



Legislative Assembly for the ACT

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

## Scrutiny Report

4 FEBRUARY 2008

Report 50

## **TERMS OF REFERENCE**

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

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - (i) is in accord with the general objects of the Act under which it is made;
  - (ii) unduly trespasses on rights previously established by law;
  - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
  - (i) unduly trespass on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

### ***Human Rights Act 2004***

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

## **MEMBERS OF THE COMMITTEE**

**Mr Zed Seselja, MLA (Chair)  
Ms Karin MacDonald, MLA (Deputy Chair)  
Dr Deb Foskey, MLA**

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

## **ROLE OF THE COMMITTEE**

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

## BILLS

### Bills—No comment

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

#### **ANIMAL DISEASES AMENDMENT BILL 2007**

This Bill would amend the *Animal Diseases Act 2005* to permit the Director of Animal Hygiene to delegate his powers to members of the Australian Federal Police and to permit them to carry out functions of authorised people under the Act.

#### **PAYROLL TAX AMENDMENT BILL 2007**

This Bill would amend the *Payroll Tax Act 1987* and make consequential amendments to the Taxation Administration Act 1999 to the general object of achieving payroll tax administration (excluding rates and thresholds) more consistent across all States and Territories.

#### **UNIT TITLES AMENDMENT BILL 2007**

This Bill would amend the *Unit Titles Act 2001* to allow for the registration of new units plans with minor encroachments over an adjoining road or public place.

### Bills—Comment

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

#### **CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2007**

This Bill would amend the *Children and Young People Act 1999* to create an offence in relation to the tattooing and body piercing of children and young people.

#### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Strict liability offences**

Proposed section 388 of the *Children and Young People Act 1999* (see clause 5) would create a strict liability offence and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

The Explanatory Statement makes no mention of the HRA issues raised by the provision for a strict liability offence, nor does it provide any justification for the imposition of strict liability.

On the face of it, the offences might be classified as “regulatory”, and justified under HRA section 28 on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007 (see *Scrutiny Report No. 43 of the Sixth Assembly*). That is, the Assembly might consider that this is a regulatory offence in respect of which strict liability might be justified on the bases of (1) an expectation that those who practise tattooing will acquaint themselves with the law, and (2) provision of an encouragement for them to do so.

The penalty attaching to breach of proposed section 388 is no more than 50 penalty points. This is within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

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

### **GENE TECHNOLOGY AMENDMENT BILL 2007**

This Bill would amend the *Gene Technology Act 2003* for various purposes, including the creation of new offences in relation to dealings with a genetically modified organism (GMO), and the creation of a Gene Technology Ethics and Community Consultative Committee.

#### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Strict liability offences**

The amendments proposed by clause 6 and 10 the Bill would, if enacted, create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

In respect of both clauses, there is thus an issue as to whether the level of penalty is such that what is proposed is a disproportionate response to the problem addressed by the imposition of strict liability.

#### *Clause 6 – insertion of new paragraph 33(1)(ba) into the Gene Technology Act 2003 ('the Act')*

When read with subsection 33(2) of the Act, section 33 of the Act provides for an offence of strict liability offence (except in respect of one element – this being the act of dealing with a GMO). This proposed amendment would add another element – this being the dealing with a GMO that is not specified in an emergency dealing determination, and in this respect too strict liability applies, so that it would not be necessary for the prosecution to prove that the defendant knew or was reckless about whether a GMO was so specified.

The Explanatory Statement provides a justification for the imposition of strict liability offence in these terms:

The application of strict liability to this offence is considered appropriate because any dealings with a GMO conducted in an unauthorised or unregulated manner could cause serious harm to the health and safety of people and the environment.

The Committee does not find this line of justification persuasive. It said in *Scrutiny Report No. 43* of the *Sixth Assembly*, in relation to the Building Legislation Amendment Bill 2007 that “an argument that the task of the prosecution should be made easier by removal of fault elements ... standing alone, is not a good argument to derogate from the Human Rights Act”. This general point was made more eloquently by Sachs J, of the Constitutional Court of South Africa:

the presumption of innocence ... serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and seriousness of a crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, house-

breaking, drug-smuggling, corruption...the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial cases.<sup>1</sup>

On the other hand, the Assembly might consider that this is a regulatory offence in respect of which strict liability might be justified on the bases of (1) an expectation that those who deal with GMOs will acquaint themselves with the law, and (2) provision of an encouragement for them to do so.

The penalty attaching to breach of proposed paragraph 33(1)(ba) is no more than 50 penalty points, unless it is for an aggravated offence, in which case the maximum penalty is 200 penalty points. The latter penalty is not within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence. (An offence is aggravated if the commission of the offence causes significant damage, or is likely to cause significant damage, to the health and safety of people or to the environment. The prosecution must prove intent or recklessness in relation to causation.)

*In terms of HRA compatibility, there is thus an issue* as to whether the level of penalty is such that what is proposed by clause 6 is a disproportionate response to the problem addressed by the imposition of strict liability.

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

*Clause 10 – insertion of new section 35B in the Act*

The effect of proposed section 35B is explained in the Explanatory Statement:

In order to have committed an offence under proposed new subsection 35B(1), the person must have knowledge of the conditions to which the emergency dealing determination is subject, but need not know that he or she is breaching that condition. Proposed paragraph 35B(1)(a) provides that the penalty for an aggravated offence is 200 penalty units. Proposed paragraph 35B(1)(b) provides that if it is not an aggravated offence the penalty is 50 penalty units.

The Explanatory Statement does not state a justification, but the Assembly may consider that this is also a regulatory offence. The issue in respect of penalty is the same as that arising with respect to proposed paragraph 33(1)(ba) (see above).

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

**Report under section 38 of the Human Rights Act 2004**

*Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?*

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<sup>1</sup> *S v Coetzee* (1997) 3 SA 527 at para [220]. In *R v Hansen* [2007] NZSC 7, Elias CJ put it more simply: “[s]imply making it easier to secure convictions is not a principled basis for imposing a reverse onus of proof...”.

## **Displacement of natural justice**

By clause 36, a new subsection 72(8) would provide that a procedural safeguard in section 72 of the Act should not apply in stated circumstances.

There appears to be an uncertainty as to when this displacement would occur, and clarification of what is intended by the amendment is necessary.

Section 72 of the Act requires the regulator to give written notice of a proposed suspension, cancellation or variation to the relevant licence holder. This is an important procedural safeguard. By clause 36, a new subsection 72(8) would provide that section 72 did *not* apply “to a variation of a licence if the regulator is satisfied that the variation is of minor significance or complexity”. This is open to at least two readings, either of which seems harsh. If it is read as applying to a variation “of minor ... complexity”, it could cover a variation that is quite significant but not complex. If read as applying to a variation “of ... complexity” it could again cover a variation that is quite significant but complex.

*The Committee considers that the Minister should explain how proposed subsection 72(8) is meant to operate.*

This same issue arises in respect of the amendments proposed by clauses 42 and 47.

### *Comment on Explanatory Statement*

The explanation of clause 25 repeats the explanation of clause 24. New text for clause 25 is needed.

## **GOVERNMENT TRANSPARENCY LEGISLATION AMENDMENT BILL 2007 [NO. 2]**

This Bill would (1) amend the *Financial Management Act 1996* to require the publication of the Report of the Strategic and Functional Review of the ACT Public Sector and Services prepared by Mr Michael Costello for the ACT government in relation to the functional review of the ACT budget announced by the Chief Minister on 9 November 2005; (2) amend the *Administrative Appeals Tribunal Act 1989* to require the decision-maker to take all reasonable steps to assist the tribunal to make its decision in relation to the proceeding; (3) amend the *Freedom of Information Act 1989* to remove the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption (from the duty to disclose a document under section 35 (Executive documents) and section 36 (internal working documents) of that Act; and (4) amend the *Law Officer Act 1992* to add the functions of the Attorney-General that of ensuring that litigation is started and conducted in accordance with proper standards and empowering the Attorney-General to issue model litigant guidelines.

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

Would removal of the ability of a decision-maker to issue a conclusive certificate to support a claim for under section 35 (Executive documents) and section 36 (internal working documents) of the *Freedom of Information Act 1989* enhance HRA section 16 (freedom of expression) and/or paragraph 17(a) (right to take part in the conduct of public affairs)?

### ***Freedom of expression and freedom of information***

By amendment of the *Freedom of Information Act 1989* (FOIA), the Bill would remove the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption (from the duty to disclose a document) under section 35 (Executive documents) and section 36 (internal working documents) of that Act.

A general account of FOIA and the role of a conclusive certificate in support a claim for exemption is in *Scrutiny Report No 36* of the *Sixth Assembly*, concerning the Freedom of Information Amendment Bill 2006. Only some key points are repeated here.

Section 10 of the FOI Act states that "every person has a legally enforceable right to obtain access" to documents of ministers, departments and agencies. This right does not however extend to matter in a document that is exempt from disclosure, and a number of provisions state what kinds of documents are exempt.

By subsection 35(1) of FOIA, certain kinds of "executive documents" are exempt; in particular, "a document that has been submitted to the Executive for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive"; "an official record of the Executive"; and "a document the disclosure of which would involve the disclosure of any deliberation or decision of the Executive ...". Under subsection 35(3), if the chief executive who has control of the administrative unit to which responsibility for the coordination of government administration signs a certificate certifying that a document is of a kind referred to in subsection 35(1), then that "establishes conclusively, subject to part 7 [concerning AAT review], that it is an exempt document of that kind".

By subsection 36(1) of FOIA, an "internal working document" (as defined) is exempt if its disclosure "would be contrary to the public interest". Under subsection 36(3), if the Minister signs a certificate to the effect that the disclosure of an internal working document "would be contrary to the public interest", then that establishes conclusively, subject to part 7 [concerning AAT review], that that is the case.

A decision-maker may claim exemption under either of subsection 35(1) or 36(1) even though there is no relevant conclusive certificate.

If an exemption is claimed by a decision-maker, the requester may seek review by the Administrative Appeals Tribunal (AAT), a body established by the *Administrative Appeals Tribunal Act 1989* (ACT). The AAT stands in the shoes of the decision-maker, and takes its own view – uninfluenced by the view of the agency decision-maker – as to whether the document falls within a category of exemption.

But the function of the AAT is very different where a conclusive certificate supports a claim that a document is exempt. An applicant can appeal to the AAT to seek review of a claim of exemption that is supported by a conclusive certificate, but the tribunal cannot overrule the claim. Rather, it may decide only whether there exist "reasonable grounds" for the claim. If the AAT determines that there are no reasonable grounds for the certificate, the Minister has a choice whether to maintain or revoke the certificate. If the certificate is maintained, notice must be provided to the applicant and tabled in Parliament.

It would thus enhance the right to information stated in section 10 of FOIA were there removed from FOIA the provisions for conclusive certificates to be issued to support claims exemption under either of subsection 35(1) or 36(1).

It may further be argued that removal would provide better protection to the right to freedom of expression stated in HRA section 16; (for more detail, see *Scrutiny Report No 36* of the *Sixth Assembly*). Section 16 provides:

## **16 Freedom of expression**

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Removal of provisions for conclusive certificates might also enhance the right stated in HRA paragraph 17(a):

## **17 Taking part in public life**

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

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

There are writers on international human rights law who argue that:

[f]reedom of information has been recognized not only as crucial to participatory democracy, accountability and good governance, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations by a number of international bodies, including the United Nations (UN), the Organization of American States (OAS), the Council of Europe (COE) and the Commonwealth, as well as national developments in countries around the world, amply demonstrate this: T Mendel, “Freedom of Information: An Internationally protected Human Right”.<sup>2</sup>

The Australian FOI laws have been introduced on the basis that they will enhance democratic accountability.

On the other hand, HRA section 28 in effect allows that a law may derogate from an HRA right where the limitation or restriction pursues a legitimate objective, and there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

In relation to the exemptions in subsection 35(1), it should be noted that the Australian common law has accorded great weight to maintaining the secrecy of certain kinds of government held information in the context of a claim by government that it should not be obliged to produce a document in the course of litigation. This is a context in which the courts give weight to the interests of the litigant seeking access. In the FOIA context, the interests of the requester are often less significant.

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<sup>2</sup> <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/1/cts/cts3.htm>

That disclosure of a document would prejudice the conduct of the “affairs of government at the highest level” has been recognised as a ground for a claim of immunity from production of the document in litigation: see *Sankey v Whitlam* (1978) 142 CLR 1 at 58 per Stephen J. In *Commonwealth v Northern Land Council* [1993] HCA 24 [6], a majority of the High Court accorded a high degree of protection to cabinet documents:

it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made.

Whether these lines of argument could be advanced to support use of a conclusive certificate in relation to a claim of exemption under subsection 36(1) will depend on the precise kind of internal working document in question. There may of course be other kinds of argument to support use of a conclusive certificate in this way.

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

#### **HUMAN CLONING AND EMBRYO RESEARCH AMENDMENT BILL 2007**

This Bill would amend the *Human Cloning and Embryo Research Act 2004* to mirror amendments made to Commonwealth law and thus to give effect in the Territory to a nationally consistent scheme for the regulation of activities involving the use of certain excess ART embryos, other embryos and human eggs.

#### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

A key effect would be that the *Human Cloning and Embryo Research Act 2004* (the Act) would no longer prohibit the creation, for research purposes, of embryos using techniques such as somatic cell nuclear transfer (SCNT). It would, however, continue to absolutely prohibit the development of embryos beyond 14 days and the implantation of human embryo clones in the body of a woman (cloning for the purposes of reproduction).

#### **Rights in conflict**

Assembly Members will be well aware of the amount and complexity of the debate that surrounded the enactment of the Commonwealth law, and it is beyond our capacity to even attempt a bare summary of the major elements of that debate. We do note that a Commonwealth Parliamentary Library paper attempted an overview of the ethical issues; see *Prohibition of Human Cloning for Reproduction and the Regulation of Human Research Amendment Bill 2006* (6 December 2006).<sup>3</sup>

An earlier House of Representatives report of 2001 summarised the competing considerations:

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<sup>3</sup> See <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd059.pdf> at pages 28-35 .

The Andrews Report revealed that its Standing Committee members were divided on the issue of whether the creation of embryos via the SCNT process should be permitted in Australia. It noted that a majority of the Standing Committee supported this process being legalised, primarily on the basis of the potential for such research to develop stem cell therapies to treat various diseases. A minority of the Committee were opposed to such research due to concerns about the ethics of the destruction of human embryos for research, particularly as, at that time, the potential benefits of such research were highly speculative.<sup>4</sup>

The nub of the ethical objection was stated by the Lockhart Report:<sup>5</sup>

the main objection to [embryonic stem] cell research is because of ethical concerns about the destruction of human embryos.<sup>6</sup>

The Parliamentary Library paper attempted to summarise the substance of the ethical debate:

The substance of this controversy relates to the moral *status* of the embryo. What will be destroyed when the stem cells are harvested: a plain cell mass or an early embryo? If it is an early embryo, is it already human life with the same moral status as a human being? Or does this early embryo constitute ante-nascent human life, which has not gained sufficient personality or ‘personhood’; that is, it has not yet acquired the same moral status as a born human being? And, finally, is there a moral difference between an embryo created by sperm and egg and those created by SCNT, parthenogenesis or other laboratory means?

The answers are important because *born* human life is considered to have the highest moral status that correlates with the full protection against destruction. This protection stems from concepts such as inviolable human dignity and human rights. The intentional destruction of a born human being is generally considered homicide. Thus, if it is argued that the embryo possesses the same moral status as a born human being, the logical consequence is inescapable: the destruction of this embryo equates to homicide.

If it can be reasoned that the embryo is merely a cell mass or an early embryo without the same moral status when compared to born human life, its intentional destruction would not necessarily equate to homicide. To argue in favour of the destruction of an embryo without moral status would reduce or even fully eliminate the moral or ethical dilemma.

These considerations amount to the search for a justification of why the destruction of an embryo is not homicide which is deemed by society to be the most reprehensible of all crimes. Two threshold questions underpin these considerations, including:

- *when* does life begin—to assess whether a blastocyst is in fact a new life or independent organism, and
- whether the moment in which a new life begins is also the moment in which a human being begins—that is, to assess the moral *status* of the blastocyst.

A further issue discussed in the literature is whether the *purpose* for which the embryo was created should be considered in the context of this debate.

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<sup>4</sup> Quoted at page 7 of the Parliamentary Library paper cited above.

<sup>5</sup> *Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*.

<sup>6</sup> Above, page 47.

After reviewing these questions, the paper then noted other rights in issue:

In addition to the issues discussed above, the justification debates often invoke the rights or freedoms of a particular class of stakeholders. A detailed discussion of the arguments comprising this debate would go beyond the scope of this Digest; however, some of the key aspects of these debates should be highlighted here, including:

- a woman's right to choose to donate her eggs—is this right absolute or should it be restricted to protect embryos? In addition, should it be restricted to protect women from being exploited for commercial reasons?
- the scientists' freedom of research and their entitlement to explore this avenue—can or should this freedom be legitimately restricted and if so, on what grounds?
- a person's right to optimal treatment for a disease—can the legislature deny a human being the chance of being cured from a grave illness or is there an overriding concern that society at large may face dire consequences as the result of the research?

Generally, these aspects raise issues such as the absoluteness of a right of freedom, and, if it is found not to be absolute, how far it may be restricted. This balancing exercise regularly invokes inquiries into the proportionality of a restricting measure.

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

#### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Strict liability offences**

The amendments proposed by clauses 7 and 13 the Bill would, if enacted, create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

In respect of both clauses, there is an issue as to whether the level of penalty is such that what is proposed is a disproportionate response to the problem addressed by the imposition of strict liability.

#### *Clause 7 – insertion of new section 20 in the Act*

There appear to be elements of strict liability offence in proposed section 20 of the Act. If this is so, then, given the very high maximum penalty that is provided (imprisonment for 10 years), a serious human rights issue arises.

The matter is not clear, and is best explained by reference first to proposed section 22. Section 22 would provide:

**22      Offence—using precursor cells from human embryo or human foetus to create human embryo, or developing such an embryo**

A person commits an offence if -

- (a) the person uses precursor cells taken from a human embryo or a human foetus, *intending to create* a human embryo, or *intentionally develops* an embryo so created; and
- (b) the person engages in activities mentioned in paragraph (a) without being authorised by a licence, *and the person knows or is reckless about that fact.*

Maximum penalty: imprisonment for 10 years.

The words emphasised make it clear that the prosecution must prove that the person must have a state of mind as stated in paragraph (a), and must know or be reckless about the fact that the activities mentioned in paragraph (a) were undertaken without being authorised by a licence. That is, it is not enough for the prosecution to prove that the person did not have a licence. Rather, they must prove that the defendant should have had a licence, or that they were reckless about the need to have a licence. Thus, this offence does not contain any element of strict liability offence, and there is no objection on this basis to the high penalty provided.

In contrast, proposed section 20 would provide:

**20      Offence—creating human embryo other than by fertilisation, or developing embryo**

A person commits an offence if—

- (a) the person *intentionally* creates a human embryo by a process other than the fertilisation of a human egg by a human sperm, or develops a human embryo so created; and
- (b) the creation or development of the human embryo by the person is not authorised by a licence.

Maximum penalty: imprisonment for 10 years.

Now while section 20 does not state in so many words that strict liability applies to paragraph 20(b), a comparison of it to paragraph 22(b) suggests very clearly that paragraph 20(b) does *not* require that the prosecution must prove that the defendant must have known or was reckless about the fact that the activities mentioned in paragraph (a) were undertaken without being authorised by a licence<sup>7</sup>. It would be enough for the prosecution to prove simply that the creation or development of the human embryo by the person was not authorised by a licence.

If this reading is correct, then the provision derogates from the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)). The Explanatory Statement does not advert to this issue, nor provide any statement that could be seen as a justification for the imposition of strict liability. (It does not draw attention to the different wording of the two sections under review.)

The Explanatory Statement makes no mention of the HRA issues raised by the provision for a strict liability offence, nor does it provide any justification for the imposition of strict liability.

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<sup>7</sup> The Committee is aware that section 22 of the Criminal Code provides that where a fault element is not specified, intention or recklessness (as the case may be) is the fault element for the physical elements of the offence. The Code, however, cannot control the content of later Territory legislation and it may well be that the comparison between sections 20 and 22 of the Act (as outlined above) and, indeed, a comparison between paragraph 20(b) and paragraph 20(a), leads necessarily to a conclusion that there is no fault element attaching to paragraph 20(b).

On the face of it, the offences might be classified as “regulatory”, and justified under HRA section 28 on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007 (see *Scrutiny Report No. 43 of the Sixth Assembly*). That is, the Assembly might consider that this is a regulatory offence in respect of which strict liability might be justified on the bases of (1) an expectation that those who work in the industry will acquaint themselves with the law, and (2) provision of an encouragement for them to do so.

The maximum penalty for breach of section 20 is imprisonment for 10 years. Given this very high penalty, there is a serious doubt that the imposition of strict liability could be justified under HRA section 28. This level for an offence that contains an element of strict liability may be seen as a disproportionate response to the problem addressed by the imposition of strict liability.

*The Committee has often drawn attention to HRA compatibility issues where imprisonment is a potential penalty<sup>8</sup>. The Committee considers that where imprisonment is a potential penalty, the Explanatory Statement should state a specific justification in this regard.*

There is a further problem. As noted, section 20 does not state in so many words that strict liability applies to paragraph 20(b), while this may well be its effect. There is then a doubt that a defendant charged with an offence against section 20 could seek to raise a defence based on the provisions of the *Criminal Code 2002*; in particular, the defence of mistake of fact under section 36 of the Code. Section 23 of the Code states that it is only where the law that creates an offence provides that strict liability applies to a particular physical element of the offence that the section 36 defence is available. It may not be enough that the effect of a statement of an offence is such that it imposes strict liability. It may be necessary that the provision state this in so many words.

On the other hand, in relation to section 20 a defendant could probably rely on the “common law” defences to offences of strict liability. The Committee considers this to be unsatisfactory and adding undue complexity to Territory criminal law.

*The Committee considers that the Minister should clarify what is intended in respect of the operation of section 23 of the Criminal Code so far as concerns proposed section 20.*

*Clause 7 – insertion of new section 21 in the Act, and  
Clause 13 – insertion of new sections 25A and 25B in the Act*

The same issues arise in respect of proposed section 21 of the Act (clause 7) and proposed sections 25A and 25B (see clause 13).

### **Privilege against self-incrimination**

Clause 33 proposes the insertion of a new paragraph 45(1)(g) into the Act.

*The Committee suggests that it is appropriate here to insert a note referring to sections 170 and 171 of the Legislation Act.*

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<sup>8</sup> See *Scrutiny Report No 37 of the Sixth Assembly*, concerning the Corrections Management Bill 2006; see too *Scrutiny Report No 46 of the Sixth Assembly*, concerning the Occupational Health and Safety Amendment Bill 2007

## HUMAN RIGHTS AMENDMENT BILL 2007

This Bill would amend the *Human Rights Act 2004* to clarify the interpretive rules so that a human rights consistent interpretation must prevail as far as is possible consistent with the purpose of underlying legislation; clarify the reasonable limits clause by setting out an inclusive list of factors to be considered in determining whether a limit on a right is reasonable; provide a direct right of action flowing from a duty on public authorities to comply with human rights; and expand the obligation to give notice to the Attorney-General and the Human Rights Commission to all legal proceedings in the Supreme Court in which interpretation of the HRA is to be argued.

**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 amendment to section 28 to set out an inclusive list of factors to be considered in determining whether a limit on a right is reasonable**

Clause 4 of the Bill would insert a new subsection 28(2) to the purpose of providing non-exhaustive guidance to a court with regard to the application of what would become subsection 28(1). The Explanatory Statement explains:

New sub-section 28(2) provides specific guidance on the range of relevant factors that must be taken into account when assessing whether a limitation on a human right is reasonable and justified.

These factors include the nature of the right; the purpose, importance, nature and extent of the limitation; the rationality of the relationship between the limitation and its purpose; and any less restrictive means that might reasonably be available to achieve the purpose of the limitation.

Section 28(2) is modelled on Section 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and section 36 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. Its intention is to provide guidance in the application of the general limitation clause in section 28(1) and to reduce its uncertainty.

With this might be contrasted the Attorney-General's expression of view in his response to the Committee's report on the Corrections Management Bill 2006:<sup>9</sup>

Thank you for raising this important issue. Whether the test of proportionality should be codified in legislation is a threshold issue for drafting. The Government's view is that section 28 of the *Human Rights Act 2004* invokes the test of proportionality as evolved in human rights jurisprudence.

The concept of proportionality as the means of accepting how and when human rights may be limited is a well accepted principle in international law and comparable domestic legal systems.

...

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<sup>9</sup> See *Scrutiny Report No 40 of the Sixth Assembly*.

As a matter of convenience, it would seem tempting to simply codify proportionality in the *Human Rights Act 2004* or within individual Acts. The danger of taking that path is that it will change the test to a matter of statutory interpretation rather than application of precedent. If the test is codified, then it is that test that will apply until amended or an appropriate court determines that the test cannot be read to be compliant with human rights. Codifying it might exclude important nuances and changes expressed in case law.

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

### **Legal proceedings in relation to the actions of public authorities**

Proposed Part 5A would make it plain that the Act applies to the actions of the Government and all public authorities in the Territory. This may well be the effect of the existing law, but the Committee recognises that it is desirable that the issue be clarified.

Proposed section 40C would make provision for a new form of legal proceeding by which means the legality of the action of a public authority in terms of compliance with the Human Rights Act might be tested. Under existing law, such as by way of an action to obtain a declaration, the Supreme Court would appear to have a jurisdiction of this kind, and paragraph 40C(2)(b) makes it plain that a person may rely on their rights under the Act in any form of legal proceeding. Paragraph 40C(2)(a) would, in addition, confer on a person a right to start a proceeding in the Supreme Court against a public authority, and subsection 40C(4) would provide that, in such a proceeding, the Supreme Court may grant the relief it considers appropriate, except damages.

*The Committee draws attention to these provisions and notes that there are quite divergent views on the issue of whether the Supreme Court should or should not be permitted to award damages simply on the basis that there has been a contravention of a human right (as stated in the Act) in the performance of some action by a public authority.*

### **Comment on the explanatory statement**

*The Committee commends the explanation, in the explanatory statement, of the amendments to the Bill.*

## **JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2007 (NO. 2)**

This Bill would amend a number of laws administered by the ACT Department of Justice and Community Safety.

### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

### **Strict liability offences**

Proposed section 10 of the *Civil Law (Sale of Residential Property) Act 2003* (see clause 1.23 of Schedule 1) would create a strict liability offence and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

The Explanatory Statement makes no mention of the HRA issues raised by the provision for a strict liability offence, nor does it provide any justification for the imposition of strict liability.

On the face of it, the offence might be classified as “regulatory”, and justified on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007 (see *Scrutiny Report No. 43* of the *Sixth Assembly*).

The penalty attaching to breach of proposed section 10 is no more than 10 penalty points. This is within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

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

#### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

**The removal of the exclusion of blind and deaf persons from juries – the right to equal treatment under the law (HRA subsection 8(2)) and the right to a fair trial (HRA section 21(1))**

While it would promote the right to equal treatment under the law (HRA subsection 8(2)), a question arises as to whether the removal of the exclusion of blind and deaf persons from juries might compromise the right to a fair trial (HRA section 21(1)).

If there is a prospect that the right to a fair trial might be compromised, there is then the question of how that prospect can be avoided.

It is proposed by clause 1.56 of Schedule 1 of the Bill to omit paragraph 10(d) of the *Juries Act 1967*. The effect and policy of this amendment is explained in the Explanatory Statement:

An amendment has been made to remove subsection 10(d) from the Act. Section 10 identifies persons who are not qualified to serve as jurors in the ACT. Subsection 10(d) provides that a person who is ‘blind, deaf or dumb’ is not qualified. It is no longer appropriate to exclude people who are blind or deaf from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability and without any enquiry as to the actual ability of a member of that class to effectively perform as a juror. Removing the subsection has also removed the classification of a person as ‘dumb’, which is archaic language.

The Explanatory Statement makes no reference to human rights issues involved in this step. This is disappointing, inasmuch as it is evident from the literature that has discussed this issue that is one in which human rights (including in particular two of which are stated in the Human Rights Act) are in tension. The Committee can do no more than provide a short outline of the competing considerations. Two rights in tension are the right to equal treatment under the law HRA subsection 8(2) and the right to a fair trial HRA section 21(1):

#### **8        Recognition and equality before the law**

...

- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind; ...;

## 21 Fair trial

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

The general question issue was explored by the Law Reform Commission of NSW in its *Report 114 (2006) - Blind or deaf jurors*.<sup>10</sup> It recommended that blind or deaf persons should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone. The Commission noted that “all [submissions] upheld the right of people who are blind or deaf to be treated in a non-discriminatory manner by being allowed to serve as jurors if they are capable of discharging the requisite duties” (paragraph 1.4). For example, People with Disability Australia Incorporated argued in its submission that:

The blanket exclusion of people who are blind or deaf from jury service denies their citizenship, and to the extent that it is based on irrational prejudice, stereotyping, and ignorance, it is also an abuse of their human rights.

On the other hand, some submissions drew attention to the prospect that a party to a criminal trial (whether it be the defendant or the Crown) might be denied a fair trial were a member of the jury to be deaf or blind. The Law Society of New South Wales argued that:

[a]ssuring that the rights of certain people can be exercised, however, may not always be consistent with achieving the proper and efficient administration of justice, and ensuring that an accused is tried fairly. Even given appropriate supports and accommodations, it is the [Law Society's] Criminal Law Committee's view that the nature of evidence in certain trials would make it difficult for a profoundly deaf or severely visually impaired person to properly perform the duties of a juror.

The LRC noted that:

[t]he majority of submissions supported the general proposition that reasonable adjustments should be provided, and that, consequently, deaf people thereby able to perform the duties of a juror should be allowed to do so. Reservations remain, however, about the ability of deaf people to perform those duties, or the effect on the trial of their empanelment. They focus on the following concerns:

- accuracy of sign interpretation;
- the ability to evaluate evidence;<sup>11</sup>
- comprehension of instructions;
- secrecy of the jury room;
- jury deliberation; and
- effects on length and cost of trial.

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<sup>10</sup> [http://www.lawlink.nsw.gov.au/lawlink/lrc/l1\\_lrc.nsf/pages/LRC\\_r114chp1#H4](http://www.lawlink.nsw.gov.au/lawlink/lrc/l1_lrc.nsf/pages/LRC_r114chp1#H4)

<sup>11</sup> In terms of the evaluation of evidence, it should be noted that the judge may order that a view be taken of some place; or that some demonstration or experiment might be take place in the courtroom; or an assessment of the credibility of a witness might turn on observation of the witness in the witness box.

The LRC evaluated these issues, and concluded that they could be accommodated by making reasonable adjustments. It explored the experience of other jurisdictions (in the USA, and New Zealand for example) that had removed the exclusion of blind and deaf persons from juries, and concluded that significant problems had not been encountered.

One NSW Supreme Court judge remained sceptical of the benefits of relaxing the rules as to the exclusion of blind and deaf persons. Justice Hulme observed:

One may ask what are the perceived advantages of changing the law so as to permit blind or deaf people to participate in the jury process. None present themselves other than perhaps some amelioration of the perception such persons may have as to the consequences of their affliction. I do not for one moment suggest that such amelioration is necessarily inconsequential but, compared with the affliction itself, about which nothing can be done, I would venture to suggest that such amelioration is certainly very small and even if all the matters to which I have referred could be satisfactorily dealt with, would impose a cost on the community vastly out of proportion to any benefit which could be achieved.

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

The Committee has noted that the Explanatory Statement does not indicate whether consideration was given to questions concerning the admission to the jury room of non-jurors (such as sign-language interpreters) whose presence might be necessary to assist a blind or deaf person. The NSW LRC did address this issue, and considered how the secrecy of jury deliberations could be maintained if non-jurors were to be present in the jury room.

*The Committee considers that the Minister should address this issue.*

While the Explanatory Statement postulates the conduct of an enquiry as to the actual ability of a blind or deaf person to be a juror, it does not explain how this might take place, or, again, whether the present law is sufficient for this purpose. The Committee is aware of section 16 of the Jury Act, but it appears that this provision could not accommodate a question of capacity that arose during a trial. The common law power of a trial judge to discharge a juror might be employed in this latter case, but there then arises the question of whether reserve jurors (who would sit with the jury) might be needed. The present state of ACT law should have been explained.

*The Committee considers that the Minister should address this issue.*

### **The proper use of omnibus legislation**

In general, the Committee raises no concern about a bill of this kind which proposes to amend a number of laws administered by a particular department. Such bills usually make only minor and technical amendments to portfolio legislation, and the Committee notes that the presentation speech asserts that this is the case with this Bill. The proposed amendments to the Juries Act are, however, of a substantive nature and the Committee's view is that they should have been put to the Assembly in a Juries Act amendment bill.

## **LONG SERVICE LEAVE (PRIVATE SECTOR) BILL 2007**

This is a Bill to provide for a portable long service leave scheme to operate in the private sector workforce in the Australian Capital Territory (with the exception of the building and construction industry and the contract cleaning industry, which already enjoy the benefits of such a scheme).

### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Strict liability offences**

If enacted, the Bill would create a number of strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

Strict liability offences would be created by clauses 39(1), 43(1), 54(1), 55(1), 59(1), 60(1), 62(1), 62(2), 63(1), 63(2), 69(2), 79(1), and 79(3).

The Explanatory Statement makes no mention of the HRA issues raised by the provision for a strict liability offence, nor does it provide any justification for the imposition of strict liability.

On the face of it, the offences might be classified as “regulatory”, and justified on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007 (see *Scrutiny Report No. 43 of the Sixth Assembly*). Employers and others in the workforce who would be affected by these provisions can be expected to be aware of their obligations, and the imposition of strict liability offences would be an encouragement to be aware.

The penalty attaching to breach of the provisions is no more than 50 penalty points. This is within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

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

#### **The provision for a civil penalty in subclause 57(2) of the Bill**

As a matter of substance, does the provision in subclause 57(2) that an employer is liable to pay \$100 for each month they fail to give the Private Sector Long Service Leave Authority a return under clause 54, or to pay the levy under section 56, involve the imposition of a criminal penalty?

If so, subclause 57(2) is not HRA incompatible, but the Legislative Assembly should be aware of the consequences in terms of how the HRA would affect the conduct of judicial proceedings to enforce the liability.

While the Explanatory Statement does not refer to the issue, the Committee considers that the provision in subclause 57(2) that an employer is liable to pay \$100 for each month they fail to give the Private Sector Long Service Leave Authority (the authority) a return under clause 54, or to pay the levy under section 56, raises a substantial and complex rights issue.

HRA subsection 22(2) appears to be engaged. It provides

## **22        Rights in criminal proceedings**

...

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

[here follow paragraphs (a) to (i), providing for rights that must be available to a defendant upon a trial of the offence].

The issue arising under HRA section 22(2) is whether the process for imposing a “civil penalty” may be described as a “criminal proceeding”. If the case-law concerning the European Convention on Human Rights is followed, the statutory description cannot govern the classification issue. In short, the question is whether as a matter of substance, what is involved is a criminal penalty.<sup>12</sup>

A determination as to what is the substance of the matter requires close attention to the statutory context. Clause 54 would create a strict liability offence where an employer during a quarter failed to give to the authority within a specified time a return containing specified information relating to employees and their remuneration. The maximum penalty for an offence is 20 penalty points. Clause 55 would create a strict liability offence, also punishable by up to 20 penalty points, where an employer fails to make a quarterly payment of the levy payable under section 56.

Proceedings against an employer for offences under clauses 54 or 55 are criminal proceedings, and would be heard before a court of competent jurisdiction. The employer would be entitled to the protections stated in HRA subsection 22(2). The employer would have rights to appeal to higher courts.

In contrast, subclause 57(2) is self-executing in the sense that the employer’s liability arises simply upon their failure to give the return or pay the levy (as the case may be). Of course, if the employer did not pay the penalty of \$100 per month, the authority would need to take action in a court of competent jurisdiction to recover the relevant amount. The court would not have any discretion as the amount payable by the employer. The registrar of the authority might however remit all or part of the amount payable under subclause 57(2).

It is also to be noted that under subclause 57(4), a court that finds an employer guilty of an offence under clause 54 or clause 55 may in addition to imposing a penalty on the person, order the person to pay the authority any amount that is payable under subclause 57(2) to the date of the order; and for a prosecution for an offence against section 55 - the levy to which the prosecution relates.

There is reason to think that as a matter of substance, the provision in subclause 57(2) that an employer is liable to pay \$100 etc does involve the imposition of a criminal penalty. This does not mean that the provision is HRA incompatible, but that section HRA section 22 may operate in any court proceedings to enforce the employer’s liability.

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<sup>12</sup> See generally, See B Emmerson, A Ashworth and A McDonald, *Human Rights and Criminal Justice* (2nd ed, 2007) ch 4

*The Committee draws this matter to the attention of the Assembly on the basis that it should be aware of the consequences in terms of how the HRA would affect the conduct of judicial proceedings to enforce the liability.*

### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Entry and search powers**

The Bill would confer on officials a number of entry and search powers. The Committee does not consider that there is an issue of HRA compatibility, but reports generally on the issues that do arise.

By clause 28, an inspector may enter premises without having obtained a warrant from a judicial officer. The right to privacy is also engaged by the proposals relating to the general powers of inspectors upon entry, including the power to examine records and to require the person to provide information and produce documents (clause 31), and the power to require a person to give information and documents to the inspector (clause 33). On the face of it, these provisions engage HRA section 12:

#### **12 Privacy and reputation**

Everyone has the right—

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

This right might be modified in terms of the proportionality test that inheres in HRA section 28.

*The Committee has reviewed these powers, and does not consider that any trespass on personal rights is undue, or that any provision is incompatible with the HRA.* It has, in particular, noted that:

- the premises that may be entered without warrant are those of an employer (clause 28);
- the premises may be entered only during normal business hours or any other time when the premises are being used as a workplace (subclause 28(6));
- the power to enter premises cannot, without the consent of the occupier, be exercised in relation to part of the premises used for residential purposes (subclause 28(3));
- an inspector must produce an identity card upon request (clause 29); and
- sections 170 and 171 of the Legislation Act will have the effect of preserving the application of the privilege against self incrimination and client legal privilege.

### **Report under section 38 of the Human Rights Act 2004**

*Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?*

#### **Discretionary powers**

Should the exercise of discretions, or the making of judgements involving the exercise of choice, be qualified by an obligation to exercise the discretion, or to make the judgement, on “reasonable grounds”?

As a matter of controlling administrative (or judicial) discretion, the Committee considers that where possible, its scope should be limited by means of the law spelling out the considerations relevant to the exercise of the power, or, at least by the insertion of a limit in terms that the repository of the power should have “reasonable grounds” for the exercise of the power.

In this Bill, some of the discretionary powers, or statutory judgements that will permit an area of choice, are conditioned on their being exercised or made on “reasonable grounds” – see subclause 28(1) (“if an inspector believes of reasonable grounds that premises are premises of an employer”) and subclause 28(6) (“a person believed [by an inspector] on reasonable grounds to be an occupier”).

Many powers or judgements are not however so conditioned. There are several instances where it is enough that the decision-maker be simply “satisfied” about the existence of some fact; see subclauses 40(2)(a), 42(4), 44(4)(a), 49(2)(a), 51(4)(a), 57(3) and 95(1).

The Committee offers three comments on this common phenomenon.

First, it is not evident why this difference of treatment is found in the Bill.

Secondly, the different treatment may lead a court to find that a power not conditioned by an obligation that it be exercised on “reasonable grounds” need not be so exercised.

Thirdly, a power that is not conditioned by an obligation that it be exercised on “reasonable grounds” may not be HRA compatible.<sup>13</sup>

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

#### **Report under section 38 of the Human Rights Act 2004**

*Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?*

#### **Natural justice**

The Committee commends the provision in subclause 66 that an employer or contractor must on their request be afforded an oral hearing where it reviews the total remuneration for a worker stated in a return by the employer or contractor for a quarter.

Provision for an oral hearing is likely to be more efficacious in protecting a person against unwarranted administrative action, and the Committee commends the provision in subclause 66.

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<sup>13</sup> See generally *Scrutiny Report No 45 of the 6th Assembly*, concerning the Legal Profession Amendment Bill 2007. The executive has at times accepted that discretionary powers should be limited to the greatest extent possible, as is implicit in the amendments to the Public Health Act 1997 in the Health Legislation Amendment Bill 2006 (No 2) – see *Scrutiny Report No 34 of the 6th Assembly*. These amendments were apparently based on legal advice to the relevant Minister that unless a power vested in a Minister was qualified by provision that the Minister have “reasonable grounds” for taking action the law would not be HRA compatible.

## **MEDICINES, POISONS AND THERAPEUTIC GOODS BILL 2007**

This is a Bill for an Act to regulate medicines, poisons and prohibited substances. It would repeal and replace the *Poisons and Drugs Act 1978*, the *Poisons Act 1933*, the *Public Health (Prohibited Drugs) Act 1957* and significantly amend the *Drugs of Dependence Act 1989*. It would establish an authorization and licensing framework for medicines and poisons, and state grounds and powers for disciplinary action to be taken against authorised and licensed persons. It would provide for a range of offences, imposing a range of potential penalties. Enforcement would be achieved through a comprehensive range of inspection and seizure powers, including the capacity to take and analyse samples.

### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Strict liability offences**

The amendments proposed by the Bill would, if enacted, create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

In particular, a question of compatibility arises in respect of subclause 64(4), on the basis that the “regulatory offence” justification does not appear to apply to this provision; and subclauses 31(1)(b), 31(2)(b), and 107(4), on the basis that the penalty for breach might be seen as a disproportionate response to the problem addressed by the imposition of strict liability.

Strict liability offences would be created by subclauses 27(1), 31(1)(b), 31(2)(b), and (2), 38(2), 44(2), 45(2), 46(1), 47(1), 49(2), 50(2), 51(1), 52(1), 56(1), 59(2), 60(2), 64(4), 75(1), 94(1), 96(2), 101(3), 106(7), 107(4), and 145(2).

#### *Is the occasion for the derogation of the HRA rights justified?*

The Explanatory Statement offers a rationale for the derogation of the HRA rights that could apply to nearly all of these offences:

Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue. ... Professionals who deal with medicines, poisons and therapeutic goods can reasonably be expected to be aware of their duties and obligations. As such, strict liability offences are more readily justified when a defendant can reasonably be expected, because of his or her professional involvement, to be aware of the requirements of the law. A defendant’s frame of mind for some regulatory offences is irrelevant, unless some knowledge or intention ought to be required to commit a particular offence. Penalties for strict liability do not exceed more than 50 penalty units or include imprisonment. The mistake of fact defence expressly applies to strict liability as do other defences in part 2.3 of the *Criminal Code 2002*.

On the face of it, and with one exception, the offences might be classified as “regulatory”, and justified under HRA section 28 on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007 (see *Scrutiny Report No. 43 of the Sixth Assembly*). That is, the Assembly might consider that this is a regulatory offence in respect of which strict liability might be justified on the bases of (1) an expectation that those who work in the industry will acquaint themselves with the law, and (2) provision of an encouragement for them to do so.

The exceptional case is subclause 64(4), which provides for a strict liability offence where a person makes a false or misleading statement concerning their name or residential address to a person who is authorised to dispense a reportable substance. In this case, the defendant could not be regarded as a professional who dealt with medicines, poisons and therapeutic goods. In this case it is hard to see why the prosecution should not need to establish a fault element in respect of the false statement.

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

*Is the extent of derogation proportionate to its occasion? – the penalty aspect*

Most of the maximum penalties that could attach to an offence do not exceed 50 penalty points, and are thus within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

The Explanatory Statement does not, however, correctly state the position when it asserts that “[p]enalties for strict liability do not exceed more than 50 penalty units or include imprisonment”. The maximum penalty for breach of subclause 107(4) is 100 penalty points.

Of more serious concern from the standpoint of the HRA rights is subclause 31(1). It is in these terms:

**31 Supply of certain declared substances—information for chief health officer**

- (1) A person commits an offence if—
  - (a) the person supplies any of the following on a supply authority:
    - (i) a controlled medicine;
    - (ii) a declared substance (other than a controlled medicine) prescribed by regulation; and
  - (b) the person does not give the chief health officer the required information as prescribed by regulation.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

By subclause 31(3), strict liability applies to subclause 31(1)(b). Thus, while the prosecution must prove that the person intended to supply the medicine or substance, it does not need to prove that the person intended to omit to give the required information to the chief health officer. Strict liability offence may be justified on the basis of a policy that the person ought to be aware that they should give the information, but is provision for a penalty of 100 penalty units, and/or imprisonment for 1 year a proportionate means of pursuing that policy?

The Committee has often drawn attention to HRA compatibility issue where imprisonment is a potential penalty<sup>14</sup>. The Committee considers that where imprisonment is a potential penalty, the Explanatory Statement should state a specific justification in this regard.

What has just been said concerning subclause 31(1)(b) applies as much to subclause 31(2)(b).

### **Report under section 38 of the Human Rights Act 2004**

*Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?*

#### **Discretionary powers**

Should the exercise of discretions, or the making of judgements involving the exercise of choice, be qualified by an obligation to exercise the discretion, or to make the judgement, on “reasonable grounds”?

As a matter of controlling administrative (or judicial) discretion, the Committee considers that where possible, its scope should be limited by means of the law spelling out the considerations relevant to the exercise of the power, or, at least by the insertion of a limit in terms that the repository of the power should have “reasonable grounds” for the exercise of the power.

In this Bill, some of the discretionary powers, or statutory judgements that will permit an area of choice, are conditioned on their being exercised or made on “reasonable grounds”; see, for example, various powers stated in clauses 106, 114, 115 and 117 (without being exhaustive).

Many powers or judgements are not however so conditioned. There are several instances where it is enough that the decision-maker be simply “satisfied” about the existence of some matter and where a restriction on the basis that the power be exercised on “reasonable grounds” would seem appropriate; see, for example, subclauses 6(3), 81(3), 82(2), 85(2), 130(3) and 123(3).

The Committee offers three comments on this common phenomenon.

First, it is not evident why this difference of treatment is found in the Bill.

Secondly, the different treatment may lead a court to find that a power not conditioned by an obligation that it be exercised on “reasonable grounds” need not be so exercised.

Thirdly, a power that is not conditioned by an obligation that it be exercised on “reasonable grounds” may not be HRA compatible.<sup>15</sup>

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

#### **Privilege against self-incrimination**

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<sup>14</sup> See *Scrutiny Report No 37 of the Sixth Assembly*, concerning the Corrections Management Bill 2006; see too *Scrutiny Report No 46 of the Sixth Assembly*, concerning the Occupational Health and Safety Amendment Bill 2007

<sup>15</sup> See generally *Scrutiny Report No 45 of the 6th Assembly*, concerning the Legal Profession Amendment Bill 2007. The executive has at times accepted that discretionary powers should be limited to the greatest extent possible, as is implicit in the amendments to the Public Health Act 1997 in the Health Legislation Amendment Bill 2006 (No 2) – see *Scrutiny Report No 34 of the 6th Assembly*. These amendments were apparently based on legal advice to the relevant Minister that unless a power vested in a Minister was qualified by provision that the Minister have “reasonable grounds” for taking action the law would not be HRA compatible.

*The Committee suggests that a note to subclause 83(1) refer to sections 170 and 171 of Legislation Act.*

### **Report under section 38 of the Human Rights Act 2004**

*Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?*

#### **Entry and search powers**

The Bill would confer on officials a number of entry and search powers. The Committee does not consider that there is an issue of HRA compatibility, but reports generally on the issues that do arise.

The Committee draws attention to three matters:

- paragraph 102(1)(b) may be HRA incompatible (and might have been inserted in error);
- the power in paragraph 102(1)(e) to make a search on grounds of serious and urgent need should be closely scrutinised by the Assembly; and
- the power of the Magistrates Court to make an order disallowing a seizure if satisfied there are exceptional circumstances should perhaps be qualified by a requirement to act on reasonable grounds.

#### *Warrantless searches*

By clause 102, an inspector may enter premises without having obtained a warrant from a judicial officer. On the face of it, this provision engages HRA section 12:

#### **12 Privacy and reputation**

Everyone has the right—

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

This right might be modified in terms of the proportionality test that inheres in both HRA paragraph 12(a) and HRA section 28.

Clause 102 has some features that make a judgement about HRA compatibility more than usually difficult.

It will enhance HRA compatibility that an inspector must produce an identity card upon request (clause 104). There are, however, some problematic aspects.

First, it is noted that the first two bases upon which an inspector may enter premises are stated in paragraphs 102(1)(a) and (b):

#### **102 Power to enter premises**

- (1) For this Act, a medicines and poisons inspector may—
  - (a) at any reasonable time, enter premises that the public is entitled to use or that are open to the public (whether or not on payment); or
  - (b) at any reasonable time, enter premises that the public is entitled to use or that are open to the public; ....

Then, by subclause 102(2), “subsection (1)(a) does not authorise entry into a part of premises that is being used only for residential purposes”. It is apparent that this restriction (which is of a kind commonly found in such provisions in other statutes) does not apply to paragraph 102(1)(b). *The Committee cannot see any reason why it should not, and, absent such a restriction, paragraph 102(1)(b) may not be HRA compatible.* (The answer may be that there is an unintended duplication here. This is a matter upon which the Minister might provide specific clarification.)

Secondly, the fifth basis upon which an inspector may enter premises is unusual. Paragraph 102(1)(e) provides that an inspector may

- (e) at any time, enter premises if the inspector believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary.

The Explanatory Statement does offer a justification for this power:

An inspector may also enter the premises at any time if the inspector believes on reasonable grounds the circumstances are so serious and urgent that immediate entry is required without the authority of a warrant. This ... ground for entry is contemplated for the rarest of circumstances. Its<sup>16</sup> use is dependent upon circumstances of such seriousness and urgency as to justify entry without a warrant. For example, situations where immediate entry is required in order to prevent or mitigate a serious threat to the life or safety of a person or persons could amount to circumstances which would justify entry without a warrant. Accordingly, the power to enter without a warrant under this provision has not been limited to police officers as it is possible that any duly authorised inspector could encounter such a situation. Were this ground for entry to be limited to only police officers it could result in a delay that could have dire consequences.

*The Committee draws this matter to the attention of the Assembly, and considers that this appears to be a sufficient justification for the derogation of the right to privacy involved.*

#### *Powers on entry*

The right to privacy is also engaged by the proposals relating to the general powers inspectors upon entry, including the power to examine records and to require a person to provide information and produce documents (clause 105). On the face of it, this provision engages HRA section 12.

*The Committee does not consider that any provision as just outlined amounts to an undue trespass on personal rights or is incompatible with the HRA.* It has, in particular, noted that sections 170 and 171 of the Legislation Act will have the effect of preserving the application of the privilege against self incrimination and client legal privilege.

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<sup>16</sup> The Committee notes that “it’s” is not correct.

### *Power to seize things*

The power to seize things is stated in clause 106. Where entry to the premises is made with the occupier's consent, under a warrant or otherwise, the inspector may seize anything at the premises if satisfied on reasonable grounds that (1) the thing is connected with an offence against this Act; and the seizure is necessary to prevent the thing from being concealed, lost or destroyed; or used to commit, continue or repeat the offence (subclause 106(3)); or (2) that the thing puts the health or safety of people at risk; or may cause damage to property or the environment (subclause 106(4)). Where entry is by consent, it is sufficient that the thing is connected with an offence against this Act, and seizure of the thing is consistent with the purpose of the entry told to the occupier when seeking the occupier's consent (subclause 106(1)). Where entry is under warrant, an inspector may seize anything at the premises that the inspector is authorised to seize under the warrant (subclause 106(2)).

Having seized a thing, a medicines and poisons inspector may remove the thing from the premises where it was seized to another place, or leave the thing at the place of seizure but restrict access to it (subclause 106(6)).

An inspector must give a receipt for things seized (clause 119). A relevant person has a right of access to things seized except where (1) the thing was seized on the basis that it posed a risk to the health or safety of people or of damage to property or the environment, or (2) possession of the thing or information by the person otherwise entitled to inspect it would be an offence (clause 120).

*The Committee does not consider that that any provision as just outlined amounts to an undue trespass on personal rights or is incompatible with the HRA.*

### *Name and address*

By subclause 108(1), a medicines and poisons inspector may require a person to state the person's name and home address if the inspector believes on reasonable grounds that the person is committing or has just committed an offence against this Act.

*The Committee does not consider that that this provision amounts to an undue trespass on personal rights or is incompatible with the HRA.*

### *Power to destroy things*

A thing inspected or seized by an inspector may be destroyed or otherwise disposed of by the inspector, or subject to a direction by the inspector to the relevant occupier to do one or other, if the inspector is satisfied on reasonable grounds that the thing puts the health or safety of people at risk, or is likely to cause damage to property or the environment. Costs incurred by the Territory in relation to the disposal of a thing are a debt owing to the Territory by the person who owned the thing, and each person in charge of the premises where the thing was; see generally clause 107.

*The Committee does not consider that that this provision amounts to an undue trespass on personal rights or is incompatible with the HRA.*

### *Return of things seized*

The provisions of the Bill follow a common form, and the Committee will point only to provisions that raise a rights issue deserving of particular note.

There is a general obligation to return a thing seized to its owner, or to pay reasonable compensation to the owner for the loss of the thing (subclause 121(1)). But this obligation does not apply where: (1) the thing was seized on the basis that it posed a risk to the health or safety of people or of damage to property or the environment; or (2) the chief health officer believes on reasonable grounds that the only practical use of the thing in relation to the premises where it was seized would be an offence; or (3) possession of the thing by its owner would be an offence (subclause 121(2)).

A person may apply to the Magistrates Court within 10 days after the day of the seizure for an order disallowing the seizure (subclause 122(1)), but not where the thing was seized on the basis that it posed a risk to the health or safety of people or of damage to property or the environment (subclause 122(2)).

The Magistrates Court must make an order disallowing the seizure if satisfied that the applicant would, apart from the seizure, be entitled to the return of the seized thing, and the thing is not connected with an offence against this Act, and possession of the thing by the person would not be an offence (subclause 123(2)).

In addition, the Court “may also make an order disallowing the seizure if satisfied there are exceptional circumstances justifying the making of the order” (subclause 123(3)).

There are also provisions for the forfeiture of seized things and for their return.

There are usual provisions obliging inspectors to minimise damage, and for claims for compensation in relation to the exercise of enforcement powers.

Apart from one matter, the Committee does not consider that any provision as just outlined amounts to an undue trespass on personal rights or is incompatible with the HRA. *The exception is subclause 123(3), in respect of which the Committee considers that this power should perhaps be qualified by a requirement to act on reasonable grounds.*

*The Committee also draws attention to an apparent error in subclause 122(2), where it appears that the reference should be to section 106(4), and not to section 106(3).*

## **SUBORDINATE LEGISLATION**

### Disallowable Instruments—No comment

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

**Disallowable Instrument DI2007-268 being the Public Place Names (Braddon) Determination 2007 (No. 1) made under section 3 of the Public Place Names Act 1989 determines the names of parks in the Division of Braddon.**

**Disallowable Instrument DI2007-269** being the Occupational Health and Safety Council (Ministerial Member and Chair) Appointment 2007 (No. 1) made under paragraph 14(c) and section 16 of the *Occupational Health and Safety Act 1989* appoints a specified person as ministerial member and chair of the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-270** being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 5) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers taking part in the media event or competing in the timed special (competitive) stages of the National Capital Rally (Brindabella Motor Sport Club).

**Disallowable Instrument DI2007-272** being the Occupational Health and Safety Council (Employee Representative) Appointment 2007 (No. 1) made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employees to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-273** being the Occupational Health and Safety Council (Employee Representative) Appointment 2007 (No. 2) made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employees to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-274** being the Occupational Health and Safety Council (Employee Representative) Appointment 2007 (No. 3) made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employees to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-275** being the Occupational Health and Safety Council (Employee Representative) Appointment 2007 (No. 4) made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employees to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-280** being the Occupational Health and Safety Council (Employer Representative) Appointment 2007 (No. 2) made under paragraph 14(b) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employers to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-281** being the Occupational Health and Safety Council (Employer Representative) Appointment 2007 (No. 3) made under paragraph 14(b) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employers to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-282** being the Occupational Health and Safety Council (Employer Representative) Appointment 2007 (No. 4) made under paragraph 14(b) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member representing employers to the Occupational Health and Safety Council.

**Disallowable Instrument DI2007-286** being the Dangerous Substances (Explosives) Authorisation 2007 (No. 1) made under section 29 of the *Dangerous Substances (Explosives) Regulation 2004* declares a specified range of propellant powders to be authorised explosives within the Australian Explosives Code 1.3C class.

**Disallowable Instrument DI2007-287** being the Utilities Exemption 2007 (No. 3) made under section 22 of the *Utilities Act 2000* exempts a specified electricity supplier from the requirement to hold a utilities licence.

**Disallowable Instrument DI2007-289** being the Public Place Names (City) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a road in the Division of City.

**Disallowable Instrument DI2007-291 being the Road Transport (Offences) (Declaration of Holiday Period) Determination 2007 (No. 1) made under paragraph 22(1)(e) of the *Road Transport (Offences) Regulation 2005* declares the period from the first moment of 21 December 2007 to the last moment of 1 January 2008 inclusive to be a holiday period.**

#### Disallowable Instruments—Comment

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

*No explanatory statement / Is this appointment valid? / Is this a disallowable instrument?*

**Disallowable Instrument DI2007-271 being the Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1) made under section 16 of the *Occupational Health and Safety Act 1989* appoints the Occupational Health and Safety Commissioner as deputy chair of the Occupational Health and Safety Council.**

This instrument appoints the Occupational Health and Safety Commissioner as Deputy Chair of the Occupational Health and Safety Council. The Committee notes that section 14 of the *Occupational Health and Safety Act 1989* provides:

#### **14 Membership**

The council shall consist of—

- (a) 4 members appointed by the Minister after consultation with such people or bodies as the Minister considers represent the interests of employees; and
- (b) 4 members appointed by the Minister after consultation with such people or bodies as the Minister considers represent the interests of employers; and
- (c) other members appointed by the Minister; and
- (d) the commissioner.

*Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

*Note 2* In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).

*Note 3* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

“The commissioner” is defined in the Dictionary at the end of the OH and S Act as:

**commissioner** means the Occupational Health and Safety Commissioner appointed under section 26.

Section 26 of the OH and S Act provides:

#### **26 Appointment of commissioner**

- (1) The Executive must appoint a person to be the Occupational Health and Safety Commissioner.

*Note* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

- (2) The commissioner must not be appointed for more than 7 years.

*Note* A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def of *appoint*).

Section 16 of the OH and S Act provides for the appointment of the chair and deputy chair of the Council. It states:

#### **16 Appointment of chair and deputy chair**

The Minister must appoint a member of the council appointed under section 14 (c) as chair of the council and another member as deputy chair of the council.

It is not clear on the face of the provision that the Commissioner can be appointed as the deputy chair of the Council, as it is not entirely clear, on the face of the provision, that “another member” in section 16 of the Act means *any other member* of the Council, rather than *another member appointed by the Minister*. If the latter is the case, the Commissioner cannot be appointed as deputy chair, as he or she is not appointed by the Minister.

The Committee notes, however, that the present section 16 was inserted by the *Occupational Health and Safety Amendment Act 2007* and that the Explanatory Statement for the Bill that was enacted as that Act states:

The clause ... remakes section 16 to ensure the independence of the Chair. It requires the Minister to appoint only a ministerial appointee member of the Council as the Chair. The Minister cannot appoint a member who is appointed to represent the interests of employees or employers as Chair of the Council. The Occupational Health and Safety Commission can also not be appointed as the Chair.

The Minister may appoint any member as Deputy Chair.

On the basis of the above, the Committee accepts that the Commissioner can be appointed as deputy chair of the Council.

The Committee notes that there is no Explanatory Statement for this instrument. As a result, there is no statement indicating to the Legislative Assembly that any pre-requisites for appointment as deputy chair of the Council have been met. More importantly, however, there is nothing that addresses the issue of whether, in fact, this appointment needs to be made by disallowable instrument.

Division 19.3.3 of the Legislation Act provides for consultation with the Legislative Assembly in relation to appointments to statutory positions. In particular, it provides that the “appropriate Assembly committee” be consulted in relation to such appointments. Section 229 also provides:

#### **229 Appointment is disallowable instrument**

The instrument making, or evidencing, an appointment to which this division applies is a disallowable instrument.

There is an important limitation on the operation of Division 19.3.3, however. Subsection 227 (2) of the Legislation Act provides (in part) that

... this division does not apply to an appointment of—

- (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant) ....

This means that the appointment of a public servant to a statutory position does not require consultation with the appropriate Assembly committee and need not be by disallowable instrument. It is for this reason that the Committee usually prefers to see, in an Explanatory Statement for an appointment instrument, a statement to the effect that the appointee is not a public servant.

In the present case, not only is there no such statement (ie because there is no Explanatory Statement) but the Committee would ordinarily assume that the Commissioner is a public servant. It appears, however, that this is not the case. “Public servant” is defined in the Dictionary to the Legislation Act as follows:

**public servant** means a person employed in the public service.

It is also relevant to consider the definition of “public employee”:

**public employee** means—

- (a) a public servant; or
- (b) a person employed by a territory instrumentality; or
- (c) a statutory office-holder or a person employed by a statutory office-holder.

Finally, the Committee notes that “statutory office-holder is defined as follows”:

**statutory office-holder** means a person occupying a position under an Act or statutory instrument (other than a position in the public service).

It would seem, therefore, that the Commissioner is not a public servant (assuming that, in fact, he or she does *not* hold a position in the public service). It would be preferable, however, if the Committee (and the Legislative Assembly) had this information presented to it in an Explanatory Statement, by way of a simple statement that “this is not a public servant appointment”, rather than having to undertake the investigative process demonstrated by the above discussion.

*Are these acting appointments valid?*

**Disallowable Instrument DI2007-276 being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1) made under paragraph 14(a) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employees to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-277 being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2) made under paragraph 14(a) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employees to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-278 being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3) made under paragraph 14(a) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employees to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-279 being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4) made under paragraph 14(a) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employees to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-283 being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2) made under paragraph 14(b) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employers to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-284 being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3) made under paragraph 14(b) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employers to the Occupational Health and Safety Council.**

**Disallowable Instrument DI2007-285 being the Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4) made under paragraph 14(b) of the Occupational Health and Safety Act 1989 and section 209 of the Legislation Act 2001 appoints a specified person as an acting member representing employers to the Occupational Health and Safety Council.**

The first 4 instruments listed above appoint 4 named persons as an “acting member representing employees” of the Occupational Health and Safety Council. In each case, the appointment is stated to be made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* and section 209 of the *Legislation Act 2001*. As the Committee has already noted above, section 14 of the OH and S Act provides for the appointment, to the Council, by the Minister, of 4 persons to represent the interests of employees.

In each case, the named person is appointed

... as an acting member representing employees to the Occupational Health and Safety Council until 31 July 2010.

The remaining 3 instruments appoint 3 named persons as “acting employer representatives” of the Council. In each case, the appointment is stated to be made under paragraph 14(b) of the OH and S Act and section 209 of the Legislation Act. As the Committee has already noted above, section 14 of the OH and S Act provides for the appointment, to the Council, by the Minister, of 4 persons to represent the interests of employers.

In each case, the named person is appointed

... as an acting member representing employers to the Occupational Health and Safety Council until 31 July 2010.

Section 209 of the Legislation Act provides:

**209 Power of appointment includes power to make acting appointment**

(1) If the appointer’s power is the power to make an appointment to a position, the power to make the appointment also includes power to appoint a person, or 2 or more people, to act in the position—

- (a) during any vacancy, or all vacancies, in the position, whether or not an appointment has previously been made to the position; or
- (b) during any period, or all periods, when the appointee cannot for any reason exercise functions of the position.

**Examples for par (b)**

- 1 the appointee is ill or on leave
- 2 the appointee is acting in another position
- 3 the appointee is outside the ACT or Australia

*Note 1* **Function** is defined in the dict, pt 1 to include authority, duty and power.

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

- (2) The power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make the appointment.

**Example**

If the appointment power is exercisable only on the recommendation of a body, the power to appoint a person to act is exercisable only on the recommendation of the body.

- (3) Without limiting subsection (2), if the law (or another law) requires—
- (a) the appointee to hold a qualification; or
  - (b) the appointer (or someone else) to be satisfied about the appointee's suitability (whether in terms of knowledge, experience, character or any other personal quality) before appointing the appointee to the position;

a person may only be appointed to act in the position if the person holds the qualification or the appointer (or other person) is satisfied about the person's suitability.

**Examples**

- 1 If an Act requires the appointee to be a magistrate, a person can be appointed to act in the position only if the person is a magistrate.
- 2 If a regulation requires the appointee to be a lawyer of at least 5 years standing, a person can be appointed to act in the position only if the person is a lawyer of at least 5 years standing.
- 3 If an Act requires the appointee to have, in the Executive's opinion, appropriate expertise, training or experience in relation to the needs of a particular group of people, a person can be appointed to act in the position only if the person has, in the Executive's opinion, that expertise, training or experience.

None of the instruments listed above indicate the circumstances in which the named person is able to act in the relevant position. That being so, it is unclear to the Committee how the acting appointments are intended to operate or, indeed, whether the appointments are valid. The Committee would appreciate the Minister's advice as to these issues.

The Committee also notes that there appears to be no *Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 1)*. The Committee would appreciate the Minister's advice as to whether there is any significance to the fact that, in relation to the Acting Employer Representative instruments, the numbering commences at 2.

## **REGULATORY IMPACT STATEMENT**

There is no matter for comment in this report.

## **GOVERNMENT RESPONSES**

The Committee has received responses from:

- The Treasurer, dated 6 December 2007, in relation to comments made in Scrutiny Report 48 concerning Disallowable Instrument DI2007-232, being the Racing Appeals Tribunal Appointment 2007 (No. 2).
- The Attorney-General, dated 6 December 2007, in relation to comments made in Scrutiny Report 46 concerning Disallowable Instruments:
  - DI2007-215, being the University of Canberra (Election of Council Members by Graduates) Repeal Statute 2007;

- DI2007-216, being the University of Canberra (Election of Student Members of Council) Statute 2007;
- DI2007-217, being the University of Canberra (University Seal) Statute 2007; and
- DI2007-218, being the University of Canberra (Academic Board) Amendment Statute 2007 (No. 1).
- The Treasurer, dated 10 December 2007, in relation to comments made in Scrutiny Report 47 concerning Subordinate Law SL2007-26, being the Road Transport (Third-Party Insurance) Amendment Regulation 2007 (No. 1).
- The Minister for Education and Training, dated 17 December 2007, in relation to comments made in Scrutiny Report 49 concerning Disallowable Instruments:
  - DI2007-252, being the Canberra Institute of Technology Advisory Council Appointment 2007 (No. 4);
  - DI2007-253, being the Canberra Institute of Technology Advisory Council Appointment 2007 (No. 5); and
  - DI2007-254, being the Canberra Institute of Technology Advisory Council Appointment 2007 (No. 6);
- The Attorney-General, dated 7 January 2008, in relation to comments made in Scrutiny Report 47 concerning Subordinate Law SL2007-25, being the Civil Law (Wrongs) Amendment Regulation 2007 (No. 1).
- The Attorney-General, dated 7 January 2008, in relation to comments made in Scrutiny Report 44 concerning Disallowable Instruments:
  - DI2007-120, being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 2); and
  - DI2007-131, being the Attorney General (Fees) Determination 2007.
- The Attorney-General, dated 9 January 2008, in relation to comments made in Scrutiny Report 48 concerning Subordinate Law SL2007-31, being the Legal Profession (Solicitors) Rules 2007.
- The Minister for the Environment, Water and Climate Change, dated 17 January 2008, in relation to comments made in Scrutiny Report 46 concerning Disallowable Instruments:
  - DI2007-206, being the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 1); and
  - DI2007-209, being the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 2); and
- The Acting Attorney General, dated 22 January 2008, in relation to comments made in Scrutiny Report 49 concerning the Regulatory Services Legislation Amendment Bill 2007.
- The Treasurer, dated 24 January 2008, in relation to comments made in Scrutiny Report 49 concerning the Road Transport (Third-Party Insurance) Bill 2007.
- The Minister for the Environment, Water and Climate Change, dated 31 January 2008, in relation to comments made in Scrutiny Report 49 concerning Subordinate Law SL2007-35, being the Environment Protection Amendment Regulation 2007 (No. 2).

- The Minister for Territory and Municipal Services, dated 31 January 2008, in relation to comments made in Scrutiny Report 49 concerning Disallowable Instruments:
  - DI2007-251, being the Road Transport (General) Public Passenger Services Licence and Accreditation Fee Determination 2007 (No. 1);
  - DI2007-257, being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2007 (No. 2); and
  - DI2007-290, being the Roads and Public Places (Fees) Determination 2007 (No. 2).
- The Minister for Territory and Municipal Services, dated 31 January 2008, in relation to comments made in Scrutiny Report 48 concerning Disallowable Instrument DI2007-238, being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 4).

The Committee wishes to thank the Treasurer, the Attorney-General, the Minister for the Environment, Water and Climate Change, the Acting Attorney-General, the Minister for Education and Training and the Minister for Territory and Municipal Services for their helpful responses.

Zed Seselja, MLA  
Chair

February 2008

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

**REPORTS—2004-2005-2006-2007-2008**

**OUTSTANDING RESPONSES**

**Bills/Subordinate Legislation**

**Report 1, dated 9 December 2004**

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)  
 Members' Hiring Arrangements Approval 2004 (No 1)  
 Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No 1)

**Report 4, dated 7 March 2005**

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)  
 Determination 2004 (No 4)  
 Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)  
 Approval 2004 (No 1)  
 Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (**PMB**)  
 Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

**Report 6, dated 4 April 2005**

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No 1)  
 Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No 1)  
 Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No 1)  
 Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

**Report 10, dated 2 May 2005**

Crimes Amendment Bill 2005 (**PMB**)

**Report 12, dated 27 June 2005**

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

**Report 14, dated 15 August 2005**

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

<b>Bills/Subordinate Legislation</b>
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**Report 15, dated 22 August 2005**

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

**Report 16, dated 19 September**

Civil Law (Wrongs) Amendment Bill 2005 (**PMB**)

**Report 18, dated 14 November 2005**

Guardianship and Management of Property Amendment Bill 2005 (**PMB**)

**Report 19, dated 21 November 2005**

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

**Report 25, dated 8 May 2006**

Registration of Relationships Bill 2006 (**PMB**)  
 Terrorism (Preventative Detention) Bill 2006 (**PMB**)

**Report 28, dated 7 August 2006**

Public Interest Disclosure Bill 2006

**Report 30, dated 21 August 2006**

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

<b>Bills/Subordinate Legislation</b>
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Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)

Education (School Closures Moratorium) Amendment Bill 2006 (**PMB**)  
 Education Amendment Bill 2006 (No. 3)

**Report 34, dated 13 November 2006**

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

**Report 36, dated 11 December 2006**

Crimes Amendment Bill 2006 (**PMB**)  
 Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

**Report 37, dated 12 February 2007**

Civil Partnerships Bill 2006

**Report 38, dated 26 February 2007**

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

**Report 43, dated 13 August 2007**

Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)

Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)

Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)

Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

**Report 44, dated 27 August 2007**

Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)

Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

**Report 45, dated 24 September 2007**

Crimes (Street Offences) Amendment Bill 2007 (**PMB**)  
 Legal Profession Amendment Bill 2007

<b>Bills/Subordinate Legislation</b>
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Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

**Report 47, dated 12 November 2007**

Disallowable Instrument DI2007-227 - Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 3)

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

**Report 48, dated 19 November 2007**

Disallowable Instrument DI2007-229 - Residential Tenancies Tribunal Appointment 2007 (No. 1)

Disallowable Instrument DI2007-230 - Residential Tenancies Tribunal Appointment 2007 (No. 2)

Disallowable Instrument DI2007-231 - Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3)

Subordinate Law SL2007-33 - Poisons Amendment Regulation 2007 (No. 1)

**Report 49, dated 3 December 2007**

Disallowable Instrument DI2007-258 - Children and Young People (Places of Detention) Admission and Classification Standing Order 2007 (No. 2)

Disallowable Instrument DI2007-259 - Children and Young People (Places of Detention) Search Standing Order 2007 (No. 1)

Disallowable Instrument DI2007-260 - Children and Young People (Places of Detention) Provision of Information, Review of Decisions and Complaints Standing Order 2007 (No. 2)

Disallowable Instrument DI2007-262 - Children and Young People (Places of Detention) Visits, Phone Calls and Correspondence Standing Order 2007 (No. 2)

Disallowable Instrument DI2007-263 - Children and Young People (Places of Detention) Safety and Security Standing Order 2007 (No. 2)

Disallowable Instrument DI2007-265 - Land (Planning and Environment) Criteria for Direct Grant of a Lease to Dytin Pty Ltd Determination 2007

Disallowable Instrument DI2007-288 - Land (Planning and Environment) Criteria for Direct Grant of a Lease (Single Residence Leases) Determination 2007 (No. 1)

Government Transparency Legislation Amendment Bill 2007 (PMB)

Sentencing Legislation Amendment Bill 2007 (PMB)

Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)

Victims of Crime Amendment Bill 2007



**Jon Stanhope MLA  
CHIEF MINISTER**

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT  
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE  
MINISTER FOR THE ARTS  
—————  
MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
C/- Scrutiny Committee Secretary  
ACT Legislative Assembly  
GPO Box 1020  
CANBERRA ACT 2601

Dear Mr Seselja

I am writing in response to comments in the Scrutiny of Bills Report No 48 of 19 November 2007 in relation to the Explanatory Statement for *the Racing Appeals Tribunal Appointment 2007 (No 2), Disallowable Instrument D12007-232*.

I confirm that all the individuals appointed and re-appointed under the Instrument meet the eligibility requirements as outlined in the *Racing Act 1999*.

Magistrate Grant Lalor who was re-appointed as President and Mr Robert Cook who was re-appointed as Deputy President are both lawyers of more than 5 years standing as required under Item 1.1 (2) of Schedule 1 to the *Racing Act 1999*

I also confirm that all the individuals appointed or re-appointed to the Tribunal meet the requirements under Item 1.1 (3) of Schedule 1 to the *Racing Act 1999*. That is, none of the individuals are officers or employees of a controlling body; registered with or licensed by a controlling body under the approved rules (otherwise than as the owner of a horse or dog that is so registered or licensed); or registered with or licensed by a corresponding body (otherwise than as the owner of a horse or dog that is so registered or licensed).

Finally, I confirm that none of the persons appointed or re-appointed to the Tribunal is a public servant. The re-appointed President, Magistrate Grant Lalor, is currently a Magistrate in the ACT Magistrates Court. The re-appointed Deputy President, Mr Robert Cook, is a lawyer in

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a private law firm. Mr Philip Drever, who was re-appointed as a member to the Tribunal, is retired. The other two persons who were appointed to the Tribunal, Ms Lois Fordham and Ms Thena Kyprianou, also work for private sector law firms.

I thank the Committee for its comments.

Yours sincerely



Jon Stanhope MLA  
Treasurer

- 6 DEC 2007



## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

Thank you for the comments raised by the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) in its Report No 46 of 15 October 2007, about entries on the ACT legislation register (the legislation register) in relation to the following disallowable instruments made under the *University of Canberra Act 1989*, section 40:

- *University of Canberra (Election of Council Members by Graduates) Repeal Statute 2007* (DI2007-215), which repeals the *University of Canberra Election of Council Members by Graduates Statute 1991* (DI1991-119)
- *University of Canberra (Election of Student Members of Council) Statute 2007* (DI2007-216), which repeals the *University of Canberra Election of Student Members of Council Statute 1991* (DI1991-118)
- *University of Canberra (University Seal) Statute 2007* (DI2007-217) which repeals the *University of Canberra University Seal Statute 1992* (DI1992-189)
- *University of Canberra (Academic Board) Amendment Statute 2007 (No 1)* (DI2007-218) which amends the *University of Canberra Academic Board Statute 1990* (DI1990-94)

I offer the following response:

The committee notes that the repealed statutes are not available on the legislation register nor on the University of Canberra Secretariat Website. However, the repealed statutes are available on the legislation register as DI1991-119, DI1991-118 and DI1992-189.

The legislation register is designed so that the most commonly accessed law, the current law, is most obvious. However, repealed disallowable instruments on the legislation register can be accessed in a number of ways. Repealed disallowable instruments can be found under Disallowable instruments in the Repealed disallowable instruments category.

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The repealed instruments are listed alphabetically in this category and the instruments the committee was searching for appear under the letter 'U'.

Repealed instruments can also be located under their parent Act, in this case the *University of Canberra Act 1989*. A link to the list of current disallowable instruments made under this Act appears below the Act information on the legislation register. Current instruments appear as a default but repealed disallowable instruments can easily be accessed by clicking on the link [[show current and repealed](#)]. The list of instruments can be sorted by name, authorising provision, effective date range or disallowable instrument number.

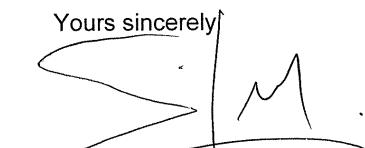
I am advised that, as part of their ongoing commitment to accessibility of the law, the parliamentary counsel's office will explore whether it is possible to make repealed instruments more simple to find. In the meantime, PCO is always happy to answer questions, provide training or guide you to relevant laws.

The committee also notes that disallowable instrument DI2007-118, which amends the *Academic Board Statute 1990*, appears as the 'University of Canberra Academic Board Statute 1990'. The prefix 'University of Canberra' is given to all University of Canberra statutes on the legislation register. This ensures that University of Canberra statutes can be found readily either under their parent Act or in the alphabetical list of disallowable instruments as mentioned above.

Under the *Legislation Act 2001*, section 19 (5) the parliamentary counsel may enter additional material in the register in any way the parliamentary counsel considers being likely to be helpful to register users. The prefix 'University of Canberra' is added to the register only to make it easier for users to find the statutes and therefore improve access to the law. The statutes themselves retain the names given by their citation provisions.

The committee also points out that some of the repealed statutes do not appear to be available on the University of Canberra Secretariat website. The Secretariat advises that they have now provided links on their website to the repealed statutes that were previously only available in paper copy.

I trust that this information addresses the committee's concerns.

Yours sincerely  
  
Simon Corbell MLA  
Attorney General

~ 6 DEC 2007



## Jon Stanhope MLA

CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT

MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE

MINISTER FOR THE ARTS

MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA

Chair

Scrutiny of Bills and Subordinate Legislation Committee

ACT Legislative Assembly

Canberra City ACT 2601

Dear Mr Seselja

I write in response to comments by the Scrutiny of Bills and Subordinate Legislation Committee in Scrutiny Report No 47 of 12 November 2007 about the *Road Transport (Third-Party Insurance) Amendment Regulation 2007 (No 1)* (Subordinate Law SL2007-26).

This Regulation prescribes the maximum premiums that can be charged for various premium classes for Compulsory Third Party (CTP) insurance by the authorised CTP Insurer, Insurance Australia Limited, trading as NRMA Insurance, for CTP policies that commence on or after 1 November 2007. This is of course under the existing law, not the *Road Transport (Third-Party Insurance) Bill 2007* currently before the Legislative Assembly.

The Committee has observed that the Explanatory Statement gives no indication as to the magnitude of any increase in premiums, or reasons for any increase in premiums, or whether any new maximum levels of fees are introduced by the subordinate law.

I am concerned by the statement in the Scrutiny Report that the Committee's brief examination of the previous maximum levels of premiums indicates that the increases in premium are significant. In fact, the situation is entirely opposite.

CTP premiums for more than 90% of ACT motor vehicles, have fallen, effective 1 November 2007, in most cases by 2.6%. For passenger vehicles (sedans, station wagons and the like) making up 85% of the ACT vehicle fleet, the reduction is \$10.35: from \$396.60 to \$386.25 where vehicles are used for private purposes.

Fewer than 10% of ACT registered motor vehicles will experience higher premiums. This mainly affects goods vehicles weighing more than 975 kg tare weight, for which premiums have increased by 2.3%. Increased premiums also apply to several very small classes of vehicles, namely primary producers' goods vehicles over 2 tonnes tare, breakdown vehicles and mobile cranes.

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CTP premiums are subject to Government regulation, including peer review by the independent actuary, to ensure that the community's interests are protected and that premiums are no higher than they need to be to properly compensate persons injured in motor vehicle accidents while maintaining the sustainability of the CTP scheme.

Lower premiums (the premium for a private car is in fact lower now than it was four years ago, when it was \$399.45) reflect the Government's continuing focus on road safety. Claimant frequency (the number of claims made by injured persons) is falling on a sustained basis and is the principal factor contributing to the fall in premiums. In the few cases where premiums have increased, it is because the claims performance of those classes has been significantly worse than average over a sustained period.

The new CTP premiums effective from 1 November 2007 and the previous premiums are listed respectively at documents marked Attachment 1 and Attachment 2.

I trust that this information clarifies matters.

Yours sincerely



Jon Stanhope MLA  
Treasurer

10 DEC 2007

ATTACHMENT 1

**NEW COMPULSORY THIRD PARTY (CTP) INSURANCE PREMIUMS**  
(APPLICABLE FROM 1 NOVEMBER 2007)

MAXIMUM RATES OF 12 MONTH PREMIUMS

Item	Classification	Maximum Premium	
		0% ITC (private use)	100% ITC (business use)
1	Ambulance.....	\$540.75	\$594.75
2	Breakdown vehicle.....	\$772.50	\$849.65
3	Bus or tourist vehicle		
	(a) if the vehicle has seating for not more than 16 adults (including the driver).....	\$1,158.75	\$1,274.50
	(b) if the vehicle has seating for more than 16 adults (including the driver).....	\$1,660.85	\$1,826.75
4	Drive-yourself vehicle.....	\$2,317.50	\$2549.00
5	Firefighting vehicle.....	\$482.80	\$531.00
6	General hire car.....	\$1,545.00	\$1,699.30
7	Goods vehicle		
	(a) if the unladen weight is not over 975 kg.....	\$386.25	\$424.80
	(b) if the unladen weight is over 975 kg but not over 2 t.....	\$579.35	\$637.20
	(c) if the unladen weight is over 2 t.....	\$1,622.25	\$1,784.30
8	Historic vehicle.....	\$38.60	\$42.45
9	Miscellaneous vehicle.....	\$540.75	\$594.75
10	Mobile crane.....	\$772.50	\$849.65
11	Motorcycle		
	(a) if the engine capacity is not over 300 mL.....	\$77.25	\$84.95
	(b) if the engine capacity is over 300 mL but is not over 600 mL.....	\$347.60	\$382.30
	(c) if the engine capacity is over 600 mL.....	\$347.60	\$382.30
12	<b>Passenger vehicle (Class 1 vehicle).....</b>	<b>\$386.25</b>	<b>\$424.80</b>
13	Police vehicle.....	\$965.60	\$1,062.05
14	Primary producer's goods vehicle		
	(a) if the unladen weight is not over 2 t.....	\$386.25	\$424.80
	(b) if the unladen weight is over 2 t.....	\$463.50	\$509.80
15	Primary producer's tractor.....	\$309.00	\$339.85
16	Taxi.....	\$5,407.50	\$5,947.70
17	Trader's Plates.....	\$115.85	\$127.40
18	Trailer.....	\$0.00	\$0.00
19	Undertaker's vehicle.....	\$309.00	\$339.85
20	Veteran vehicle.....	\$38.60	\$42.45
21	Vintage vehicle.....	\$38.60	\$42.45

**ATTACHMENT 2**

**PREVIOUS COMPULSORY THIRD PARTY (CTP) INSURANCE PREMIUMS**  
**(APPLICABLE FROM 15 JUNE 2006 TO 31 OCTOBER 2007)**

**MAXIMUM RATES OF 12 MONTH PREMIUMS**

Item	Classification	Maximum Premium	
		0% ITC (private use)	100% ITC (business use)
1	Ambulance.....	\$555.20	\$610.40
2	Breakdown vehicle.....	\$594.90	\$654.05
3	Bus or tourist vehicle		
	(a) if the vehicle has seating for not more than 16 adults (including the driver).....	\$1,189.80	\$1,308.15
	(b) if the vehicle has seating for more than 16 adults (including the driver).....	\$1,705.35	\$1,875.00
4	Drive-yourself vehicle.....	\$2,379.60	\$2,616.35
5	Firefighting vehicle.....	\$495.75	\$545.05
6	General hire car.....	\$1,586.40	\$1,744.20
7	Goods vehicle		
	(a) if the unladen weight is not over 975 kg.....	\$396.60	\$436.05
	(b) if the unladen weight is over 975 kg but not over 2 t.....	\$575.05	\$632.25
	(c) if the unladen weight is over 2 t.....	\$1,586.40	\$1,744.20
8	Historic vehicle.....	\$39.65	\$43.55
9	Miscellaneous vehicle.....	\$555.20	\$610.40
10	Mobile crane.....	\$713.85	\$784.85
11	Motorcycle		
	(a) if the engine capacity is not over 300 mL.....	\$79.30	\$87.15
	(b) if the engine capacity is over 300 mL but is not over 600 mL.....	\$356.90	\$392.40
	(c) if the engine capacity is over 600 mL.....	\$356.90	\$392.40
12	<b>Passenger vehicle (Class 1 vehicle).....</b>	<b>\$396.60</b>	<b>\$436.05</b>
13	Police vehicle.....	\$1,110.45	\$1,220.90
14	Primary producer's goods vehicle		
	(a) if the unladen weight is not over 2 t.....	\$396.60	\$436.05
	(b) if the unladen weight is over 2 t.....	\$396.60	\$436.05
15	Primary producer's tractor.....	\$317.25	\$348.80
16	Taxi.....	\$6,345.60	\$6,976.95
17	Trader's Plates.....	\$118.95	\$130.75
18	Trailer.....	\$0.00	\$0.00
19	Undertaker's vehicle.....	\$317.25	\$348.80
20	Veteran vehicle.....	\$39.65	\$43.55
21	Vintage vehicle.....	\$39.65	\$43.55



## Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING  
MINISTER FOR PLANNING  
MINISTER FOR TOURISM, SPORT AND RECREATION  
MINISTER FOR INDUSTRIAL RELATIONS

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MEMBER FOR MOLONGLO

Mr Zed Seselja  
Chair  
Scrutiny of Bills and Subordinate Legislation Committee  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

*Zed*  
Dear Mr ~~Seselja~~

I refer to the Scrutiny of Bills Report No. 49 dated 3 December 2007 and the comments in the report concerning the Disallowable Instruments DI2007-252, DI2007-253 and DI2007-254 being the Canberra Institute of Technology Advisory Council Appointments 2007.

I thank the Committee and will take account of the Committee's comments when making further appointments to the Canberra Institute of Technology Advisory Council.

Yours sincerely

*Andrew Barr*  
Andrew Barr MLA  
Minister for Education and Training

17 DEC 2007

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**Simon Corbell MLA**

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

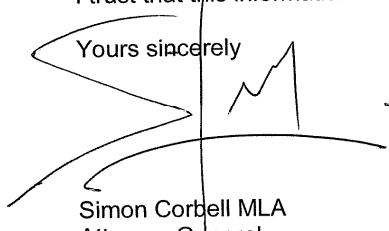
Thank you for your Scrutiny of Bills Report No. 47 of 13 November 2007. I offer the following response in relation to Subordinate Law SL2007-25, the Civil Law (Wrongs) Amendment Regulation 2007 (No. 1).

This subordinate law is made under subsection 4.29(3) of Schedule 4 of the *Civil Law (Wrongs) Act 2002* and prescribes a statement which professionals are obligated to include in their promotional documentation to clients to notify of their limited occupational liability.

I note the Committee's comment that the print size of the prescribed statement may not be effective in making clients aware of the limitation on the relevant professionals' occupational liability.

I can confirm that in making the decision about the size of the print careful consideration was given to choosing an appropriate size that was reasonable to allow clients to view the disclosure statement. The size of the print is consistent with the size prescribed in the other states and territory and is also consistent with the size of disclosure statements in other spheres of activity.

I trust that this information addresses the concerns raised by the Committee.

Yours sincerely  
  
Simon Corbell MLA  
Attorney General  
7.1.08

ACT LEGISLATIVE ASSEMBLY

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## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No. 44 of 27 August 2007. I offer the following response in relation to Disallowable Instruments DI2007-120, the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No.2) and DI2007-131, the Attorney General (Fees) Determination 2007.

### *Instrument No. DI2007-120*

This instrument is made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* and appoints seven named persons as members of the ACT Professional Standards Council (ACT Council).

I note the Committee's comment that the Explanatory Statement for DI2007-120 does not indicate whether the named persons are public servants.

I confirm that these appointments are of individuals who live and work interstate, and are not ACT public servants. Further, I wish to advise that the Explanatory Statement of the forthcoming Instrument No. DI 2007-231, which appoints a final interstate member of the ACT Council, does not indicate whether the appointee is an ACT public servant. I confirm that the final appointee is not an ACT public servant.

### *Instrument No. DI2007-131*

This instrument is made under the *Agents Act 2003*, *Associations Incorporation Act 1991*, *Births, Deaths and Marriages Registration Act 1997*, *Business Names Act 1963*, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*, *Consumer Credit (Administration) Act 1996*, *Cooperative Act 2002*, *Court Procedures Act 2004*, *Dangerous Substances Act 2004*, *Emergencies Act 2004*, *Guardianship and Management of Property Act 1991*, *Instruments Act 1933*, *Land Titles Act 1925*, *Liquor Act 1975*, *Machinery Act 1949*, *Occupational Health and Safety Act 1989*, *Partnership Act 1963*, *Pawnbrokers Act 1902*, *Prostitution Act 1992*, *Public Trustee Act 1985*, *Registration of Deeds Act 1957*, *Sale of Motor Vehicles Act 1977*, *Scaffolding and Lifts Act 1912*, *Second-hand Dealers Act 1906*, *Security Industry Act 2003*, *Trade Measurement (Administration) Act 1991* and *Workers Compensation Act 1951* and determines fees payable for the purposes of the Acts.

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As noted by the Committee, I wish to reiterate that this instrument determines fees under 27 Acts and is therefore necessarily large and complex.

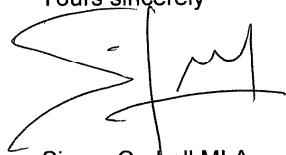
The Committee asked that I consider whether the various fee determinations might be presented in the alphabetical order of the Acts under which they are made. I note the merit in this suggestion, and this approach will be considered when preparing the instrument for 2008.

With respect to the appearance of the instrument in the ACT Legislation Register, since the fees determinations are currently incorporated into a single instrument, the instrument's appearance on the Register is necessarily subject to the presentation conventions mentioned in the scrutiny report. The current approach of consolidating the fee determinations into a single instrument is preferred to creating separate fee determinations because it allows an easier comparison of fees across the various Acts. In addition, as the instrument is frequently updated, it is more administratively expedient to maintain a single instrument.

I note the Committee's comment regarding the lack of an Explanatory Statement. As noted by the Committee, the instrument itself contains relevant explanatory material. I believe it is easier to interpret the instrument when relevant explanatory statements, such as the previous years' fees, are included in proximity to the relevant information in the same document. This saves the reader from cross-referencing documents to understand the context of the instrument.

I trust that this information addresses the concerns raised by the Committee.

Yours sincerely



Simon Corbell MLA  
Attorney General

- 7 JAN 2008



## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

I refer to the Scrutiny of Bills and Subordinate Legislation Committee Report No.48 of 2007, tabled in the Assembly on 20 November 2007, part of which Report relates to Subordinate Law SL2007 – 31 being the *Legal Profession (Solicitors) Rules 2007* (the Rules).

As the Committee notes in its Report, the Rules were made by the Law Society Council. The Council's power to make Rules does not involve my approval. My Department has, however, examined the Committee's comments and discussed with the Law Society how best to address them. I agree that the best vehicle for providing the required information would be an Explanatory Statement, and the Law Society has been asked to prepare a document to be provided to you.

In relation to the *Legal Profession (Solicitors) Rules 2006*, I should point out to the Committee that the *Legal Profession Act 2006*, at the time of its notification, included a number of transitional provisions, one of which was section 615 (Legal profession rules), which I set out in full for the Committee's information. I have bolded what I believe to be the important provisions.

- (1) **The provisions set out in schedule 1, part 1.1 are taken, on the commencement day, to be legal profession rules made under this Act by the law society council.**
- (2) The provisions set out in schedule 1, part 1.2 are taken, on the commencement day, to be legal profession rules made under this Act by the bar council.
- (3) **To remove any doubt, section 583 (Public notice of proposed legal profession rules) does not apply to the provisions mentioned in subsection (1) or (2).**
- (4) **To remove any doubt and without limiting subsection (1), the provisions mentioned in that subsection may be amended or repealed as if they had been made as legal profession rules by the law society council under this Act.**
- (5) To remove any doubt and without limiting subsection (2), the provisions mentioned in that subsection may be amended or repealed as if they had been made as legal profession rules by the bar council under this Act.

### ACT LEGISLATIVE ASSEMBLY

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- (6) To remove any doubt, the legal profession rules mentioned in subsection (1) and (2) are taken—
- to have been notified under the Legislation Act on the commencement day; and
  - to have commenced on the commencement day; and
  - not to be required to be presented to the Legislative Assembly under the Legislation Act, section 64.
- (7) This section is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.
- (8) This section and schedule 1 expire on the day they commence.

The Rules taken to be the Solicitors Rules on the day of commencement were the same in content as those in force when the profession was regulated under the repealed *Legal Practitioners Act 1970* but which, without section 615 of the new Act, would have had no statutory status on the commencement day.

Although consultation on the 'original' Rules was not required, consultation on the recent amendment was, as the Committee states, necessary unless the requirements of section 583(5) of the Act were met.

The attached copy of the Explanatory Statement will assist the Committee in understanding the nature of the amendments made by the *Legal Profession (Solicitors) Rules 2007*. I understand that the Law Society will deal with the minor typographical error, noted by the Committee in its Report, in the next amendment to the Rules.

I thank the Committee for its comments.

Yours sincerely  
  
Simon Corbell MLA  
Attorney General

- 9 JAN 2008

**2007**

**THE LEGISLATIVE ASSEMBLY FOR  
THE AUSTRALIAN CAPITAL TERRITORY**

**LEGAL PROFESSION (SOLICITORS) RULES 2007**

**SL2007 – 31**

**EXPLANATORY STATEMENT**

Circulated by authority of  
Simon Corbell MLA  
Attorney General

## **Legal Profession (Solicitors) Rules 2007**

### **Background**

On 1 October 2007, Part 3.1 (Trust money and trust accounts) and Part 3.2 (Costs disclosure and assessment) of the *Legal Profession Act 2006* (the Act) commenced. Parts 3.1 and 3.2 of the Act now regulate areas of legal practice that were traditionally regulated by the (now inoperative) Professional Conduct Rules. To address that change, the Law Society Council conducted a review of the *Legal Profession (Solicitors) Rules 2006* during 2007.

Section 580(1) of the (the Act) empowers the Law Society Council to make rules for or in relation to practice as a solicitor. Section 583 of the Act requires the council to notify proposed changes to the rules, the particular requirements for which notice are set out in subsections 583(1) to (3).

Subsection 583(5) states that subsections (1) to(4) do not apply to a proposed rule that “in the opinion of the council .... does not justify publication because of its minor or technical nature”.

The *Legal Profession (Solicitors) Rules 2007* (the 2007 Rules) were notified on the Legislation Register on 28 September 2007, and took effect on 1 October 2007.

While the 2007 Rules repealed and entirely replaced the *Legal Profession (Solicitors) Rules 2006*, all of the changes made to the rules were considered by the Law Society Council to be of a minor or technical nature. They were not, therefore, notified under section 583 of the Act.

### **OUTLINE OF THE AMENDMENTS**

The introduction to the 2006 Rules was revised to reflect the new procedure and status under the Act. The introduction had become factually incorrect when the new Act commenced. The introduction itself has no legal status – the scope of the rules and rule-making procedure is governed by Part 8.3 of the Act. The inaccuracy was, however, undesirable and unnecessary.

The name of the rules was updated to the name given to them in the Act, and the Law Society’s former logo was replaced with the new logo.

Some definitions were amended to be consistent with the definitions in the Act.

Rules 3 and 40, which dealt with the regulation of legal costs and costs disclosure, were repealed, given the new extensive regulation of legal costs and costs disclosure in Part 3.2 of the Act. The effect on regulation as a result of the amendment is negligible.

Rule 7 was amended to require practitioners to keep client documents for at least seven years, rather than six years, after a practitioner’s retainer ends. The amendment is required because Part 3.1 of the Act introduces a new seven-year document retention rule.

The heading to Rule 34 (now 33), and the substance of Rules 35 and 38 (now 34 and 37 respectively), were amended in minor ways to acknowledge the two new practice structures (incorporated legal practice and multidisciplinary partnerships) available under the Act since 1 July 2006.

Rule 43, which dealt with trust money, was repealed in view of the extensive new regulation of trust money and trust accounts in Part 3.1 of the Act. The effect on regulation as a result of the amendment is negligible.

Other, technical amendments removed inconsistencies with the Act. They did not change the operation of the law itself.



**Jon Stanhope MLA**

CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT  
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND  
CLIMATE CHANGE MINISTER FOR THE ARTS

MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601



Dear Mr Seselja

Thank you for your letter of 24 September 2007 regarding two declarations I made in relation to Equine Influenza. I apologise for the delay in responding to you.

In your letter you raised concerns about the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 1) and the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 2.). As you would be aware, I made a new quarantine declaration concerning equine influenza which came into effect on 28 September 2007 – the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 3) – which, among other things, addressed the committee's concerns, particularly in relation to the requirements of paragraph 21(e) of the *Animal Diseases Act 2005*.

Thank you for raising this matter with me.

Yours sincerely

Jon Stanhope MLA  
Minister for the Environment, Water and Climate Change

17 JAN 2008

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## Jon Stanhope MLA

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MINISTER FOR THE ARTS

MEMBER FOR GINNINDERRA

Mr Zed Seselja  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
CANBERRA CITY ACT 2601

Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No.49 of 2007. I offer the following responses as acting Attorney General in relation to the matters raised by your Committee about the Regulatory Services Legislation Amendment Bill 2007 (the Bill).

The report notes the Committee's concerns about a possible breach of the right to privacy due to the disclosure of a previous charge of a criminal offence in the amendments to the *Agents Act 2003* and the *Sale of Motor Vehicles Act 1977*. The amendments to these Acts remove the obligation on the Office of Regulatory Services to obtain criminal record checks. Instead, the Bill provides for the applicant to obtain a criminal record check and to provide this to the Office as part of their application for a licence or registration. I do not anticipate that the criminal record check will differ from the check that is currently undertaken, rather who obtains the criminal record check will change. This amendment will also permit the applicant to liaise with the Australian Federal Police about the content of their police record and have any errors corrected.

The report also notes the Committee's concerns that the amendments to the search and entry powers in the *Sale of Motor Vehicles Act 1977* may breach the right to privacy. The Bill permits inspectors from the Office of Regulatory Services to properly investigate unlicensed dealers and replaces the current search and entry powers in this Act with powers that are consistent with the *Human Rights Act 2004*. I support the findings of the Committee that the powers are not an undue trespass on personal rights and that the provisions are not incompatible with the *Human Rights Act 2004*.

I hope this information addresses the Committee's concerns about the Regulatory Services Legislation Amendment Bill 2007.

Yours sincerely

A handwritten signature in black ink, appearing to read "J Stanhope".

Jon Stanhope  
Acting Attorney General

22 JAN 2008

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MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA  
Chair  
Scrutiny of Bills and Subordinate Legislation Committee  
ACT Legislative Assembly  
Canberra City ACT 2601

Dear Mr Seselja

I write in response to comments by the Scrutiny of Bills and Subordinate Legislation Committee in Scrutiny Report No 49 of 3 December 2007 concerning *Road Transport (Third-Party Insurance) Bill 2007*.

This Bill is based largely on compulsory third party insurance (CTP) legislation in NSW and QLD. The Bill is crafted in this way to reflect the desire of all three Governments to align the procedural requirements of their CTP schemes as far as possible in order that claimants in any of these fault jurisdictions can expect similar application of procedural principle. The operative provisions of the NSW and QLD schemes have already been construed by Courts in those States at appellate level over a number of years. Hence, some provisions in this Bill may not be familiar to the Committee, but are reflective of that alignment and of the recognition of the mobility of the citizens of all three jurisdictions. From our own perspective, an estimated 50% of ACT citizen road deaths and 30% of motor accident injuries occur outside the ACT.

In addition, the existing legislation, the *Road Transport (General) Act 1999* reflects a 60 year old CTP scheme that neither represents modern regulatory nor statutory scheme claims management principles. The new Bill brings insurer regulation into the 21<sup>st</sup> century. In this regard, CTP is a compulsory, statutory scheme of insurance within which a defined class of insureds have no choice but to contribute an amount of money, fixed by law and that money must be applied to administer the scheme and compensate those who suffer negligent injury as a result of motor accidents.

In a privately underwritten scheme where fault is a key element in recovery, as here, and in NSW and QLD, it is incumbent on governments that regulate the scheme to ensure benefits are properly directed and costs fairly reflect the needs of the scheme and its solvency. In the past 60 years, the ACT scheme was regarded not so much as I have described, but rather as a virtually unfettered gateway to the common law

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wherein the need to provide those compelled to pay premiums with an accountable mechanism for measuring value for money did not exist. This new Bill establishes those principles and that mechanism.

With regard to clause 17 (1) and (3), I thank the committee for its support for this important provision. With respect to the burden of proof issue, the original draft provision was recast after consultation with the Human Rights Office to ensure that it preserved the principle originally espoused by Dixon J as he then was, in *Proudman v Dayman* (1941) 67 CLR 536, that the burden on the defendant was an evidentiary burden, as opposed to a probative burden.

Turning now to clause 104 and the issue of “directly relevant,” in the context of clause 97(1)(a)(ii), this Bill adopts the principles of full and open disclosure between parties to a motor accident claim and it will place affirmative, sometimes onerous burdens on insurance companies to provide all directly relevant information to claimants. Clause 97(1)(a)(ii) is based upon section 64 of the Civil law (Wrongs) Act 2002 and section 45 of the QLD Motor Accidents Insurance Act 1994.

The open disclosure provisions in the Bill are the cornerstone of procedural efficiency in terms of claims processing, evaluation and management under a compulsory, statutory scheme. The term “directly relevant” is taken from its equivalent QLD provisions and rather than cause additional confusion, the word “directly,” added to “relevant” works well in QLD and adds clarity to the law. In that regard, the principles are so clearly accepted, failure by a lawyer to provide material that is directly relevant to a claim amounts to professional misconduct (see *Legal Services Commissioner v Mullins*, [2006] LPT 012). Two observations by the Tribunal are pertinent:

- [27] Context influences the extent of legal and equitable obligations of disclosure...
- [28] Nor does the involvement of lawyers suggest that negotiations about settling a personal injuries claim are conducted in a shared expectation that legal consequences will not attach to intentional deception about material facts.
- [29] When this mediation was held, Queensland barristers could not have approached the exercise on the basis that they were entering an honesty-free zone.”

Consequently, the Government is happy with the clause as drafted. In addition, a sanction for failure to meet the required standard of disclosure is not only appropriate, but expected in a modern compulsory, statutory scheme of insurance.

With regard to the case of disclosure of medical and other reports, as mentioned in the Committee’s observations with respect to part 3.3 of the Bill, specifically clauses 101 (1) and (2), I recognise that the Explanatory Statement was somewhat bland in terms of the impact of clause 101 (1) and (2). However, in the context of this legislation, and in light of the enhanced disclosure provisions already present in the *Civil Law (Wrongs) Act 2002* (for example, section 61 (3) refers), it was not regarded as revolutionary, rather a standard provision, and a natural incident of a modern statutory compensation scheme. In addition, it was not considered proper to make sweeping policy statements in the Explanatory Statement.

Turning now to the issue of discretions under clauses 136, 177 and 194: as to clause 136, the intention there was to give the Court and the parties the broadest opportunity

to consider and resolve matters in relation to mandatory final offers, and indeed, the provision recognises the fact that the parties may simply not be *ad idem* on any aspect of quantum and the experience in QLD is that Courts are responsive to that without the need for parties to incur additional costs. By contrast, clause 131 relates to one of the seminal events in the compensation claim process, the compulsory conference. With the greatest respect, I suggest the comparison the Committee draws is, therefore, not valid.

With regard to clause 177, the general discretion is broad, but necessarily so, in the Government's view. That said, the Committee will be aware that broad statutory discretions, if tested by courts and tribunals are always subjected to a reasonableness test, irrespective of their apparent breadth. It is indeed implicit these days, in the exercise of any discretion that the exercise of that discretion must be reasonable in the circumstances.

In the case of clause 194, this discretion stands in parallel to that which applies in clause 177. A future government may simply decide to dispense with the CTP scheme as it stands and substitute its own regime. The Committee will recall Mr Brendan Smyth MLA put forward the introduction of a no-fault scheme to replace all elements of tort liability in his proposed response to the insurance crisis. The discretion in a statutory scheme must be sufficiently broad to facilitate a change as fundamental as that.

These provisions (177 and 194) were derived from NSW, a State where necessary changes to the CTP law have been frequent and considerable over the past nine years. While the Government hopes that will not be necessary in the ACT, the Government has decided to retain a broad decision spectrum.

Turning now to general regulatory controls and sanctions, experience by regulators in NSW (seven licensed insurers) and QLD (six licensed insurers) over many years has led the ACT Government to conclude that it needs broad controls over insurers, including sanctions. The Australian Prudential Regulation Authority (APRA) takes a similar view. Governments must be able to respond to rapid shifts in the insurance market and in insurer behaviour.

Against this background, the CTP regulator needs broad powers and wide discretions under the CTP scheme's primary statute, but these will be countervailed by a robust accountability structure. The accountability factors attending these powers will be dealt with by a series of regulations and guidelines (either Disallowable Instruments or Notifiable Instruments) that follow the methodology applied in NSW with respect to controls over the similarly broad regulatory powers exercised by the Motor Accidents Authority under its primary statute. These will all be subject to Assembly scrutiny.

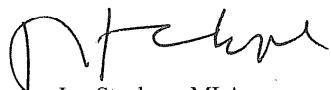
In addition, and for the information of the Committee, the Government has requested legal advice from APRA with respect whether some of the insurer regulatory provisions (Chapter 4 refers), all of which have been adopted from NSW law (as is the case in QLD) to permit the ACT scheme to conform to a common regulatory standard might be ceded to APRA under its expanded powers under the *Insurance Act 1973 (Cwlth)*. This advice is expected by the end of January 2008 and the outcome of the

APRA advice will be incorporated in Government amendments to the Bill if appropriate.

Finally, I recognise the genuine concern the Committee expresses in relation to administrative penalties. To this end, amendments have been prepared to deal with these matters and the amendments will be presented to the Assembly as Government amendments.

I trust that this information will clarify matters.

Yours sincerely



Jon Stanhope MLA  
Treasurer

24 JAN 2008



## Jon Stanhope MLA

### CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT  
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE  
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MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
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Dear Mr Seselja

I refer to Scrutiny of Bills Report No. 49 dated 3 December 2007 regarding *Subordinate Law SL2007-35*.

***Subordinate Law SL2007-35***

I note that the Committee used this Subordinate Law to make a comparison to Subordinate Law SL2007-34 which was prepared by the Department of Justice and Community Service. There were, however, no recommendations made in regards to SL2007-35.

Yours sincerely

Jon Stanhope MLA  
Minister for the Environment, Water and Climate Change  
31 January 2008

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**John Hargreaves MLA**

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MINISTER FOR HOUSING

MINISTER FOR MULTICULTURAL AFFAIRS

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Member for Brindabella

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

*Zed*  
Dear Mr Seselja

I refer to Scrutiny of Bills Report No. 49 dated 3 December 2007 regarding  
*Disallowable Instruments DI2007-251, DI2007-257 and DI2007-290.*

***Disallowable Instruments DI2007-251, DI2007-257 and DI2007-290***  
The Committee commented on some minor typographical errors in these three Instruments (the use of lower-case in the word "Register" and the incorrect reference to the "ACT Government Legislation Register"). These errors have been noted and the Department will ensure that they do not occur when preparing future Instruments.

Yours sincerely

*[Signature]*  
John Hargreaves MLA  
Minister for Territory and Municipal Services  
31 January 2008

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## John Hargreaves MLA

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Member for Brindabella

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*Zed*  
Dear Mr Seselja

I refer to Scrutiny of Bills Report No. 48 dated 19 November 2007 regarding *Disallowable Instrument 2007-238 (DI2007-238)*.

I note the Committee's comments that no Explanatory Statement was provided for this Instrument. An Explanatory Statement was prepared, but due to an administrative oversight, it was not placed on the Legislation Register. More care will be taken in the future to ensure that this does not occur again.

Yours sincerely

*John Hargreaves*  
John Hargreaves MLA  
Minister for Territory and Municipal Services  
31 January 2008

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