Legislative Assembly for the ACT

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

Scrutiny Report

29 June 2004

Report 52

Terms of reference

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

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

  (i) is in accord with the general objects of the Act under which it is made;
  (ii) unduly trespasses on rights previously established by law;
  (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

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

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

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

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

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

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

Role of the Committee

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

BILLS:

Bills – No Comment

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

Animal Legislation (Penalties) Amendment Bill 2004

This is a Bill to amend the *Animal Welfare Act 1992* and the *Animal Diseases Act 1993* to provide for increased penalties in relation to various offences in relation to animals.

Commissioner for the Family Bill 2004

This is a Bill for an Act to provide for the establishment of a commissioner for the family, and for related purposes.

Court Procedures (Consequential Amendments) Bill 2004

This is a Bill for an Act to make a series of consequential amendments to various Acts establishing courts and tribunals consequent on the Court Procedures Bill 2004. It would advance the purposes of the Court Procedures Bill 2004 by significantly reducing differences in practice and procedure in ACT courts.

Gaming Machine Amendment Bill 2004 (No 3)

This is a Bill to amend the *Gaming Machine Act 1987* to ensure that Automatic Teller Machines (ATMs) are not present in venues that are licensed to operate gaming machines.

Inquiries Amendment Bill 2002 (No 2)

This is a Bill to amend the *Inquiries Act 1991* in relation to the tabling of reports.

Land (Planning and Environment) Amendment Bill 2004

This is a Bill for an Act to amend the *Land (Planning and Environment) Act 1991* to remove the power of the minister to call in, and make decisions on, applications for the approval of development under Part 6 the Act, thus requiring all such decisions to be made by the ACT Planning and Land Authority.

Partnership (Venture Capital Funds) Amendment Bill 2004

This is a Bill to amend the *Partnership Act 1963* to provide a framework for registration and regulation of incorporated limited partnerships.

Pharmacy Amendment Bill 2004 (No 2)

This is a Bill to amend the *Pharmacy Act 1931* to facilitate the entry of friendly society pharmacies into the ACT pharmacy sector.

Roads and Public Places (Vandalism) Amendment Bill 2004

This is a Bill to amend the *Roads and Public Places Act 1936* to facilitate the rapid removal of graffiti from property on leased Territory land, and the rapid removal of vehicles that are suspected to be abandoned.

Water and Sewerage Amendment Bill 2004

This is a Bill to amend the *Water and Sewerage Act 2000* and the *Water and Sewerage Regulations 2001* in relation to the installation of plumbing in respect of showers.

Bills – Comment

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

Auditor-General Amendment Bill 2004

This Bill would amend the *Auditor-General Act 1996* to clarify and strengthen the Auditor-General's powers.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

Strict liability offences

The Bill would create a number of strict liability offences. The Committee draws attention to the justification offered.

> The application of strict liability is consistent with the current *Auditor-General Act 1996*, a regulatory scheme to assist the Auditor-General in the performance of his/her duties. The majority of offences proposed in the Bill carry a maximum penalty of 50 penalty units, imprisonment for six months or both. The penalties are as currently in the Act. The retention of the imprisonment penalty with strict liability reflects the importance of ensuring that the Auditor-General is able to carry out his or her duties effectively. Among other things, the Auditor-General is required to determine whether public sector resources are appropriately managed. To achieve this aim, the Auditor-General must have appropriate access to relevant information, premises and things.

With respect to some offences, imprisonment is a possible punishment. In **Scrutiny Report No 38**, the Committee drew attention to the rights objection to such provisions.

The Committee notes that the physical element in the strict liability offences is described in terms such as that the person "fails to comply" (subsection 14B(1)); or "fails to attend" (subsection 14B(2)); or "fails to swear" (paragraph 14C(1)(c)); or "fails to answer" (paragraph 14C(2)(d)); or "fails to continue to attend" (paragraph 14C(3)(c)); or "fails to comply" (paragraph 15A(1)(c)).

The Committee notes, as did the Explanatory Statement, that an accused could invoke the defence of mistake of fact (*Criminal Code 2002*, section 36). That defence does not, however, permit an accused to argue that he or she had a reasonable excuse for committing the acts that make up the physical elements of the offence, including, in particular, that they exercised due diligence in seeking to avoid committing the acts.

To illustrate, a person may have "fail[ed] to continue to attend" before the Auditor-General, and thus committed the physical elements of the offence in paragraph 14C(3)(c), yet be able to adduce evidence that they exercised due diligence in seeking to attend. But this line of defence would not necessarily be such as to show "mistake of fact" under section 36 of the *Criminal Code 2002*. For example, the person may have been injured while making their way back to the inquiry after an adjournment.

The distinction between mistake of fact, and exercising due diligence, is explained in **Scrutiny Report No 38**. An example of a due diligence defence, in relation to an offence of strict liability, is provided in the *Crimes Amendment Bill 2004* (see below).

The Committee draws this to the attention of the Assembly.

Displacement of self-incrimination privilege

Proposed new section 14D displaces the self-incrimination privilege in relation to examinations by the Auditor-General. This is, however, matched by a prohibition on the direct and derivative use of the information provided to the Auditor-General in any civil or criminal proceeding, other than one for an offence in relation to false or misleading information.

This scheme accords with the view of the Committee as to what is appropriate where the self-incrimination privilege is displaced. In **Report No 3 of 1999**, the Committee said:

> 2. If there is displacement, what level (if any) of protection should be afforded to a person who is compelled to self-incriminate?
>
> The Committee's view is that the starting point should be that there is protection against immediate and derivative use of the information provided by the person except in relation to a proceeding based on the falsity of the information provided. This is the policy reflected in section 128 of the *Evidence Act 1995* ….

Freedom of expression

Proposed new section 19A of the *Auditor-General Act 1996* (see clause 11 of the Bill) would provide:

19A Deliberations etc of the Executive

(1) The auditor-general must not include information in a report for the Legislative Assembly if the information would disclose a deliberation or decision of the Executive and a certificate under subsection (2) is in force in relation to the information.

(2) The Chief Minister may give a certificate to the auditor-general that the inclusion of particular information in a report for the Legislative Assembly would disclose a deliberation or decision of the Executive and would be contrary to the public interest.

This provision needs to be considered in the light of section 16 of the *Human Rights Act 2004*.

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.

It is to be noted that this statement refers to "the freedom to … receive … information and ideas of all kinds".

In its application, the freedom stated in section 16 is likely to be understood in a way that accords a high value to political free speech, and, in particular, to speech that facilitates the operation of responsible government. This assertion may be supported by reference to the development by the High Court of a freedom of political communication.

In *Lange v ABC* (1997) 189 CLR 520 at 557, the High Court explained why there was to be implied in the Constitution of the Commonwealth of Australia a freedom of political communication. The majority said:

> What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect.

Later, the Court noted (at 559):

> In his *Notes on Australian Federation: Its Nature and Probable Effects*, Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and **the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government** (emphasis added).

Going on to speak of "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government", the Court said

> legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.
>
> That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

As Gummow J put it in *Kruger v Commonwealth* (1997) 190 CLR 1 at 156, the "communication of information respecting, and discussion of, matters of political interest" is of "central importance to the efficacious working of the system of responsible and representative government established by the Constitution for the Commonwealth".

This doctrine is applicable in the Territory. Coming now to proposed new section 19A of the *Auditor-General Act 1996*, what is involved is not any interference in lines of communication between electors (or the people). It is a prohibition on the Auditor-General communicating to the Assembly (the parliament) information about the workings of some government body or agency, being information that would apart from the Chief Minister's certificate, have been included in a report to the Assembly.

Nonetheless, and noting that the scope of the notion that section 16 states a **freedom to receive** information and ideas of all kinds, a tension between section 16 and proposed new section 19A may be thought to arise from a conflict between two competing standpoints.

On the one hand, and in line with the High Court's rationale for its political communications freedom, it may be argued that it is information about the deliberations or decisions of the Executive that are of great importance from the viewpoint of the public being informed, and of the working of responsible government. Information contained in reports of the Auditor-General would, on the face of it, have a high value given the independent standing of the office and the capacity of the office to 'find out what happened' in relation to a particular matter.

On the other, the law has traditionally accorded great weight to maintaining the secrecy of such information. In *Commonwealth v Northern Land Council* [1993] HCA 24 at [6], the High Court said:

> it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not

> survive in practical terms if Cabinet deliberations were not kept confidential. Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support. (Footnotes omitted).

Nevertheless, the effect of the *Human Rights Act 2004* is that traditional notions about rights – in this case, the notion of open government that section 16 of the *Human Rights Act 2004* may embrace - need to be reconsidered.

The Committee draws this to the attention of the Assembly.

Comment on the Explanatory Statement

The Committee notes, in relation to proposed new subsection 32(1), that its scope of operation is more limited than the manner in which it is described in the Explanatory Statement. It is not correct to assert that this section

> "will allow the Auditor-General to require any person who receives information related to an audit to keep that information confidential. The Auditor-General is often required to provide information to a person to seek an explanation, for natural justice reasons or for third party verification purposes. Section 32C(4) creates an offence for disclosure of information where a direction under 32C(1) is in force."

Having regard to the definition of "protected information" in proposed new section 32A, the only person who may be given a direction under subsection 32C(1) is a person who obtained the relevant information "while the person was exercising a function of the auditor-general".

Court Procedures Bill 2004

This is a Bill for an Act to create a rule-making power for both the ACT Supreme Court and ACT Magistrates Court, thus allowing for the harmonisation of court rules. It is associated with the Court Procedures (Consequential Amendments) Bill 2004. Both Bills amend the *Supreme Court Act 1933*, the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Magistrates Court Act 1930*. The Court Procedures Bill 2004 also incorporates and amends a range of other legislation with provisions that impact on the practice and procedure of the courts.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

The yardstick for assessing whether there is any undue trespass on rights and liberties may be taken to be sections 21 and 22 of the *Human Rights Act 2004*. These provide:

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.

(2) However, the press and public may be excluded from all or part of a trial—

(a) to protect morals, public order or national security in a democratic society; or

(b) if the interest of the private lives of the parties require the exclusion; or

(c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.

(3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

22 Rights in criminal proceedings

(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:

(a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;

(b) to have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;

(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;

(e) to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;

(f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;
(g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
(h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
(i) not to be compelled to testify against himself or herself or to confess guilt.

(3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
(4) Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

Should the policies of sections 21 and 22 be recognised in the objects clause?

In order to promote the policies of the *Human Rights Act 2004*, the Committee suggests that consideration could be given to inserting an appropriate reference to them in clause 5 of the Bill, accompanied by a statement that the Act be carried into effect in a way that is consistent with sections 21 and 22.

Has there been an inappropriate delegation of legislative powers? - Para 2(c)(iv)

By subclause 13(1), the Minister "may, in writing, determine fees for any of the following purposes: …". Those purposes include "(c) the general purposes of the legislation".

This provision is common, and in itself does not raise a problem in terms of whether there has been an inappropriate delegation of legislative power. The problem arises because by clause 12, "***fee*** includes a charge and a tax".

In ordinary and legal parlance, a fee is not a tax. A fee is a charge for a service rendered, and to be validly imposed there must be a proportionate relationship between what has been (or is to be) rendered and the fee charged. A tax is an impost that need bear no relationship at all to any service.

That the Bill intends that a fee not bear any relationship to a service provided (in which case it would in legal effect be a tax), is underlined by subclause 14(2), which provides that:

(2) A determined fee is payable on notice from the registrar of the court or tribunal if it is worked out by reference to expenses actually incurred in exercising the function,

If the word 'fee' were given its usual meaning, then to be valid any particular fee must bear a proportionate relationship to the service. The use of the word "if" in subclause 14(2) contemplates that under this Bill, it may not be worked out in this way. In this case, it would in effect be a tax. But by the proposed definition by clause 12 – that a "***fee*** includes a charge and a tax" – a fee need bear no relationship at all to the service rendered.

The empowerment of the Minister to impose a tax raises an issue that has been addressed in past Reports. In **Scrutiny Report No 14 of 1999** (and in **Report No 5 of 2000**), the Committee noted that many scrutiny committees operate according to the principle that "[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so": Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. This Committee said: "[t]he vice to be avoided is taxation by non-primary legislation". This approach reflects the long-standing constitutional position that "the raising and expenditure of public revenue have long been under the control of Parliament": *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579 per Brennan J.

In the past, in response to such comments, the relevant Bill, to the extent that it conferred on a Minister a power to levy a tax, has not been further advanced.

The Committee considers that it is inappropriate that a tax be levied by non-primary legislation.

Crimes Amendment Bill 2004

This Bill would amend the *Crimes Act 1900* to create offences in relation to the sale of spray paint cans to children.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

Strict liability offences

The Bill would create offences containing elements of strict liability. The Committee draws attention to the:

- Absence of a justification in an Explanatory Statement;
- That imprisonment is not a possible penalty; and
- That in relation to the offence in proposed new section 384A(3) of the *Crimes Act 1900*, there is provision for a due diligence defence.

Discrimination Amendment Bill 2004

This is a Bill to amend the *Discrimination Act 1991* to insert a provision that would render it lawful for a person to discriminate against someone else on the ground of sex in order to overcome gender imbalance in a profession, trade, occupation or calling.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

By the Bill, proposed new section 34A of the *Discrimination Act 1991* would provide:

> **34A Overcoming gender imbalance in professions etc**
>
> Section 10 (1) (a) or (b), section 12 (1) (a) or (b) or section 13 (b), does not make it unlawful for a person to discriminate against someone else on the ground of sex if—
>
> (a) statistical data on which it is reasonable to rely show a gender imbalance in a particular profession, trade, occupation or calling; and
>
> (b) the discrimination is—
>
> (i) to assist in overcoming the imbalance; and
>
> (ii) reasonable having regard to the data and any other relevant factors; and
>
> (iii) in the public interest.
>
> Example
>
> an employer gives preference to males when hiring teachers

On its face, this raises a question as to whether there is a conflict between the Bill and section 8 of the *Human Rights Act 2004*, which provides:

> **8 Recognition and equality before the law**
>
> (1) Everyone has the right to recognition as a person before the law.
>
> (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
>
> (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.

If there is a conflict, then the Bill might be seen to be justified under section 28, which 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.

In relation to Art 26 of the International Covenant on Civil and Political Rights (ICCPR), on which section 8 is based, the Human Rights Committee (HRC) of the United Nations has said that:

> Discrimination in a society may be so firmly entrenched that 'positive' or 'affirmative' action must be taken in order properly to redress the historical disadvantages suffered by some groups. Affirmative action denotes positive steps taken by a State to improve the status of some disadvantaged groups. A classic affirmative action policy is to discriminate in favour of disadvantaged groups: S Joseph, et al, *The International Covenant on Civil and Political Rights* (2nd ed, 2004) at 23.68.

The authors (at 23.72) quote a comment from the HRC:

> [Affirmative] action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

This comment notes the need for a demonstration in fact of a claim that a part of the population needs certain preferential treatment.

The European Court of Human Rights has said that there is a violation of a clause prohibiting discriminatory treatment when there is different treatment of persons in analogous situations without providing an objective and reasonable justification: *Thlimmenos v Greece* (2001) 15 EHRR 411 at 424 [44].

The Court further indicated that the end to be sought by the discriminatory treatment must be legitimate, and that there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised": Ibid [46].

In relation to proposed new section 34A of the *Discrimination Act 1991,* it is noted that the provision cannot operate unless there is a basis in fact for the discriminatory treatment that may be taken.

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

Heritage Bill 2004

This is a Bill for an Act to establish principles and processes for conserving significant heritage places and objects in the ACT. It contains provisions for the establishment of the Heritage Council; a Heritage Register (separate from the Territory Plan); registration processes for entry of significant heritage places and objects in the Register; heritage guidelines (which set out requirements for conserving the heritage significance of a place or object), offences relating to damaging heritage; heritage directions and enforcement; obligations of public authorities; and incentives for heritage conservation. It covers natural and cultural heritage (including Aboriginal heritage) and deals with both heritage places and objects.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

The Bill treats Aboriginal places and objects somewhat differently to other places and objects. There is thus, on the face of it, a law that breaches the principle in section 8 of the *Human Rights Act 2004;* see, in particular, subsection 8(3): "Everyone is equal before the law and is entitled to the equal protection of the law without discrimination". The full text of section 8 is set out above, in relation to the *Discrimination Amendment Bill 2004*. Any breach of section 8 might, however, be justified under section 28; see the discussion above in relation to the *Discrimination Amendment Bill 2004*.

The Committee notes that the Explanatory Statement does not address this issue.

Strict liability offences

The Bill would create a number of strict liability offences. The Committee notes that the legal effect of a strict liability offence is explained in the Explanatory Statement, but that there is no justification offered. It is noted that imprisonment is not a possible punishment.

Clauses 49 and 50 raise an issue that appears to require clarification. First, and noting that the physical element of the offence under paragraph 49(1)(c) is described as "fails to take reasonable steps", the Committee notes that the effect of making this an offence of strict liability is ameliorated.

The Explanatory Statement, however, states that the effect of clause 49 is to require a person to report, etc. This appears to overstate its effect, which is only to take reasonable steps to report, etc. On the other hand, clause 50 appears to assume that the obligation is to make a report. This issue appears to require clarification.

Compensation

A critical element of the scheme of the Bill is the power of the Minister to give heritage directions. The Explanatory Statement states:

> Part 11 Heritage directions
>
> These provisions establish a range of directions dealing with heritage matters. They allow the Minister to make directions to intervene in situations where the heritage values of places and objects in the Territory are at risk, or are being adversely affected by the actions (or inaction) of the owner of the place or object in question.
>
> Clause 60 empowers the Minister to give directions to the owner or occupier of a place to do or not to do something to conserve the heritage significance of the place or object. The Council is required to recommend the giving of the direction and the Minister is required to be satisfied that there is a serious and imminent threat to the heritage significance of the place or object. The direction can be given in relation to an unregistered place or object as well as a registered place or object. The decision of the Minister to make a direction is reviewable by the Administrative Appeals Tribunal.

A direction under clause 60 will require "the owner or occupier of a place or object", "to do or not do something to conserve the heritage significance of the place or object". The examples given are:

1 to do essential maintenance on a place;
2 not to adversely affect a significant feature of a heritage place; and
3 not to undertake a development affecting the heritage significance of a place without development approval under the *Land Act*, part 6.

So far as the Committee can see, the person to whom the direction is given must bear the cost of complying with the direction. This is affirmed by subclause 64(3). If an

authorized person carries out the direction under subclause 64(2), than by subclause 64(3)

> The reasonable cost incurred by the Territory in doing anything under subsection (2) is a debt owing to the Territory by the person to whom the direction was given.

An issue for the Assembly to address from a rights perspective is whether a person who carries out a direction is entitled to recover reasonable costs *from* the Territory.

Enforcement powers

The statement in the Bill of the nature of the enforcement powers is not of concern except to the extent that:

- There is no restriction on who may be appointed as an "authorized person" under clause 76;
- Which raises a concern about the power of such a person to require persons to provide their name and address under clause 83.

See **Report No 50,** concerning the Emergencies Bill 2004. The Committee notes that, in his response to **Report No. 47** of 3 May 2004, the Minister for Health has indicated that the Government would amend a provision of the *Gene Technology (GM Crop Moratorium) Bill 2004* so that authorised officers must be Territory public servants. The Committee points to this as a possible model for amendment of clause 76 of the Heritage Bill 2004.

The information discovery order

As the Explanatory Statement explains:

> Clause 93 enables the Council where there are reasonable grounds to give an order requiring a person to give information or produce documents to the Council required for the administration of the Act. These are termed information discovery orders.
>
> Clause 94 [provides] that it is an offence if a person contravenes an information discovery order.

When read with the definitions of key concepts such as "place", "object" and "heritage significance", this is a very wide power. As such, it raises a number of concerns:

- There is no provision for the affected person to seek review by the Administrative Appeals Tribunal;
- There is no provision for compensation for any loss suffered as a result of complying with clause 93;
- While the person may claim the benefit of legal professional privilege and self-incrimination privilege (see sections 170 and 171 of the *Legislation Act*), there is no basis for the person to claim that complying with clause 93 would involve a breach of confidence on their part, or that their privacy interests would be breached; and
- There is no provision governing the return of a document to the person.

Has there been an insufficient definition of administrative power? - Para 2(c)(ii)

The Committee notes, with approval, the devices employed in the Bill to permit the use of guidelines, or declared criteria, so as to permit more specific statements of the parameters of administrative powers; and for such instruments to be disallowable by the Assembly: see subclauses 14(5) and 25(1).

Mental Health (Treatment and Care) Amendment Bill 2004

This is a Bill to amend the *Mental Health (Treatment and Care) Act 1994* to enable the Mental Health Tribunal to authorise the involuntary treatment, care and support of mentally dysfunctional people and their detention.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

The power to detain

The Explanatory Statement states that the amendments proposed are designed to improve the legal mechanism for providing long-term involuntary treatment, care and support, to people with mental dysfunction. The current regime is ineffectual because people requiring involuntary care and support have not been able to be detained in community care facilities. Thus, the Mental Health Tribunal would be authorised to order the involuntary treatment, care and support of mentally dysfunctional people and their detention.

These objects are achieved largely by the insertion in the Act of new Divisions 4.3 and 4.4. Division 4.3 addresses who the Mental Health Tribunal must consult and the matters the Mental Health Tribunal must take into account in making a mental health order. The matters to be considered (see proposed new section 26) reflect a concern for the rights of the person who may be affected by the order. The Committee also notes that the existing section 9 of the Act states concerns about the freedom, dignity and self-respect of a person affected.

Division 4.4 deals with psychiatric treatment and restriction orders. These orders permit the involuntary detention of the person and the involuntary use of medication.

As such, and given the high value that must be placed on personal liberty, the Committee suggests that the Assembly take careful note of proposed new sections 28 to 31, and 35, of the Act:

28 Criteria for making psychiatric treatment order

The tribunal may make a psychiatric treatment order in relation to a person if—

(a) the person has a mental illness; and

(b) the tribunal has reasonable grounds for believing that, because of the illness, the person is likely to—

(i) do serious harm to himself, herself or someone else; or

(ii) suffer serious mental or physical deterioration;

unless subject to involuntary psychiatric treatment; and

(c) the tribunal is satisfied that psychiatric treatment is likely to reduce the harm or deterioration (or the likelihood of harm or deterioration) mentioned in paragraph (b) and result in an improvement in the person's psychiatric condition; and

(d) the treatment cannot be adequately provided in a way that would involve less restriction of the freedom of choice and movement of the person than would result from the person being an involuntary patient.

29 Content of psychiatric treatment order

(1) A psychiatric treatment order made in relation to a person may state 1 or more of the following:

(a) a health facility to which the person may be taken;

(b) that the person must do either or both of the following:

(i) undergo psychiatric treatment, other than convulsive therapy or psychiatric surgery;

(ii) undertake a counselling, training, therapeutic or rehabilitation program;

(c) that limits may be imposed on communication between the person and other people.

(2) A psychiatric treatment order may not include any requirement mentioned in section 31 (Content of restriction order).

(3) A psychiatric treatment order made in relation to a person must include a statement that the person—

(a) has the capacity to consent to the order, and consents; or

(b) has the capacity to consent to the order, but refuses to do so; or

(c) does not have the capacity to consent to the order.

30 Criteria for making restriction order

In addition to making a psychiatric treatment order in relation to a person, the tribunal may make a restriction order in relation to the person if satisfied that it is in the interests of the person's health or safety or public safety to do so.

31 Content of restriction order

A restriction order made under section 30 in relation to a person may state either or both of the following:

(a) that the person must—

(i) live (but not be detained) at a stated place; or

(ii) be detained at a stated place;

(b) that the person must not approach a stated person or stated place or undertake stated activities.

35 Powers in relation to detention, restraint etc

(1) This section applies if a psychiatric treatment order has been made in relation to a person.

(2) If the chief psychiatrist considers that it is necessary for the treatment and care of the person to detain the person at certain premises, the chief psychiatrist may—

(a) take, or authorise someone else to take, the person to the premises and for that purpose—

(i) use the force and assistance that is necessary and reasonable to apprehend the person and take the person to the premises stated by the chief psychiatrist; and

(ii) if there are reasonable grounds for believing that the person is at particular premises—enter those premises using the force and assistance that is necessary and reasonable; and

(b) keep the person at the premises in the custody that the chief psychiatrist considers appropriate; and

(c) subject the person to the confinement or restraint that is necessary and reasonable—

(i) to prevent the person from causing harm to himself, herself or someone else; or

(ii) to ensure that the person remains in custody under the order; and

(d) subject the person to involuntary seclusion if satisfied that it is the only way in the circumstances to prevent the person from causing harm to himself, herself or someone else.

(3) In acting under this section, the chief psychiatrist must have regard to the matters stated in section 7 (Objectives of Act) and section 9 (Maintenance of freedom, dignity and self-respect).

(4) If the chief psychiatrist subjects a person to involuntary restraint or seclusion, the chief psychiatrist must—

(a) enter in the person's record the fact of and the reasons for the involuntary restraint or seclusion; and

(b) tell the community advocate in writing within 24 hours after the person is subjected to the involuntary restraint or seclusion; and

(c) keep a register of the involuntary restraint or seclusion.

Restrictions on civil liberties and rights stated in the *Human Rights Act 2004* may also flow from the making of a community care order under the provisions of proposed new Division 4.5 of the Act. These restrictions are significant in terms of the restrictions of rights and liberties, but appear to be less draconic than those that may flow from the combination of psychiatric treatment and restriction orders.

Proposed new Division 4.6 would provide for limits on communication between a person affected by an order and other people.

The Committee draws attention to provisions of the *Human Rights Act 2004* that have a bearing on whether provisions of the Bill amount to an undue trespass on rights. Those most relevant appear to be:

13 Freedom of movement

Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

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.

18 Right to liberty and security of person

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

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

…

19 Humane treatment when deprived of liberty

(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

…

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.

This list of those rights most obviously implicated demonstrates the gravity and extent of the rights issues thrown up by this Bill. Given its resources of time, and personnel to conduct research into the practical working and needs of a system of mental health detention, it is not appropriate – from a rights perspective - for the Committee to attempt any evaluation in detail of the scheme in the Bill. The Committee has noted that section 7 of the Act states its objects in a way that reflects a concern for the rights of the mentally ill. In part, section 7 states:

This Act has the following objectives:

(a) to provide treatment, care, rehabilitation and protection for mentally dysfunctional or mentally ill persons in a manner that is least restrictive of their human rights;

…

(c) to protect the dignity and self-respect of mentally dysfunctional or mentally ill persons; … .

These statements do not preclude an issue arising as to whether some provision of the Bill is in breach of the *Human Rights Act 2004*. However, when taken with provisions of that Act concerning the interpretation to be given to other laws, the provisions of the *Mental Health (Treatment and Care) Act 1994* should receive an interpretation that reflects a concern for the rights of the mentally ill.

So far as concerns the compatibility of the Bill with the *Human Rights Act 2004*, the Committee notes that courts and bodies which have assessed the compatibility of laws dealing with the detention of those suffering some mental illness with rights, and in particular with the right to liberty, have accepted that in certain conditions, the laws are compatible. N Jayawickrama, *The Judicial Application of Human Rights Laws* (2002) at 393 states:

> The European Court [of Human Rights] has required three minimum requirements to be satisfied for the 'lawful detention of a person of unsound mind': first, except in an emergency, the person must be reliably shown to be of 'unsound mind', i.e. a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of the continued confinement will depend on the persistence of the disorder.

Periodic review of the detention is regarded by the Human Rights Committee of the United Nations (HRC) as an important component of a scheme for detention: see S Joseph, et al, *The International Covenant on Civil and Political Rights* (2nd ed, 2004) at 320. The HRC had also allowed that "perceived dangerousness may be a factor in justifying a person's enforced detention in a psychiatric institution, as opposed to a prison" (ibid at 321).

No doubt the provisions of this Bill could be the subject of a very detailed study of whether its provisions conform to the standards stated in the *Human Rights Act 2004*. This is far beyond the time available to the Committee.

The Committee appreciates that assessment of whether the Bill meets the general standards stated by bodies such as the European Court and the HRC cannot be carried out without a study of the Act as it would be amended, and knowledge of how the Act is carried out in practice.

The Committee cannot do more than draw these matters to the attention of the Assembly.

Revenue Legislation Amendment Bill 2004

This is a Bill to amend the *Taxation Administration Act 1999* and the *Payroll Tax Act 1987* to fix directors of corporations with the tax liability of the corporation.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

The Explanatory Statement states the main thrust of these amendments. In relation to company directors, it states:

> The amendments to the Taxation Administration Act provide that a director of a corporation is liable for its unpaid tax debts from the time the corporation first becomes liable, even if they are a former director when the assessment is issued. If there was more than one director at the time the corporation became liable to a charge, then each would be jointly and severally liable with the corporation for any unpaid tax.

Thus, a director may be liable to pay the tax of a distinct legal entity – that is, of the corporation of which the person is (or was at the time the tax liability accrued) a director. That a person might be fixed with responsibility for a liability incurred by another is, on its face, objectionable on rights grounds. In relation to this scheme, however, given that a director directs the affairs of the other legal person, this apparent objection falls away.

It should also be noted that this scheme also allows that:

- "A former director of a corporation is not liable for any tax for which the corporation first became liable after the director ceased to be a director of the corporation, other than interest on an assessment amount for which the former director is liable": clause 7 – proposed new subsection 56B(7);

- a director or former director who is liable to pay a tax liability of the corporation "is entitled to be indemnified by the corporation for payment of the amount": clause 7 – proposed new subsection 56D(2); and

- "It is a defence to a proceeding for recovery of an assessment amount from a director or former director of a corporation if the director or former director establishes that he or she took all reasonable steps in the circumstances to ensure that the corporation paid the assessment amount": clause 7 – proposed new section 56E.

In relation to payroll tax, the Explanatory Statement states:

> The amendments to the Payroll Tax Act provide that all members of a group are jointly and severally liable for the taxation debts of other members of the group. This works in conjunction with the Taxation Administration Act amendments in this Bill. Extending the liability to group members only applies to the Payroll Tax Act.

Again, the Committee sees no rights objection to this scheme.

Revenue Legislation Amendment Bill 2004 (No 2)

This is a Bill to amend the *Taxation Administration Act 1999* and the *Rates Act 2004* to permit the Commissioner for ACT Revenue to disclose the UV of every rateable parcel of land in the ACT to the public.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

This Bill would override the secrecy provisions of the *Taxation Administration Act 1999* and the *Rates Act 2004* to the extent that the Commissioner for ACT Revenue may disclose the UV of every rateable parcel of land in the ACT to the public.

On its face, this raises a question as to whether there is a conflict between the Bill and section 12 of the *Human Rights Act 2004*, which provides:

> **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.

If there is a conflict, then the Bill might be seen to be justified under section 28, which 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.

On the one hand, the public disclosure of the UV of every rateable parcel of land would permit members of the public to make assessments of the wealth of the owner of the land, and to this extent amount to a disclosure of personal information of a sensitive nature about the land owner. It is arguable that there is breach of section 12 (although it might be said that this is not an 'arbitrary' breach).

On the other hand, as the Explanatory Statement notes, for a person to make an objection to the assessment of their liability "the grounds must be stated fully and in detail. That detail may be a comparison with the UVs of other blocks, …". It is thus arguable that the Bill states only "reasonable limits" to a lease-holders privacy; that these limits are "set by Territory laws"; and that they "can be demonstrably justified in a free and democratic society".

In support of this latter line of argument, it appears to the Committee that the current system of the public disclosure of the UV of every rateable parcel of land has worked without substantial objection.

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

Sentencing Reform Amendment Bill 2004

This is a Bill to amend a number of Acts in respect of the sentencing process. In particular, it would provide for the Court of Appeal of the Territory to issue guideline judgments.

Strict liability offences

Proposed new section 35A of the *Crimes Act 1900* (see clause 23 of the Bill) would create offences in respect of which strict liability attaches to one of the physical elements of the offence – that is, as to whether the victim of the offence was a police officer acting in the course of the officer's duty; see subsections 35A(1), (2) and (3).

In each of these offences, imprisonment for a term is stipulated as the penalty. In **Scrutiny Report No 38**, the Committee drew attention to the rights objection to such provisions.

The Committee notes that there is no Explanatory Statement in relation to this Bill.

The Committee acknowledges that the rights issues thrown up by strict liability offences are less acute where strict liability attaches to only one (or less than the total sum) of the physical elements of the offence.

The Committee draws these matters to the attention of the Assembly.

Tree Protection Bill 2004

This is a Bill for an Act to establish a scheme for the protection of trees in the urban area.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

Strict liability offences

The Bill would create a number of strict liability offences. The Committee notes that a justification is offered. In relation to clause 15, the Explanatory Statement states:

> The question of whether a tree is a protected tree is a matter of strict liability. This is to reflect the policy that people should take care to ensure that trees they are working on are not protected, or that they have the relevant approvals to do the work.

Similar points are made in relation to clause 16.

Equality under the law

The Bill treats Aboriginal heritage trees somewhat differently to other trees; (see clauses 60 and 61). There is thus, on the face of it, a law that breaches the principle in section 8 of the *Human Rights Act 2004;* see, in particular, subsection 8(3): "Everyone is equal before the law and is entitled to the equal protection of the law without discrimination". The full text of section 8 is set out above, in relation to the *Discrimination Amendment Bill 2004*. Any breach of section 8 might, however, be justified under section 28; see the discussion above in relation to the *Discrimination Amendment Bill 2004*.

The Committee notes that the Explanatory Statement does not address this issue.

Compensation

The Explanatory Statement notes that clauses 73 and 74 provide as follows:

> Clause 72 permits the Conservator to determine criteria for giving directions.
> Clause 73 empowers the Conservator to give directions with regard to the protection of trees and provides for an offence to defy a direction.

So far as the Committee can see, the person to whom the direction is given must bear the cost of complying with the direction. An issue for the Assembly to address from a rights perspective is whether a person who carries out a direction is entitled to recover reasonable costs from the Territory.

Enforcement powers

The statement in the Bill of the nature of the enforcement powers is not of concern except to the extent that:

- There is no restriction on who may be appointed as an "authorized person" under clause 75;
- Which raises a concern about the power of such a person to require persons to provide their name and address under clause 82.

SUBORDINATE LEGISLATION

Subordinate Legislation – No Comment

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

Disallowable Instrument DI2004-69 being the Public Place Names (Aranda) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* **details the names, origin and significance of two new street names in the Division of Aranda.**

Disallowable Instrument DI2004-70 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2004 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes Disallowable Instrument DI2004-7 and determines fees relating to vehicle registration.**

Disallowable Instrument DI2004-71 being the Road Transport (General) (Driver Licences and Related Fees) Determination 2004 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes Disallowable Instrument DI2003-78 and determines fees for various kinds of driver licences.**

Disallowable Instrument DI2004-72 (without explanatory statement) being the Attorney-General (Determination of Fees and Charges for 2003/2004) Amendment 2004 (No. 1) made under section 176 of the *Agents Act 2003* **amends the Determination of Fees and Charges for 2003/2004 – Disallowable Instrument DI2003-90, as amended.**

Disallowable Instrument DI2004-73 being the Road Transport (Dimensions and Mass) Oversize Vehicles Exemption Notice 2004 made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990* **exempts compliant vehicles from the requirements of sections 9 and 24 of the Act and permits these vehicles to travel in the ACT, on approved routes, without permits.**

Disallowable Instrument DI2004-74 being the Road Transport (Dimensions and Mass) B-Double Exemption Notice 2004 made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990* **exempts compliant B-Doubles and other vehicles from the requirements of sections 9 and 24 of the Act.**

Disallowable Instrument DI2004-76 being the Taxation Administration (Amounts payable – Home Buyer Concession Scheme) Determination 2004 (No. 3) made under section 139 of the *Taxation Administration Act 1999* **revokes Disallowable Instrument DI2004-62 and Disallowable Instrument DI2003-169 and determines the eligibility and methods of calculation for the Home Buyer Concession Scheme.**

Disallowable Instrument DI2004-77 being the Taxation Administration (Objection Fees) Determination 2004 (No. 2) made under section 139A of the *Taxation Administration Act 1999* **revokes Disallowable Instrument DI2004-64 and Disallowable Instrument DI1999-175 and determines new objection fees for the purposes of the Act.**

Disallowable Instrument DI2004-78 being the Taxation Administration (Amounts Payable – Home Buyer Concession Scheme) Determination 2004 (No. 4) made under section 139 of the *Taxation Administration Act 1999* **revokes Disallowable Instrument DI2004-63 and determines thresholds for eligible property and eligible vacant block for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2004-79 being the Public Place Names (Harrison) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* **details the names, origin and significance of new street names in the Division of Harrison.**

Disallowable Instrument DI2004-80 being the Gungahlin Drive Extension Authorisation to grant licence (for the *Nature Conservation Act 1980,* Section 24) 2004 (No. 1) made under section 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* **grants a licence to allow the Contractor to interfere with the nest of a native animal as part of the construction of the GDE.**

Disallowable Instrument DI2004-81 being the Gungahlin Drive Extension Authorisation to grant licence (for the *Nature Conservation Act 1980,* sections 26 and 39) 2004 (No. 1) made under section 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* **grants a licence to allow the Contractor to take and release a native animal as part of the construction of the GDE.**

Disallowable Instrument DI2004-82 being the Gungahlin Drive Extension Authorisation to grant a licence (for the *Nature Conservation Act 1980,* Section 42) 2004 (No. 1) made under section 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* **grants a licence to allow the Contractor to take a plant as part of the construction of the GDE.**

Disallowable Instrument DI2004-83 being the Gungahlin Drive Extension Authorisation to grant an authority (for the *Nature Conservation Act 1980,* Section 43(5)(b)) 2004 (No. 1) made under section 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* **grants an authority to allow the Contractor to fell, remove or damage native timber as part of the construction of the GDE.**

Disallowable Instrument DI2004-84 being the Gungahlin Drive Extension Authorisation to grant a consent (for the *Nature Conservation Act 1980,* section 56(1), (2) and (3)) 2004 (No. 1) made under section 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* **grants a consent to allow the Contractor to undertake activities in a reserved area as part of the construction of the GDE.**

Disallowable Instrument DI2004-85 being the Public Place Names (O'Malley) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines three new street names in the Division of O'Malley.**

Disallowable Instrument DI2004-87 being the Public Place Names (City) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* **details the name, origin and significance of the new street name in the Division of City.**

Disallowable Instrument DI2004-88 being the Public Place Names (Greenway) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* **details the names, origins and significance of new street names in the Division of Greenway.**

Disallowable Instrument DI2004-89 being the Dangerous Substances (Fireworks Default Classification Criteria) Determination 2004 (No. 1) made under sub-regulation 14 of the *Dangerous Substances (Explosives) Regulations 2004* **determines the default fireworks classification criteria as set out in the schedule.**

Disallowable Instrument DI2004-90 being the Health (Fees) Determination 2004 (No. 1) made under section 36 of the *Health Act 1993* **revokes Disallowable Instrument DI2003-150 and determines the fees and charges payable for the purposes of the Act, including new fees for Hospital in the Home and an increase to the Pharmaceutical Co-payment.**

Disallowable Instrument DI2004-91 being the Taxation Administration (Payroll Tax) Special Arrangements Approval 2004 (No. 1) made under section 42 of the *Taxation Administration Act 1999* **extends the time by which employers liable for payroll tax must lodge a return from 7 July to 31 July.**

Disallowable Instrument DI2004-94 (without explanatory statement) being the Water and Sewerage (Fees) Determination 2004 (No. 1) made under section 45 of the *Water and Sewerage Act 2000* **revokes Disallowable Instruments DI2003-16 and DI2003-155 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2004-98 (without explanatory statement) being the Plumbers, Drainers and Gasfitters Board (Fees) Determination 2004 (No. 1) made under section 46 of the *Plumbers, Drainers and Gasfitters Board Act 1982* **revokes Disallowable Instrument DI2003-158 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2004-99 (without explanatory statement) being the Electricity Safety (Fees) Determination 2004 (No. 1) made under section 128 of the *Electricity Safety Act 1971* **revokes Disallowable Instrument DI2003-160 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2004-100 (without explanatory statement) being the Community Title (Fees) Determination 2004 (No. 1) made under section 96 of the *Community Title Act 2001* **revokes Disallowable Instrument DI2003-161 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2004-101 (without explanatory statement) being the Building (Fees) Determination 2004 (No. 1) made under section 108 of the *Building Act 1972* **revokes Disallowable Instrument DI2003-162 and determines the fees payable for the purposes of the Act.**

Subordinate Law SL2004-14 being the Health Regulations 2004 made under the *Health Act 1993* **provide the authorisation process for the approval of nurse practitioner positions.**

Subordinate Law SL2004-15 being the Supreme Court Amendment Rules 2004 (No. 3) made under section 36 of the *Supreme Court Act 1933* **sets out the procedure for selection of an expert by the court and makes provision for the material required to be given to that person.**

Subordinate Law SL2004-16 being the Road Transport Legislation (Australian Road Rules) Amendment Regulations 2004 (No. 1) made under the *Road Transport (General) Act 1999* **and the** *Road Transport (Safety and Traffic Management) Act 1999* **amend the *Road Transport (Offences) Regulations 2001* and the *Road Transport (Safety and Traffic Management) Regulations 2000.***

Subordinate Legislation – Comment

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

Is this instrument disallowable?

Disallowable Instrument DI2004-75 being the Commissioner for the Environment Appointment 2004 (No. 2) made under section 4(1) of the *Commissioner for the Environment Act 1993* **appoints a specified person as Commissioner for the Environment.**

The Committee notes that the explanatory statement gives no indication as to whether or not the person appointed to the position of Commissioner for the Environment is a public servant. An instrument appointing a public servant is not a disallowable instrument under section 227(2) of the *Legislation Act 2001*.

Retrospectivity
Is this instrument lawful?

Disallowable Instrument DI2004-86 being the Land (Planning and Environment) (Fees) Determination 2004 (No. 1) made under section 287 of the *Land (Planning and Environment) Act 1991* **determines the fees payable for the supply of information from the Public Register of Applications, Approvals and Order in electronic disk format.**

The Committee notes that the above instrument states that the fees shall apply from the date of notification of the instrument, i.e. 7 June 2004. However, sub-section 73(2) of the *Legislation Act 2001* provides that:

"(2) A registrable instrument commences—

(a) on the day after its notification day

(b) if an Act or the instrument provides for a later date or time of commencement—on that date or at that time; or

(c) if an Act provides for an earlier date or time of commencement—on that date or at that time; or

(d) if the instrument, under authority given by an Act, provides for an earlier date or time—on that date or at that time.".

The Committee therefore seeks the Minister's advice as to whether fees were levied on the day of notification of this instrument and, if so, whether this was lawful as there is no provision in the Act for the fees to be charged retrospectively.

Confirmation is also sought that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

The possible effect of section 76 of the *Legislation Act 2001* appears to be of particular relevance to this instrument. It provides as follows:

"76 Non–prejudicial provision may commence retrospectively (SLA s 7)

(1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.

(2) This section applies to a non-prejudicial provision of a statutory instrument only if the instrument clearly indicates that the provision is to commence retrospectively.

Example

the instrument provides that a non-prejudicial provision is 'taken to have commenced' at an earlier date or time

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

(3) This section is a determinative provision.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

(4) In this section:

non-prejudicial provision means a provision that does not operate to the disadvantage of a person (other than the Territory or a Territory authority or instrumentality) by—

(a) adversely affecting the person's rights; or

(b) imposing liabilities on the person.".

Retrospectivity

Disallowable Instrument DI2004-92 being the Mental Health (Treatment and Care) Mental Health Official Visitor Appointment 2004 (No. 1) made under section 121 of the *Mental Health (Treatment and Care) Act 1994* **appoints a specified person as a Mental Health Official Visitor.**

The Committee notes that the above appointment commences on 6 June 2004, whereas the instrument was not notified on the Legislation Register until 10 June 2004.

What is the effect of the period from the instrument taking effect until notification?

The effect of the period between this instrument taking effect and its notification on the Legislation Register needs to be considered.

The possible effect of section 76 of the *Legislation Act 2001* appears to be of particular relevance to this instrument. It provides as follows:

"76 Non–prejudicial provision may commence retrospectively (SLA s 7)

(1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.

(2) This section applies to a non-prejudicial provision of a statutory instrument only if the instrument clearly indicates that the provision is to commence retrospectively.

Example

the instrument provides that a non-prejudicial provision is 'taken to have commenced' at an earlier date or time

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(3) This section is a determinative provision.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

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non-prejudicial provision means a provision that does not operate to the disadvantage of a person (other than the Territory or a Territory authority or instrumentality) by—

(a) adversely affecting the person's rights; or

(b) imposing liabilities on the person.".

Confirmation is sought that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

Incorrect reference

Disallowable Instrument DI2004-95 (without explanatory statement) being the Land (Planning and Environment) (Fees) Determination 2004 (No. 2) made under section 287 of the *Land (Planning and Environment) Act 1991* **revokes Disallowable Instruments DI2003-159 and DI2003-185 and determines the fees payable for the purposes of the Act.**

The Committee notes that item 9 on page 1 of the schedule states:

"Section 171A	Application for the grant of a further lease for a term exceeding the term of the existing lease for residential purposes".	228.00	232.00

A check of the Act on the Legislation Register shows that section 171A refers to "Grant of further rural leases". Perhaps the correct reference should be to section 171 "Grant of further residential leases".

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 17 June 2004, in relation to comments made in Scrutiny Report 47 regarding the Gene Technology (GM Crop Moratorium) Bill 2004.
- The Attorney-General, dated 18 June 2004, in relation to comments made in Scrutiny Report 50 regarding the Crimes Legislation Amendment Bill 2004.
- The Minister for Police and Emergency Services, dated 21 June 2004, in relation to comments made in Scrutiny Report 50 regarding the Emergencies Bill 2004.
- The Minister for Sport, Racing and Gaming, dated 21 June 2004, in relation to comments made in Scrutiny Report 50 regarding the Gaming Machine Bill 2004.
- The Attorney-General, dated 22 June 2004, in relation to comments made in Scrutiny Report 50 regarding the Justice and Community Safety Legislation Amendment Bill 2004.

The Committee thanks the Minister for Health, the Attorney-General, the Minister for Police and Emergency Services and the Minister for Sport, Racing and Gaming for their helpful responses.

Bill Stefaniak MLA
Chair

June 2004

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

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
REPORTS – 2001-2004	
Report No. 1, dated 12 December 2001	
Nil	
Report No. 2, dated 19 February 2002	
Crimes Amendment Bill 2001 (No. 2) **(PMB)**	
Act citation: Crimes Amendment Act 2002 **(Passed 5.3.02)**…….	**No. 5**
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Disallowable Instrument DI2004-1 being the Government Procurement Appointment 2004 (No 1)	**No 46**
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Gaming Machine Bill 2004.....	
Justice and Community Safety Legislation Amendment Bill 2004....	
Report No 51, dated 23 June 2004	
Pharmacy Amendment Bill 2004.....	

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

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Standing Committee on Legal Affairs
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Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 47 of 3 May 2004. I offer the following response in relation to the matters raised by your Committee.

In relation to the *Gene Technology (GM Crop Moratorium) Bill 2004* (the Bill), ACT Health provides the following comments:

Clause 8 - Exemptions

The committee raised concerns regarding the appropriateness of clause 8, which allows the Minister to provide an exemption to a moratorium order.

The Government's policy position in relation to this matter is that it has issued a three-year moratorium on the commercial release of GM food crops. It wishes however to continue to support scientific research into GM organisms being conducted in the ACT. The Bill aims to give effect to this policy position. Clause 8 provides the Minister with a mechanism to specifically exempt from prohibition under a moratorium order, field trials or contained research, involving a plant for which a moratorium order has been issued, and which the Government is supportive of continuing.

Following consultation with members of the Assembly, the Government has decided to bring forward an amendment to the Bill to establish an advisory council. Membership of the advisory council will comprise representation from the fields of science, environment, industry, primary production, academia and government. One of the tasks of the proposed advisory council will be to provide advice to the Minister in relation to making exemption orders for research trials for GM food crops. This provision may further alleviate the Committee's concerns, as it provides for a consultative mechanism regarding the Minister's use of his/her power under this clause.

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Clause 10 – Orders can not be challenged

The Committee raised concerns that clause 10 amounts to an inappropriate use of legislative power in that a law made under this cause could have the effect of depriving someone of liberty, yet there is no provision in the Bill for that law to be reviewed.

The Government acknowledges the operation and intent of the *Human Rights Act 2004*. It believes however that in this instance retention of clause 10 is warranted. This clause provides the legislative protection necessary to ensure the appropriate operation of moratorium orders and exemption orders under the legislation.

In relation to the Committee's comment that such a provision is highly unusual, the Government notes that Section 17(3) of the *Plant Diseases Act 2002* has the same effect as clause10 of the Bill.

Furthermore, the Bill, including clause 10, is modelled on corresponding legislation in existence in NSW. Given the geographical location of the ACT and the cross border nature of agricultural activities, the Government believes it is important for the ACT to maintain consistency with the NSW legislative approach in this area.

Clause 14 – Offence – Failing to report contravention of moratorium order

The Committee raised concerns that clause 14 creates an inappropriate criminal offence.

To address the concerns of the Committee, the Government intends to bring forward an amendment to clause 14. The Government proposes to base the amendment on section 16 of the *Plant Disease Act 2002*. The amended offence would create an obligation to report where a person has *reasonable grounds* for believing a GM food plant is being cultivated in contravention of a moratorium order.

Strict Liability Offences

In accordance with current legal policy, most regulatory offences with small or moderate penalties are now offences of strict liability. A strict liability offence under section 23 of the Criminal Code means that there are no fault elements for any of the physical elements of the offence. That means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences have a specific defence of mistake of fact.

Section 16 – Appointment of Inspectors

The Government accepts the Committee's suggestion to amend clause 16 to limit the range of people who can be appointed as authorised officers. As such, the Government proposes to bring forward an amendment to require that persons who are appointed as authorised officers are Territory public servants.

In relation to the *Health Professionals Bill* 2003 (the bill), ACT Health provides the following comments:

Strict liability offences

A strict liability offence is an offence where you do not have to establish that the person was aware of any fault element. The justification of the strict liability offences in the Bill is in essence the need to ensure that health professionals are at all times appraised of their obligations to ensure the safety of the public. The government considers that the public interest is best served by ensuring that health professionals act appropriately to secure the health safety and wellbeing of health consumers and the general public. The safety of the public would be more difficult to accomplish without the use of strict liability in these offences. It should be noted that in several instances the Bill contains a cascade of offences. Where an offence involves acts or omissions that are done intentionally, the penalty is higher to reflect the greater degree of culpability.

The strict liability offences referred to by the Committee only applies in respect of an element of the offence and not to the whole offence. In both instances the strict liability applies to the requirement to establish that the health professional was not registered in a particular health profession. It is important to confirm that there is no strict liability in respect of clauses 71(a) or 72(1) (a) which both require proof of intention.

The inclusion of strict liability in an element of the offence does not render the whole offence a strict liability offence. The effect of applying strict liability is that it is not necessary to prove that the health professional had any awareness (or any other fault element) about whether they were registered in the profession at the relevant time. It is important to note that the mistake of fact defence applies under section 36 of the Criminal Code 2002. Mistake of fact is open to the health professional only if the person considered whether or not the facts existed and was under the mistaken but reasonable belief about the facts. There are other defences under the Criminal Code 2002 that are also available to the health professional in responding to these offences.

Apart from these defences the inclusion of intention as an element of the offence in clauses 71 and 72 mitigates against the objections raised by the Committee to the use of strict liability in respect of the other element of the offence relating to whether the health professional was registered in a particular health profession. In addition, clause 72 allows a number of exemptions that would safeguard against the possibility of convicting a person who has acted innocently (i.e. has acted neither negligently nor intentionally).

The imposition of a penalty of imprisonment for these offences is justified on the grounds that persons who intentionally pretend to be a registered health professional and who intentionally provide a regulated health service are considered to be such fundamental breaches of the standards that are expected of health professionals and therefore should attract a significantly serious penalty in order to protect the communities confidence in the provision of health services in the Territory. As both of these offences involve acts or omissions that are done intentionally the penalty of imprisonment has been included to reflect the greater degree of culpability. The government is of the view that the penalty of imprisonment is not incompatible with the inclusion of strict liability as an element of these offences. The penalty of imprisonment for this type of offence is consistent with the penalties that are imposed for similar offences on the statute books.

In respect of clauses 74 and 75 the inclusion of strict liability for these offences is to ensure that the registered health professional is vigilant about informing the relevant health professional board about changes in the health professionals name, address or insurance. The lesser maximum penalty of 5 penalty units (i.e. $500) is because of the lesser degree of culpability. Without the use of strict liability in these offences it would be much more difficult to ensure that these changes are communicated to the relevant health professional board.

These offences are regulatory in nature and therefore strict liability offences are appropriate. In addition, the defences of mistake or ignorance of fact (section 36 of the Criminal Code 2002) and the defence of intervening conduct or an event (section 39 of the Criminal Code 2002) and other defences available under the Criminal Code apply to these strict liability offences to ensure that persons who have done nothing wrong are not convicted. It is also not insignificant that a fine rather than imprisonment is prescribed as a penalty for these offences.

In addition, I understand that in future the Government will be providing a justification in respect of strict liability clauses contained in legislation coming before the Committee. In future, the Government will be identifying the strict liability clauses in offences and providing a general comment as a justification of why strict liability is necessary for these particular clauses. It is worth mentioning that strict liability offences have been used in legislation since self government commenced in the ACT in 1989. However, only recently have these offences been expressly identified by way of drafter's note, which has allowed these offences to be more easily identified. Strict liability offences are not new and serve an important purpose in ensuring that offences are established without an undue waste of time and resources in the court context. Strict liability offences are particularly important in the context of regulatory offences like clauses 74 and 75. It is not insignificant that in both these offences one months grace is allowed before the offence takes effect. Notwithstanding the concerns of the Committee, the government is of the view that the strict liability attaching to these offences are appropriate given that the offences contained in clauses 74 and 75 are regulatory in nature.

An inappropriate criminal offence

Clause 34 prohibits a member of a board from knowingly agreeing to a health professional board engaging in business that is outside its functions. The offence, if proven, imposes a penalty of 50 penalty units ($5,000). The Committee has indicated that it is not apparent why such a default should be a criminal offence. The inclusion of this offence was justified on the basis that for a board member to authorise the board to engage in business that was not related to the functions of the board was a practice that should be made a criminal offence. The reason for this is because the alternative penalty of dismissal of the member from the board was not considered from a policy perspective as a sufficient penalty. An alternative option would be to make such a practice a general prohibition with the addition of an express ground stipulated in clause 29 as a ground for discharging the Board by the Minister. The difficulty with this approach is that it seems unreasonable to discharge a board when it relates to the actions of an individual board member.

It is not altogether clear why the Committee has stated that the activity of the Board would be unlawful in itself as many activities that the Board could engage in outside its functions may or may not be unlawful and in any event the conduct that is made unlawful by the offence is the conduct of the board member and not the board. Nor is it clear how the Committee intended the clause to operate in respect of individual board members. In view of the need to ensure that responsibility for these types of practices remain with the board member rather than the board itself, it is considered justified that this prohibition be a criminal offence.

As to the appropriateness of the offence the reasons given for its inclusion have been outlined above. While the government does not agree with the Committee that the imposition of a criminal offence for this default is inappropriate the following points can be made. The functions of the Board have been clearly set out in detail in clause 26 and individual board members would be well aware of what would or would not be within the functions of the board. The opinion of the Committee that the board member could be dismissed from the board is a several step process and in circumstances where a member of a board could knowingly have engaged in conduct that constitutes the offence such an approach was not considered appropriate from a policy perspective. If the conduct of the board member would only result in dismissal from the board the Government was of the view that a more serious sanction would be necessary in order to prevent this conduct from occurring. It is important to understand that the conduct that constitutes the offence under clause 34 is not the conduct of the board but of the board member. It is not as the Committee suggests that for the board to act outside its functions would be unlawful in itself, but rather that a board member must not authorise a health professional board to carry on business except in the exercise of its functions.

Privileges in relation to disclosure of information under compulsion

ACT Health accepts the Committee's recommendation that in respect of clauses 58 and 59 that a drafters note be inserted to refer to sections 170 and 171 of the *Legislation Act 2001* which deals with the preservation of certain common law privileges regarding self incrimination and client legal privilege.

Privacy and reputation

The Committee has raised a number of concerns in respect of section 12 of the *Human Rights Act 2004* regarding Part 9 of the Bill, which is intended to facilitate the making of complaints against health professionals. The Committee believes there has been an undue trespass on the reputation rights of the affected health professional. The Committee claims that at the heart of the matter is a question of the extent to which a health professional should be the subject of, and/or called upon to answer, a complaint that does not reveal to the health professional the name of the complainant, and/or does not disclose the full detail of the complaint.

In particular, the Committee has raised concerns regarding the legitimacy of the process of acting on a complaint that does not comply with the requirements of subclause 81(1). While it is desirable that any complaint or report be in writing, be signed by the person making the report and include the persons name and address there are times when these requirements cannot be satisfied. It would be undesirable that complaints against health professionals, particularly in an area where public safety could be at risk, that complaints cannot progress

because the complaint does not comply with subclause 81(1). It is not insignificant that the Minister may make guidelines for the exercise of the discretion by the health professional board or Commissioner under subclause 81(5). These guidelines are a disallowable instrument and therefore subject to parliamentary scrutiny. ACT Health believes that in all these matters it is a question of balancing the public interest in respect of ensuring the safety of the public in their dealings with health professionals and the individual rights and protections of the health professional. It was never intended that these powers would be exercised by the Commissioner or the health professional boards in a manner that was unlawful or arbitrary.

To prevent this from happening the Bill contains subclause 81(5) that provides that the Minister may make guidelines for the exercise of the discretion. This is an important provision that will help to prevent any abuses of power that potentially could occur. In addition, the guidelines are a disallowable instrument thereby allowing the Assembly the opportunity to consider and scrutinise the circumstances in which this discretion may be exercised.

Clause 82 has been inserted to assist in those infrequent situations where a person wishing to make a complaint has such a poor grasp of the English language or in some other way is unable to make a report themselves are able to be provided with assistance by the Commissioner or an executive officer of the health professional board. It would be undesirable that persons who are the most vulnerable in terms of their communication skills were unable to voice their concerns regarding the provision of health services in the Territory. This in itself would create an underclass of health consumers that would be undesirable in terms of the overall objectives of the legislation. It is essential that health consumers, irrespective of their background or written communication skills, are able to seek redress against errant health professionals. However, in view of the concerns raised by the Committee in respect of the administration of these provisions, the Committee's concerns will be brought to the attention of the health professional boards and the commissioner for health complaints.

In respect of clause 84 while the concerns of the Committee are noted the reason why the board or the health commissioner need inform the health professional only to the extent of saying what the report is about in general terms is that often the report will refer to other matters unconnected with the provision of services by the health professional concerned or it may refer to the provision of health services by several health professionals and it is necessary in order to protect their privacy not to include details of those parts of the complaint. It was never intended that the provision be used, as supposed by the Committee, as an opportunity to conceal aspects of the complaint against a health professional or to prevent the health professional of an opportunity to respond fully to the complaints raised against him or her. It is not insignificant that both the Commissioner and the Boards are required to follow the rules of natural justice in the management of complaints against health professionals.

In addition, clause 129 sets out the circumstances that are required to be considered by the Commissioner and the board before deciding not to provide the identity of the person making the complaint or report. As these circumstances relate to the public safety and public interest surrounding such inquiries they are considered reasonable and appropriate.

Provisions that may operate retrospectively

The Committee's comments are noted and while it is recognised by the Committee that in respect of the transitional arrangements proposed that there may be some retrospective application of some regimes during this transitional period this is considered by the Committee as appropriate in the circumstances.

Clause 130

The Committee has raised concerns regarding the appropriateness of clause 130 which allows the Minister to exempt a health professional from a provision of the Act if satisfied that the public interest is served by doing so. The exemption is a notifiable (but not disallowable) instrument. The Committee is concerned that this clause contains insufficient definition of administrative powers, inappropriate delegation of legislative powers and insufficient subjection of an exercise of legislative power to parliamentary scrutiny. While it is appropriate for the law to apply equally to all citizens it was always intended to allow the Minister a broad discretion in respect of the dispensation of the operation of the law in favour of a particular person or group of persons. There are innumerable instances and circumstances surrounding the registration and regulation of health professionals in the Territory that may require in some situations and for an interim period only that particular provisions of the Bill be suspended in respect of a person or a group of persons. Any decision to suspend the application of the provisions of the Bill is required to be done only in situations where the Minister is satisfied that the public interest is served by doing so. This is an important qualification that helps to safeguard against any arbitrary application of the Ministers' discretion.

Clause 130 was intended to apply not only to individuals but also to a class of persons in situations where it was necessary to ensure adequate and sufficient health services are generally available to health consumers in the ACT that would not create a significant risk to public safety. The difficulty with umbrella legislation such as the *Health Professionals Bill 2003* is that it is difficult to proscribe in detail the circumstances in which there will be a need to allow a more liberal interpretation of the requirements for registration of health professionals. Consideration will, however, be given as to whether guidelines need to be issued in respect of the exercise of this discretion and whether those guidelines need also to be subject to parliamentary scrutiny (i.e. a disallowable instrument).

Clarity of the provisions

The Committee's comments in respect of the drafters note to clause 54 has been referred to the Parliamentary Counsels Office and will be incorporated in the final version of the Bill.

I trust the above allays your Committee's concerns.

Yours sincerely

Simon Corbell MLA
Minister for Health
17.6.04

Jon Stanhope MLA

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

MEMBER FOR GINNINDERRA

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Standing Committee on Legal Affairs
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Dear Mr Stefaniak

I refer to the committee's comments on the Crimes Legislation Amendment Bill 2004 (the Bill) in Scrutiny Report No. 50 of 15 June 2004.

I note the committee does not suggest that the possible rights objections raised by offences applying strict and absolute liability have weight in relation to the proposed offences. Nevertheless, I consider it appropriate to clarify that the application of strict and absolute liability to the offences in this Bill is to an element of the offence and not to the offence as a whole. As the government's reply to Scrutiny Report No. 38 stressed, the application of strict or absolute liability to a specific element of an offence does not render the whole offence a strict or absolute liability offence. Sections 23 and 24 of the *Criminal Code 2002* contemplate that strict and absolute liability can be applied to a specific element of what is otherwise a fault element offence.

I thank the committee for its consideration of this Bill and its agreement that the offences impose an appropriate level of punishment.

Yours sincerely

Jon Stanhope MLA
Attorney General

18 JUN 2004

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Bill Wood MLA

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

MEMBER FOR BRINDABELLA

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.50 of 2004. I offer the following responses in relation to the matters raised by your Committee on the Emergencies Bill 2004 (the Bill).

The report notes the Committee's concerns that the Bill contains various emergency powers that may amount to an undue trespass on personal rights and liberties. The powers that may be exercised by the Territory Controller and the Chief Officers of the emergency services do affect a wide range of human rights, including the right to privacy and freedom of movement. The issue is whether the Bill and the surrounding legal framework place limits on rights that are justifiable and contain adequate safeguards against possible violations of rights.

International human rights norms provide that a fundamental requirement for limiting rights during an emergency is that they be limited to the extent strictly required by the exigencies of the situation. Certain rights have been identified as non-derogable under any circumstances, including the right to life; the prohibition of torture; the right to be free from forced labour; and protection from retrospective criminal offences and penalties. In relation to non-absolute rights such as the right to privacy and freedom of movement, the International Covenant on Civil and Political Rights (ICCPR) includes specific limitations in the article relating to the particular right. By saying which limitations are permissible the ICCPR accommodates the tension between legitimate competing interests and the protection of individual human rights.

In line with these international norms, the *Human Rights Act 2004* recognises that few rights are absolute and limits may be placed on rights within defined boundaries with the aim of balancing competing interests. Placing limits on rights is permissible only if what is done is authorised by a Territory statute or statutory instrument; is reasonable; and is demonstrably justifiable in a democratic society, which means it

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must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued.

In my view, the special powers that may be exercised by the Territory Controller and the Chief Officers are compatible with the ICCPR and the *Human Rights Act 2004*. Clauses 34, 67, 68, 86 and 112 of the Bill are reasonable and justifiable and settle on the right balance between individual rights and the public interest in ensuring the protection and preservation of life, property and the environment from emergencies such as fire, earthquake and hazardous material incidents. The Bill also provides for remedies to be sought if a person suffers loss as a result of emergency powers being exercised.

Strict liability offences

I note that the Committee has drawn attention to clauses 187(1) and 188(4) of the Bill, which include strict liability offences being punishable by imprisonment. As the Government has previously advised to the Committee, strict liability offences that include a penalty of imprisonment are not incompatible with the rights outlined in the *Human Rights Act 2003*. Rather, it is a question of balance, to ensure that strict liability offences are compatible with basic human rights, having regard to the nature of behaviour being regulated and the extent of the prison term that can be imposed.

The two offences replace existing provisions in the *Fire Brigade Act 1957*. The existing offences are strict liability and have a penalty of imprisonment. These two offences are about ensuring the safety of members of the public from fire. The offences are committed where a person does something to a fire alarm that prevents or hinders the effective use of the fire alarm, or where a person fails to leave premises at or near a fire when directed to by a member of the Fire Brigade, Rural Fire Service or a Police Officer. The later offence is also about ensuring that the efforts of emergency service workers in putting out a fire are not hampered by members of the public who have put themselves at peril and will not follow a direction to leave the premises.

Having regard to the seriousness of these two offences the Government considers that imprisonment is an appropriate penalty for these offences. In addition, judicial discretion in sentencing for these offences is preserved, thereby ensuring that the punishment will be suited to the circumstances of each case.

The name and address of a person

The Committee's comments on the ability of an investigator or authorised person in clauses 113 and 194 to require a person to provide their name and address are noted. The two clauses replace existing provisions in the *Bushfire Act 1936* and the *Emergency Management Act 1999*. In addition, the Bill provides that a person's name and address are only required if the person may be able to assist the investigator in investigating the cause of a fire or if the person is committing or is about to commit an offence against the Act.

Compensation

The Committee's comments on the different methods of seeking compensation in the Bill are noted. The process for seeking compensation for loss suffered in a declared emergency under clause 167 differs from the process in all other cases, as outlined in clause 197. This difference is due to the fact that the *Emergency Management Act 1999* introduced a right to reasonable compensation for damages sustained because of a declared emergency. This right to compensation has been continued in this Bill. As you would be aware, the right to reasonable compensation is unusual in legislation and differs substantially from the ability to claim compensation. This right to compensation should not be applied as a general rule as there may be cases where compensation is not appropriate. For example, compensation may not be appropriate where the damage would have occurred regardless of the exercise of powers by an emergency service or where the person suffers damage partially as a result of commission of a crime.

I note that currently under the *Emergency Management Act 1999* there is an avenue for direct appeal to the Administrative Appeals Tribunal (AAT) about the Minister's decision on compensation due to a declared emergency. While the AAT is an appropriate Tribunal to review administrative decisions, the courts more appropriately consider decisions about the level of compensation. The courts are better able to consider other matters that may be relevant in determining the level of compensation that is reasonable in the circumstances. For example the courts may reduce the damages available to someone whose car is damaged by the Fire Brigade in accessing a fire hydrant or fire escape, where the damage is as a result of the person parking their car illegally in front of the fire hydrant or fire escape. This sort of case would raise issues such as contributory negligence and whether it is reasonable in the circumstances for the person to be fully compensated. These are not appropriate matters to be considered by the AAT.

For compensation matters considered by the courts the *Civil Law (Wrongs) Act 2002* provides procedures for early resolution of claims and to assist settlement of cases before they get to court.

Determination of fees

The Committee noted that subclause 199(2) provides that a fee determined for a service provided to a person by an emergency service is payable by the person even if the person did not ask for, or consent to, the provision of the service. This provision is identical to section 68(2) of the existing *Emergency Management Act 1999*. This provision has been included as the circumstance regularly occurs where a third party requests the response of an emergency service. This provision ensures that the person who received the benefit of the service pays the fee, rather than the third party who requested the service.

Powers to detain persons

The Committee's comments on clause 166 are noted. To ensure that clause 166 does not infringe on the rights in section 18 of the *Human Rights Act 2004* the clause only permits detention for the purpose of removing a person who is obstructing or threatening to obstruct emergency operations.

I hope this information addresses the Committee's concerns about the Emergencies Bill 2004.

Yours sincerely

Bill Wood

Bill Wood MLA
Minister for Police and Emergency Services
24.6.04

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for the Australian Capital Territory
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Dear Mr Stefaniak

Re: Gaming Machine Bill 2004

I refer to Report No. 50 of the Standing Committee on Legal Affairs (Performing the Duties of a Scrutiny of Bills and Subordinate Legislation Committee), and particularly to comments on the provisions of the Gaming Machine Bill 2004 (the Bill).

I would like to thank the Committee for its comments contained in the Report on the Bill and would like to offer the following comments in reply.

Has there been an undue trespass on rights and liberties?

Specifically the Committee commented on a problem that may arise in regard to equality under the law because of clause 170 of the Bill. This clause provides for the incentive scheme for licensed clubs to contribute to women's sport.

The Government notes the Committee's consideration of a similar provision in its **Report No. 8 of the Fifth Assembly.**

This Government acknowledges that everyone is equal before the law and that this scheme provides explicitly for participants in 'women's sport' as a category for the operation of the law. However, it is our objective to encourage contributions to women's sport to a more equitable level as this sector is clearly under represented in current funding patterns.

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The Government agrees with the Committee's comments that the debate from **Report No. 8 of the Fifth Assembly** can be seen to resolve this issue.

Has there been insufficient definition of administrative power?

The Committee raised the issue of the discretionary power vested in the Commission, such as under clauses 13, 20 and 21, and commented that guidelines or the regulations could be used to provide information on how the Commission may exercise its powers.

The Government considers that the discretionary powers that the Commission may exercise are transparent and appropriately constrained by the context of the existing provisions in the Bill.

Clause 13 provides a number of specific requirements that a licensee must comply with in order to satisfy these additional requirements. The provisions set out in clause 13 are designed to enable the Commission to undertake its regulatory duties in the full range of circumstances that may arise in the proposed operations of a club.

While the Commission must be satisfied that certain licensing requirements pursuant to clause 13 have been met, the discretionary element is limited. The Bill provides detail about the requirements that a licensee must provide in relation to the matters that have a discretionary element. These provisions are explicit in what is required and provide guidance for applicants, for example, the rules for the control of gaming machines under paragraph 11(2)(c) of the Bill.

The linkage between clauses means the limited discretionary element the Commission has in relation to clause 13 is transparent for both the Commission and for applicants. The Committee's attention is also drawn to the rights of applicants to appeal against all reviewable decisions by the Commission. This is provided for under clause 172 of the Bill and listed in Schedule 1.

In relation to clauses 20 and 21, the discretionary power of the Commission has been provided so that in circumstances where the Commission considers that a decision to disqualify a person would be harsh or unreasonable, a person may be deemed to be *eligible*. This position is outlined in the Explanatory Statement that deals with clauses 20 and 21.

In addition, it is considered that clauses 20(5) and 21(3) further qualify and provide guidance to both the Commission and individuals in how the Commission may exercise its discretion in these circumstances.

Has there been an inappropriate delegation of legislative powers?

The Committee noted that clause 159 provides for the Minister to determine the tax rate by disallowable instrument and that the Assembly should be the appropriate decision making body for the determination of tax rates rather than through subordinate legislation.

The approach taken on this occasion is consistent for the determination of tax rates across all of the ACT's taxation and gaming laws. In addition, as this method of setting tax rates still affords the Assembly the opportunity to scrutinise and disallow a decision by the relevant Minister, the Government is not convinced that the ACT would be better served by the Committee's approach.

Yours sincerely

Ted Quinlan MLA 21 June 2004

Jon Stanhope MLA

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

MEMBER FOR GINNINDERRA

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

22 JUN 2004

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.50 of 2004. I offer the following responses in relation to the matters raised by your Committee on the Justice and Community Safety Legislation Amendment Bill 2004 (the Bill).

The Committee has drawn the attention of the Assembly to a number of questions in relation to the proposed amendments to the *Ombudsman Act 1989*.

Firstly, the Committee has questioned why it is proposed that the jurisdiction of the Ombudsman is to be excluded in respect of the deliberative processes of a tribunal. Part of the answer to this question relates to an understanding of the role of the Ombudsman. The role of Ombudsmen differs between jurisdictions. Reviewing the role of the Commonwealth Ombudsman in 1991, the Senate Standing Committee on Finance and Public Administration concluded:

> [T]he primary role of the ombudsman [is] resolving individual complaints against public agencies. Sometimes this will produce a process analogous to the legal remedies available through courts and tribunals. Sometimes it will expose serious malpractice or point to problems with the overall system of administration. In may cases… [it] will merely involve rectifying error or satisfying those concerned that no error occurred.[1]

The establishment of Ombudsmen in the English-speaking world was largely in response to concern that increasingly, citizen's rights could be accidentally impinged upon by government administration. The potential for this to occur increased as modern government moved to regulate an increased range of activities and to provide for an expanded range of services. At the same time, traditional means of challenging administrative decisions through the courts were considered lengthy, time consuming and expensive.[2]

[1] *Review of the Office of the Commonwealth Ombudsman*, Canberra 1991.
[2] A Satyanand 'The role of the ombudsman' [1996] *New Zealand Law Journal* 206.

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The Government's view is that scrutiny of deliberative decisions of tribunals in the ACT by the Ombudsman is unnecessary because the procedural requirements of tribunals already provide substantial protections for citizens rights. Tribunals operate in accord with principles of procedural fairness and with protections for those appearing before them. This ensures that complainants' contentions are adequately presented before the decision-maker. Tribunals are generally open to the public and reasons for decisions are made available. Tribunals are constituted by independent members who make decisions at arms length from government, being free from perceptions of bias that may attach to internal review processes. In addition, conclusions by a tribunal are already reviewable through judicial supervision, either as a direct right of appeal, or under the *Administrative Decisions (Judicial Review) Act 1989.*

Tribunals are also not subject to the same problems of access that attach to traditional means of challenging administrative decisions. When performing deliberative functions, tribunals provide conclusions in a timely manner and minimise the time and cost required to make a decision.

Investigation by the Ombudsman of actions taken by a tribunal is likely to duplicate an already independent, impartial, accessible, efficient and transparent decision-making process. These factors militate against the likelihood of a citizen's rights being arbitrarily infringed, and the need for an investigation to be carried out by the Ombudsman. Resources would be better allocated to the investigation of actions that are not subject to such a rigorous decision making process. This is particularly so in a small jurisdiction.

This is also consistent with the approach that has been taken in Queensland, Victoria and New South Wales. Paragraph 16 (2) (a) of the *Ombudsman Act 2001* (QLD) provides:

> [T]he ombudsman must not investigate administrative action taken by—
> (a) a tribunal, or a member of a tribunal, in the performance of the tribunal's deliberative functions;

Section 12 and schedule 1 of the *Ombudsman Act 1974* (NSW) provide that any person may complain to the Ombudsman about the conduct of a public authority unless the conduct is of:

> (a) a court or a person associated with a court, or
> (b) a person or body (not being a court) before whom witnesses may be compelled to appear and give evidence, and persons associated with such a person or body, where the conduct relates to the carrying on and determination of an inquiry or any other proceeding.

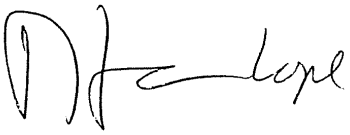
Section 13 of the *Ombudsman Act 1973* (VIC) provides that the Ombudsman is not authorised to enquire into or investigate any administrative action taken: by a court of law or by a Judge or a magistrate; or by a board, tribunal, commission, or other body presided over by a Judge, magistrate or legal practitioner presiding as such by virtue of a statutory requirement and appointment.

The Committee has queried what the term "tribunal" means. The term is defined in the *Legislation Act 2001* as including any entity that is authorised to hear, receive and examine evidence.
The Committee has also queried what is meant by the exercise of the tribunal's deliberative functions. The Government is of the view that this expression is appropriate. "Deliberative" takes on its ordinary meaning as "having to do with policy; dealing with the wisdom and expediency of a proposal" (Macquarie Dictionary, 3rd edition). Quite clearly, this does not exclude the Ombudsman

from receiving complaints about the way in which a complainant was dealt with by tribunal staff, as has been suggested by the Committee.

I hope this information addresses the Committee's concerns about the Justice and Community Safety Legislation Amendment Bill 2004.

Yours sincerely



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