



Legislative Assembly for the ACT

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

Scrutiny Report

9 MARCH 2004

Report 45

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.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
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

Bills – No Comment

The Committee has examined the following Bills and offers no comment on them.

Human Cloning and Embryo Research Bill 2003

This is a Bill for an Act to form part of a national regulatory scheme to address concerns, including ethical concerns, about scientific developments in relation to human reproduction and the utilisation of human embryos. It would prohibit the creation, importation, exportation or implantation of a human embryo clone. The Bill would also regulate activities that involve the use of certain types of human embryos created by assisted reproductive technology and support the establishment of a principal committee of the National Health and Medical Research Council.

Road Transport (General) Amendment Bill 2003

This Bill would amend section 48 of the *Road Transport (General) Act 1999* to the effect that a person whose vehicle registration or licence has been suspended may apply to the Magistrates Court for an order revoking the suspension on the basis that one of a number of particular circumstances exists.

Bills - Comment

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

Civil Law (Wrongs) (Thresholds) Amendment Bill 2003

This Bill would amend the *Civil Law (Wrongs) Act 2002* to the effect of restricting the amount of an award that may be made for non-economic loss that arises from a wrong occasioned by the provision of a health service by a doctor.

(i) an undue trespass on personal rights and liberties

A right to property?

The effect of the amendment would be that where the severity of the non-economic loss is less than \$10,000, no damages for non-economic loss are payable. There is then a sliding upwards scale of damages payable to the effect that it is not until the loss amounts to \$20,000 that full damages are payable.

There have, over time, evolved certain common law remedies for an injured person. The basic rule is that where P (plaintiff) is injured as a result of the negligence of D (defendant), P may recover compensation from D. P must therefore prove that D was under a duty to take care for the safety of P; that D failed to take such care as was reasonable in the circumstances; and that this failure to take care was the cause of P's injuries. The basic rule governing the extent of compensation is that the damages - the monetary sum - awarded should, so far as possible, place P in the same position as he or she would have been if D had not negligently injured P.

At common law and under statute a person has various rights to recover compensation. These may be considered to be 'rights' such that a restriction of them is a matter that the Committee should address and make report to the Legislative Assembly. In a fundamental and functional sense, the rights to compensation are rights to property.

Thus, it is arguable that the effect of proposed new section 99A would be to deprive persons of a right to protection of property, in the sense of their being able to recover compensation for non-economic loss arising from a wrong occasioned by the provision of a health service by a doctor, where that loss is less than \$20,000.

The retrospectivity element

There is a more particular issue arising out of proposed new section 225A. Subsection 225A(1) would provide that section 99A would not apply to "a claim arising out of an accident that happened before the commencement of the section", but by section 225A(2), "This section expires 3 years after the day it commences".

It appears that the result might be that at the expiry of 3 years, section 99A *would* apply to "a claim arising out of an accident that happened before the commencement of the section". In this way, it would have retrospective operation.

The Explanatory Statement does not advert to this aspect of proposed new section 225A. Given the difficulties that have arisen in the past in relation to laws that have affected rights to claim for compensation, the Committee considers that the statement should explain whether there will be a problem under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which provides that the Assembly has no power to make laws with respect to "(a) the acquisition of property otherwise than on just terms".

Crimes Amendment Bill 2004 (No 2)

This Bill would amend the *Crimes Act 1900* and the *Mental Health (Treatment and Care) Act 1994* to (1) prescribe what ultimate facts in issue need be proved at a special hearing held when an issue arises as to the fitness to plead of an accused; and (2) remove the bar to further prosecution after a non-acquittal verdict at a special hearing. The latter is achieved by creation of a regime to ensure that a person's fitness to plead is subsequently reviewed, so that where people subsequently become fit to plead they can face prosecution for the offence originally the subject of the special hearing.

(i) *an undue trespass on personal rights and liberties*

The interests of the mentally ill

It is recognised that those with a mental illness or dysfunction have particular needs or interests that in some circumstances must be reflected in the way they are dealt with by the law. It is apparent that the Bill, when read with the *Crimes Act 1900*, makes provision to address the fact that the illness or dysfunction of an accused may render a trial according to normal procedures unjust. On their face, the provisions of the Bill appear not to trespass unduly (if at all) on the rights of the accused in respect of whom is raised an issue about the consequences of their mental illness or dysfunction.

The Committee is however hampered by the little time it has had to examine these proposals, and by the deficiencies in the Explanatory Statement (see below). It draws to the attention of the Legislative Assembly that by paragraph 112(d) of the *Discrimination Act 1991*, the Discrimination Commissioner of the Territory has the function -

- (d) when requested to do so by the Minister, to examine any proposed law for the purpose of ascertaining whether the proposed law, if enacted, would be inconsistent with [the *Discrimination Act*], and to report to the Minister on the results of the examination.

The Assembly may wish to consider whether a reference to the Discrimination Commissioner would be appropriate.

Retrospectivity of the amendments

Clause 16 would insert into the *Crimes Act 1900* a new section 337 in these terms:

337 Application of amendments made by Crimes Amendment Act 2004 (No 2)

The amendments of this part made by the *Crimes Amendment Act 2004 (No 2)* apply in relation to a hearing that takes place after the commencement of this section, regardless of when the person accused was found unfit to plead.

There is no reference in the Explanatory Statement to this potentially significant provision, and the Committee is unable to say whether it could operate so as to deprive a person of some existing right or interest. Nor is it able to say whether an issue of deprivation of property arises. It should be noted that paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* provides that the Assembly has no power to make laws with respect to "(a) the acquisition of property otherwise than on just terms".

The Committee considers that an explanation of proposed new section 337 be given, addressing the issues just noted.

Comment on the Explanatory Statement

The Explanatory Statement to this Bill does not meet the standards set by practice in the Territory.

- The explanation to clause 8 of the Bill is in fact part of the explanation to clause 7. This throws out references to clauses 7 and 10 in that explanation, and also means that all subsequent heading references to clauses are incorrect.
- Later in the Explanatory Statement, the failure to refer at all to what is clause 16 of the Bill means that references in the Explanatory Statement to clauses 15, 16 and 17 are two clauses out.
- A block of text that was appropriate to one clause (what should be the explanation to clause 8) is repeated at other inappropriate places (see explanation of clauses 8 and 9 – which should be clauses 9 and 10).
- The explanation to clause 12 (which should be clause 13) does not correctly describe the words in clause 13 which would be substituted for certain words in paragraph 335(4)(b) of the Act. This might indicate that what is proposed by clause 13 is not what is intended.
- The explanation to clauses ?? (should be 11) and 14 (should be 15) both refer to proposed new sections of the Act. Just what is referred to can be worked out, but it would help if a reference to the number of the proposed new section was made.
- There is no reference to what is clause 16 of the Bill. This is an apparently significant provision (see above).
- The Explanatory Statement states that the Bill “amends provisions to clarify that only the physical elements of an offence are required to be proved at a special hearing. The Bill is silent as to what, if any, and the circumstances in which, defences may be raised in a special hearing”. The first sentence correctly describes an effect of the Bill, but a reader would be curious about the second. Why is it that the Bill “is silent” about a matter, and what is the effect of its being silent? These questions appear to warrant an answer.

Discrimination (Genetic Status) Amendment Bill 2003

This Bill would amend the *Discrimination Act 1991*, the *Health Records (Privacy and Access) Act 1997* and the *Crimes Act 1900*, to the effect of prohibiting discrimination based on genetic information.

(i) *an undue trespass on personal rights and liberties*

The prohibition on discrimination on the ground of a genetic characteristic

Subsection 7(1) of the *Discrimination Act 1991* provides:

This Act applies to discrimination on the ground of any of the following attributes-
... .

By clause 4 of the Bill, a further ground would be added, being:

(ja) a genetic characteristic or a genetic predisposition to a condition or disease;

There are then some qualifications which apply where the information is used in relation to insurance and superannuation decisions. These qualifications parallel existing provisions of the Act.

The Committee raises no issue in relation to the proposed amendments to the *Discrimination Act 1991*. It notes the statement in the Explanatory Statement that "Discrimination based on an unchangeable genetic characteristic is the equivalent of being discriminated against based on sex or race and thus, should not be allowed".

Genetic testing without consent

Cls 1.2 of Schedule 1 of the Bill would add a new section 49G to the *Crimes Act 1900*. This would provide that:

- (1) A person commits an offence if—
 - (a) the person—
 - (i) takes a sample from someone else for the purpose of genetic testing; or
 - (ii) submits a sample from someone else for genetic testing; or
 - (iii) conducts genetic testing on a sample from someone else; and
 - (b) a relevant person has not consented to the taking of the sample for the purpose of genetic testing; and
 - (c) the person knows that a relevant person has not consented to the taking of the sample for the purpose of genetic testing.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

The proposed amendments to the *Crimes Act 1900* raise a difficult rights issue. On the one hand, the person whose sample (of genetic material) is taken for the purpose of genetic testing, or so submitted, or which is the subject of a test, may raise a privacy interest in support to a prohibition on the use of a sample of their genetic material being used in the ways that proposed new section 49G would prohibit.

On the other hand, a person (say A) desiring to make such a use of the genetic material of another (say B) may point to a need to make such a use to protect themselves against some legal liability, or to further some legal interest. For example, (and such cases have been the subject of public comment), B may claim that A is the father of B's child, and thus liable to pay support to B in relation to the child. If the claim is recognised by law, A might suffer a financial penalty for a considerable period of time, which in turn would have seriously adverse consequences for the conduct of A's private life. Of course, a test of the genetic material of B, or of the child, may easily establish that A is not the father of the child.

Whether or not a person may suffer some financial penalty if held by the law to be in (or not to be in) a particular relationship to another person, the former person may have a privacy interest in establishing whether that relationship exists or not. For example, a child may wish to know whether a person is or is not genetically related.

A question for the Legislative Assembly is how these conflicting claims should be resolved. The comments that follow are designed to assist the Assembly.

First, the Committee notes that by proposed new sub-section 49G(3):

- (3) This section does not apply to a person acting in accordance with—
 - (a) a law in force in the Territory relating to the taking of forensic samples; or
 - (b) a court order.

Thus, person A might seek a court order to the effect that he or she might do something that is otherwise prohibited by proposed new sub-section 49G(1). There are, however, some difficulties with this mechanism. First, this provision does not appear to vest jurisdiction in any particular court to make such an order. Rather, the making of an order would be incidental to the court having jurisdiction in some other manner. This may well be by way of a suit for a declaration by person A. That, however, points to the second problem, being the potentially great expense associated with person A taking some action in a court.

Secondly, it should be noted that under the general law, a person may in any that is not prohibited by law, gather information about another, for the purpose of using that information as evidence in a legal proceeding. The method of gathering the information may be highly intrusive of the privacy of the person, and may concern private conduct of the person. Such is often the case; (for example, where there is video surveillance of a compensation claimant). So far as collecting information for possible litigation is concerned, the rationale for the absence of any general rule against collecting information in way that intrudes in privacy may be that the interests of justice - that is, that a person should be able to place before a court all information relevant to that person pursuing their legal entitlements - prevails over any privacy interest of the person about whom the information is collected.

Thus, as the law stands, person A is not prohibited from submitting a genetic sample of person B for testing. (It may be unlawful for A to *take* a sample from B for this purpose, but even in such a case, the evidence of the test is not necessarily inadmissible in a legal proceeding.)

An issue is why this method of obtaining information about a person should be prohibited, or made more difficult in practical terms, when other intrusive methods are not regulated or prohibited.

Nurse Practitioners Legislation Amendment Bill 2003

This Bill would amend a number of laws in ways that are consequential upon amendments to the *Nurses Act 1988*.

(i) an undue trespass on personal rights and liberties

Absolute liability offences where imprisonment a penalty

The Committee notes that by clause 13 of the Bill the amendment to section 51 of the *Pharmacy Act 1931* would create an offence punishable by imprisonment where an element of the offence would be one of absolute liability (and in respect of other elements would be one of strict liability).

In Report No 38, the Committee has pointed out that there are significant rights objections to such provisions.

A similar issue arises under clause 16 whereby the amendments to section 16 of the *Poisons Act 1933* would create offences having elements of absolute and strict liability where imprisonment is a possible penalty.

Occupational Health and Safety Amendment Bill 2004

This Bill would amend the *Occupational Health and Safety Act 1989* in relation to the powers of inspectors, the breadth and range of compliance measures available, and an internal review mechanism for decisions of inspectors. The amendments would also provide for right of entry provisions for authorised representatives of employee organisations registered under *Workplace Relations Act 1996* (Cth).

(i) an undue trespass on personal rights and liberties

The amendments would provide for right of entry provisions for authorised representatives of employee organisations registered under *Workplace Relations Act 1996* (Cth).

The conferral on representatives of an employee organisation (trade union) of legal entitlements to enter upon workplace premises is recognised in the laws of all Australian jurisdictions. It may be seen to derive from international treaty obligations, and in particular those stated in the *Occupational Safety and Health Convention, 1981* of the International Labour Organisation. Article 19 of this convention provides:

There shall be arrangements at the level of the undertaking under which--

...

(e) workers or their representatives and, as the case may be, their representative organisations in an undertaking, in accordance with national law and practice, **are enabled to enquire into**, and are consulted by the employer on, all **aspects of occupational safety and health associated with their work**;

Article 20 provides:

Co-operation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of Articles 16 to 19 of this Convention.

Provisions that are analogous to those proposed by clause 16 of the *Occupational Health and Safety Amendment Bill 2004* are found in the laws of all Australian jurisdictions.

A rights analysis may be seen to involve a conflict between -

- on the one hand, the right of the employer to control the entry of persons on to their land or other property, and to control the activities of those lawfully on their land, and,
- on the other, of the employees and their trade unions in the pursuit of their rights to ensure employee safety, to enter the property and the employer and to conduct activities thereon.

This balance is struck in different ways in each of the Australian jurisdictions. From the viewpoint of a rights analysis, the Assembly may wish to focus on the extent of the powers available to an authorised representative of the union once entry is made on to the workplace.

A useful contrast is found in section 81 of the *Occupational Health and Safety Act 2000* (NSW) provides:

Powers available on entry

81 For the purpose of investigating any suspected breach of the occupational health and safety legislation, an authorised representative who enters premises under this Division may do any of the following:

- (a) make searches and inspections (and take photographs and make video and audio recordings),
- (b) require the occupier of those premises to provide the authorised representative with such assistance and facilities as is or are reasonably necessary to enable the representative to exercise his or her functions under this Division,

- (c) require the production of and inspect any documents in or about those premises that directly affect or directly deal with the occupational health and safety of employees working at those premises,
- (d) take copies of or extracts from any such documents.

Under the Bill, proposed new section 57E of the *Occupational Health and Safety Act 1989* would provide:

57E Powers available to authorised representative on entry

- (1) This section applies if an authorised representative enters premises under section 57B (Entry to workplaces by authorised representatives) to investigate a suspected contravention of this Act.
- (2) The authorised representative may investigate the contravention by doing 1 or more of the following:
 - (a) inspect or view work, materials, plant or systems at the premises;
 - (b) interview employees who are members of the employee organisation (or are eligible to be members of the organisation) with their consent;
 - (c) take measurements and make sketches, drawings or any other kind of record (including photographs, films, or audio, video or other recordings) at the premises;
 - (d) examine and copy, or take extracts from, documents relating to occupational health and safety at the premises;
 - (e) require the occupier, or anyone at the premises, to give the representative any assistance reasonably needed to exercise a function under this part at the premises.
- (3) However, the authorised representative must not make a requirement of a person under subsection (2)(e) unless the representative has shown the person his or her authorisation.

It is to be noted that by proposed new subsection 57J(1), “A person commits an offence if the person obstructs, hinders, intimidates or resists an authorised representative in the exercise of his or her functions as an authorised representative”. The offence is one of strict liability.

Taking a rights analysis, aspects of this provision to note are:

- the authorised representative may examine and copy documents without the involvement of the occupier of the premises;
- which in turn will have an impact on the extent to which the occupier may make an effective claim of privilege in relation to disclosure, (and it would appear from sections 170 and 171 of the *Legislation Act 2000* that privileges in relation to self-incrimination and legal professional privilege might be claimed);

- the power to require a person to render assistance may be exercised in relation to “anyone at the premises”. This would appear to include a person (such as a customer) who had no concern with employment conditions at the premises. Failure to comply with a request might amount to a strict liability offence.

(i) an undue trespass on personal rights and liberties

Strict liability offences

The Committee has addressed the rights dimensions of provisions that impose strict liability in recent Reports: see **Scrutiny Report No 38**, of 14 October 2003.

The Committee notes that a large number of strict liability offences would be created by the Bill: see proposed new sections 35C(1), 51(8) and (8A), 57J(1), 62K, 62M, 62N, 75C, 75D, 75J, 75K, 76E, 76F, 76H, 77E, 77F, 77K, 78F, and 84S.

In relation to some, there is no mention in the Explanatory Statement that the offence is one of strict liability: see proposed new sections 62M, 62N, 75C, 75D, 75J, 75K, 76E, 76F, 77E and 84S.

In relation to some clauses, there is some justification offered for making the offence one of strict liability: see proposed new sections 57J, 62K, 76H, and 77K.

There is no general explanation offered (such as might relate to all the proposed strict liability offences).

Absolute liability offences

Offences of this kind are a more significant displacement of the principle that a person should not be convicted of a crime unless the prosecution establishes beyond reasonable doubt that the defendant intended to commit the acts that constitute the physical elements of the crime.

The Committee notes that a number of absolute liability offences would be created by the Bill: see proposed new sections 34C to 34E inclusive. (The Committee appreciates that absolute liability attaches to only some of the elements of these offences.)

In relation to the offences of absolute liability that would be created by proposed new sections 34D and 34E, the Committee notes that imprisonment is a possible penalty. In **Scrutiny Report No 38**, the Committee pointed out that there is a substantial ‘rights based’ objection to such provisions.

In no respect does the Explanatory Statement attempt to justify the imposition of absolute liability in these clauses.

(i) an undue trespass on personal rights and liberties

Privileges in relation to the exercise of powers to compel a person to give oral evidence or to produce document

The Committee has noted the displacement by proposed new section 75E(3) of the common law privilege against self-incrimination and exposure to civil liability of people who have been required to answer questions and produce documents to an inspector. It notes, however, that section 75E(4) provides derivative use immunity to people required to answer questions, because it protects information, documents or things obtained both directly and indirectly.

This grant of an immunity from use of the compelled evidence that corresponds to the extent of the displacement of the privilege against self-incrimination and exposure to civil liability removes a substantial rights objection to the displacement.

The Committee notes, however, that the Explanatory Statement does not justify the need for displacement.

(i) an undue trespass on personal rights and liberties

Provisions for compensation

Certain provisions of the Bill acknowledge that the exercise of some powers vested in administrative decision-makers could result in damage to persons affected, and that those persons should be compensated where there were insufficient grounds for the exercise of the power.

Proposed new section 67A is a provision of general application, and provides, as described in the Explanatory Statement, that a person may claim compensation from the Territory for loss or expenses arising from the exercise, or purported exercise of functions under this chapter of the Bill. Any court of competent jurisdiction can decide applications for compensation.

The Committee commends the provision and notes that the jurisdiction to decide whether compensation is payable is vested in a court.

The provision for compensation made in proposed new sections 77L and 77M compare unfavourably. The Explanatory Statement describes the effect of clause 120 and 121 as follows:

New sections 77L and 77M create a right for people who are bound by a prohibition notice and suffer loss or expense as a consequence to seek compensation, if there were insufficient grounds for the prohibition notice. Applications for compensation are made to the Minister, who must consider applications and provide reasons for any decision about the application. If an application for compensation is not decided within 28 days, the Minister is deemed to have refused the application. It should be noted that applicants who are

aggrieved by a decision under this section have judicial review rights under the *Administrative Decisions (Judicial Review) Act 1989*.

The Committee acknowledges the potential application of the ADJR Act. This is however a very expensive procedure and is a vehicle for only a limited review of an exercise of power by the Minister (the usual result of which is only that the Minister has to reconsider the matter).

The scheme for compensation embodied in section 67A (which applies to several potential situations in which loss could occur) is an apparently more desirable provision from the point of view of the affected person obtaining a judicial determination of compensation.

(i) an undue trespass on personal rights and liberties

An unusual punishment provision

The Explanatory Statement notes that:

New section 93D confers on the court the power to order a convicted person to publish a statement. The Court can give directions to the person about the contents of a statement. The purpose of this provision is to give the court another option when dealing with offenders, recognising that the adverse publicity that such a statement would engender can be both a punishment and a significant deterrent.

This is an unusual provision that raises a number of rights issues.

The major issue is whether this form of punishment is in itself objectionable on rights grounds. Two sections in the *Human Rights Act 2004* may bear on this question.

Section 10 of the Act provides:

10 Protection from torture and cruel, inhuman or **degrading** treatment etc

- (1) No-one may be—
 - (a) tortured; or
 - (b) treated or punished in a cruel, inhuman or degrading way.
- (2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Also relevant to an assessment of the value of a person's reputation is clause 12:

12 Privacy and reputation

Everyone has the right—

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

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

The argument might be made that for a court to order a person to make a public statement that would necessarily, or at least in many cases, be harmful to that person's reputation, might be seen as degrading. This effect would lie both in the content of the statement, and in that the person would be coerced (presumably under the threat of otherwise being in contempt of court) into participating in her or his own punishment.

A second rights issue is whether it is appropriate to vest this kind of power in a court. It might be argued that it is not in its nature a judicial power, and that is so incompatible with the exercise of judicial power that it should not be vested in a court; (see **Scrutiny Report No 43**, of 15 January 2004, for a general discussion of this issue.)

Further report on the Construction Occupations (Licensing) Bill 2003

The Committee has acted on a request by Mrs Dunne MLA that it revisit certain provisions of the *Construction Occupations (Licensing) Bill 2003*. The Committee understands that there is concern that clauses 35 and 36 of the Bill may operate retrospectively to impact on building works completed before the commencement of the Bill and may go back as far as 10 years.

The Committee consider that, when read with clause 146, clauses 35 to 37 may have this effect. On analysis, however, the Committee does **not** consider that in this respect the Bill has a retrospective effect.

Some analysis of these complex clauses is necessary.

It needs to be understood that clauses 35 and 36 operate only if the registrar has given an entity – that is, a licensee or former licensee – notice under clause 34 of an intention to make a rectification order. Subclause 34 provides that such notice may be given only “if the registrar believes on reasonable grounds that – (a) a licensee or former licensee (the entity) has provided a construction service otherwise than in accordance with this Act or an operational Act; ...”.

It is only if a valid notice is given under clause 34 that a rectification order may be made under subclause 37(2), or action may be taken by the Territory under clause 36 (which applies where a rectification order is not appropriate).

On its face, clause 34 does not operate retrospectively. It applies only where the entity has done something that is “otherwise than in accordance with [the *Construction Occupations (Licensing) Act*] or an operational Act”. (By clause 16, each of the following is an operational Act:

- *Building Act 2003*
- *Electricity Safety Act 1971*
- *Gas Safety Act 2000*
- *Utilities Act 2000*
- *Water and Sewerage Act 2000.*)

There is, however, no cross reference at clauses 34, 35 or 36 to clause 146. The scope of operation of clauses 35 and 36 is expanded if regard be had to clause 146, **and the Committee considers that a cross- reference would be appropriate.**

Clause 146 may *appear* to give clauses 35 and 36 a retrospective effect. Clause 146 provides:

146 Contraventions before commencement day

A reference in section 35 (When rectification order may be made) or section 36 (Rectification order inappropriate) to a contravention of this Act includes a reference to a contravention, before commencement day, of—

- (a) the repealed Act; or
- (b) an operational Act; or
- (c) the Building Act; or
- (d) the Plumbers, Drainers and Gasfitters Board Act 1982 (repealed).

The Explanatory Statement to clause 146 states only that “Clause 146 provides that contraventions that occurred before commencement day may be taken into account under the Bill in issuing rectification orders or authorising a licensee to take action as an alternative to issuing a rectification order”.

The reason for the clause may well be that were it not possible for the registrar to take past contraventions of the law into account when giving a notice under clause 34, a person affected by the past contravention could not obtain the benefit of a rectification order made under clause 37, or of action taken by the Territory under subclause 36(2). It should also be noted that the past events described in clause 146 were contraventions of the law as the law stood at that time.

From the perspective of a rights analysis, clause 146 may be seen as *not* having a retrospective effect. A law “only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation” (D Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) at 244. Clause 146 would not have this effect. Rather, clause 146 (when read with clauses 35 and 36) would be a law “basing future action on past events” (ibid, at 245), or, to put it another way, this body of law would operate by taking account “of antecedent facts and circumstances as a basis for what it prescribes for the future” (ibid).

The liabilities of those entities (licensees and former licensees) who contravened one of the laws described in clause 146 before the commencement date of the *Construction Occupations (Licensing) Act* are not changed with effect from an earlier date. It is only that the fact of their having contravened the law before the commencement date is made the basis for the imposition on them of an obligation that will arise only after the commencement date.

There is, however, an aspect of the scheme that may need attention. Under subclause 37(2), where a valid notice has been given under clause 34, the registrar may make a rectification order under clause 37. Unless restricted, the power of the registrar to make this order could be based on any action that was not in accordance with the *Construction Occupations (Licensing) Act* or with an operational Act. Subclause

37(3) is a beneficial provision in that it precludes the registrar from taking into account an action that “caused the contravention [to happen, or end], more than 10 years before the day the registrar proposes to make the order”.

The Committee notes however that this allowance for disregarding contraventions that are more than 10 years old does not appear to apply to the scheme in clause 36. Under clause 36, where the registrar is not satisfied that it is appropriate to make a rectification order under clause 37, the Territory may authorise a licensee to enter the land where the work to which the notice under clause 34 related to was to be done, and to take the action that was stated in the notice given under clause 34.

On the face of, there is no warrant for this distinction between clauses 36 and 37.

Subordinate Legislation – No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them:

No Comment:

Subordinate Law SL2004-6 being the Electoral Amendment Regulations 2004 (No 1) made under the *Electoral Act 1992* provide that publications of government agencies that contain the new “building our city, building our community” logo will not be required to include an electoral authorisation statement.

Disallowable Instrument DI2004-16 being the Cemeteries and Crematoria Appointment 2004 (No 1) made under section 33 of the *Cemeteries and Crematoria Act 2003*) appoints a specified person to be a member of the ACT Public Cemeteries Board.

Disallowable Instrument DI2004-19 being the Public Place Names (Gungahlin) Determination (No 2) made under section 3 of the *Public Place Names Act 1989* details the names, origins and significance of the new street names in the Division of Gungahlin.

Disallowable Instrument DI2004-20 being the Utilities Exemption 2004 (No 1) made under section 22(1) of the *Utilities Act 2000* exempts ActewAGL from the requirement to hold a licence to provide gas transmissions services.

Disallowable Instrument DI2004-21 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No 2) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used for the Yokohama tyre testing session to be held in the Blewitts area, Stromlo Forest and the Hyles Block area, Uriarra Forest.

Disallowable Instrument DI2004-23 being the Justices of the Peace Appointment 2004 (No 1) made under section 3(1) of the *Justices of the Peace Act 1989* appoints specified persons to be Justices of the Peace.

Disallowable Instrument DI2004-24 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2004 (No 2) made under regulation 75A (2) of the Road Transport (Safety and Traffic Management) Regulations 2000) declares Sports Centres Australia Pty Ltd to be a Parking Authority for the Canberra International Sports & Aquatic Centre car park, Block 7, Section 3, Bruce.

Disallowable Instrument DI2004-25 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No 3) made under section 12 of the Road Transport (General) Act 1999 declares that the road transport legislation does not apply to the ACT roads and road related areas used for the Toyota Australia corporate day to be held in the Kowen Forest..

Disallowable Instrument DI2004-26 being the Mediation (Approved Agency) Declaration 2004 (No 1) made under section 4(2) of the Mediation Act 1997 approves Stephen Herrick as an approved agency under the Act.

Subordinate Legislation – Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them:

Error in Explanatory Statements:

Disallowable Instrument DI2004-17 being the Cultural Facilities Corporation Appointment 2004 (No 1) made under Schedule 2 Section 2 of the Cultural Facilities Corporation Act 1997 appoints specified persons to be members of the Cultural Facilities Corporation Board.

Disallowable Instrument DI2004-18 being the Cultural Facilities Corporation Appointment 2004 (No 2) made under Schedule 2 Section 2 of the Cultural Facilities Corporation Act 1997 appoints specified persons to be members of the Cultural Facilities Corporation Board.

The explanatory statements to the above two Disallowable Instruments both state that the instruments are made under Part 2 Division 2, Section 10 of the Act. Perhaps the correct reference should be to Schedule 2 Section 2 “Appointment and terms of office” as indicated on the instruments themselves. Thus, the reference in the second paragraph of each explanatory statement may also be incorrect and should refer to Part 2 Division 2 Section 20 “Constitution”.

Numbers of instruments being revoked

Disallowable Instrument DI2004-22 being the Smoke-free Areas (Enclosed Public Places) (Fees) Determination 2004 (No 1) made under section 22 of the Smoke-free Areas (Enclosed Public Places) Act 1994 revokes all previous determinations of fees and redetermines the fees payable under the Act.

The Committee notes that the numbers of the instruments being revoked are not included in the disallowable instrument or the explanatory statement. It assists both the public and Members when tracking legislation to know exactly what instruments are being revoked.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 23 February 2004, in relation to comments made in Scrutiny Report No 42 regarding the Human Rights Bill 2003.
- The Chief Minister, dated 25 February 2004, in relation to comments made in Scrutiny Report No 42 regarding Disallowable Instrument DI2003-311 being the University of Canberra Council Appointment 2003 (No 1) and DI2003-312 being the University of Canberra Council Appointment 2003 (No 2).

The Committee thanks the Chief Minister for his helpful response.

Bill Stefaniak MLA
Chair

March 2004

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

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>REPORTS – 2001-2004</u>	
<u>Report No. 1, dated 12 December 2001</u>	
Nil	
<u>Report No. 2, dated 19 February 2002</u>	
Crimes Amendment Bill 2001 (No. 2) (PMB) <i>Act citation: Crimes Amendment Act 2002 (Passed 5.3.02)</i>	No. 5
Crimes (Abolition of Offence of Abortion) Bill 2001 (PMB).....	
Health Regulation (Maternal Health Information) Repeal Bill 2001 (PMB).....	
Land (Planning and Environment) Legislation Amendment Bill 2001 (PMB).....	
Supreme Court Amendment Bill 2001 (No. 2) (PMB).....	
Subordinate Law No 40 – Building Regulations Amendment.....	No. 8
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001.....	
Subordinate Law No 42 – Crimes Regulations 2001.....	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment.....	No. 8
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002.....	No. 8
Subordinate Law No 46 – Road Transport Amendment Regulations 2001.....	
Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001.....	No. 10
Health Professions Board (Procedures) Act – Determination No 221 of 2001.....	No. 10

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Health Professions Board (Procedures) Act –	
Determination Nos. 216-220, 222, 225 to 237 of 2001.....	No. 10
Independent Pricing and Regulatory Commission Act -	
Determination No. 291 of 2001.....	No. 8
Legislative Assembly (Members’ Staff) Act -	
Determination No. 292 of 2001.....	No. 23
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001..	
Rehabilitation of Offenders (Interim) Act 2001 -	
Determination No. 305 of 2001.....	
Commissioner for the Environment Act -	
Determination No. 315 of 2001.....	No. 8
Psychologists Act - Determination No. 318 of 2001.....	No. 10
Auditor-General Act – Determination No. 323 of 2001.....	
Drugs of Dependence Act – Determination No. 328 of 2001.....	No. 10
National Exhibition Centre Trust Act - Determination Nos. 330 and	
331 of 2001.....	No. 8
Appointment to the Racing Tribunal.....	No. 8
<u>Report No. 3, dated 21 February 2002</u>	
Rehabilitation of Offenders (Interim) Amendment Bill 2002	
(Passed 21.2.02).....	
<u>Report No. 4, dated 5 March 2002</u>	
Inquiries Amendment Bill 2002 (PMB).....	
Gene Technology Bill 2002 (Passed 27.11.03)	No. 12
Legislation Amendment Bill 2002 (Passed 15.4.02).....	No. 9
Subordinate Law No 49 – Road Transport (Offences)	
Regulations 2001.....	No. 8
Road Transport (Safety and Traffic Management) Regulations 2000 –	
Disallowable Instrument No 4.....	No. 8
Road Transport (Driver Licensing) Regulations 2000 –	
Disallowable Instrument No 7.....	No. 8
Health and Community Care Services Act – Determinations	
Nos 5 and 15.....	
<u>Report No. 5, dated 5 March 2002</u>	
Nil	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No. 6, dated 7 March 2002</u>	
Nil	
<u>Report No. 7, dated 27 March 2002</u>	
Drugs of Dependence Amendment Bill 2002 (Passed 14.5.02).....	No. 10
Duties Amendment Bill 2002 (Passed 11.4.02).....	No. 8
Fair Trading Amendment Bill 2002 (PMB) (Passed 29.08.02).....	
Subordinate Law 2002 No 1 – Radiation Regulations 2002.....	No. 10
<u>Report No. 8, dated 1 May 2002</u>	
Discrimination Amendment Bill 2002 (PMB) (Passed 5.6.02).....	
Gaming Machine (Women’s Sports) Amendment Bill 2002 (Passed 4.6.02).....	No. 10
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002.....	No. 15
Subordinate Law No. 4 – Community Title Regulations 2002.....	No. 15
Road Transport (Public Passenger Services) Regulations 2002 – Disallowable Instruments Nos 12 and 18.....	No. 15
Road Transport (General) Act – Disallowable Instrument No. 20.....	No. 15
Public Place Names Act – Disallowable Instrument No. 24.....	No. 15 (No. 32)
<u>Report No. 9, dated 7 May 2002</u>	
Nil	
<u>Report No. 10, dated 14 May 2002</u>	
Building Amendment Bill 2002 (Passed 16.5.02).....	No. 16
<u>Report No. 11, dated 14 May 2002</u>	
Nil	
<u>Report No. 12, dated 16 May 2002</u>	
Justices of the Peace Act – Disallowable Instrument No. 25.....	
Residential Tenancies Act – Disallowable Instrument No. 26.....	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No. 13, dated 29 May 2002</u>	
Cemeteries and Crematoria Bill 2002.....	No. 15
Duties (Insurance Exemptions) Amendment Bill 2002.....	No. 15
Road Transport Legislation Amendment Bill 2002.....	No. 16
<u>Report No. 14, dated 4 June 2002</u>	
Statute Law Amendment Bill 2002 (Passed 29.08.02).....	No. 15
<u>Report No. 15, dated 20 June 2002</u>	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002....	No. 17
Remuneration Tribunal Act – Disallowable Instrument No. 34.....	No. 23
Hotel School Act – Disallowable Instrument No. 35.....	No. 18
Road Transport Act – Disallowable Instrument No. 39.....	No. 17
Commissioner for the Environment Act No. 38.....	No. 17
<u>Report No. 16, dated 25 June 2002</u>	
Maternal Health Legislation Amendment Bill 2002 (PMB).....	
Medical Practitioners (Maternal Health) Amendment Bill 2002	
(Passed 21.08.02) (PMB).....	
Health and Community Care Services Act –	
Disallowable Instrument No. 41.....	No. 19
Public Place Names Act –	
Disallowable Instrument No. 43.....	No. 17
Disallowable Instrument No. 44.....	No. 17
Building Act – Disallowable Instrument No. 50.....	No. 17
<u>Report No. 17, dated 9 August 2002</u>	
Justice and Community Safety Legislation Amendment Bill 2002	
(Passed 22.08.02).....	
Magistrates Court (Refund of Fees) Amendment Bill 2002 (Passed	
25.09.02).....	
Planning and Land Bill 2002 (Passed 12.12.02).....	No. 20
Plant Diseases Bill 2002 (Passed 12.11.02).....	No. 18
Revenue Legislation Amendment Bill 2002 (Passed 22.08.02)	No. 18

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002... Land (Planning and Environment) ACT Heritage	
Council Appointments 2002 (No 1) - DI 2002—56.....	No. 20
Roads and Public Places (Fees) Revocation and Determination 2002 (No 1) - DI 2002—71.....	No. 19
Roads and Public Places (Fees) Revocation and Determination 2002 (No 2) - DI 2002—72.....	No. 19
Roads Transport (General) (Fees) Revocation and Determination 2002 – DI2002—73.....	No. 19
Hawker (Fees) Revocation and Determination 2002 – DI2002—74....	No. 19
Roads and Public Places (Fees) Revocation and Determination 2002 (No 3) – DI2002-75.....	No. 19
Water Resources (Fees) Revocation and Determination 2002 – DI2002-76.....	No. 19
Stock (Fees) Revocation and Determination 2002 (No 1) – DI2002-77	No. 19
Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	No. 19
Pounds (Fees) Revocation and Determination 2002 – DI2002-79.....	No. 19
Nature Conservation (Fees) Revocation and Determination 2002 – DI2002-80.....	No. 19
Lakes (Fees) Revocation and Determination 2002 – DI2002-81.....	No. 19
Environment Protection (Fees) Revocation and Determination 2002 – DI2002-82.....	No. 19
Domestic Animals (Fees) Revocation and Determination 2002 – DI2002-83.....	No. 19
Animal Welfare (Fees) Revocation and Determination 2002 – DI2002-84.....	No. 19
Animal Diseases (Fees) Revocation and Determination 2002 – DI2002-85.....	No. 19
Road Transport (General) (Parking Permit Fees) Revocation and Determination 2002 – DI2002-86.....	No. 19
Road Transport (General) (Vehicle Impounding and Seizure/Speed Tests) Revocation and Determination 2002 – DI2002-89.....	No. 19
<u>Report No. 18, dated 27August 2002</u>	
Cooperatives Bill 2002...(Passed 19.11.02).....	No 22
<u>Report No. 19, dated 20 September 2002</u>	
Adventure Activities (Liability) Bill 2002 (PMB)	
Civil Law (Wrongs) Bill 2002 (Passed 26.09.02)	No. 20

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Injuries Compensation Framework Bill 2002 (PMB)	
Prostitution Amendment Bill 2002 (Passed 24.09.02)	
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	No. 22
Disallowable Instrument DI 2002—103 being the Building (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—104 being the Building (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—105 being the Community Title (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—106 being the Construction Practitioners Registration (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—109 being the Water and Sewerage (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—110 being the Water and Sewerage (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—111 being the Land (Planning and Environment) (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—112 being the Land (Planning and Environment) (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—114 being the Surveyors (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—115 being the Unit Titles (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—116 being the Unit Titles (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—120 being the Plumbers, Drainers and Gasfitters Board (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—130 being the Workers’ Compensation (Fees) Revocation and Determination 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	No. 22
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	No. 22
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002	No. 32
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2)	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1)	No. 22
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002	No. 32
<u>Report No 20, dated 11 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (Passed 4.03.03)	
Criminal Code 2002 (Passed 10.12.02).....	No. 22
Planning and Land Bill 2002 (Further response).....	No. 22
Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1)	No. 24
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)	No. 24
<u>Report No 21, dated 19 November 2002</u>	
Administrative Appeals Tribunal Amendment Bill 2002	No. 23
Building (Water Efficiency) Amendment Bill 2002 (PMB)	
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-183 being the Justices of the Peace Appointment of Justices of the Peace 2002	
<u>Report No 22, dated 21 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (No 2) (PMB)	
Crimes Amendment Bill 2002 (PMB)	
Revenue Legislation Amendment Bill 2002 (No 2) (Passed 10.12.02)	No. 23
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) Veterinary Surgeons Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	No. 24
<u>Report No 23, dated 6 December 2002</u>	
Discrimination Amendment Bill 2002 (No 2) (Passed 13.03.03)	
Health and Community Care Services (Repeal and Consequential Amendments) Bill 2002 (Passed 10.12.02)	
Litter Amendment Bill 2002 (PMB)	
<u>Report No 24, dated 28 January 2003</u>	
ACTION Authority Amendment Bill 2002 (Passed 18.2.03)	
Taxation (Government Business Enterprises) Bill 2002 (Passed 11.03.03)	No 27

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Community Based Sentences (Transfer) Bill 2002 (Passed 20.2.03) .. Cemeteries and Crematoria Bill 2002 (No 2) (Passed 6.03.03)	No 32
Hawkers Bill 2002 (Passed 6.03.03)	No 32
Security Industry Bill 2002 (Passed 20.2.03).....	
<u>Report No 25, dated February 2003</u>	
Confiscation of Criminal Assets Bill 2002 (Passed 4.3.02)	No 26
Crimes (Industrial Manslaughter) Amendment Bill 2002 (Passed 27.11.03)	
Disallowable Instrument DI2002-193 being the Supervised Drug Injection Trial Advisory Committee Appointments 2002 (No 1)...	No 32
Disallowable Instrument DI2002-194 being the Residential Tenancies - Tribunal Selections 2002	
Disallowable Instrument DI2002-195 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2002 (No 7)	No 32
Disallowable Instrument DI2002-197 being the Domestic Violence Prevention Council Appointments 2002-2004.....	
<u>Report No 26, dated 27 February 2003</u>	
Consumer and Trader Tribunal Bill 2003 (Passed 1.04.03).....	
Land (Planning and Environment) (Compliance) Amendment Bill 2003.....	
Subordinate Law SL2003-1 being the Urban Services (Application of Criminal Code) Amendment Regulations 2002	No 32
Disallowable Instrument DI2002-207 being the Gambling and Racing Commission – Appointments 2002 (No 1).....	No 30
Disallowable Instrument DI2002-212 being the National Exhibition Centre Trust Appointment 2002 (No 2).....	No 30
Subordinate Law SL2002-37 being the Trade Measurement (Miscellaneous) Amendment Regulations 2002	
Disallowable Instrument DI2002-219 being the Health Professions Boards (Procedures) – Nurses Board of the ACT Appointments 2002 (No 2)	No 32
Disallowable Instrument DI2002-220 being the Water Restriction Scheme Approval 2002 (No 2)	No 32
Disallowable Instrument DI2002-223 being the Occupational Health and Safety Council – Appointment 2002 (No 3)	No 30

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-224 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	No 30
Disallowable Instrument DI2002-225 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	No 30
Disallowable Instrument DI2002-232 being the Road Transport (General) Revocation of Declaration for Traffic Marshals 2002....	No 32
Disallowable Instrument DI2003-3 being the Hotel School Appointment 2003 (No 1)	No 30
Disallowable Instrument DI2003-5 being the Tree Protection (Interim Scheme) Determination of Criteria 2002	No 32
<u>Report No 27, dated 11 March 2003</u>	
Bushfire Inquiry (Protection of Statements) Bill 2003 (PMB) (Passed 12.03.03)	
Bushfire Reconstruction Authority Bill 2003 (PMB)	
Charitable Collections Bill 2002 (Passed 1.04.03)	No 31
Disallowable Instrument DI2003-21 being the Plumbers, Drainers and Gasfitters Board Appointments 2003 (No 1)	
Disallowable Instrument DI2003-23 being the Occupational Health and Safety (Fees) Revocation and Determination 2003	No 32
<u>Report No 30, dated 31 March 2003</u>	
Agents Bill 2003 (Passed 6.05.03)	
Legislation (Statutory Interpretation) Amendment Bill 2003 (Passed 3.04.03)	
<u>Report No 31, dated 11 April 2003</u>	
Animal and Plant Diseases Amendment Bill 2003 (Passed 25.09.03).	
Road Transport (Public Passenger Services) Amendment Bill 2003	No 32
Sentencing Reform Amendment Bill 2003 (PMB)	
Tertiary Accreditation and Registration Bill 2003 (Passed 21.08.03) .	
Vocational Education and Training Bill 2003 (Passed 21.08.03)	
Disallowable Instrument DI2003-26 being the Public Trustee – Appointments to the Public Trustee Investment Board 2003 (No 1)	No. 37
Disallowable Instrument DI2003-27 being the Utilities (Dam Safety Code) Variation Determination 2003	No 32

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No 32, dated 15 May 2003</u>	
Bushfire Reconstruction Levy Bill 2003	No 34
Long Service Leave (Private Sector) Bill 2003 (PMB).....	
Nurses Amendment Bill 2003.....	No 34
<u>Report No 33, dated 5 June 2003</u>	
Electoral Amendment Bill 2003	
Gaming Machine (Political Donations) Amendment Bill 2003	
<u>Report No 34, dated 24 June 2003</u>	
Bushfire Inquiry (Protection of Statements) Amendment Bill 2003 (No 2)	
Firearms (Prohibited Pistols) Amendment Bill 2003	
Disallowable Instrument DI2003-52 being the Tree Protection (Interim Scheme) Instrument of Appointment 2003.....	
Disallowable Instrument DI2003-57 being the Scaffolding and Lifts (Fees) (Bushfire Emergency) Determination 2003.....	No 39
Disallowable Instrument DI2003-58 being the Dangerous Goods (Fees) (Bushfire Emergency) Determination 2003.....	No 39
Disallowable Instrument DI2003-59 being the Territory Records Advisory Council Appointments 2003 (No 1).....	No 35
Disallowable Instrument DI2003-60 being the Stadiums Authority Board Appointments 2003 (No 1).....	
Disallowable Instrument DI2003-61 being the Stadiums Authority Board Appointments 2003 (No 2)	
Disallowable Instrument DI2003-62 being the Stadiums Authority Board Appointments 2003 (No 3)	
Disallowable Instrument DI2003-65 being the Victims of Crime – Appointment of Victims of Crime Coordinator 2003.....	No 36
Disallowable Instrument DI2003-74 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2003 (No 1).....	No 35
Disallowable Instrument DI2003-81 being the Victims of Crime Appointment to Victims Assistance Board 2003 (No 1).....	No. 36
Disallowable Instrument DI2003-84 being the Land (Planning and Environment) ACT Heritage Council Appointments 2003 (No 1).	No 35

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2003-112 being the Cultural Facilities Corporation Act 1997 Appointment to Cultural Facilities Corporation Board 2003 (No 1)	No 35
<u>Report No 35, dated 22 July 2003</u>	
Bail (Serious Offences) Amendment Bill 2003	No 38
Civil Law (Sale of Residential Property) Bill 2003 (Passed 28.08.03)	No 38
Civil Law (Wrongs) Amendment Bill 2003 (Passed 21.08.03)	No 38
Smoking (Prohibition in Enclosed Public Places) Bill 2003 (Passed 19.11.03)	No 38
Disallowable Instrument DI2003-122 being the Planning and Land Council Appointments 2003 (No 1)	No 37
Disallowable Instrument DI2003-123 being the Planning and Land Council Appointments 2003 (No 2).....	No 37
Disallowable Instrument DI2003-124 being the Planning and Land Council Appointments 2003 (No 3).....	No 37
Disallowable Instrument DI2003-125 being the Planning and Land Council Appointments 2003 (No 4).....	No 37
Disallowable Instrument DI2003-126 being the Planning and Land Council Appointments 2003 (No 5).....	No 37
Disallowable Instrument DI2003-127 being the Planning and Land Council Appointments 2003 (No 6).....	No 37
Disallowable Instrument DI2003-128 being the Planning and Land Council Appointments 2003 (No 7).....	No 37
Disallowable Instrument DI2003-129 being the Land Agency Board Appointments 2003 (No 1)	No 37
Disallowable Instrument DI2003-130 being the Land Agency Board Appointments 2003 (No 2)	No 37
Disallowable Instrument DI2003-131 being the Land Agency Board Appointments 2003 (No 3)	No 37
Disallowable Instrument DI2003-132 being the Land Agency Board Appointments 2003 (No 4)	No 37
Disallowable Instrument DI2003-133 being the Land Agency Board Appointments 2003 (No 5)	No 37
Disallowable Instrument DI2003-135 being the Planning and Land Council Appointments 2003 (No 8).....	No 37
Disallowable Instrument DI2003-136 being the Planning and Land Council Appointments 2003 (No 9).....	No 37
Disallowable Instrument DI2003-137 being the Planning and Land Council Appointments 2003 (No 10).....	No 37

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2003-138 being the Planning and Land Council Appointments 2003 (No 11).....	No. 37
Disallowable Instrument DI2003-139 being the Planning and Land Council Appointments 2003 (No 12).....	No. 37
Disallowable Instrument DI2003-140 being the Planning and Land Council Appointments 2003 (No 13).....	No. 37
Disallowable Instrument DI2003-141 being the Planning and Land Council Appointments 2003 (No 14).....	No. 37
Disallowable Instrument DI2003-142 being the Land Agency Board Appointments 2003 (No 6)	No. 37
Disallowable Instrument DI2003-143 being the Land Agency Board Appointments 2003 (No 7)	No. 37
Disallowable Instrument DI2003-144 being the Land Agency Board Appointments 2003 (No 8)	No. 37
Disallowable Instrument DI2003-145 being the Land Agency Board Appointments 2003 (No 9)	No. 37
Disallowable Instrument DI2003-146 being the Land Agency Board Appointments 2003 (No 10)	No 37
<u>Report No 36, dated August 2003</u>	
Evidence (Miscellaneous Provisions) Amendment Bill 2003 (Passed 23.10.03)	No 38
<u>Report No 37, dated 2 September 2003</u>	
Dangerous Goods Legislation Amendment Bill 2003	No 38
Inquiries Amendment Bill 2003.....	
Royal Commissions Amendment Bill 2003 (Passed 25.11.03)	
Victims of Crime (Financial Assistance) Amendment Bill 2003	
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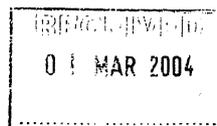


Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS

MEMBER FOR GINNINDERRA



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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 42 of 15 January 2004. The Government welcomes your endorsement of the Government's efforts to strengthen human rights protection through the ACT Human Rights Bill 2003 (the Bill). The report raises a number of important issues that require clarification of the Government position.

The Committee questions the constitutional validity of the power to issue a declaration of incompatibility. It suggests that the power conferred on the Supreme Court is non-judicial in nature and incompatible with the exercise of Territory and Commonwealth judicial power. Based on this reasoning the Committee argues that appeals to the Federal Court and High Court may not be available.

As the Committee is aware, under section 48A (2) of the *Australian Capital Territory (Self-Government) Act 1988* the Legislative Assembly has the power to confer jurisdiction on the Supreme Court to deal with matters arising under the Bill. Section 20 of the *Supreme Court Act 1933* confirms that jurisdiction may be conferred on the Supreme Court by a law of the Territory. And, as a matter of policy, the ACT Government accepts the principle that the legislature should not confer a non-judicial power on a court that is incompatible with the exercise of Commonwealth or Territory judicial power.

In our view, the Assembly does have the power to confer upon the Supreme Court the discretion to issue a declaration of incompatibility. The interpretation of the law is quintessentially an exercise of judicial power. The requirement to determine a question of compatibility is integral to that process and results in a binding interpretation of law.

The power to make a declaration of incompatibility is not unique to the ACT model and is available in both New Zealand (NZ) and the United Kingdom (UK). In New Zealand it has been accepted that the question of consistency is a legal one that is incidental to the judicial function of statutory interpretation. The leading authority on the point is *GA Moonen v Film and Literature Board of Review [1999] NZCA 329* in which the Court held that it was

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required by the *Bill of Rights Act 1990* to indicate that, “although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society”. The Court went on to say that:

Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In light of the presence of section 5 (*justified limitations*) in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified there under [para 20].

The Committee may also be aware that an explicit power to issue a declaration of incompatibility was included in the UK *Human Rights Act 1998*. And that in 2001 the New Zealand Government established a procedure by which a formal declaration of inconsistency can be made in relation to the right to freedom from discrimination. The NZ *Human Rights Amendment Act 2001* adapts the procedure established under the UK *Human Rights Act 1998*. In view of existing judicial authority and the lack of constitutional challenge to the power to make a declaration in these jurisdictions it is unlikely that a serious argument can be made against the constitutional validity of the provisions of the ACT Bill.

For clarification, neither the determination of compatibility nor the issuing of a declaration interfere with the essential attributes of the curial process and all remedies that are currently available are available to litigants who raise a human rights issue during proceedings. For example, where the court determines that an administrative decision is flawed because of a failure to take account of human rights, remedies under the *Administrative Decisions Judicial Review Act 1977* are available and binding on the parties.

It is also incorrect to characterise the declaration of incompatibility as a declaration of the invalidity of a territory law (see page 8). A determination that an ACT law is incompatible with the Bill does not render ACT law invalid. The ACT model, like its UK and NZ counterparts, expressly preserves the sovereignty of the Assembly, which has the final say on the extent to which ACT law should protect human rights. The purpose of the Bill is to provide an overarching framework against which existing and future laws can be assessed.

The Committee also suggests that by involving the courts in the interpretation of human rights principles the Bill will undermine the independence of the judiciary and respect for the rule of law in the wider community. There is legitimate philosophical debate about the value of a statutory bill of rights as opposed to one that is constitutionally entrenched, which allows courts to strike down inconsistent legislation. But I cannot accept the Committee’s unnecessarily bleak view of the impact of the Bill on democracy in the ACT. The judiciary perform an important check on the excesses of executive power and are as essential to a functioning democracy as the executive and the legislature. There is little evidence that either the independence of the judiciary or respect for the rule of law has been undermined in the US, Canada, the UK or New Zealand by either a constitutionally entrenched or statutory bill of rights.

Under the Bill the judiciary are confined to findings of law, public policy remains a matter for the government and the parliament. The tabling of a declaration of incompatibility in the Legislative Assembly guarantees a higher level of democratic participation in debate on important human rights issues. In fact the Bill reinforces the importance of the separation of powers by incorporating article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14 enshrines the right to have criminal charges and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal and a

right to a fair and public hearing. Consequently, the Bill provides an additional guarantee of the independence of the judiciary and ensures that ACT laws will be measured against this important principle.

The interpretation of human rights principles is not new to Australian judges. Criminal law, industrial relations, family law, refugee law, race and sex discrimination law are all fields in which Australian judges are accustomed to having recourse to international human rights law principles. There is a significant body of Australian case law, which establishes the rules for the interpretation of domestic statutes that incorporate international law human rights principles and for the development of the common law. The Bill will modernise Australia's approach and open the ACT to the same benefits enjoyed by people in comparable countries.

The Committee also argues for property rights to be included in the Bill. As the Committee is aware, the Bill gives effect to the rights enshrined in the ICCPR and are therefore binding under international treaty law. The prohibition on arbitrary or unlawful interference with privacy and home provides protection against unreasonable or unlawful house searches. By contrast, the right to own property and not be arbitrarily deprived of property was considered during the drafting of the ICCPR and abandoned because of the wide divergence of opinion on the nature and limits of the right. An important consideration was the definition of property. And in the European system the concept of property has been interpreted to include not just physical property but also rights and interests such as claims to income support and compensation. The inclusion of property rights in the Bill raises a number of important and complex issues. For this reason, the Government does not support the inclusion of property rights in the Bill. However, this is a matter that can be considered in detail during a future review of the legislation.

Finally, I note that the Committee refers extensively to the Canadian *Charter of Rights and Freedoms* and the US Bill of Rights when considering the effect of the Bill. As the Committee is aware, the Canadian and US systems are based on constitutionally entrenched bill of rights that permit the striking down of legislation and which are the product of different historical influences. Heavy reliance upon these jurisdictions is of doubtful value when analysing the impact of the Bill. The UK *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990* have significantly influenced the development of the ACT Bill and may provide more useful insights into the operation of the ACT Human Rights Act in the future.

Yours sincerely



Jon Stanhope MLA
Attorney General

23 FEB 2004



Jon Stanhope MLA

CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Stefaniak *Bill*

I refer to the comments on Disallowable Instruments DI2003-311 and DI2003-312 being the Council of the University of Canberra Council appointments, in Report No. 42 of the Scrutiny of Bills and Subordinate Legislation Committee.

The commencement of appointments prior to the notification of the instrument was an administrative error, and care will be taken in the future to ensure that this is in line with the dates of effect. In this instance the effect of the notification of DI2003-311 and DI2003-312 after commencement of the appointments did not affect any person's rights adversely, nor impose any liabilities on any person.

I trust this will allay the Committee's concerns.

Yours sincerely

Jon Stanhope MLA
Chief Minister
25 FEB 2004

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