Legislative Assembly for the ACT

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

Scrutiny Report

24 SEPTEMBER 2007

Report 45

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

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 Bill and offers no comments on it:

MURRAY-DARLING BASIN AGREEMENT BILL 2007

This is a Bill for an Act to approve and provide for an agreement entered into between the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory with regard to the water, land and other environmental resources of the Murray-Darling Basin. The purpose of the inter-governmental agreement is to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the Murray-Darling Basin.

Bills—Comment

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

CRIMES (STREET OFFENCES) AMENDMENT BILL 2007

This Bill would amend the *Crimes Act 1900* to repeal section 392 and to insert in its stead two new sections that somewhat extend the scope of section 392.

Introduction

At present, section 392 of the Crimes Act provides:

> **392 Offensive behaviour**
>
> A person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner.
>
> Maximum penalty: $1000

The Bill would replace section 392 with two sections:

> **392 Disorderly or offensive behaviour**
>
> (1) A person must not behave in a disorderly or offensive way in or near a public place or school.
>
> Maximum penalty: 10 penalty units.
>
> (2) An offence against this section is a strict liability offence.
>
> (3) In this section:
>
> *disorderly* includes violent or riotous.
>
> *near*, a public place or school, includes within view of, or hearing from, the place or school.
>
> *offensive* includes intimidating, indecent, threatening, abusive, obscene or insulting.

392A Offensive language

(1) A person must not use offensive language in or near a public place or school.

Maximum penalty: 10 penalty units.

(2) An offence against this section is a strict liability offence.

(3) In this section:

near, a public place or school, includes within view of, or hearing from, the place or school.

offensive includes intimidating, indecent, threatening, abusive, obscene or insulting.

Comparing the existing section 392 with the proposed new sections 392 and 392A it is to be noted:

- the proposed sections would create strict liability offences, so that, for example, the prosecution need prove only that the defendant had behaved in a disorderly or offensive way in or near a public place or school, and need not prove that the defendant had any intention to do so;
- the word "behave" in section 392 encompasses the use of language. Thus proposed section 392A does not in this respect add to the existing law;
- the words "riotous, indecent, offensive or insulting" in existing section 392 are replaced by the more extensive definitions of "disorderly" and "offensive" in proposed section 392; and
- both proposed sections would extend the operation of the law to encompass behaviour or speech in or near a school. (The term "school" is defined extensively in the Dictionary to the Crimes Act to include "any land or premises that belong to, are occupied by, or are *used in relation to*, a school".)

Rights issues arising

These proposals give rise to a number of rights issues. How they might be resolved by a court is far from clear and the issues could be subject to extensive analysis. This report will do no more than draw attention to them. The Assembly is not of course bound either to refrain from enacting a provision of a Bill where incompatibility with the HRA appears clear, nor, on the other hand, to enact the provisions if they are apparently compatible.

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 proposed amendments would create strict liability offences, and thus the issue under the *Human Rights Act 2004* (HRA) is whether, in each case, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or of presumption of innocence (HRA subsection 22(1)).

There is as yet no Explanatory Statement that addresses the issue.

On the face of it, these offences are not as "regulatory" as that concept is generally understood, and thus are not 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*. While on the one hand it might be said that a person should be aware that they should not behave in a disorderly or offensive way, this may not be said about their knowledge of whether they are in or near a public place or school.

The degree of moral opprobrium that would attach to a conviction is perhaps higher than is the case with most regulatory offences – which perhaps points against strict liability, but, on the other hand, is probably lower than is the case with ordinary offences - which perhaps points in favour of strict liability.

The penalty attaching to breach – of no more than 10 penalty points - is quite low. A defendant could rely on the defences available under the Criminal Code, Part 2.3, so that, for example, a defendant who had made a reasonable mistake of fact as to where he or she was at the time (that is, reasonably thought that they were not near a school) could rely on the defence in section 36 of the Code).

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

Vagueness of the concepts of disorderly and offensive

Does the vagueness of the concepts of disorderly and offensive mean that the provisions are not compatible with one or both of HRA subsections 18(2) or 25(1)?

Subsection 18(2) provides:

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

Subsection 25(1) provides:

> (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.

There may be some doubt whether HRA subsection 18(2) is relevant in that imposition of a fine may not amount to a deprivation of liberty; this issue is not further explored.

If the case-law of the European Convention is followed, HRA subsection 25(1) will not apply only to retrospective laws, but will also encompass a principle of legal certainty – that is, that there can be no punishment without law.[1]

Two major aspects of this principle were stated by the European Court in the *Sunday Times* case: [2]

[1] See generally, B Emmerson, A Ashworth and A McDonald, *Human Rights and Criminal Justice* (2nd ed, 2007) chapter 10.
[2] http://www.mediator.online.bg/eng/sundayt2.htm or (1979) 2 EHHR 245 [49].

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The Court went on to qualify:

> Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

The vagueness of the concepts of "disorderly" and "offensive" used in the proposed sections is exacerbated by the definitions of these terms. Taking for example the term "insulting", in *Coleman v Power* [2004] HCA 39 Gummow and Hayne JJ noted the questions it threw up:

> … is "insulting" to be read as encompassing any and every disrespectful or harmful word or gesture? Is it a criminal offence (of *behaving* in an insulting manner) for someone in a public place to deliberately turn his or her back on a public figure or even an acquaintance? To do so may be an insult, but is it to behave in an insulting manner? Is the uttering of an unmannerly jibe at another to be a criminal offence (of using insulting *words*) if, for example, one calls the other "ugly", or "stupid", or uses some other term of disapprobation? Again, to do so may be to offer insult, but is it to use insulting words to a person? [181]

On the face of it, there is a real question whether proposed sections 392 and 392A are compatible with the legal certainty principle in HRA subsection 25(1).

On the other hand, the European courts have allowed that vagueness can be accommodated if there are external materials (such as judicial decisions) that provide a more precise definition of the term. In *Coleman v Power*, Gummow and Hayne JJ held that in the particular statute under consideration:

> [insulting] does not suffice for the person to whom the words were used to assert that he or she was insulted by what was said. And it does not suffice to show that the words used were calculated to hurt the self-esteem of the hearer. … The use of such words would constitute no offence unless others who hear what is said are reasonably likely to be provoked to physical retaliation [200]; see too per Kirby J at [260].

The word "offensive" has been the subject of judicial consideration.[3] (Of course, a court looking at the proposed sections 392 and 392A would need to decide whether what was said in other cases about other statutes was applicable.)

This issue of HRA compatibility under consideration arises of course in relation to the *existing* section 392 of the Crimes Act. The issue for the Assembly however is whether it should enact a new provision, and a new provision must be assessed in terms of the HRA.

[3] Such as in *Saunders v Herold* (1991) 105 FLR 1, per Higgins J.

The Committee may assist the Assembly if it suggests that it has a choice between two contrasting approaches.

First, the Assembly might continue to enact laws that employ expressions such as "insulting" that may well need to be read down to be compatible with the HRA. The virtue of this approach is that it enables the Courts to adapt the meaning of a concept to accord with changing community values. It might reasonably be expected that the Courts will act on their conception of relevant community values. This approach is preferable to one where the legislature would attempt to freeze the meaning of a concept such as "insulting" at the time it enacts the law.

A second approach is to engage in more precise drafting of a concept such as "insulting" that is, on its face, HRA compatible, such as, for example, by limiting the concept in the way suggested by Gummow and Hayne JJ. A virtue of this approach is that it provides, to the citizen, a much clearer statement of the content of the law.

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

Freedom of expression

Does the proposed section 392A restrict freedom of expression in ways that are not proportionate to the interest which the section is designed to serve?

Subsection 16(2) provides in part that "everyone has the right to freedom of expression". "Expression" encompasses any form of language that would be caught by proposed section 392A. The critical issue is whether the restriction is justifiable under HRA section 28:

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

The same issue arises in respect of the scope of the freedom of expression of political communication enshrined in the Commonwealth Constitution. In *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* [1992] HCA 45 [6], Brennan J said:

> … in order that a law may validly restrict a freedom of communication about political or economic matters, the restriction must serve some other legitimate interest and it must be proportionate to the interest to be served. Thus, a law which … forbids the publication of … obscene material … trespasses upon absolute freedom to communicate, but it is a valid law provided the restrictions imposed by the law are proportionate to the interest which the law is calculated to serve [emphasis added].

It is not easy to be certain about how this question would be resolved by a court looking at the proposed section 392A. On the one hand, there are judicial views that could be read as sympathetic to the restriction on expression in proposed section 392A. In *Australian Capital Television* [33], Gaudron J said:

> Recourse to the general law reveals that freedom of speech … is not absolute, but may be regulated and, in certain circumstances, may be severely restricted. As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law. Thus, in general terms, the laws which have developed to regulate speech, including the laws with respect to defamation, sedition, blasphemy, obscenity and offensive language, will indicate the kind of regulation that is consistent with the freedom of political discourse.

Her Honour spoke about the general position, and in a particular case much will turn on what would be regarded as the legitimate object of the offensive language statute. On this point, there are at least two contrasting standpoints.

Those who would support a restriction of speech such as is found in proposed section 392A might argue that it is legitimate to use the law to promote a concern for civil behaviour in public places and near schools. On the other hand, those who oppose such laws might argue that civility is a trivial concern, and even if legitimate the restriction proposed is disproportionate to achieving this objective.

The degree of flexibility involved in the restriction on speech (see above) may have a bearing on whether the legislative response is a proportionate matter of achieving the objective of that restriction.

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

ELECTORAL LEGISLATION AMENDMENT BILL 2007

This Bill would amend the *Electoral Act 1992*, the *Referendum (Machinery Provisions) Act 1994* and the *Electoral Regulation 1993* for various purposes.

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

Privacy

Is a person's privacy arbitrarily interfered with where the law permits the registration of a political party that includes the name of a particular living person in circumstances where use of the person's name does not suggest that there is a connection between the party and the person?

The Explanatory Statement states the effect of clause 9 of the Bill:

> Clause 9 amends section 89 of the Electoral Act to provide that an application for registration of a political party that includes the name of a particular living person in the party's name or abbreviation must include a notice signed by that person indicating his or her consent to use of the person's name in the party name. The notice must also include the person's address, or if the person's address is suppressed from the electoral roll, an indication that the person's address is suppressed.
>
> However, this amendment also provides that the consent of a living person to the use of the person's name in the name or abbreviation of a political party is not required where the use of the person's name does not suggest that there is a connection between the party and the person.

The privacy issue may be posed through an example. A person engaging in political debate may make it clear that her or his political position is defined by their opposition to the policies or behaviour of a particular person. The first person might do so by promoting or forming a political party the name of which makes clear this opposition. It is arguable that the use of the second person's name in this way infringes on this person's privacy. The general law (including defamation) might restrain the first person, but the HRA has no bearing.

Under the Bill, however, the state would sanction the action of the first person by registering the party, and it is perhaps arguable that state approval of this kind is an arbitrary interference with the privacy of the named person and in breach of HRA section 12:

> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> (b) not to have his or her reputation unlawfully attacked.

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

Right to equal protection of the law

Would the removal of the facility for non-party groups to be listed on ballot papers be a denial of the equal protection of the law (HRA subsection 8(3)) to those independent candidates who wished to be grouped on a particular list on the ballot paper, and/or would this removal be an undue trespass on 'common law' rights of those candidates?

The Explanatory Statement states the effect of clause 14:

> ***Grouping of candidates' names***
>
> **Clause 14** amends section 115 of the Electoral Act [by the deletion of existing subsections 115(2) and (3)] to remove the facility for non-party groups to be listed on ballot papers. As a result, [given the retention of subsection 115(1)], only two or more candidates nominated by the registered officer of a registered party may be grouped on ballot papers. All other candidates must be listed in the "ungrouped" column or columns on the right hand side of the ballot paper.

It is arguable that clause 14 engages HRA subsection 8(3), which provides in part:

> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

If this right is not engaged, it is possible to state a rights issue in "common law" terms. To pose the issues, the Committee draws attention to *Hansard* extracts on the debate on the Electoral Amendment Bill 2003. It will be apparent that the Electoral Commission supports the policy of clause 14.[4]

Hansard extracts on the debate on the Electoral Amendment Bill 2003

8 May 2003
http://www.hansard.act.gov.au/hansard/2003/pdfs/20030508.pdf

Mr Wood as the proposing Minister:

[4] See the Commission's reports following both the 2001 and 2004 elections; see http://www.elections.act.gov.au/adobe/2001ElectionReview.pdf, andhttp://www.elections.act.gov.au/adobe/2004electionreview.pdf.

The Electoral Commission noted in its report that in its original conception, dating back to the days when political party affiliations were not listed on ballot papers, a non-party group was seen as a collection of like-minded candidates campaigning on a common platform. These days a non-party group is commonly used as a vehicle for two or more candidates to distinguish themselves on the ballot paper by being listed in a separate column. There is no expectation that candidates in a non-party group have any connection with each other beyond a desire to be listed in a separate column.

Removing non-party groups would give voters a clearer picture of the backgrounds of candidates by more clearly delineating independent and non-party candidates from candidates representing registered political parties or ballot groups. It would also reduce the opportunity for persons to mischievously frustrate the electoral process by causing ballot papers to be unnecessarily large through a proliferation of non-party groups.

14 May 2004
http://www.hansard.act.gov.au/hansard/2004/pdfs/20040514.pdf

Ms Dundas

While the electoral system is only one part of a democratic system of government, it is probably the most fundamental, by ensuring that those who are given the power to make laws and govern are directly chosen by the people.

… removal of the ability for non-party groups to be listed in a separate column has raised some issues.

The commission has put a number of arguments on the practicality of having these additional columns, such as that they make the ballot papers longer and make it difficult to fit all candidates on the screen during electronic voting. The commission also points out:

…the facility for candidates to stand in non-party groups is most commonly used as a vehicle for two or more candidates to distinguish themselves on the ballot paper by being listed in a separate group. There is no requirement or expectation that candidates listed in a non-party group have anything in common other than a desire to be listed together in a separate column. Indeed, it is possible that one of the two candidates listed in the column may only have agreed to be nominated in order to allow the other candidate to be listed in a non-party group on the ballot paper.

These claims are no doubt true in some cases, but I am not convinced that they are sufficient to justify the elimination of non-party groups.

Large ballot papers can be difficult for voters to find their preferred candidates, but our ballot papers are not as large as the Senate ballot papers or other upper house ballot papers, such as those in New South Wales. In fact, despite the reforms of the New South Wales ballot paper in recent years, the number of candidates did not get much smaller. Administrative simplicity is not a good reason to remove columns. The democratic representation of candidates is the primary concern of the ballot papers and that should not be diluted by administrative convenience.

I would also argue that our system of Robson rotation is specifically designed to draw attention to the differences between candidates, even those who run in the same column. The Robson rotation system is recognition that the decisions than [sic] an assembly produces are influenced not only by the size of the political parties or the number of Independents, but also which specific members of each party are elected and their individuality.

Mrs Cross

> I think the intention to ban non-party groups is undemocratic, unfair and unequal. …
>
> It is said that removing non-party groups would give voters a clearer picture of the backgrounds of particular candidates, but how does that possibly make sense when the intention is to lump the non-party candidates into one column, thereby blurring even further the differences that exist between them? In practice, it would do exactly the opposite of what the minister is claiming.
>
> It is also said that the move would reduce the opportunity for mischievous frustration of the electoral process through causing ballot papers to be too large. I have to say that I never dreamt that someone would come up with such an excuse. In the midst of all the recent talk of rights, equality and so forth, something like this non-reason is trotted out to fill the space in a paragraph to make it look as if the proposal has been logically derived. What is the form of that possible mischievous frustration that Minister Wood has alluded to? Why, on the remote chance of a possible mischief, should the group be subjected to pre-emptive punishment? Why should the size of a ballot paper be considered … more important than the ideals of fairness, democracy, non-discrimination and equality?
>
> …
>
> It also diminishes the spirit of the Hare-Clark system, in which it is stated, as characteristic of the system, that Independent candidates are included in one or more ungrouped columns on the ballot paper. This, no doubt, deliberately accords a degree of significance to Independent candidates, but this amendment bill would strip them of that.

Mr Stanhope

> These days a non-party group is arguably just a vehicle for two or more candidates to distinguish themselves on the ballot paper by being listed in a separate column. Candidates in a non-party group are no longer expected to have any connection with each other beyond a desire to be listed in their own column.

Ms Dundas

> … I think that, quite often, candidates listed together as a non-party group generally have very similar political views. They are quite often more similar than those of people who may run together as members of the same political party. I also believe that there is an expectation in the electorate that members of a non-party group do have something in common.
>
> I understand that the commission can be very concerned about the administration of the election, its associated costs and logistics—it is their job to do so. However, my concern as a member of this Assembly is to ensure that candidates at an election are treated equally. It is important to remember that our Hare-Clark system of election is one that is candidate centred and not party centred. The ACT has purposely rejected a party with this system of voting in favour of one that specifically elects individual candidates based on merit.
>
> Despite the fact that this change could make elections easy to administer, it does privilege some candidates over others.

Mr Stanhope

> Candidates in a non-party group are no longer expected to have any connection with each other beyond a desire to be listed in their own column. The government agrees with the Electoral Commission that the ability of candidates to form non-party groups is more likely to confuse than to inform voters. The government will, therefore, oppose this clause.

The citizen's right to take part in the conduct of public affairs

Does the proposal in clause 57 of the Bill to insert new sections 220 and 221 of the Electoral Act to regulate the obligations of a person who is not a party, candidate or associated entity, concerning her or his expenditure for political purposes, derogate from the citizen's right to take part in the conduct of public affairs as stated in HRA paragraph 17(a), and, if so, is this derogation justifiable under HRA section 28?

HRA paragraph 17(a) provides:

> 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; … .

Clause 57 of the Bill would repeal sections 220 and 221 of the Electoral Act in the ways described in the Explanatory Statement, and would replace them with new sections of the same numbers.[5]

The effect of proposed subsections 220(1) to (3) is that where a person (**not being** a party, candidate or associated entity):

- incurred expenditure of $1500 or more for a political purpose during the disclosure period for an election; **and**
- had received from someone else [the donor] 1 or more gifts totalling $1500 or more **all or a part of each of which was used by the person** to enable her or him to incur expenditure during the disclosure period **for a political purpose** (or to reimburse the person for incurring expenditure during the disclosure period for a political purpose);
- then the person must within 8 weeks after the polling day for the election give the commissioner a return for all of the gifts (the nature of which is stated in proposed subsection 220(3)).

The notion of "incurs expenditure for a political purpose" is stated very broadly in proposed subsection 220(5). It includes:

> (a) publishing electoral matter (including publishing by radio or television); or
>
> (b) otherwise publishing a view on an issue in an election; ….

By proposed subsection 220(6):

[5] This discussion points to a rights issue in respect of parts of these proposed sections that restate the existing law. The Committee is nevertheless obliged to report on rights issues raised by bills, and this applies as much to proposals that merely restate existing law. It must also be noted that the *Human Rights Act 2004* came into effect after the enactment of sections 220 and 221 of the *Electoral Act 1992*.

(6) A person is taken to have incurred expenditure for a political purpose if, during the disclosure period for an election, the person incurs expenditure in relation to that or any other election.

Do these proposals derogate from the citizen's right to take part in the conduct of public affairs as stated in HRA paragraph 17(a)?

The Committee does not propose to do little more than raise the question for the Assembly to consider. It is probably true to say that these proposals might discourage some citizens from making expenditure for political purposes, and thus from taking part directly in the conduct of public affairs. On the other hand, it is perhaps the purpose of these proposals to inhibit some form of "dummying" on behalf of a party, candidate or associated entity. The issue then is whether the proposals are a proportionate response to dealing with this problem.

These questions are not adverted to in the Explanatory Statement.

Drafting query

Why is there no subsection (4) in the proposed section 220?

LEGAL PROFESSION AMENDMENT BILL 2007

This Bill would amend the *Legal Profession Act 2006* to implement in the Australian Capital Territory a range of amendments to the national model Legal Profession Bill, which were developed by the national legal profession model laws Joint Working Party.

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 Bill proposes to create a number of strict liability offences, and thus the issue under the *Human Rights Act 2004* (HRA) is whether, in each case, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or of presumption of innocence (HRA subsection 22(1)).

The Explanatory Statement helpfully refers (at page 3) to these proposals and advances a justification:

> Offences incorporating strict liability … generally arise in a regulatory context in which, for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, when a defendant can reasonably be expected, because of his or her professional involvement, to be aware of the requirements of the law the mental, or fault, element can justifiably be excluded.

> Professionals engaged in the practice of law can reasonably be expected to be aware of their duties and obligations. Unless some knowledge or intention ought be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

The Committee accepts this as a valid line of justification, and notes that in no case does the penalty exceed 50 penalty points.

Report under section 38 of the Human Rights Act 2004
Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?

Wide discretionary powers

In relation to clause 192, which would insert into the Act a new section 300B, pursuant to which the Supreme Court may assess the amount of any disputed costs that are not the subject of a costs agreement *by reference to anything it considers appropriate*, the rights issue is whether the provision should spell out the considerations relevant to the exercise of this power to avoid incompatibility with the *Human Rights Act 2004*.

The Committee has long adopted the standpoint that administrative power should be confined in its scope so far as practicable. Paragraph 2(c)(ii) of the Committee's terms of reference require it to report on whether a clause of a bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative power. Where a clause does so, it may be incompatible with HRA subsection 21(1); see generally *Scrutiny Report No 43* of the *Sixth Assembly* concerning the Surveyors 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*.

A discretionary power expressed in very wide terms - such as in proposed section 300B – is on its face "insufficiently defined". The Supreme Court would no doubt read down its power so that its lawful exercise would require that it should have regard only to those matters the court, by reference to its view of the object of the Act, thinks were intended by the Act to be relevant to the exercise of the power. Nevertheless, the Committee's term of reference reflect a policy that a law should provide a sufficient definition of relevant (and/or irrelevant) matters. Moreover, closer definition of the scope of an administrative power also provides guidance to members of the community who might be affected by its exercise.

A similar issue arises with respect to the proposal by clause 193 to insert a new section 302 – see the words 'unless the Supreme Court otherwise orders" in proposed subsection 302(3).

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 this 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.[6]

[6] 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

Lest it be argued that it is not appropriate for the legislature to trammel a discretion vested in the Supreme Court, the Committee points out that other clauses in this Bill propose that Supreme Court discretion should at least be structured by stipulation of a list of relevant factors, even if ultimately open-ended; see clause 173.

Rights issues identified in the Explanatory Statement

The Explanatory Statement identifies two rights issues that the Committee considers are addressed adequately in that Statement. These issues arise with respect to the proposals to:

- add to the number of entities in relation to which costs disclosure is not required – which may engage HRA subsection 8(3) (equality before the law); and
- the power of a disciplinary tribunal to make a decision without proceeding to a hearing - which may engage HRA subsection 21(1) (right to fair trial).

These issues are not acute and the Explanatory Statement advances a justification the Committee considers adequate.

OCCUPATIONAL HEALTH AND SAFETY AMENDMENT BILL 2007

This Bill would amend the *Occupational Health and Safety Act 1989* in relation to the Occupational Health and Safety Council and amend the safety duty offences in this Act and the *Dangerous Substances Act 2004*.

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 18 and 19 would create strict liability offences, and thus the issue under the *Human Rights Act 2004* (HRA) is whether, in each case, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or of presumption of innocence (HRA subsection 22(1)).

Given the penalty attaching to breach – 1,500 penalty units, imprisonment for 5 years, or both – there is a further question whether the punishment is disproportionate to the crime and thus in breach of HRA paragraph 10(1)(b), which provides that no-one may be "punished in a cruel, inhuman or degrading way", *and/or* in breach of HRA section 18(1), which provides that "[e]veryone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained".

On the face of it, a strict liability offence derogates from "the right to liberty and security of person" in HRA subsection 18(1), and/or the presumption of innocence in subsection 22(1). (The citation to subsection 18(1) is explained in *Scrutiny Committee Report No 41*, concerning the Water Resources Bill 2007.) There is thus raised the question of whether the derogation is justifiable under HRA section 28. In short form, section 28 requires that any limitation or restriction of human rights must

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.

pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

Existing section 48 of the *Occupational Health and Safety Act 1989* provides:

> **48 Failure to comply with safety duty—exposing people to substantial risk of serious harm**
>
> (1) A person commits an offence if—
>
> (a) the person is required to comply with a safety duty; and
>
> (b) the person fails to comply with the safety duty; and
>
> (c) the failure exposes anyone to a substantial risk of serious harm; and
>
> (d) the person either—
>
> (i) was reckless about whether the failure would expose anyone to a substantial risk of serious harm; or
>
> (ii) was negligent about whether the failure would expose anyone to a substantial risk of serious harm.
>
> Maximum penalty: 1 500 penalty units, imprisonment for 5 years or both.
>
> (2) Absolute liability applies to subsection (1) (a).

Thus, a person could not be convicted unless the prosecution proved (that is, satisfied the court beyond reasonable doubt) the existence of the 4 elements of the offence. That is, that:

- first, there was a safety duty with which the defendant was required to comply – and because of subsection 48(2), the prosecution would not need to prove that the defendant was aware of her or his obligation;
- secondly, the defendant failed to comply with the safety duty – and here the prosecution would need to prove that the defendant *intended* to fail to comply (or perhaps was reckless as to whether he or she was required to comply);
- thirdly, the defendant's failure to comply exposed someone to a substantial risk of serious harm; and
- fourthly, the defendant was reckless or negligent about whether the failure to comply would expose anyone to a substantial risk of serious harm.

Clause 18 of the Bill would insert a new subsection 48(3) to provide "Strict liability applies to subsection (1)(b)". This would affect the second element, so that the prosecution would no longer need to prove that the defendant *intended* to fail to comply with the safety duty. It would be sufficient to prove that the defendant did not comply.

A defendant who did not comply might however avoid conviction (assuming that the prosecution proves the third and fourth elements) by relying on the defence of reasonable mistake of fact under section 36 of the Criminal Code. The Explanatory Statement gives an example:

> So if a person in control of plant checks the temperature gauge on a piece of machinery to ensure that it is safe and falls within the limits of accepted industry standards (or any regulations) but the gauge is faulty and the piece of machinery is showing no signs of overheating etc, the person is not liable for an offence that may result from this scenario because it occurred because of a reasonable mistake of fact.

The need for the prosecution to prove the third and fourth elements would not be changed by the amendment proposed by clause 18.

Thus, the nub of the offence would now lie in a person, who is required to comply with a safety duty, (whether the person was aware of this or not), doing or omitting to do something in breach of that duty that exposed anyone to a substantial risk of serious harm *and* where the person was reckless or negligent about whether what he did exposed anyone to that risk. The maximum penalty for committing the offence would be 1,500 penalty units, imprisonment for 5 years or both.

Is the imposition of strict liability in relation to the second element of the offence justifiable?

The Explanatory Statement addresses this question:

> The imposition of a fault element for this element of the offence is inconsistent with the regulatory context and poses unjustified limitations on enforcement as the prosecution would need to prove that the person was aware of the safety duty and intentionally or recklessly failed to comply with the safety duty. In particular, it would be difficult to prove that a defendant intended to omit performance of a duty if the defendant was unaware that the duty existed. In an occupational health and safety context duty holders are expected to be aware of their duties and obligations to their employees etc. This is a long-standing principle and is based on reasons of workers and public safety.
>
> … where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale in this cause is that duty holders under the Act, as opposed to members of the general public, are expected to be aware of their duties and obligations. The defendant's frame of mind in relation to the existence of, and compliance with, the safety duty is irrelevant. However, some knowledge or intention is required in order to justify the level of penalty for this particular offence. This is provided through the third element of the offence.

Apart from the argument that strict liability eases the prosecution's difficulty of proof, this line of justification is generally acceptable; see *Scrutiny Report No 43* of the *Sixth Assembly* concerning the Building Legislation Amendment Bill 2007.

There are, nevertheless, two matters to consider:

First, the existing section 48 already contains an element of absolute liability in relation to the first element of the offence. Given its terms of reference, the Committee cannot comment on whether this appropriate, but it is appropriate to point to this onerous aspect of the existing provision when considering whether to add another onerous element.

Secondly, even if the potential punishment is proportionate to the offence under the proposed amendment (see below), there is a question whether this punishment is proportionate where the first and second elements of the offence would be ones of absolute and strict liability. The Committee has frequently drawn attention to the HRA compatibility issue where imprisonment is a potential punishment; see *Scrutiny Report 37* of the *Sixth Assembly* concerning the Corrections Management Bill 2006. The Committee notes that this issue can be avoided (as has been done in Territory legislation) by creating two offences. One offence as is proposed by clauses 18 and 19 would contain elements of absolute and strict liability but would not provide for imprisonment as a penalty. The second offence would provide for imprisonment, but would not affect the governing rule that fault elements attach to all physical elements of the offence.

Is the penalty proportionate to the offence?

This issue can be put in two alternative ways:[7]

- whether the punishment is so disproportionate to the crime that it is in breach of HRA paragraph 10(1)(b), which provides that no-one may be "punished in a cruel, inhuman or degrading way"; or
- whether the punishment is so disproportionate to the crime that it is in breach of HRA section 18(1), which provides that "[e]veryone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained". The argument might be that a deprivation of liberty pursuant to a disproportionate sentence is "arbitrary".

The critical question in either case might be posed in this way: supposing the *worst* case where a person through their negligence *exposed* a person to a substantial risk of serious harm, would the imposition of a fine of 1500 penalty points and imprisonment for 5 years be justified? If the answer is "no", then it is arguable that proposed section 48 is not HRA compatible.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2007-180 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2007 (No. 1) made under section 29 of the *Cemeteries and Crematoria Act 2003* **appoints specified persons as chair and deputy chair of the ACT Public Cemeteries Authority governing board.**

Disallowable Instrument DI2007-181 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2007 (No. 2) made under section 29 of the *Cemeteries and Crematoria Act 2003* **appoints specified persons as members of the ACT Public Cemeteries Authority governing board.**

Disallowable Instrument DI2007-195 being the Environment Protection (Consultation for Environmental Authorisation Application) Exemption 2007 (No. 1) made under section 48 of the *Environment Protection Act 1997* **revokes DI1998-77 and exempts the Environment Protection Authority from publicly notifying an application for authorisations for lighting, using or maintaining a fire in the open air; the commercial use of chemical products registered under the Veterinary Chemicals Code; and the sale or supply of firewood**

Disallowable Instrument DI2007-196 being the Public Sector Management Amendment Standards 2007 (No. 6) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards to increase the base monthly lease rate for executive vehicles.**

Disallowable Instrument DI2007-197 being the Health Records (Privacy and Access) (Fees) Determination 2007 (No. 2) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2007-59 and determines fees payable for the purposes of the Act.**

[7] See B Emmerson, A Ashworth and A McDonald, *Human Rights and Criminal Justice* (2nd ed, 2007) 670-671.

Disallowable Instrument DI2007-199 being the Public Place Names (Forde) Determination 2007 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Forde.**

Disallowable Instrument DI2007-200 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 2) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drivers competing in the timed special (competitive) states of the 2007 BRM Silverstone Safari Rally.**

Disallowable Instrument DI2007-201 being the Architects Board Appointment 2007 (No. 1) made under subsection 70(2) of the *Architects Act 2004* **appoints specified persons as members of the Australian Capital Territory Architects Board, one representing the community interests and the other as the academic architect member.**

Disallowable Instrument DI2007-202 being the Road Transport (Dimensions and Mass) Higher Mass Limits (HML) Exemption Notice 2007 made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990* **revokes DI2006-132 and exempts vehicles fitted with road friendly suspensions from the requirements of sections 24 and 25 of the Act and the provisions of DI2006-119.**

Disallowable Instrument DI2007-203 being the Utilities (Gas Network Capital Contributions Code) Approval 2007 made under section 58 of the *Utilities Act 2000* **approves the Gas Network Capital Contributions Code.**

Disallowable Instrument DI2007-204 being the Utilities (Electricity Network Capital Contributions Code) Approval 2007 made under section 58 of the *Utilities Act 2000* **approves the Electricity Network Capital Contributions Code.**

Disallowable Instrument—Comment

The Committee has examined the following disallowable instrument and offers these comments on it:

Retrospective operation

Disallowable Instrument DI2007-198 being the Public Sector Management Amendment Standards 2007 (No. 7) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards by broadening exclusion provisions to cover all executives and statutory office holders employed by the Territory before 30 June 2006 to ensure they maintain the employer superannuation contributions they received upon commencement with the Territory.**

This instrument amends the Public Sector Management Standards, made under section 251 of the *Public Sector Management Act 1994*. The Explanatory Statement to the instrument states:

> From 1 July 2006 the Standards have provided executives, chief executives and statutory office holders engaged or appointed from 1 July 2006 with an employer superannuation contribution of 9%. The Standards also specify that a 10% employer contribution will be paid, where the executive, chief executive or statutory office holder makes a personal superannuation contribution of 3% or more.
>
> It was intended that existing staff would not be affected by this arrangement. Accordingly, the Standards contain exclusion provisions that exempt existing members of the Commonwealth Superannuation Scheme (CSS) and Public Sector Superannuation Scheme (PSS). Exclusion provisions also applied to executives engaged and statutory office holders appointed between 1 July 2005 and 30 June 2006, covering Public Sector

Superannuation Scheme Accumulation Plan (PSSAP) members or circumstances where an executive elected to contribute to another fund in accordance with commonwealth superannuation choice arrangements.

Inadvertently, executives and statutory office holders engaged or appointed before 1 July 2005, who were not members of the CSS or PSS, were not exempted from the employer superannuation contribution arrangements in place from 1 July 2006.

The amendment clarifies the 1 July 2006 amendment to the Standard by broadening the exclusion provisions to cover all executives and statutory office holders employed by the Territory before 30 June 2006. This ensures that where an executive or statutory office holders [sic] was employed before 30 June 2006 and remains in continuous employment with the Territory, they maintain the employer superannuation contributions they received upon commencement with the Territory.

The amendment also clarifies that where an executive or statutory office holder commenced before 30 June 2006, and maintains continuous employment with the Territory, they will retain their commencing employer superannuation contribution if they accept a different type of office within the Territory. For example, an executive employed before 30 June 2006, who accepts and [sic] appointment as a statutory office holder after this date will continue to receive the employer superannuation contribution they received as an executive.

The Committee notes that, though the instrument commences the day after notification (see section 3), it has application back to 30 June and 1 July 2006. That being so, it has a retrospective operation.

Section 76 of the *Legislation Act 2001* provides:

76 Non–prejudicial provision may commence retrospectively

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

(2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.

Example

The *Locust Damage Compensation Determination 2003* (a hypothetical disallowable instrument) sets out (among other things) the people who are eligible for compensation under a compensation fund. Previously, there was no restriction on who was eligible. The determination provides that it is taken to have commenced on 1 July 2003, but it is not notified until 15 August 2003. There is nothing in the Act under which the determination is made (or any other Act) that authorises the retrospective commencement.

The provision of the determination that limits who can apply for compensation is a prejudicial provision (ie it adversely affects some people's right to receive compensation) and cannot commence retrospectively. Instead, it would commence on the day after the determination's notification day (see s 73 (3)).

(3) This section is a determinative provision.

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

(4) In this section:

non-prejudicial provision means a provision that is not a prejudicial provision.

prejudicial provision means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

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

(b) imposing liabilities on the person.

Despite the fact that this instrument has a retrospective *application*, rather than a retrospective commencement, the Committee considers that the Explanatory Statement should indicate whether or not it involves any prejudicial retrospectivity. While the Committee assumes (given the explanation of the effect of the substantive amendments) that there is no prejudicial retrospectivity, it would assist the Committee (and the Legislative Assembly) if this issue was dealt with expressly in the Explanatory Statement. As a result, the Committee seeks the Minister's advice that the instrument involves no prejudicial retrospectivity.

Subordinate Laws—No comment

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

Subordinate Law SL2007-18 being the Radiation Protection Regulation 2007 made under the *Radiation Protection Act 2006* **determines what constitutes a radiation facility, a regulated radiation source, a dangerous event and prohibited radiation sources and the criteria for exemptions.**

Subordinate Law SL2007-19 being the Health Professionals Amendment Regulation 2007 (No. 2) made under the *Health Professionals Act 2004* **amends the *Health Professionals Regulation 2004* to accommodate the implementation of the Competent Authority model for the registration of medical practitioners and clarify the process for the President's appointment to the Board.**

Subordinate Law SL2007-22 being the Water Resources Regulation 2007 made under the *Water Resources Act 2007* **determines the conditions to which a water access entitlement is subject and specified circumstances for exemption.**

Subordinate Laws—Comment

The Committee has examined the following subordinate law and offers these comment on it:

Incorporation of material by reference

Subordinate Law SL2007-20 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **amends the *Road Transport (Safety and Traffic Management) Regulation 2000* to provide a new definition of fixed camera detection device and to include two additional devices.**

This subordinate law amends the *Road Transport (Safety and Traffic Management) Regulation 2000* (**Regulation**), to provide (among other things) for the use of various new speed measuring devices. Section 9 of this subordinate law inserts new section 104A into the Regulation. Section 9 provides for the testing of various speed measuring devices. It provides (in part):

…….

(2) The devices mentioned in subsection (1) must be tested at least once every 12 months.

(3) The test must be carried out by a person approved under section 106 (Approved people—testing and sealing).

(4) The test of a radar speed measuring device that is not a component of a fixed camera detection device, or a digital camera detection device, must show whether the device is operating in accordance with Australian Standard AS 2898.1-2, as in force on the commencement of this subsection.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

(5) The Legislation Act, section 47 (5) does not apply in relation to AS 2898.1-2 under subsection (4).

…….

Subsection 47(5) of the *Legislation Act 2001* provides:

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

The significance of subsection 47(5) of the Legislation Act is that if material is incorporated by reference (as here), the incorporated material is available to a person who seeks to understand the requirements of the incorporated material, which must be published on the ACT Legislation Register. The **dis**application of subsection 47(5) denies that opportunity to examine the incorporated material.

In this case, the incorporated material is Australian Standard AS 2898.1-2. The Committee is aware that there are copyright/licensing issues in relation to the publication of Australian Standards, which are generally not available except at the payment of a not-insignificant fee.

The Committee notes, however, that it is not without precedent for subordinate laws to require the notification of Australian Standards. Section 5 of the *Dangerous Substances (General) Regulation 2004*, for example, incorporates several Australian Standards by reference, with no disapplication of subsection 47(5) of the Legislation Act. This is at least partly explained by the fact that the *Dangerous Substances Act 2004*, under which the Dangerous Substances (General) Regulation is made, provides a scheme to make incorporated material available. Included in that scheme is section 206, which provides:

206 Inspection of incorporated documents

(1) This section applies to an incorporated document, or an amendment or replacement of an incorporated document.

Note For the meaning of *incorporated document*, see the dictionary.

(2) The chief executive must ensure that the document, amendment or replacement is made available for inspection free of charge to the public on business days at reasonable times at the office of an administrative unit administered by the chief executive.

(3) In this section:

amendment, of an incorporated document—see section 220 (6).

The Committee seeks the Minister's advice as to whether a similar mechanism might be feasible in relation to the incorporation by reference of Australian Standard AS 2898.1-2 in this subordinate law.

"Henry VIII" clause – Retrospective operation

Subordinate Law SL2007-21 being the Radiation Protection Amendment Regulation 2007 (No. 1) made under the *Radiation Protection Act 2006* **amends the *Radiation Protection Regulation 2007* to temporarily reinstate the Radiation Council as it was constituted immediately prior to the commencement of the Act.**

This subordinate law is made under the *Radiation Protection Act 2006*, which commenced on 1 July 2007. It amends the *Radiation Protection Regulation 2007*, which commenced on 7 July 2007. The Explanatory Statement to this subordinate law states:

> Upon commencement the *Radiation Protection Act 2006* repealed and replaced the *Radiation Act 1983,* its subordinate laws and supporting instruments. Licences and registrations in place under the *Radiation Act 1983* were specifically preserved by the transitional provisions in Part 10 of the *Radiation Protection Act 2006*. However, appointments to the Radiation Council, which is the decision-maker for licences and registrations, were not preserved and no new appointments were in place when the *Radiation Protection Act 2006* commenced.
>
> The absence of a Radiation Council could have thwarted the functional operation of the *Radiation Protection Act 2006*, and generated significant uncertainty for those regulated by the Act. This Regulation has been prepared to temporarily reinstate the Radiation Council as it was constituted immediately prior to the commencement of the *Radiation Protection Act 2006*, thereby avoiding the serious problems that could have arisen.

Section 2 of this subordinate law provides that it commenced on the day after it was notified. It was notified on 2 August 2007, meaning that it commenced on 3 August 2007. This would appear to mean that there is a period during which there was no Radiation Council in place. The Committee notes, however, that the effect of this subordinate law is to amend the Radiation Protection Act, as it amends the Radiation Protection Regulation in a way that amends the Act under which the Regulations are made. This is possible because section 131 of the Radiation Act provides:

> **131 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
>
> (2) A regulation may modify this part to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
>
> (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

Section 131 of the Radiation Act is, in effect, a "Henry VIII" clause, in that it allows the amendment of primary legislation by way of subordinate legislation. While it notes that "Henry VIII" clauses are generally not favoured by the Committee (and like Committees in other jurisdictions), the Committee acknowledges that section 131 of the Radiation Act was enacted by the Legislative Assembly and that this subordinate law is within the scope of the power given by section 131.

The Committee also notes that the substantive amendment made by this subordinate law is to insert into the Radiation Act a new section 130A, which provides:

> **130A Council members**
>
> (1) In this section:

former radiation council means the Radiation Council established under the repealed Act.

(2) The members of the former radiation council immediately before commencement day are taken to be members of the council appointed under this Act, section 68 until 1 January 2008.

(3) The chairperson and deputy chairperson of the former radiation council immediately before commencement day are taken to be the chair and deputy chair of the council appointed under this Act, section 70 until 1 January 2008.

(4) This Act applies as if the appointments under this section commenced on commencement day.

(5) This section expires on 1 January 2008.

"Commencement day" is defined in section 128 of the Radiation Act as "the day this Act commences." This means that the overall effect of this substantive law is not only to reinstate the Radiation Council but to do so with effect from the commencement of the Radiation Act. As a result, there is no period during which there was no Radiation Council was in place.

While the effect of this subordinate law is to make a retrospective amendment, the Committee notes that the amendment is evidently within power and that the Explanatory Statement explains the need for the amendment. Given the nature of the amendment (ie to reinstate the Radiation Council), the Committee assumes that the subordinate law has no "prejudicial" operation, as contemplated by section 76 of the *Legislation Act 2001*. As there is no information in the Explanatory Statement in relation to prejudicial retrospectivity, however, the Committee would appreciate the Minister's confirmation that this is the case.

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for the Arts, dated 28 August 2007, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2007-90, being the Cultural Facilities Corporation Appointment 2007 (No. 1).
- The Minister for Health, dated 3 September 2007, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instruments:
  - DI2007-41 being the Health Professionals (Fees) Determination 2007 (No. 10);
  - DI2007-80 being the Tobacco (Compliance Testing Procedures) Approval 2007 (No. 1); and
  - DI2007-103 being the Health Professionals (Medical Board) Appointment 2007 (No. 1).
- The Minister for Planning, dated 5 September 2007, in relation to comments made in Scrutiny Report 43 concerning the Surveyors Bill 2007.
- The Minister for the Environment, Water and Climate Change, dated 12 September 2007, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2007-85, being the Nature Conservation (Threatened Ecological Communities and Species) Action Plan 2007 (No. 2).

- The Acting Minister for Children and Young People, dated 17 September 2007, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instrument DI2007-111, being the Adoption Review Committee Appointment 2007 (No. 1).
- The Minister for Territory and Municipal Services, dated 19 September 2007, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2007-81, being the Road Transport (Driver Licensing) Driving Instruction Code of Practice 2007 (No. 1).

The Committee wishes to thank the Minister for the Arts, the Minister for Health, the Minister for Planning, the Minister for the Environment, Water and Climate Change, the Acting Minister for Children and Young People and the Minister for Territory and Municipal Services for their helpful responses.

MINISTERIAL RESPONSE

In its *Scrutiny Report No 41* of the *Sixth Assembly*, the Committee commented on the *Road Transport (Driver Licensing) Driving Instruction Code of Practice 2007 (No. 1)* (DI2007-81). The Committee referred to new section 13 of the Code of Practice for the Competency Based Training and Assessment Scheme, which provides:

> **13. Appeals**
>
> 13.1 An instructor has the right to appeal to the Authority on any matter related to the issuing of a Notice of Unsatisfactory Audit. A Notice of Unsatisfactory Audit will contain information on appeal rights.
>
> 13.2 An instructor has the right to seek a review of any suspension or cancellation decision imposed by the Authority under section 112 of the *Road Transport (Driver Licensing) Regulation 2000.* A decision to suspend or cancel an instructor's accreditation will be in writing and will provide information on internal review and appeal rights to the Administrative Appeals Tribunal.

The Committee noted that the notification of appeal rights is an important mechanism in ensuring that instructors' rights are protected. The Committee suggested that it would be more appropriate for subsection 13.1 above to provide that a Notice of Unsatisfactory Audit **must** contain information on appeal rights, rather than providing that it *will* provide such information.

The Minister for Territory and Municipal Services has responded to the Committee's comments. In a letter dated 19 September 2007, the Minister states (in part):

> … I am advised that there is no significant issue with changing the word from *will* to *must* in section 13.1 and this change would not alter its context or meaning. I therefore agree with the Committee's comments. However, given it does not alter the context or meaning, I do not propose to remake this instrument but will ensure this change is made in future instruments.

The Committee thanks the Minister for this response and for agreeing to make the change suggested by the Committee in future instruments.

On the issue of the meaning of *must*, as opposed to *will*, the Committee notes that the ACT Parliamentary Counsel's Office's publication, *Words and Phrases* (available at http://www.pco.act.gov.au/pages/draftpubstand.htm), contains the following entry in relation to "will":

will
[as a verb]

☹ **usage**—consider alternatives before using

try—►*may* / ►*must* / recasting / no change

extra information

1 Traditionally, *shall* is used for the first person, simple future tense (eg 'I/we *shall* go to town tomorrow') and *will* is used for the second or third person, simple future tense (eg 'You/he/they *will* go to town tomorrow'). Avoid the use of *shall* or *will* with the first person, simple future tense by recasting.

2 *Will* can usefully be used instead of *must*:

- in a standard form contract—to express the obligations of the party supplying the contract; or
- in a contract or arrangement involving delicate relations between the parties—to express both parties' obligations; or
- in an instrument—to direct a person of the same standing as the maker of the instrument to do something (see example 3, examples of no change).

However, *must* should be used to create obligations intended to have criminal or direct civil consequences.

see also*—last will and testament*

examples of no change

1 The insurer must tell the commissioner that the issue will not be referred to the tribunal.

2 changes that will result in a more effective and efficient maritime industry [used in an objects clause]

3 An agency head will ensure that workplace conditions do not have an indirect effect of discriminating against employees because of race, sex, or physical disability. [from a direction given by an official of the same standing as the agency head.

Note There are no criminal or direct civil consequences for not complying with the direction.]

examples of change

1 Payment of the amount ~~will be enforceable~~ may be enforced under this part.

2 The authority ~~will~~ must grant a statutory fishing right to a person who is eligible for the grant of the right.

3 The commissioner ~~will~~ may exercise the following powers of the agency: …

further reading

Cambridge Style Guide pp 687–8 (*shall or will*)

Fowler's English Usage pp 706–7 (*shall and will*)

Garner's Dictionary pp 941–2 (words of authority)

Garner's Legal Style p 139 (*shall*; *will*)

Gowers' Plain English pp 141–2 (*shall and will*)

Zed Seselja, MLA
Chair

September 2007

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

REPORTS—2004-2005–2006–2007

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)**

Bills/Subordinate Legislation

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)

Bills/Subordinate Legislation

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)
Domestic Animals Amendment Bill 2007
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 DI2007-120 - Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 2
Disallowable Instrument DI2007-131 - Attorney General (Fees) Determination 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)

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
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Seselja

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee Report No. 41 of 2007, where the Committee has requested confirmation that appointments to the Cultural Facilities Corporation's board should be made under the *Financial Management Act 1996.*

The Report, at page 18, refers to the recent appointment of Justice Malcolm Gray to the Corporation's board made under the *Cultural Facilities Corporation Act 1997.*

I confirm that appointments to the Corporation's board should be made under the *Financial Management Act 1996* and that all future appointments will be made under this Act.

I also confirm that a new instrument for Justice Gray is not necessary given that the correct procedures were followed with his appointment.

Thank you for raising this matter with me.

Yours sincerely

Jon Stanhope MLA
Minister for the Arts

cc Max Kiermaier (Deputy Clerk, Assembly Secretariat)

28 AUG 2007

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Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Scrutiny of Bills and Subordinate
Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2602

Dear Mr Zed Seselja

I refer to the Scrutiny of Bills and Subordinate Legislation Committee Report No. 43 of 13 August 2007, and in particular, the schedule of outstanding responses attached to the Committee's Report.

Please find attached a response to each of the outstanding issues raised by the Committee and I apologise for the delay in providing the responses.

I would also like to thank the Committee for their input and assure the Committee that every effort will be made to ensure that material drafted in the future takes into consideration the important comments of the Committee.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
31/8/07

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Responses to outstanding issues raised by the Scrutiny of Bills and Subordinate Legislation Committee

Title	*Number*	*Comment by Committee*	*Response*
Report No. 39 of 12 March 2007			
Health Professionals (Fees) Determination 2007 (No. 10)	DI 2007-41	The Committee notes that the instrument is made (and signed) by the President of the ACT Nursing and Midwifery Board. That being so, the Committee queries why the Schedule to the instrument contains a space for the "Deputy President's initials". The Explanatory Statement to this instrument gives no indication as to whether this instrument provides for new fees or increased fees, nor does it provide any justification for any new fees or any increase in fees. As the Committee has previously stated, the Committee considers it useful if Explanatory Statements in relation to fees determinations contain this information.	The Report identifies technical errors in the instrument and also notes that the explanatory statement provided with the instrument fails to mention justification for the fee increase. To address these issues raised by the Standing Committee a revised Disallowable Instrument and Explanatory Statement will be prepared for the Minister's endorsement.
Report No. 41 of 28 May 2007			
Tobacco (Compliance Testing Procedures) Approval 2007 (No. 1)	DI 2007-80	Paragraph 2 of Appendix 1 states: *The young person and the person(s) with parental responsibility for the young person, prior to undertaking the training for the purpose of being a PA or CTs, must sign a Consent form (at Appendix 3). If two people have parental responsibility then both signatures will be required.* This seems to be at odds with the Explanatory Statement to the instrument, which states: *The procedures stipulate that before a young person can be used as a purchase assistant the authorised officer must have obtained in writing the informed consent of the young person and at least one of the person(s) with parental responsibility for the young person, as defined in the Children and Young People Act 1999.* It also appears to be at odds with the Note to section 42E of the Tobacco Act, subsection 19(2) of the Children and Young People Act and the Minister's response to the Committee's original comments on the Bill. The Committee would appreciate the Minister's advice as to meaning and effect of the statement in Appendix 1 to Schedule 1 of the instrument.	The Explanatory Statement explains that before a young person can be used as a purchase assistant the authorised officer must have obtained in writing the consent of the young person and at least one of the person's with parental responsibility for the young person. Appendix 1 is a guideline for officers who engage and train purchase assistants. The statement about obtaining the consent of two persons with parental responsibility is intended to alert the officer to the possibility that two people may have responsibility as there may be family relationships and other circumstances where it may be appropriate to obtain both consents. This is a higher requirement than that contained in the *Children and Young People Act 1999*, s19(2), however, ACT Health wishes to ensure that both consents are obtained if necessary.

Title	Number	Comment by Committee	Response
Report No. 42 of 4 June 2007			
Health Professionals (Medical Board) Appointment 2007 (No. 1)	DI 2007-103	The Committee finds the Explanatory Statement confusing. As it correctly notes, subsection 2.6(2) of Schedule 2 of the *Health Professionals Regulation 2004* requires that one of the 2 community representatives that are to be appointed under paragraph 2.6(1)(b) must be a person who has been a lawyer for a continuous period of 5 years. The Explanatory Statement advises that the Board currently does not include such a person. There is no indication that the person appointed by the instrument is such a person.	It is noted that the Explanatory Statement made reference to the requirements of the *Health Professionals Regulations 2004*, however failed to clearly state that Ms Lauder met the requirements of the Regulation. The Committee should note that Ms Lauder meets the specific requirements. It is unfortunate that the Explanatory Statement did not clearly state this.

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr ~~Seselja~~ Zed

Scrutiny Report 43 – 13 August 2007 – Surveyors Bill 2007

Thank you for the Scrutiny Report No 43 that contains comments on the Surveyors Bill. The following is offered in response to the issues raised.

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

Assembly Amendments have been prepared to address issues raised in reference to Clause 7 and Clause 8 of the Bill.

Clause 8 has been amended by omitting clause 8(2) and substituting:

On application by a person for registration as a surveyor, the chief surveyor must—
(a) if the person is eligible for registration—register the person; or
(b) if the person is not eligible for registration—refuse to register the person.

Should the power of the chief surveyor in subclause 59(1) to exempt a surveyor from a stated requirement of a practice direction if satisfied in all the circumstances that it is not reasonably practicable for the surveyor to comply with the direction be further qualified by a requirement that the chief surveyor have "reasonable grounds" for his or his state of satisfaction?

Note that there is a typographic error in the report and that this comment refers to subclause 56(1) and not 59(1).

A Government Amendment has been prepared to replace Clause 56(1) with the following:

(1) The chief surveyor may, in writing, exempt a surveyor from a stated requirement of a practice direction if the chief surveyor is satisfied on reasonable grounds that it is not practicable for the surveyor to comply with the direction.

Do any of the clauses of the Bill "unduly trespass on personal rights and liberties?

The Surveyors Bill (and the current Surveyors Act 2001) establishes a regulatory regime necessary to ensure secure title to legal parcels of land. Surveyors registered under the Bill (or Act) are authorised to establish the definition, identification, demarcation, measurement and mapping of new or changed legal boundaries. They can also be required to re-establish lost boundaries and assist in resolution of disputes over boundaries or other interests in real property. For example, surveyors establish whether or not a building lies wholly within a land parcel and/or its location complies with other legislative requirements. Members of the public may employ surveyors to ensure that a property they intend to purchase lies on the correct land parcel and is legally positioned within its boundaries.

The strict liability requirements established by the Bill are addressed as follows.

Clause 15(3) and Clause 43 (4): These are minor regulatory offences punishable by a maximum of 5 penalty units. It is reasonable to expect that surveyors are aware of their obligations in these respects. Section 15 is required to ensure that surveyors notify the chief surveyor of their address, or of a change to their address. Failure to comply with this requirement could be used to frustrate legitimate chief surveyor investigation of complaints. It would also inhibit notification of change of survey practice guidelines. The requirement to return a registration certificate on cancellation or suspension of registration if requested to do so (Section 43) is an important protection of the community against an unregistered surveyor practicing as though still registered.

Clause 50(2): This provision is intended to prevent a person who is not a surveyor from providing a certificate that must only be issued by a surveyor. It is an offence provision to protect the public from unqualified, unaccountable, and potentially fraudulent, surveys. While this provision does not apply to registered surveyors, it is reasonable to assume that a person able to provide a certificate capable of being taken as being provided by a registered surveyor, is sufficiently conversant with the provisions of this and other relevant legislation, to be also aware of the obligations of these provisions. As such, it is argued that this provision should be considered in the same light as Sections 15 and 43. This provision carries a maximum penalty of 30 penalty units.

Clause 54(3): This provision requires a surveyor to provide the chief surveyor with evidence of field procedures. The requirement is necessary to ensure that the chief surveyor can meet his or her obligations to pursue complaints, or to take disciplinary action if required, as specified under this act. It is reasonable to expect that surveyors are aware of their obligations in this respect. This requirement carries a maximum penalty of 50 penalty units. Section 54(4) provides a defence against this requirement if the defendant is able to prove that they took reasonable steps to comply.

It is argued that proof of acceptable non-compliance should rest with the defendant in each of these provisions. This is because it is beholden upon registered surveyors to provide the information, and consequently they are in the unique position of being able to demonstrate what steps they took to meet that obligation. It would be easier for the defence to argue where non-compliance is reasonable noting that I draw the Committee's and the Assembly's attention to the fact that the onus of a legal burden of proof upon the defendant only needs to be discharged on the balance of probabilities rather than beyond reasonable doubt (Section 60 – Criminal Code 2002).

Given clause 54 is critical to the regulation of surveying in the ACT and that registered surveyors know that the provision of evidence of field procedures is an inherent part of their duties, the Government believes clause 54(4) is justified and proportionate.

Yours sincerely

Andrew Barr MLA
Minister for Planning
- 5 SEP 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
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Seselja

I refer to the Scrutiny of Bill Committee Report No. 41 – 28 May 2007 where the Committee seeks advice on the implications of an unintended and temporary revocation of Disallowable Instruments for four threatened species Action Plans.

The Committee noted that DI2007-85 reinstated four Action Plans that previously had been inadvertently revoked and seeks advice '…as to the effect of the inadvertent revocations of the 4 Action Plans referred to and, in particular, the consequences of the revocation in the period prior to their reinstatement'

Action Plans are prepared by the Conservator of Flora and Fauna in response to a declaration that a species or community is threatened with extinction. An Action Plan is a Disallowable Instrument that is required to include proposals for the identification, protection and survival of the species or community concerned. In recent times it has been the practice to combine a number of pre-existing species' Action Plans into one inclusive statutory document where conservation of the declared species, and typically an associated ecological community, would benefit from a coordinated approach. This involves revoking a particular species' Action Plan in conjunction with declaration of the overarching community-based Action Plan.

Action Plans for threatened species and communities are a management response to a recognised ecological threat. They identify conservation issues and actions needed to maintain or enhance the conservation status of the species or community of concern. Action Plans guide the design of management programs and inform decisions that may have conservation implications.

Action Plans have no statutory authority in themselves, but may point to statutory action that should be taken, for example – assigning a higher level of protection to a species or guiding a decision by the Conservator on a related matter.

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Although the unintended revocation of four Action Plans is regrettable, their content has remained authoritative and there has been no material consequence. I agree that further information should have been included in the Explanatory Statement to clarify this issue.

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

Yours sincerely

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

12 SEP 2007

Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

I am writing with regard to the Scrutiny of Bills Report No. 43, dated 13 August 2007.

I thank the Committee for its comments in relation to the Adoption Review Committee Appointment 2007 (No.1) made under Part 3, subsection 17(1) of the Adoption Act 1993. I agree that whilst the Explanatory Statement identifies that the Minister has appointed the persons in question, and that the appointments have been considered by the Standing Committee on Education, Training and Young People, it does not specifically address subsection 17(2).

I assure the Committee that the appointments have been in compliance with the mandatory conditions for an appointment under subsection 17(2).

The Department notes the Committee's concern, and recognises that in future it would be more helpful to demonstrate in the Explanatory Statement that mandatory conditions have been met.

Thank you for the opportunity to respond to this matter.

Yours sincerely

Simon Corbell MLA
Acting Minister for Children and Young People
17 September 2007

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John Hargreaves MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

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

Dear Mr Seselja

I refer to Scrutiny of Bills Report No. 41 dated 28 May 2007 regarding *Disallowable Instrument 2007-81 (DI2007-81)*

I note the Committee's comments and I am advised that there is no significant issue with changing the word from *will* to *must* in section 13.1 and this change would not alter its context or meaning. I therefore agree with the Committee's comments. However given it does alter the context or meaning I do not propose to remake this instrument but will ensure this change is made in future instruments.

Yours sincerely

John Hargreaves MLA
Minister for Territory and Municipal Services
19 September 2007

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