
Legislative Assembly for the ACT

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

# Scrutiny Report

2 MAY 2005

**Report 10**

# TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

## *Human Rights Act 2004*

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

## MEMBERS OF THE COMMITTEE

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

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

## ROLE OF THE COMMITTEE

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

**BILLS:**

**Bills—No Comment**

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

**Health Legislation Amendment Bill 2005**

This Bill would amend various laws to relocate the current abortion provisions of the *Medical Practitioners Act 1930* to the *Health Act 1993*; repeal the *Medical Services (Fees) Act 1984*; and amend the *Health Professionals Act 2004* to allow for the establishment of midwifery as a separate health profession to nursing; and to allow veterinary surgeons to be included under the *Health Professionals Act 2004*.

**Human Rights Commission Legislation Amendment Bill 2005**

This is a Bill for an Act that would be consequential upon the enactment of the Human Rights Commission Act 2005. This Bill would thus make amendments to various laws as a result of the provisions in the HRC Bill establishing a new commission in place of existing statutory oversight offices. The Bill would also repeal the *Community and Health Services Complaints Act 1993*.

**Bills—Comment**

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

**Crimes Amendment Bill 2005**

This is a Bill to amend the *Crimes Act 1900* to insert a new section 42A, to create certain new offences in relation to children, the central aspect of which would be the killing of an unborn child

**Report under section 38 of the *Human Rights Act 2004* and report on whether a clause of the Bill unduly trespasses on personal rights and liberties**

In the absence of an Explanatory Statement, it is difficult for the Committee to be clear about the intended effect of the Bill. The problem may be illustrated by taking the proposed subsection 42A(2):

(2) A person commits an offence if the person intentionally kills an unborn child.

The concept of "unborn child" is then defined in proposed subsection 42A(8) to mean "an embryo or foetus at any stage of its development". Stopping here, it might appear that the effect of section 42A would be to reinstate abortion as a crime. But then subsection 42A(1) provides:

(1) This section does not apply to—

(a) a lawful abortion; or

(b) anything done by a pregnant woman in relation to her own unborn child; or

(c) anything done to save the life of, or preserve the health of, a woman who is pregnant or her unborn child; or

(d) anything done otherwise within the usual and customary standards of medical practice.

The Committee cannot stipulate whether or not section 42A would reinstate abortion as a crime. A Member who took this view of it is referred to the Committee's Report No 2 of the 5th Assembly, for a discussion of the rights issues.

## Crimes (Child Sex Offenders) Bill 2005

This is a Bill for an Act to establish a Register of Sex Offenders; to require certain offenders who are, or have been, sentenced for registrable offences to report specified personal information details to police for inclusion in the register, and to report such details annually to police; to empower a sentencing court to order offenders who commit certain sexual offences against children to comply with reporting obligations; and to prevent registered child sex offenders working in child-related employment by making it an offence for them to apply for or engage in such employment.

**Report under section 38 of the *Human Rights Act 2004* and report on whether a clause of the Bill unduly trespasses on personal rights and liberties**

It needs emphasis that under *HRA* section 38 the function of this Committee is to report to the Legislative Assembly "about human rights issues raised by bills presented to the Assembly". While, in what follows, the Committee identifies a number of issues, it should not be taken to imply that in so doing there is any rights objection to any clause of the Bill.

The general purpose of the Bill is stated in subclause 6(1):

(1) The purpose of this Act is to—

(a) require certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time—

(i) to reduce the likelihood that they will reoffend; and

(ii) to facilitate the investigation and prosecution of future offences that they may commit; and

(b) prevent registrable offenders working in child-related employment.

A general outline is stated in subclause 6(2):

(2) In outline, this Act—

(a) provides for the establishment of a child sex offenders register; and

(b) requires certain offenders who are sentenced for registrable offences to report particular personal details for inclusion in the child sex offenders register; and

(c) allows the sentencing court to order young offenders to comply with the reporting obligations of the Act; and

(d) requires the offenders to keep their details up to date, to report their details annually and to also report certain travel details; and

(e) imposes the reporting obligations for a period of between 4 years and life, depending on the number, severity and timing of the offences committed, and the age of the offender when an offence was committed; and

(f) allows for the recognition of the period of reporting obligations imposed under laws of foreign jurisdictions; and

(g) makes it an offence for registrable offenders to work in child related employment; and

(h) authorises the ombudsman to monitor compliance with chapter 4 (Child sex offenders register).

**The rights of a child**

| Summation |
| --- |
| The general purpose of the Bill is, in terms of *HRA* s 11(2) to protect of the rights of children. In one respect, an issue arising out of s 11(2) arises out of the way the scheme under the Bill would apply to young offenders. |

*HRA* subsection 11(2) provides:

11 Protection of the family and children

…

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

The enhancement of this right is of course the very purpose of the Bill, and this must be kept in mind in any assessment of whether the Bill impinges adversely on some other right.

In one respect, there is an issue as to whether the Bill impinges adversely on the rights of some children—being young offenders who may become subject to the reporting requirements. (Under the Bill, a "young person" is a person who is not yet an adult.)

Given that the kinds of child sex offences that may trigger the operation of the scheme include some that would be involved in internet down-loading and swapping of child pornography, there is a prospect that many young people will commit the trigger offences. The issue then is whether, in addition to whatever will follow from their conviction of an offence, the young offender should be treated as a registrable offender and subject to the scheme of this Bill. (The Committee has noted that the operation of the scheme is in some respects modified as it applies to young offenders.)

The Committee's limited research does not permit it to take the matter much further. That research has shown that this issue is perhaps the most significant point on which the child sex-offender registration laws have been criticised. The general question is whether young persons involved in down-loading and swapping of child pornography should be treated as potential recidivists. From the perspective of the young person, the effect of their having to comply with the scheme, and being treated as a threat to other children, may be to inhibit their rehabilitation. More significant effects on their psychological state could result in some cases; (one source raising such concerns is R E Freeman-Longo, "Revisiting Megan's Law and Sex Offender Registration: Prevention of Problem".
[http://www.appa-net.org/revisitingmegan.pdf]

It may assist debate to record here parts of a report the English newspaper *The Guardian* of July 18, 2002:
[http://society.guardian.co.uk/children/story/0,1074,757233,00.html]

> UK vice squads have arrested around 15 boys under 16 in internet trawling operations in the past 18 months. The youngest, aged just 13, was placed on the sex offenders' register last May after 326 images of child abuse were found on his home computer.
>
> Although these boys currently represent a fraction of the 500 teenagers convicted of sexual offences in England and Wales every year, child welfare and law enforcement agencies admit they are only just catching up with a global trend in sexually inappropriate behaviour online.
>
> New Zealand has led the way in investigating this problem. According to Steve O'Brien, manager of the New Zealand department of internal affairs' censorship unit, nearly 20% of its investigations into illegal material on the internet involve young males aged 14-19 distributing and trading child pornography. Research in the US and Canada has uncovered similar rates among teenagers.
>
> Domestic child protection agencies are divided on whether to treat these boys as criminals or victims. Leading children's charities believe they should not always be prosecuted because they are often looking at images of girls their own age. But Detective Inspector Terry Jones, of Greater Manchester police's abusive images unit, said placing teenagers on the sex offenders register was "reasonable as young people are accessing material of unimaginable depravity".

> The Children's Charities Coalition for Internet Safety (Chis), a taskforce set up last year following a series of internet trawls, argues that prosecution is not in these boys' best interests because adult paedophiles coax them into thinking child pornography is acceptable. Chis, whose members include the NSPCC, Barnardo's and Childline, has called on the courts to distinguish between adults and children arrested on child pornography offences.
>
> Ray Wyre, an expert on treating sex offenders and an adviser to police forces around the world, said the boys' only offence was downloading the material. …
>
> But Detective Inspector Jones said research with adult paedophiles suggested that collecting child abuse images was a step towards carrying out abuse. Of the 1,207 people arrested for using the internet to sexually exploit children by the US Postal Inspection Services since 1997, 36% were also directly abusing children.
>
> Rachel O'Connell, director of the cyberspace research unit (CRU) at the University of Central Lancashire, said paedophiles established virtual communities on the internet to support one another, organise abuse and ensnare young people.
>
> Ms O'Connell, who has spent five years investigating internet paedophiles, said: "Young people can quickly become integrated into these communities, sometimes lured with images of girls their own age but then exposed to even more hardcore material. It's a form of 'grooming' and we urgently need to develop preventative measures."

The matter is one that calls for explanation of just how the Bill might impact on young offenders.

**Privacy issues**

Summation

*HRA* section 12 states a right to privacy. In relation to the Bill as a whole, and in relation to many specific provisions, the issue is whether the way that the scheme would impinge on the privacy interests of persons affected is a proportionate response to the problem to which the Bill is addressed. That problem is the risk to children posed by the likelihood that child sex offenders are prone to repeat their crimes. Specific privacy issues arise in relation to:

- the lack of clarity of some reporting obligations;
- the manner of reporting;
- the ways in which identifying material may be used;
- whether an entity other than the chief police officer might establish the register; and
- the provisions concerning access to the register.

*HRA* section 12 provides a right to protection of privacy:

> 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.

*A general perspective*

It would be generally accepted that the imposition of reporting obligations on persons after they have served the term of imprisonment to which they were sentenced, and have been released back into the community, impacts adversely on their right to privacy.

In general terms, the question is then whether these restrictions are a proportionate response to the problem presented to the community by the fact that a person is a convicted child sex offender. That problem is that there is a high rate of recidivism amongst child sex offenders and thus a corresponding need to protect children. Thus, in general, the issue is: Is the scheme in the Bill reasonably related to the danger of recidivism?

This is a judgment on which minds could differ, and a person's opinion will no doubt turn on how the person perceives the nature of the problem addressed by the Bill. The Committee has not made any investigation of the issue. The Assembly may find helpful some points noted by a majority of the USA Supreme Court in Smith v Doe (2003) 538 US 84. It cited (at 105) a 1997 report on the risk of recidivism:

> "When convicted sex offenders re-enter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))

In relation to whether the reporting period was excessive, the Supreme Court said:

> Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997).

*Specific privacy issues*

<u>Clauses 59 and 60 – reporting personal information</u>

The obligation to report personal information is extensive, and here arises the general issue as to whether the scheme is a proportionate response to the problem (see above).

In several respects, the registrable offender must make a difficult judgment as to whether he or she is under an obligation to report. Failure to report is an offence, punishable quite severely. A trial for a failure to report would also publicise the fact that the person was a child sex offender.

There is thus an issue as to whether the registrable offender might be permitted to obtain some form of advance ruling as to whether he or she is, in some respect, obliged to report some particular matter. Of course, the person might simply provide any information which they consider might be required, but this could lead them into making unnecessary disclosures of their personal information.

Division 3.4.2 and 3.4.3 – how a report is made

In general, so far as the Bill reveals, the intent of the scheme is that a registrable offender will report in person to a police station. From a privacy perspective, an issue is whether there should be provided other forms of reporting that would be less public in their character. The Committee notes that regulations may provide for alternative forms of reporting: see clauses 63(b) and 64(b).

So far as reporting in person is concerned, clause 73 provides:

> A person making a report under this chapter in person is entitled to make the report outside the hearing of members of the public.

An issue is whether this should be extended to embrace "outside the sight of members of the public".

Clause 82 – keeping of identification material

The procedures in Division 3.4.3 for verification of identification of the person reporting require that, in the first place, the person provides identifying information and a passport photograph. At later times, the person may be compelled to provide fingerprints and, with their consent, the person may be photographed. Division 3.4.5 then governs how this material may be used. Clause 82 then provides:

> 82 Documents, fingerprints, photographs may be kept
>
> (1) The chief police officer may, during a registrable offender's reporting period, keep for law enforcement, crime prevention or child protection purposes any of the following taken under this part from, or in relation to, the offender:
>
> (a) copies of documents;
>
> (b) fingerprints;
>
> (c) photographs.
>
> (2) At the end of the registrable offender's reporting period, the chief police officer must ensure that any item that is being kept under subsection (1) is destroyed.

There is no issue insofar as use of this material is made for detection of child sex offences. But on its face, the material may be used more generally for "law enforcement" and "crime prevention". This brings into focus a principle of personal information protection privacy, such as is stated in Information Privacy Principle 11 (see section 14 of the *Privacy Act 1988* (Commonwealth), noting that this Act applies in the ACT.

Principle 11

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

…

(c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;

…

(e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

The concept of "crime prevention" may extend further than "enforcement of the criminal law" in IPP 11.1(e), but IPP 11.1(c) might apply in particular circumstances.

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

Clause 117 – establishment of the child protection register

Subclause 117(1) provides:

117 Establishment of child sex offenders register

(1) The chief police officer must establish a register of sex offenders (the ***child sex offenders register***), or arrange for another entity to establish the child sex offenders register.

An issue here is whether, given the object of the Bill, and the need to evaluate whether its provisions are a proportionate response to the problem to which the Bill is addressed (see above), it is reasonable that "another entity" (other than the chief police officer), should establish the register. On its face, this would result in persons other than the police becoming aware of the information on the register, and there is no apparent limit as to who these persons might be.

In this respect, it is to be noted that IPP 1.1 provides:

1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:

(a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity **of the collector**; and

(b) the collection of the information is necessary for or directly related to that purpose; (emphasis added).

Clause 118 – access to the register

Subclause 118(1) provides:

118 Access to child sex offenders register restricted

(1) The chief police officer must ensure—

(a) that the child sex offenders register, or a part of the register, is only accessed by people who are authorised by the chief police officer or under a regulation; and

(b) that personal information in the child sex offenders register is only disclosed by a person with access to the register, or the relevant part of the register—

(i) for law enforcement functions or activities and then only to an entity prescribed by regulation; or

(ii) as otherwise required or authorised by a regulation or under an Act or other law.

On its face, a regulation might authorise access by persons other than those authorised by the chief police officer, and that access might be for purposes beyond what is encompassed by "law enforcement functions or activities".

In this connection, reference might be made to IPP 11 (see above).

There is also a question here as to whether the making of laws to extend the scheme in potentially significant ways should be by way of an Act, and not by regulation.

The Committee has noted that the chief police officer is required to develop guidelines about access to the register, which must take account of the privacy concerns of the registrable offender; see subclause 118(2). Such guidelines could not however prevail over a regulation made under subclause 118(1).

The Committee commends the provision for guidelines. In this context, there is however an issue as to whether, given their critical significance, the guidelines should be at least a notifiable instrument.

The Committee has also noted subclause 118(4):

(4) This section has effect despite any other Act or law to the contrary.

As a matter of law, this provision could not have this effect. A statute of the Assembly cannot restrict the legislative capacity of the Assembly.

**Freedom of movement**

| Summation |
| --- |
| *HRA* section 13 states a right to freedom of movement. The issue is whether the way that the scheme would impinge on this freedom is a proportionate response to the problem to which the Bill is addressed. |

*HRA* section 13 provides:

> 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.

It is apparent that the Bill regulates and burdens the right of a registrable offender to enter and leave the ACT. The general issue is whether these restrictions are a proportionate means of putting into effect the purpose of the Bill.

**The presumption of innocence**

| Summation |
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| *HRA* subsection 22(1) states a presumption of innocence. Furthermore, this is a notion that is recognised as common law right. The issue is whether those provisions of the Bill, which impose obligations on persons not yet finally convicted are in conflict with presumption of innocence. |

*HRA* subsection 22(1) provides:

> 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.

This "presumption" is not well-defined at common law, and in that context is adapted to proceedings on a trial. Just what laws or actions might be seen to infringe upon this right is a matter of conjecture. Beyond what ever may be proscribed by the terms of subsection 22(1), it might also be accepted that an unconvicted person should not be dealt with as of they are guilty of an offence, notwithstanding that they have been charged with an offence.

The Committee notes that several provisions of the Bill would operate on a person whose guilt has not been finally determined by the criminal process; see

- Clause 12 – appeal proceedings irrelevant;
- Clause 13 – dealing with the effect of a quashing of finding of guilt (noting in particular subclause 13(2): " … the person does not stop being a registrable offender … if the court orders that the person be retried for the registrable offence";
- Clauses 129 and 130 – stating obligations of a person to disclose the fact of being charged to a prospective employer.

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

**The retrospective element of the Bill**

| Summation |
| --- |
| The issue is whether some provisions of the Bill have a retrospective operation; see *HRA* s 25(2). |

The scheme will have an impact on persons who have already committed offences, or have committed and been convicted of, relevant offences, and/or who have committed a relevant offence before the Bill's commencement, but are not convicted until after the commencement. While the question of whether a particular legislative provision is actually retrospective is often complex and difficult, several provisions of the Bill at least raise the possibility of this Bill operating retrospectively in respect of existing child offenders. See in particular clause 88.

This brings *HRA* subsection 25(2) into focus:

> 25 Retrospective criminal laws
> …
>
> (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

There is, however, much support in relevant case-law to support an argument that the provisions of the Bill are non-punitive in character, and thus subsection 25(2) is not implicated.

The Queensland Court of Appeal in *R v C* [2002] QCA 156 held that an order under comparable Queensland law was not intended to impose a form of punishment but rather its purpose was protective or a vulnerable part of the community. The retrospective application of registration schemes has been judicially tested in the United States of America, with the United Kingdom scheme considered by the European Commission of Human Rights. In each case, the registration requirements were found not to impose additional punishment.

It is useful to note the mode of analysis of the Supreme Court of the USA,(which has had long experience in assessing the application of a right such as is found in *HRA* subsection 25(2). The court asks first if the intention of the legislature was to impose punishment. If it does, that ends the inquiry, and a breach of *HRA* section 25(2) would be established. On the basis of the law briefly noted above, this would be a very unlikely outcome.

The USA approach takes the inquiry one step further. If the intention of the law is to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether the scheme is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. This analysis was applied in a USA Supreme Court case dealing with a law similar to the Bill under review, and it was held by a majority that the law retained its non-punitive character notwithstanding that some of its features pointed to a punitive element (such as that the scheme was embodied in the criminal law statutes); see S*mith v Doe* (2003) 538 US 84 at 94 and passim.

Three of the nine Supreme Court justices did, however, dissent. For example, Stevens J reasoned that

> the registration and reporting obligations that are imposed on convicted sex offenders and on no one else as a result of their convictions are … part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment. It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted: 538 US at 112.

In the end, even if a conflict with *HRA* subsection 25(2) is perceived, the issue would be whether this derogation was justified under *HRA* section 28. In this respect, the element of retrospectivity must be balanced against the perceived propensity of child offenders to re-offend, and the consequent imperatives to protect children.

**Free speech**

| Summation |
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| *HRA* subsection 16(2) states a right to freedom of expression. The issue is whether the imposition of an obligation on a registrable offender to provide personal information breaches this right. |

*HRA* subsection 16(2) provides that "Everyone has the right to freedom of expression".

The Committee raises this issue given that it is aware that the Attorney-General of New Zealand was provided with advice, from within the Ministry of Justice, as to whether provisions of a New Zealand Bill similar to this ACT Bill infringed upon the freedom of expression of the registrable offender.
[http://www.justice.govt.nz/bill-of-rights/bill-list-2003/s-bill/sex-offenders.html]

The particular concern was with the obligations to report personal information. Adapted to make it relevant to the HRA, the Ministry of Justice report said:

> We acknowledge that the right to freedom of expression, as protected by [HRA] section [16] includes the right to say nothing or the right not to say certain things. We also acknowledge the decision of the High Court in *Duff v Communicado Ltd* that freedom of expression under section [16] should generally be defined widely and question of limits on the right should generally be determined pursuant to section [28] (justified limitations in a free and democratic society). However, we do not consider that a statement of an individual's name and address is sufficiently expressive so as to attract the protection afforded by section [16] … .
>
> The requirements of [the registration scheme] do not compel any individual to disclose any opinion they hold, or to state any matter that they do not believe to be true. …
>
> In addition, we note … the decision of the Supreme Court of Canada in *Irwin Toy Limited* that "expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content." Here, a requirement to provide your name and address details does not appear to be sufficiently "expressive" in content to attract the protection of section [16]. Rather, name and address information can be described as factual and descriptive in nature as opposed to expressive or representative of expressive content.
> …
>
> Even if provision of this information could be said to attract the protection of section [16] of the [*Human Rights Act 2004*], we consider the nature and extent of any inconsistency is such that, having regard to the Bill's objectives, it would be "justified" in terms of section [28] … .

**Due process of law**

| Summation |
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| The issue is whether the provisions of clause 43 for a court to declare a person to be a registrable offender afford sufficient due process to the person. |

Child sex offender registration orders – Part 2.2

Part 2.2 provides for a sentencing court, on application only by the prosecution, to declare that a person is a registrable offender and thus subject to the scheme of the Bill. The persons concerned are those who have not committed an offence of a kind which would bring the scheme into operation without a court order.

It is thus a very significant power. It is noted that, as elaborated in clause 16, the sentencing court may only make the order if a person poses a risk to the sexual safety of another person. Furthermore, the court is bound to observe natural justice. Nevertheless, there arises an issue as to whether the procedures that would accompany an exercise of the power should be further spelt out. One such issue is the court should be satisfied of the need to make the declaration beyond reasonable doubt.

## Crimes (Sentencing) Bill 2005

This is a Bill for an Act to consolidate existing sentencing laws and to introduce a number of new options for sentencing courts. The Bill would provide for: the concept of combination sentences; non-association orders and place restriction orders; deferred sentence orders; replacement of the term 'recognisance' with that of 'good behaviour order'; reform relating to community service orders; and reform relating to victim impact statements.

**Report under section 38 of the *Human Rights Act 2004* and report on whether a clause of the Bill unduly trespasses on personal rights and liberties**

**Privacy rights**

Summation

The issue is whether a conflict with *HRA* s 12 is involved in the displacement of existing rights to protection of confidential information, or to reputation, in respect of information given to an assessor under clause 43 of the Bill.

*HRA* section 12 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.

Privacy rights issues arise out of clause 43. Part 4.2 provides for the making, by an assessor, of a pre-sentence report about an offender. The report is provided to the sentencing court. By subclause 43(1), the assessor, in preparing the pre-sentence report, may ask various Territory bodies "to provide information", and, in addition, may ask "a victim of the offence" (paragraph 43(1)((iv)), and "any other entity" (paragraph 43(1)((v)). Part 1 of the Dictionary to the *Legislation Act 2001* defines "entity" to include "an unincorporated body and a person (including a person occupying a position)".

Subclause 43(3) then provides:

> (3) If an entity gives information honestly and with reasonable care in response to a request under subsection (1), the giving of the information is not—
>
> (a) a breach of confidence, professional etiquette, ethics or a rule of professional misconduct; or
>
> (b) a ground for a civil proceeding for defamation, malicious prosecution or conspiracy.

There appears to be no restriction on the use the assessor may make of the information obtained; (apart, of course, from using it for the purpose of making a pre-sentence report, which restriction may be implied). Given that the provision of the information may amount to a breach of confidence, etc, or may be defamatory in nature, the giving of the information could well impact adversely on a third party, such as the confider (or "owner") of information which would be protected by the law of breach of confidence; and the person defamed in the statement of the information given to the assessor making the pre-sentence report.
In these ways, the right stated in *HRA* section 12 might be abrogated. The issue would then becomes one of whether the abrogation is justified under *HRA* section 28:

> 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.

**Comment on the Explanatory Statement**

The Committee commends the high quality of the Explanatory Statement. It is a lucid explanation of the provisions both in terms of their intended effect and, in some instances, of their background and rationale. It should be of considerable assistance to the courts.

## Human Rights Commission Bill 2005

This is a Bill for an Act to establish a Human Rights Commission (HRC), to have the functions of dealing with complaints about discrimination, health services, disability services and services for older people, as well as facilitating service improvement and developing awareness in government and the community of human rights. The HRC would be constituted by the president and a number of specialist commissioners, being the Discrimination Commissioner; the Human Rights Commissioner; the Health Services Commissioner; and the Disability and Community Services Commissioner. The specialist commissioners would be responsible for dealing with complaints, inquiries, preparation of advice and community education in relation to particular areas of expertise. The president will take responsibility for the day to day administration of the HRC, including receipt of complaints and staffing matters, and will also be responsible for conciliation of complaints that are suitable for a conciliation process. The health services commissioner would replace the Community and Health Services Complaints Commissioner established in the *Community and Health Services Complaints Act 1993*, and the HRC would

continue to have a special relationship with the health profession boards established under the *Health Professionals Act 2004.*

**Report under section 38 of the *Human Rights Act 2004* and report on whether a clause of the Bill unduly trespasses on personal rights and liberties**

**Displacement of the privilege against self-incrimination**

| Summation |
| --- |
| The issue is whether the displacement of the privilege against self-incrimination by clause 75 is justifiable. |

The Explanatory Statement states the effect and object of clause 75:

> Clause 75 removes the common law privilege against self-incrimination and civil liability that would otherwise allow a person to refuse to answer questions or produce documents as requested by the commission. This allows discrimination and service provision matters to be fully considered using all available information. In order to protect the people required to provide the information, the clause provides that material obtained as a result of them having to act without the protection of the privilege cannot be used as evidence against them in court proceedings.

The Committee raises no concern about this provision. It notes the grant of immunity extends to a derivative as well as a direct use of the information provided under this compulsion.

Strict liability offences

| Summation |
| --- |
| The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly.* In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28). |

Provision for strict liability offences are to be found in clauses 85 and 95.

In no case does the maximum punishment exceed 50 penalty points. (The Committee's view is that 50 penalty points might be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 5 of the 6th Assembly*.)

**Access to the law**

Incorporation by reference

| Summation |
| --- |
| The effect of clause 97 is to displace, in limited circumstances, the operation of section 46 of the *Legislation Act 2001*. To this extent, the right of a person to ascertain and gain access to the text of a law is qualified. The issue is whether this is justifiable in the circumstances. |

Basic to the protection and enforcement of rights of any kind is the ability of a person to ascertain the law. A problem arises when a law would itself incorporate into its terms the text of some other document, or would permit the maker of a statutory instrument to incorporate into its terms the text of some other document.

This problem has been addressed in section 46 of the *Legislation Act 2001,* which operates where a law incorporates into its text the text of some document as it exists from time to time. The effect of subsection 47(6) is that the text of the incorporated document, as it is from time to time, must be published in the Legislation Register. The policy objective here is that the public may thus ascertain just what the law of the Territory is as it stands at a particular time. A member of the public need only consult the Legislation Register. This is an important safeguard of the basic right of a person to ascertain the law. Displacement of subsection 47(6) thus raises a rights issue, and where it is proposed by a bill, the Committee looks for a justification in the Explanatory Statement.

Clause 97 of the Bill provides in effect for an alternative scheme. The chief executive must ensure that incorporated documents are available for inspection, and may prepare an incorporated document notice in respect of the relevant documents. This notice is a notifiable instrument, and, if so notified, subsection 47(6) is displaced. In brief, the alternative to compliance with section 46 of the *Legislation Act 2001* is the notification (on the Legislation Register) of the incorporated document notice, which notice would inform the public how to gain access to the incorporated document.

The Explanatory Statement does not explain why this alternative is thought desirable. The Committee notes too that the Explanatory Statement does not describe, however briefly, how the alternative scheme would work. In this respect it compares unfavourably with the Explanatory Statement accompanying the Tree Protection Bill 2005, see *Report No 5 of the 6th Assembly*.

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

**Right to a fair trial**

Summation

The issue is whether clauses 66(2) and 99 of the Bill conflict with the principle that on a trial all relevant evidence is admissible. This element of a fair trial (see *HRA* s 22(1)) is also stated in s 56(1) of the *Evidence Act* 1995.

It is necessary to draw attention to an issue which may be related HRA subsection 21(1):

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

The more specific issue is the problem thrown up by the fact that, of its own force, the *Evidence Act 1995* (Commonwealth) applies in the Territory. A law of the Territory is inoperative to the extent that it conflicts with the *Evidence Act*. This was recognised by Higgins CJ and Crispin J in *Habda v The Queen* [2004] ACTSC 62 [12], where their Honours noted:

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

Of critical significance is subsection 56(1) of the *Evidence Act*, which provides:

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

This principle is an element of a fair trial. In certain circumstances it may be qualified without being in breach of the principle in *HRA* subsection 21(1), and indeed the *Evidence Act 1995* contains many provisions which do qualify the principle. The *HRA* can of course have no effect on any of these qualifications, given that the *Evidence Act 1995* is a Commonwealth law.

A problem arising out of clause 99 of the Bill is not so much that there is an issue as to whether it is in conflict with *HRA* subsection 21(1), but that it appears to conflict with subsection 56(1) of the *Evidence Act 1995*. As the Explanatory Statement states, clause 99 "is a secrecy provision that protects information provided to the commission in relation to the Act. It ensures that commission members and staff are not compelled to reveal information obtained through their work". Subclause 99(5) provides:

> (5) A person to whom this section applies need not divulge or communicate protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another territory law.

If the concept of "another territory law" embraces the *Evidence Act*, there is no conflict, but then clause 99 would have no practical effect given subsection 56(1) the *Evidence Act*. If it does not, then perhaps clause 99 would be ineffective.

A similar problem arises out of subclause 66(2) of the Bill, which appears to define circumstances in which section 131 of the *Evidence Act 1995* (Commonwealth) would apply. This it could not do.

**Submission from the Pharmacy Guild of Australia**

The Committee received a letter from the Branch Director of The Pharmacy Guild of Australia, ACT Branch, dated 28 April 2004, regarding the Human Rights Commission Bill 2005 and the Human Rights Commission Legislation Amendment Bill 2005 (see copy attached).

There are three points of substance to be addressed.

First, an issue arises out of the fact that the Human Rights Commission Legislation Amendment Bill 2005 repeals the *Community and Health Services Complaints Act 1993*. Under section 44 of this Act, a person who is required to produce documents to the Community and Health Services Complaints Commissioner "maybe represented by another person". The Human Rights Commission would now perform the functions previously performed by this Commissioner, and there are provisions in the Human Rights Commission Bill 2005 under which a person can be required to produce documents or answer questions. There is, however, no provision in this Bill which expressly refers to the ability of a person to be represented by another person. It would appear, however, that under clause 73 of the Bill leave for representation might be given.

Thus, in the end, the only difference in substance between the existing scheme and the scheme to be introduced by the Human Rights Commission Bill 2005 is that in the latter there is no express reference to the ability of a person to seek to be represented by another.

Secondly, the Guild has noted that, while clause 75 of the Human Rights Commission Bill 2005 precludes a person from claiming the privilege against self-incrimination, it does also provide for direct-use and derivative-use immunity. The Committee has made the same comment and has not raised any issue. The Guild asks, however, whether displacement of the privilege is warranted at all.

In this respect, the Committee notes that it is common that investigative bodies may compel disclosure of information, and its position is commonly that such displacement does not raise a rights breach so long as there is provision for direct-use and derivative-use immunity. It is not apparent to the Committee that there is any reason why the Human Rights Commission should be treated differently to similar bodies. On the other hand, the point raised by the Guild points to the need for a justification for displacement to be offered.

Thirdly, the Guild asks why a person may be compelled to attend a conciliation hearing if, at the same time, they are not compelled to participate. The Committee draws this to the attention of the Assembly.

## SUBORDINATE LEGISLATION:

**Disallowable Instruments—No Comment**

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

**Disallowable Instrument DI2005-31 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 5) made under section 12 of the** *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to the ACT roads and road related areas used for the special stage of the Subaru Rally of Canberra.**

**Disallowable Instrument DI2005-35 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2005 (No. 1) made under section 21(1) of the** *Race and Sports Bookmaking Act 2001* **revokes Disallowable Instrument DI2004-246 and provides for the approval of a new ACTTAB Limited sub-agency.**

**Disallowable Instrument DI2005-37 being the Education (Non Government Schools Education Council) Appointment 2005 (No. 1) made under section 109(1) of the** *Education Act 2004* **appoints specified persons as education members of the Non Government Schools Education Council.**

**Disallowable Instruments—Comment**

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

*No Explanatory Statements*

**Disallowable Instrument DI2005-21 being the Waste Minimisation (Fees) Amendment Determination 2005 (No. 1) made under section 45(1) of the** *Waste Minimisation Act 2001* **amends Disallowable Instrument DI2004-122 and determines fees payable for the purposes of the Act.**

The Committee notes that no Explanatory Statement is provided in relation to this instrument, one of the effects of which is to double the fee that is payable in relation to the disposal of "special waste" that is or contains asbestos where the amount involved is between 0.25 and 0.5 tonne. The Committee also notes, however, that the instrument, as published on the ACT Legislation Register, includes a statement, headed "Additional Explanatory Notes", that indicates that the effect of the instrument is to "[lower] the current asbestos disposal minimum chargeable quantity from 0.5 tonnes to 0.25 tonnes".

In this context, the Committee also notes that, in a response to the committee dated 20 April 2005, in relation to the Committee's earlier comments on another instrument, the Minister for Police and Emergency Services has advised the Committee that this is a "current widespread practice" and that the intent of the practice is:

> to simplify the presentation of less complex instruments by incorporating the explanatory statement into the instrument itself. This avoids the need to refer to a separately registered instrument.

The Committee notes that the Minister's response goes on to say:

> The Committee's discomfort with the current practice is noted, and officers from the [Authority] will make inquiries with the Department of Justice and Community Safety, which I understand has the issue under consideration.

The Committee is pleased to hear that its comments in relation to the current practice have been noted and that the issue is under consideration by the Department of Justice and Community Safety. When that consideration has been completed, the Committee would be grateful if the Department could advise of the outcome.

**Disallowable Instrument DI2005-34 being the Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1) made under section 5 of the** *Health Regulation 2004* **determines criteria for the approval of nurse practitioner positions.**

The Committee notes that there is no Explanatory Statement for this instrument.

*Minor drafting issue*

**Disallowable Instrument DI2005-32 being the Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 1) made under section 23 of the** *Road Transport (Public Passenger Services) Act 2001* **revokes Disallowable Instrument DI2004-117 and determines the maximum fares payable for ACTION Authority regular route services.**

The Committee suggests that it would be more accurate for paragraph 2 of the instrument to refer to the "ACT Legislation Register" and that it would be more appropriate to state that DI2004-117 was notified "on" the Register on 19 July 2004.

## INTERSTATE AGREEMENTS

The Committee has not been advised of any negotiations in respect of an Interstate Agreement.

## REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

## CORRESPONDENCE RECEIVED

The Committee received a letter from the Branch Director of The Pharmacy Guild of Australia, ACT Branch, dated 28 April 2004, regarding the Human Rights Commission Bill 2005 and the Human Rights Commission Legislation Amendment Bill 2005 (see copy attached).

This correspondence has been addressed in the Committee's report on Human Rights Commission Bill 2005.

**GOVERNMENT RESPONSES**

The Committee has received responses from:

- The Minister for Industrial Relations, dated 2 April 2005, in relation to comments made in Scrutiny Report 7 regarding the Workers Compensation Amendment Bill 2005.
- The Minister for Environment, dated 7 April 2005, in relation to comments made in Scrutiny Report 6 regarding the Animal Diseases Bill 2005 and the Stock Bill 2005.
- The Attorney-General, dated 12 April 2005, in relation to comments made in Scrutiny Report 4 regarding Subordinate Law SL2004-64, being the Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2).
- The Minister for Urban Services, dated 13 April 2005, in relation to comments made in Scrutiny Report 6 regarding Disallowable Instrument DI2005-28, being the Road Transport (Public Passenger Services) Exemption 2005 (No. 1).
- The Minister for Police and Emergency Services, dated 20 April 2005, in relation to comments made in Scrutiny Report 5 regarding Disallowable Instrument DI2005-18, being the Emergencies (Fees) Determination 2005.
- The Deputy Chief Minister, dated 20 April 2005, in relation to comments made in Scrutiny Report 5 regarding Disallowable Instrument DI2005-11 and Scrutiny Report 1 regarding Disallowable Instrument DI2004-246.
- The Minister for Environment, dated 28 April 2005, in relation to comments made in Scrutiny Report 6 regarding the Tree Protection bill 2005 and the Pest Plants and Animals Bill 2005.

The Committee thanks the Minister for Industrial Relations, the Minister for Environment, the Attorney-General, Minister for Urban Services, the Deputy Chief Minister and the Minister for Police and Emergency Services for their helpful responses.

Bill Stefaniak, MLA
Chair

May 2005

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

## REPORTS—2004-2005

## RESPONSES

| Bills/Subordinate Legislation | Responses received—Scrutiny Report No. |
|---|---|
| **Report 1, dated 9 December 2004** | |
| Disallowable Instrument DI2004-180 - Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1) | **No. 2** |
| Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004 | **No. 2** |
| Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1) | **No. 6** |
| Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2) | **No. 6** |
| Disallowable Instrument DI2004-220 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1) | **No. 4** |
| Disallowable Instrument DI2004-221 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2) | **No. 4** |
| Disallowable Instrument DI2004-230 - Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No. 1) | |
| Disallowable Instrument DI2004-231 - Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No. 1) | |
| Disallowable Instrument DI2004-232 - University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2) | |
| Disallowable Instrument DI2004-246 - Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1) | **No. 10** |
| Disallowable Instrument DI2004-258 - Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1) | **No. 3** |
| Subordinate Law SL2004-41 - Health Professionals Regulations 2004 | **No. 2** |
| Subordinate Law SL2004-48 - Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1) | **No. 2** |

| Bills/Subordinate Legislation | Responses received—Scrutiny Report No. |
|---|---|
| **Report 2, dated 14 February 2005** | |
| Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 *Act citation: Classification (Publications, Films and Computer Games) (Enforcement) Amendment Act 2005* **(Passed 8.03.05)** | **No. 5** |
| Fair Work Contracts Bill 2004 | **No. 6** |
| Government Procurement Amendment Bill 2004 *Act citation: Government Procurement Amendment Act 2005* **(Passed 15.02.05)** | **No. 3** |
| Justice and Community Safety Legislation Amendment Bill 2004 (No. 2) *Act citation: Justice and Community Safety Legislation Amendment Act 2005* **(Passed 17.02.05)** | |
| Water Efficiency Labelling and Standards Bill 2004 *Act citation: Water Efficiency Labelling and Standards Act 2005* **(Passed 10.03.05)** | **No. 5** |
| **Report 3, dated 17 February 2005** | |
| Dangerous Substances (Asbestos) Amendment Bill 2005 **(Passed 17.02.05)** | **No. 6** |
| Health Records (Privacy and Access) Amendment Bill 2005 **(Passed 17.02.05)** | |
| **Report 4, dated 7 March 2005** | |
| Disallowable Instrument DI2004-260 - Health (Interest Charge) Determination 2004 (No. 1) | |
| Disallowable Instrument DI2004-261 - Liquor Licensing Standards Manual Amendment 2004 (No. 1) | |
| Disallowable Instrument DI2004-262 - Taxation Administration (Amounts payable-Home Buyer Concession Scheme) Determination 2004 (No. 5) | **No. 6** |
| Disallowable Instrument DI2004-266 - Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 15) | **No. 6** |
| Disallowable Instrument DI2004-267 - Public Sector Management Amendment Standard 2004 (No. 8) | **No. 6** |
| Disallowable Instrument DI2004-269 - Public Place Names (Gungahlin) Determination 2004 (No. 4) | |
| Disallowable Instrument DI2004-270 - Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1) | |
| Disallowable Instrument DI2005-1 - Emergencies (Strategic Bushfire Management Plan) 2005 | |

| Bills/Subordinate Legislation | Responses received—Scrutiny Report No. |
|---|---|
| Disallowable Instrument DI2005-2 - Public Sector Management Amendment Standard 2005 (No. 1) ..... | |
| Disallowable Instrument DI2005-3 - Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 1) ..... | **No. 6** |
| Domestic Violence and Protection Orders Amendment Bill 2005 **(Passed 17.03.05)**..... | **No. 6** |
| Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)** ..... | |
| Residential Tenancies Amendment Bill 2005..... | **No. 6** |
| Subordinate Law SL2004-52 - Health Professionals Amendment Regulation 2004 (No. 1)..... | |
| Subordinate Law SL2004-53 - Supreme Court Amendment Rules 2004 (No. 4) ..... | |
| Subordinate Law SL2004-56 - Dangerous Substances (General) Regulation 2004 ..... | **No. 6** |
| Subordinate Law SL2004-61 - Utilities (Electricity Restrictions) Regulations 2004..... | |
| Subordinate Law SL2004-64 - Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2)..... | **No. 10** |
| Utilities Amendment Bill 2005 **(Passed 17.03.05)**..... | **No. 6** |
| **Report 5, dated 14 March 2005** | |
| Disallowable Instrument DI2005-11 - Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2005 (No. 1) ..... | **No. 10** |
| Disallowable Instrument DI2005-12 - Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1)..... | \ |
| Disallowable Instrument DI2005-18 - Emergencies (Fees) Determination 2005..... | **No. 10** |
| Disallowable Instrument DI2005-8 - Community and Health Services Complaints Appointment 2005 (No. 1) ..... | |
| **Report 6, dated 4 April 2005** | |
| Animal Diseases Bill 2005 **(Passed 7.04.05)** ..... | **No. 10** |
| Disallowable Instrument DI2005-20 - Public Place Names (Dunlop) Determination 2005 (No. 1) ..... | |
| Disallowable Instrument DI2005-22 - Public Place Names (Watson) Determination 2005 (No. 1) ..... | |
| Disallowable Instrument DI2005-23 - Public Place Names (Bruce) Determination 2005 (No. 1)..... | |
| Disallowable Instrument DI2005-28 - Road Transport (Public | |

| Bills/Subordinate Legislation | Responses received—Scrutiny Report No. |
|---|---|
| Passenger Services) Exemption 2005 (No. 1)..... | **No. 10** |
| Long Service Leave Amendment Bill 2005..... | |
| Pest Plants and Animals Bill 2005..... | **No. 10** |
| Stock Bill 2005 **(Passed 7.04.05)** ..... | **No. 10** |
| Subordinate Law SL2005-4 - Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1) ..... | |
| Tree Protection Bill 2005..... | **No. 10** |
| **Report 7, dated 6 April 2005** | |
| Workers Compensation Amendment Bill 2005 **(Passed 7.04.05)**... | **No. 10** |

The PHARMACY GUILD of AUSTRALIA
ACT BRANCH

28 April 2004

The Secretary
Standing Committee of Legal Affairs
GPO box 1020
**CANBERRA** ACT 2601

**BY E-MAIL** - robina.jaffray@parliament.act.gov.au

Dear Madam,

The Pharmacy Guild of Australia ACT Branch has examined the Human Rights Commission Bill, which winds in the functions and responsibilities of the Community and Health Services Complaints Commissioner exercises under the *Community and Health Services Complaints Act 1993*. (The **previous legislation**)

The Guild notes that under section 44 of the previous legislation, a person who was required to answer questions and to produce documents was entitled to be represented - one presumes usually by a lawyer.

This entitlement has been removed in the Bill.

Given:

- the compulsory powers that the Commission can exercise;
- the consequences that can flow as a result of their exercise; and
- the lack of statutory guidance as to how inquiries are to be conducted[1]

it wonders whether this removal of a protection against a commission exceeding the terms of its inquiry could be regarded as an undue trespass on the rights and duties of a person required to ask to attend before an inquiry.

The Guild notes in passing that a person the subject of a complaint being investigated by a Health Board has the right to be represented – see sections 57, 95 and 120 of the *Health Professionals Act 2004*.

The Guild also notes that legislation inserts an end-use indemnity, which, although restricting the use of answers derived in an investigation in a court, nevertheless requires a person to answer questions that may be self-incriminating.

[1] Complaints are to be handled in a manner determined by the Commission – see cl.72

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Under the previous legislation a person had to answer a question, unless they had a reasonable excuse.

One presumes the exercise of the right against self-incrimination would be a relevantly reasonable excuse.

In such a circumstance, the way the previous provision was structured would mean that where there was a standoff, the Supreme Court would determine whether an answer etc should be provided – see subsection 47(2) of the previous legislation.

Given the wide capacity conferred on the Human Rights Commission to conduct inquiries as it sees fit, the Guild wonders whether again the previous legislations powers were appropriate, and new powers in the Bill are disproportionate relative to the functions and powers to be exercised by the Commission, and thus a trespass on liberties.

Finally, the Guild notes that a person may be compelled to attend a conciliation hearing.

Given the explanatory statement admits that someone could be forced to come along to a conciliation, but not participate in the proceedings, it wonders whether compulsorily requiring someone to attend what may be a waste of time is a disproportionate power for an administrative body to possess.

Yours faithfully

**Ann Dalton**
**Branch Director**
**(ANN DALTON)**

cc Bill Stefaniak MLA
Jon Stanhope MLA
Brendan Smyth MLA

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


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

Bill
Dear Mr Stefaniak

I am writing in response to Scrutiny Report No 7 of the Standing Committee on Legal Affairs tabled in the Legislative Assembly on 7 April 2005.

The Committee notes, in its comments on the *Workers Compensation Amendment Bill 2005*, that "a compatibility statement was not tabled with the Bill as required under section 37 of the *Human Rights Act 2004*".

Unfortunately, because the Bill's introduction was urgent, there was insufficient time for the compatibility statement to be drafted, authorised and tabled simultaneously with the Bill.

I am pleased to inform the Committee that the compatibility statement was tabled in the Legislative Assembly on Thursday 9 April 2005.

Thank you for bringing this matter to my attention.

Katy Gallagher
Katy Gallagher MLA
Minister for Industrial Relations
7/4/05

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

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

Thank you for your Scrutiny of Report No. 6 of 4 April 2005. The Committee has made a number of comments in relation to the Stock Bill 2005 and the Animal Diseases Bill 2005 and I am responding to them accordingly.

**Animal Diseases Bill 2005**
***Clause 14 - Directions to control the spread of exotic diseases***

The Committee noted the absence of a review provision by the Administrative Appeals Tribunal for the giving of a direction to control the spread of exotic diseases. A direction can be given to a stock-owner to take action in relation to management of a disease if there are reasonable grounds to believe that an animal is infected with an exotic disease and to prevent the spread of disease. The issue here is one of a timely response to an emergency situation. It is vital that control action be initiated at the earliest possible moment. Hours can mean the difference between containment and eradication in a specific area or property, or a major incursion with substantial economic implications.

Having a review period would significantly delay initiation of essential control action.

The Committee will recall the Mad Cow Disease outbreak in Europe and its cost to primary industry and the community generally. The socio-economic, public health and trade implications of a delayed response are substantial. Another example is Foot and Mouth disease, which can spread rapidly and be ruinous to affected industry sectors if not controlled effectively.

Australia is able to demonstrate its freedom from these and other exotic diseases and we benefit from trade advantages as a consequence. These advantages and associated public health implications should not be put at risk and for this reason a review mechanism is not provided for a direction to control the spread of an exotic disease.

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There is a distinction between an exotic disease and an endemic disease in terms of a management response. An exotic disease does not currently occur here. The primary goal is to contain and eradicate an incursion should one occur. In most cases the consequences of an exotic disease becoming established are of national significance. Timeliness is of the essence. Endemic diseases already occur in Australia and the management strategy, while similar in many respects, recognises that while local control or eradication may be feasible, national eradication is not.

***Clause 26 – Court proceedings about exotic disease declaration***

The Committee is concerned that this provision may be in breach of the *Human Rights Act 2004* subsection 21(1) as a declaration may not be challenged.

A declaration of an exotic disease quarantine area and any related direction would be made in response to a recognised emergency, namely that an exotic disease has been detected and prevention of its spread is necessary. The public interest is a primary consideration here and the timeliness of a response is critical to an effective outcome as outlined above. The Committee would have noted that a declaration of an exotic disease quarantine area is a disallowable instrument.

***Clause 66(1)(e) - Powers of authorised people to enter premises***

The Committee was concerned that the power to enter premises without a search warrant may be in breach of the *Human Rights Act 2004* section 28.

This subsection provides for an authorised person to enter premises without a warrant if the person believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry is necessary. The amendment will allow authorised people to enter premises where the owner of the premises is unable to be contacted so that urgent disease management matters can be initiated.

The capacity to confirm a disease incursion and initiate an appropriate emergency response as quickly as possible is a vital element of disease management. Control requirements and associate costs and risk can escalate significantly if emergency response measures cannot be undertaken in a timely manner. The key words here are *serious* and *urgent.* An example could be when an emergency response team is working in an isolated rural area and it is serious and urgent that access be gained to adjacent premises to adequately scope the extent of a confirmed disease presence. As previously discussed, the effectiveness or otherwise of disease containment can be a matter of hours.

**Stock Bill 2005**
***Part 4 Travelling Stock***
The Committee noted that no review if provided in relation to a travelling stock permit under Part 4.

Travelling stock permits are a longstanding and necessary process to ensure that ownership of stock that is being moved from their normal place can be satisfactorily demonstrated. It also provides a record of stock movements in the case of a disease incident or when ownership of stock becomes a matter of dispute.

Every owner has to sign a travelling stock permit and state that the stock are legally his or hers. Travelling stock permits generally are a record-keeping device and normally there is no reason to refuse an application, which can be received at short notice if unplanned stock movement is contemplated. However, on special occasions, there may be justification to refuse a permit if the movement is linked to a disease incident or if stock ownership is in dispute. Travelling stock permits can be used to trace back a journey, including any stop overs that would indicate if stock have been moved for agistment or sold in the paddock.

For this reason, a review of a decision to issue a permit is not provided in the Bill. This is primarily due to the nature of the activity of travelling stock. An application for a travelling stock permit is usually made only one or two days before the stock is due to travel, typically to a sale yard for auction. A review of a decision would delay the process unreasonably, and it would be a rare occurrence that a person is denied a permit to travel stock. It is customary for a stock owner to be issued with a number of permits to cover day to day business requirements if so requested. The stock owner completes and returns permits as they are used.

The Committee noted that an internal review of some decisions is provided in the Tree Protection Bill 2005 and that something similar could be considered for the Stock Act travelling stock permit process. Travelling stock permits are essentially a record keeping mechanism, which may be required at short notice. A decision to refuse a permit would be a rare occurrence, supported by other legislative authority relating to disease management or stock ownership. A review of a tree-related decision would be a much longer process and its application to a travelling stock permit process would lead to an unreasonable delay.

I trust that this information satisfactorily addresses matters raised in the Committee's report.

Yours sincerely

Jon Stanhope MLA
Minister for Environment

7 APR 2005

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**Jon Stanhope** MLA

**CHIEF MINISTER**

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak

I refer to your Committee's comments in the Scrutiny of Bills Report No. 4 of 7 March 2005 relating to the Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2) which amended a commencement provision in the *Civil Law (Sale of Residential Property) Act 2003*.

This amendment was an administrative necessity which enabled more time for the Office of Fair Trading, in consultation with the pest and building industries, to develop an electronic public register website. The public register will enable the public to check whether more than one pest inspection report or building compliance inspection report have been prepared for a property they are intending to purchase. The 1 January 2005 timeline did not allow sufficient time for the public register to become operational.

I hope the above information clarifies the matter for you.

Yours sincerely

Jon Stanhope MLA
Attorney General

12 APR 2005

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**JOHN HARGREAVES MLA**

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

*MEMBER FOR BRINDABELLA*

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 6 dated 4 April 2005. I offer the following response in relation to the matter raised by your Committee.

1. **Disallowable Instrument DI 2005-28 – Road Transport (Public Passenger Services) Exemption 2005 (No 1)**

The Committee note that the instrument is made under section 64(1) however should be made under section 84(1).

The instrument was correct at the date of notification. The instrument was notified prior to amendments being notified by Act 2004-69 under section17, which was published 9 March 2005.

Yours sincerely

John Hargreaves
Minister for Urban Services
13 April 2005

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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.5 tabled on 15 March 2005. I offer the following response to the matters raised by your Committee.

**Disallowable Instrument DI2005-18 being the Emergencies (Fees) Determination 2005 made under section 201 of the *Emergencies Act 2004* determines the fee payable for an application under section 61.**

The Committee notes that there is no explanatory statement for the instrument and that the instrument itself incorporates an "explanatory note". While the Committee accepts that the incorporation of an explanatory statement into the instrument does not affect its validity, the use of that term in the instrument is confusing as the content of the statement is what the Committee would normally expect to find in a separate Explanatory Statement.

The Committee's observations on the requirements of the *Legislation Act 2001* are understood, but I note also that the instrument's validity is not in question. My understanding is that the Emergency Services Authority prepared the instrument in accordance with current widespread practice, the intent being to simplify the presentation of less complex instruments by incorporating the explanatory statement into the instrument itself. This avoids the need to refer to a separately registered instrument.

The Committee's discomfort with the current practice is noted, and officers from the Authority will make inquiries with the Department of Justice and Community Safety, which I understand has the issue under consideration.

Yours sincerely

John Hargreaves
Minister for Police and Emergency Services
20 April 2005

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**Ted Quinlan** MLA

DEPUTY CHIEF MINISTER

TREASURER

Minister for Economic Development and Business, Minister for Tourism,
Minister for Sport and Recreation, Minister for Racing and Gaming

MEMBER FOR MOLONGLO

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

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Dear Mr Stefaniak

I am writing in response to the comments by the Standing Committee on Legal Affairs in *Scrutiny of Bills and Subordinate Legislation Report No. 5* of 14 March 2005 regarding Disallowable Instrument DI2005-11. I am also further responding to the *Scrutiny of Bills and Subordinate Legislation Report No. 1* of 9 December 2004 regarding Disallowable Instrument DI2004-246.

The Committee notes that Part C, paragraph 1.1.3 for the Instrument DI2005-11 refers to the Canberra Cosmos participation in the National Soccer League when in fact Canberra Cosmos ceased participating in the National Soccer League and the National Soccer League has been replaced by the "A-League".

The Gambling and Racing Commission notes the Committee's concern and agrees that the reference to the Canberra Cosmos and the National Soccer League in DI2005-11 was incorrect. DI2005-11 has subsequently been revoked and replaced with DI2005-48. This instrument was notified on the Legislation Register on 14 April 2005.

On 21 December 2004, I wrote to the Committee and advised that the Committee's comments regarding Explanatory Statement for DI2004-246 had been noted. I have attached a copy of that correspondence for your reference. Explanatory Statement for DI2004-246 was amended in accordance with the Committee's comments and was subsequently notified. DI2004-246 has now been revoked by DI2005-35, and was notified on the Legislation Register on 24 March 2005.

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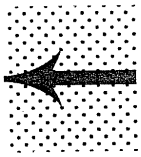
Thank you for bringing these matters to my attention.

Yours sincerely

20.4.05

Ted Quinlan MLA
Deputy Chief Minister



Original sent on 21/4/05

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**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
Australian Capital Territory Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

I am writing to response to comments by the Committee in *Scrutiny of Bills and Subordinate Legislation Report No. 1* of 9 December 2004 regarding Disallowable Instrument DI2004-246.

The Committee notes that the explanatory statement to DI2004-246 states that the instrument being revoked, DI2003-74, was notified on 24 May 2003 and that a check on the Legislation Register shows that the instrument was, in fact, notified on 23 May 2003.

The Gambling and Racing Commission notes the Committee's concern and agrees that the explanatory statement should have read that DI2003-74 was notified on 23 May 2003.

Thank you for bringing this matter to my attention.

Yours sincerely

Ted Quinlan MLA 21/12/04
Deputy Chief Minister

Original sent 22/12/04 Stefaniak

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MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak

Thank you for your Scrutiny Report No. 6 of 4 April 2005. The Committee has made a number of comments in relation to the Tree Protection Bill 2005 and the Pest Plants and Animals Bill 2005 and I am responding to them accordingly.

***Tree Protection Bill 2005***

*Protection of property interests balanced against interest in the preservation of trees*

The Committee questions whether the regulation of a lessee's activities regarding protected trees is a diminution of the lessee's rights to use their property. They draw parallels with the *Environment Protection Act 1997* and the *Heritage Act 2004* in terms of balancing of a countervailing public interest.

The Bill represents a relatively minor diminution of a lessee's rights in return for the considerable collective benefit that the community gains from the maintenance of a healthy urban forest and protection of individual trees of importance. The urban forest and the associated canopy cover provides significant environmental, economic and amenity benefits to the community as a whole. The object of the Bill is to protect these urban forest values that may be at risk because of unnecessary loss or degradation.

As noted by the Committee, similar diminution of a lessee's rights for the good of the wider community is justified in the objects of the *Environment Protection Act 1997* and the *Heritage Act 2004*. In addition, there are comprehensive notification and appeal provisions in relation to statutory decisions made under the Bill.

The Human Rights Commissioner has assessed the Bill and certified its compliance with the *Human Rights Act 2004* (HRA).

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*Strict liability offences*

The Committee questions whether the derogation from the presumption of innocence through the use of strict liability offences is justified by reason of the nature of the activity the subject of the offence. The Committee draws particular attention to the use of strict liability for higher-level offences that are subject to penalties up to 400 penalty units (subclauses 15(5) and 16(4)).

The Bill includes a number of offences where strict liability applies to a specific element of the offence or to the offence. The incorporation of strict liability elements in the offences was carefully considered when developing this Bill. The Criminal Code provides for the use of strict liability provisions where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are. Therefore, the mental or fault element can justifiably be excluded. The rationale in this case is that people engaged in the conduct of, for example, arboriculture or development activities, can be expected to be aware of their duties and obligations in relation to protected trees.

The existence of strict liability offences acts to discourage reckless behaviour and needless loss, by forcing potential defendants to take every possible precaution. Strict liability for the higher-level offences applies specifically to whether the person knew that the tree was protected. This is consistent throughout the penalty structure of this Bill. The use of strict liability as a component of these higher-level offences places the onus on lessees and businesses, such as tree surgeons and developers, to find out whether a tree is protected before undertaking an activity.

As noted by the Committee, a majority of the strict liability offences are minor and are limited to 50 penalty units.

The Criminal Law and Justice Group and the Human Rights Commissioner have assessed the penalty provisions of the Bill.

*Aspects of the regulatory scheme*

The Committee questions whether adequate provision is made for members of the public to participate in the decision-making processes surrounding administrative decisions made under the scheme.

There is significant opportunity for the public to participate in decisions in relation to the establishment and management of a Tree Register. The Bill provides for comprehensive notification, consultation and appeal avenues on matters associated with the registration or cancellation of the registration of a tree. In addition to notifying the lessee and nominator when a tree is provisionally registered, the Bill requires the Conservator to publish a notice in the press calling for comments from the community (clauses 47 and 54).

It is not appropriate to include a similar level of consultation prior to making the more routine decisions, such as approval for removal or groundwork within the Tree Protection Zone of a Regulated Tree, as this would create an excessive administrative burden and add considerable delay to the decision-making process. As noted by the Committee, the Bill does, however, provide for a comprehensive review process on such decisions (clauses 103 to 105).

*Incorporation by reference*

The Committee questions whether there is adequate justification for the incorporation of documents (clauses 110 to 112) and the subsequent limitation this places on the accessibility of text associated with the legislation.

This provision is necessary because some of the incorporated documents may not be able to be reproduced in a form suitable for inclusion on the Legislation Register, or they may be subject to copyright restrictions. An example is the copyright issues arising from the use of the Australian Standard for Pruning Amenity Trees (ASNZ4373).

Procedures will be introduced to ensure that the community is familiar with the relevant documents and has access to them. Such measures may include, for instance, producing fact sheets summarising lessees' obligations and providing opportunity for the public to access the documents during business hours.

*Equality before the law*

The Committee raises a concern that the restricted information provisions of the Bill (clauses 61 and 62) may be in breach of section 8 of the HRA (right to equal treatment under the law). The Committee notes that this may be justifiable under section 28 of the HRA.

These clauses provide particular protection for information relating to trees of Aboriginal heritage significance. This distinction is necessary due to the risks should Aboriginal heritage be easily found. Historically, many Aboriginal sites have been vandalised when information about their location and nature has been made public. Accordingly, a more cautious approach to information about Aboriginal heritage is being taken in the Bill. The same danger is not apparent for trees registered for values other than Aboriginal heritage, and the public interest is better served if information about these trees is widely known. In some cases it will be appropriate to restrict information about non-Aboriginal heritage trees to protect them.

This is considered to be adequate justification under section 28 of the HRA which states that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

*Delegation of legislative power*

The Committee notes that under subclause 113(2), a regulation made under the Act may "create offences and fix maximum penalties of not more than 10 penalty units for the offences". Given the significance of the power to create an offence, the Committee draws to the attention of the Assembly the question whether it is appropriate for a law of this kind to be made by regulation.

It is a well-established practice to include the ability to create minor offences in regulations. This is not an uncommon provision and is currently widely used in other legislation, such as the *Nature Conservation Act 1980* (Sub-section 140(3)).

***Pest Plants and Animals Bill 2005***

*Strict liability offences*

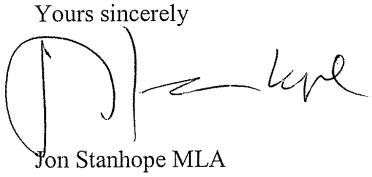
In accordance with section 38 of the *Human Rights Act 2004*, the Committee reports on the human rights issues raised by the Bill, specifically in relation to strict liability offences. Provision of strict liability offences are to be found in subclauses 10(2), 18(2), 35(5) and 36(5) of the Bill.

The Committee notes the justification for inclusion of strict liability offences outlined in the Explanatory Statement and that in no case does the maximum punishment for these offences exceed 50 penalty points.

The Criminal Law and Justice Office and the Human Rights Commissioner have assessed the penalty provisions of the Bill.

I trust that this information satisfactorily addresses matters raised in the Committee's report.

Yours sincerely



Jon Stanhope MLA
Minister for the Environment

28 APR 2005