Legislative Assembly for the ACT

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

Scrutiny Report

15 NOVEMBER 2010

Report 30

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

(d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

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

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

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

ROLE OF THE COMMITTEE

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

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BILLS

Bill—No comment

The Committee has examined the following Bill and offers no comments on it:

CRIMES (CHILD SEX OFFENDERS) AMENDMENT BILL 2010

This Bill would amend the *Crimes (Child Sex Offenders) Act 2005* to ensure that offenders convicted of new Commonwealth offences (offences including criminalising child sex tourism against children overseas; for the overseas dealing in child pornography; child abuse material; and using a postal service for a child sex related activity) are registered on the child sex offenders register.

ENVIRONMENT PROTECTION AMENDMENT BILL 2010

This Bill would amend section 57 of the *Environment Protection Act 1997* to modify the annual review period of Environmental Authorisations granted by the Environment Protection Authority.

FIRST HOME OWNER GRANT AMENDMENT BILL 2010

This Bill would amend the *First Home Owner Grant Act 2000* for various purposes.

STATUTE LAW AMENDMENT BILL 2010 (No 2)

This Bill would amend a number of Acts and regulations for statute law revision purposes only.

Bills—Comment

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

CORRECTIONS MANAGEMENT (MANDATORY URINE TESTING) AMENDMENT BILL 2010

This Bill would amend the *Corrections Management Act 2007* to permit detainees at the Alexander Maconochie Centre to be randomly selected for alcohol and drug testing.

The key elements of the Bill are:

- an obligation on the chief executive to prepare a list each month of randomly selected detainees for the correctional centre that includes the Alexander Maconochie Centre;
- that the number of detainees on the list must be at least 5% of the total number of detainees on the register of detainees for the AMC on the day the chief executive prepares the list; and
- an obligation on the chief executive, each month, to direct each detainee on the list for the month to provide a test sample that is a urine sample.

There is as yet no Explanatory Statement for the Bill. The Committee cannot thus offer a detailed comment on the rights issues raised, but will suggest what is not much more than a starting point for debate.

There are two HRA rights that bear most obviously on the question of the HRA compatibility of the Bill. First, subsection 19(1) provides: "(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person". This is the basis for the generally accepted principle that "[d]eprivation of liberty is an extremely severe penalty and creates an obligation to ensure that other rights are not also curtailed more than absolutely necessary".[1] However, the circumstance that a person is in a prison does require that rights and liberties available to all must be curtailed. The question is when, and how far.

Secondly, the right that would most obviously be claimed by a prisoner would be the right to privacy in HRA paragraph 12(a): "Everyone has the right — (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; … ". Subjection to a drug test is a serious interference with privacy.

The question of whether the interference with privacy inherent in random drug testing is arbitrary is in essence the same question involved in the application of HRA section 28, and a full section 28 justification is called for. One matter here is the "right to life" of other prisoners. The ACT Human Rights Commissioner has pointed out[2] that "[t]here is also a positive obligation to protect rights [of prisoners] by preventing the loss of life, eg providing the right medical treatment to HIV positive detainees, so that lack of action by correctional authorities does not result in loss of life. … The right to life has been found to be violated by the European Court of Human Rights under the European Convention on Human Rights when a prison failed to protect a detainee with a mental illness from another prisoner in a shared cell with a history of violence who stamped and kicked him to death: *Edwards v United Kingdom*[3]". This reasoning can be extended to protection of a prisoner – in particular one with a mental illness – from exposure to drugs.[4]

Even if this line of reasoning provides a basis for a justification, the issue would be whether the use of random drug testing is a proportionate means of achieving the objective.

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

DISCRIMINATION AMENDMENT BILL 2010

This Bill would amend the *Discrimination Act 1991* in relation to the operation of provisions of the Act in relation to access to premises, the use or availability of facilities or the provision of goods or services to students at school.

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[1] ACT Human Rights & Discrimination Commissioner, "Our Prisons – Human Rights, Mental Health & Privatisation" (2009).

[2] Ibid.

[3] (2002) 35 EHRR 487.

[4] The Commissioner noted figures that suggested that "86% of female and 72% of male prisoners have had a psychiatric disorder, compared to 22% in the general population"; above note 1.

The only substantive provision of the Bill reads:

> **57JA Premises, goods, services and facilities—school hours**
>
> Section 19 (Access to premises) or section 20 (Goods, services and facilities) does not make it unlawful for a person to discriminate against someone else on the ground of age in relation to access to premises, the use or availability of facilities or the provision of goods or services if the person reasonably believes that—
>
> (a) the other person is a student at a school; and
>
> (b) the school is open for attendance.

There is as yet no Explanatory Statement for the Bill. The Committee cannot thus offer a detailed comment on the right issues raised, but will suggest what is not much more than a starting point for debate.

Sections 19 and 20 of the *Discrimination Act 1991* enhance the HRA right to "the equal protection of the law", and any displacement of their operation requires a full section 28 justification. The Committee can take this no further than to point out that a proportionality analysis might have regard to HRA subsection 11(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 Committee draws this matter to the attention of the Assembly and recommends that the Member respond.

PLASTIC SHOPPING BAGS BAN BILL 2010

This is a Bill for an Act to create an offence of strict liability for a retailer to supply a plastic bag for the purposes of carrying goods bought, or to be bought, from the retailer, with the objective of reducing the use of plastic bags made from polyethylene.

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

The essence of the scheme proposed is contained in clause 7:

> **7 Retailer not to supply plastic shopping bags**
>
> (1) A retailer commits an offence if—
>
> (a) the retailer supplies a plastic shopping bag to a customer of the retailer; and
>
> (b) the plastic shopping bag is supplied for the customer to carry goods bought, or to be bought, from the retailer.
>
> Maximum penalty: 50 penalty units.
>
> (2) An offence against this section is a strict liability offence.

There is also a transitional strict liability offence provision (clause 100) designed to ensure that retailers make alternative shopping bags available and display notices during the four months prior to the commencement of what is proposed in clause 7.

The simplicity of this scheme provides a vehicle for the Committee to raise two issues that have either not been raised directly before, or raised and discussed only incidentally, together with very brief reference to a recurring issue. The issues are as follows:

- Is the criminalisation of the activity of a retailer supplying a plastic bag to a customer justifiable, which involves the question of whether there is there some other way the objectives of the scheme could be achieved?
- If criminalisation is justifiable, should this be by way of a strict liability offence?
- If strict liability is justifiable, should there be provision for a specific defence of 'due diligence'?

Is criminalisation justifiable?

Why this question must be asked is related most clearly to the nature of the criminal sanction. Punishment, in particular by imprisonment,[5] is a severe intrusion into the personal rights of a person. A fine may not be the severest sanction, in that administrative sanction fees are often more severe than punitive fines. However, this issue is complicated by the use of imprisonment as a back-up sanction in cases of unpaid fines. It is also the case that the burden of a regime of fines may fall unevenly across the community. In addition, the mere effect of a conviction of a criminal offence may stigmatise the offender, or create embarrassment, or difficulties on obtaining employment, or in travelling overseas.

What principle guides an assessment of justifiability? Ultimately, it may be argued that it is the principle of proportionality in its prospective sense. That is, "[t]he principle is breached if the means [that is, criminalisation] are excessively burdensome, intrusive or otherwise costly, given the significance of the interest we have in achieving the goal".[6] This is a very much value-laden and open-ended exercise, but in this context it is argued that it should be guided by the principle that criminalisation is a last resort. In the words of one commentator:

> the criminal law is not the only appropriate means by which to pursue the proper end of protecting legitimate values and interests … . On the contrary, the whole arsenal of the legal order must be put to use, and criminal law is actually the last means of protection to be considered. It may only be employed where other means (e.g., private law litigation, administrative solutions, non-criminal sanctions, etc.) fail.[7]

[5] See the comment on the Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2010 in reference to the discussion of strict liability.

[6] Nils Jareborg, "Criminalization as Last Resort (*Ultima Ratio*)" (2004) 2 *Ohio State Journal of Criminal Law* 521 at 532.

[7] Ibid at 524-525. Other examples given of non-criminalisation are "aid, support, care, insurance and license arrangements", ibid at 524.

It is a matter for each member of the Assembly to decide whether this approach to the scope of criminalisation has merit. If it is, and accepting that the creation of a criminal offence raises a rights issue, the issue of whether some approach other than criminalisation to achieve the objective of the law arises, in particular, in consideration of paragraph 28(2)(e) of the Human Rights Act.

The Explanatory Statement says very little as to the proportionality of creating a criminal offence to reduce the use of plastic bags. The objectives sought are stated very generally:

> Plastic bags have an impact on the environment and society. Plastic bags have become a symbol of excessive consumption and reducing plastic bag use is an action that everyone can contribute to. Efforts to reduce plastic bags may also have additional benefits through raising community awareness of broader environmental and sustainability issues.

More particularly, "[t]he Bill aims to put in place arrangements to reduce the use of plastic bags made from polyethylene through restricting supply of plastic bags at the point of sale where the bag is provided to carry goods".

It is a matter for each member of the Assembly to decide whether these are adequate justifications.

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

If criminalisation is justifiable, should this be by way of a strict liability offence?

The Explanatory Statement justifies the strict liability character of the offence in clause 7 by reference to the regulatory context in which it will operate and, in particular, that "[r]etailers are a specific group of people who could be reasonably expect [sic] to know the requirements of the law in relation to their business".

The Committee considers that this justification is acceptable in this context, and makes no further comment on this aspect of the matter.

If strict liability is justifiable, should there be provision for a specific defence of "due diligence"?

The Committee considers that it is timely to bring to the fore an issue that it has raised from time to time over last decade.

In noting the character of a strict liability offence, the Explanatory Statement said that "this means that conduct alone is sufficient to make the defendant culpable", but continued:

> However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Subclause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

The reference is to "other defences" as stated in the Code.[8]

The "specific defence of mistake of fact" referred to in the Explanatory Statement refers to section 36 of the Criminal Code and its effect is that a person is not criminally responsible in relation to a strict liability offence where:

- the person, when carrying out the conduct that makes up the physical element of the offence (as has been proved by the prosecution) to have occurred, considered whether or not certain facts existed;
- those facts did not exist;
- the person held a reasonable belief that those were the facts; and
- if those had been the facts, the person would not have carried out the physical elements of the offence.

These matters are the elements of the defence.

Suppose it is an offence of strict liability to sell adulterated food. A manufacturer (M) of canned peas is aware that a caterpillar is commonly to be found in a tin, rolled up into a ball and the size, density and colour of the standard issue pea.[9] M purchases a machine which he reasonably believes will infallibly indicate when a caterpillar is ensconced in a tin with the peas. In fact, however, the machine cannot detect some caterpillars, and thus M sells some tins that do contain adulterated food. However, had the facts been as M reasonably believed them to be, he would not have sold adulterated food, and thus, by reason of section 36 of the Criminal Code, is not criminally responsible for having done so.

M's position is made somewhat easier in that if he satisfies the magistrate or judge that the evidence he adduces is such that the magistrate could (but not necessarily would) find that defendant had considered certain facts, etc, the prosecution must then prove beyond reasonable doubt that the defendant had not considered certain facts, etc. That is, the defendant carries only an evidential burden of proof in relation to the elements of the defence in section 36. (In contrast, if it were the case that the defendant carried a legal burden of proof of those elements, the defendant would need to satisfy the fact-finder at the trial, on the balance of probabilities, that those elements existed.)

On the other hand, there are some limitations to the scope of the defence in section 36:

- a defendant cannot be mistaken about the facts unless he or she has considered whether or not facts existed. There is then, in effect, a duty of inquiry in circumstances where the defendant's conduct might result in the commission of the offence;
- it is not a defence of reasonable ignorance of the facts. Nor is it a defence of reasonable ignorance of the law; and

[8] Section 39 of the Code provides a defence in the case of intervening conduct or event; section 40 in the case of duress; section 41 in the case of sudden or extraordinary emergency; section 42 in the case of self-defence; and section 43 in the case of acting under lawful authority.

[9] This example is given in G R Sullivan, "Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights", in A P Simester (ed), *Appraising Strict Liability* (2004) 215. The comment in this report alters it somewhat.

- it is not a defence (often called a "due diligence" defence) that reasonable (but of course ineffective) steps were taken by the defendant to avoid carrying out the physical elements of the offence.

This third limitation is very significant. It means that the taking of reasonable steps to comply with the law will not avoid the defendant committing the offence where the physical elements are nevertheless carried out.

Modifying the example given above, suppose M utilises a state-of-the-art canning process backed up by thorough inspection, but this process cannot stop all caterpillars finding their way into a tin. In other words, M takes all reasonable steps to avoid carrying out the physical elements of selling adulterated food short of not selling the particular foodstuff at all.

Nevertheless, if a caterpillar was found in a tin, M will have committed the offence. Section 36 of the Code cannot apply because M has not made a mistake about the facts, etc.

This situation can be avoided if in relation to a particular strict liability offence, a defence of due diligence is provided.[10] Some might argue that it is unjust to convict a person who took all reasonable steps to avoid committing an offence. Another line of argument is that provision of a due diligence defence adds to the clarity and precision of the law, thus "enabling citizens and their legal advisers to ascertain with reasonable assurance where they stand in terms of the potential for their conduct to attract criminal penalties".[11] The defence does so because potential offenders can at least predict that if they take all reasonable steps, etc, they will not be found guilty of the offence should they carry out the physical elements.[12]

Present practice in Australia is, however, to include this defence on a case-by-case basis, and this is a sensible approach. Nevertheless, it must be recognised that if a due diligence defence is not allowed, that must be because it is an objective of the law to permit the punishment of a person who carries out the physical elements even though they took reasonable care not to do so.

It should also be recognised that, in some cases – depending on who is likely to be affected (such as by payment of a fine) by the operation of the offence in question – the effect of not permitting a due diligence defence may be to give the law an unequal operation between classes of those persons, and, in some cases, may cause some to cease the activity that might result in carrying out the physical elements of the offence. Taking the manufacturer of canned peas, a large company could absorb the uncertainties of whether it would commit an offence "into its risk assessments and financial contingencies. Yet the proprietor of a small business in similar circumstances might not be able to sustain such costs and pressures".[13]

This discussion leads to the conclusion that where it is proposed to create a strict liability offence, it should always be asked whether there should also be provision of a due diligence defence.

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[10] This is narrower than a "reasonable excuse" defence.

[11] G R Sullivan, above, at 215. The author points out that the European Court has found these standards to be required by Article 7 of the European Convention, which is the equivalent of HRA subsection 25(1) (retrospective criminal laws). There are other human rights bases for these standards.

[12] Ibid.

[13] See G R Sullivan, above, at 215.

This applies to proposed clause 7 of this Bill.

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

ROAD TRANSPORT (ALCOHOL AND DRUGS) LEGISLATION AMENDMENT BILL 2010

This Bill would amend certain Territory laws with the objective of improving ACT road safety outcomes in relation to drink and drug driving.

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

In this report, the Committee will identify issues for particular consideration by the Assembly in relation to the changes proposed that are designed to achieve certain of the particular objectives sought to be achieved by the Bill. The Committee refers to and incorporates comments it made in *Scrutiny Report No 25* of the *7th Assembly*, concerning the Road Transport (Drink Driving) Legislation Amendment Bill 2010.

The Committee draws attention to pages 2 and 3 of the Explanatory Statement, where there is offered a general line of justification for any derogation of HRA rights that may be affected by the Bill. This is helpful, but is not a substitute for a clause by clause section 28 justification of those particular provisions that derogate from an HRA right. The Committee also suggests that a justification for a particular provision is not taken very far by pointing to a similar provision in a law of another Australian jurisdiction that does not operate under the influence of a human rights statute.

<u>The application of different levels of alcohol concentration in the blood (for the purpose of tests) to "special drivers" as compared to other drivers</u>

One objective is to apply different levels of alcohol concentration in the blood (for the purpose of tests) to "special drivers" as compared to other drivers. As the Explanatory Statement explains in relation to clause 8 of the Bill:

> [n]ew section 4C defines the concept ***prescribed concentration*** of alcohol. It provides that the prescribed concentration for a special driver is more than 0g of alcohol in 100mL of blood or 210L of breath. The concentration of alcohol for any other driver is 0.05g or more of alcohol in 100mL of blood or 210L of breath.

This change appears to engage the "equal protection of the law without discrimination" element of HRA subsection 8(3). The issue then is whether the discrimination involved is justifiable under HRA section 28. The Explanatory Statement makes no mention of these matters, but does, in a comment to clause 6, offer reasons for creating a category of "special driver". The Presentation Speech also addresses the issue.

Notwithstanding that the HRA issues are not addressed specifically in the Explanatory Statement, the Committee does not consider that there is a question of the compatibility of these changes with the HRA.

The concept of "repeat offender"

The issue is well explained in the Explanatory Statement comment to clause 8, concerning proposed section 4F of the *Road Transport (Alcohol and Drugs) Act 1977*:

> New section 4F defines the concept of ***first offender*** and ***repeat offender.*** …
> Higher penalties apply to a person who is a repeat offender. …
>
> New section 4F (1) provides that a person who is convicted or found guilty of a disqualifying offence will be a first offender for that offence if the person is not a repeat offender for the offence. …
>
> Under proposed section 4F (2) (a), a repeat offender for a disqualifying offence is a person who has already been convicted or found guilty of a 'relevant offence' that was committed before the disqualifying offence was committed, whether or not the person had been convicted or found guilty of the relevant offence when the person committed the disqualifying offence. … New section 4F (2) (b) deals with the situation where a person is convicted or found guilty of a disqualifying offence and is concurrently convicted of one or more relevant offences. If one or more of those relevant offences were committed before the disqualifying offence was committed, the person will be a repeat offender in relation to the disqualifying offence.
>
> The inclusion of the words 'whether or not the person had been convicted or found guilty of the relevant offence' in section 4F (2) (a) and 'concurrently with being convicted or found guilty' in section 4F (2) (b) are intended expressly to exclude a common law principle of statutory construction for repeat offender provisions. **The essence of the principle is that a law which imposes a higher penalty on repeat offenders should be interpreted as applying only to offences committed after being convicted the first time** (emphasis added).

The Explanatory Statement cites a passage from the decision of the Northern Territory Supreme Court in *Schluter v Trenerry* [1997] NTSC 102:

> The theory is that the appropriate lesson will have been learnt on the first or subsequent occasion upon which the offender is dealt with by the court, and he or she, having suffered the punishment, will then be deterred from offending in like manner again.

This common law principle of statutory construction may be displaced by contrary specific provision in a statute, as is proposed here. Where this occurs, the Committee considers that there is an issue as to whether, in terms of a term of reference of the Committee, the provision unduly trespasses on personal rights and liberties. It may also be that the relevant provision engages the right in HRA subsection 18(1) that "[e]very one has the right to liberty and the security of the person".

The Committee commends the Explanatory Statement in the respect that it identifies the issue and provides a reason for the displacement of the principle under discussion. In essence, it is argued that by reason of ready access to the text of the law, members of the community should be aware of the severity of punishment if a person reoffended. It is also argued that "[a]wareness that drink driving is an offence is an essential part of the knowledge test for all learner drivers and the penalties for drink driving offences are well publicised".

It is a matter for each member of the Assembly to decide whether these are adequate justifications.

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

The requirement that a police officer suspend a person's licence where the officer believes on reasonable grounds that a person has committed an immediate suspension offence

The Explanatory Statement explains proposed section 61B of the Act (see clause 131):

> Subsection 61B (1) requires a police officer who believes on reasonable grounds that a person has committed an immediate suspension offence[14] to give the person an immediate suspension notice for the offence. … The notice must contain the details set out in subsection 61B (2), … . Subsection 61B (3) provides that a suspension notice has effect when it is served on the person. … Subsection 61B (4) sets out the consequences of being served with a suspension notice. These consequences are that a person's driver licence is suspended; the person must surrender the licence to a police officer at the time, or if that is not possible, do so as soon as practicable; the person must not drive in the ACT; and the person cannot apply for or be granted a restricted licence during the suspension period.
>
> Section 61B (5) explains that a suspension notice ceases to have effect when any of the following things happen:
>
> - the notice is stayed by order of the Magistrate's Court;
> - the proceeding for the relevant suspension offence is withdrawn or discontinued;
> - the offence is dealt with by a court;
> - 90 days have passed since the suspension notice was issued, and the suspension notice has not otherwise ceased to have effect under subsection (5). The effect is to limit an immediate suspension notice to no more than 3 months' duration.
>
> It should be noted that the power to issue a suspension notice is not discretionary: the language in section 61B (1) directs a police office to issue the notice once the officer has formed a reasonable belief as to the existence of certain facts.

In *Scrutiny Report No 25* of the *7th Assembly*, the Committee considered that this provision engaged the right to a fair trial HRA subsection 21(1). This provides that:

> 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.

[14] Proposed section 61A (see clause 131) defines the concept of "immediate suspension offence". The explanatory statement states that "in essence, this is an offence under section 19 of the *Road Transport (Alcohol and Drug) Act 1997* where the person is over the applicable limit by 0.05g of alcohol or more or any of the offences in section 22 to 24 of the Act", and certain other offences.

On its face, subclause 61B(1) requires a police officer to determine that a person *has committed* an immediate suspension offence; that is, in effect, to make a determination of guilt on a criminal charge. Given that penalties follow on this determination, it appears that there is a serious issue as to whether this provision is compatible with HRA subsection 21(1).[15] The Magistrates' Court may issue a stay order,[16] but this will not redress the adverse effects on a person of the police officer's determination. This point is emphasised by the Minister in the Presentation Speech:

> [e]ven where persons charged with drink driving successfully pursue a stay of suspension in order to get their licence restored before their court appearance, they will, nonetheless, serve a minimum period of licence suspension. This is because the level of their BAC reading will make them ineligible, under the new laws, to apply for a restricted licence during the disqualification period.

The Speech also states that "the process [of obtaining stay] will take a period of time and so one effect of this new provision will be that for high range offenders there will be an immediate consequence of being caught drink driving – a period of time off the road".

Thus, as a result of the police officer's determination, a person will suffer a detriment in advance of a judicial determination of the substantive charge which detriment could be very significant (for example, to trades contractors and their employees), which might be of innocence.

Both the Explanatory Statement and the Presentation Speech offer justifications for this regime:

(1) There is an argument based on the form of the sanction:

> [t]he power to issue a suspension notice is an administrative sanction, in that it does not depend upon on judicial determination of guilt. That determination is reserved for the hearing of the substantive charge, and the determination of the sentence to be applied if the accused if found guilty.

On the other hand, it might be argued that it is the lack of a judicial determination of guilt that creates the incompatibility with HRA subsection 21(1). The Committee notes that notwithstanding the Committee's reference to subsection 21(1) in Scrutiny Report No 25, the Explanatory Statement does not refer to this right, or to HRA section 28.

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[15] Some High Court Justices have spoken of the function of adjudging and punishing criminal guilt as "exclusively judicial function": *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, per Brennan, Deane and Dawson JJ. There is then a separation of powers objection to the scheme of the Bill under discussion.

[16] See proposed section 61F, which is well explained in the Explanatory Statement at page 46. The Committee notes that the Presentation Speech asserts that "[t]he Court's primary consideration in deciding whether to stay the suspension will be the risk to the safety of road users". This is not correct. As the Explanatory Statement notes, the court may also have regard to "the applicant's need for a licence", and other relevant matters. No factor has primacy over any other.

(2) Argument is based on the law of other Australian jurisdictions, but this is of limited assistance given that (except for Victoria[17]), there is no applicable human rights law.

(3) Reliance is placed on certain provisions of Territory law that are said to be comparable to proposed section 61B. If they are comparable, then there is a question as to their compatibility with HRA subsection 21(1), but it appears that they are not. In no instance cited is an administrative or police officer required to determine whether a person is in effect guilty of a criminal offence.

(4) The Explanatory Statement points to benefits to the public interest. It is argued that:

> [i]mmediate licence suspension addresses a road safety risk by removing a driver from the road immediately (rather than having the person continue to drive until the matter is dealt with by the court) and delivers an immediate consequence of drink-driving to the offender.

(The reference to the person as an "offender" underlines the function of the police officer as an adjudicator of guilt.) There is also reference to a study conducted in the USA that showed "that immediate suspension of licence has a strong deterrent effect on repeat offenders".

The points of substance just noted might satisfy a member of the Assembly of the need for a provision such as proposed section 61B, but there remains a question whether the scheme might be designed in a way that is less restrictive of the right to a fair trial; see HTA paragraph 28(2)(e). In *Scrutiny Report No 25*, the Committee asked the Minister to consider "whether the person affected could seek a quicker, less expensive and more extensive form of review than the procedure of application to the Magistrates Court for a stay of operation of the suspension; see proposed 61F". This is not addressed in the Explanatory Statement.

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

Strict liability offences

The Bill would create a number of strict liability offences. In introductory comments, the Explanatory Statement address the issue of compatibility with the *Human Rights Act 2004*, and the Committee refers the Assembly to this discussion, although it is of limited value in that, as the Explanatory Statement notes, "reasons for applying strict liability are explained in the clause notes for each provision". The Committee suggests that where a Bill proposes to create strict liability offences, the Explanatory Statement should, where a global comment is made, indicate the particular clauses of the Bill to which the comments relate.

[17] Concerning Victorian law, there would then be a question as to when the law was enacted, that is, whether this was before or after the comment of the Victorian Charter of Rights and Responsibilities.

It is highly likely that the courts will not find much difficulty accepting that the imposition of strict liability in relation to drink or drug driving is justifiable.[18] There are however two qualifications. First, the Committee considers that consideration be given to qualifying each offence with a due diligence defence (which should not be taken as suggesting that this would be appropriate in any particular instance).

Secondly, there is an issue of HRA compatibility where the penalty for the offence includes the possibility, however remote, that the offender will be imprisoned.

This is the case with proposed section 19 of the *Road Transport (Alcohol and Drugs) Act 1977*, which creates a strict liability offence, and provides that the offender "is punishable in accordance with section 26" (proposed subsection 19(3)). Reference to section 26 reveals that in certain circumstances imprisonment is a possible punishment.

The way this issue is dealt with in the Explanatory Statement gives rise to considerable concern in two ways.

First, the Explanatory Statement does not, in its notes on clause 40, draw attention to what section 26 of the Act to be amended provides. Proposed section 19 is not intelligible without such an explanation, and in this case, inadvertently it is accepted, hides the fact that imprisonment is within the range of penalties.

Secondly, and notwithstanding that the Committee has on many occasions (as recently as 20 September 2010, in *Scrutiny Report No 27* of the *7th Assembly* at pages 17-18[19]) drawn attention to the rights issues arising out of punishment by imprisonment for a strict liability offence. Imprisonment is problematic because it is a severe sanction. In the words of a commentator:

> As regards imprisonment there is no reason to doubt [that it is the severest State sanction]. Loss of liberty is in itself grossly intrusive, and as a punishment it constitutes a clear expression of severe societal censure. In addition, incarceration often involves stigmatization and humiliation. If one disregards very short prison sentences, going to prison often affects family life and working life in ways that can never be repaired.[20]

The Committee considers that there is a serious question as to whether proposed section 19 of the Road Transport (Alcohol and Drugs) Act 1977, in that it would create a strict liability offence in respect of which imprisonment is a possible punishment, is compatible with the Human Rights Act. The Committee draws this matter to the attention of the Assembly and recommends that the Minister address this issue.

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[18] See the cases referred to in the Explanatory Statement comment on clause 40; (although the USA Supreme Court case of *Leocal v Ashcroft* (2004) 543 US 1 has no bearing on this issue).

[19] To add to what is said there, the Committee notes that after a review and consideration of submissions from a wide range of parties, the Legislation Review Committee of the NSW Parliament has adopted the principle that "[s]trict liability offences should not be punishable by imprisonment, unless there are highly compelling and extraordinary public interest justifications for doing so": Legislation Review Committee, *Strict and Absolute Liability*, Report No 6 – 17 October 2006, at 14.

[20] Nils Jareborg, "Criminalization as Last Resort (Ultima Ratio)" 2 Ohio St. J. Crim. L. 531 (2005.

The same issue arises in respect of proposed subsection 20(1A) of this Act, given that it proposes that the offence of driving under the influence of drugs in subsection 20(1) be a strict liability offence.

If the Minister does not propose to amend the Bill to avoid the possibility of punishment by imprisonment, the Committee considers that the argument for inserting in the relevant clauses a due diligence defence is much stronger.

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

Detention and custody powers

Several clauses of the Bill would confer a power on police officers to detain a person in custody or to require them to stay in a particular place. These engage HRA subsection 18(1) (right to liberty); see in particular clauses 16 and 20. In *Scrutiny Report No 25*, the Committee called for a justification for identical provisions in the earlier Bill, and it notes that the Explanatory Statement does address these issues.

The Committee does not consider that there is a question of the compatibility of these provisions with the HRA.

"Evidentiary" provisions

A number of clauses propose provisions that provide that production to a court of a certificate stating that certain facts exist is "evidence of" those facts. Although it is arguable that these provisions engage the presumption of innocence in HRA section 22(1), this is so, in such cases, only to a minor degree and in these respects the Committee does not consider that there is a question of the compatibility of these provisions with the HRA.

There is, however, an issue arising out of proposed subsection 20(1B) of the main Act. Subsection 20(1) of the Act creates the offence of driving under the influence of drugs. Proposed subsection 20(1B) provides:

> (1B) For subsection (1), a person is taken to have a prescribed drug in—
>
> (a) the person's oral fluid if an analysis of a part of a sample of the person's oral fluid under section 13G (Oral fluid—confirmatory analysis) confirms that a prescribed drug is present in the sample; or
>
> (b) [a similar provision].

The words "taken to have" indicate that the defendant could not challenge the accuracy of the analysis. To deprive a defendant on a criminal charge of an opportunity to adduce evidence to contradict prosecution evidence appears clearly to derogate from the right to a far trial in HRA subsection 21(1).

If any justification is offered, a critical issue would then be whether there are any less restrictive means to achieve the objective. In this instance, proposed subsection 19(4) of this Act (see clause 40) points to an alternative. Here, it is provided that "evidence may be given of the concentration of alcohol in the person's blood or breath based on" certain analyses.

This provision would not prevent a defendant from adducing contrary evidence. (The Explanatory Statement appears to consider that the provisions of section 20 are in line with section 19, but in this respect there is a crucial difference.)

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

Evidence for insurance purposes

Clause 71 would replace existing section 41A of the main Act with another provision. The Explanatory Statement explains:

> Like its predecessor, on which it is based, new section 41A deals with evidence for insurance purposes - or rather, it explains when evidence about an alcohol or drug test conducted under part 2 is not admissible in a proceeding in relation to an insurance contract. A similar provision, dealing with the exclusion of evidence of alcohol and drugs tests in insurance proceedings, is found in section 37 of the NSW *Road Transport (Safety and Traffic Management) Act 1999*. The *Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Act 2010* inadvertently omitted to include provisions addressing oral fluid tests for prescribed drugs in the provisions for evidence in insurance proceedings.

There is nevertheless an issue as to the compatibility of proposed section 41A with the HRA right to a fair trial (subsection 21(1)). To deny a party the opportunity to adduce evidence relevant to the proof of its case, or to the disproof of an opponent's case, is apparently unfair. A section 28 justification for this provision is required.

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

Exemption from alcohol awareness course

While not raising a rights issue, the Committee notes an apparent contradiction between the provisions of the Bill and the statement in the Explanatory Statement. The relevant provisions are in clause 126 of the Bill, and are proposed amendments to the *Road Transport (Driver Licensing) Regulation 2000*. A new division 3.13 governs alcohol awareness courses. Under proposed subsection 73(1), the road transport authority "may … grant a person an exemption from the requirement to complete an alcohol awareness course because of exceptional circumstances". Subsection 73H(2) then provides that the authority "must refuse to grant the exemption if satisfied on reasonable grounds that exceptional circumstances do not exist for granting the exemption". On the other hand, the Explanatory Statement states that the authority "can only grant such an exemption where it is satisfied that there are exceptional circumstances to justify the exemption".[21]

[21] The Bill does contain a provision in this form; see proposed subsection 61F(2) of the *Road Transport (General) Act 1999* (clause 131).

These are two quite different tests. In the first case, once an applicant provides some basis for an "exceptional circumstance", the authority must then determine whether this basis does *not* exist; in the second, it must determine if it *does* exists. The first form is more favourable to an applicant than the second.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2010-268 being the Utilities (Electricity Feed-in Code) Determination 2010 (No. 1) made under sections 59 and 63 of the *Utilities Act 2000* **revokes DI2009-23 and determines the Electricity Feed-in Code.**

Disallowable Instrument DI2010-269 being the Independent Competition and Regulatory Commission (Investigation into the ACT Racing Industry) Terms of Reference Determination 2010 (No. 1) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the task of undertaking an investigation into the ACT racing industry.**

Disallowable Instruments—Comment

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

Incorporation of material by reference / Accessibility of legislation

Disallowable Instrument DI2010-263 being the Building (ACT Appendix to the Building Code—2010 edition) Determination 2010 made under subsection 136(2) of the *Building Act 2004* **revokes DI2009-26 and makes appendices for the 2010 edition of the Code.**

This instrument makes a new ACT Appendix to the Building Code. It does so by adopting the 2010 version of the Building Code of Australia, as amended by Schedule 1 of this instrument. Schedule 1 amends the Building Code to account for the particular requirements of the ACT.

The Committee notes that section 5 of this instrument expressly disapplies subsection 47(5) of the *Legislation Act 2001*. Subsection 47(5) provides:

> (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

The effect of disapplying subsection 47(5) of the Legislation Act is that there is no requirement that the Building Code be published on the ACT Legislation Register. This means that it is not possible for anyone wishing to work out what the Building Code requires to do so by consulting the Legislation Register, as is possible in relation to the requirements of the vast majority of legislation applicable in the ACT. The Committee notes, however, that section 6 of this instrument provides:

> **6 Access to referenced documents**
>
> A copy of the Australian Capital Territory Appendix to the Building Code of Australia is available for inspection by members of the public between 9am and 4.30pm on business days at the ACT Planning and Land Authority shopfront, Dame Patty Menzies House, 16 Challis Street, Dickson.

The Committee also notes that the Explanatory Statement for the instrument states:

> **Section 5** is intended to disapply the requirement of the *Legislation Act 2001*, section 47 (5), so as the published version of the ACT appendices that accompany the published version of BCA 2010, and that are relied on by the determination, do not have to be notified on the ACT legislation register.
>
> The building code is subject to copyright, making it inappropriate to notify on the legislation register. BCA 2010 including accompanying published State and Territory appendices are available on the ABCB web site at www.abcb.gov.au.
>
> **Section 6** is to make the community aware of how they can freely access the building code and its appendices, considering that access to the code is generally otherwise by paid purchase or subscription.

While it is not ideal that subsection 47(5) of the Legislation Act is routinely disapplied, the Committee notes both that an explanation has been provided in this particular case and that steps have been taken to make the Building Code available to the general public.

This comment does not require a response by the Minister.

Positive comment

Disallowable Instrument DI2010-267 being the Surveyors (Surveyor-General) Practice Directions 2010 (No. 2) made under section 55 of the *Surveyors Act 2007* **revokes DI2010-40 and establishes the Surveyors (Surveyor-General) Practice Directions 2010 (No. 2).**

The Committee notes that this instrument revokes and re-makes an earlier instrument - DI2010-40 - made on 3 March 2010. The Committee notes that the Explanatory Statement provides the following explanation of the amendments made by this instrument to the previous instrument:

1. Direction 11 amended to require identification surveys to show easements when relevant. This has been standard practice for many years however the practice has not be reflected in the practice directions.
2. Direction 14 – Supervision has been updated with further detail and in line with recent changes made in NSW. The majority of the additional detail is provided in Schedule 4.
3. Direction 65 amended to ensure that all deposited plans and unit plans are signed by hand by the surveyor and makes it clear that electronic facsimile signatures are not acceptable.
4. Direction 67 is new and provides instruction on community title sub-divisions.

5. Directions 68-76 provide instruction to surveyor in relation to the preparation of Unit Plans. These directions are consistent with recent changes to the Unit Titles Act 2001 and the Unit Title regulations. They replace an old document titled Standards and Specifications for Unit Plans.
6. Examples of Unit Plans have been added as Schedule 3.
7. The previous Schedule 2, a comparison between the old 2008 directions and the 2010 directions, has been deleted as it referred to a document now over two years old.

The Committee notes that it commented on the previous instrument in its *Scrutiny Report No 23* of the *7th Assembly*. The Committee notes with approval that the issue identified in relation to the earlier instrument - the lack of an indication as to whether the Survey Practice Advisory Committee had been consulted, as required by subsection 55(2) of the *Surveyors Act 2007* - has been addressed in the Explanatory Statement for this instrument.

This comment does not require a response from the Minister.

Is this appointment valid?

Disallowable Instrument DI2010-271 being the Electoral Commission (Member) Appointment 2010 made under section 12 of the *Electoral Act 1992* **appoints a specified person as a member of the ACT Electoral Commission.**

The Committee notes that this instrument appoints a specified person as a member of the ACT Electoral Commission. While (as the instrument notes) the appointment is made under section 12 of the *Electoral Act 1992*, the Committee notes that section 12A of the Electoral Act also applies to the appointment. It provides:

12A Eligibility for appointment as member

The Executive must not appoint a person as a member if the person—

(a) is or has, in the 10 years immediately before the day of the proposed appointment, been a member of—

(i) the Legislative Assembly; or

(ii) the Parliament of the Commonwealth; or

(iii) the legislature of a State or another Territory; or

(b) is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—

(i) a registered party; or

(ii) a political party registered under a law of the Commonwealth, a State or another Territory; or

(iii) a political party.

As there is no indication in the Explanatory Statement for this instrument in relation to the matters mentioned in section 12A, the Committee (and the Legislative Assembly) must assume that there is no issue with the section 12A limitations in the case of this appointment. It would a reasonable assumption that the Minister would not appoint someone unless they met the formal requirements for appointment. This assumption may be strengthened by the fact that (as the Explanatory Statement for the instrument states) various entities have been consulted in relation to the appointment. As the Committee has previously observed, however, it would assist the Committee (and the Legislative Assembly) if all instruments of

appointment expressly addressed all formal requirements for the making of an appointment. As the Committee has also observed, this would not seem to be an onerous requirement.

This comment does not require a response from the Minister.

Correction of error

Disallowable Instrument DI2010-276 being the Liquor (Fees) Amendment Determination 2010 (No. 1) made under section 227 of the *Liquor Act 2010* **amends DI2010-273 to correct a typographical error in Schedule 1, item 2, column 5.**

The Committee notes that this instrument amends DI2010-273, made on 19 October 2010 and commented on in the Committee's previous report (*Scrutiny Report No 29* of the *7th Assembly*). The Committee notes that the Explanatory Statement for the instrument states:

> The amendment substitutes the amount of $14,661 with the amount of $13,661, which is the fee amount payable for a liquor licence trading to 4am with an occupancy loading of greater than 80 people, where the annual liquor purchase value for the previous financial year was greater than $100,000.

This comment does not require a response from the Minister.

Subordinate Laws—Comment

The Committee has examined the following subordinate laws and offers the following comments on them:

"Henry VIII" clause

Subordinate Law SL2010-39 being the Health Practitioner Regulation National Law (ACT) (Transitional Provisions) Regulation 2010 (No. 2) made under the *Health Practitioner Regulation National Law (ACT) Act 2010* **corrects an oversight with amendments to the *Health Act 1993* to ensure that a pharmacist has direct, personal control of the operation of a community pharmacist for the protection of the community.**

The Committee notes that this subordinate law, in effect, amends the operation of the *Health Act 1993*, in the sense that it operates, in effect, to insert a new section 12A into the Health Act. The source of the power to do so is contained in section 13 of the *Health Practitioner Regulation National Law (ACT) Act 2010* (incorrectly referred to in the Explanatory Statement for this subordinate law as the "*Health Practitioner Regulation National Law (ACT) 2010*"), which provides:

> **13 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
>
> (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
>
> (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

Section 3 of this subordinate law provides:

3 Modification of Act, pt 3—Act, s 13 (2)

The [Health] Act, part 3 applies as if the following section were inserted in division 3.1:

'12A Modification—Health Act 1993

(1) The *Health Act 1993* is modified as set out in the *Health Practitioner Regulation National Law (ACT) (Transitional Provisions) Regulation 2010 (No 2)*, schedule 1.

(2) This section expires on the day the *Health Practitioner Regulation* National Law (ACT) (Transitional Provisions) Regulation 2010 (No 2) expires.'.

The substantive amendment made by this subordinate law (an amendment to correct an oversight in relation to the ownership of pharmacies) is then made by Schedule 1 of this subordinate law, which (in effect) inserts a new section 129A into the Health Act.

Leaving aside the relatively complicated process by which this amendment is achieved, the Committee notes that this subordinate law relies on a "Henry VIII" clause, in the sense that the empowering provision (section 13 of the Health Act) allows for the amendment (though, technically, this is a "modification, rather than an amendment as such) of primary legislation by subordinate legislation. The Committee notes, however, that this process has been explicitly authorised by the Legislative Assembly, in enacting section 13 of the Health Act. The Committee also notes that the relevant amendment also has a limited effect, in that this subordinate law is expressed to expire on 1 July 2012.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Disability, Housing and Community Services, dated 20 October 2010, in relation to comments made in Scrutiny Report 27 concerning the Working with Vulnerable People (Background Checking) Bill 2010.
- The Acting Minister for Transport, dated 28 October 2010, in relation to comments made in:
  - Scrutiny Report 24 concerning Subordinate Law SL2010-18, being the Road Transport (General) Amendment Regulation 2010 (No. 1); and
  - Scrutiny Report 25 concerning the Road Transport (Drink Driving) Legislation Amendment Bill 2010.
- The Chief Minister, dated 3 November 2010, in relation to comments made in:
  - Scrutiny Report 12 concerning Disallowable Instrument DI2009-185, being the Public Sector Management Amendment Standards 2009 (No. 7); and
  - Scrutiny Report 29 concerning Disallowable Instrument DI2010-206, being the Public Sector Management Amendment Standards 2010 (No. 5).

The Committee wishes to thank the Chief Minister, the Minister for Disability, Housing and Community Services and the Acting Minister for Transport for their helpful responses.

PRIVATE MEMBER'S RESPONSE

The Committee has received a response from Ms Meredith Hunter, dated 9 November 2010, in relation to comments made in Scrutiny Report 28 concerning the Gaming Machine (Problem Gaming Assistance) Bill 2010.

The Committee wishes to thank Ms Hunter for her response.

Vicki Dunne, MLA
Chair

November 2010

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

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008
Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009
Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009
Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Report 10, dated 10 August 2009
Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Report 11, dated 24 August 2009
Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

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

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

Report 19, dated 22 February 2010
Education (Suspensions) Amendment Bill 2010 (PMB)

Bills/Subordinate Legislation

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

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010

Report 27, dated 20 September 2010
Children and Young People (Death Review) Amendment Bill 2010 (PMB)

Report 28, dated 18 October 2010
Disallowable Instrument DI2010-191 - Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2010

Report 29, dated 25 October 2010
Disallowable Instrument DI2010-196 - Taxation Administration (Amounts Payable—Land Rent) Determination 2010 (No. 1)
Disallowable Instrument DI2010-202 - Road Transport (Public Passenger Services) (Minimum Service Standards—Taxi Network) Approval 2010 (No. 1)
Disallowable Instrument DI2010-210 - Work Safety Council (Member) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-211 - Work Safety Council (Employee Representative) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-212 - Work Safety Council (Employee Representative) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-213 - Work Safety Council (Employee Representative) Appointment 2010 (No. 3)
Disallowable Instrument DI2010-214 - Work Safety Council (Employee Representative) Appointment 2010 (No. 4)
Disallowable Instrument DI2010-215 - Work Safety Council (Acting Employee Representative) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-216 - Work Safety Council (Acting Employee Representative) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-217 - Work Safety Council (Employer Representative) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-218 - Work Safety Council (Employer Representative) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-219 - Work Safety Council (Employer Representative) Appointment 2010 (No. 3)
Disallowable Instrument DI2010-220 - Work Safety Council (Acting Employer Representative) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-221 - Work Safety Council (Acting Employer Representative) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-222 - Work Safety Council (Member) Appointment 2010 (No. 2)

Bills/Subordinate Legislation

Disallowable Instrument DI2010-223 - Work Safety Council (Member) Appointment 2010 (No. 3)
Disallowable Instrument DI2010-224 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 8)
Disallowable Instrument DI2010-241 - Work Safety (National Standard for Occupational Noise) Code of Practice 2010
Disallowable Instrument DI2010-242 - Work Safety (National Code of Practice for Noise Management and Protection of Hearing at Work) Code of Practice 2010
Disallowable Instrument DI2010-248 - Fisheries Prohibition and Declaration 2010 (No. 1)
Disallowable Instrument DI2010-265 - Plant Diseases (Phylloxera) Prohibition 2010 (No. 1)
Disallowable Instrument DI2010-273 - Liquor (Fees) Determination 2010 (No. 1)
Subordinate Law SL2010-40 - Liquor Regulation 2010

Joy Burch MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR WOMEN

MEMBER FOR BRINDABELLA

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No.27 of 20 September 2010. I offer the following response to the Committee's comment on the Working with Vulnerable People (Background checking) Bill 2010 (the Bill).

The need for a full HRA section 28 justification of limitations to HRA rights

The Committee has commented on the value of an analysis of whether the Bill engages rights under the *Human Rights Act 2004* and where any limitations on rights are justifiable under subsection 28(2) of the Act.

While I will address the specific matters raised by the Committee concerning rights engaged by the Bill as part of this response, I will also revise the explanatory statement to the Bill to include a provision by provision analysis.

A revised explanatory statement, also incorporating changes brought about due to amendments made in response to the Committee's recommendations, will be tabled prior to debate of the Bill in December 2010.

The rights enhancement dimension of the scheme

The Committee identifies that the Bill will enhance and limit certain rights of people in the ACT. In a general sense, certain rights of vulnerable people will be enhanced while certain rights of people to whom background checking will apply may be limited.

I appreciate the Committee's commendation for the contribution the Bill seeks to make in protecting vulnerable people in the ACT. The Committee notes that the Bill will enhance several rights including:

- Right to protection needed by the child because of being a child (HRA subsection 11(2);
- Right to liberty and security (HRA 18(1)); and
- Right to equal and effective protection against discrimination on any ground (HRA subsection 9(3).

The Committee also notes that the provisions of *United Nations Convention on the Rights of the Child* reinforce the State's positive obligation to protect the needs of our children through appropriate legal protection.

The protection of the rights of children and vulnerable adults in the ACT is a legitimate objective and pressing social need. The ACT Government considers that the creation of a checking system for people who work with vulnerable people, with appropriate safeguards, is a proportionate response under s28 of the *Human Rights Act 2004.*

My comments concerning whether other rights engaged by the checking system are subject to reasonable limits are predicated on this position.

The nature and extent of the rights to which limitations apply have been identified by the Committee. In the following sections of this response, I provide specific comment on the importance of the limitations, the relationship between the limitation and its purpose, as well as an examination of any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (where applicable).

The rights to privacy and reputation: HRA section 12

The Committee notes that the Bill will place a limit on the right to privacy and reputation of individuals through the collection of personal information and the displacement of legal safeguards of privacy. Explanation is sought concerning whether there are "*less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*".

The objective of the Bill is to protect vulnerable people by establishing minimum and compulsory background checking and risk assessment requirements on people working with vulnerable people.

The establishment of a statutory checking system is the least restrictive means reasonably able to achieve this objective. The alternative would be a continuation of the current practice of individual employers conducting background checks and risk assessments. Under this scenario, personal information concerning individuals is duplicated and held by a plethora of individual employers, risk assessment procedures are informal and inconsistent, and there are no formal avenues of appeal or review.

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The Bill will improve the robustness and consistency of the risk assessment process while at the same time limiting privacy impacts for individuals by holding personal information in a statutory repository subject to the protections established under the *Privacy Act 1988*. The Bill includes specific safeguards to limit the impacts on the rights of applicants by requiring consent from the applicant, providing a relevance test for information collected, making the risk assessment guidelines publically available, allowing applicants to supply additional information in support of their application, requiring that reasons for decisions be communicated to applicants and enshrining rights of reply, review and appeal of important decisions.

The purpose of collecting personal information is to facilitate the risk assessment process which inherently relies upon the availability of information upon which to make a determination about the risk of harm posed by a particular applicant. There is a general view that better decisions can be made in light of a greater range of information. This is of particular importance when making decisions that may affect the safety of vulnerable people as well as the livelihood of applicants.

A critical issue for compatibility is that decisions in relation to recruitment and employment must rely on the "inherent requirements of a particular job". This requirement is reflected in Article 1(2) of ILO Convention No 111 (*Discrimination and (Employment and Occupation) Convention 1958*) (ILO 111). ILO 111 generally prohibits discrimination in recruitment and employment. Article 1(2) provides that a distinction, exclusion or preference in respect of a job is not discrimination if it is based on the inherent requirements of the job.

Convention No 111 is scheduled to the *Human Rights and Equal Opportunity Act 1986* and that the "inherent requirement" exception in Article 1(2) is reflected in the *Disability Discrimination Act 1992* (Cwth), and *Age Discrimination Act 2004* (Cwth) and, in effect, the provisions of the *Discrimination Act 1991.*

The Human Rights and Equal Opportunity Commission publication '*On the Record: guidelines for the prevention of discrimination in employment on the basis of criminal record*', makes the point that:

- "The more information available to the employer, the greater the likelihood that an employer can exercise reasonable judgment in assessing the connection between the criminal record and the inherent requirements of the job".

Information of relevance to making a risk assessment may be held by various entities including government agencies, private organisations or individuals. With the consent of the applicant (s16 (2) (a)) the commissioner will seek to acquire information that may assist in the process of risk assessment (including information on spent convictions and non-conviction information – see sections to follow). It is important that the commissioner can access a broad range of information so that both 'risk factors' (behaviours or circumstances that indicate a risk) and 'mitigating factors' (behaviours or circumstances that mitigate risk) may be considered in making a balanced determination.

While subclause 47 (2) of the Bill enables the commissioner to request information from any entity, this provision does not compel entities to provide information in response to such a request. There is no recourse for the commissioner to take action if a request is refused.

The Bill limits privacy impacts on applicants by specifying the types of criminal offences that are relevant for risk assessment (clause 24). This provision effectively prevents the consideration of other types of criminal history information that may be inadvertently collected by the commissioner. Relevance tests for other types of information will also be incorporated into the risk assessment guidelines provided for at clause 25.

The Committee notes that the scheme is expected to apply to around 12% of people in the Territory (or around 42,000 people). The primary type of information that will be sought by the commissioner will be a National Criminal History Report. Based on advice from the Australian Federal Police it is expected that around 85% of applicants will have no criminal history. In the majority of these cases it is likely that the information held by the commissioner will be the identifying information supplied on the application form. The remaining 15% of applicants equate to around 1.8% of the total population of the Territory.

Information obtained by the commissioner will be held in accordance with the *Privacy Act 1988.* The ACT Government has made a commitment for a privacy audit to be undertaken by the Office of the Privacy Commissioner before the commencement of the checking system.

On balance, the limitations on the right to privacy for an employee or volunteer under HRA s12 are reasonable and proportionate given that the centralised handling of personal information otherwise available to individual employers will reduce the risk of a privacy breach. The Bill will at the same time improve the procedural fairness and consistency of checking outcomes for applicants and the protection of vulnerable people from discrimination or deprivation of their liberty or security.

Definition of Vulnerable Person

The Committee asks whether or not the Bill could have adopted a less comprehensive definition of the concept of "vulnerable person".

The definition of vulnerable adult encompasses both 'children' and 'vulnerable adults'. The Bill refers to the definition of child under the *Legislation Act 2001*. The crux of the Committee's question relates to the definition of 'vulnerable adult'.

The definition of vulnerable adult relates to an adult who is disadvantaged and accessing a regulated activity in relation to the disadvantage. In this respect, vulnerability can be considered 'contextual' in that a person is only considered vulnerable upon the acceptance or use of a regulated service.

The community discussion paper released in August 2009 canvassed 11 definitions of vulnerable person or vulnerable adult in use in other Australian jurisdictions or internationally. Analysis revealed that there are two basic approaches.

The first is to list broad categories of people who might generally be considered to be vulnerable such as those listed under the Queensland Department of Justice and Attorney-General *Vulnerable People Policy* or the Northern Territory *Criminal Records (Spent Convictions) Act 2002*. Examples include disabled, mentally ill, indigenous people or frail aged.

Consultations with the ACT Human Rights Commission and community representative groups indicated that this style of definition was likely to be considered patronising or offensive to some people in the ACT – a position later confirmed during broader consultations. Many people do not consider themselves to be vulnerable because they are physically disabled or of a particular cultural group. It is the need of assistance that renders a person vulnerable.

This comprehensive style of definition would also be broadly applicable outside the intended purpose of the Bill. It was suggested during the consultation phase that being labelled as a vulnerable adult could create a power imbalance that might have other implications for the vulnerable person.

The alternative option was to condition vulnerability on the receipt of certain social services that are associated with alleviating disadvantage. This definition is less comprehensive because it is contextual and requires that two conditions be met (i.e. a person must be disadvantaged and in receipt of a specific regulated service). This type of definition has the advantage of establishing a basis for the determination of the types of services or activities that might attract background checking.

I consider the Bill refers to the best available policy option. People will not be considered vulnerable at all times. Rather, they are considered vulnerable at the time of receiving a service provided as part of a regulated activity.

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Regulated Activities

The Committee has noted the comments of the Office of the Privacy Commissioner relating to the breadth of "regulated activities".

The objective of the Bill is to protect vulnerable people and the collection of personal information is necessary for conducting risk assessments.

While there is a relationship between the scope of regulated activities and the collection of personal information, regulated activities are included because of perceived risks to vulnerable people, not for the purpose of collecting a greater volume of personal information.

To promote national consistency the list of regulated activities for people working with children was developed with reference to the activities that currently attract checking in other Australian jurisdictions.

The summary report *Addressing Disadvantage in the ACT – Mapping of ACT Government Funded Services for the Disadvantaged* (2003) was used as the primary basis for the development of a list of regulated activities for people working with vulnerable adults.

The report was produced by the ACT Chief Minister's Department and identifies and categorises government, government-funded and non-government services provided to disadvantaged people in the ACT during 2001-02. As part of the research, the ACT Council of Social Service (ACTCOSS) was commissioned to identify non government organisations that provide services for disadvantaged people and those in poverty that do not receive ACT Government funding.

The scope of regulated activities was further refined before and after the public consultation process. Some categories were removed on the basis of rights issues (e.g. services provided to Aboriginal and Torres Strait Islander people) while some new categories were included (e.g. services provided to migrants and refugees).

Specifically defining the range of regulated activities is the least restrictive means reasonably able to limit privacy impacts. If regulated activities were not specified on the basis of objective research and refined through community consultation, all services provided to people experiencing disadvantage would be included in the checking system. This would result in more people being checked and a larger volume of personal information would be collected.

Given the extensive research and public consultation on this matter, I consider that the current range of regulated activities is appropriate at this time.

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Spent Convictions

The Committee notes the comments from the Office of the Privacy Commissioner concerning the undesirability of displacing the scheme under a spent convictions scheme.

The Committee has acknowledged that the protection of vulnerable people is an important public interest objective. The collection of personal information is a necessary part of conducting fair and balanced risk assessments for people working with vulnerable people as required under the Bill.

The consideration of longer term patterns of behaviour is of particular relevance when determining whether or not a person may pose a risk of harm to vulnerable people. There is broad agreement across Australian jurisdictions conducting 'working with children checks' that the disclosure of spent convictions is necessary for reasonable judgement to be exercised in this regard.

I draw to the attention of the Committee that s19 of the *Spent Convictions Act 2000* establishes exemptions from the disclosure provision at s16 for people working with certain vulnerable people in the ACT including children, the disabled and the elderly. This exemption is an acknowledgement of the importance of considering all available information when vetting people working with the most vulnerable groups in the ACT community.

Spent conviction information made available to the screening unit for use in the risk assessment process will not be disclosed to individual employers or the public.

Are there protections that might be added to the scheme?

I agree with the Committee's suggestion that the inclusion of a facility for a holder of the registration to surrender their registration would not damage the operation of the scheme and I will amend the Bill accordingly.

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

Some administrative discretions that are not conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis

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

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While the powers cited at subclauses 31(1), 35(1), 37(1), paragraph 39(3)(b)(ii), subclauses 47(1), 51(2), 51(3), and paragraph 53(1)(c) do not include a specific reference to "reasonable grounds", each of these decisions are based on an equivalent basis. In each case, the commissioner must have regard for the risk assessment guidelines which are provided for at clause 25 and will constitute statutory criteria for decision making. The guidelines will be an instrument under the primary legislation and the contents of the guidelines are provided for at clauses 26, 27, 28 and 29.

In contrast, the guidelines do not apply to the decisions at subclause 34(2), 40(2), 48(1), and paragraph 51(1)(c) and hence these decisions are explicitly conditioned upon the commissioner acting upon "reasonable grounds".

While the risk assessment guidelines will be available to the Assembly upon notification of the instrument, I intend to make draft guidelines available for consideration prior to debate of the Bill.

A limitation on the scope of the reconsideration powers

The Committee queries whether applicants ought to be permitted to seek a reconsideration of certain decisions of the commissioner on a full merits review basis.

In the United Kingdom, the right to fair trial is said to be satisfied in relation to an administrative decision if it is capable of being subject to judicial review, provided the decision is guided by statutory criteria, made by a qualified decision maker or tribunal, and would be justiciable by a judicial review court. In the absence of these criteria, the right has been said to require merits review.

Decisions of the commissioner will generally be made in accordance with the risk assessment guidelines and will be capable of being subject to a judicial review. However, I consider that broadening the basis upon which applicants may seek a review of a decision is nonetheless a reasonable proposition and I will amend clause 32 and clause 33 accordingly.

Non-conviction information and the right to privacy (HRA section 12) and presumption of innocence (HRA subsection 22(1))

The Committee recommends that the Minister advise the Assembly why it should not be considered that provisions of the Bill permitting or requiring the gathering and consideration of information about criminal charges resolved in an applicant's favour are an arbitrary interference with an applicant's privacy; and why they should not be viewed as incompatible with the HRA right of those applicants to be presumed innocent until proven guilty.

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Section 22(1) of the HRA provides that:

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

Section 22(1) is based on, and is identical to, Article 17(2) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory.

I am advised that the right contained in subsection 22(1) of the HRA is a procedural right which is only applicable during criminal proceedings, and, as a general rule, has no application to public authorities in the course of the administrative decisions they make.

The purpose of the Bill is to minimise the risk of harm to vulnerable people. Risk assessment describes the process of considering available information and making a determination about the risk of harm to vulnerable people posed by a particular applicant. The process of risk assessment does not involve a determination of guilt or innocence.

The critical issue, with respect to the reasonable limits test or compatibility is that disclosure of non-conviction information must be in accordance with the law, or authorised by clear and precise statutory provisions with appropriate legal safeguards, and must not be arbitrary or lacking in reasonableness or foreseeability in respect of its application.

The Bill and associated risk assessment guidelines to be made as a notifable instrument constitutes a statutory framework, with appropriate legal safeguards, under which non-conviction information may be disclosed. The Bill provides for a high degree of natural justice and procedural fairness through the inclusion of specific safeguards that require consent from the applicant, provide for a relevance test for information collected, make the risk assessment guidelines publically available, allow applicants to supply additional information in support of their application, require that reasons for decisions be communicated to applicants and enshrine rights of reply, review and appeal of important decisions.

The consideration of non-conviction information is an important aspect of the Bill. Conviction rates for some relevant offences are low. According to the Australian Institute for Criminology only 10% of sexual assaults reported to police in 2006 resulted in a guilty verdict. Conviction rates are even lower for certain types of sexual assault, such as rape, in the order of between 1 – 4%.

While non-conviction information cannot be considered to have the same weight as conviction information it is nonetheless useful in establishing likely patterns of behaviour and contributing to a considered risk assessment. For instance, it might be reasonable to conclude that a person who has been convicted of a single minor sexual offence may in fact be a greater risk if the person has also been charged on separate occasions with more serious sexual offences that have resulted in acquittals.

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In recognition of the value of non-conviction information in the conducting of risk assessments all jurisdictions with the exception of Victoria have agreed to exchange non-conviction information via the COAG project on the *Exchange of Criminal History Information for People Working with Children*. Victoria has cited human rights concerns about the use of this information. The ACT Government policy is that, given the public interest in protecting vulnerable people, non-conviction information may be used in the ACT subject to certain safeguards relating to the consideration of such information. To this end the Bill includes a provision at clause 23 which defines non-conviction information and clause 28 mandates certain additional considerations that must be taken into account by the commissioner when considering this information.

My previous comments on the use of spent convictions are also relevant to the comments of the Committee in this section.

The strict liability offences and the presumption of innocence (HRA subsection 22(1))

The Committee considers that there is a serious question as to whether the strict liability offence provisions that provide for imprisonment as a punishment are compatible with the Human Rights Act. The Committee draws this matter to the attention of the Assembly and recommends that the Minister address this issue.

The proposed penalties have been set at a level that a person will regard as a sanction rather than a mere expense for breaching the provision. However, from a practical perspective, I consider that would be unlikely that a person would accept an offer of a term of imprisonment in preference to contesting an alleged offence. For this reason the imposition of a term of imprisonment for a strict liability offence is unlikely to be an effective deterrent.

I also note the Committee's concerns in relation to the human rights aspect of including a term of imprisonment as part of a penalty attached to a strict liability offence and I will amend the Bill to remove this element of the penalty.

Does the Bill inappropriately delegate legislative power? Does the Bill subject the exercise of legislative power to insufficient scrutiny?

The Committee raises two issues relating to whether or not the commissioner's power to make guidelines is appropriate and whether or not a 'notifiable' instrument is insufficiently subject to legislative scrutiny.

The Committee recognises that the process of risk assessment is of critical significance to the integrity of the scheme. The importance of establishing robust risk assessment guidelines is outlined in the *National Framework for Creating Child Safe Environments* which contains a schedule on *An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*. The schedule states that:

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- "*Responsible risk assessment seeks to ensure decision-making that is ethical, evidence-based and defensible. This requires following a logical and systematic process*".

The commissioner's power to make risk assessment guidelines will be a central tenet of ensuring that discretionary risk assessment decisions are made in accordance with a logical and systematic process under the Bill.

All other jurisdictions in which working with children checks are in place have developed internal risk assessment guidelines. Primary legislation requires only that the decision maker must determine whether or not an applicant poses a risk of harm to children, however, it is accepted that the complicated nature of making these assessments relies to a large degree on following a logical and systematic process. While certain aspects of the guidelines are made public (e.g. the list of criminal offences taken into account as part of the risk assessment process) the actual guidelines are an internal working document and are not included in subordinate legislation or otherwise made publically available.

Given the critical significance of the risk assessment guidelines, I consider that it is in the public interest for the guidelines to be publically available as a notifiable instrument under the primary legislation.

Public consultations on risk assessment guidelines for the ACT commenced on 29 September 2010 with a roundtable of community representatives and statutory office holders. While proposed guidelines were developed with strong reference to guidelines already in use in other Australian jurisdictions, there are unique issues for the ACT relating to the inclusion of vulnerable adults as part of the checking system.

Once established, risk assessment guidelines must be continually updated to reflect emerging research into the factors indicating a risk of harm to vulnerable people and require a degree of flexibility for this reason. The National Operators Forum, comprising representatives from all Australian jurisdictions with working with children checks, meets annually to discuss issues relating to the implications of new research. As it is believed that persons excluded from child related work in one jurisdiction may gravitate to other jurisdictions with less stringent screening provisions, there is a need to ensure some level of consistency in the risk assessment process.

I consider that it is more appropriate for risk assessment guidelines to be developed and continually refined by the commissioner in consultation with the ACT community and via the National Operators Forum. If the guidelines were to be disallowable by the Assembly, this would increase the potential for the guidelines to diverge significantly from the prevailing community of practice and be subject to political, rather than academic, considerations.

To guard against wholesale divergence from the intended purpose of the guidelines, the Bill enshrines certain high level principles concerning the minimum content of the risk assessment guidelines. If it becomes necessary for the guidelines to operate outside of these parameters, legislative amendments will be required that will be subject to legislative scrutiny.

Yours sincerely

Joy Burch MLA
Minister for Disability, Housing and Community Services

October 2010

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Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

The Government notes that responses are listed as outstanding for Committee Report No. 24, in relation to Subordinate Law SL 2010-18 *Road Transport (General) Amendment Regulation 2010 (No.1)* and Committee Report No. 25, in relation to the Road Transport (Drink Driving) Legislation Amendment Bill 2010. I am responding in my capacity as Acting Minister for Transport, and apologise for the delay.

In relation to Report No. 24, I can advise the Committee that the Road Transport Authority has received no adverse comments from its clients about the operation of the new provision since it came into effect. The Government believes that had it adopted a more expensive notification and receipt system that resulted in cost increases for clients, then complaints would have been forthcoming.

The Committee may be interested in the approach to service of similar notices that has been taken in Victoria. The Committee will be aware that Victoria is also a jurisdiction with a human rights framework. Section 25 (4A) of the Victorian *Road Safety Act 1986* deals with the service of demerit point notices and provides as follows:

> "(4A) A demerit point option notice or a notice under subsection (3B)(c) sent by post addressed to the holder of the licence or permit at his or her current address as shown in any record maintained under this Act must be taken to have been served on that person 14 days after the date of issue of the notice unless at any time after that period of 14 days the Corporation is satisfied that the notice has not been served on that person."

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The Corporation referred to in that provision is the Roads Corporation. The Victorian provision effectively leaves it solely to the Victorian Roads Corporation to determine whether a notice has been served on a client.

In relation to Report No. 25, the Government thanks the Committee for its comments and advises that due to the withdrawal of the Bill from the Assembly it is not proposed to provide a detailed response at this stage, as it is anticipated that the Committee will wish to review the Bill when it is reintroduced. However, the Government has noted the Committee's preference relating to the format of the Explanatory Statement for the Bill and can advise that the Explanatory Statement for the replacement Bill will follow the more traditional 'clause by clause' format.

Finally, as noted above the Government intends to introduce a revised Bill to amend the *Road Transport (Alcohol and Drugs) Act 1977* in October 2010. The Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2010 will apply to the Act as amended by the uncommenced *Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Act 2010*. To facilitate the Committee's consideration of the Bill, I have asked Parliamentary Counsel to prepare an unofficial future consolidation of the Act, a copy of which is enclosed.

I trust the above information assists the Committee.

Yours sincerely

Simon Corbell MLA
Acting Minister for Transport

28.10.10

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety—Scrutiny of Bills
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Dear Chair Vicki

Thank you for the Standing Committee on Justice and Community Safety—Scrutiny of Bill's comments in the Committee's Scrutiny Report of 25 October 2010 about the definition of 'remuneration' in the Public Sector Management Amendment Standards 2010 (No.5) (the 2010 Standards).

The Committee has requested advice on the intended effect of clause 4 of the 2010 Standards which amends the definition of 'remuneration'. Please be advised that it was not intended for clause 4 to omit everything after the definition of 'remuneration'. The reference to 'remuneration' in the heading of clause 4—'Section 29 Interpretation—Pt 3.1 *remuneration'* intended to confine the amendment to the definition of the specified word 'remuneration' and not any other definition under the same section.

The Committee has also noted an outstanding response to the Committee's comment about a superfluous 'the' in the commencement clause of the Public Sector Management Amendment Standards 2009 (No.7). The Committee's comment is noted. Please be advised that the superfluous 'the' was a technical oversight.

Yours sincerely

Jon Stanhope MLA
Chief Minister

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MEMBER FOR GINNINDERRA

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Dear Mrs Dunne,

I refer to the Scrutiny of Bills Report No28 dated 18 October 2010 in relation to the Committee's comments on the *Gaming Machine (Problem Gaming Assistance) Bill 2010*. The committee raised a concern that the Bill inappropriately delegates legislative power.

The intention behind the provision is to allow the Minister to respond to any changes in demand for, or any other identified shortcomings in, the provision of problem gambling services. Given that the scheme is being established by the Legislative Assembly in response to an identified harm caused by the licensed activity it was felt appropriate to then allow the Minister to maintain the integrity of the scheme and ensure it is delivering the services and addressing the problem identified by the Legislative Assembly.

In effect the required payment by a licensee is a tax on the regulated activity and it is acknowledged that there should be a limitation on the delegation of a power to levy a tax. In addition to the factors identified by the Committee that mitigate the concern, the defined purpose for which the funds can be used creates a substantive distinction from a general taxation provision.

The licensee payments are not paid into the Territory Banking Account, rather directly into the problem gambling assistance fund. Payments out of the fund can only be made for a defined purpose (see new section 163B) by the Commissioner for Gambling and Racing.

Given that this is not a general revenue raising measure, and that all money levied can only be spent on addressing a significant and well recognised social harm directly caused by the licensed activity this is an instance where it is reasonable to provide that the Minister may increase the licensee liability; subject to the oversight of the Legislative Assembly.

Yours sincerely,

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9 November 2010

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