Legislative Assembly for the ACT

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

Scrutiny Report

6 FEBRUARY 2006

Report 21

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:

Bills—No comment

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

ANNUAL REPORTS (GOVERNMENT AGENCIES) AMENDMENT BILL 2005

This is a Bill to amend the *Annual Reports (Government Agencies) Act 2004* in relation to the reporting arrangements for ACT Government administrative units.

ROAD TRANSPORT (ALCOHOL AND DRUGS) (RANDOM DRUG TESTING) AMENDMENT BILL 2005

This Bill would amend the *Road Transport (Alcohol and Drugs) Act 1977* to allow for random roadside drug testing (RDT) to be conducted alongside or independent to random roadside breath testing (RBT). It also sets out the relevant testing requirements, procedures, offences and penalties applicable to the introduction of random drug testing in the Territory.

ROAD TRANSPORT (PUBLIC PASSENGER SERVICES) AMENDMENT BILL 2005

This Bill would amend the Road Transport (Public Passenger Services) Act 2001 to introduce "demand responsive services" as a new category of public passenger service.

Bills—Comment

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2005 (NO 2)

This Bill would amend the *Children and Young People Act 1999* consequent upon an operational review of the Act. In particular, the amendments address: the principles to be applied when making decisions about children and young persons; the process for making care and protection decisions; placement decisions concerning Aboriginal and Torres Strait Islander children and young persons; the test for making a care and protection decision; the categories of persons required to report abuse of children and young persons, and the manner of reporting; the nature of reports to the Office of Community Advocate; the protection and release of information; and the power to make standing orders for places of detention.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

The right of a child to protection – in contrast to preservation of the family as the natural and basic group unit of society

Subsections 11(1) and (2) of the *Human Rights Act 2004* provide:

> (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
>
> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

There is a tension between these two provisions if a question arises as to whether a child should be removed from her or his family unit (or their contact with the unit somehow qualified) on the basis that the child is in need of care and protection. The need for legislation to provide for care and protection is of course widely accepted, and reflected in the legislation of all Australia jurisdictions. It is however in the detail of the scheme that a human rights issue may arise.

Does the change in the test for assessment of whether a child or young person is in need of care and protection diminish the extent of the protection to the child – or, contrawise, does the change have the effect of better preserving the family as the natural and basic group unit of society?

Clause 11 of the Bill would insert new sections 151, 151A and 151B in the Act. Their general effect is explained in the Explanatory Statement.

> Clause 11 This clause provides the meaning of abuse and neglect of children and young people. **A new concept** is introduced **of a child or young person being at risk of abuse or neglect**. This **replaces the concept of likelihood of abuse or neglect** and reflects contemporary child protection assessment of risk. **A child or young person will be at risk of abuse or neglect if there is a significant risk of the abuse or neglect occurring**. The standard of proof is the balance of probabilities.

On the face of it this is a diminution of protection to the child or young person and engages HRA subsection 11(2). That there be a "significant risk" of an event occurring is a higher threshold than the standard of a "likelihood" of the event occurring.

The only explanation given is this "reflects contemporary child protection assessment of risk". It may be that there is some explanation of why "contemporary child protection assessment of risk" justifies a different standard which would be consistent with HRA subsection 11(2), or, it may be that the different standard is justified on the basis that it promotes the policy of subsection 11(1).

The Committee suggests that further explanation directed to the HRA issues is necessary.

The equal protection of the law without discrimination

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

> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Is a scheme for decision-making concerning indigenous children and young people compatible with HRA subsection 8(3), and, if not, is it justifiable under section 28?

The Act as it stands includes a scheme to regulate decision-making concerning indigenous children and young people. The Bill would amend this scheme. Any legislative scheme which provides for different rights or obligations according to a racial classification requires specific justification. The Committee recognises that there is scope for such differentiation under HRA section 28.

The Committee raised this issue in its report on the Children and Young People Bill 1999 – see *Report No 8 of 1999*. The response of the Minister, and further comments of the Committee are in *Report No 12 of 1999*. There is a further Ministerial response in *Report No 2 of 2000*. The general issue has been fully ventilated in these exchanges, and the Legislative Assembly passed the relevant provisions into law.

Nevertheless, this Bill is presented in the era of the *Human Rights Act 2004*, and the Committee is obliged to draw attention to human rights issues which arise out of any Bill.

The Committee suggests that further explanation directed to the HRA issues is necessary.

The right to a fair trial: HRA subsection 21(1), and the Evidence Act 1995

Clause 21 of the Bill would insert proposed section 405G:

> **405G Giving protected or sensitive information to a court**
>
> (1) An information holder need not divulge protected information, that is not sensitive information, to a court unless it is necessary to do so for this Act or another territory law.
>
> (2) An information holder need not produce a document containing protected information, that is not sensitive information, to a court unless it is necessary to do so for this Act or another territory law.
>
> (3) An information holder need not divulge sensitive information to a court unless it is necessary to do so for this Act.

(4) An information holder need not produce a document containing sensitive information to a court unless it is necessary to do so for this Act.

(5) In this section:

court includes a tribunal, authority or person with power to require the production of documents or the answering of questions.

produce includes allow access to.

The issue is whether proposed subsections 405G(3) and (4) conflict with the principle that on a trial all relevant evidence is admissible. This is an element of a fair trial (HRA subsection 21(1)), which may, however, be displaced under HRA section 28 to avoid an incompatibility with the HRA. The principle is, however, also stated in subsection 56(1) of the *Evidence Act 1995* (Commonwealth).

HRA subsection 21(1) provides:

21 Fair trial

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

The ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent, is an element of a fair trial. This is reflected in the common law rule that the starting point for the admission of evidence is that any relevant evidence is admissible. The rule is restated in the *Evidence Act 1995* (Commonwealth), which applies in the Territory and which prevails over any inconsistent Territory law. Subsection 56(1) provides:

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

Subsection 55(1) then defines the notion of relevance:

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

In simpler terms, a piece of evidence (information) submitted to an adjudicator (such as a court) is admissible if that evidence – assuming that the adjudicator accepts that it has some value - would tend to establish the existence, or non-existence, of a fact in issue which must be resolved as a step towards adjudication. The rights dimension of this principle was made clear by Spigelman CJ in *R v Young* [1999] NSWCCA 166:

75 The starting point is that the search for the truth requires all oral and documentary information, which is directly or indirectly relevant or material, to be available. As Rich J has put it:

"The paramount principle of public policy is that truth should always be accessible to the established courts of the country." *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 87).

76 However, in recognition of the fact that truth may sometimes cost too much, the common law recognises a specific list of privileges. This list has been modified by statute.

77 Such privileges include legal professional privilege, the privilege against self incrimination, clergy-communicant privilege, "without prejudice" privilege. (See eg McNicol *Law of Privilege* (1992) pp7-11; also Lord Simon of Glaisdale in *D v NSPCC* supra at 231-233). Each category reflects a different form of public policy and, in that sense, represents a "public interest".

The common law does not recognise any all-embracing privilege in respect of information that is provided from one person to another in confidence. Nor does the *Evidence Act 1995*, which does, however, provide for a number of particular privileges, some of which accord protection to specific kinds of information provided in confidence.

The issue under HRA subsection 21(1)

It is no doubt the case that a Territory law extending the occasions on which a person may refuse to disclose evidence to a court may avoid incompatibility with the HRA, either on the basis that such a law is not incompatible with a fair trial, or, if it is, that this derogation is justifiable under HRA section 28. This may well be the case with proposed subsections 405G(3) and (4), although whether they are compatible is an issue which arises under the HRA, and the Committee draws this to the attention of the Assembly.

The essential question is whether the interests of others – such as the person who provided the information to the information holder, or of a child or young person – warrant protection in preference to the right of a litigant to be able to adduce relevant evidence in some matter before a court. The Explanatory Statement does not provide any justification for proposed subsections 405G(3) and (4).

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

The issue under the *Evidence Act 1995*

The more difficult legal issue is whether these provisions are compatible with subsection 56(1) of the *Evidence Act 1995*. In *Habda v The Queen* [2004] ACTSC 62 [12], Higgins CJ and Crispin J said:

> The ACT Legislative Assembly clearly has power to redefine the elements of any Territory offences, to define such concepts as intention and voluntariness and, subject to the provisions of the *Evidence Act 1995* (Cth), to restrict the admissibility of evidence.

It is arguable that proposed subsections 405G(3) and (4) conflict with subsection 56(1) of the *Evidence Act 1995*, inasmuch as subsections 405G(3) and (4) leave it to the information holder to decide whether they will give evidence to a court. If the information is relevant to a matter before a court, subsection 56(1) provides that it is admissible, and section 12 of the *Evidence Act* renders the information holder compellable to give that evidence.

The Committee has drawn attention to this issue in earlier reports. In response to a comment in *Report No 10 of the Sixth Assembly*, concerning the Human Rights Commission Bill 2005, the Minister (see letter of 7 June 2005, appended to *Report No 11 of the Sixth Assembly*) drew attention to the fact that the provision in issue provided that a person "need not" divulge the information "to a court, unless it is necessary to do so for this Act or another Territory law". The Minister's primary point, which the Committee accepts, is that the words "or another Territory law" include the *Evidence Act 1995*. These words are not, however, included in proposed subsections 405G(3) and (4).

The Minister also made another point which might be thought to apply to proposed subsections 405G(3) and (4). It was said that "the effect of section 56 of the *Evidence Act 1995* (Cwth) is to make material admissible rather than compellable". This is so, but section 12 of the Act provides that a person who is competent to give evidence is compellable to do so. A compellable witness who refused to give evidence, either generally or about a particular topic, would be in contempt of the court.

The Committee thus considers that it is arguable that proposed subsections 405G(3) and (4) conflict with subsection 56(1) of the *Evidence Act 1995*. Given that subsection 56(1) reflects a basic rights principle, the Committee draws this matter to the attention of the Assembly.

CIVIL LAW (WRONGS) AMENDMENT BILL 2005 (NO 2)

This Bill would amend the *Civil Law (Wrongs) Act 2002* to insert provisions to regulate the common law of defamation in ways that would be uniform with the laws of other Australian jurisdictions. The amendments would retain (with some modifications) the common law of defamation to determine civil liability for defamation; create a cap on the amount of damages for non-economic loss that may be awarded; abolish exemplary and punitive damages; facilitate the resolution of civil disputes about the publication of defamatory matter without litigation; establish truth alone as a defence; provide for a limitation period for civil actions for defamation of one year, subject to an extension (in limited circumstances) to a period of up to three years following publication; and provide for criminal defamation.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

The rights to reputation and to freedom of speech

The general issue

The general issue is whether, from one perspective, the law is compatible with HRA subsection 16(2) (freedom of speech), when reinforced by HRA paragraph 17(a) (right to take part in public affairs), **or**, from another perspective, is compatible with HRA paragraph 12(b) (right to reputation). In making these assessments, regard must be had to whether any derogation of these rights is permitted by HRA section 28.

In order to assist each Member of the Legislative Assembly, what follows is an attempt to provide a general framework for thinking through to a view about how these questions might be answered. It is relevant to note that the Bill is the product of long consideration by a joint Committee of Commonwealth, State and Territory officials and Ministers. It is also relevant that the result is a reform of certain aspects of the common law rather than a major change of direction.

The tort of defamation provides for remedies in respect of a defamatory statement. Such a statement is:

- a false statement made by one person (A) about another person (B) which injures the reputation of B, or deters others from associating with B; and
- which is communicated (or 'published') to a third party.

The remedies include an award of damages to B in respect of any publication of the statement, or, in some cases the grant of an injunction to restrain further publication of the statement. At common law, and by statute, there are many occasions in respect of which a defamatory statement is not actionable – that is, in respect of which cannot obtain a remedy. This body of law provides defences to an action in defamation.

This Bill does not affect the common law statement of when a statement is defamatory. Nor does it affect the range of defences available at common law except so far as change is explicit or follows necessarily from what is provided by the Bill; see proposed section 118 of the Act (clause 4 of the Bill). Nor can the Bill affect the restrictions on the law of defamation which follow from the requirement of the Commonwealth *Constitution* that the law of all Australian jurisdictions must allow for a measure of political free speech; (as to which, see below).

A law governing the tort of defamation engages HRA sections 12, 16, 17 and 28.

16 Freedom of expression

(1) Everyone has the right to hold opinions without interference.

(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

17 Taking part in public life

Every citizen has the right, and is to have the opportunity, to—

(a) take part in the conduct of public affairs, directly or through freely chosen representatives; … .

It is apparent that a law that attaches civil liability to "expression" of a person (A) that is damaging to the reputation of another person (B) derogates from A's freedom of expression. Section 17 gives added force to the right of expression where it occurs in political debate.

On the other hand, there is HRA section 12:

12 Privacy and reputation

Everyone has the right—

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

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

It is apparent that a law that relieves a person (A) from civil liability for "expression" that is damaging to the reputation of another person (B) derogates from B's right "not to have his or her reputation unlawfully attacked". (On the face of it, this depends on what effect is given to the word "unlawfully". For the sake of getting to the heart of the matter, this complication may be left aside).

This tension between rights was recognised in *Hill v. Church of Scientology of Toronto* 1995 CanLII 59 (Supreme Court of Canada):

> 100 There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

The values of free speech

It has been said that the "core values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process": *Ross v. New Brunswick School District No. 15* (1996 CanLII 237, Supreme Court). The court then said:

> This Court has subjected state action limiting such values to "a searching degree of scrutiny". This standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 [of the *Canadian Charter of Human* Rights] has been applied.

HRA section 28 is modelled very closely on section 1 of the *Canadian Charter*.

A lower value is attached to expression which is harmful to particular individuals. In *Hill v. Church of Scientology of Toronto* (above) it was said:

> 106 … defamatory statements are very tenuously related to the core values which underlie [freedom of expression]. They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

The value of reputation privacy

What must also be put in the balance is the strength of the rationale for the HRA's statement of a right to reputation in paragraph 12(b). In *Hill*, the Supreme Court of Canada said:

> 107 … to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. …
>
> 108 Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.
>
> 117 … the protection of reputation remains of vital importance. … reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J. in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), who stated at p. 92:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.
>
> 121 … reputation is intimately related to the right to privacy … [P]rivacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.

Balancing the two sets of values in relation to political free speech

Those who are concerned with the effect of defamation law on freedom of expression will in particular point to its "chilling effect", by which is meant that from a fear of being sued, a person will be inhibited from exercising their right to freedom of expression. Some judges have allowed that it is a reason to restrict the ways in which those laws permit a tort of defamation, in particular as those laws bear on expression concerning politicians or public figures; (see *New York Times v Sullivan* (1964) 376 US 254 at 273-279). Australian judges have recognised this point. In *Theophanous v Herald and Weekly Times* [1994] HCA 46 [29], Mason CJ, Toohey and Gaudron JJ said:

> … an implication of freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous criminal and civil liability if the implication is to be effective in achieving its purpose. The correctness of that proposition has repeatedly been affirmed. In the United States, in *City of Chicago v. Tribune Co. Thompson CJ* said ((37) (1923) 139 NE 86 at 90.):
>
> > "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticize the government is a privilege which ... cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions".
>
> That statement, along with others to the same effect, was endorsed by the Supreme Court of the United States in *Sullivan*.

Their Honours also approved of what had been said in an English case:

> Subsequently, in *Derbyshire C.C. v. Times Newspapers*, Lord Keith cited ((38) (1993) AC at 547-548.) those statements and the endorsement of them in Sullivan and went on to say ((39) ibid. at 548.):

> "While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available."

Earlier his Lordship had observed ((40) ibid. at 547.):

> "The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."

(It is noted below that the High Court has thus modified the common law to accommodate its concern about the chilling effect of the law of defamation on free speech.)

On the other hand, some judges have approved the chilling effect on the basis that it is part of the rationale of a defamation law. As the Privy Council said in *Gleaner Company Limited v Abrahams* (Privy Council 14 July 2003):

> … defamation cases have important features not shared by personal injury claims. The damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims. Indeed, the effectiveness of the deterrent is the whole basis of [the] argument that high awards will have a "chilling effect" on future publications. Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens.

The court alluded to a concern that the media might make "a cold-blooded cost benefit calculation that it was worth publishing a known libel".

<u>The special protection given to political free speech under the *Constitution*</u>

So far as concerns Territory law, there is less reason to be concerned about the effect of defamation law on political speech. The Bill cannot affect the limits of the tort of defamation which follow from the provision by the *Constitution* of a right to 'political free speech'. In *APLA Ltd v Legal Services Commissioner* (NSW) [2005] HCA 44 [213], Gummow J said:

> The doctrine for which *Lange v Australian Broadcasting Corporation* is authority, as reformulated in *Coleman v Power*, [(2004) 209 ALR 182 at 207–8 [93], 229–30 [196], 233 [211]] is as follows. Where a law of a state or federal parliament or a territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions are to be answered. The first question was stated in *Lange* as follows:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

The second question, as reformulated in Coleman, asks:

> [I]f the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Thus, this right protects the value of free speech as a protection of our democratic form of government. One of its effects is that the common law of defamation must be shaped so as to conform to the right. The High Court has reshaped the law to this end, and the process is not complete; see *Roberts v Bass* [2002] HCA 57. A provision of Territory statute law which is inconsistent with this right is invalid to that extent.

Some particular rights issues

Is the provision for a restriction – by means of a defence to an action in defamation – on the right to reputation in HRA paragraph 12(b), which restriction may be imposed by the law of another legislative jurisdiction in Australia, justifiable under HRA section 28?

This issue arises in respect of proposed paragraphs 137(2)(c), 138(4)(f), and 139(4)(o). The Explanatory Statement draws attention to an issue arising out of these provisions, each of which, in effect, permits a law of some jurisdiction other than the Territory (such as a State of Australia, or the Commonwealth) to state a rule on a matter of significance to the scope of the law of defamation. This rule will then apply in the Territory. These matters are:

- the occasions in which defamatory matter will attract absolute privilege for the purposes of proposed paragraph 137(2)(c);
- what will qualify as a "public document" for the purposes of proposed paragraph 138(4)(f); and
- what will qualify as a "proceeding" for the purposes of proposed paragraph 139(4)(o).

In each case, (as the Explanatory Statement notes in relation to the scope of absolute privilege), the effect of the rule of the other jurisdiction will be, so far as concerns Territory law, to limit "a person's right to protect their reputation" and thus constitute a limitation on the right to reputation under HRA paragraph 12(b). In relation to another provision, the Explanatory Statement noted, however, that "[l]imitations on human rights are, however, justifiable where the section serves a legitimate purpose and is a proportionate response to that purpose". This is a reference to HRA section 28, and in that respect two sorts of issues need to be addressed.

(The Committee notes that the Explanatory Statement refers to some limits to the defences provided by proposed paragraphs 138(4)(f) and 139(4)(o), but this does not substantially affect the resolution of the section 28 issues thrown up by the device of allowing the law of some other jurisdiction to control the content of a Territory law.)

HRA section 28 provides:

> **28 Human rights may be limited**
>
> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Two basic issues arise.

Are these restrictions "set by" Territory law?

The first issue is whether a restriction on the right in paragraph 12(b) consequent upon the making of a law of another jurisdiction is "set by" a Territory law. It is useful to note the basic issues which may arise in an assessment of whether a limit is "set by law". The case-law of the European Court of Human Rights (EctHR), and of the Canadian Supreme Court concerning a provision of the Canadian Charter upon which HRA section 28 is closely modelled, (differing only in that the Canadian provision uses the words "prescribed by law"), points to these issues:

(1) whether the restrictions have a basis in domestic law, which latter may be sourced to a statute or any form of subordinate law, or to the common law (and see here *The Sunday Times Case* (EctHR, 29 March 1979, para 47);

(2) but "[m]ere guidelines established by an administrative tribunal for the exercise of its power to censor films have no legal status" (*Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.); affirmed (1984), 5 D.L.R. (4th) 766 (Ont. C.A.));

(3) there is a "formal aspect of [fair notice to the citizen], that is acquaintance with the actual text of a statute" (*R v Nova Scotia Pharmaceutical Society* (1992 CanLII 72, Supreme Court), or, as it was put in *The Sunday Times Case* (above at para 49), "the law must be adequately accessible"; and

(4) there is a substantive (or foreseeability) aspect of fair notice. In *The Sunday Times Case* (EctHR, 29 March 1979, para 49, it was said:

> a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

These principles have been affirmed in later cases; see *Tolstoy v United Kingdom* (EctHR, 23 June 1995), para 37, and see too *R v Nova Scotia Pharmaceutical Society* (above). It should also be noted that although a particular rule may meet the "set by law" test, the degree of vagueness or ambiguity in the rule may bear on whether it is a proportionate means of achieving the objective of the rule; see *R v Nova Scotia Pharmaceutical Society* (above). The degree of vagueness which will be tolerable will vary according to the rule, its purposes, and the context in which it operates.

Looking at the three provisions in issue:

- it appears that the law of the other jurisdiction has a basis in Territory law – being each of the provisions in issue here;

- whether the law of the other jurisdiction is formulated with sufficient precision will depend on the nature of that law, and it cannot be postulated now that such a law will not have this quality; but

- there is a question whether any such the law of another jurisdiction is "accessible to the persons concerned" – that is, the parties to a defamation matter.

This last query may have some substance here because the effect of these provisions is that a person, (or their lawyer – although bearing in mind that resort to a lawyer is expensive), will need to refer to the current law of every other Australian jurisdiction before he or she can ascertain whether there is some relevant restriction on the ability to sue (or be sued) for defamation. The issue is whether the degree of difficulty in finding those laws is such that the restrictions contained in these provisions are not "accessible", and thus not "set by" the provision (as HRA section 28 requires).

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

Are these restrictions "reasonable limits … that can be demonstrably justified in a free and democratic society"?

The Explanatory Statement argues that each of these provisions

> is a 'proportionate' limitation on the right to reputation, having regard to the federal nature of Australian government. The provision serves the legitimate purpose of promoting a uniform Australian defamation law. It gives full faith and credit to the laws of the various jurisdictions. It prevents a litigant who cannot take action in a home jurisdiction from 'forum shopping' in another jurisdiction (preventing a person from doing indirectly what they cannot do directly).

The Committee acknowledges the force of this argument, but on the other hand it must point out that the device empowers every other Australian legislative jurisdiction a power to enact laws restrictive of the right to reputation in HRA paragraph 12(b) which might be incompatible with the HRA because, given its substance, the restriction cannot be justified under section 28. For example, to posit an extreme case, was some other jurisdiction to provide that a media outlet could not be sued in defamation, this rule would also apply in the Territory. Such a rule is clearly not a restriction which could be upheld under section 28.

There is then a strong doubt as to whether the Supreme Court could make a declaration of incompatibility in respect of such a restriction. Its jurisdiction to do so under HRA section 32 arises only where "an issue arises in the proceeding about whether a Territory law is consistent with a human right" (paragraph 32(1)(b)), and in the HRA "*Territory law* means an Act or statutory instrument" (Dictionary). It would thus not be open to the Supreme Court to exercise its power where the issue is whether the law of another jurisdiction is consistent, etc, unless one was to regard that law as part of the *Civil Law (Wrongs) Act 2002* (if it is amended by the relevant provisions of this Bill). This seems a strained interpretation. It also appears that the Explanatory Statement argument seems to assume that the law of the other jurisdiction would always be applied.

If this strained interpretation is not open, then the issue is whether the device of incorporating into Territory law the law of some other jurisdiction which restricts the right to reputation in HRA paragraph 12(b) is a reasonable limit that can be demonstrably justified in a free and democratic society. While the Legislative Assembly operates in a federal system, and while in relation to defamation law there is a compelling case for uniformity, it is clearly possible that by this device the right to reputation in HRA paragraph 12(b) may be restricted in ways which, as a matter of substance, could not be justified under section 28.

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

Is the width of the definition of "public document" in proposed paragraph 138(4)(d) such that the defence permitted by proposed subsection 138(1) is not justifiable under HRA section 28?

The Explanatory Statement poses the issue clearly:

> Section 138 represents a limitation on a civil action for defamation and consequently on the right to reputation under section 12(b) of the *Human Rights Act 2004*. Limitations on human rights are, however, justifiable where the section serves a legitimate purpose and is a proportionate response to that purpose.
>
> Section 138 provides a defence for a defamation action for the publication of defamatory matter contained in a public document, or copy, summary or extract of such a document. Of central importance to section 138 is the definition of "public document" under section 138(4).

The Explanatory Statement then identified a particular issue and addressed the HRA section 28 issue:

> Relevantly, section 138(4)(d) includes within the ambit of the definition of "public document":
>
> > "any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public"
>
> On the face of it, this definition potentially encompasses a wide range of documents. Nevertheless the section is a 'proportionate' limitation on the right to reputation, serving the legitimate purpose of promoting the efficient operation of Government. In addition:
>
> - the provision must be read in the context of section 138(3), which creates a condition that the publication must be made "honestly for the information of the public or the advancement of education"; and
> - under the *Privacy Act 1988*, the power of an individual to amend any "personal information" which is incorrect.

The Committee considers that more needs to be said on this issue.

First, the width of the definition of the concept of "country" in proposed section 116 needs to be noted. The word has its natural meaning – which of course embraces at the least all the members of the United Nations – and if any country is a federation, includes the federal government and "a state, territory, province or other part of [the] federation". "Country" also includes any Australian jurisdiction.

Secondly, it must be noted that proposed subsection 138(3) **places on the plaintiff** the burden to prove that the publication was **not** published "honestly for the information of the public or the advancement of education". Given the nature of the issue, this will in many cases be very difficult to prove.

Thirdly, the scheme of the *Privacy Act 1988* will apply only to documents held by the Commonwealth and Territory government agencies, and in any event does not operate to give the person whose personal information is contained in the document a right to amendment. Whether an amendment is made is in the power of the person asked to amend, although there is a scheme for review of relevant decisions.

Fourthly, in relation to the substance of the justification offered, the Explanatory Statement does not spell out – and it is not apparent – just how this definition of "document" promotes the "efficient operation of Government". (Is this a reference to the government of the Territory, or to the government that issued the document?)

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

There are other aspects of the definition of "public document" in proposed subsection 138(4) that raise a question whether the defence permitted by proposed subsection 138(1) has such a width of operation that it is not justifiable under HRA section 28. Thus, it should be noted that:

- proposed paragraph 138(4)(a) embraces "any report or paper published by a parliamentary body …". The definition of "parliamentary body" in section 116 is very wide, and picks up such a body (which includes a committee of such a body) "of any country";
- proposed paragraph 138(4)(b) embraces "any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings …";
- proposed paragraph 138(4)(c) embraces "any report or other document that under the law of any country - (i) is authorised to be published…"; and
- proposed paragraph 138(4)(e) embraces

  "any record or other document open to inspection by the public that is kept—

  (i) by an Australian jurisdiction; or

  (ii) by a statutory authority of an Australian jurisdiction; or

  (iii) by an Australian court; or

  (iv) under legislation of an Australian jurisdiction; …".

These definitions give the defence in proposed subsection 138(1) a wide field of operation. For example, would proposed paragraph 138(4)(e) have the effect that defamatory matter contained in a document "open to inspection by the public" would include a document kept by a public library, one result of which might be that matter in a newspaper is included.

On the other hand, proposed subsection 138(1) might have a much more limited effect. It may only protect publication of defamatory matter so far as concerns the publication of that matter by the parliamentary body, the court, the country, the government, or the body keeping the document and permitting public inspection. Thus, any other person which published the matter could not rely on this defence.

The Committee draws these matters to the attention of the Assembly, and suggest that some matters require further explanation.

<u>The provisions concerning damages</u>

Are the provisions concerning damages compatible with HRA subsection 16(2) (freedom of speech), or, from another perspective, compatible with HRA paragraph 12(b) (right to reputation)? In making this assessment, regard must be had to whether any derogation of these rights is permitted by HRA s 28.

In *Tolstoy v United Kingdom* (EctHR, 23 June 1995) the European Court of Human Rights heard an application from Count Tolstoy (a British citizen). He had been found liable for defaming a former soldier (in respect of alleged activities of the soldier at the end of World War II). A jury had awarded over $3 million on damages to the soldier. The Court found that the award of damages … clearly constituted an interference with the exercise by the applicant of his right to freedom of expression, as guaranteed by paragraph 1 of Article 10 [of the European Convention]. Such an interference entails a violation of Article 10 unless it was "prescribed by law", pursued an aim or aims that is or are legitimate … and was "necessary in a democratic society" to attain the aforesaid aim or aims (at para 35).

The Court concluded that

> the award was "prescribed by law" but was not "necessary in a democratic society" as there was not, having regard to its size in conjunction with the state of national law at the relevant time, the assurance of a reasonable relationship of proportionality to the legitimate aim pursued. Accordingly, on the latter point, there has been a violation of Article 10.

The legitimate aim was of course the protection of the reputation of the soldier about whom defamatory statements had been made by Tolstoy.

Of course, this case demonstrates merely that on a particular set of facts, an award of damages may be incompatible with a freedom of expression right (such as HRA subsection 16(2), and not be justifiable under a derogation provision such as HRA section 28. What a court applying a freedom of expression right might regard as "too high" will depend very much on the fact situation before the court. The court might approve a very high award, such as in *Gleaner Company Limited v Abrahams* (see references below), where the Privy Council upheld an award of well over $1,000,000 where there was evidence of psychological and physiological damage of a high order.

On the other hand, a person whose reputation is traduced by the defamatory statement might argue that a particular award of damages is so low that it is a disproportionate restriction on that person's right to reputation.

The Bill addresses this issue by first stating an unexceptional principle:

> **139E Damages to bear rational relationship to harm**
>
> In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

This is the object of the common law, and by this yardstick, awards of damages for non-economic loss often exceeded $250,000. Judges have taken widely disparate views as to how to approach the fixing of damages; see the differences of opinion in the High Court judgments in *Carson v John Fairfax & Sons Ltd*. (1993) 113 ALR 577. Some consider that it is appropriate to refer to damages awards in personal injury cases, an approach that tend to support low awards. Others consider that there is no analogy. In *Gleaner Company Limited v Abrahams* (above), the Privy Council said:

> … defamation cases have important features not shared by personal injury claims. The damages often serve not only as compensation but also as an effective and necessary deterrent. … there are other differences between general damages in personal injury cases and general damages in defamation actions. One is that the damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1071, the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge".

The Supreme Court of Canada has rejected the notion of that a cap be placed on damages for defamation. In *Hill v. Church of Scientology of Toronto* 1995 CanLII 59, and speaking of a case where a person had been defamed in the course of a news conference, the majority judgment said:

> [169] The written words emanating from the news conference must have had an equally devastating impact. All who read the news reports would be left with a lasting impression that Casey Hill has been guilty of misconduct. It would be hard to imagine a more difficult situation for the defamed person to overcome. Every time that person goes to the convenience store, or shopping centre, he will imagine that the people around him still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

Under the Bill, however, the sum of $250,000 is stipulated in proposed subsection 139F(1) to be the maximum amount of an award of damages for non-economic loss, subject to some variation by means of a declaration by the Minister to take account of the moving average of weekly earnings.

A higher award may result where the court on particular trial "is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages" (proposed subsection 139F(2)). The key here, however, is the concept of "aggravated damages". Such are generally understood to mean damages intended to compensate the plaintiff for aggravating the injury through related conduct, whether at the time of publication or afterwards. On this basis, such an award cannot respond to the damage inflicted by the defamatory statement itself.

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 comment on them:

Disallowable Instrument DI2005-250 being the Building (Prudential Standards) Determination 2005 made under section 103 of the *Building Act 2004* **revokes DI2002-48 and determines the Prudential Standards.**

Disallowable Instrument DI2005-251 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 11) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles competing in the ACT timed special (competitive) stages of the Brindabella Motor Sport Club Truss Me National Capital Rally.**

Disallowable Instrument DI2005-252 being the Public Place Names (Tharwa) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a street in the Division of Tharwa.**

Disallowable Instrument DI2005-253 being the Public Place Names (Red Hill) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes DI1990-3 and determines the name of a new park in the Division of Red Hill.**

Disallowable Instrument DI2005-254 being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2005 (No. 1) made under subsection 20(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2003-258 and determines approved sports bookmaking events.**

Disallowable Instrument DI2005-256 being the Pest Plants and Animals (Pest Plants) Declaration 2005 (No. 1) made under section 7 of the *Pest Plants and Animals Act 2005* **declares specified plants to be pest plants for the purposes of the Act.**

Disallowable Instrument DI2005-257 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2005 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2001-264, DI2001-268, DI2001-269, DI2001-270, DI2001-320, DI2001-321, DI2002-6 and DI2005-94 and determines specified locations as sports bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2005-258 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2005 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **determines a specified location as a sports bookmaking venue for the purposes of the Act.**

Disallowable Instrument DI2005-259 being the Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Determination 2005 (No. 3) made under section 22 of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-48 and determines the directions for operation of sports bookmaking venues.**

Disallowable Instrument DI2005-260 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2005 (No. 3) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-113 and determines the rules for sports bookmaking.**

Disallowable Instrument DI2005-261 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2005 (No. 4) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **determines the rules for sports bookmaking for record keeping and audit requirements.**

Disallowable Instrument DI2005-262 being the Road Transport (General) (Parking Ticket Fees) Determination 2005 (No. 3) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2005-200 and determines ticket parking fees within Territory ticket parking areas.**

Disallowable Instrument DI2005-264 being the Gambling and Racing Commission Appointment 2005 (No. 3) made under subsection 12 (2) and clauses 2(1), 5(1) and 5(2)—Schedule 1 of the *Gambling and Racing Control Act 1999* **appoints a specified person as an ordinary member of the Gambling and Racing Commission.**

Disallowable Instrument DI2005-265 being the Land (Planning and Environment) (Fees) Determination 2005 (No. 2) made under section 287 of the *Land (Planning and Environment) Act 1991* **determines new fees payable for the purposes of the Act.**

Disallowable Instrument DI2005-266 being the Tertiary Accreditation and Registration Council Appointment 2005 (No. 4) made under subsection 12(3) of the *Tertiary Accreditation and Registration Act 2003* **appoints a specified person to the ACT Accreditation and Registration Council.**

Disallowable Instrument DI2005-269 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2005 (No. 5) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **determines the methods of betting and the use, approval and minimum specifications for telecommunications equipment operated by sports bookmakers.**

Disallowable Instruments—Comment

Inadequate Explanatory Statement

Disallowable Instrument DI2005-245 being the Nurses (Fees) Determination 2005 (No. 1) made under section 86 of the *Nurses Act 1988* **revokes DI1996-5 and determines fees payable for the purposes of the Act.**

The Committee notes that this instrument was made on 2 November 2005, under section 86 of the *Nurses Act 1988* (**Nurses Act**). The instrument lapsed when the Nurses Act was repealed, on 17 January 2006. As a result, it had a very short life.

The instrument sets various fees for the purposes of the Nurses Act. The fees range from $5.00 (for inspecting an entry in a register or roll) to $120.00 (for assessment of registration, based on qualifications and training). The Explanatory Statement for the instrument indicates that it revokes a previous determination setting fees and "determines new fees under the Act". It also states:

> The changes in fees reflect the administrative costs associated with the assessment of registration of nurses and midwives, based upon their qualifications and training, who have completed their qualification in a country other than Australia and New Zealand. The costs have been benchmarked with other nursing and midwifery regulatory Authorities in Australia.

The Committee has examined the instrument that this instrument revokes - DI1996-5 - and notes that the fees set by this instrument are identical to those set by the previous instrument. The only difference is that a new fee - of $120.00 - is set in relation to "Administrative for assessment of registration based on qualifications and training".

The fee is set by reference to subparagraph 10(b)(i) of the Nurses Act. Section 10 of the Nurses Act provides (in part):

> **Entitlement to registration as general nurse**
>
> **10(1)** A person is entitled to be registered as a general nurse if—
>
> ……..
>
> (b) the person—
>
> (i) has completed a course of education or training in a place outside Australia that is substantially equivalent to a course referred to in paragraph (a) and that qualifies the person to practise nursing in that place; and
>
> (ii) has undertaken the further education or training, gained the experience in practising nursing and passed the examinations that the board requires; …….

The Committee notes that, unlike other fees determinations that the Committee has examined, neither the instrument itself nor the Explanatory Statement indicates the magnitude of the change in fees that is effected by the instrument. The Explanatory Statement merely indicates that "[t]he change in fees reflect the administrative costs of registration of nurses and midwives ….". The Committee was only able to ascertain that, in fact, the fees imposed by the instrument are unchanged, save for the imposition of one new fee, by examining the previous instrument.

In making this comment, the Committee notes that there is no formal requirement that such information be provided and that the instrument otherwise fulfils the requirements of Part 6.3 of the *Legislation Act 2001*. The Committee suggests, however, that it would assist the Assembly if fees determinations routinely provided information about the magnitude of fee increases and identified any new fees imposed. The Committee considers that this is a matter that is appropriate to raise under paragraph (b) of the Committee's terms of reference, which allows the Committee to:

> Consider whether any explanatory statement …. associated with legislation …. meets the technical or stylistic standards expected by the Committee.

Minor drafting issues

Disallowable Instrument DI2005-255 being the Pest Plants and Animals (Pest Animals) Declaration 2005 (No. 1) made under section 16 of the *Pest Plants and Animals Act 2005* **declares specified animals to be pest animals for the purposes of the Act.**

This instrument declares certain animals to be "pest animals". Within that general categorisation, the instrument differentiates between "notifiable" and "prohibited" pest animals. The Explanatory Statement to the instrument states that if a pest animal is a prohibited pest animal "it is an offence to supply or propagate the plant". This is clearly a mistake. In the case of pest animals, the prohibition (in section 16 of the *Pest Plants and Animals Act 2005*) is to supply or keep the animal. The prohibition on supply and propagation relates to pest *plants*.

Disallowable Instrument DI2005-263 being the Gambling and Racing Commission Appointment 2005 (No. 2) made under subsection 12 (2) and subclauses 2(1), 3(2), 5(1) and 5(2)—Schedule 1 of the *Gambling and Racing Control Act 1999* **appoints a specified person as an ordinary member and deputy chairperson of the Gambling and Racing Commission.**

The Committee notes that this instrument appoints a person as an ordinary member of the Gambling and Racing Commission (**Commission**) and also as "deputy chairperson" of the Commission. The Committee notes that there is no power in the legislation to appoint a deputy chairperson, as such. Rather, there is a power (in subclause 3(2) of Schedule 1 of the *Gambling and Racing Control Act 1999*) to "appoint an ordinary member to act as chairperson when the chairperson is for any reason unable or unavailable to act in that capacity." The Committee notes that the term "deputy chairperson" is not used, however.

Subordinate Law—Comment

The Committee has examined the following subordinate law and offer these comments on it:

Strict liability offences/Dis-application of subsections 47(5) and 47(6) of the Legislation Act

Subordinate Law SL2005-38 being the Environment Protection Regulation 2005 made under the Environment Protection Act 1997 updates the Environment Protection Regulation 1997 with particular regard to air, noise and water standards.

Strict liability offences

The Committee notes that the following subsections of this subordinate law expressly create strict liability offences: subsections 9(4), 10(5), 11(8), 12(3), 15(3),16(2), 40(3), 44(3), 45(2), 46(2), 47(3), 48(3), 49(3), 50(2), 55(3), 58(3), 59(3), 60(3) and 61(2).

The Explanatory Statement for the subordinate law states (on page 2):

> Provision of strict liability to a specific element of the offence
> These amendments include a number of offences where strict liability applies to a specific element of the offence or to the offence. Section 23 of the *Criminal Code 2002* provides that if a law that creates an offence provides for strict liability, there are no fault elements for the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable. However if strict liability applies, the defence of mistake of fact is available where the person considered whether or not the facts existed and was under a mistaken but reasonable belief about the facts.

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

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

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

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

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

The Committee notes that, in this instance, the Explanatory Statement meets the second of the principles set out by the Committee in its *Report No 38 of the Fifth* Assembly. It does not meet the first principle, however, in that it does not indicate why a fault element (or guilty mind) is not required in the case of the particular offences that are designated as strict liability offences. In this regard, the Committee notes that, in its *Report No 2 of the Sixth Assembly*, it quoted the statement of general approach contained in the Explanatory Statement to the *Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004* as an example of the kind of explanation that the Committee would prefer to see.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

Dis-application of subsections 47(5) and 47(6) of the Legislation Act - Does this limit accessibility?

Subsection 67(1) of this subordinate law provides that subsection 47(5) of the *Legislation Act 2001* (**Legislation Act**) does not apply so far as three specified laws and one specified instrument are applied under the instrument. Subsection 67(2) provides that subsection 47(6) of the Legislation Act does not apply so far as nine specified Acts and three other categories of instrument are applied under the instrument.

Section 47 of the Legislation Act deals with the making of statutory instruments that apply to another law or instrument. This is sometimes referred to as the incorporation of material by reference.

Subsection 47(5) provides:

> If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

The effect of an instrument being a notifiable instrument is that a copy of the instrument, as made, must be put on the ACT Legislation Register (Legislation Act, paragraph 19(1)(e)). A notification of the making of a notifiable instrument must also be put on the ACT Legislation Register (Legislation Act, 19(2)(d)).

The Committee assumes that the effect of the dis-application of subsection 47(5) of the Legislation Act is that there is no obligation to put the laws and instrument referred to in subsection 67(1) of the subordinate law on the ACT Legislation Register. The Committee notes that while the three laws in question are available on the Internet, the instrument, Australian Standard 2436 - 1981, *Guide to noise control on construction, maintenance and demolition sites*, is not. What is more, copies must generally be purchased from SAI Global, the distributors of Australian Standards. This would tend to limit the accessibility of the instrument in question.

The Committee also notes, however, that section 68 of the subordinate law requires the chief executive who administers the subordinate law to ensure that the instrument in question, and any amendment to or replacement of it, be made available for inspection by the public, free of charge. This alleviates the Committee's concerns about the accessibility of the incorporated instrument.

The Committee notes that section 69 of the subordinate law imposes alternative notification requirements in relation to the instrument in question and any amendment to or replacement of it.

Finally in this context, the Committee notes that there is an inconsistent reference to "Australian **s**tandard 2436" in subsection 68(3) of the subordinate law (compare with the reference in paragraph 67(1)(b)).

Turning to the dis-application of subsection 47(6) of the Legislation Act, the Committee notes that it provides:

> If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
>
> (a) the law or instrument as in force at the time the relevant instrument is made;
>
> (b) each subsequent amendment of the law or instrument;
>
> (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
>
> (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

Subsection 47(3) of the Legislation Act sets the general rule in relation to incorporation of material by reference, which is that the law of another jurisdiction or an instrument can only be applied as it is in force at a particular time. This means that it cannot be applied as it exists from time to time. In other words (and for good reason), it cannot be applied in such a way that amendments subsequently made by the relevant parliament or rule-maker apply in the ACT, without any further reference back to the Assembly.

The general rule provided for by subsection 47(3) can be displaced, however, either expressly or by manifest contrary intention (Legislation Act, subsection 6(2)). The provisions of this instrument that apply the relevant Acts and instruments expressly apply them "as in force from time to time" (see, eg, subsection 55(4), section 56, paragraph 57(b), paragraph 65(a) and paragraph 66(1)(e) of this instrument). The Committee assumes that this is an express displacement of subsection 47(3) of the Legislation Act.

This means that the effect of subsection 67(2) of the instrument is that the various Acts and instruments referred to in subsection 67(2) not only apply "as in force from time to time" but they are not notifiable instruments. Nor are any amendments to or repeals of such Acts and instruments. This, in turn, means that the reader of the instrument must go to the legislation websites of the various relevant jurisdictions in order to work out what law applies. While this may be relatively straightforward in the case of the Acts referred to, the Committee is unsure as to the accessibility of the other instruments, namely:

- national capital plan (paragraph (f));
- a national environment protection measure (paragraph (k));
- a national environment protection protocol made under the national scheme laws (paragraph (l)).

In this context, the Committee notes that the mechanisms for access and notification provided for by sections 68 and 69 of the instrument only apply to Australian Standard 2436.

The Committee also notes that the Explanatory Statement to the instrument is not helpful in relation to the effect of section 67 of the instrument. It states:

> **Section 67 - Displacement of Legislation Act S 47(5) and (6)**
>
> This clause explains that section 47(6) of the *Legislation Act 2001* does not apply to the instruments listed in this clause.

The Committee would appreciate the Minister's advice as to whether the non-Act instruments that are referred to in subsection 67(2) of this subordinate law are accessible and, if so, where.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Chief Minister, dated 26 October 2005, in relation to comments made in Scrutiny Report 4 concerning DI2005-2—Public Sector Management Amendment Standard 2005 (No. 1) and Scrutiny Report 12 concerning DI2005-71—Public Sector Management Amendment Standard 2005 (No. 5).
- The Minister for Education and Training, dated 16 November 2005, in relation to comments made in Scrutiny Report 17 concerning DI2005-192, being the University of Canberra (Academic Progress) Amendment Statute 2005 (No. 1).
- The Minister for Planning, dated 6 December 2005, in relation to comments made in Scrutiny Reports 17 and 18 concerning:
  - SL2005-18 being the Construction Occupations (Licensing) Amendment Regulation 2005 (No. 1);
  - DI2005-223 being the Building (Fees) Determination 2005 (No. 2);
  - DI2005-224 being the Construction Occupations Licensing (Fees) Determination 2005 (No. 3); and
  - DI2005-225 being the Water and Sewerage (Fees) Determination 2005 (No. 2).
- The Attorney-General, dated 13 December 2005, in relation to comments made in Scrutiny Report 18 concerning SL2005-27, being the Fair Trading Amendment Regulation 2005 (No. 1).
- The Minister for Health, dated 14 December 2005, in relation to comments made in Scrutiny Report 19 concerning DI2005-231, being the Health (Fees) Determination 2005 (No. 4).

- The Minister for Planning, dated 14 December 2005, in relation to comments made in Scrutiny Report 19 concerning DI2005-222, being the Architects (Fees) Determination 2005 (No. 2).
- The Minister for Urban Services, dated 19 December 2005, in relation to comments made in Scrutiny Report 13 concerning:
  - DI2005-90 being the Roads and Public Places (Fees) Determination 2005 (No. 1);
  - DI2005-93 being the Road Transport (General) (Fees) Determination 2005 (No. 1);
  - DI2005-97 being the Hawkers (Fees) Determination 2005 (No. 1); and
  - DI2005-98 being the Roads and Public Places (Fees) Determination 2005 (No. 2).
- The Minister for Racing and Gaming, dated 13 January 2006, in relation to comments made in Scrutiny Report 20 concerning the Casino Control Bill 2005.
- The Acting Minister for Industrial Relations, dated 27 January 2006, in relation to comments made in Scrutiny Report 20 concerning the Workers Compensation Amendment Bill 2005 (No. 2).

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Education and Training, the Minister for Planning, the Minister for Health, the Minister for Urban Services, the Minister for Racing and Gaming and the Acting Minister for Industrial Relations for their helpful responses.

Bill Stefaniak, MLA
Chair

February 2006

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

REPORTS—2004-2005-2006

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 3, dated 17 February 2005

Health Records (Privacy and Access) Amendment Bill 2005. **(Passed 17.02.05)**

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-260 – Health (Interest Charge) Determination 2004 (No. 1)
Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No. 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1)
Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management Plan) 2005
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**
Subordinate Law SL2004-52 – Health Professionals Amendment Regulation 2004 (No. 1)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 5, dated 14 March 2005

Disallowable Instrument DI2005-12 – Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1)
Disallowable Instrument DI2005-8 – Community and Health Services Complaints Appointment 2005 (No. 1)

Bills/Subordinate Legislation

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)**
Disallowable Instrument DI2005-34 – Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)

Report 11, dated 20 June 2005

Disallowable Instrument DI2005-33 – Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-61 – Radiation (Fees) Determination 2005 (No. 1)
Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)

Report 13, dated 9 August 2005

Disallowable Instrument DI2005-99 – Domestic Animals (Fees) Determination 2005 (No. 1)

Report 14, dated 15 August 2005

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

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No. 2)
Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1)
Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No. 2)

Bills/Subordinate Legislation

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 **(Passed 25.08.05)**
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

Disallowable Instrument DI2005-209 – Health (Fees) Determination 2005 (No. 3)
Disallowable Instrument DI2005-212 – Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1)
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 20, dated 12 December 2005

Disallowable Instrument DI2005-241 - Public Place Names (Phillip) Amendment 2005 (No. 1) .....
Disallowable Instrument DI2005-242 - Public Place Names (Bonython) Amendment 2005 (No. 1) .....

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak Bill

Thank you for providing me with Report No 16 of the Scrutiny of Bills and Subordinate Legislation Committee of 19 September 2005. I refer to the listing of Disallowable Instrument DI2005-2 Public Sector Management Standard 2005 (No 1) and Disallowable Instrument DI2005-71 Public Sector Management Standard 2005 (No 5), which the Committee has not yet received a response to.

The Committee queried the accessibility of the Management Standards (the Standards) in comments about Disallowable Instrument DI2005-2 Public Sector Management Standard 2005 (No 1) in Report No 4 of 7 March 2005. The Committee made the same comments about the accessibility of the Standards in that same Report regarding Disallowable Instrument DI2004-267 Public Sector Management Standard 2004 (No 8).

I responded to comments about inaccessible legislation relating to Disallowable Instrument DI2004-267 Public Sector Management Standard 2004 (No 8) on 22 March 2005 (see Attachment A). My department advises that this response should also have referred to comments made about DI2005-2 Public Sector Management Standard 2005 (No 1), as comments on both Standards relate to the same issue of inaccessible legislation.

I would therefore appreciate if you would accept my response to Disallowable Instrument DI2004-267 Public Sector Management Standard 2004 (No 8) dated 22 March 2005, as a response to Disallowable Instrument DI2005-2 Public Sector Management Standard 2005 (No 1).

The Committee also commented on Disallowable Instrument DI2005-71 Public Sector Management Standard 2005 (No 5) in Report No 12 of 27 June 2005, in which the Committee sought an update on progress of the translation of the Standards to the Legislation Register. My department advises me that due to administrative difficulties and key staffing changes at this time, a response was not prepared.

RECEIVED
26 OCT 2005

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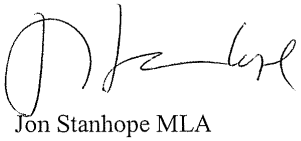
However, subsequent to the Committee's comments in Report No 13 of 9 August 2005, I have provided the Committee, on 23 August 2005, with the most up to date information about the translation of the Standards to the Legislation Register (see Attachment B).

I would appreciate if the Committee would accept this response dated 23 August 2005 to comments made about Disallowable Instrument DI2005-71 Public Sector Management Standard 2005 (No 5).

Yours sincerely



Jon Stanhope MLA
Chief Minister

26 OCT 2005

COPY

KATY GALLAGHER MLA
MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chairperson
Scrutiny of Bills and Legislation Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to the Scrutiny Report No 17 of 2005 regarding subordinate legislation made under the *University of Canberra Act 1989* (DI2005-192).

In examining this disallowable instrument, which amends *Academic Progress Statute 1995*, the Committee made comment on the accessibility of the Principal Statute.

I am advised that the ACT Parliamentary Council's Office intends to make the University of Canberra Statutes available on the ACT Legislation Register. I note the Committee is relatively confident that it understands the full effect of the amendments and is aware that the Principal Statute is available on the University of Canberra's website.

I understand that no further action is required on this matter and thank the Committee for this valuable feedback.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Education and Training
16/11/05

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Received Time 13.Dec. 14:30

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak Bill

Thank you for Scrutiny Reports Number 17 of 17 October 2005 and Number 18 of 14 November 2005 in which included comment on disallowable instruments and a subordinate law prepared by the ACT Planning and Land Authority.

In relation to disallowable instruments made under the *Building Act 2004* (DI2005-223, the *Construction Occupations (Licensing) Act 2004* (DI2005-224) and the *Water and Sewerage Act 2000* (DI2005-225), I have previously advised the Committee that as the schedule attached to each instrument provides information that would be contained in an Explanatory Statement there is no need to repeat this information in an additional statement.

I have noted the Committee's discussion in relation to the subordinate legislation made under the *Construction Occupations (Licensing) Act 2004* in Report No 18 and note that the Committee has no further comment on this matter.

Thank you for raising these matters with me.

Yours sincerely

Simon Corbell MLA
Minister for Planning
6.12.05

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-7 DEC 2005

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Jon Stanhope MLA
CHIEF MINISTER
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MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak

I refer to the Committee's comments on the Fair Trading Amendment Regulation 2005 (No. 1) in Scrutiny Report No18 of 14 November 2005. I write in reply to those comments.

On page 13 the Committee suggests the Explanatory Statement is inadequate. The Committee comments:

> The effect of the first of the amendments made by this subordinate law is not to amend the previous Code of Practice but to prescribe a Code of Practice. As a result, the committee is curious as to why it is necessary to refer to section 35 of the Fair Trading Act 1992 (the Act) in the Explanatory Statement. Of more concern, however, is the fact that the Explanatory Statement does not indicate whether or not the requirements of subsections 33(4) and (5) of the Act have been met.

The Committee then quotes those provisions. The provisions clearly state the Commissioner for Fair Trading, not the Minister, must be satisfied that appropriate persons have been consulted. I am advised the Commissioner was satisfied in this regard.

The Committee's comment that the first amendment of the regulation is the prescription of a new Code rather than an amendment to an existing Code is accurate in form but not in substance. As set out in the Explanatory Statement, the Fitness Industry Code of Practice – June 2005 is a consolidated republication of the Code incorporating amendments approved by me in May 2005. The incorporation of amendments in the consolidated republication makes access to the provisions of the Code available in one document rather than having to view the existing Code and separate prescribed amendments.

I note the Committee's observation that the Regulation is misdescribed as a "Registrable Instrument". I understand the Register will be altered accordingly.

Yours sincerely

Jon Stanhope MLA
Attorney General
13 DEC 2005

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Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I refer to the comments made by the Standing Committee on Legal Affairs in it Scrutiny Report of 21 November 2005, Report 19, at page 6 regarding Disallowable Instrument DI2005-231 being the Health (Fees) Determination 2005 (No. 4).

I acknowledge that the inclusion of fees payable for the production of health records by subpoena could pre-empt a decision of the Supreme Court. The inclusion of these fees was an attempt by ACT Health to provide the courts with a guideline to what should be considered a reasonable expense. Notwithstanding this, I will arrange for the relevant fees to be removed from the Determination.

In relation to the provision of "grey scale" copies, it should be noted that clinical records from 1994 to 2003 were scanned using monochrome scanners producing a black and white image. The original hard copy documents were destroyed after scanning with the electronically stored image being accepted as the official "Canberra Hospital Clinical Record" and printed copies of these images were accepted as meeting the requirements under the Evidence Act. Clinical records after 2003 are available in colour, however, due to significant increase in time and cost associated with printing colour copies, grey scale copies will continue to be provided where it is acceptable to the court (in most cases grey scale copies are adequate).

Yours sincerely

Simon Corbell MLA
Minister for Health
14.12.05

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Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

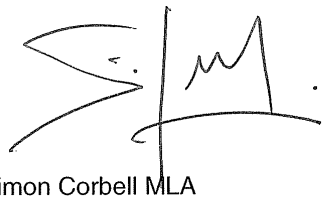
Thank you for Scrutiny Report Number 19 of 21 November 2005 that included comment on disallowable instrument DI2005-222 prepared by the ACT Planning and Land Authority. The Committee sought an explanation as to "why a new instrument has been required so soon after the earlier instrument and in relation to such a small increase in the fee".

The reason for the new instrument to increase the *Replacement of Registration ID Card Fee*' from $31.50 to $32.00 was to standardise the fee with two similar fees. Under section 33 of the Construction Occupations Licensing (Fees) Determination 2005 (No 1) the fee for the 'replacement of a licence card' and for the 'change of details -this is to cover the reproducing of a new licence card and assessment – is $32.00. The change to the 'Replacement of Registration ID card fee' was overlooked in the 27 June 2005 fees notification.

The opportunity was taken to increase this particular fee at this time because the two other fee changes were being made.

Thank you for raising these matters with me.

Yours sincerely



Simon Corbell MLA
Minister for Planning

14.12.05

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JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR URBAN SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

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

Bill

Dear Mr Stefaniak

I refer to Scrutiny of Bills Report No.13 dated 9 August 2005. I offer the following response in relation to the matters raised by the Committee.

1. **Disallowable Instrument DI2005-97 – Hawkers (Fees) Determination 2005 (No 1)**

2. **Disallowable Instrument DI2005-98 – Roads and Public Places (Fees) Determination 2005 (No 2)**

The Committee noted that there was no explanatory statement for the above instruments. While explanatory notes had been included in the instruments in lieu of an explanatory statement, the Committee's comments are noted, and in future, explanatory statements will be prepared.

6. **Disallowable Instrument DI 2005-90 – Roads and Public Places (Fees) Determination 2005 (No 1)**

The Committee noted that items 3 and 4 of the Schedule to this instrument determine fees in relation to the use of airspace over unleased Territory land. It sought reassurance that such fees do not exceed the constitutional limitations on the Territory's legislative power. The fees determined by this instrument apply to persons granted a permit to place an object in, over or across a public place under section 15A of the *Roads and Public Places Act 1937*. While it is theoretically possible for overlap to occur between these fees and fees determined under Commonwealth legislation regulating the use of airspace, section 22 of the *Australian Capital Territory (Self Government) Act 1988* gives the Legislative Assembly, subject to the

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matters excluded by section 23, the power to make laws for the peace order and good government of the Territory. Section 28 of the Self Government Act requires the determination to be taken to be consistent with any Federal law in force in the Territory to the extent that it is capable of operating concurrently.

7. Road Transport (General) (Fees) Determination 2005 (No. 1)

The Committee requested further explanation as to the application of this fee determination. Upon reviewing the instrument in the light of these comments, I have decided to replace it with a new instrument and explanatory statement, which includes clearer references to the permit provisions in the *Road Transport (Dimensions and Mass) Act 1990*. No changes to the fees have been made. The new determination and explanatory statement have been attached for the Committee's information, although they will also be tabled in the normal course of events.

Yours sincerely

John Hargreaves
Minister for Urban Services
19 December 2005

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Ted Quinlan MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM
MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING
MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak Bill

I refer to comments made by the Standing Committee on Legal Affairs in its Scrutiny Report 20 of 12 December 2005 relating to the *Casino Control Bill 2005*.

The Committee made a number of comments in relation to the *Human Rights Act 2004* as it applies to the *Casino Control Bill 2005* and I thank the Committee for raising these matters. I note that the Committee is generally satisfied that the human rights issues have been adequately addressed in the proposed legislation and the accompanying Explanatory Statement.

I also note that the Attorney General issued a Human Rights Compatibility Statement confirming that the *Casino Control Bill 2005* is consistent with the *Human Rights Act 2004.*

However, the Committee did comment on four specific issues which it raised for the information of members of the Legislative Assembly. I provide some comments on and clarification of these matters.

Firstly, the Committee raised the issue whether the maximum penalty of 100 penalty units, as specified in some strict liability offence provisions, is appropriate for a strict liability offence. This level of maximum penalty has been included only where the defendant is the casino corporation and not to any individuals.

The five sections where the higher penalty applies to the casino licensee relate to the critical areas of the proper conduct of gaming and in preventing children from gaming in the casino. These sections are fundamental to the integrity of casino gaming and the Government's harm minimisation responsibilities in ensuring that children do not play casino games.

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As outlined in the Committee's report, the Explanatory Statement provides the reasoning behind the higher penalty unit for the casino corporation and is based on the fact that the corporation carries a higher level of responsibility compared to an individual and will be more aware of its obligations under its licence and the legislation. Therefore in these circumstances a breach by the casino licensee will be a serious matter and should be able to be adequately dealt with by the judicial system.

I consider that this description as outlined in the Explanatory Statement is adequate to justify the higher penalty for the casino licensee in the limited circumstances that it is included in a strict liability offence.

Secondly, the Committee raised the issue of the detention of persons in the casino under section 121 of the Bill and whether this was compatible with sections 18 and 19 of the *Human Rights Act 2004.*

As the Committee correctly identifies, the Explanatory Statement does provide information on the limited circumstances in which the power of detention may be exercised and the protections afforded, including the relevant facilities in the casino that offer assistance or protection (such as the security camera surveillance) and the regulatory oversight by the Gambling and Racing Commission.

The Committee raised some issues of concern in relation to this matter including the fact that the obligation to detain a person is based on when a casino official "suspects" (rather than believes) on reasonable grounds; the fact that a "casino official" embraces most casino employees; possible issues that could arise relating to evidence that may be gained during the detention; the sex of the person detaining the person and the fact that the only limitation on the manner of detention is that it be in a suitable place. In addition, the Committee states that there is no explanation why the casino operator should be given such powers to detain.

In relation to the reasons for such powers, the Explanatory Statement provides the following information on section 121 of the Bill:

> *"This section provides a casino official with the power to detain a person that is committing an offence or has committed an offence in the casino. On the basis that the casino licensee has a sophisticated system of camera surveillance along with trained surveillance and security officers, there is a high probability of detecting criminal activity in the casino. This detection may be in real time (ie. at the time of the offence) or it may be at a later time when surveillance tapes are reviewed.*
>
> *If illegal activity is detected by tape review at a later date, the person that committed the offence may return to the casino. If this is the case, this provision allows a casino official that has identified the person to detain the suspected offender pending the attendance of a police officer.*
>
> *The offences committed in the casino could be cheating at gaming, assault of another person or official or theft of an item such as chips, a handbag or item of clothing such as a leather jacket.*

> *While it is essential to the security and integrity of the casino to have this section, it is also essential to protect the patron from any possible abuse or assault. Therefore a safe guard has been included to ensure that essential requirements are met if a person is to be detained. The penalty provisions reflect the seriousness of breaching these requirements in undertaking these functions. The casino licensee's and the relevant employees' activity in this regard are closely monitored by the Commission as regulator of casino operations."*

While I note the concerns raised by the Committee in this regard, I consider that the Explanatory Statement provides sufficient background on the reasoning behind the provision and the operational detail to be satisfied about its inclusion. As outlined in the introductory comments to the Explanatory Statement, it is important to remember that historically casinos attract some unsavoury characters that could quickly bring criminal influence to the premises and permanently ruin the casino's reputation for integrity. This provision is part of the regulatory scheme that is aimed at preventing this from occurring.

The third issue raised by the Committee relates to comments on the cheating offence outlined in section 108 of the Bill in that it requires a person to "dishonestly" obtain some benefit before the activity undertaken is to be considered as cheating and therefore an offence under this section. The Committee raises the issue that the inclusion of "dishonestly" in the offence provision may make it too vague to be acceptable as a standard for the application of the criminal law.

While the Committee's comments are noted, the provision was drafted following careful consideration not to inadvertently cover those legitimate practices that are acceptable and not dishonest. The Committee raises an example of a gambler counting cards which is a good illustration of a scheme or practice that is not in itself dishonest. Therefore under the current drafting of the offence provision card counting as a scheme or practice is legitimately acceptable (though not favoured by casino operators) as it is not cheating. The removal of the concept of "dishonesty" from the offence provision would either broaden the coverage of the provision to include unintended legitimate schemes, or if redrafted, may not cover the scope of all schemes or practices that may be dishonestly employed.

Finally, the Committee raised the issue whether the Commission's discretionary powers in section 27(5) of the Bill (concerning the waiver of a late payment penalty) and section 68(2) of the Bill (concerning exemption of the casino operating core-trading hours) should be reviewable.

In relation to the casino licensee's obligation to pay the casino licence fee, it is a fundamental principle that such fees (and taxes) be correctly paid on time by the licensee. The application of late payment penalties if the licensee does not do so reflects the seriousness of not meeting this obligation. However, section 27(5) of the Bill recognises that there may be some circumstances where it may be harsh or unreasonable for the late payment penalties to be applied and therefore the discretion is provided for the Commission to waive the penalty.

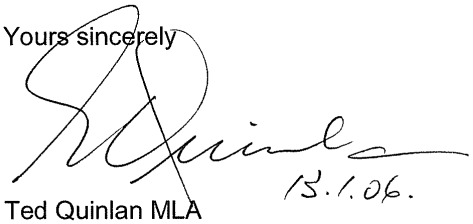
It was not considered appropriate for the Commission's decision to waive all or part of the penalty to be reviewable since the full application of the penalty is established as the normal or usual provision that would apply and that the waiver of the penalty was a benefit that may be bestowed on the licensee in certain circumstances.

In relation to whether section 68(2) of the Bill, relating to an exemption from complying to the core operating hours should be a reviewable decision, the operation of this provision is that the Commission may make a decision if there is a good reason to give an exemption. The section has been drafted in such a manner that the Commission determines the situation at its discretion if the "good reason" provision has been met. It has deliberately not been drafted as a formal application process where the licensee applies in writing for an exemption and the Commission must either accept or reject the application (in these circumstances it would be appropriate for the Commission's decision to be reviewable).

It was on this basis that it was decided not to make the Commission's decision reviewable since there is no formal application and resultant decision making process. I considered that this approach was appropriate in the circumstances.

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

Yours sincerely



Ted Quinlan MLA
Minister for Racing and Gaming

Ted Quinlan MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM
MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING
MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak Bill

I am writing in regard to Scrutiny of Bills and Subordinate Legislation Report 20 of 12 December 2005. As the Minister for Industrial Relations is now on leave I would like to respond to the Report on her behalf.

I would like to thank the Standing Committee on Legal Affairs for its comments in support of the *Workers Compensation Amendment Bill 2005 (No 2)* particularly with respect to the inclusion of strict liability offences within the Bill. These comments will assist the Legislative Assembly during the debate of the Bill.

Yours sincerely

27.1.06

Ted Quinlan MLA
Acting Minister for Industrial Relations

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30 JAN 2006

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