STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Scrutiny Report

3 MARCH 2011

Report 33
TERMS OF REFERENCE

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

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
   (i) is in accord with the general objects of the Act under which it is made;
   (ii) unduly trespasses on rights previously established by law;
   (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
   (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

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

(c) consider whether the clauses of bills introduced into the Assembly:
   (i) unduly trespass on personal rights and liberties;
   (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   (iv) inappropriately delegate legislative powers; or
   (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the Human Rights Act 2004;

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

Mrs Vicki Dunne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

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

BILL .................................................................................................................................................. 1

Health Amendment Bill 2011 ............................................................................................................. 1

SUBORDINATE LEGISLATION ............................................................................................................. 3

Disallowable Instruments—No comment ............................................................................................. 3

Disallowable Instruments—Comment ...................................................................................................... 5

Subordinate Laws—No comment ......................................................................................................... 9

PROPOSED GOVERNMENT AMENDMENTS—Working with Vulnerable People (Background Checking) Bill 2010 ............................................................................................................. 9

GOVERNMENT RESPONSES ........................................................................................................... 11

PRIVATE MEMBER’S RESPONSE .................................................................................................... 11

OUTSTANDING RESPONSES ........................................................................................................... i
The Committee has examined the following bill and offers these comments on it:

HEALTH AMENDMENT BILL 2011

This Bill would amend the *Health Act 1993* to establish a legislative basis for a Local Hospital Network (LHN) for the ACT, and to change the scheme within the Act relating to clinical privileges committees and quality assurance committees.

Introduction

The **scope of clinical practice** of a doctor or dentist for a health facility, means the rights of the doctor or dentist established by agreement between the doctor or dentist and the health facility to treat patients, and to use the equipment of the health facility (proposed section 54 of the Act). To **review** that scope includes assessment and evaluation of it (proposed section 55). A **scope of clinical practice committee** has a number of functions, including whether to decide whether to credential a doctor or dentist, and to define, and review, the scope of clinical practice of a credentialled doctor or dentist.

**Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

The obtaining of information by a Committee and the removal of the protection of breach of confidence law: HRA paragraph 12(a) – the right to privacy

Proposed subsection 64(1) would permit a Committee to “ask anyone to give the committee information, including protected information, that is relevant to the committee carrying out [a] function”, and by subsection 64(3), the giving of the information, if done “honestly and without recklessness”, is not a breach of confidence, or a breach of professional etiquette or ethics, or a breach of a rule of professional conduct, and the person does not incur civil or criminal liability only because of giving the information.

In the respect at least of providing that the giving of the information is not a breach of confidence, subsection 64(3) would remove a major common law protection of the right to privacy stated in HRA paragraph 12(a).

This issue is not noted by the Explanatory Statement, and the limitation of HRA paragraph 12(a) requires justification, either on the basis that this limit is not arbitrary or, which amounts to the same thing, that it is justifiable under HRA section 28.

In particular, the Committee considers that there should be justification for permitting protected information to be given to a clinical practice committee.

*The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.*
Provision for procedural fairness (natural justice) in respect of some Committee functions: 
HRA subsection 21(1) – the right to fair trial

A person whose interests would be affected adversely by an exercise of administrative power should ordinarily be afforded a measure of procedural fairness before the power is exercised, or at least an opportunity after its exercise to submit that the particular decision should be changed.

Proposed section 65 is illustrative, in that it provides that if, upon a review, the Committee proposes to recommend in a scope of clinical practice report that the scope of clinical practice of the doctor or dentist should be amended or withdrawn (and other like matters), the Committee must give the doctor or dentist a notice stating the committee’s proposed recommendation; its reasons for the committee’s proposed recommendation; and “that the doctor or dentist may, not later than 21 days after the day the recommendation notice is given to the doctor or dentist, make a submission to the committee about the proposed recommendation”.

There are two cases where this Committee suggests that a measure of procedural fairness could be provided:

1. in relation to the power of a Committee to “withdraw or amend the scope of clinical practice of the doctor or dentist with immediate effect” in an emergency (proposed subsection 65(1)) – in which case, after the event, the person might be permitted to submit that the particular decision should be changed; and

2. similarly in relation to the power of the CEO of a health facility to make a similar emergency decision (subsection 69(1)).

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

Prohibition on the disclosure of evidence to a court: HRA subsection 21(1) - The right to a fair trial

Proposed subsection 75(1) of the Act (see clause 13) raises a rights issue which has been addressed in several previous reports. It would provide:

1. The following are not admissible as evidence in a proceeding before a court:
   (a) an oral statement made in a proceeding before a scope of clinical practice committee;
   (b) a document given to a scope of clinical practice committee, but only to the extent that it was prepared only for the committee;
   (c) a document prepared by a scope of clinical practice committee.

As explained in Scrutiny Report No. 25, concerning the Victims of Crime Amendment Bill 2010, it is strongly arguable that a provision of this kind limits the right to a fair trial. This issue is not noted by the Explanatory Statement and limitation of HRA subsection 21(1) requires justification.

Scrutiny Report No. 33—3 March 2011
A particular issue is why subsection 75(1) should not be limited as it is in similar provisions in Territory law. That is, the prohibition might be qualified by the words “unless it is necessary to do so for this Act or another territory law, or any other law applying in the Territory”.¹

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

Possible error

Should the reference to “66” in proposed paragraph 67(1)(b) be to “65” instead?

Comment on the Explanatory Statement

The Explanatory Statement notes that clause 13 of the Bill substitutes new sections for existing sections 50 to 74, and that some new provisions have been added. All this is, however, explained in only five paragraphs and there is no reference to any particular provision. While the Committee accepts that an explanatory statement may group a number of provisions together, the approach taken with respect to clause 10 falls well short of meeting the technical requirements of an explanatory statement.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2010-291 being the Public Health Risk Activity Revocation 2010 (No. 1) made under section 18 of the Public Health Act 1997 revokes DI2001-32.

Disallowable Instrument DI2010-292 being the Transplantation and Anatomy (Designated Officers) Appointment 2010 (No. 1) made under section 5 of the Transplantation and Anatomy Act 1978 appoints specified medical practitioners as Designated Officers at The Canberra Hospital.

Disallowable Instrument DI2010-293 being the Education (School Boards of School-Related Institutions) Murrumbidgee Education and Training Centre Determination 2010 made under section 43 of the Education Act 2004 determines the composition of the School Board of the Murrumbidgee Education and Training Centre.

Disallowable Instrument DI2010-294 being the Gaming Machine (Maximum Number of Gaming Machines) Declaration 2010 (No. 1) made under section 35 of the Gaming Machine Act 2004 declares that the maximum number of gaming machines allowed on all licensed premises in the ACT is 5,057.

Disallowable Instrument DI2010-295 being the Financial Management (Investment and Borrowing) Guidelines 2010 made under section 133 of the Financial Management Act 1996 prescribes the investment and borrowing requirements of both the Territory and territory authorities.

Disallowable Instrument DI2010-297 being the Planning and Development (Land Agency Board) Appointment 2010 (No. 4) made under section 42 of the Planning and Development Act 2007 and section 79 of the Financial Management Act 1996 revokes DI2010-173 and DI2010-174 and appoints a specified person as chairman of the Land Agency Board.

Disallowable Instrument DI2010-298 being the Health (Fees) Determination 2010 (No. 5) made under section 192 of the Health Act 1993 revokes DI2010-274 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2010-299 being the Public Place Names (Forde) Determination 2010 (No. 1) made under section 3 of the Public Place Names Act 1989 determines the name of a corridor of urban open space in the Division of Forde.

Disallowable Instrument DI2010-301 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2010 (No. 2) made under subsection 21(1) of the Race and Sports Bookmaking Act 2001 revokes DI2010-46 and determines specified ACTTAB sub-agencies to be sports bookmaking venues for the purposes of the Act.

Disallowable Instrument DI2010-302 being the Board of Senior Secondary Studies Appointment 2010 (No. 7) made under section 8 of the Board of Senior Secondary Studies Act 1997 appoints a specified person as chair of the ACT Board of Senior Secondary Studies.

Disallowable Instrument DI2010-304 being the Board of Senior Secondary Studies Appointment 2010 (No. 8) made under section 8 of the Board of Senior Secondary Studies Act 1997 appoints a specified person as a member of the ACT Board of Senior Secondary Studies.

Disallowable Instrument DI2010-305 being the University of Canberra Council Appointment 2010 (No. 1) made under section 11 of the University of Canberra Act 1989 appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2010-306 being the Taxation Administration (Ambulance Levy) Determination 2010 (No. 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2009-241 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2011.

Disallowable Instrument DI2010-307 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2010 (No. 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2010-109 and determines the property value threshold amounts applicable to the calculation of concessional duty for eligible property.

Disallowable Instrument DI2010-308 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2010 (No. 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2010-110 and determines, for the purposes of the scheme, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.
Disallowable Instrument DI2010-309 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concessi on Scheme) Determination 2010 (No. 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2010-111 and determines the property value threshold amounts applicable to the calculation of concessional duty for eligible property.

Disallowable Instrument DI2010-310 being the Taxation Administration (Amounts Payable—Eligibility—Home Buyer Concession Scheme) Determination 2010 (No. 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2010-112 and determines, for the purposes of the scheme, the income test and thresholds, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.

Disallowable Instrument DI2010-311 being the Construction Occupations Licensing (Fees) Determination 2010 (No. 2) made under section 127 of the Construction Occupations (Licensing) Act 2004 determines fees payable for the purposes of the Act.

Disallowable Instrument DI2010-312 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2010 (No. 1) made under section 13 of the Road Transport (General) Act 1999 removes application of the Road Transport (Third-Party Insurance) Act to ACT registered entrant, promotional and unregistered vehicles participating in the Street Machine 23 Summernats Car Festival, and exempts vehicles from the provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.

Disallowable Instrument DI2010-313 being the Planning and Development (Land Agency Board) Appointment 2010 (No. 5) made under section 42 of the Planning and Development Act 2007 and section 79 of the Financial Management Act 1996 revokes DI2010-4 and appoints a specified person as deputy chairman of the Land Agency Board.

Disallowable Instrument DI2010-314 being the Public Health (Fees) Determination 2010 (No. 1) made under section 137 of the Public Health Act 1997 revokes DI2002-217 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2010-315 being the University of Canberra Council Appointment 2010 (No. 2) made under section 11 of the University of Canberra Act 1989 appoints a specified person as a member of the University of Canberra Council.


Disallowable Instrument DI2011-3 being the Corrections Management (Indigenous Official Visitor) Appointment 2011 made under subsection 57(1) of the Corrections Management Act 2007 appoints a specified person as an indigenous official visitor.

Disallowable Instruments—Comment

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

Disallowable Instrument DI2010-285 being the Fisheries Prohibition and Declaration 2010 (No. 2) made under sections 13, 15 and 17 of the Fisheries Act 2000 revokes DI2010-248 and determines the requirements and restrictions on fishing.

The Committee notes that this instrument revokes and re-makes DI2010-248, which the Committee commented on in its Scrutiny Report No 29 of the 7th Assembly. The Committee notes with approval that this instrument addresses various drafting issues that the Committee identified in the earlier Report.

This comment does not require a response from the Minister.

Exemptions from the requirements Government Agencies (Campaign Advertising) Act 2009


The Committee notes that the six instruments listed above exempt six specified advertising campaigns from the requirements of the Government Agencies (Campaign Advertising) Act 2009. The instruments are made under section 23 of the Act, which provides:

23 Exemptions

(1) The Minister may exempt a campaign from this Act.

(2) However, the Minister may exempt a campaign only if satisfied it is appropriate because of—
(a) an emergency; or
(b) extreme urgency; or
(c) other extraordinary circumstances.

(3) The Minister must tell the Legislative Assembly, in writing, about an exemption and the reasons for the exemption as soon as practicable after the exemption is given.

(4) An exemption is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The Committee notes that, in both instances, the Explanatory Statement for the instrument contains the following statement:

The failure of the Legislative Assembly to appoint an independent reviewer in accordance with the Act is an extraordinary circumstance and requires that any ACT Government advertising campaign exceeding $40,000 will require an exemption from the Minister before proceeding.

The Committee merely notes the explanation provided.

This comment does not require a response from the Minister.

Positive comment

Disallowable Instrument DI2010-300 being the Utilities (Electricity Network Use of System Code) Determination 2010 (No. 1) made under sections 59 and 63 of the Utilities Act 2000 revokes DI2007-212 and determines the Electricity Network Use of System Code.

The Committee notes with approval that the Explanatory Statement for this instrument sets out the legislative requirements for the making of the Code that is made by the instrument and provides information as to how the various requirements have been met.

This comment does not require a response from the Minister.

Minor typographical error

Disallowable Instrument DI2011-2 being the Food (Fees) Determination 2011 (No. 1) made under section 150 of the Food Act 2001 revokes DI2003-8 and determines fees payable for the purposes of the Act.

The Committee notes that the definition of community organisation, set out on page 2 of this instrument, incorrectly refers to the “Associations Incorporations Act 1991”.

This comment does not require a response from the Minister.

Drafting issue

Disallowable Instrument DI2011-4 being the Public Sector Management Amendment Standards 2011 (No. 1) made under section 251 of the Public Sector Management Act 1994 amends the Standards by omitting reference to "Indigenous" and substituting "Aboriginal and Torres Strait Islander".

Scrutiny Report No. 33—3 March 2011
The Committee notes that section 4 of this instrument provides:

4 Division 3.11.1
   omit
   Indigenous
   substitute
   Aboriginal and Torres Strait Islander

The Committee assumes that the intention of the amendment is to amend the heading to Division 3.11.1 of the Public Sector Management Standards 2006. That being the case, the Committee suggests that it would be in line with good drafting practice for section 4 of this instrument to expressly indicate that it is an amendment to the heading to Division 3.11.1. Alternatively, the Committee suggests that, perhaps, section 4 might have provided:

4 Division 3.11.1
   omit each mention of
   Indigenous
   substitute
   Aboriginal and Torres Strait Islander

An amendment in these terms might have avoided the need for sections 7, 8, 10 and 11 of this instrument.

In that context, the Committee also notes that section 8 provides:

8 Section 247D
   omit
   Indigenous
   substitute
   Aboriginal and Torres Strait Islander

Section 247D of the Public Sector Management Standards is as follows:

247D Classification on appointment
   Appointees to the Indigenous Traineeship Program will be appointed as an Indigenous Trainee.

The Committee assumes that the intention of the amendment is to replace each of the references to “Indigenous” in section 247D with “Aboriginal and Torres Strait Islander”. This assumption is confirmed by the version of the Public Sector Management Standards that incorporates the section 8 amendment and that appears on the ACT Legislation Register. This being so, the Committee suggests that it would be in line with good drafting practice for section 8 to have been expressed in terms of “omit each mention of”.

This comment does not require a response from the Minister.
Positive comment

Disallowable Instrument DI2011-5 being the Auditor-General Standing Acting Appointment 2011 made under Schedule 1 of the Auditor-General Act 1996 and Division 19.3.2A of the Legislation Act 2001 appoints a specified person to act as Auditor-General when the Auditor-General is on leave or the office is vacant.

This instrument provides for the standing appointment of a specified person to act as Auditor-General, when the office of Auditor-General is vacant. The Committee notes with approval that the Explanatory Statement for the instrument sets out the legislative requirements for appointing an acting Auditor-General and provides information as to how the various requirements have been met.

This comment does not require a response from the Minister.

Subordinate Laws—No comment

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

Subordinate Law SL2010-45 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No. 5) made under the Medicines, Poisons and Therapeutic Goods Act 2008 amends the Medicines, Poisons and Therapeutic Goods Regulation to enable midwives to prescribe medicines in the ACT.

Subordinate Law SL2010-46 being the Work Safety Amendment Regulation 2010 (No. 1) made under the Work Safety Act 2008 establishes when notice must be given in relation to a serious event under section 39(2) of the Act.

Subordinate Law SL2010-47 being the Magistrates Court (Liquor Infringement Notices) Regulation 2010 made under the Magistrates Court Act 1930 enables infringement notices to be issues for offences against the Liquor Act 2010.

Subordinate Law SL2010-48 being the Liquor Amendment Regulation 2010 (No. 1) made under the Liquor Act 2010 amends the Liquor Regulation 2010 to delay the commencement of Schedule 1, section 1.20, so that licensees will only be required to start collecting sales data on 1 July 2001 for providing to the chief Health Officer by end of July 2012.

Subordinate Law SL2010-49 being the Magistrates Court (Tobacco Infringement Notices) Regulation 2010 made under the Magistrates Court Act 1930 enables infringement notices to be issued for offences against the Tobacco Act 1927.

Subordinate Law SL2010-50 being the Magistrates Court (Smoke-Free Public Places Infringement Notices) Regulation 2010 made under the Magistrates Court Act 1930 enables infringement notices to be issued for prescribed offences under the Smoke-Free Public Places Act 2003.

PROPOSED GOVERNMENT AMENDMENTS—Working with Vulnerable People (Background Checking) Bill 2010

The Committee reported on this Bill in Scrutiny Report No 27. The Minister has prepared a revised Explanatory Statement, and advised the Committee of amendments she proposes to move. The set of amendments are accompanied by a Supplementary Explanatory Statement.
The amendments deal with a number of rights issues raised by the Committee.

**Strict liability offences and imprisonment**

A number of amendments react to the Committee’s concern that the provision for the imprisonment of a person convicted of a number of the strict liability offences provided for in the Bill would be incompatible with the Human Rights Act (*Scrutiny Report No 27* at pages 17-18).

Amendments 4, 5, 8, 10, 30, 33, 35, and 37 would omit the provision for imprisonment in the relevant clauses.

**Internal reconsideration of a negative risk assessment**

A number of amendments adopt the Committee’s suggestion that a facility for internal reconsideration of certain decisions be amenable to a broader scope of review than that permitted by the Bill.

The Committee noted that:

[w]here the commissioner “is satisfied that the person poses an unacceptable risk of harm to a vulnerable person (a negative risk assessment), he or she must provide written reasons in support of this intention, and [advise] that the latter may seek reconsideration of the proposal under clause 33 on the ground that the assessment “has been made because of incomplete or incorrect information”*: [paragraph 32(3)(b)] (*Scrutiny Report No. 27* at page 9).

It noted that the scope for review might be considered to be too narrow.

[U]pon the commissioner giving an applicant a proposed negative notice under subsection 32(1), the applicant may, within 14 days, ask the commissioner “to reconsider the application based on new or corrected information” (paragraph 32(2)(a)). The commissioner is then obliged to “conduct a risk assessment (a revised risk assessment) considering the new or corrected information” (subclause 33(3)).

A decision under subsection 32(1) will in some circumstances have a significant impact on the person affected, and the question arises as to whether this ground of review is too restrictive. It would not, for example, permit the applicant to seek reconsideration on the ground that the reasoning of the commissioner, based on the information that was before the commissioner, did not support the findings involved in making the a proposed negative notice.

The question arises: should the applicant be permitted to seek reconsideration on a full merits review basis? That is, to submit that the relevant decision is not the correct or preferable decision to be made? In other words, clause 32 might provide simply that the applicant can seek reconsideration of the decision under subsection 32(1). (*Scrutiny Report No 27* at pages 15-16).
Proposed amendment number 11 would delete paragraph 32(3)(b) and insert instead a new paragraph that would enable an aggrieved person to seek reconsideration on any basis. In consequence, clause 33 of the Bill is proposed to be omitted and a new clause 33 inserted. There are in addition other consequential amendments proposed.

The Minister also proposes similar amendments to the scheme for internal reconsideration of a proposed conditional registration: see in particular amendments 22 and 24.

_Surrendering of a registration_

Amendment 41 proposes an amendment to adopt the Committee’s suggestion that the Bill provide for a registrant to surrender her or his registration.

**GOVERNMENT RESPONSES**

The Committee has received responses from:

- The Minister for Disability, Housing and Community Services, dated 15 February 2011, in relation to comments made in Scrutiny Report 27 concerning the Working with Vulnerable People (Background Checking) Bill 2010.

The Committee wishes to thank the Chief Minister, the Minister for Territory and Municipal Services and the Minister for Disability, Housing and Community Services for their helpful comments.

**PRIVATE MEMBER’S RESPONSE**

The Committee has received a response from Ms Bresnan, dated 14 February 2011, in relation to comments made in Scrutiny Report 32 concerning the Workplace Privacy Bill 2010.

Vicki Dunne, MLA
Chair
March 2011
**JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE**  
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)  

**REPORTS—2008-2009-2010-2011**  

OUTSTANDING RESPONSES

<table>
<thead>
<tr>
<th>Bills/Subordinate Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Report 1, dated 10 December 2008</strong></td>
</tr>
<tr>
<td>Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008</td>
</tr>
<tr>
<td><strong>Report 2, dated 4 February 2009</strong></td>
</tr>
<tr>
<td>Education Amendment Bill 2008 (PMB)</td>
</tr>
<tr>
<td><strong>Report 8, dated 22 June 2009</strong></td>
</tr>
<tr>
<td><strong>Report 10, dated 10 August 2009</strong></td>
</tr>
<tr>
<td>Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)</td>
</tr>
<tr>
<td><strong>Report 12, dated 14 September 2009</strong></td>
</tr>
<tr>
<td>Civil Partnerships Amendment Bill 2009 (PMB) Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)</td>
</tr>
<tr>
<td><strong>Report 14, dated 9 November 2009</strong></td>
</tr>
<tr>
<td><strong>Report 18, dated 1 February 2010</strong></td>
</tr>
<tr>
<td>Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)</td>
</tr>
<tr>
<td><strong>Report 19, dated 22 February 2010</strong></td>
</tr>
<tr>
<td>Education (Suspensions) Amendment Bill 2010 (PMB)</td>
</tr>
<tr>
<td><strong>Report 22, dated 27 April 2010</strong></td>
</tr>
<tr>
<td>Infrastructure Canberra Bill 2010 (PMB) Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)</td>
</tr>
<tr>
<td><strong>Report 24, dated 28 June 2010</strong></td>
</tr>
<tr>
<td>Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010</td>
</tr>
</tbody>
</table>
### Bills/Subordinate Legislation

<table>
<thead>
<tr>
<th>Report</th>
<th>Date</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Report 30, dated 15 November 2010</td>
<td>Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Discrimination Amendment Bill 2010 (PMB)</td>
<td></td>
</tr>
<tr>
<td>Report 32, dated 10 February 2011</td>
<td>Courts Legislation Amendment Bill 2010</td>
<td></td>
</tr>
</tbody>
</table>
Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne,


The lack of response to the Committee in relation to this matter was an oversight, for which I apologise.

The Committee noted that the Explanatory Statement for the Instrument did not include a statement that the person appointed as a non-public employee member was, in fact, a non-public employee.

I have instructed my Department to take more care when preparing appointments of this nature in the future.

Yours sincerely

[Signature]

Jon Stanhope MLA  
Minister for Territory and Municipal Services  
9 FEB 2011
Ms Vicki Dunne  
Chair  
Standing Committee on Justice and Community Safety  
Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

Dear Ms Dunne

I am writing in response to comments made by the Standing Committee on Justice and Community Safety (the Committee) in Scrutiny Report No. 32 regarding the Public Sector Management Act Amendment Bill 2010.

The Committee specifically draws attention to three matters, and these are addressed below.

The right to privacy and the definition of Aboriginal person or Torres Strait Islander

The committee raises for the Assembly’s consideration whether the Bill through the application of the definition of Aboriginal person or Torres Strait Islander, limits the right under paragraph 12 (a) of the Human Rights Act 2004 (HRA), and then whether this interference is arbitrary.

Further the committee in acknowledging the complexity of the issue has asked:

- how a claimant might or must demonstrate that they have been “accepted” by an Aboriginal or Torres Strait Islander community;

- how a claimant might or must demonstrate that where a number of persons have accepted the claimant, these persons constitute a “community” for the purposes of paragraph (c) insofar as concerns the claimant; and

- how any dispute between a claimant and a community he or she has approached for acceptance might be resolved.

In considering these issues, it should be noted that the inclusion of the definition of Aboriginal Person or Torres Strait Islander within the Public Sector Management Act 1994 (the Act) is intended to assist individuals in understanding whether they satisfy
the requirements for a particular job, namely a job that is identified for an Aboriginal or Torres Strait Islander person.

In other words the definition is an enabling provision for persons covered by the definition, where relevant, to self identify. It is not intended that persons identifying as an Aboriginal or Torres Strait Islander will be required to provide evidence to substantiate their status.

The Committee has also noted that the Explanatory Statement to clause 5 of the Bill states that the purpose of the amendment proposed to section 39 of the Act is to update the definition of Aboriginal person or Torres Strait Islander, but that this is actually achieved by clause 38 of the Bill which amends the Dictionary of the Act. The Explanatory Statement will be amended accordingly.

Qualification of the merit principle

The Committee suggests that proposed subsection 65(3) and subsection 65(5) of the Bill appears to limit the rights in the HRA section 8, recognition and equality before the law.

I note the Committee’s concerns in these areas, and would draw the Committee’s attention to the HRA Compatibility Statement signed by the Attorney General on 7 December 2010. I defer to the Attorney General in providing the Compatibility Statement.

However, in response to the Committee’s concerns I am satisfied that any limitation of the rights under the HRA section 8, by subsections 65(3) and 65(5) of the Bill are reasonable and proportionate in ensuring that women and other persons covered by identified groups have appropriate access to government employment. The Explanatory Statement will be amended to provide further explanation in relation to these issues.

The right to a fair trial: HRA subsection 21(2)

The Committee raises the question “Do any of the clauses of the Bill “make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers”? ”.

The administrative law principles of natural justice and procedural fairness as applicable to administrative processes are well settled. The processes contained in the Act are of an administrative nature. I do not intend for the legislation to depart from established administrative law principles without good cause and I do not think such a departure has occurred.

While the meaning of the Committee’s question at the second paragraph under this heading is unclear, I take the question to ask whether the proposed powers of decision makers in the proposed amendments should contain an element of ‘reasonable grounds’.
Although I would expect the principles of natural justice and procedural fairness to apply to administrative processes contained in the proposed amendments, the Explanatory Statement will be amended to be clear of the legal requirement to engage these principles. Specific reference will also be made in the Explanatory Statement to require that decision makers in exercising their relevant powers under sections 70(4), 71(4), 71A(4), 71B(1), 71B(5), 90(1), 95(1), 96(1), and 96D(1) must be satisfied on ‘reasonable grounds’ of the matters being decided.

A similar approach will be taken in response to the Committee’s query about requiring the reasons for decisions to be made available to the relevant person affected by the decision and/or give that person an opportunity to respond to the decision.

The Committee also raises the question of why principles of natural justice and procedural fairness should not be made in relation to powers contained in subsections 70(5), 71(5), 71A(5), 71B(3), 112(2)(b), 118(3), 118(5), 143(1) and 143(8) in the Act.

However, I would expect again that existing administrative law principles are sufficient in ensuring that natural justice and procedural fairness must, and in practice does apply to the administrative processes contained in the Act.

The Committee’s comments in relation to the Explanatory Statement are noted and will be taken into account in the preparation of any future Statements.

I trust the above comments address the Committee’s concerns and I thank the Committee for its comments.

Yours sincerely

[Signature]

Jon Stanhope MLA
Chief Minister

14 FEB 2011
Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA  ACT  2601

Dear Mrs Dunne

This letter is in relation to the Committee’s comments concerning the Working with Vulnerable People (Background checking) Bill 2010 (the Bill) in Scrutiny Report No 27, and my subsequent response dated 20 October 2010.

In my response I agreed to revise the explanatory statement in accordance with section 28 of the Human Rights Act 2004. I also agreed to include a facility in the Bill to allow a person to voluntarily surrender their registration and considered that a provision for the availability of a full merits review was a reasonable proposition.

Explanatory Statement

The Committee commented on the value of an analysis of whether the Bill engaged rights under the Human Rights Act 2004, including where any limitations on rights were justifiable under subsection 28(2) of the Act.

I have revised the explanatory statement to include a provision-by-provision analysis. I have also included a supplementary explanatory statement and proposed a number of government amendments to the Bill.

A copy of the revised explanatory statement, supplementary explanatory statement, and proposed government amendments are attached to this letter for your consideration.

Government Amendments

I am proposing that the Bill be amended to allow a person to voluntarily surrender their registration and also make provision for the availability of a full merits review.

Additionally, I am proposing to amend the Bill in respect of a term of imprisonment for a strict liability offence.
There are also minor amendments based on feedback from consultation, a number of which are technical in nature.

- **Provision to allow a person to surrender their registration**  
  **(HRA subsection 21(1))**

  A proposed new division 6.5, clause 53A has been inserted to allow a person to voluntarily surrender their registration. There are minor amendments to clauses 16 and 46 arising from this amendment.

- **Provision for applicants to seek reconsideration of a proposal to issue a negative notice on a full merits review basis**

  It is proposed to amend clauses 33 and 39 (proposed conditional registration) to give an applicant the capacity to seek a review of a decision if they believe there is relevant ‘new or corrected’ information. Minor amendments will be required to clauses 32, 34, 35, 38, 40, 41, the Dictionary, and Schedule 2 (Item 4).

- **Terms of imprisonment for strict liability offences**  
  **(HRA subsection 22(1))**

  The proposed amendments at clauses 12, 13, 19, 42, 46 and 49 remove the imprisonment elements.

  The way the Bill currently stands year 11/12 students on placement (work experience etc) would be required to be registered if engaged in a regulated activity, as would employers or supervisors if the student was engaged in an unregulated activity.

  As the Bill does not require an employer / supervisor to be registered unless it is a regulated activity, nor was it intended for year 11/12 school students on placement to be registered, it is proposed that clause 11 be amended to reflect this. The proposed amendments include:

  - (definition 11(4)) *school* means a high school or secondary college;
  - (11(g) amended wording to incorporate all school students; and
  - new clause (ga) to exempt registration for employers/supervisors of students unless the placement is within a regulated activity.

  Some minor amendments are required to ensure consistency with current practices regarding timeframes for submitting further information and/or providing advice to the Commissioner.

  In this context it is proposed that timeframes be stated in working days to support these practices, and that the Dictionary and clauses 19, 20, 33, 34, 39, 40, 46, 49, 50, 52 be amended to reflect this.

  Feedback from stakeholders indicated that the term ‘position’ needed to encompass a broader ‘role’ in an organisation. It is proposed that the term ‘position-based’ be amended to ‘role-based’ to reflect this; minor amendments will be required to clause 37 and the definition in the Dictionary will be omitted.
Other proposed minor amendments are at:
- clause 53 (4) (b) to read ‘on the later date’;
- clause 65 to reflect new fair trading legislation;
- omitting the definition proposed interim negative notice (32(2)) as the Bill does not have a provision to issue one; and
- updating the Dictionary to correct a cross-reference to reviewable decision.

I trust these amendments to the explanatory statement and proposed government amendments to the Working with Vulnerable People (Background Checking) Bill 2010 addresses the human rights aspects raised by the Committee.

Yours sincerely

Joy Burch MLA
Minister for Disability, Housing and Community Services
5 February 2011
Mrs Vicki Dunne  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601  

Dear Mrs Dunne,

As per the recommendation of the Committee in the Scrutiny Report of 10 February 2011, I am formally responding to the comments made in the Report regarding the Workplace Privacy Bill 2010.

I thank the Committee for the time it has spent considering this Bill, and for the comments it has made in regards to it.

In addition to providing this response to the report, I will be tabling an updated Explanatory Statement in the Assembly prior to debate of the legislation, as per the Committee’s comments.

**Response to Committee comments:**

Regarding the comment on paragraph 2 of the Scrutiny Report, in relation to limitations on the requirements for notification on optical devices if the workplace is not the usual workplace of the worker, this limitation is introduced to ensure that, where an employer conducts surveillance in a specific part of a workplace that is not usually frequented by the majority of the employer’s workers, the employer is not required to provide a notice to every worker that may possibly enter that part of the workplace. In addition, the requirement that an employer place signage on that area of the workplace is sufficient notification for workers who may occasionally enter the area where the surveillance is being conducted.

Regarding the comment on paragraph 3 of the Scrutiny Report, this clause enables an employer to create a policy in consultation with a union, workplace consultative committee or other body representative of workers for the purpose of conducting surveillance in the workplace. This ensures that where an employer creates or engages with industrial democratic structures in a workplace, that surveillance policy can be created co-operatively with those representative bodies. In respect to the concerns that workplaces or individuals may not be represented through an industrial
democratic structure, it should be assumed that where an industrial democratic structure is in place that it would take into account the concerns of the workers it represents.

Regarding the comment on paragraph 4 of the Scrutiny Report, the requirement for consultation in this instance, as opposed to simple notification, is to ensure that an employer has an obligation to respond to any concerns raised by workers in regards to the conduct of surveillance as outlined in the notice. In effect, it creates an obligation on the employer to respond to concerns raised by workers (or the appropriate industrial body) during the consultation period. Whilst this does not oblige an employer to change the proposed surveillance in response to worker concerns, it ensures that surveillance is not imposed arbitrarily without regard to the impact on a workplace. Where an employer fails to consult in good faith with a worker (i.e. the worker raised a concern about the conduct of the surveillance and it was not responded to appropriately by the employer), the worker may have grounds to challenge adverse action taken against them on the basis of surveillance records generated.

Regarding the comment on paragraph 6 of the Scrutiny Report, in the instance where an employer stops delivery of an electronic communication sent by a worker where the stoppage is not conducted in accordance with the policy as notified to all employees, the employer commits an offence as the stoppage is not compliant with the policy. Employers should operate on a presumption that electronic messages are being sent legitimately, even where the employer does not know the identity of the worker. In effect, not knowing the identity of the worker should not be cause for stopping electronic communications.

In the instance where an employer stops delivery of an electronic communication sent to a worker, the employer commits an offence under subclause 20(1) unless it is conducted in accordance with a policy (subclause 20(2)). Even where an employer does not know the identity of a worker, surveillance should still be conducted in accordance with the legislation, as the electronic communication should be presumed to be legitimate.

Regarding the first comment on paragraph 8 of the Scrutiny Report, the provisions for access to covert surveillance records are outlined in s31(5), in brief, the worker must have access any part of a surveillance record that is being used in a legal proceeding against them or to justify adverse action against them. It is clear from the structure of the bill and the title of the section that s23 applies to notified surveillance, not covert surveillance.

Also, in the event of covert surveillance without an authority (i.e. where an employer has committed an offence under s35(1), the employer commits a further offence if they use or disclose the surveillance record under s39(1), except for the reasons outlined by s39(4).

Regarding the second comment on paragraph 8 of the Scrutiny Report, the words "needs not" are read to give discretion to the employer in the instances outlined. Whilst it is accepted that the employer should give regard to the circumstances highlighted by the Committee in the paragraphs of s23(3), the employer should be given the discretion whether to disclose with regard to any legal consequences that may arise as a result of the employer’s decision to disclose. Nothing in this
legislation prevents action being taken against an employer where disclosure of a surveillance record under s23 would be unlawful.

Regarding the comment on paragraph 9 of the Scrutiny Report, Part 4 does not apply to the surveillance described in s13(2). The surveillance described in s13(2) is not covert, as it has been notified to the workers usually affected and other workers are made aware of the conduct of the surveillance by the visible casing and signage requirements of optical surveillance outlined by s15.

Regarding the first comment on paragraph 10 of the Bill, use of covert surveillance should be restricted to “unlawful activity” in recognition that covert surveillance, even when conducted through an authority, consists of a breach of privacy of all employees subject to such surveillance, and should therefore be restricted only to the most serious matter.

Regarding the second comment on paragraph 10 of the Scrutiny Report, implicit in the requirements of s26(2)(a), whereby an employer must lay out the grounds for suspecting a worker is involved in unlawful activity is the nature of the unlawful activity the worker is suspected of being involved in. As hearings regarding applications for covert surveillance authorities are held in private, workers would not have access to the application, however, under s38(3), the Magistrates Court must make an order making surveillance records generated by covert surveillance available unless the Court is satisfied that there is a good reason not to.

Regarding the comment on paragraph 13 of the Scrutiny Report, disclosure of covert surveillance records is limited to part of a record in order to avoid the unnecessary breach of privacy that would result from disclosing parts of a covert surveillance record that is not relevant to unlawful activity.

Regarding the comment on paragraph 14 of the Scrutiny Report, the definition in this instance is broad to ensure that no part of a surveillance record that may be relevant to a later matter would be destroyed.

Regarding the comment on paragraph 15 of the Scrutiny Report, there is a different requirement for disclosure for covert surveillance in s31(5) in that, unlike notified surveillance where the worker would reasonably be aware of the contents of the surveillance record (as the worker was aware of the surveillance), the worker has no way of knowing the contents of a covert surveillance record being used against them. As such, if an employer wishes to use any part of a covert surveillance record against an employee, the record must be disclosed.

Regarding the comment on paragraph 16 of the Scrutiny Report, the Committee’s comment is noted.

Regarding the first comment on paragraph 17 of the Scrutiny Report, the Committee’s comment is noted, and the Explanatory Statement will be amended to include a s28 justification.

Regarding the second comment on paragraph 17 of the Scrutiny Report, the desirability of evidence on the grounds of the manner in which the evidence was obtained recognises the potential breach of privacy of potentially unrelated parties under surveillance that is not related to the unlawful activity the covert surveillance record reveals (i.e. use of the surveillance record may publicly reveal private information about a worker was not aware they were under surveillance). As such,
the seriousness of the breach of privacy must be weighed against the seriousness of
the unlawful activity detected by the covert surveillance.

Regarding the comment on paragraph 18 of the Scrutiny Report, the intent of this
clause is to enable the Magistrates Court to order a surveillance supervisor to
release covert surveillance records. As such, the Magistrates Court does not need
to possess the records to make an order in regards to the covert surveillance record.
I would also draw attention of the Committee to s38(2)(a), which allows the Court to
order that covert surveillance records to be delivered to Court for safekeeping.

Regarding the first comment on paragraph 19 of the Scrutiny Report, the
Committee’s comment is noted. This clause clarifies that inadvertent use of covert
surveillance records on the grounds that the person could not know that they were
surveillance records is not an offence. This is consistent with the fault element noted
by the Committee.

Regarding the second comment on paragraph 19 of the Scrutiny Report, a
surveillance supervisor providing a surveillance record or part thereof that relates to
the unlawful activity specified in the authority or in relation to some other unlawful
activity under s31(3) is permitted under s39(3)(b). Additionally, where there is no
evidentiary or investigative purpose for retaining the record, the surveillance record
must be destroyed under s31(4). This is consistent with the defences to use or
disclosure of covert surveillance records outlined under s30(3).

Regarding the comment on paragraph 20 of the Scrutiny Report, s35 (2)(b)-(e) and
s36 outlines situations where covert surveillance can take place without a covert
surveillance authority without being unlawful.

I would like to thank the Committee for the comments and feedback on the Bill.

Yours Sincerely,

Amanda Bresnan MLA
14 February 2011

Phone: (02) 6205 0130
E-mail: bresnan@parliament.act.gov.au