Legislative Assembly for the ACT

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

Scrutiny Report

10 JUNE 2008

Report 55

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS

Bill—No comment

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

ANZAC DAY BILL 2008

This is a bill for an Act to criminalise the conduct of certain activities in the nature of entertainment between 3am and 1pm on Anzac Day where the relevant person has not obtained a permit from the Minister to engage in the activities.

APPROPRIATION BILL 2008-2009

The Appropriation Bill 2008-2009 is the mechanism for the appropriation of moneys for the 2008-2009 financial year.

CHILDREN AND YOUNG PEOPLE (CONSEQUENTIAL AMENDMENTS) BILL 2008

This is a Bill for an Act to make transitional arrangements for the implementation of the Children and Young People Bill 2008 and to amend other legislation because of the enactment of the Bill.

DUTIES AMENDMENT BILL 2008

This Bill would amend the *Duties Act 1999* to abolish duty on the establishment of and changes to trusts over non-dutiable property.

DUTIES (LANDHOLDERS) AMENDMENT BILL 2008

This Bill would amend the *Duties Act 1999* to tighten anti-avoidance provisions in the Duties Act to ensure that certain transfers of entities that hold land in the ACT are subject to duty as if they were a transfer of the underlying land.

LAND RENT BILL 2008

This is a Bill for an Act to provide for the rental of a single dwelling house lease granted by the planning and land authority to a person other than a territory authority.

NATIONAL GAS (ACT) BILL 2008

This is a Bill for an Act to establish a framework to enable third parties to gain access to certain natural gas pipeline services.

Bills—Comment

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

ACT CIVIL AND ADMINISTRATIVE TRIBUNAL BILL 2008

This is a Bill for an Act to establish the ACT Civil and Administrative Tribunal and to vest in it civil dispute and administrative review jurisdiction.

Introduction

The Act would establish the ACT Civil and Administrative Tribunal (the tribunal) to operate both as a "court substitute" body – in that it would decide certain kinds of disputes between individuals that are ordinarily decided by a court – and as an "executive substitute" body - in that it would hear an appeal from decisions of ACT administrators and as such would in effect operate as another (superior) level in the administrative agency in which the decision-maker was located.

It must at the outset be noted that while this Act would create the tribunal, it would not confer on it any jurisdiction. Any jurisdiction must be conferred by some other law - an 'authorising law in the words of the Bill – see clause 9.

The objects clause states various objects, and in particular it should be noted that the scheme is designed "to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal" (paragraph 6(c)).

The civil dispute jurisdiction. In terms of subject matter, the civil jurisdiction may be very wide, embracing most of what is commonly known as "common law"' jurisdiction – such as for example, causes of action in relation to contracts; in relation to any tort (except nuisance – which however is specifically included – and trespass[1]); and certain statutory causes of action (as under the *Common Boundaries Act 1981*, and the *Residential Tenancies Act 1997*). However, with some exceptions, the jurisdiction is limited to applications claiming amounts of not more than $10,000 (paragraph 18(2)(a)).

When it decides a civil dispute application the tribunal exercises power of the same nature as a court. Thus, by subclause 22(1), '[t]he tribunal has, in relation to civil dispute applications, the same jurisdiction and powers as the Magistrates Court has under the *Magistrates Court Act 1930*, part 4.2 (Civil jurisdiction)", although a "rule" (presumably made by the tribunal under clause 24) may prescribe that certain provisions of this Act are not to apply (subclause 22(2)).

Furthermore, "[a] money order or non-money order made by the tribunal is, by force of this section, taken to have been filed in the Magistrates Court for enforcement under the *Court Procedures Rules 2006*, part 2.18 (Enforcement) on the day the order is made".

Administrative review jurisdiction. In terms of its administrative review function, clause 68 provides that when "the tribunal reviews a decision by an entity" (subclause 68(1)), - which it may do only if another law authorises such review (clause 9) – it "may exercise any function given by an Act to the entity for making the decision" (subclause 68(2)). (The scope of the power conferred by this latter provision is unclear, and the Explanatory Statement confuses the matter by stating that it means that the tribunal "may exercise any function given to a decision-maker under an Act".) Subclause 68(3) confers the usual power of an administrative review tribunal to confirm, or to vary, or to set aside the decision under review and, in this third case, either to substitute another decision or to refer the matter back to the decision-maker.

[1] Why trespass is excluded is not explained.

The executive substitute character of the tribunal is emphasised by clause 69, which provides that an order of the tribunal under subclause 68(3):

(a) is taken to be the decision of the decision-maker; and

(b) takes effect from the day the decision has or had effect, unless the tribunal orders otherwise.

In other words, it is clear that the tribunal should, on a review of a decision, "stand in the shoes" of the decision-maker. This means that the power that was used by the decision-maker must be exercised by the tribunal on a view of the facts as found by the tribunal (and not as they were found to be by the decision-maker). While the tribunal may have regard to the reasoning of the decision-maker, the tribunal's review is in no sense a review of the adequacy of that reasoning. The tribunal must take its own view of the law and of the merits of the exercise of any discretion vested in the decision-maker. The effect of subsection 68(2) may be at least that the tribunal can exercise any power that the law confers on the decision-maker so far as concerns dealing with the facts as found by the tribunal.

These are very extensive powers and travel well beyond the powers of a court conducting a review of the legality of an administrative decision.

Other jurisdiction. The tribunal will also have jurisdiction in relation to matters arising out of laws that regulate the discipline of persons who are licensed or registered under a law (Division 6.2).

Composition of the tribunal. The tribunal will be comprised of presidential members (including a general president and an appeal president – who might be the one person[2]), and non-presidential members (either senior or ordinary). The former hold office for a minimum of 7 years (subclause 96(1)), and any such member must be a person who "has been a lawyer for 5 years or more" (subclause 94(2)). (The Committee notes that Part 1 of the Dictionary to the Legislation Act provides that "*lawyer* means a legal practitioner".)

A non-presidential member (either senior or ordinary), must have "the experience or expertise to qualify the person to exercise the functions of a senior member or ordinary member" (subclause 96(2)), and will hold office for a minimum of 5 years (subclause 98(2)).

There is provision for termination of a member's appointment on grounds of misbehaviour, or "physical or mental incapacity, if the incapacity affects the exercise of the person's functions" (paragraphs 99(1)(a) and (b)). Subclause 99(2) expands the notion of what may constitute misbehaviour by providing that it encompasses the case where "the member fails to act consistently with the undertaking given by the member under section 109". This undertaking is found in schedule 1, and is in terms that the member will "do right to all people, according to law, without fear or favour, affection or ill will".

Tribunal procedure. Clause 7 states basic principles:

In exercising its functions under this Act, the tribunal must –

(a) ensure the procedures of the tribunal are as simple, quick, inexpensive and informal as is consistent with achieving justice; and

(b) observe natural justice and procedural fairness.[3]

[2] Subclause 94(3).

[3] It is far from clear that there is any difference between the concepts of 'natural justice' and 'procedural fairness'.

The tribunal need not comply with the rules of evidence, but must consider whether they could be applied "and still give effect to the objects and principles of this Act" (paragraph 8(2)(b)). The tribunal is given ample power to fashion procedure for both particular cases and classes of case.

Further appeals from decisions of the tribunal. Part 8 of the Bill provides for a scheme for appeals on questions of fact or law, within the tribunal structure, and for referrals and appeals (with leave of the Court) to the Supreme Court.

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

Separation of powers

There are at least 2 ways a court can rely on separation of powers doctrine to set a limit to legislative power. One is to adopt the theory that applies in Commonwealth constitutional law – that a law cannot vest in a federal court a power that *is not* "judicial" in nature, and, conversely, cannot vest in an administrative body or a tribunal that is not constituted as a court a power that *is* "judicial" in nature; (this is often referred to as the *Boilermakers'* doctrine[4]). A more limited theory is that a law cannot vest in a court a function that is incompatible with the integrity, independence and impartiality of the court; (this is often referred to the *Kable* doctrine[5]).

It is clear that the *Kable* doctrine applies in the ACT, but much less clear whether the *Boilermakers'* doctrine applies.

In *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, Higgins CJ considered a law that provided that an interim protection order became a final order where the respondent to the interim order did not file a notice of objection to the interim order within a certain period. His Honour noted that the law "raises serious concerns as to the proper separation of judicial and executive functions" in that the "'final' protection order lasting for 12 months, was made by an officer of the ACT Executive (ie, a deputy Registrar) and not by a magistrate" (at [99]). He then offered these views on the manner in which the legislative power of the Assembly is limited:

> 100. Even absent the [*Human Rights Act 2004*], such a result … should be regarded as ultravires by reference to the principles adopted by the High Court in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.
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> 101. In this regard, it should be noted that the ACT Supreme Court is itself a creature of federal law, albeit that the Supreme Court is not a federal court (see *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322). Nevertheless, it is invested with at least the same federal jurisdiction as are all other Supreme Courts. The Assembly is constrained by both the Constitution (ss 71, 122) and by the Judiciary Act 1903 (Cth) s 39 as well as the *Australian Capital Territory (Self-Government) Act 1988*, s 48A as to the powers and functions that may legitimately be conferred upon the Supreme Court or the judges thereof.
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> 102. Further, it is arguable that, to a greater extent than pertains in New South Wales, there is entrenched in the ACT a separation of powers between the legislature, the executive and the judiciary.

[4] *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10.
[5] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

> 103. It is an essential constitutional requirement that the Supreme Court and, in my view, the Magistrates Court as a subordinate repository of the judicial power of the Territory and, in the case of each Court as repositories of federal judicial power (see, for example, *Spratt v Hermes* (1965) 114 CLR 226) may not be required by legislation of the Territory (nor of the Commonwealth) to act incompatibly with the integrity, independence and impartiality required of a judicial officer appointed under Chapter III of the Constitution.

The thrust of these comments suggests that Higgins CJ was primarily concerned to assert that a Territory court could not be given functions that were incompatible with its integrity, independence and impartiality. However, his Honour also says that section 71 of the Commonwealth *Constitution* sets limits to the kinds of laws that the Assembly may make so far as concerns Territory courts. If this is taken to mean that the separation of powers doctrine applied to the federal judicial system also applies in the Territory, then there is a basis in law to argue that the Territory Legislative Assembly cannot vest judicial power in a body that is not constituted as a court.

It is perhaps unlikely that the Territory Supreme Court, and less so the High Court, would accept this line of argument. However, in assessing the impact on human rights of a Bill, the Assembly is not restrained by the limitations of constitutional law. A Member of the Assembly might take the view that the separation of powers doctrine applied to the federal judicial system is a standard that should be adopted when reviewing the impact on human rights of a Bill. The separation of the exercise of judicial power from the exercise of other kinds of power (legislative and executive) has long been justified on the basis that it serves to enhance and protect the independence of the courts, and, in turn, the protection of the legal rights of all potential litigants.

Against this background of separation of powers theory, the Committee will turn to a particular issue thrown up by the Bill.

Should the proposed ACT Civil and Administrative Tribunal – a body not constituted as a court - be empowered to determine “common law” causes of action?

As a matter of federal constitutional law the answer is “no”. In *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54 at [15], the High Court said:

> There are some matters which appertain exclusively to the judicial power.[5] For example, the determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs are inalienable exercises of judicial power.[6][6]

In *Brandy v Human Rights and Equal Opportunity Commission*¸ Mason CJ, Brennan and Toohey JJ said:

> … when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards "supposed already to exist" … . And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question …).

[6] Citing at [5] *Waterside Workers' Federation of Australia v J W Alexander Ltd* [1918] HCA 56; (1918) 25 CLR 434 at 444, and at [6] *Polyukhovich v The Commonwealth* [1991] HCA 32; (1991) 172 CLR 501 at 706; and *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 at 258, 269.

> Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch.III of the Constitution.

This reasoning appears to be based on the *Boilermakers'* doctrine, and may or may not be part of Territory constitutional law. Moreover, the vesting in an administrative tribunal of power to adjudicate "common law" causes of action may be consistent with HRA subsection 21(1), which 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.

Nevertheless, the vesting in the ACT Civil and Administrative Tribunal of jurisdiction to determine "common law" causes of action does pose a rights issue. This tribunal does not have that degree of independence from the executive as possessed by courts; it is not comprised of people of the degree of legal experience as judges or magistrates; and its procedure – including its ability to dispense with the law of evidence and to fashion its own procedure – on its face offers less protection to litigants.

One response may to say that it deals with only relatively minor matters, given that its jurisdiction is limited to applications claiming amounts of not more than $10,000. On the other hand, amounts up to this figure may not at all be "minor" to particular classes of litigants, and to take the jurisdiction limit into account avoids the issue of principle.

The issue may be raised by posing a question: suppose the jurisdictional limit were set at $100,000, would it be acceptable to vest this jurisdiction in a body that is not a court? There are perhaps some who would argue that this is not appropriate, and that only the courts should determine such matters. But if this is so, why is a lower jurisdictional limit acceptable?

The Committee draws this matter to the attention of the Assembly.

Procedure of the tribunal

It has been noted that the tribunal is given ample power to fashion procedure for both particular cases and classes of case. Some aspects of this power give rise to rights issues.

Is the power of a tribunal hearing a particular matter to fashion its own procedure for that matter consistent with the fair hearing requirement of HRA subsection 21(1)?

By subclause 24(1), the tribunal "may make rules in relation to the practice and procedure of the tribunal and the tribunal registry", and in particular may make rules "to prescribe how the tribunal may deal with applications and other proceedings, including when a tribunal may stop a person representing another person before the tribunal" (paragraph 25(1)(b)). The Explanatory Statement, however, expresses a policy standpoint that appears aimed at discouraging the formulation of rules. It says:

> However, the grant of the power does not imply that the tribunal need create a detailed body of rules.
>
> A distinguishing feature of tribunals is the absence of rules of the kind often encountered within a court – while the rule-making power is considered desirable, the subject matter of the jurisdiction of the tribunal and the objectives of the tribunal would generally preclude the need to create detailed rules of that nature.

This policy is reflected in provisions of the Bill that emphasise – indeed give primacy to – the power of a particular tribunal to fashion its own procedure. Subsection 24(3) states that "[t]his section does not limit the power of the tribunal or a tribunal member to control proceedings", and thus appears to say that a tribunal is not bound to comply with rules made under subsection 24(1). Moreover, by clause 26 "[t]he tribunal may inform itself in any way it considers appropriate in the circumstances".

These provisions raise an issue of their compatibility with the fair hearing requirement of HRA subsection 21(1). It may be argued that it is of the essence of fairness that like cases be treated alike, not only in terms of outcome, but also in terms of procedure. Different procedures lead to different outcomes, and the reason why courts operate under detailed rules as to procedure, and under a detailed body of the law of evidence, is both to enhance the accuracy of fact-finding and to ensure that all litigants receive the same kind of hearing. There is a danger that these principles are sacrificed when a tribunal is permitted to operate on a basis that each time it sits a different procedural regime may be adopted.

The Committee draws this matter to the attention of the Assembly.

Is it appropriate that a rule of a kind mentioned in subclause 25(1)(e) prevail over a rule in the Act or an authorising law?

As an instance of the rules that may be made by the tribunal under subclause 24(1), paragraph 25(1)(e) provides that a rule might:

> (e) … prescribe a time for doing a thing by a person that is longer than the time for doing the thing provided under this Act or an authorising law –
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> (i) in relation to an application to the tribunal; but
>
> (ii) not in relation to any thing to be done by the tribunal; … .

Subclause 25(2) then provides that:

> (2) If a rule of a kind mentioned in subsection (1)(e) prescribes a time for doing something that is longer than the time for doing the thing set out in this Act or an authorising law, the time for doing the thing is the longer time prescribed by rule.

It is generally considered inappropriate that a piece of subordinate law amend an Act. The issue might be regarded as quite minor, but the issue of principle is not. Moreover, this subordinate law – the rule – is only a notifiable and not a disallowable instrument, and thus the Assembly has no control over the amendment of the Act or of some other law by the rule.[7]

The Committee draws this matter to the attention of the Assembly.

The privilege against self-incrimination

The Committee suggests that notes to subclause 41(1) and to clause 33 refer to sections 170 and 171 of Legislation Act.

[7] It should also be noted that subclause 25(2) would be ineffective if the contrary provision of the Act or the other law post-dated the commencement of the Act arising from this Bill. An Act that is earlier in point of time to another Act cannot control the effect of the latter. This same comment applies to subclause 27(2).

Subclause 41(1) empowers the tribunal:

> by subpoena given to a person, require the person, at a stated time and place, to appear before the tribunal to do 1 or more of the following:
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> (a) produce a stated document or other thing relevant to the hearing;
>
> (b) give evidence.

By subclause 33(1), the tribunal "may require the parties to an application to attend a preliminary conference", and by subclause 33(2) the tribunal "may make inquiries, or require further information from a party, for or during a preliminary conference".

Assuming (as is usually the case with respect to tribunals) that in these proceedings a person may claim the benefit of the right of a person not to self-incriminate, and of client legal privilege, the Committee suggests that a note to subclause 41(1) refer to sections 170 and 171 of the Legislation Act.

Does subclause 34(1) provide inadequate protection of the right not to self-incriminate in that it does not provide for a prohibition on the derivative use of evidence given before a preliminary conference?

Subclause 34(1) provides that "[e]vidence given before the tribunal during a preliminary conference is not admissible against a person in a criminal proceeding".

This protection is wider than a protection against the use of evidence by a person that self-incriminates, and on that basis is commended, but it does not – as is considered desirable - provide for a prohibition on the derivative use of evidence given before a preliminary conference.

The Committee draws this matter to the attention of the Assembly.

Is the provision for hearings to be held in private wide enough to protect the privacy interests of persons who are not parties to a matter?

The hearing of an application to the tribunal "must be in public" (subclause 38(1)), unless the tribunal makes an order under clause 39 that the hearing, or part of it, take place in private (subclause 39(2)).

The Explanatory Statement notes that a restriction on a public hearing engages HRA subsection 21, and the statement in subclause 39(4) of what "competing interests" might outweigh the primacy of subclause 39(1) repeats the provisions of HRA subclause 21(2). In particular, paragraph 39(4)(b) refers to "the interest of the private lives of the parties as require the privacy" that is obtained by an order under clause 39. Moreover, clause 39 can apply only if a party makes application for an order.

There are two problems with clause 39.

First, it is arguable that clause 39 is too narrow, in that it is common for courts and tribunals to make orders for private hearings out of regard for the privacy or business interests of persons who are not parties to the particular case. For example of a power that permits of such protection, subsection 34(3) of the *Administrative Appeals Tribunal Act 1989* allows the tribunal to make an order when "satisfied that it is desirable to do so because of the confidential nature of any evidence or matter or for any other reason".

Secondly, in such cases, the court or tribunal must be alert to the need for such protection, and clause 39 does not permit the tribunal to act on its own initiative.

The Committee draws this matter to the attention of the Assembly.

Is there adequate protection against legal liability for a person subpoenaed to attend or appearing before the tribunal as a witness?

It is usual to provide that a person subpoenaed to attend or appearing before the tribunal as a witness before a tribunal is afforded the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the Supreme Court.[8]

There appears to be no such provision in the Bill, and it is not apparent why this should be so.

The Committee draws this matter to the attention of the Assembly.

Is the proposal in clause 42 to empower a presidential member of the tribunal to issue a warrant for the arrest of a person who has not appeared pursuant to a subpoena, and for the person to be brought to the tribunal, compatible with HRA subsection 18(1) (right to liberty and security) and/or is this power inconsistent with separation of powers doctrine?

Clause 42 provides:

> (1) If a person who is subpoenaed to appear before the tribunal under section 41 does not appear, a presidential member may, on proof of the service of the subpoena, issue a warrant to arrest the person and bring the person before the tribunal.
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> (2) However, the presidential member may only issue a warrant if satisfied that –
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> (a) the tribunal has taken reasonably practicable steps to contact the person; and
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> (b) the issue of a warrant is in the interests of justice.

Subclause 42(3) states a list of considerations relevant to an assessment in terms of paragraph 42(2)(b).

The powers of a police officer are stated in paragraph 43(3)(d). He or she "must bring the person immediately before a presidential member", and subclause 43(4) provides:

> If, after arresting the person, the police officer believes on reasonable grounds that the person cannot be brought immediately before a presidential member, the police officer must immediately release the person.

The Committee considered a similar provision in *Scrutiny Report No 34* of the *6th Assembly*, concerning the Health Legislation Amendment Bill 2006 (No 2), and in particular proposed section 59A of the *Health Professionals Act 2004.* It said that such a provision

> engages a number of HRA rights. Most obviously, there is an apparent derogation of the right in HRA section 18:

[8] This is a statement of the content of subclause 51(4) of the *Administrative Appeals Tribunal Act 1989*.

18 Right to liberty and security of person

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

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

The Committee commented on how an analysis of the effect of HRA section 18 should proceed, noting that "any argument that a detention is justified will focus on the notion of "arbitrary" in subsection 18(1)". It also said:

> As the Committee pointed out in *Scrutiny Report No 25* of the *6th Assembly*, some might argue that a provision such as section 59A 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, but they would not cover detention of a potential witness to a tribunal hearing).
>
> There is some judicial support in High Court authority for the principle just stated (see *Scrutiny Report No 25* of the *6th Assembly*). 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 (see *Scrutiny Report No 25* of the *6th Assembly*).
>
> On this second view, close attention must thus 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.

It should be added that those High Court judges that allow for wider latitude for executive detention emphasise that it must be for "protective" and not "punitive" purposes. It is probable that the High Court would not permit detention of a potential witness to a tribunal hearing, and hold that any such detention must be by order of a court. It is possibly the case that this High Court doctrine does not limit the power of the Assembly, but it can provide a yardstick for the application of HRA subsection 18(1).

The provisions of clauses 42 and 43 of the Bill are very different to the proposed section 59A of the *Health Professionals Act 2004* commented upon by the Committee in *Scrutiny Report No 34* of the *6th Assembly*. The period of detention consequent upon an arrest will in practice be short, although depending on circumstances this time could amount to several hours. There will nevertheless be a detention, and the issue of whether it is arbitrary cannot be avoided.

The Committee is disappointed to see that the Explanatory Statement makes no reference to these rights issues, and considers that the Minister should provide an explanation of why it is considered by government that clauses 42 and 43 are HRA compliant.

Are the provisions of the Bill concerning the costs of a matter such as to ensure that access to the tribunal is inexpensive?

A stated object of the Bill is "to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal" (paragraph 6(b)). Against this yardstick, some questions might be asked with respect to the provisions of the Bill concerning costs.

Subclause 48(1) provides that "[t]he parties to an application must bear their own costs unless this Act otherwise provides or the tribunal otherwise orders". Subclause 48(2) then specifies some circumstances in which the tribunal may order a party to pay costs to another party.

The first question is whether subclause 48(2) is an exhaustive statement of when the tribunal may make a costs order.

If it is, then there is a question whether the circumstances specified are wide enough. A party to a civil dispute may find it necessary to go to considerable expense, even if a lawyer is not called upon. A party may need to pay for medical and other expert reports. A respondent to the case may well feel aggrieved that they cannot recover any expenses if they win the case. An applicant may feel that their damages have been swallowed up in expenses.

The Committee considers that there should be some explanation of why the usual rule in civil matters that "the loser pays" does not apply in the civil disputes jurisdiction of the tribunal.

Once a matter is removed to the Supreme Court the costs will become quite onerous for many persons, and will indeed be such that the litigant will need to consider very carefully whether to abandon their claim at that point – in other words, many applicants will "give up" and many respondents will "give in". It may be that some litigants will seek Supreme Court intervention in order to force the other party to abandon their claim.

Where a party initiates an appeal or reference to the Supreme Court, it may be fair enough to say that he or she should take the risk of paying costs of the other party. Where there has been an adjudication by the tribunal, and the losing party appeals to the Supreme Court, it may also be fair enough to say that the respondent to the appeal should take the risk of paying costs of the other party.

Under the Bill however, a party may be forced to appear in the Supreme Court even though there has not been an adjudication by the tribunal of the merits of the case.

- Under subclause 83(2), on the application of one party, "the tribunal may order that the application be removed to the Supreme Court".

- Under subclause 84(1), "[i]f the tribunal considers that a question of law that arises in considering an application or an appeal raises an issue of public importance, the tribunal may refer the question to the Supreme Court". The tribunal may act on its own initiative or on application by a party.

- Under clause 85, the appeal president may refer an internal appeal (that is, where a party appeals a tribunal decision to an appeal tribunal) to the Supreme Court (subject to specified conditions).

The issue is whether in all these cases a party who does not wish to have the matter proceed to the Supreme Court should be given some protection against a costs order made by the Supreme Court. Without such protection, such a party may well be advised to "give in".

HOUSING ASSISTANCE AMENDMENT BILL 2008

This Bill would amend the *Housing Assistance Act 2007* to provide for regulation of the community and affordable housing sector by the Housing Commissioner.

Do the provisions that permit or require the housing commissioner to make several kinds of subordinate law amount to an appropriate delegation of legislative power?

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

Much of the critical detail of the scheme is left to various forms of subordinate law to be made by the housing commissioner, who may[9]:

- "determine a process for the registration of [both kinds of] housing providers" (proposed subsection 25A(2)) – such determinations are disallowable instruments (proposed subsection 25A(3)). These determinations are critical in that the Bill makes no provision for any kind of hearing of an application for registration[10]; and

- "determine standards (the ***standards***) for a community housing provider" (proposed subsection 25I(1)) - such determinations are only notifiable instruments (proposed subsection 25I(3)). These standards are critical in that an entity is not eligible to be registered as a community housing provider unless it satisfies the standards (paragraph 25G(e)); and

- "may determine guidelines (the ***monitoring guidelines***) for monitoring the operation of affordable and community housing providers" (proposed subsection 25K(1)) - such guidelines are disallowable instruments (proposed subsection 25K(4)). These guidelines are maybe used by the commissioner "to decide whether a provider continues to comply with the eligibility criteria for the provider's registration" (proposed subsection 25K(2)).

The Assembly will have some measure of control over disallowable instruments, but not over a notifiable instrument.

The Committee draws this matter to the attention of the Assembly.

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

Reasons for decisions

Is there adequate provision concerning an obligation to provide reasons for decisions that will affect the interests of persons?

[9] At least with respect to the first two kinds of law now to be noted, the word "may" is probably to be understood as imposing a duty to make the subordinate law.

[10] The Committee notes that proposed subsection 25B provides merely that "[t]he housing commissioner must refuse to register an entity as a housing provider if the entity does not satisfy the eligibility criteria", and proposed subsection 25T(1) provides only that "[t]he housing commissioner may remove a registered housing provider from the register if the provider breaches a condition of registration".

Proposed section 25B empowers the housing commissioner to refuse to register an entity as a housing provider if the entity does not satisfy the eligibility criteria. There appears to be no obligation to provide a reasons statement for a decision. An aggrieved person might obtain a statement by seeking review by the Administrative Appeals Tribunal (see clause 9, proposed Table 31A, item 3). This step would put both the person and the agency to expense, and it is not clear why the course of requiring a reasons statement when the decision is made is not followed.

A similar comment may be made concerning the powers of the commissioner in proposed subsection 25O(3) and 25S(1).

In contrast, proposed subsection 25T(1) empowers the housing commissioner to "remove a registered housing provider from the register if the provider breaches a condition of registration" In this case, it is provided that the commissioner "must prepare a written notice of a decision to remove a housing provider from the register" (proposed subsection 25T(3)). This provision in turn may (it is not clear) cause section 179 of the Legislation Act to operate:

> (1) This section applies if a law requires a tribunal or other entity making a decision to give written reasons for the decision, whether the term 'reasons', 'grounds' or any other term is used.
> (2) The document giving the reasons must also set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based.

The Committee considers that the Minister should clarify what is intended with respect to the giving of reasons in respect of the various powers just noted.

A wide administrative discretion

Is there adequate definition of the scope of the discretion of the housing commissioner or another Territory entity in subsection 25Q(1)?

By proposed subsection 25Q(1), "[t]he housing commissioner or another Territory entity may give assistance to a registered housing provider". The examples provided as a note to the provision suggest that assistance may extend to "a grant of money", or "a transfer of land", and other like benefits.

This is a very significant power, and it is to be noted that the discretion is entirely open-ended, with no indication of what considerations are relevant or not to its exercise. The exercise of this power will be of interest not only to potential recipients of assistance, but to the public generally.

The Committee draws this matter to the attention of the Assembly.

The privilege against self-incrimination

The Committee suggests that a note to proposed subsection 25R(1) refer to sections 170 and 171 of Legislation Act.

Are rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?

Should there be provision for review by the Administrative Appeals Tribunal of a decision under proposed subsection 25T(1) to "remove a registered housing provider from the register if the provider breaches a condition of registration"?

By proposed subsection 31A there would be provision for review by the Administrative Appeals Tribunal of most of the significant decision-making powers to be vested in the housing commissioner. The Committee notes, however, that there is no provision for review of a decision under proposed subsection 25T(1) to "remove a registered housing provider from the register if the provider breaches a condition of registration" – see Table 31A. This is a significant power, for, as the Explanatory Statement states, "[t]he framework empowers the Housing Commissioner to register, monitor the activities of, and de-register housing providers. The consequence of de-registration would be the loss of any tied government assistance and publicly funded assets".

The Committee draws this matter to the attention of the Assembly.

PROJECTS OF TERRITORY IMPORTANCE BILL 2008

This is a Bill for an Act to permit the Executive of the ACT Government to expedite land planning assessment and evaluation processes in relation to a project of importance to the future of the Territory on certain land, in circumstances where the project was previously proposed to be conducted on other land and that other land was found to be unsuitable at a late stage of the planning process.

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

General considerations

The Committee notes that the relevant Ministers cannot prepare a certificate of importance unless (a) the commissioner for the environment has certified in writing he or she is satisfied that the environmental impact of the project at the 2nd location is not significantly worse than the environmental impact of the project at the originally proposed location; and (b) the human rights commissioner has certified in writing that the impact of the project on human rights at the 2nd location is not significantly worse than the impact of the project on human rights at the originally proposed location.

Judicial review

The Committee notes that while clause 13 proposes that any kind of decision made in relation to the project, is not a reviewable decision under section 407 the *Planning and Development Act 2007*, this exclusion will not affect the availability of judicial review.

Is the provision for a certificate of importance to modify a planning law an inappropriate delegation of legislative power?

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

Delegation of legislative power – the power to suspend the operation of the law

The Committee notes that a certificate of importance "modifies a planning law in relation to the project" to allow the project to be delivered at the 2nd location (subclause 12(2)), and that it "may modify the operation of a planning law in relation to the project by suspending the law's operation in relation to the project as stated in the certificate" (subclause 12(3)).

The Committee draws attention to this significant modification of the principle that only the legislature may change the terms of a statute. It also notes that a certificate does not come into force until the Legislative Assembly has "by motion carried by at least 12 members", approved a certificate.

The Committee draws this to the attention of the Assembly.

WASTE MINIMISATION (CONTAINER RECOVERY) AMENDMENT BILL 2008

This Bill would amend the *Waste Minimisation Act 2001* to create a scheme whereby: (a) a person who person manufactures, or brings into the ACT, a beverage container must pay a contribution (of not less than 10 cents) for each container; (b) the contributions are paid into a container deposit fund; (c) the operator of a collection depot must pay the refund value (of not less than 10 cents) to a person who presents an unbroken container to the depot; and (d) any credit amount in the fund is distributed under the direction of a management committee.

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

Strict liability offences

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

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

A retrospective provision

Is it justifiable to provide for the retrospective operation of proposed subsection 20I(1) of the Act?

Section 25 of the *Human Rights Act 2004* states a principle against the retrospective application of criminal laws. It is, however, generally accepted, as a common law right, that a law should not have a retrospective operation, in particular where that would affect adversely the rights or interests of a person.[11] One way in which a retrospective law is unfair is that it disappoints the expectations of those who assumed that the quality of their past acts would be assessed on the basis of the law as it then stood. It is important to keep this in mind when assessing whether a particular law having retrospective effect is unfair.

Proposed section 20C of the Waste Minimisation Act would provide:

> This part does not apply to a beverage container manufactured before the day this part would, apart from this section, apply to the beverage container.

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

The Committee notes that the scheme applies more widely, that is, "if a person manufactures, ***or brings into*** the ACT, a beverage container" (subsection 20I(1)). There thus arises a question as to why proposed section 20C does not apply more widely.

It appears that proposed subsection 20I(1) would be retrospective in that it fixes on an action (the bringing in to the Territory of a container) that occurred in the past and then from a later date attaches some legal consequence to the action.

A person who brought a container into the Territory before the passage of the Bill (or at least before it is presented to the Assembly) could be said to have an expectation that he or she would not be obliged to pay a contribution, and proposed subsection 20I(1) would defeat this expectation.

(The Committee notes that subsection 20I(1) seems very widely drawn. It appears to encompass a person who say purchased a beverage contained in Queanbeyan and brought it into the Territory.)

The Committee draws this matter to the attention of the Assembly.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-51 being the Water and Sewerage (Fees) Determination 2008 (No. 1) made under section 45 of the *Water and Sewerage Act 2000* **revokes DI2007-154 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-52 being the Betting (ACTTAB Limited) Rules of Betting Determination 2008 (No. 1) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2005-246 and determines the Rules of Betting incorporating the Rules Relating to Betting Transactions in Victoria (TABCORP Totalizator Rules).**

Disallowable Instrument DI2008-53 being the Nature Conservation (Species and Ecological Communities) Declaration 2008 (No. 2) made under section 38 of the *Nature Conservation Act 1980* **revokes DI2008-26 and determines specified species to be vulnerable species, endangered species and endangered communities.**

Disallowable Instrument DI2008-55 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares a specified organisation to be a Parking Authority within the area of Block 19, Section 63 in the suburb of City.**

Disallowable Instrument DI2008-56 being the Public Sector Management Amendment Standards 2008 (No. 1) made under section 251 of the *Public Sector Management Act 1994* **updates the overtime duty meal allowance rate.**

Disallowable Instrument DI2008-60 being the Road Transport (Public Passenger Services) (Defined Rights Conditions) Determination 2008 (No. 1) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* **determines the defined rights conditions for a ballot of defined rights for non-transferable leased taxi licences.**

Disallowable Instrument DI2008-61 being the Road Transport (Public Passenger Services) (Defined Rights Conditions) Determination 2008 (No. 2) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* **determines the defined rights conditions for a ballot of defined rights for conditional non-transferable taxi licences.**

Disallowable Instrument DI2008-62 being the Corrections Management (Official Visitor) Appointment 2008 made under subsection 57(1) of the *Corrections Management Act 2007* **appoints a specified person as an Official Visitor.**

Disallowable Instrument DI2008-63 being the Financial Management (Statement of Performance Scrutiny) Guidelines 2008 made under section 133 of the *Financial Management Act 1996* **revokes DI2005-273 and prescribes the annual scrutiny requirements for different categories of performance measures included in the Statement of Performance.**

Disallowable Instrument DI2008-64 being the Government Procurement Appointment 2008 (No. 1) made under section 12 of the *Government Procurement Act 2001* **appoints a specified person as a non-public employee member of the Government Procurement Board.**

Disallowable Instruments—Comment

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

Minor drafting issues

Disallowable Instrument DI2008-47 being the Health Professionals (Psychologists Board) Appointment 2008 (No. 1) made under sections 5 and 10 of the *Health Professionals Regulation 2004* **appoints specified persons as president and members of the ACT Psychologists Board.**

Disallowable Instrument DI2008-48 being the Health Professionals (Pharmacy Board) Appointment 2008 (No. 2) made under sections 5 and 10 of the *Health Professionals Regulation 2004* **appoints specified persons as president and members of the ACT Pharmacy Board.**

Disallowable Instrument DI2008-49 being the Health Professionals (Dental Technicians and Dental Prosthetists Board) Appointment 2008 (No. 1) made under section 10 of the *Health Professionals Regulation 2004* **appoints a specified person as a member of the ACT Dental Technicians and Dental Prosthetists Board.**

The first of the instruments listed above appoints three named persons to the ACT Psychologists Board. One is appointed as the President of the Board. The Committee notes that the prefaratory part of this instrument indicates that it is made under sections 5 and 10 of the *Health Professionals Regulation 2004*. Section 5 is correctly identified as the provision that authorises the appointment of the President of a health profession board. Section 10 is identified as relating to "Board members – election or appointment". The Committee notes that, in fact, section 10 of the Health Professional Regulation is headed "Appointment of board members" and relates only to the appointment of Board members.

The Committee also notes that the Explanatory Statement to this instrument states:

> A person is not eligible for appointment as President or as a psychologist member unless the person is a registered psychologist in the ACT. The person also needs to have been registered for a continuous period of at least three years immediately before the day of the appointment. A community representative member must be on the community

representative list for the Board, in accordance with section 11 (4) of the *Health Professionals Regulation 2004*.

The Committee notes that the first 2 sentences above correctly state the appointment requirements set out in section 5 of the Health Professionals Regulation for the President of the Board. There is no indication, however, that the person appointed actually *satisfies* the relevant requirements. While it is a small matter, the Committee suggests that it would be appropriate if, in addition to setting out these requirements, an Explanatory Statement should also state that the person appointed fulfils the relevant requirements, rather than expecting the Committee (and the Legislative Assembly) simply to assume that this is the case. In this regard, the Committee also notes that the Explanatory Statement goes on to state that the person appointed as a community representative actually meets the requirement set out in the third sentence of the paragraph of the Explanatory Statement that is set out above.

The Committee notes that similar issues arise in relation to the Explanatory Statements accompanying the second and third instruments listed above.

Minor drafting issues

Disallowable Instrument DI2008-50 being the Cultural Facilities Corporation (Governing Board) Appointment 2008 (No. 1) made under Division 2.2 of the *Cultural Facilities Corporation Act 1997* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as chair of the Cultural Facilities Corporation.**

The Committee notes that this instrument contains several typographical errors. First, it initially identifies the authorising legislation as the "*Cultural Facilities Corporation* ***ACT 199***". Second, it identifies the authorising legislation as the "*Cultural Facilities Corporation* ***ACT*** *1997*". Third, while it initially identifies section 79 of the *Financial Management Act 1996* as the provision that authorises the appointment of chair and deputy chair of the governing board of a territory authority, it later, incorrectly, identifies section 78 as the empowering provision.

Setting of fees

Disallowable Instrument DI2008-54 being the Legal Profession (Bar Council Fees) Determination 2008 (No. 1) made under subsection 84(2) of the *Legal Profession Act 2006* **revokes DI2007-112 and determines fees payable for the grant or renewal of a barrister practising certificate.**

The Committee notes that, in this instrument, the ACT Bar Association determines fees in relation to practising certificates. The Committee notes that there is no indication in either the instrument itself or in the Explanatory Statement that accompanies the instrument as to the magnitude of any increase in the relevant fees, nor the reasons for any increase. The Committee notes that it has previously pointed out that it is important that the Legislative Assembly, which has a supervisory role in relation to the setting of fees, be advised of the magnitude of fees increases and also the justification for increasing fees.

Setting of fees

Disallowable Instrument DI2008-57 being the Planning and Development (Fees) Determination 2008 (No. 3) made under section 424 of the *Planning and Development Act 2007* **revokes DI2008-42 and determines fees payable for the purposes of the Act.**

The Committee notes that this instrument determines fees for the purposes of the *Planning and Development Act 2007*. The Explanatory Statement to the instrument states:

The purpose of this determination is further to adjust fees for the period ending 30 June 2008 for services prescribed by the Act which are not covered by an existing fees determination.

The Committee notes that there is no indication in either the instrument itself or in the Explanatory Statement that accompanies the instrument as to the magnitude of any increase in the relevant fees, nor the reasons for any increase. The Committee notes that it has previously pointed out that it is important that the Legislative Assembly, which has a supervisory role in relation to the setting of fees, be advised of the magnitude of fees increases and also the justification for increasing fees.

No Explanatory Statement

Disallowable Instrument DI2008-58 being the Major Events Security Declaration 2008 (No. 1) made under section 4 of the *Major Events Security Act 2000* **determines the National Convention Centre to be a restricted area during the Beijing 2008 Olympic Torch Relay.**

Disallowable Instrument DI2008-59 being the Major Events Security Declaration 2008 (No. 2) made under section 4 of the *Major Events Security Act 2000* **declares the route/venue of the Beijing 2008 Olympic Torch Relay to be a restricted area.**

The Committee notes that there is no Explanatory Statement for either of these instruments. While the Committee acknowledges that it is not compulsory that legislation be accompanied by an Explanatory Statement, the Committee also notes that (as it has consistently maintained) it greatly assists the Committee (and the Legislative Assembly) in its scrutiny of legislation if an Explanatory Statement is provided for each piece of legislation considered by the Committee.

Subordinate Laws—No comment

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

Subordinate Law SL2008-12 being the Fair Trading (Consumer Product Standards) Amendment Regulation 2008 (No. 1) made under the *Fair Trading (Consumer Affairs) Act 1973* **prescribes a consumer product safety standard for basketball rings and backboards and for monkey bikes.**

Subordinate Law SL2008-14 being the Magistrates Court (Crimes Infringement Notices) Regulation 2008 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for certain specified offences against the Crimes Act 1900.**

Subordinate Law SL2008-15 being the Magistrates Court (Liquor Infringement Notices) Regulation 2008 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued when a person consumes liquor in certain public places.**

Subordinate Law SL2008-16 being the Road Transport (Vehicle Registration) Amendment Regulation 2008 (No. 1) made under the *Road Transport (Vehicle Registration) Act 1999* **and** *Road Transport (General) Act 1999* **amends the *Road Transport (Vehicle Registration) Regulation 2000* and the *Road Transport (General) Regulation 2000* to prevent a new owner of a vehicle that has a suspended or cancelled registration due to a dishonoured registration payment from being disadvantaged.**

Subordinate Law SL2008-17 being the Gene Technology Amendment Regulation 2008 (No. 1) made under the *Gene Technology Act 2003* **amends the *Gene Technology Regulation 2004* to implement the national framework for gene technology.**

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Planning, dated 5 May 2008, in relation to comments made in Scrutiny Report 52 concerning Subordinate Laws:
  - SL2008-2, being the Planning and Development Regulation 2008; and
  - SL2008-3, being the Building (General) Regulation 2008.
- The Chief Minister, dated 9 May 2008, in relation to comments made in Scrutiny Report 52 concerning Disallowable Instrument DI2007-323, being the Auditor-General Acting Appointment 2007.
- The Minister for Planning, dated 16 May 2008, in relation to comments made in Scrutiny Report 51 concerning the Planning and Development Legislation Amendment Bill 2008.
- The Attorney-General, dated 22 May 2008, in relation to comments made in Scrutiny Report 38 concerning Subordinate Law SL2006-56, being the Freedom of Information Amendment Regulation 2006 (No. 1).
- The Attorney-General, dated 22 May 2008, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instrument DI2007-107, being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1).
- The Minister for Housing, dated 31 May 2008, in relation to comments made in Scrutiny Report 54 concerning Subordinate Law SL2008-7, being the Housing Assistance Regulation 2008.
- The Minister for Children and Young People and the Attorney-General, dated 4 June 2008, in relation to comments made in Scrutiny Report 53 concerning the Children and Young People Bill 2008.

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Children and Young People, the Minister for Planning and the Minister for Housing for their helpful responses.

Bill Stefaniak, MLA
Chair

June 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

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

Report 4, dated 7 March 2005

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

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

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

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

Report 6, dated 4 April 2005

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

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

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

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

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Bills/Subordinate Legislation

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

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

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

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

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

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

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

Bills/Subordinate Legislation

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

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

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

Report 37, dated 12 February 2007
Civil Partnerships Bill 2006

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

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

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

Report 47, dated 12 November 2007
Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Bills/Subordinate Legislation

Report 49, dated 3 December 2007

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

Report 50, dated 4 February 2008

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

Report 51, dated 3 March 2008

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

Report 52, dated 31 March 2008

Disallowable Instrument DI2008-19 - Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1)

Report 53, dated 7 April 2008

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2008
Disallowable Instrument DI2008-20 - Territory Records (Advisory Council) Appointment 2008 (No. 1)
Disallowable Instrument DI2008-23 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 3)
Disallowable Instrument DI2008-24 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 4)
Disallowable Instrument DI2008-25 - Emergencies (Bushfire Council Members) Appointment 2008

Report 54, dated 5 May 2008

Aboriginal and Torres Strait Islander Elected Body Bill 2008
Crimes (Forensic Procedures) Amendment Bill 2008
Firearms Amendment Bill 2008
Protection of Public Participation Bill 2008 (PMB)

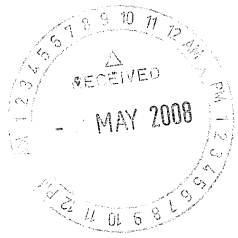
Bills/Subordinate Legislation

Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2008 (PMB)

Subordinate Law SL2008-10 - Magistrates Court (Building Infringement Notices) Regulation 2008

Subordinate Law SL2008-8 - Planning and Development Amendment Regulation 2008 (No. 1), including a regulatory impact statement

ACT Planning & Land Authority



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

Dear Mr Stefaniak

I am writing in response to the comments made by the Standing Committee on Legal Affairs in Scrutiny Report 52 of 31 March 2008 on the *Planning and Development Regulation 2008* (the regulation) and the *Building (General) Regulation 2008* (the Building Regulation). I have considered the Report and provide the following comments.

The Committee raised a number of issues on the regulations, the explanatory statements and the regulatory impact statements. I shall respond against each comment in the order that they arise in the Committee's report.

The Planning and Development Regulation 2008 - Strict Liability

The Committee commented that the Explanatory Statement did not address certain issues in relation to the strict liability offence created by section 76 of the regulation. Under section 76 an inquiry panel established under the *Planning and Development Act 2007* may direct its proceedings to be conducted in private and may direct the restriction of publication of information given to the inquiry. Contravening a direction is a strict liability offence under section 76(2) with a maximum penalty of $1,000.

In the Committee's view, the Explanatory Statement should have addressed the issues of why a fault element was not required for the offence and whether a defendant could rely on some defences other than the defence of reasonable mistake of fact allowed by the *Criminal Code 2002*.

It is agreed that the Explanatory Statement failed to address the issues raised by the strict liability offence in the regulation. Unfortunately, an earlier version of the Explanatory Statement was inadvertently notified on the ACT Legislation Register and subsequently tabled. The latest version, which had addressed the issues raised by the Committee will now be tabled in the ACT Legislative Assembly as a *Revised Explanatory Statement* as soon as practicable.

The use of strict liability was carefully considered in developing the offence.

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The ACT Planning and Land Authority must be provided with an adequate deterrent scheme to ensure the protection of the community from the dissemination of information considered to be confidential by the inquiry panel. Strict liability is beneficial where offences need to be dealt with expeditiously to ensure confidence in the regulatory scheme. Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions. They are appropriate where the authority is in a position to readily assess the truth of a matter and whether an offence has been committed. Lower penalties for strict liability offences provide a safeguard for those affected.

I thank the Committee for drawing our attention to the omission in the Explanatory Statement with the result that the correct, revised Explanatory Statement will now be tabled.

Building (General) Regulation 2008 - section 45 and the asbestos removal code

The Committee has asked for the Minister's advice as to the purpose of section 45 of the regulation. The purpose of section 45 is to disapply the requirements of the Legislation Act, section 47 (5) from the asbestos removal code and from the tolerances guide. The intention is to avoid having to notify those instruments on the legislation register because they are subject to copyright restrictions and are also freely available through the internet. Although copyright restrictions apply, including the need to note that the use of the work is for personal use, non-commercial use or use within the organisation, the work may be down-loaded, displayed, printed and reproduced, in unaltered form.

The Committee has asked for the Minister's advice as to where (other than on the ACT Legislation Register) the asbestos removal code is publicly available. The asbestos removal code is available through various avenues;

- Via disallowable instruments made under the Building Act 2004:
  The Dictionary to the Building Regulation provides a definition of ***asbestos removal code.*** It means a code approved by the Minister under the *Building Act 2004*, section 139B. An approved code is a disallowable instrument under s139B (3) of the Act. On the Legislation Register there are 2 disallowable instruments relating to asbestos.

  DI 2006 – 175 establishes the asbestos code of practice in relation to minor maintenance work as the NOHSC Code of Practice for the Management and Control of Asbestos in the Workplace, published by the Office of the Australian Safety and Compensation Council. The instrument **provides the website address for the *NOHSC*** and that the asbestos code and any other related documents are available for **inspection** by members of the public on business days **at the ACT Planning and Land Authority**.

  DI 2006 -174 states that the code of practice for an ***asbestos removal control plan*** (as defined by the Act) is that the ***asbestos removal control plan*** is to contain, as a minimum, the following information-
  (1) the method proposed to be used to remove the asbestos;
  (2) the approximate quantity and kind of asbestos to be removed;

(3) the equipment proposed to be used to remove the asbestos, including any personal protective equipment; and
(4) details of a program (prepared in accordance with the ***NOHSC Code of Practice for the Safe Removal of Asbestos***, **published by the Office of the Australian Safety and Compensation Council**) for monitoring airborne asbestos.

The instrument further states that copies of this and related documents are available for inspection by members of the public on business days at the ACT Planning and Land Authority shopfront, Dame Pattie Menzies House, 16 Challis Street, Dickson; and online (electronic PDF format) from the Office of the Australian Safety and Compensation Council at www.nohsc.gov.au/OHSInformation/NOHSCPublications/#5.

The relevant website has been updated since the instrument was made and a copy of the DI can now be accessed from the following links:

- http://www.ascc.gov.au/ascc/healthsafety/hazardssafetyissues/hazardoussubstances/atozlist/asbestos/codeofpracticesaferemoval

- http://www.ascc.gov.au/ascc/aboutus/publications/nationalstandards/listofnationalcodesofpractice.htm

- Using internet search engine, such as ***Google***
  A search using the key words *asbestos code* and limiting the responses to Australia, provides quick and easy access to the NOHSC website. This is a quick and efficient way for members of the public and industry to ensure that they access current information.
- Visiting the Customer Service Centre of the ACT Planning and Land Authority, 16 Challis Street Dickson ACT.

I trust that this answers the Committee's inquiry.

Planning and Development Regulation - part 3.2, schedule 3

In this section of the report, under the sub-heading *Subordinate Law SL2008-3 being the Building (General) Regulation 2008…'* the Committee refers to both the *Building (General) Regulation 2008* and the *Planning and Development Regulation 2008*. However, the substantive comments of the Committee relates to exemptions from third party merit review in the Planning and Development Regulation. My response relates to these substantive comments.

Part 3.2, schedule 3 of the *Planning and Development Regulation 2008, Schedule 3* deals with third-party exemptions from AAT review. Schedule 3 of the *Planning and Development Regulation 2008*, by and large, maintains the status quo of rights that existed under the *Land (Planning and Environment) Act 1991* (repealed) regulation (the original regulation). The original regulation was amended by the *Land (Planning and Environment) Amendment Regulation 2006 (No 2) (repealed)*. This amendment removed third party appeal rights in relation to town centres, Civic and industrial areas consistent with the Governments overall planning system reforms.

When this amendment regulation was made, under the *Land (Planning and Environment) Act 1991*, the Committee, in Scrutiny Report #26, raised similar issues to those identified in the Committee's current report. The letter in response to the Report #26 of 14 July 2006 is appended to Scrutiny Report #28.

To assist the Committee I provide the following extract from the explanatory statement for the 2006 amendment regulation related to the requirements of the *Human Rights Act 2004*:

> "....The Human Rights Act 2004, in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the amendment regulation. However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.
>
> To the extent that the amendment regulation limits any rights afforded by the Human Rights Act 2004, these limitations must meet the proportionality test of section 28 of that legislation. In this case the amendment regulation serves to improve the development assessment process within the Civic centre area, a town centre area and industrial areas by increasing certainty and reducing delays and costs. It should serve to facilitate development in these areas, which is of general benefit to the Territory. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. Rights of judicial review remain.

The Committee generally accepted the above rationale for the changes to third party appeal rights contained in the regulation in Scrutiny Report #26. However, the Committee in that report did also query whether the amendment regulation contained matters that were more properly dealt with through and Act rather than a regulation. The letter in response indicated that these were matters appropriate for a regulation. The letter noted:

> "The Committee appears to express, however, some reservations about the appropriateness of exempting certain types of development applications from third party merit appeals, suggesting that this matter is more appropriately dealt with in legislation. As you are aware the Land (Planning and Environment) Act has long contained a power to exempt certain development applications from the application of Part 6

of the Act dealing with development assessment, including the application of third party appeal rights. As you are also undoubtedly aware, a number of exemptions from third party appeal rights have been made over the years.

As the Committee acknowledges, the rationale for this regulation is provided in the regulation's Explanatory Statement. The regulation achieves an appropriate balance between the general benefit to the ACT community of facilitating development in the Civic centre area, the other town centres and industrial areas and the protection of the interests of residents and others likely to be affected by such development. As the Committee notes, persons affected by particular development proposals are able to make submissions on individual proposals or relevant Territory Plan variations and the rights under the *Administrative Decisions (Judicial Review) Act 1989* are not affected.

In light of the above, I conclude that the removal of specified rights of merit appeal is warranted, does not represent an undue trespass on existing rights and is an appropriate matter for regulation."

I believe the reasoning in the above extracts remains as valid for the relevant provisions of the new regulation (item 4 of part 3.2) as it is for the original.

The current regulation preserves the exemptions from third party appeal in the original regulation including exclusion of third party appeals from town centres, Civic and industrial areas, with some changes to accommodate the assessment track system and where necessary changes to the boundaries of the town centre maps. Boundary map changes ensure consistency with the view that third party appeals should not be available within the commercial areas of these town centres. In particular, the boundaries of the Gungahlin town centre have been extended consistent with the enlargement of the commercial area of this centre under the restructured territory plan.

I propose that the revised Explanatory Statement will now include additional explanations of these matters consistent with the rationale put forward in relation to the *Land (Planning and Environment) Amendment Regulation 2006 (No 2) (repealed).*

Planning and Development Regulation 2008 - Regulatory Impact Statement

I thank the Committee for pointing out (p17) that, although appearing detailed and comprehensive, the regulatory impact statement contained no assessment under section 35 (h) of the *Legislation Act 2001*, and as such it failed to comply with the paragraph (b) – technical and stylistic standards, of the Committee's Terms of Reference.

In compiling the regulatory impact statement the Authority assessed each element of the regulation for compliance with the Committee's principles. It was determined that each element did comply with the Committee's principles and a general statement, to this effect, was provided.

Future regulatory impact statements shall ensure that the processes that the Authority has undertaken to establish compliance with the Committee's principles, and details of the assessment, as required by the Legislation Act 2001 s35 (h), is articulated in the regulatory impact statement.

Building (General) Regulation 2008 - Regulatory Impact Statement

In this section of the report the Committee comments on the *Building (General) Regulation 2008* and the *Planning and Development Regulation 2008*. I assume that comments in that section relate to the *Planning and Development Regulation 2008* and as such the following responses are provided.

The Committee made a further comment about the explanation provided for the use of strict liability offences in the regulation. This comment while contained under the sub-heading 'Subordinate Law SL2008-3 being the B*uilding (General) Regulation 2008....*' is relevant to the Planning and Development Regulation. The Committee had previously, page 11, commented favourably on the explanation provided for the use of Strict Liability offences in the *Building (General) Regulation 2008*. I draw the Committee's attention to my earlier response on the *Planning and Development Regulation 2008*.

The Committee comments on a previously mentioned issue around merit review and whether the subordinate law unduly trespasses on rights previously established by law. I hope that my earlier explanation satisfies any concerns that the Committee had on this issue.

The Committee reiterates a comment in regard to technical and stylistic standard of the regulatory impact statement. As my earlier response noted future regulatory impact statements will ensure that they provide more detailed information about the processes the Authority has used in establishing compliance with requirements set-out in the Legislation Act 2001.

I trust that the information provided above adequately addresses the issues raised by the Committee.

Thank you for raising these matters.

Yours sincerely

Andrew Barr MLA
Minister for Planning
5.5.08

Jon Stanhope MLA
CHIEF MINISTER
TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE
MINISTER FOR THE ARTS
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to the comments in the Scrutiny Report of the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) Report 52 of 31 March 2008 in respect of Disallowable Instrument D12007-323, being that of the Auditor-General Acting Appointment 2007.

The Committee noted that clause 6 of the Schedule to the *Auditor-General's Act 1996* is not the appropriate reference for acting Auditor-General arrangements, and that, as no Explanatory Statement was provided, there was no indication as to whether or not the presiding member of the Public Accounts Committee was consulted about the proposed appointment.

My department has advised that the correct reference will be included in all future instruments and that Explanatory Statements will be included with the notifications. The Parliamentary Counsel's Office has advised that the instrument is still effective because of the provisions of section 212 of the *Legislation Act 2001*.

I trust this addresses the concerns of the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister
9 MAY 2008

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ACT Planning & Land Authority

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

Dear Mr ~~Stefaniak~~ Bill

I am writing in response to the comments made by the Standing Committee on Legal Affairs in Scrutiny Report 51 of 3 March 2008 on the *Planning and Development Legislation Amendment Bill 2008* (the Bill). I have considered the Report and provide the following comments.

The first issue raised by the Committee was that the Explanatory Statement made no mention of the *Human Rights Act 2004* issues raised by the strict liability offence in the Bill, nor did it provide any justification for the imposition of strict liability. By subsection 392B(1) (see clause 42) of the Bill, an inspector who enters premises under a search warrant or monitoring warrant may require the occupier, or anyone at the premises, to give the inspector reasonable help to exercise a power under the chapter. By subsection 392B(2), a person commits an offence if they fail to take all reasonable steps to comply with such a requirement, and by subsection 392B(3), this is a strict liability offence. This power is necessary if the inspector is to be able to make an effective investigation. For example, the inspector needs to be able to ask a visitor at the premises to remove their car from the driveway or to leave an area prior to investigation.

It is agreed that the Explanatory Statement failed to address the rights issues raised by the strict liability offence in the Bill. A Revised Explanatory Statement which addressed the issues raised by the Committee was tabled in the ACT Legislative Assembly on 6 March 2008 and is now included on the ACT Legislation Register. For the reasons indicated in the tabled Revised Explanatory Statement, the strict liability offence is justified. Strict liability is necessary to ensure that this relatively minor or regulatory offence can be prosecuted in an effective and efficient manner. It is also important to note that this power and the offence provision can only apply in the context of investigations authorised by a court order.

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The Scrutiny Committee also raised an issue about the unfettered exercise of discretionary power by the ACT Planning and Land Authority (the authority) in some provisions of the Bill. It questioned the open ended discretion of the authority in section 239 to restrict the class of people that may be eligible for the grant of a lease in respect of a particular ballot, auction, tender or direct sale. It also questioned the open ended discretion in new section 272D(2).

Apart from the inclusion of direct sales in the discretion, new section 239 is identical to that section in the *Planning and Development Act 2007*, which in itself is the same as the provision contained in the previous *Land (Planning and Environment) Act 1991*. This discretion has been exercised on a fairly regular basis, without much comment, so the government does not propose to amend the legislation at this time but will examine the need for such an amendment and other possible legislative answers to the matters raised.

New section 272D(2) of the Bill affirms the authority's power to decide an application for payout of land rent notwithstanding the prescribed time period for making this decision has expired. The Scrutiny Committee questioned why the discretion of the authority to make a decision at this late stage was not limited by a requirement that it be exercised on reasonable grounds, as is the case in the new section 298B(3). After examining this matter, it has been decided that an amendment in line with the Scrutiny Report is not warranted. This is because section 272D and section 298B(3) provide different powers. Section 272D is primarily about giving the authority the actual power to make a late decision, notwithstanding that the prescribed time period has elapsed. It is not about exercising a discretion to decide an application for an extension of time, as is the case in the new section 298B.

Finally, the Scrutiny Committee pointed to a typographical error in the new section 391B. This error was corrected when the Bill, as enacted, was published on the ACT Legislation Register.

I would like to conclude by thanking the Committee for its detailed consideration of the Bill and I trust that the information provided above adequately addresses the issues raised by the Committee.

Yours sincerely

Andrew Barr MLA
Minister for Planning

16 MAY 2008

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I refer to Scrutiny of Bills Report No.38 February 2007. It has been noted by the Committee that there is an outstanding response in relation to the Committee's comments contained in that report on the *Freedom of Information Amendment Regulation 2006 (No.1)*.

A response to the comments was provided in July 2007. I have enclosed a copy of the comments for the Committee's records.

Yours sincerely

Simon Corbell MLA
Attorney General

22 MAY 2008

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COPY

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Seselja

I am writing in response to the Standing Committee on Legal Affairs Report Number 38, tabled in the Legislative Assembly on 26 February 2007. I apologise for the delay in responding.

I note the Committee's comments on *Subordinate Law SL2006-56 Freedom of Information Amendment Regulation 2006 (No.1)* at page 26 of the report. The Explanatory Statement for the Regulation includes an explanation of why the exemption is necessary.

The right to freedom of expression, which covers access to information, is not an absolute right, and it is accepted that the right may be legitimately subject to reasonable restrictions. One such reasonable restriction is client legal privilege – a privilege that applies to clients of the Government Solicitor. As noted in the Explanatory Statement, access to the documents can still be sought through client agencies and the Government Solicitor remains subject to the *Freedom of Information Act 1991* in relation to its internal administrative documents.

I thank the Committee for its comments in relation to the amendment.

Yours sincerely

Simon Corbell MLA
Attorney General

2.7.07

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MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
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Dear Mr Stefaniak

Thank you for the Committee's Scrutiny of Bills Report No. 43 of 13 August 2007. I apologise for the long delay in sending this reply. My Department and the Law Society of the ACT considered the Committee's comments some months ago, but a decision had not been made until recently as to how the Society would address the matter.

I offer the following response in relation to the Committee's comments on Disallowable Instrument DI2007-107, being the *Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No 1)*.

I understand that the Law Society is in agreement with the Committee's observation that there appears to be no valid power in the instrument to waive fees. At the time the Committee published its report, the process of grant and renewal of practising certificates for 2007-08 was, I believe, substantially complete.

I further understand that the Law Society will shortly notify a determination of fees for practising certificates for 2008-09, and that the revised instrument will address the matter on which you commented.

I thank the Committee for its comments.

Yours sincerely

Simon Corbell MLA
Attorney General
22 May 2008

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John Hargreaves MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MINISTER FOR HOUSING

MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

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

Dear Mr Stefaniak

I am writing with regard to Scrutiny Report No. 54, dated 5 May 2008.

I thank the Committee for its comments concerning Subordinate Law SL2008-7 which is the Housing Assistance Regulation 2008 made under the *Housing Assistance Act 2007*. I agree that there is an assumption that the transitional nature of the issues addressed is known, and that it would have been helpful to refer to section 109 of the Act in the Explanatory Statement to clarify that the issues addressed by the Regulation are transitional arrangements.

The Department has noted the Committee's concern and will ensure that in future, similar issues are addressed in the Explanatory Statement.

Thank you for the opportunity to respond to this matter.

Yours sincerely

John Hargreaves MLA
Minister for Housing

31 May 2008

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DEPUTY CHIEF MINISTER
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MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Stefaniak

We are writing with regard to the Standing Committee on Legal Affairs Scrutiny of Bills Report No. 53 dated 7 April 2008 which comments on the Children and Young People Bill 2008.

We thank the Committee for its detailed comments and recognition of the emphasis placed by Government on protecting human rights throughout the Bill. We offer the following response in relation to the matters raised by the Committee.

1. **The Committee notes that several provisions of the Bill propose to create strict liability offences and asks whether there is an issue under the Human Rights Act 2004 (HRA) as to whether the provision is in terms of HRA section 28, a justifiable limitation of the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).**

We note that the Committee refers to the defence set out in subclauses 145(3) and 147(5) and assume that you are referring to subclauses 230(4) and 231(6). It is the Government's intention that a person has a defence to the offence if the person proves to the evidential standard of proof that the person took reasonable steps to comply with the direction, and that this defence ameliorates the strict liability of the offences.

The Government is of the view that these strict liability offences are justified. The provisions are in the same terms as sections 145 and 146 of the *Corrections Management Act 2007* which applies to the management of a correctional facility. The purpose of the offence is to create a cause for all visitors to abide by reasonable directions. A failure to abide by reasonable directions in the environment of a detention facility has a strong potential to result in risks to the safety of young people, staff and visitors in the detention facility. Entry into a detention facility is conditional and visitors who enter the detention place are advised of the conditions of their visit. Examination of the intention of a person, or any other mental element, of this particular offence has little bearing on the purpose of the offence. The Government is mindful of ensuring that strict liability offences are only created in the most appropriate circumstances.

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Although the offence doesn't fit within the traditional concept of what is 'criminal' and what is 'regulatory', this offence still serves a regulatory function. It serves to create a cause for visitors, who have been informed of the conditions of their visit, to comply with the conditions of their visit to a detention centre. The Government is of the view that these offences are regulatory in nature and warrant the focus on the physical element of the offence.

2. **The Committee requested an explanation of why many discretionary powers, or statutory judgements involving an area of choice, are conditioned on being exercised or made on "reasonable grounds", while many others are not.**

The use of the term 'reasonable grounds' is used in drafting to expressly remove any doubt that the nature of the decision is expected to be of an objective rather than subjective nature. The term 'reasonable grounds' or 'reasonable' is considered unnecessary if the context or relevant words require an objective, rather than a subjective, test.

3. **The Committee queried whether:**

- **there should be a stronger indication in the Bill that clause 8 (Best interests of children and young people paramount consideration) operates to qualify every other provision in the Bill;**
- **there should be specific reference to the principle that the decision-maker must regard the best interests of the child or young person as the paramount consideration, in the context of clause 512 (priorities for placement);**
- **clause 512 is compatible with the HRA.**

Clause 8 regarding the best interests of the child or young person is the paramount consideration for persons making decisions or taking action under the Act, and thus operates to qualify every other provision in the Bill.

The best interests of the child or young person is paramount over the hierarchy of placement decisions set out for Aboriginal or Torres Strait Islander children and young people at clause 512(1). Any placement decision for an Aboriginal or Torres Strait Islander child or young person must as an overarching priority be in their best interests. This is consistent with the *Bringing them home report* (Report of the National Inquiry into the Separation of Aboriginal or Torres Strait Islander Children from their Families (HREOC, 1977) which made a statement about when the Indigenous Child Placement Principle should be displaced.

However the Government will, in the context of the Committee's comments, consider whether amendment is necessary to clarify the operation of clause 8 (Best interests of children and young people paramount consideration) in relation to other provisions in the Bill, including priorities for placement for Aboriginal or Torres Strait Islander children and young people at clause 512.

The Government is of the view that clause 512 is justified on the basis that it is appropriately balanced with the child or young person's right to protection under section 11(2) of the HRA.

4. **The Committee queried whether a separate scheme of decision making for Aboriginal or Torres Strait Islander children limits the right of all persons to the equal protection of the law without discrimination (HRA subsection 8(3)), and, if it does, whether it is justifiable under section 28.**

The Government is of the view that a separate regime for the making of decisions concerning Aboriginal or Torres Strait Islander children and young people is justified. The Committee raised similar issues in the Scrutiny of Bills Report No. 21, 6 February 2006 regarding the introduction of cultural plans through the *Children and Young People Amendment Act 2006*. For the reasons

outlined in my previous response to the Committee on this issue and those provided in the explanatory statement for the Bill, the Government maintains this position.

5. **The Committee queried whether the breadth of the definition of Aboriginal will complicate the administration of the regime for the making of decisions concerning Aboriginal or Torres Strait Islander children, and thus be to the detriment of their rights.**

The Government notes the concerns raised by the Committee regarding the definition of Aboriginal person which as drafted, does not include recognition of the person as part of an Aboriginal community.

This definition re-enacts the definition of Aboriginal person from the *Children and Young People Act 1999*, however the Committee's comments provide the Government with an opportunity to harmonise this definition to be consistent with similar definitions across the statue book. The Government will in the context of the Committee's comments, consider whether amendment is necessary for the definitions relating to Aboriginal and Torres Strait Islander person.

6. **The Committee queried whether the reference to "the identity of the child or young person" in subclause 512(3) should be clarified.**

The cultural plan referred to in subclause 512(3) will preserve and enhance the identity of the child or young person as an Aboriginal or Torres Strait Islander person, as outlined at clause 454(b)(ii). The Committee's comments provide an opportunity to reconsider whether the intention of subclause 512(3) can be strengthened, and the Government will, in the context of the Committee's comments, consider whether amendment is necessary.

7. **The Committee queried whether the vagueness of the concept of "adverse finding" in paragraph 70(4)(b), which is a critical element of an offence provision, means that the offence is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, is that incompatibility demonstrably justifiable (HRA section 28).**

The intent of subclause 70(4)(b) is to provide specific guidance about what is to be reported to the Chief Executive in order to assess the entity's honesty and integrity in subclause 65(1)(e). It is intended to encapsulate offences or findings of dishonesty that may affect the Chief Executive's assessment of the entity's reputation and character.

However, the Government will, in the context of the Committee's comments, consider whether amendment is necessary to remove doubt in relation to the meaning of an adverse finding.

8. **The Committee queried whether the vagueness of the concept of "unreasonable discipline" in clause 740 means that it is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, whether that incompatibility is demonstrably justifiable (HRA section 28)?**

Clause 740 re-enacts the offence at section 366(4) of the *Children and Young People Act 1999*. The meaning of unreasonable discipline is informed by the common law and is intended to encapsulate actions likely to cause emotional or physical harm to the child.

However, the Government will, in the context of the Committee's comments, consider whether amendment is necessary to clarify the meaning of unreasonable discipline.

9. The Committee queried whether the vagueness of the concept of "light work" in subclause 792(1), which is a critical element of the offence provision in subclause 794(1) as qualified by clause 795, mean that the offence is not compatible with one or both of HRA subsections 18(2) or 25(1), and if so, whether that incompatibility is demonstrably justifiable (HRA section 28).

The Government's intention in relation to light work is to ensure that children and young people under school leaving age can engage in and benefit from light work that is in their best interests. This is achieved through introducing a new test of light work to mean work that is not contrary to the best interests of a child or young person. Clause 781 provides that employment is contrary to the best interests of a child or young person in any of the following circumstances:

1. If the employment occurs when the child or young person is required under the *Education Act 2004* to attend a school, school activity or approved educational course.
2. If the employment is likely to prejudice the child or young person's ability to benefit from education or training they are participating in.
3. If the employment is likely to harm the child or young person's health, safety, or personal or social development.

However, the Government will, in the context of the Committee's comments, consider whether amendment is necessary to clarify the meaning of light work.

10. The Committee queried whether subclauses 646(1) and 646(3), in combination, amount to a privative clause, and if so are they incompatible with HRA subsection 21(1) and/or inconsistent with subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth).

The Government is of the view that the timeframes for judicial review are justified and do not amount to a privative clause. The timeframes for appeal were reviewed under the *Children and Young People Act 1999* and have been increased from 3 to 10 days in the Bill. The appeal times are consistent with the national scheme for the interstate transfer of child protection orders and proceedings, which prescribes a 10 day appeal period - see for example, sections 231K and 231O of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and section 239 of the *Child Protection Act 1999* (Qld).

11. The Committee asked why is the word "lawful" inserted in proposed clause 320J

New section 320J places an obligation upon a young offender to comply with a reasonable direction. Contravening the direction may result in the young offender facing breach proceedings before the sentencing court. The administration of most sentences are conducted by public authorities, who are at common law obliged to give lawful directions. In the case of accommodation orders, a private citizen or non-government entity can be authorised to give directions to young offenders.

The inclusion of the word lawful is intended to remove any doubt that any direction from a private citizen or entity must be lawful. For example, a private entity could not give a direction under another sentence imposed by a court, such as a supervision condition of a good behaviour order unless that entity was contemplated by the order. So, while the substance of the direction might be reasonable, it would not be lawful.

12. The Committee drew attention to provisions that could be made clearer and highlighted possible drafting errors.

The Government will consider whether amendments are necessary to address these issues raised by the Committee, within the context of current drafting practice.

We trust that the above comments clarify the provisions and the issues raised and we thank the Committee for its comments.

Yours sincerely

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4/6/08

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