Legislative Assembly for the ACT

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

Scrutiny Report

9 AUGUST 2010

Report 25

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: Ms Janice Rafferty
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2010

This Bill would amend the *Children and Young People Act 2008* to provide clarity of interpretation regarding certain provisions.

PLANNING AND DEVELOPMENT (CONCESSIONAL LEASES) AMENDMENT BILL 2010

This Bill would amend the *Planning and Development Act 2007* to regulate concessional leases.

Bills—Comment

The Committee has examined the following Bill and offers these comments on it:

CONSTRUCTION OCCUPATIONS LEGISLATION AMENDMENT BILL 2010

This Bill would amend a number of Territory laws to: (i) provide for licensing of a new occupation of building assessor under the *Construction Occupations (Licensing) Act 2004* and codes of practice for those assessors; (ii) to authorise the Construction Occupations Registrar to suspend any kind of licensed construction practitioner's licence where an issue of public safety has been identified; and (iii) to authorise relevant regulatory agencies and inspectors to share information where public safety is at risk.

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

Fair trial in the context of administrative decision-making – HRA subsection 21(1)

Suspension of a licence

By clause 18 of the Bill, section 52A would be inserted into the *Construction Occupations (Licensing) Act 2004* (COLA), and would read:

> **52A Suspension of licence—public safety**
>
> (1) This section applies if a licensed construction practitioner engages in conduct that the registrar decides, on reasonable grounds, presents or is likely to present a risk of death or injury to a person, significant harm to the environment or significant damage to property.
>
> [Examples omitted.]
>
> (2) The licensed construction practitioner's licence is suspended when the registrar gives the practitioner notice of—
>
> (a) the nature of the conduct; and

(b) the nature of the risk.

(3) However, during the suspension the registrar may allow the licensed construction practitioner to undertake construction work, within the scope of the licensee's licence, necessary to comply with a rectification order.

A decision of the registrar to suspend a licence is probably a decision about "rights and obligations recognised by law" and thus attracts the right on the part of the licensee to have that decision made by "a competent, independent and impartial court or tribunal after a fair and public hearing" (HRA subsection 21(1)). (The application of HRA subsection 21(1) to administrative decision-making is fully analysed below, in relation to the Liquor Bill 2010.)

Taking the "composite approach" to assessment of whether the scheme for the making of an administrative decision is fair, the scheme surrounding proposed section 52A exhibits these features:

(1) the registrar's discretion must be exercised on reasonable grounds and with reference to stated criteria;

(2) it appears that the registrar is not obliged to afford the affected licensee any notice of the registrar's intention to suspend, nor does it afford the licensee any opportunity to be heard on the matter, even at that point after the suspension when the registrar considers whether to revoke the suspension;[1] and

(3) it appears that a decision to suspend is not reviewable by the ACT Civil and Administrative Tribunal (ACAT), in that the *Construction Occupations (Licensing) Regulation 2004* would not be amended to accommodate such a decision.

Feature (1) supports a view that the scheme is fair, but features (2) and (3) suggest that it is not. It is very difficult to predict how an ACT court would resolve this question. The absence of merits review by ACAT may not be so critical, given that the licensee could resort to judicial review or the much less expensive complaint to the Ombudsman. The omission of any kind of opportunity to be heard may be more critical.

The question of the application of HRA subsection 21(1) should be addressed in the Explanatory Statement.

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

The sharing of private information between agencies – HRA paragraph 12(a)

The Explanatory Statement identifies the relevant provisions of the Bill and by reference to HRA section 28 – including an analysis against each of the particular matters mentioned in subsection 28(2) – provides a justification for limiting the right to privacy.

The Committee refers the Assembly to the Explanatory Statement.

[1] By subsection 53(2) of COLA, "(2) The registrar must revoke the suspension if satisfied that the cause of the suspension no longer exists".

LIQUOR BILL 2010

This is a Bill for an Act to regulate the sale, supply, promotion and consumption of liquor, and in particular will require the administrators of the licensing regime to better reflect harm minimisation and community safety principles,

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

Equal protection of the law without discrimination – HRA subsection 8(3)

The effect of clause 8 of the Bill is summarised in the Explanatory Statement:

> This clause disapplies the provisions of this Act relating to the sale of liquor in an exempt university building of the Australian National University (ANU) and the University of Canberra (UC), and makes it an offence for a person to sell or purchase liquor in an exempt university building in contravention of a university statute.

Subsection 8(3) of the Human Rights Act 2004 provides:

> Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

Given that university retailers of liquor are treated differently to other retailers, it appears that clause 8 derogates from HRA subsection 8(3), and is thus incompatible with the HRA unless it can be demonstrated by the Minister to be justifiable under HRA section 28. The Explanatory Statement does not address this matter, and it is not taken further by the Attorney-General's Compatibility Statement, which simply reads: "In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the Human Rights Act 2004".

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

Fair trial in the context of administrative decision-making – HRA subsection 21(1)

The Bill provides for the making of a wide range of administrative decisions that would, in the words of HRA subsection 21(1), amount to decisions about "rights and obligations recognised by law". The decisions concerning the grant and cancellation of liquor licences are obvious examples.

The Committee takes this opportunity to restate and amplify the framework within which it makes comments on how an administrative decision-making scheme is assessed according to the Committee's terms of reference and according to the rights stated in HRA subsection 21(1).

<u>Provisions restricting review of a primary administrative decision</u>

In terms of paragraph (c)(iii) of the terms of reference, the Committee will comment on a provision in a bill that appears to "make(s) rights, liberties and/or obligations unduly dependent upon non-reviewable discretions". In addition, it is now accepted by governments that a law that precludes judicial review of some administrative action is inconsistent with

subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*.[2] It is perhaps unlikely that a bill will seek to preclude judicial review of administrative action, and more likely that the Committee will have cause to comment on matters such as removal of the obligation to give reasons that is stated in the *Administrative Decisions (Judicial Review) Act 1989*, or a proposed limit to the scope of judicial review, or a modification of the common law principles concerning standing to seek review.

The Committee has not taken the view that every exercise of administrative power should be capable of a full "merits" review by a body (such as the ACT Civil and Administrative Tribunal (ACAT)) that is independent of the executive government. Some such decisions are not appropriate for review, by reason of their nature (such as those having a high policy or polycentric character). The Committee recognises that Ombudsman review may be sufficient for many minor decisions, and will comment where there is a proposed exclusion of the jurisdiction of the Ombudsman.

The Committee considers that the Explanatory Statement should identify and justify:

- ***a limitation to the scope of judicial review of administrative action, or of a person's standing to seek review, (as those matters are understood at common law), or the exclusion of the reasons obligation in the ADJR Act;***
- ***an omission to provide for merits review where that would normally be provided; and***
- ***a reduction in the jurisdiction of the Ombudsman.***

Provisions conferring administrative power in wide terms

This Committee has frequently commented on provisions in bills that express the scope of an administrative power in very wide (or "open-ended") terms. Paragraph (c)(ii) of its terms of reference requires it to consider whether "rights, liberties and/or obligations" have been made "unduly dependent upon insufficiently defined administrative powers", and it is important to appreciate why this term of reference is included. It derives from the first expression in the early 1930s of the functions of the Senate Committee on Regulations and Ordinances. The drafters of those terms were much influenced by A V Dicey's *Introduction to the Study of the Law of the Constitution*,[3] wherein Dicey contrasted the rule of law to "government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint".[4] The editor of the ninth edition of the book observed:

> In so far as the rule of law connotes the absence of arbitrary power, it is important that the individual should have the assurance that the law can be ascertained with reasonable certainty. … The reason why lawyers are in the main critical of [the creation of administrative powers] lies in the uncertainty which they are alleged to produce. It may be conceded that the private law on many matters is difficult to ascertain with any assurance. But in public law there may be added uncertainty produced by the bulk and detail of regulations … and the impossibility of predicting how a … discretion will be exercised.[5]

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[2] See generally *Scrutiny Report No. 11* of the *6th Assembly*, concerning the Water Resources Amendment Bill 2005.

[3] The Committee has used the 9th edition, 1952.

[4] Ibid at 188.

[5] E C S Wade, ibid at lxxiv-lxxv.

A power expressed in very wide terms—such as that the decision-maker simply "may" do something—is "insufficiently defined". The same may be said of a structured discretionary power that specifies particular matters as relevant to the exercise of the power, but then permits the decision-maker to have regard to "any other relevant matter". It is of course true that a court would read down such powers so that their lawful exercise would require that the decision-maker have regard only to those matters the court, by reference to its view of the object of the Act, thinks were intended by the legislature to be relevant to the exercise of the power. But it remains very difficult for a person to guess just how a court (or other body applying the law) will fix the limits of the power, and this is the basis of the "rule of law" objection to the grant of wide discretionary powers. In *Scrutiny Report No. 16* of the *7th Assembly*, concerning the Racing Amendment Bill 2009, the Committee observed that "[a] citizen should not … be put to the expense of a legal suit to find out the boundaries of an administrative power. To the extent of what is feasible, these boundaries should be stated in the law conferring the power".[6]

Express statutory limitation of an administrative power also facilitates judicial review. A limitation in the form of the specification of what matters are (or are not) relevant to the exercise of the power provides a firmer basis for a judicial challenge to the exercise of the power, in that there is less room for guesswork as to what matters the court will consider relevant or irrelevant to its exercise. A power conferred in terms of the decision-maker simply having an opinion (or being satisfied) that upon some grounds that some action is desirable, is clearly less capable of review than a power conferred in terms that those grounds must exist. Thus, a power conferred in terms that require the decision-maker to be satisfied "upon reasonable grounds" that a state of affairs exists permits the court to assess whether there were reasonable grounds for the opinion.[7]

More constructively, in *Scrutiny Report No. 32* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee suggested that where an administrative power was conferred, then:

- as far as practicable having regard to the nature of the power, the decision-maker be required to address specific matters as relevant (or irrelevant) to the exercise of the power;
- if a generally worded residual discretion to act is desirable, that completely subjective language be avoided and a more objective test (such as a power to act on "reasonable grounds") be conferred; and
- that some person or body, (preferably including the decision-maker, but perhaps some superior authority), be empowered to issue guidelines which state how in general the administrative discretion should be exercised. Guidelines might be prescriptive as to the range of matters the decision-maker may consider, or, in some circumstances, might leave a residual discretion to the decision-maker.

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[6] These comments do not suggest that a "catch-all" provision in the expression of the scope of a discretionary power may not be justifiable. However, where a power is apparently unlimited, the Explanatory Statement should explain why this form is adopted and, if relevant, how its apparent width is constrained by other provisions of the relevant bill. (See the responses of 9 December 2009 of the Minister for Industrial Relations, concerning the Workers Compensation Amendment Bill 2009, attached to *Scrutiny Report No. 18* of the *7th Assembly*, and of 19 February 2010 of the Minister Gaming and Racing, concerning the Racing Amendment Bill 2009, attached to *Scrutiny Report No. 19* of the *7th Assembly*.) The Assembly may then determine whether the relevant provision is acceptable.

[7] See the discussion *in Scrutiny Report No. 20* of the *7th Assembly*, concerning the Crimes (Surveillance Devices) Bill 2010.

The Committee considers that the Explanatory Statement should identify and justify any administrative power that is conferred in wide or open-ended terms.

Provisions that do not condition an exercise of power on the decision-maker having "reasonable grounds" for the existence of a state of affairs that must exist as a basis for the exercise of the power

In *Scrutiny Report No. 4* of the *7th Assembly*, concerning the First Home Owner Grant Amendment Bill 2009, the Committee said:

> From a rights perspective, the conferment of a discretion in terms that it must be exercised upon the repository of the power having "reasonable grounds" to be satisfied that certain matters exist, is preferable to a provision that allows simply that the repository be "satisfied" of those matters.
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> In *Scrutiny Report No. 34* of the *Sixth Assembly*, the Committee supported the proposal in the Health Legislation Amendment Bill 2006 (No. 2) to amend what at that time was the current subsection 100(1) of the *Public Health Act 1997* - which provided that "the Minister may … determine" certain matters in relation to a disease or medical condition – so that it would after amendment provide that the Minister could not make a determination "unless the Minister believes, on reasonable grounds, that the determination is necessary to protect public health".
>
> The Explanatory Statement to the Bill stated that "This amendment is necessary to avoid incompatibility with the *Human Rights Act 2004*". In *Scrutiny Report No. 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).
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> The Committee notes that, in *Scrutiny Report No. 3* of the *7th Assembly*, concerning the Justice and Community Safety Legislation Amendment Bill 2009, and more particularly in relation to amendments proposed to proposed sections 40A(3) and 40C(5) of the Crimes (Forensic Procedures) Act 2000, the Assembly amended the Bill in a way which agreed with the Committee's proposal that the powers of a magistrate being conditioned on he or she having "reasonable grounds" for a particular belief.

The Committee does not suggest that every discretionary power be framed in a way that conditions an exercise of power on the decision-maker having "reasonable grounds" for the existence of a state of affairs that must exist as a basis for the exercise of the power. The Committee notes that in a government response it was suggested that the insertion of a "reasonable grounds" limitation into the power was not needed where the exercise of the power did not impact on the interests of a person. On the other hand, that limitation was desirable where there was such an impact.[8]

[8] See *Scrutiny Report No. 23* of the *7th Assembly* for the response of 3 May 2010 of the Attorney-General to the Committee's comments *in Scrutiny Report No. 22* of the *7th Assembly* concerning the Crimes (Sentence Administration) Bill 2010. The text above has extrapolated this response into more general propositions.

The Committee considers that the Explanatory Statement should identify and justify any administrative power, the exercise of which might have a significant adverse impact on a person's interest, where the exercise of the power is not conditioned on the decision-maker having "reasonable grounds" for the existence of a state of affairs that must exist as a basis for the exercise of the power.

Assessment of schemes of administrative decision-making for compliance with HRA subsection 21(1)

HRA section 21(1) provides:

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

It is now clear that a provision conferring administrative power will be incompatible with HRA subsection 21(1) (and will thus need to be justified under HRA section 28) where (i) the exercise of the power is a decision on the extent of a right or of an obligation recognised by law, and (ii) the manner of this exercise is not by "a competent, independent and impartial court or tribunal after a fair and public hearing".

Concerning (i), it is probably the case (as a matter of predicting what an Territory court would find) that many kinds of decisions made by administrative decision-makers will be found to be decisions on the extent of a right or of an obligation recognised by law.[9] But prediction is very difficult, for there is very little Australian case-law. For the purposes of preparing an Explanatory Statement to facilitate scrutiny by this Committee and the Assembly, there is nothing to be lost, and much to be gained, by taking a broad view. The Committee therefore proposes that the exercise of any kind of administrative power that may affect adversely a person's interests in a significant way should be regarded as involving a decision on the extent of a right or of an obligation recognised by law.

One thing that is clear is that the application of subsection 21(1) is not restricted to cases where the statute specifies that the decision-making process surrounding the exercise of the power be by a court or tribunal, after a fair and public hearing. That approach would rob the right of any content. On the contrary, it is the fact that there is a process for decision on the extent of a right or of an obligation recognised by law that triggers the right to have this process decided by "a competent, independent and impartial court or tribunal after a fair and public hearing".

Concerning (ii), according great width to the operation of subsection 21(1) could greatly complicate the process of administrative decision-making. The courts in Europe and the United Kingdom (in decisions that have been applied by ACAT[10]) have devised an interpretation of the provision designed to accommodate the fact that at first instance a great many decisions in relation to rights and obligations are made by persons or bodies that are not courts or tribunals. Such a scheme will comply with subsection 21(1) if, in the words of the theory applied by the European Court of Human Rights, and adopted in the United Kingdom

[9] See the discussion in *Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at [57]ff. See too *Kracke v Mental Health Review Board* [2009] VCAT 646

[10] *Thomson v ACT Planning and Land Authority* [2009] ACAT 38.

House of Lords in their application of Article 6 of the European Convention on Human Rights, "the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires".[11] HRA subsection 21(1) thus limits legislative choice in the design of schemes for the exercise of administrative power and of judicial review.

In making this assessment, the courts look at:

- the nature of the power, contrasting a power the exercise of which is primarily focussed narrowly on the particular circumstances of the person affected, as against a decision of a polycentric character that takes into account a range of community interests;
- the procedures followed by the primary decision-maker, and in particular whether the person adversely affected was given an opportunity to be heard before the decision was made; and
- the scope for review of the primary administrative decision at the behest of the person affected.[12]

This theory about the reach of subsection 21(1) has been accepted as applicable to the equivalent provision in the Victorian Charter of Rights,[13] and it is now common to find this issue addressed the Statements of Compatibility that accompany Bills submitted to the Parliament of Victoria.[14]

The Victorian approach shows that an analysis in an Explanatory Statement[15] to demonstrate (as may be expected to be the usual case) that a particular scheme of administrative regulation complies with HRA subsection 21(1) need not address every element of the scheme. Rather, having described its general features, the analysis, within the framework of an assessment of "proportionality" under HRA section 28, would note those aspects of the scheme that suggest that it is "fair"; such as that persons whose rights might be affected are afforded natural justice (or procedural fairness); are entitled to be consulted; and may seek further review (and in particular judicial review. Any particular aspect of the scheme that suggests some unfairness should be addressed and explained.

The Committee considers that in relation to the exercise of any kind of administrative power that may affect adversely a person's interests in a significant way, the Explanatory Statement should address the question whether the scheme, taken as a whole, complies with HRA subsection 21(1). More particularly, any aspect of the scheme that may suggest that it is not compliant should be identified and justified in terms of the proportionality analysis required by HRA section 28.

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[11] *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113 at 129, per Clarke LJ.

[12] It has been noted above that the width of the relevant administrative power will have a bearing on the efficacy of judicial review, and thus the width of the power is a factor to be addressed in the application of the "composite approach".

[13] *Kracke v Mental Health Board* [2009] VCAT 646, addressing subsection 24(1) of the Charter.

[14] See for an example, the Statement of Compatibility for the Equal Opportunity Bill 2010, Hansard of the Legislative Assembly of the Parliament of Victoria, 10 March 2010, p 781ff.

[15] Or a Compatibility Statement, were the Victorian approach to the contents of these Statements to be adopted.

Application of these principles to the provisions of the Liquor Bill 2010

The Committee will note some aspects of the scheme that might raise an issue as to whether in a particular respect noted the scheme satisfies HRA subsection 21(1).

As a preliminary, the Committee notes that clause 10 provides that "[i] making a decision under this Act, a decision-maker must have regard to the following principles (the harm minimisation and community safety principles): … ". This provision has the beneficial effect of stating a structure within which discretion conferred on an administrative decision-maker must be exercised, and the Committee commends this technique.

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

There are several provisions in the Bill that condition the exercise of a discretion upon the holder of the power acting upon "reasonable grounds" or some equivalent basis; see for examples, subsections 32(3), 56(4), paragraph 105(6)(b)(ii), subsection 143(1), 145(1), and paragraph 149(1)(a).

There are however many provisions that do not. The Committee refers to subsections 27(2), paragraph 31(2)(b), subsections 37(1), 38(4), 39(3), 41(2), 43(2), 44(2), 51(2), paragraph 55(2)(b), subsections 57(1), 58(3), 62(2), 63(1), 63(2), 65(1), section 67, subsections 71(2), 72(2), 77(1), 90(1), 92(2), 96(2) and paragraph 98(b).

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

(b) Administrative discretions not subject to merits review by ACAT

Schedule 1 lists those decisions that are reviewable by ACAT.

First, there may be some errors in column 2. Concerning item 10, the reference should perhaps be to "90(1)", and concerning item 12, the reference should perhaps be to "96(2) and (3)".

Secondly, the Committee suggests that consideration be given to adding as items references to paragraph 31(2)(b), subsection 37(1), paragraph 55(2)(b), subsection 57(1), subsection 63(1), section 67, subsections 71(2), 72(2), 77(1), and paragraph 98(b).

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

Strict liability offences – HRA subsections 21(1) and 22(2)

The Bill would create a number of strict liability offences, each of which, as the Explanatory Statement notes, engages the right to a fair trial in HRA subsection 21(1) and the presumption of innocence in HRA subsection 22(1). The Explanatory Statement refers to the "grave risks associated with the supply of liquor", and to changing community expectations of what activities should be regulated and how. The policy objectives are said to be "harm

minimisation and community safety, both of which are demonstrably justifiable and reasonable". The basis for the imposition of strict liability is said to be that "[p]eople who elect to apply for a liquor licence or permit choose to do so and are on notice that they must abide by the laws that govern the licence". This is a very limited justification, and while the stated basis is correct, the Explanatory Statement does not address the fundamental issue of why a person should be guilty of failing to have abided by the laws that govern the licence in a case where the person did not intend to act in a way that so failed.

This particular issue might have been addressed if the Explanatory Statement had offered its justification in terms that recognise what section 28 requires. In the end, the question is whether the limitations to the HRA rights is "demonstrable justified in a free and democratic society" (subsection 28(1)), and any matter relevant to answering this question may be advanced. In addition, the justification must address the particular matters stated in HRA subsection 28(2). The matter stated in paragraph 28(2)(e) – that is, whether there are "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve" – is particularly important.

The Committee draws this matter to the attention of the Assembly and recommends that the Explanatory Statement be amended to state a justification for the imposition of strict liability offence in terms of what HRA section 28 requires.

Particularly problematic are subsections 121(1), 122(1), and 122(2), which create a strict liability offence in respect of actions taken by children. This brings into focus HRA subsection 11(2):

> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

In addition, there is a question whether a child can be said to be aware of her or his obligations while on licensed premises so that it may be said that these are regulatory offences.

The Committee draws this matter to the attention of the Assembly and recommends that the section 28 justification address theses issues.

The right to property (or to peaceful enjoyment of possessions)

<u>Emergency closure of premises for 24 hours</u>

Subclause 145(1) provides:

> (1) A senior police officer may order (an ***emergency closure order***) a licensee, or permit-holder, to close licensed premises, or permitted premises, if the officer believes on reasonable grounds that—
>
> (a) a breach of this Act has happened, or is likely to happen; and
>
> (b) the closure of the premises is necessary to prevent or reduce a significant threat or significant risk to the safety of the community.

The exercise of this power, even taking into account that the order "must not require the closure of premises for longer than a continuous period of 24 hours" (subclause 145(3)) could have a significant effect on the business of the licensee or permit-holder. There is thus raised the issue of whether the Bill is an undue trespass on the right to property (or to peaceful enjoyment of possessions as stated in some human rights instruments[16]). The right is stated in Article 17(1) of the Universal Declaration of Rights: "(1) Everyone has the right to own property alone as well as in association with others". It is accepted that consistent with this right, a legislature may regulate the exercise of this right, and the question is whether there is, in terms of Article 17(2), of the Universal Declaration of Rights, an arbitrary deprivation of property. In making this assessment, the public interests in depriving or restricting the right are relevant.

The Committee notes that the discretion is restricted, and the restriction would assist any attempt to seek an injunction.

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

Detention of a child to whom a caution is given by a police officer - the right to liberty – HRA section 18 and the rights of a child – HRA subsection 11(2)

Division 9.3 of the Bill provides for police cautions for children and young people. Where a police officer intends to administer a caution, he or she must "take the child or young person to a police station" (paragraph 150(1)(a)), and issue the caution within a reasonable time thereafter. Once the caution is administered, the child must be released in one of three ways.

The purpose of this scheme is beneficial, in that "a child or young person …. cautioned for an offence … must not be prosecuted in a court for the offence" (subclause 149(4)).

Nevertheless, this is an instance of police detention without there being any kind of adjudication of guilt for an offence, and the fact that the detainee will be a child makes the issue of HRA compliance more acute.[17] The situation calls for a justification in terms of HRA section 28, and in particular of whether there are "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve" (paragraph 28(2)(e)).

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

The power of an authorised person to enter premises - HRA paragraph 12(a) - the right to privacy

Subclause 153(1) of the Bill states circumstances in which an authorised person may enter premises, and these embrace entry with and without a search warrant. From a rights perspective, the problematic circumstance is the power without warrant to enter—

[16] See Protocol 1 to the *European Convention on Human Rights*.

[17] Rights issues concerning detention powers are discussed below with reference to the Road Transport (Drink Driving) Legislation Amendment Bill 2010.

(f) at any time, enter premises if the authorised person believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary.

In terms of HRA paragraph 12(a), the issue is whether this limitation of privacy is "arbitrary", and this requires an analysis similar to that undertaken under section 28. The Senate Scrutiny of Bills Committee takes the view that:

> circumstances may arise which may make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer.[18]

There is no provision in the Bill for judicial review of an exercise of the power in clause 153, but a provision such as paragraph 153(1)(f) is commonly found in Territory laws. The matter calls for some justification.

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

ROAD TRANSPORT (DRINK DRIVING) LEGISLATION AMENDMENT BILL 2010

This Bill would amend the *Road Transport (Alcohol and Drugs) Act 1977* ("the Act") and other Territory laws with the intention of improving ACT road safety outcomes in relation to drink driving, and, among other matters: apply the zero alcohol concentration to a wider range of people than currently; amend the definition of "repeat offender"; and introduce a requirement that a police officer suspend a person's licence as soon as the person is caught exceeding the prescribed concentration of alcohol applying to that person by 0.05g or more.

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

In the respect that it explains the reason for a proposed clause, and of how a clause will operate, Explanatory Statement is of a high quality. But two general points must be made. First, while the thematic approach has its virtues, it might lead to significant aspects of a particular clause being overlooked. For example, clause 11 (substituting a revised section 11 into the Act) permits detention without trial and weakens the protections in the replaced version, but the only references in the Explanatory Statement (see pp 3 and 4) to the clause are extremely brief and do not mention the aspects just mentioned.

Secondly, while the Bill is accompanied by a one-line statement by the Attorney-General that he is of the opinion that the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*, at no point does the Explanatory Statement identify any clause that appears to limit an HRA right and require justification under HRA section 28. In the Committee's view, there are several such clauses.

[18] Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and search provisions in Commonwealth legislation* 6 April 2000, at 50.

While analysis of some of the apparent limitations would leave little doubt that the limitation is justifiable under section 28, it is nevertheless important that even in these cases the Explanatory Statement should identify and justify. Where that justification is self-evident, it can be stated at a high level of generality. Otherwise, the basic principle to govern what is about the needed in order to show "demonstrable justification" of a human rights infringement is that stated by Dickson CJ in *Oakes* [1986] 1 SCR 103 at 138:

> Where evidence is required in order to prove the constituent elements of a [HRA section 28] enquiry, *and this will generally be the case*, it should be cogent and persuasive and made clear to the Court the consequences of imposing or not imposing the limit ... A Court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions (emphasis added).[19]

The Committee's previous comments in *Scrutiny Report No. 23* of the *7th Assembly* [20] on the value of an analysis of a bill in terms of the HRA right bear repeating:

> The Human Rights Act is often promoted as embodying a "dialogue model", and the first stage of dialogue should occur between the promoter of a bill and the Assembly. The point of section 38, which requires this Committee to report to the Assembly "about human rights issues raised by" a bill, is to ensure that when a bill is debated the Assembly appreciates that a provision of the bill impinges on a right protected by the Act. Given that section 37, which requires the Attorney-General to prepare and present a written "compatibility" statement to the Assembly, has been (with very few exceptions) understood to be satisfied by a single line statement of compatibility with the Act,[21] the Explanatory Statement must be the vehicle for a Minister to identify the rights issues that are raised by a bill, and to explain either why it is considered that any relevant provision does not derogate from a right, or, if it does, why that derogation is compatible with HRA section 28. The first stage in the dialogue is then the Explanatory Statement. The next stage is the Committee report, followed by debate in the Assembly.[22]

Clauses which limit an HRA right but which appear on their face to be justifiable under HRA section 28

The right to equality before the law (HRA subsection 8(3)) is limited by provisions that for various purposes differentiate between categories of drivers by reference to matters such as age, and as to whether they assess the skill of other drivers. The Explanatory Statement justifies (albeit very briefly) this differential treatment.

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[19] Quoted in *R v Momcilovic* [2010] VSCA 50 [143], which in turn is quoted and more fully discussed in *Scrutiny Report No. 24* of the *7th Assembly*, in relation to the Territory-Owned Corporations Amendment Bill 2010.

[20] In the section "Comments on Government response – Crimes (Sentence Administration) Bill 2010".

[21] Where the Attorney considers that a provision in a bill is not compatible, the obligation to explain why this is so will require more than a single line statement. The Attorney's obligations extend only to bills presented by a Minister.

[22] The Explanatory Statement also plays a role in the promotion of dialogue, at this pre-enactment stage, between the promoter of the bill and the public. It also serves to promote knowledge of the rights stated in the Act.

The right to privacy (HRA paragraph 12(a)) is limited by various provisions, such as those that require a person to provide date of birth and other personal information, and by the provisions concerning the taking and analysis of blood samples. It appears to be now well-accepted that the public interests underlying such provisions in this context justify the limitation.

The presumption of innocence (HRA subsection 22(1)) is limited by provisions that cast an evidential burden on a defendant to prove a matter of defence, or to rebut a presumption that a fact exists (such as where there is an evidentiary certificate or the like). While not all such provisions are obviously justifiable, the Committee's review does not suggest any difficulty so far as concerns this Bill.

The report will now turn to those clauses which limit an HRA right and in respect of which justification justifiable under HRA section 28 is more problematic.

The right to liberty – HRA section 18

Detention of a person by a police officer for breath analysis

Proposed section 11 of the Act (see clause 11) would read:

11 Detention for breath analysis

(1) This section applies if—

(a) a person undergoes a screening test under a requirement made by a police officer under section 8, section 9 or section 10 and the screening device used for the test indicates that the concentration of alcohol in the person's blood or breath is the prescribed concentration; or

(b) a person required by a police officer to undergo a screening test under section 8, section 9 or section 10 fails or refuses to undergo the test in accordance with the directions of the police officer.

(2) The police officer may take the person into custody.

(3) If the police officer has reasonable cause to suspect that the person is a special driver, the police officer may take the person into custody if the concentration of alcohol in the person's blood or breath is the prescribed concentration for a special driver.

(4) If a person is taken into custody under this section, a police officer must take the person, as soon as practicable, to a police station or other convenient place (for example, a police vehicle) for the person to undergo breath analysis.[23]

This clause enlivens HRA section 18, which in part provides:

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

[23] The Committee is aware that the current section 11, which is closely similar to this proposal, was part of the *Motor Traffic Alcohol and Drugs) Ordinance 1977*. That law was of course never reviewed by predecessors of this Committee, and, in any event, the Committee is obliged to report on any provision of a bill, irrespective of whether it is a re-enactment of an earlier version of the provision.

(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

There are two aspects of proposed section 11 to be noted.

First, there is the issue of whether the provision is entirely incompatible with HRA section 18. General aspects of section 18 have been analysed in earlier Committee reports.[24] In most such cases, argument that a detention is justified will focus on the notion of "arbitrary" in subsection 18(1), and possibly on the additional requirement in subsection 18(2). In other words, there is no need to take section 28 into account directly. On the other hand, the same kind of analysis as takes place where section 28 is relevant will occur as a result of the focus on the notion of "arbitrary" in subsection 18(1).

As the Committee pointed out in *Scrutiny Report No. 25* of the *6th Assembly*, some might argue that a provision such as proposed section 11 is necessarily an "arbitrary" deprivation of the right to liberty (and thus incompatible with HRA subsection 18(1)) simply upon the principle that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". (Some exceptional cases might be allowed).

There is some judicial support in High Court authority for the principle just stated. But other High Court judges do not preclude the validity of detention otherwise than as a result of an adjudication by a court, and outside the accepted "exceptional cases", either by an exercise of judicial power, or by executive power.[25]

On this second view, close attention must be paid to the circumstances in which the power to detain may be exercised, and the nature of the protections afforded to the person placed in detention, (in particular whether there is scope for a quick and inexpensive form of review of the decision available to the person detained).

Secondly, there is the issue arising out of the use of the word "suspect" in proposed subsection 11(3) (in contrast to the word "believe" which is employed in the current section 11). In *Scrutiny Report No. 20* of the *7th Assembly* concerning the Crimes (Surveillance Devices) Bill 2010, the Committee noted that "a requirement that a person "suspect" something is a less rigorous requirement that they "believe" that thing", and discussed the issue extensively. It concluded that the 'suspicion' standard may be justified in the particular circumstances, but that a justification must be provided for this lower standard.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister provide a section 28 justification for this detention power.

[24] *See Scrutiny Report No. 34* of the *6th Assembly*, concerning the Health Legislation Amendment Bill 2006 (No. 2)*, Scrutiny Report No. 14* of the *6th Assembly* concerning the Litter Amendment Bill, and *Scrutiny Report No. 25* of the *6th Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006.

[25] See *Scrutiny Report No. 25 of the 6th Assembly*.

The right to a fair trial – HRA subsection 21(1)

The power of a police officer to issue an immediate licence suspension notice to a person for a drink driving offence

The Explanatory Statement explains the key provision in this scheme, being proposed section 61B of the Act (see clause 101):

> Subsection 61B (1) requires a police officer who believes on reasonable grounds that a person has committed an immediate suspension offence to give the person an immediate suspension notice for the offence. … The notice must contain the details set out in subsection 61B (2), … . Subsection 61B (3) provides that a suspension notice has effect when it is served on the person. … Subsection 61B (4) sets out the consequences of being served with a suspension notice. These consequences are that a person's driver licence is suspended; the person must surrender the licence to a police officer at the time, or if that is not possible, do so as soon as practicable; the person must not drive in the ACT; and the person cannot apply for or be granted a restricted licence during the suspension period.
>
> Section 61B (5) explains that a suspension notice ceases to have effect when any of the following things happen:
>
> - the notice is stayed by order of the Magistrate's Court;
> - the proceeding for the relevant suspension offence is withdrawn or discontinued;
> - the offence is dealt with by a court.
>
> It should be noted that the power to issue a suspension notice is not discretionary: the language in section 61B (1) directs a police office to issue the notice once the officer has formed a reasonable belief as to the existence of certain facts.

Having regard to subsection 61B(4), this action by a police officer involves a number of decisions about a person's rights and obligations, and on the face of it section 61B is limitation on the right to a fair trial HRA subsection 21(1).[26] (The Explanatory Statement notes that "[t]he power to issue a suspension notice is an administrative sanction, in that it does not depend upon a judicial determination of guilt". This points directly to the problem.) This limitation needs to be justified under HRA section 28.

The Explanatory Statement does provide an extensive justification, but not by reference to section 28. In particular, it does not address the issue of whether there are "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve" (paragraph 28(2)(e)). One particular matter is whether the person affected could seek a quicker, less expensive and more extensive form of review than the procedure of application to the Magistrates Court for a stay of operation of the suspension; see proposed 61F.

[26] The Committee notes that, in some circumstances, deprivation of a licence to drive will impact directly on the ability of a person to practice a trade or profession and the like, and may thus engage the right to property.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister provide a section 28 justification for this detention power.

The right to liberty and security – HRA subsection 18(1)

The misleading nature of a provision that purports to state that a provision of an Act, or a piece of subordinate law, operates or has effect despite anything else in another Territory law

Proposed subsection 109(2) of the Act (see clause 58) would confer on the Executive a power to make regulations on a topic and is designed to permit the Executive to respond to unforseen contingences that arise in the transition from the current scheme of the Act to that which will operate if this Bill is passed.[27] Subsection 109(3) then provides:

> A regulation under subsection (2) has effect despite anything else in this Act or another territory law.

This clause does not mean what it appears to say, for, as has been accepted in a recent Minister's response to a Committee report, "such a provision does not restrain the power of the Legislative Assembly to make laws. [Such a] provision can be amended or repealed by the Assembly at any like any [other] piece of legislation. The Assembly could even make another law that overrides the effect of this law if necessary".[28]

The Committee's objection to a provision such as proposed subsection 109(3) is that it is misleading. It recommends that if it is to be included in a bill, a Note be inserted stating the points made by the Minister that were just quoted.

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

SECURITY INDUSTRY AMENDMENT BILL 2010

This Bill would amend the *Security Industry Act 2003* and the *Security Industry Regulation* to expand the current suitability criteria and pre-requisites for applicants for an employee licence to work in the security industry.

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

Right to privacy – HRA paragraph 12(a)

Obligation on applicant for an employee position in the security industry to obtain information from an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cwlth)

[27] Subsection 109(2) would permit a regulation to modify proposed part 21 of the Act, but this limited form of an Henry VIII clause is not objectionable.

[28] See *Scrutiny Report No. 23* of the *7th Assembly* for the response of the Minister dated 3 May 2010 to the Committee's comments on the Emergencies Amendment Bill 2010 in *Scrutiny Report No. 22* of the *7th Assembly*.

Section 21 of the Act states suitability criteria and pre-requisites for applicants for an employee licence to work in the security industry. By clause 4 of the Bill there would be added a requirement that:

> (iia) for an application for an employee licence to do 1 or more of the things mentioned in section 13 (1) (a), (b) or (d) - an employee organisation has given the applicant the information prescribed by regulation in relation to workplace rights and responsibilities (workplace information); … .

By clause 8, "employee organisation means an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cwlth)".

As the Explanatory Statement explains, "[a]pplicants for an employee licence (to patrol, guard, watch or protect property; act as a bodyguard and act as a crowd controller) will be required to obtain information about their workplace rights and responsibilities from representatives of a registered organisation, before they can be issued with a licence".

On the face of it, this scheme enlivens the right to privacy in HRA paragraph 12(a), which provides that "Everyone has the right not to have his or her privacy ... interfered with unlawfully or arbitrarily". The notion of "privacy" has been given a very extensive definition. In the words of a recent Statement of Compatibility provided to the Parliament of Victoria:

> Privacy encapsulates concepts of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty - a 'private sphere' free from government intervention and from excessive unsolicited intervention by other individuals. Privacy comprises bodily, territorial, communications and information privacy.

This right is enlivened in that a prospective employee is required to engage with representatives of a registered organisation, and by amendment of the *Security Industry Regulation*, to obtain "a certificate from an employee organisation stating that the applicant has been given workplace information at an information session provided by the organisation".

The issue then is whether this interference is "arbitrary". For present purposes, this answer to this question may be taken to involve the same sort of analysis that is undertaken where the proponent of a bill seeks to justify, in terms of HRA section 28, a limitation in the bill to a right stated in the HRA.

The Explanatory Statement does not mention the Human Rights Act, but does offer some justifications; see the "Overview" and the comments to clause 4. These comments do not address the requirements of HRA section 28, and, in particular, do not comment on whether there are "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve".

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

VICTIMS OF CRIME AMENDMENT BILL 2010

This Bill would amend the *Victims of Crime Act 1994* to insert an objectives clause; rename the Victims of Crime Coordinator as the Victims of Crime Commissioner and clarify the Commissioner's statutory role and functions, in particular in regard to the Commissioner to request information from an agency; remove the complaints and investigation role from the Victims of Crime Coordinator; and establish the Victims Advisory Board.

The right to a fair trial – HRA subsection 21(1)

Prohibition on the disclosure of evidence to a court

Proposed subsection 29(4) of the Act (see clause 14) raises a rights issue which has been addressed in several previous reports.

It would provide:

> (4) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another territory law.

(By proposed subsection 29(5), "protected information means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else".)

The critical issue is: does proposed subsection 29(4) conflict with the principle that in a trial all relevant evidence is admissible – which principle may be seen as a component of the right to a fair trial stated in HRA subsection 21(1) - and, if it does so conflict, is proposed subsection 29(4) nevertheless justifiable under HRA section 28, at least in part on the basis that it enhances the right to privacy stated in HRA section 12?

Subsection 21(1) states:

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

The issue arises this way. The ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent, is an element of a fair trial. This is reflected in the common law rule that the starting point for the admission of evidence is that any relevant evidence is admissible.[29] The rule is restated in sections 55 and 56 of the *Evidence Act 1995* (Cwlth), which applies in Territory judicial proceedings. The rule may be argued to be a component of a "fair" hearing within subsection 21(1).

[29] See the discussion in *Scrutiny Report No. 26* of the *6th Assembly,* concerning the Revenue Legislation Amendment Bill 2006.

The provisions of the *Evidence Act 1995* do not however apply where there is an inconsistent Territory law, and subclause 29(4) appears to be inconsistent. This is because this Act does not fall within the words "unless it is necessary to do so for this Act or another territory law" in that clause. The concept of "territory law" embraces an Act of the Legislative Assembly, but not an Act of the Commonwealth Parliament; (see section 7 of the Legislation Act, and the definition of "law, of the Territory" in Schedule 1).

Thus, if in a judicial proceeding a party sought to adduce evidence of "protected information", and supposing this information was relevant to proof or disproof of issues arising in the particular litigation, and the production of that information could not be said to be necessary for the Victims of Crime Act, or another territory law, the information could not be adduced by reason of the prohibition in subclause 501(5).

It is strongly arguable that this result engages the right to a fair trial in HRA subsection 21(1) and is indeed inconsistent with it.

That is not the end of the matter, for it might be argued that this restriction on subsection 21(1) was justifiable under HRA section 28.[30] The need to balance the right to a fair trial in against the right to privacy in paragraph 12(a) is obviously an element in this justification. (HRA paragraph 12(a) states that states: "Everyone has the right—(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily … ".)

The Committee made an identical comment to the above in *Scrutiny Report No. 7* of the *7th Assembly*, concerning the Road Transport (Mass, Dimensions and Loadings) Bill 2009, and the Minister responded by letter of 18 June 2009.[31] This response appears to concede that sections 55 and 56 of the *Evidence Act 1995* are displaced by a provision such as proposed subsection 29(4). The response points only to more limited ways in which a law of the Territory may be a basis for a party to adduce "protected information" to a court. The first is under a subordinate law (Part 2.8 of the *Court Procedure Rules 2006*, concerning information that is divulged in civil discovery), and the second is under a common law rule (the duty of the prosecution to divulge information to the defence).

The Committee notes that this response only partially meets the point that the right to a fair trial is limited where a party cannot adduce evidence – gained from any source – that is relevant to that party presenting their own case, or meeting the case of an opponent. Moreover, that there some procedures for adducing evidence of "protected information" to a court raises the question of why there should be any limitations. It could not be said that "protected information" that is discovered by an opponent in civil litigation, or disclosed by the prosecution in a criminal matter, is less likely to be deserving of less protection than "protected information" that could be adduced in some other way.

There is no reference to these issues in the Explanatory Statement.

[30] The kinds of argument that might be put in justification are reviewed in *Scrutiny Report No. 26* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006.
[31] See *Scrutiny Report No. 8* of the *7th Assembly*.

The Committee should add that the rights issue could be avoided were the exception in subclause 501(1) to read "unless it is necessary to do so for this Act, another territory law or another law applying in the territory". For an example of where this approach is taken in an analogous context, see subsection 129(5) of the *Health Professionals Act 2004*.

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

Right to equality before the law – HRA subsection 8(3)

HRA section 8(3) provides that "(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination."

Proposed Part 4A of the Act (clause 13) provides for the creation of a Victims Advisory Board, and provides that the Minister must appoint "1 person who, in the Minister's opinion, represents the interests of indigenous communities" (paragraph 22D(1)(c)).

This provision enlivens the right in HRA subsection 8(3), and there needs be an explanation of why either (i) this right is not limited, or, (ii) if it, how that limitation is justified under HRA section 28.

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

Matter for explanation in the Explanatory Statement

In relation to proposed new section 12 of the Act (clause 10), Explanatory Statement states in part:

> Section 12(1) and (2) provides a facilitative function for the Victims of Crime Commissioner to try to resolve a concern raised by a victim about an agency involved in the administration of justice, in circumstances where the Commissioner considers that the agency has not complied with the governing principles. … the Commissioner will be able to request that an agency provide any document or information reasonably required by the Commissioner to resolve such a concern.

The agency is required to provide any information to the commissioner that it "***could*** provide to the victim" (subsection 12(2), emphasis added).

The proposed definition of "victim" (see proposed new section 6 of the Act (clause 9) is very wide. For example, it would encompass a person who witnessed an offence, and thereby suffered harm in the form of "emotional suffering", and such a person could raise a concern with the Commissioner.

There are some points upon which the Assembly might be assisted by further explanation.

First, what is an "agency" for the purposes of proposed section 12? The Committee assumes that this term will cover the police and the Director of Public Prosecutions. Is this correct?

Secondly, does the use of the word "could" subsection 12(2) mean that an agency is obliged to disclose information to the commissioner where it could as a matter of law do so? This appears to be its natural meaning, and on this basis would cover a range of information that has a direct bearing on the progress of an investigation into whether an offence has been committed and by whom.

Thirdly, the commissioner having been given information by an agency, are there any limitations on that officer's ability to give that information to the victim who raised the concern as mentioned in proposed subsection 12(1)?

Fourthly, the Committee queries whether subsection 12(5) is necessary, given that by subsection 12(3), a victim need not raise a matter with the Commissioner before making a formal complaint to a complaints entity. (Perhaps the Committee has misunderstood the point of subsection 12(3), and it notes that it is not mentioned in the Explanatory Statement.

PROPOSED GOVERNMENT AMENDMENTS—LITTER (SHOPPING TROLLEYS) AMENDMENT BILL 2010

Proposed government amendments to the Litter (Shopping Trolleys) Amendment Bill 2010 (proposed by Ms Caroline Le Couteur)

On 2 August, the Chief Minister provided to the Chair of the Committee a set of amendments (*version J2010-361 DO9*) which the Government proposes to move to the Litter (Shopping Trolleys) Amendment Bill 2010. These amendments would make substantial changes to the scheme of the Bill and, to assist the Assembly, the Committee will outline the two schemes, and offer very brief comments on matters that call for comment according to the Committee's terms of reference.

(References to a section or a part of a section refer to the provision as it would appear in the amended Litter Act.)

The scheme of the Litter (Shopping Trolleys) Amendment Bill 2010

1. The Bill would create a strict liability offence (maximum penalty 10 penalty points) where a person leaves a shopping trolley in a public place (subsections 24D(1) and (2)), qualified by a defence (in respect of which the defendant would bear an evidential burden), where the person had been given a written direction under section 24E by an authorised person or police officer to return the shopping trolley to the retailer's address identified on the trolley, and had complied with that direction.

The authorised person or police officer *must* give the person a written direction if the former believes on reasonable grounds that the person has left or intends to leave a shopping trolley in a public place (section 24E).

The Committee notes the Explanatory Statement identified that the Bill would create strict liability offences. The Committee did not raise this as an issue given that the offences are of a regulatory nature and the maximum penalty is low.

It was also considered that the imposition of an evidential burden in respect of the defence (and this comment applies to other such provisions) was a limitation of the presumption of innocence that was justifiable.

2. By section 24F, the bill would create a strict liability offence (maximum penalty 10 penalty points) where a retailer fails to display specified information (including the address at which the retailer keeps the trolley) on a shopping trolley, qualified by a defence (in respect of which the defendant would bear an evidential burden), where the information is "(a) removed from the shopping trolley by a person other than the retailer; or (b) made illegible by a person other than the retailer".

3. Section 24G would provide for the removal (by an authorised person or a police officer) of a shopping trolley that has been left in a public place to a "retention area", in circumstances where the retailer has been given a "removal notice" (the contents of which are specified in section 24H), and the trolley was not removed from the removal notice location within 24 hours after the time the notice was given. In the circumstances defined in subsection 24G(4), a removal notice need not be given.

4. By subsection 24H(5), the bill would create a strict liability offence (maximum penalty 10 penalty points) where a retailer fails to comply with a removal notice, qualified by a defence (in respect of which the defendant would bear an evidential burden) where the person is a "small retailer", or the retailer "operates a trolley containment system at the premises where the trolley identified in a removal notice came from" (subsection 24I).

By subsection 24I(2), a "small retailer" means 'a retailer prescribed by regulation".

Subsection 24I(2) delegates to the executive the legislative power in respect of what might be considered to be a significant matter, and there thus arises the question whether this is an inappropriate delegation of legislative power.

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

5. Upon the removal of a shopping trolley to a detention area, the chief executive "must give written notice (a collection notice) that the shopping trolley is in the retention area to the retailer identified on the trolley", (subsection 24J(2)). Subsection 24J(3) states the detail to be specified in this notice, including the address of the retention area where the trolley may be collected, and any costs the retailer must pay before the trolley may be collected. (Costs for removing the trolley to a retention area are reasonable costs that can be claimed under the *Uncollected Goods Act 1996*.)

6. Section 24K governs the disposal of a retained shopping trolley. An essential point is that the trolley may be disposed of under the *Uncollected Goods Act 1996*, part 3, if the trolley is not collected within 7 days after the day the notice is given to the retailer.

The scheme proposed in the government amendments (version J2010-361 DO9)

1. By section 24D, an authorised person or a police officer may give a person a written direction to return a shopping trolley to the retailer's premises identified on the trolley where the former

believes on reasonable grounds that—

(a) a person—

(i) has taken a retailer's shopping trolley from the retailer's shopping centre precinct; or

(ii) is using a retailer's shopping trolley in a place outside the retailer's shopping centre precinct; or

(iii) has left a retailer's shopping trolley at a place outside the retailer's shopping centre precinct subsection 24D(1)).

A person who fails to comply with the direction (within the "reasonable time" specified in the notice) commits a strict liability offence (maximum penalty 10 penalty points).

The Committee notes that the proposed amendments would create strict liability offences, but does not raise any issue concerning them given that they are of a regulatory nature and the maximum penalty is low.

The Committee also considers that while some offences are qualified by a defence in respect of which the defendant would carry an evidential burden, these limitations of the presumption of innocence are justifiable.

The Committee notes however that sometimes the relevant provision draws attention to the fact that the burden is evidential, and at other times it does not. There is the possibility that a reader will be confused as to the legal position by the absence of a reference where it would be applicable.

The Committee recommends that the Minister respond to this last point.

This operation of this offence is qualified by subsection 24D(5):

(5) The authorised person or police officer must not give the person a written direction under subsection (2) if it is harsh or unreasonable in the circumstances to do so.

Subsection 24D(5) raises an issue for comment. While in respect of any conduct that constitutes a criminal offence the police may choose not to prosecute, a person charged with an offence cannot (except perhaps in very limited circumstances) object to being prosecuted on the ground that the police should have chosen not to prosecute. Where however a person is charged with an offence under subsection 24D(3), it appears that he or she may argue that the particular direction in question is invalid on the basis that it was "harsh or unreasonable in the circumstances" for the authorised person or police officer to have given the direction. Then, if the court finds the direction invalid, there is no basis for the prosecution.

The Committee calls for the Minister to clarify whether this result could occur, and more generally, the object of subsection 24D(5).

2. By section 24E, a retailer must place prominently at or near the customer exits in the retailer's premises a notice that "can be seen and read easily by a person leaving the retailer's premises", which warns people about the fines that are applicable under the Litter Act, "describes the retailer's shopping centre precinct", and "contains anything else prescribed by regulation". Failure to comply is a strict liability offence (maximum penalty 10 penalty points).

3. Section 24F states rules about how ownership of a shopping trolley is to be identified by the retailer on the trolley. Failure to comply is a strict liability offence (maximum penalty 10 penalty points), qualified by a defence (in respect of which the defendant would bear an evidential burden) if the information is "(a) removed from the shopping trolley by a person other than the retailer; or (b) made illegible by a person other than the retailer".

4. By section 24FA, a retailer commits an offence if the retailer fails to keep a shopping trolley, identified as belonging to the retailer under section 24F(1), within the retailer's shopping centre precinct, qualified by a defence (in respect of which the defendant would bear an evidential burden), if the retailer:

(a) operates and maintains a trolley containment system at the retailer's premises where the shopping trolley came from and the containment system applied to the trolley; or

(b) took all reasonable measures to ensure that the trolley was kept within the retailer's shopping centre precinct;

(c) is prescribed by regulation (subsection 24FA(3)).

Where a regulation prescribes a particular retailer (or a class thereof), the person(s) prescribed cannot commit an offence under section 24FA. There are no criteria stated to limit or guide the exercise of this power. This a wide dispensing power, and there is thus raised the question whether there is an inappropriate delegation of legislative power in that the Executive may, by way of a regulation, dispense with the operation of the Act in favour of specified retailers. This issue was addressed in *Scrutiny Report No 7* of the *7th Assembly*, concerning the Road Transport (Mass, Dimensions and Loading) Bill 2009, where the Committee noted the long-standing constitutional objection to such provisions. The Committee notes that the Assembly may disallow the regulation, but also that disallowance only takes effect from the date of the resolution of disallowance, and will not affect the legal situation between the date of the regulation and the date of the resolution.

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

5. Section 24FB would establish a scheme whereby the chief executive may give a retailer a notice (*a collection day notice*) of the chief executive's intention to remove shopping trolleys left in places outside a shopping centre precinct. (Subsection 24FB(2) specifies what a notice must contain.)

In many (if not all) cases where a trolley is left in a place outside a shopping centre precinct, the retailer will have committed the offence under section 24FA of having failed to keep the trolley within the relevant precinct. The point of section 24FB may be to give the retailer an opportunity of at least 2 days duration to avoid prosecution under section 24FA.

The Committee recommends that the Minister clarify the purpose of section 24FB.

6. Section 24FC provides for notice to a retailer to remove, within 24 hours, an individual shopping trolley, where the latter is found in a place outside the retailer's shopping centre precinct by an authorised person or police officer, *other than* in circumstances where the retailer identified on the shopping trolley had been given a collection day notice and the trolley is found on a collection day in a collection area.

The removal notice must (among other matters) state that if the trolley is not removed within 24 hours, "it is an offence against section 24FA".

It is not clear to the Committee how section 24FC operates in conjunction with the offence under section 24FA of having failed to keep the trolley within the relevant precinct. It is noted that an an authorised person or a police officer has discretion to give (or not) the retailer a removal notice (subsection 24FC(3)). Does this mean that a retailer could be prosecuted under section 24FA in circumstances where the retailer had not been given a notice? Perhaps another way to frame the question is to ask whether a retailer who has breached the section 24FA will always have an opportunity to avoid prosecution by complying within 24 hours with a removal notice? Paragraph 24FC(4)(c)(ii) appears to suggest that this is what is intended.

The Committee recommends that the Minister clarify the purpose of section 24FC and how it will operate in conjunction with the offence provision in section 24FA.

7. By subsection 24G(2), a "trolley collector" or "an authorised person"

> may remove a shopping trolley found outside a shopping centre precinct to a retention area if the retailer identified on the trolley has been given—
>
> (a) [under section 24FB] a collection day notice and the trolley is found on a collection day in a collection area; or
>
> (b) [under section 24FC] a removal notice in relation to the trolley and the trolley has not been removed from the removal notice location within 24 hours after the time the notice was given.

However, by subsection 24G(4),

> an authorised person or a police officer may remove a shopping trolley to a retention area without a notice under section 24FB or section 24FC having been given if the authorised person or a police officer believes on reasonable grounds that—
>
> (a) the trolley may cause injury to a person or animal or damage to property or a public place if it is not removed; or
>
> (b) it is impractical for the retailer to remove the trolley.

There are some matters for clarification: (i) what range of persons may be authorised to be a "trolley collector"?; (ii) what range of persons may be appointed to be "an authorised person"?; and (iii) is it intended that removal under subsection 24G(4) cannot be by a trolley collector?

The Committee recommends that the Minister clarify these matters.

8. Section 24J states rules to apply if a shopping trolley is removed to a retention area. With some minor changes, these rules are the same as in section 24J of Ms Le Couteur's Bill.

9. Section 24K states rules to govern the disposal of retained trolleys. With some minor changes, these rules are the same as in section 24J of Ms Le Couteur's Bill. Section 24KA states some additional rules concerning recovery of the cost of disposal etc of a shopping trolley.

SUBORDINATE LEGISLATION

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

Disallowable Instruments—No comment

Disallowable Instrument DI2010-46 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2010 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2009-164 and determines specified venues to be approved bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2010-102 being the Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 2) made under section 8 of the *Exhibition Park Corporation Act 1976* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as chair of the governing board of the Exhibition Park Corporation.**

Disallowable Instrument DI2010-103 being the Planning and Development (Change of Use Charge on Disused Service Station Sites) Policy Direction 2010 (No. 1) made under section 177 of the *Planning and Development Regulation 2008* **revokes DI2009-140 and sets out a policy direction for determining when the Planning and Land Authority must remit 100% of the change of use charge paid for a lease variation in relation to the redevelopment of disused service station sites.**

Disallowable Instrument DI2010-104 being the Casino Control (Fees) Determination 2010 (No. 1) made under section 143 of the *Casino Control Act 2006* **revokes DI2009-94 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2010-105 being the Gaming Machine (Fees) Determination 2010 (No. 1) made under section 177 of the *Gaming Machine Act 2004* **revokes DI2009-95 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2010-106 being the Race and Sports Bookmaking (Fees) Determination 2010 (No. 1) made under section 97 of the *Race and Sports Bookmaking Act 2001* **revokes DI2009-96 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2010-108 being the Utilities (Consumer Protection Code) Determination 2010 made under sections 59 and 63 of the *Utilities Act 2000* **revokes DI2009-75 and determines the Consumer Protection Code.**

Disallowable Instrument DI2010-134 being the Government Agencies (Campaign Advertising) Guidelines 2010 (No. 1) made under section 17 of the *Government Agencies (Campaign Advertising) Act 2009* **determines the guidelines for the use of public funds for ACT Government advertising and promotion.**

Subordinate Laws—No comment

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

Subordinate Law SL2010-19 being the Firearms Amendment Regulation 2010 (No. 1) made under the *Firearms Act 1996* **inserts a description of a specified firearm.**

Subordinate Law SL2010-20 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No. 4) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **removes references to "enrolled nurse (medications)" in the ACT statute book.**

Subordinate Law SL2010-21 being the Building Legislation Amendment Regulation 2010 (No. 2) made under the *Building Act 2004* **and** *Water and Sewerage Act 2000* **makes minor technical amendments to the Building (General) Regulation 2008 and the Water and Sewerage Regulation 2001 to clarify intent.**

Subordinate Law SL2010-22 being the Planning and Development Amendment Regulation 2010 (No. 4) made under the *Planning and Development Act 2007* **determines the discharge amount in relation to both a dealing with a rural lease and a dealing with a defined rural lease.**

HEALTH PRACTITIONER REGULATION NATIONAL LAW REGULATION

On 1 July 2010, Ms Gallagher tabled in the Legislative Assembly the *Health Practitioner Regulation National Law Regulation* (**Regulation**). As the document tabled by Ms Gallagher noted, the Regulation was made under section 245 of the Health Practitioner Regulation National Law "as applied by the law for States and Territories".

For the ACT, section 6 of the *Health Practitioner Regulation National Law (ACT) Act 2010* provides:

> **6 Application of Health Practitioner Regulation National Law**
>
> The Health Practitioner Regulation National Law, as in force from time to time, set out in the schedule to the Qld Act—
>
> (a) applies as a territory law, as modified by schedule 1; and
>
> (b) as so applying may be referred to as the *Health Practitioner Regulation National Law (ACT)*; and
>
> (c) so applies as if it were a part of this Act.
>
> *Note* The Qld Act is accessible at www.legislation.qld.gov.au

Section 245 of the Health Practitioner Regulation National Law provides:

> **245 National regulations**
>
> (1) The Ministerial Council may make regulations for the purposes of this Law.
>
> (2) The regulations may provide for any matter that is necessary or convenient to be prescribed for carrying out or giving effect to this Law.

(3) The regulations are to be published by the Victorian Government Printer in accordance with the arrangements for the publication of the making of regulations in Victoria.

(4) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

(5) In this section—

Victorian Government Printer means the person appointed to be the Government Printer for Victoria under section 72 of the *Constitution Act 1975* of Victoria.

The Committee notes that section 246 of the Health Practitioner Regulation National Law provides:

246 Parliamentary scrutiny of national regulations

(1) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction—

(a) in the same way that a regulation made under an Act of that jurisdiction may be disallowed; and

(b) as if the regulation had been tabled in the House on the first sitting day after the regulation was published by the Victorian Government Printer.

(2) A regulation disallowed under subsection (1) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.

(3) If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the date of its disallowance in the last of the jurisdictions forming the majority.

(4) In this section—

regulation includes a provision of a regulation.

Section 247 of the Health Practitioner Regulation National Law deals with the effect of disallowance of a national regulation.

The Committee notes that, while the Assembly's normal disallowance provisions apply, under paragraph 246(1)(b) of the Health Practitioner Regulation National Law, the disallowance period runs from the date that the Regulation was published by the Victorian Government Printer.

The Regulation was published on 22 June 2010 (see http://www.gazette.vic.gov.au/gazette/Gazettes2010/GG2010S233.pdf#page=1). That being so, by the day that the Regulation was tabled in the Assembly, 5 of the 6 sitting days within which a disallowance motion could have been moved had already elapsed. Clearly, in legislative scrutiny terms, this is most unsatisfactory, as it allows the Committee (and the Legislative Assembly) very little time to scrutinise the Regulation and to provide advice to the Assembly against the Committee's terms of reference. The Committee also notes that no Explanatory Statement was provided in relation to the Regulation.

In making these comments, the Committee notes that some might consider that the Committee has no jurisdiction to consider the Regulation, in the sense that the regulation has not come to the Committee's attention through the "normal" legislative processes. The Committee disagrees. The Committee's terms of reference require it (among other things) to:

(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;

The Regulation is "an instrument of a legislative nature". It is "made under an Act" (albeit not an Act of the Legislative Assembly) and, most importantly, it is "subject to disallowance and/or disapproval by the Assembly". As a result, it is appropriate that the Committee consider the Regulation.

Despite the issues identified above, however, the Committee has no comments to make on the Regulation.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 29 June 2010, in relation to comments made in Scrutiny Report 23 concerning Disallowable Instrument DI2010-41, being the Dangerous Goods (Road Transport) Fees and Charges Determination 2010 (No. 1).
- The Minister for Energy, dated 29 June 2010, in relation to comments made in Scrutiny Report 23 concerning Disallowable Instrument DI2010-42, being the Electricity Feed-in (Renewable Energy Premium) Rate Determination 2010 (No. 1).
- The Minister for Planning, dated 29 June 2010, in relation to comments made in Scrutiny Report 23 concerning Disallowable Instrument DI2010-40, being the Surveyors (Surveyor-General) Practice Directions 2010 (No. 1).
- The Minister for Education and Training, dated 15 July 2010, in relation to comments made in Scrutiny Report 14 concerning the Education (Participation) Amendment Bill 2009.
- The Minister for Tourism, Sport and Recreation, dated 15 July 2010, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instrument DI2010-10, being the Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 1).
- The Attorney-General, dated 21 July 2010, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instruments:
  - DI2010-44 being the Civil Law (Wrongs) Professional Surveyors' Occupational Association Scheme 2010 (No. 1); and

  - DI2010-68 being the Domestic Violence Agencies (Council Chairperson) Appointment 2010.

- The Minister for Industrial Relations, dated 23 July 2010, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instruments:
  - DI2010-53 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 1);
  - DI2010-54 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 2);
  - DI2010-55 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 3);
  - DI2010-56 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 4);
  - DI2010-57 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 5); and
  - DI2010-53 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2010 (No. 6).
- The Minister for Health, dated 27 July 2010, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instruments:
  - DI2010-69 being the Health Professionals (Psychologists Board) Appointment 2010 (No. 1);
  - DI2010-70 being the Health Professionals (Dental Technicians and Dental Prosthetists Board) Appointment 2010 (No. 1); and
  - DI2010-71 being the Health Professionals (Physiotherapists Board) Appointment 2010 (No. 2).
- The Chief Minister, dated 29 July 2010, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instrument DI2010-67, being the Public Sector Management Amendment Standards 2010 (No. 1).
- The Minister for Planning, dated 30 July 2010, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instrument DI2010-81, being the Public Place Names (Bonner) Determination 2010 (No. 1).

The Committee wishes to thank the Chief Minister, the Minister for Energy, the Minister for Planning, the Minister for Education and Training, the Minister for Tourism, Sport and Recreation, the Attorney-General, the Minister for Industrial Relations and the Minister for Health for their helpful responses.

John Hargreaves, MLA
Deputy Chair

August 2010

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

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009

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

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

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 8, dated 22 June 2009

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

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

Report 10, dated 10 August 2009

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

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

Report 11, dated 24 August 2009

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

Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)

Crimes (Assumed Identities) Bill 2009

Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)

Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Bills/Subordinate Legislation

Report 14, dated 9 November 2009
Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)

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

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

Report 18, dated 1 February 2010
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010
Disallowable Instrument DI2009-235 - Attorney General (Fees) Amendment Determination 2009 (No. 5)
Education (Suspensions) Amendment Bill 2010 (PMB)

Report 20, dated 15 March 2010
Subordinate Law SL2009-56 - Court Procedures Amendment Rules 2009 (No. 3)

Report 22, dated 27 April 2010
Infrastructure Canberra Bill 2010 (PMB)
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-62 - Government Procurement Appointment 2010 (No. 1)
Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010
Disallowable Instrument DI2010-81 - Public Place Names (Bonner) Determination 2010 (No. 1)
Disallowable Instrument DI2010-84 - Animal Welfare (Animals Used on Film Sets) Code of Practice 2010
Disallowable Instrument DI2010-85 - Animal Welfare (Welfare of Dogs in the ACT) Code of Practice 2010
Disallowable Instrument DI2010-87 - Blood Donation (Transmittable Diseases) Blood Donor Form 2010 (No. 1)
Disallowable Instrument DI2010-89 - Animal Welfare (Welfare of Poultry: Non-Commercial) Code of Practice 2010
Disallowable Instrument DI2010-97 - Betting (ACTTAB Limited) Payments to Territory Determination 2010 (No. 1)

Disallowable Instrument DI2010-98 - Betting (ACTTAB Limited) Payments to Territory Determination 2010 (No. 2)

Bills/Subordinate Legislation

Subordinate Law SL2010-18 - Road Transport (General) Amendment Regulation 2010 (No. 1)
Territory-owned Corporations Amendment Bill 2010

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Ms Vicki Dunne, MLA
Chair
Scrutiny of Bills and
Subordinate Legislation Committee
Legislative Assembly for the ACT
London Circuit
CANBERRA ACT 2600

Dear Ms Dunne

I refer to the Committee's comments on the *Dangerous Goods (Road Transport) Fees and Charges Determination 2010 (No 1)* in Scrutiny Report No 23 of 15 June 2010.

The Committee pointed out that the section references in the instrument were incorrect. The incorrect section references are unfortunately repeated in the *Dangerous Goods (Road Transport) Fees and Charges Determination 2010 (No 2)* DI2010-79 which is expressed to commence on 1 July 2010. The Committee has yet to comment on this instrument.

A new instrument, the *Dangerous Goods (Road Transport) Fees and Charges Determination 2010 (No 3)*, which has the correct section references, will be notified on the legislation register shortly. This instrument will repeal both of the other instruments.

I thank the Committee for drawing the matter to the Government's notice.

Yours sincerely

Jon Stanhope MLA
Chief Minister

25 JUN 2010

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Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chairperson
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

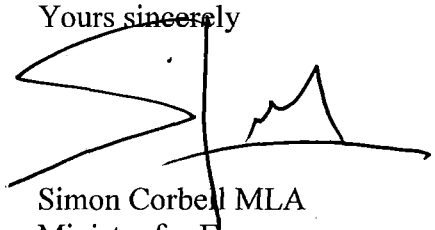
In *Scrutiny Report No. 23*, the Committee made comment on DI2010-42 *Electricity Feed-in (Renewable Energy Premium) Rate Determination 2010 (No 1)*, regarding the determination of a new Premium Rate.

The Committee noted that there was no explicit indication that I had complied with section 10(3) of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* (the Act).

Given that I tabled in the Legislative Assembly the information provided to me by the Independent Competition and Regulatory Commission on 16 March 2010 (as required under section 10(5) of the Act), I can confirm that I have complied with the provisions of the Act.

I will endeavour in future to include specific mention of the advice requested and received in the Explanatory Statement to the Determination.

Yours sincerely



Simon Corbell MLA
Minister for Energy
29.6.10

cc Deputy Clerk, ACT Legislative Assembly

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Andrew Barr MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No. 23 of 15 June 2010 and the Committee's comments regarding the *Construction Occupations Legislation (Exemption Assessment) Amendment Bill 2010* (the Bill); Subordinate Law SL2010-11, the *Planning and Development Amendment Regulation 2010 (No 2)* (the regulation); and Disallowable Instrument DI2010-40 being the Surveyors (Surveyor –General) Practice Directions 2010 (No.1).

The Committee made no comment on the Bill and commented favourably on the fact that the Explanatory Statement for the regulation expressly acknowledged that the regulation was made to correct an oversight. I would like to thank the Committee for its consideration of these items of legislation.

The Committee was critical of the Disallowable Instrument DI2010-40 being the Surveyors (Surveyor –General) Practice Directions 2010 (No.1). The Committee noted that there was no indication, either on the face of the instrument or in the Explanatory Statement that the advisory committee had been consulted as required under section 55 (2) of the *Surveyors Act 2007*. The Committee requested my advice as to whether the Surveyor-General consulted the advisory committee before making the directions in the disallowable instrument.

I acknowledge that the explanatory statement accompanying Disallowable Instrument DI2010-40 should have made reference to consultation with the Survey Practice Advisory Committee. In fact, the Advisory Committee was consulted prior to lodgement of the DI with 4 of the 5 members agreeing. There was initially no response from the 5th member but that member has since agreed. I apologise for omitting to refer to this in the Explanatory Statement and will endeavour to ensure that all future explanatory statements contain a reference to consultation where appropriate.

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The Committee also requested my advice as to whether any "standards, specifications and/or guidelines" were promulgated under the previous (incorrect) formulation of direction 67(2) and, if so, what (if any) steps have been taken to address any validity issues arising from the incorrect formulation of direction 67(2). I can advise that there were no Standards, Specifications or guidelines developed under direction 67(2) and therefore, there is no need to address validity issues.

I would like to thank the Committee for its consideration of these items of legislation.

Yours sincerely

Andrew Barr MLA
Minister for Planning

29 JUN 2010

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2610

Dear Ms Dunne

I refer to the Scrutiny Report No 14 of 9 November 2009 in which the Committee commented on the Education (Participation) Amendment Bill 2009 (the Bill). The Bill was notified on 17 November 2009 and commenced on 1 January 2010. The issues raised within the Scrutiny Report were discussed at the time of the Bill being debated and passed with bipartisan support from the ACT Legislative Assembly. I thank the Committee for its comments and now provide my written response.

The Committee asked whether 'any clauses of the Bill 'unduly trespass on personal rights and liberties'?'

The interests of children and their parents in relation to the making of an application for an exemption certificate under proposed section 11H of the Act.

Section 11H(3) permits a child to apply for an exemption certificate if the child has the signed consent of the child's parents. Section 11H(4) states that 11H(3) does not apply if the chief executive is satisfied on reasonable grounds that it is not appropriate to require the signed consent.

The purpose of section 11H(4) is to cater for the exceptional circumstances in which it may not be appropriate to require a child to obtain the signed consent of his or her parents to apply for an exemption. Such circumstances may include, for example, when a child's parents are for medical reasons, unable to provide signed consent.

To be satisfied on 'reasonable grounds' that it is not appropriate to require signed consent requires the chief executive to form an evidence-based opinion supporting his or her decision.

Decisions made under section 11H will be made with due consideration given to the ACT *Human Rights Act 2004*, including protection of the family and children.

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The interests of children and their parents in relation to the factors relevant to the granting exemption certificate under proposed section 12A, and *approval to participate in training and employment alternatives under sections 13D and 14A.*

The 'touchstone' of the *Education Act 2004*, including sections 12A, 13D and 14A is the best interests of the child. Whether exemption certificates and approval statements would benefit the child is one of five key considerations to which the chief executive may refer in determining whether it is in the child's best interests to issue an exemption certificate or approval statement.

It is possible, though unlikely, that an exemption certificate or approval statement may be of benefit to a child, but not in the child's best interests. For this reason the best interests of the child is to be the primary consideration of the chief executive in making the decision.

The wishes of the child's parents are not referred to as a matter to which the chief executive may turn his or her mind in reaching a decision under proposed section 12A, however, the section does not limit the matters which the chief executive may take into account.

Sections 12A, 13D and 14A uphold the values intrinsic to section 11 of the *Human Rights Act 2004*. Similarly to section 11 of the *Education Act 2004*, decisions made under sections 12A, 13D and 14A will be made with due consideration given to the *Human Rights Act 2004*, including protection of the family and of children.

The Committee also commented on the Education (Participation) Amendment Bill 2009 Explanatory Statement:

Explanatory Statement – section 9A

The reference to home education in the explanation of section 9A is an error. The sentence should read: 'To best accommodate the educational needs of children in the ACT, section 9A incorporates government and non-government schools in the definition of education course.' Home education is an education option catered for under section 10.

Bill and Explanatory Statement – section 9B

Concerning section 9B of the Act, the Explanatory Statement states that "[a] child who receives a high school record for the purpose of transferring to another school within the ACT or leaving the ACT school system has not completed year 10 for the purpose of subsection 9B(1)(b)".

A high school record can be granted at any time upon request. The wording in the Explanatory Statement is intended to delineate between the use of a high school record that shows that year 10 has been completed, and the use of one prior to the completion of year 10, to facilitate a transfer to another school or when leaving the ACT, for example.

Explanatory Statement – section 9C

In addition to the existing paragraph under section 9C, the Explanatory Statement should say: 'In order to accommodate students who have undertaken year 12 equivalents such as the Certificate of General Education for Adults or the International Baccalaureate, section 9C incorporates these equivalents as satisfying the requirement to complete year 12. The section also gives the chief executive the discretion to issue a certificate or record for the purposes of satisfying section 9C.'

Explanatory Statement – section 10D(2)

Section 10D of the Explanatory Statement should say 'This section requires a child's parents to ensure the child participates in an education course conducted by an education provider other than a school.'

'Participates in' is defined in section 10B. The participation requirement would be considered to be satisfied if the education course provider's attendance requirement (and/or participation requirements if the course is undertaken by correspondence) were being met. Participation requirements are further outlined in departmental policies including *Education participation requirements*; *Education options (other than school)*; *Post Year 10 Alternatives (training and employment)*; and *Exemption Certificates*.

Explanatory Statement – section 11H and 13D

In addition to the existing paragraphs under sections 11H and 13D, the following sentence should be included: 'In exceptional circumstances it may be inappropriate for the chief executive to require a child to obtain his or her parents' signed consent. If there is evidence which indicates the chief executive has reasonable grounds to find it is not appropriate to require signed consent, the chief executive may waive that requirement.'

I thank the Committee for bringing these matters to my attention. These concerns will be given ongoing consideration in the context of the Department's policy development processes and stakeholder engagement activities.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

15 JUL 2010

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne
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

I refer to Scrutiny Report No. 20 prepared by the Standing Committee on Justice and Community Safety (the Committee) on the Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 1) (DI 2010-10). The Committee has asked how section 81 of the *Financial Management Act 1996* (FMA) applies.

As the explanatory statement made clear, Mr Peter Barclay was already an ordinary member of the Governing Board. Section 81 of the FMA provides for the ending of board appointments. It provides 10 grounds for the ending of board member appointments or on the resolution of the board.

I am advised that as none of the grounds applied and there was no resolution from the board to remove Mr Barclay, the instrument appointing Mr Barclay as an ordinary member could not be revoked. This conclusion was reached on the basis that revocation has a similar effect to ending an appointment, a matter expressly dealt with by section 81. This is what was meant by "owing to the operation of section 81" in the explanatory statement.

I trust I have addressed the Committee's question. I thank the Committee for its comment.

Yours sincerely

Andrew Barr MLA
Minister for Tourism, Sport and Recreation

15 JUL 2010

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Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 24 of 28 June 2010. I offer the following response in relation to Disallowable Instrument DI2010-44 being the Civil Law (Wrongs) Professional Surveyors' Occupational Association Scheme 2010 (No 1) and Disallowable Instrument DI2010-68 being the Domestic Violence Agencies (Council Chairperson) Appointment 2010.

Disallowable Instrument DI2010-44
The Committee noted that there are formatting errors in the instrument which, in particular, make the table in section 3.2 of the attached scheme difficult to understand. The formatting errors are not in the original instrument that was signed by me. It appears that these errors have arisen in the process of converting the original instrument into a format suitable for presentation on the Legislation Register. After bringing this issue to the attention of Parliamentary Counsels Office the instrument has been appropriately revised on the Legislation Register.

Disallowable Instrument DI2010-68
With respect to the Committee's comment on the instrument, I can confirm that the Chair of the Domestic Violence Prevention Council was a member of the Council immediately prior to her appointment as Chair. Where such appointments are made in the future, the Explanatory Statement will indicate that the person is already a member of the Council.

I trust that the above responses address the Committee's comments in relation to the two instruments and I thank the Committee for its observations.

Yours sincerely

Simon Corbell MLA
Attorney General
21.7.10

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Katy Gallagher MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

RE: Scrutiny Report 24 dated 28 June 2010 – response to Committee observations

I am writing in response to the Standing Committee on Justice and Community Safety's Scrutiny Report dated 28 June 2010, which in part related to the re-appointment of members to the Default Insurance Fund Advisory Committee (the DIFAC).

The Standing Committee indicated that neither the instruments re-appointing the representative members of the DIFAC nor the supporting explanatory statements gave an adequate indication of whether the legislative requirements applicable to those appointments had been met.

As the Standing Committee has noted, s 3.4 of Schedule 3 to the *Workers Compensation Act 1951* (the Act), requires the Minister to appoint 6 representative members to the DIFAC. These members must be taken from groups representing employer and employee interests and from the approved insurers.

In order for the obligation imposed by s 3.4 to be discharged the Act requires the Minister to be satisfied that the members appointed appropriately represent these stakeholders.

I sought to re-appoint the DIFAC members notified on 29 April 2010 on this basis, the instruments of appointment being evidence that the above conditions were met.

However, I acknowledge the Standing Committee's views and thank you for your feedback. Your input will be incorporated into future instruments of appointment in relation to the DIFAC.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Industrial Relations

23 July 2010

cc Assembly Secretariat

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MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No. 24 dated 28 June 2010, and the Committee's comments relating to a number of Disallowable Instruments drafted by ACT Health.

I note the Committee's concerns in relation to appropriate consultation being undertaken for appointments to the Health Professionals Boards, and the unfortunate omission of this information in the Explanatory Statement to the Disallowable Instruments. I can assure the Committee that consultation was undertaken in accordance with the *Health Professionals Act 2004*, and the *Health Professionals Regulation 2004*, and I have asked the Department to ensure that future Explanatory Statements include this level of detail.

In relation to the minor drafting issue with regards to the Blood Donation (Transmittable Diseases) Blood Donor Form 2010 (No 1), ACT Health notes the Committee's concerns and will endeavour to ensure that legislation is quoted correctly in future.

Thank you for raising these concerns.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

21 July 2010

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Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Vicki

Dear Mrs Dunne

I refer to the comments in the Scrutiny of Bills and Subordinate Legislation Committee Report No 24 of 2010 in respect of Disallowable Instrument D12010-67, an amendment to the Standards for the overtime meal allowance rate.

The Committee noted that the Explanatory Statement in relation to the amendment made under section 251 of the *Public Sector Management Act 1994* omitted certain words after 'the Commissioner may make Standards without'.

My department has advised that the words deleted after 'without' were 'seeking further approval of the Chief Minister'.

I trust this addresses the concerns of the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

29 JUL 2010

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Andrew Barr MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No. 24 of 28 June 2010 and the Committee's comments regarding Disallowable Instrument DI2010-81 being the Public Place Names (Bonner) Determination 2010 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of new roads in the Division of Bonner.

I would like to thank the Committee for its consideration of these items of subordinate legislation and advise that your comments have been noted, and will be taken into account in preparing future disallowable instruments.

The Committee noted that both the Instrument and the Explanatory Statement for the Instrument indicate that the theme for naming public places in Bonner is *Indigenous leaders and their supporters* and raised two points. I will address each in turn.

Discrepancy between the Instrument and its Explanatory Statement

The Committee noted that the Explanatory Statement said its instrument commemorated eight women and five men, whereas it should have read: This instrument commemorates seven women and six men.

This error was an oversight. While preparing the documents commemorating these people, the number of men and women changed. Unfortunately, the Explanatory Statement was not updated. More care will be taken in future to ensure that the numbers add up.

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Consultation with Aboriginal and Torres Strait entity

The Committee notes that the theme for the naming of public places in Bonner is *Indigenous leaders and their supporters* and that the Public Place Names Act requires that, before "having regard to Aboriginal or Torres Strait islander vocabulary" the minister must consult with each entity prescribed under the regulations as an entity that represents the interests of Aboriginals and Torres Strait Islanders. Section 2 of the *Public Place Names Act Regulation 2001* provides:

> An entity that represents the interests of Aboriginals and Torres Strait Islanders is the Aboriginal and Torres Strait Islander Commission.

The Aboriginal and Torres Strait Islander Commission was abolished however, the following bodies have been consulted:

- The ACT's Aboriginal and Torres Strait Islanders Elected Body
- United Ngunnawal Elders Council
- Relevant Local Indigenous Land Councils
- Interested Indigenous people
- The families of people being commemorated
- Experts and academics in the Indigenous field (both Indigenous and non-indeginous), including Professor Mick Dodson AM.

The Place Names Officer is seeking legal advice as to the actual application of this provision of the Act. The word 'vocabulary' suggests that the names of individual indigenous people do not require consultation with a national body, only words within Indigenous vocabulary. Regardless of this advice, similar levels of consultation as shown above would be conducted as a matter of course. Although undertaken consultation required under 4(3) may not be required in respect of people's names.

In future explanatory statements will refer to the fact that consultation has taken place when required.

The National Congress of Australia's First Peoples Ltd was incorporated in April 2010. It is the current national Indigenous representative body and is presently in the process of becoming operational.

Section 2 of the *Public Place Names Act Regulation 2001* will be amended.

I note that the subject instrument, DI2010-81 has since been repealed by DI2010-138 on 28 June.

I thank the committee in raising these matters.

Yours sincerely

Andrew Barr MLA
Minister for Planning
30 JUL 2010