change is required.

The Committee has also expressed the view in the Report that certain clauses providing "discretionary powers, or statutory judgements" should be conditional on such powers being exercised on 'reasonable grounds'. Respectfully, these suggested changes are not necessary.

Finally, I note that the Committee has identified some minor errors in the Bill such as clause 102(1)(b) which partially repeats clause 102(1)(a). These minor errors will be corrected and I thank the Committee for your comments.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health