Legislative Assembly for the ACT

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

Scrutiny Report

24 MARCH 2011

Report 34

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

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

MEMBERS OF THE COMMITTEE

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

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.

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BILLS

Comment

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

EVIDENCE BILL 2011

This Bill is the first of three to reform the law of evidence in the ACT, and largely replicates for the Territory the provisions of the reformed 'model uniform evidence law', such as is reflected in the current *Evidence Act 1995* of the Commonwealth. If this Bill is enacted into law, on its commencement the Commonwealth Act will cease to operate in the Territory.

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

The right to a fair trial – HRA subsection 21(1)

The Explanatory Statement acknowledges that the Bill "contains a number of provisions which engage rights under the *Human Rights Act 2004*", and at pages 4 and 5 outlines the content of the relevant rights. At various places, the statement then considers the application of one or more of these rights to a particular clause or subclause of the Bill. The Committee refers the Assembly to the Explanatory Statement discussion.

In its comments below, the Committee will endeavour to add value to the Explanatory Statement discussion, largely by addressing issues not raised in the statement.

In several reports, the Committee has adopted the view that a fundamental aspect of a fair trial is the ability of a party to the matter on trial to present ("adduce") to the finder of fact any information ("evidence") that is relevant to that party establishing its case, or to rebutting the case of any opposing party. This principle is stated in subclause 56(1) of the Bill:

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

The concept of "relevant evidence" is defined vey broadly in subclause 55(1):

> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

There are, however, many provisions of the Bill that would restrict the admission of otherwise relevant evidence, such as are found primarily in parts 3.2 (hearsay evidence), 3.3 (opinion evidence), 3.4 (admissions), 3.5 (evidence of judgments and convictions), 3.6 (evidence to show that a person has a tendency to do something, or that a number of events have not occurred coincidentally and are therefore connected in some way), 3.7 (evidence of the character of a person), 3.9 (evidence of identification of a person or object), 3.10 (privileges to refuse to adduce evidence), and 3.11 (judicial power to exclude certain evidence).

The Committee has identified a number of provisions in respect of which there is an issue concerning the right to a fair trial and the justifiability of excluding relevant evidence. In addition, some other rights issues are raised. The report follows the order of the clauses of the Bill.

The right to preservation of the family (HRA subsection 11(1), and the rights of a minority (HRA section 27)
The compellability of domestic partners and others in criminal proceedings

The Explanatory Statement notes that clause 18:

> provides that a person who is the domestic partner, parent or child of a defendant can object, in a criminal proceeding, to being required to give evidence, or to give evidence of a communication between the person and the defendant, as a witness for the prosecution.
>
> For an objection to be upheld, two criteria must be met. First, there must be a likelihood that harm would or might be caused to the person or to the relationship between the defendant and the person if the person gives the evidence.
>
> Second, the nature and extent of that harm must outweigh the desirability of the evidence being given. The court must take into account a number of matters in determining an objection, including the nature and gravity of the offence charged, and the substance and importance, and the weight likely to be attached to, any evidence that the person might give.

This provision might be seen as enhancing the right to protection of the family, which HRA subsection 11(1) states to be "the natural and basic group of society and is entitled to be protected by society". The argument might be that compelling such a person as is described in clause 18 to give evidence could have a disruptive effect on the family.

The Explanatory Statement sees the issue as one of whether rights of a minority – being Aboriginal communities – have been limited by reason that "kinship ties" in those communities spread further than the categories identified in clause 18. It then justifies this limitation of the right stated in HRA section 27.

Clause 19 is however a significant limitation to the scope of the protection afforded by clause 18, and thus engages the rights in HRA subsection 11(1) and section 27. The Explanatory Statement notes that clause 19:

> limits the application of clause 18, so that a member of the family of a defendant in criminal proceedings may be compelled by the prosecution to give evidence against the defendant in certain types of proceedings relating to alleged assaults on children and other forms of domestic violence.

The Explanatory Statement does not attempt to justify these derogations from the rights in HRA subsection 11(1) and section 27.

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

The right of a defendant on a criminal charge not to be compelled to testify against himself or herself (the "right to silence") – HRA paragraph 22(2)(i)
Comment by a judge or other party on the failure of a defendant (or a member of a defendant's family) to give evidence

The Explanatory Statement notes that clause 20:

> permits the judge or any party (other than the prosecutor) to comment on a failure by a defendant, and on a failure of his or her domestic partner, parent or child, to give evidence.
>
> Any such comment, however, (except when made by a co-defendant) must not suggest that the failure to give evidence was because the defendant was guilty of the offence concerned, or the defendant, domestic partner, parent or child believed the defendant was guilty of the offence.
>
> If such comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.
>
> The clause applies only to criminal proceedings for indictable offences.

The Explanatory Statement does not attempt to justify these derogations from the right in HRA paragraph 22(2)(i).

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

The right to a fair trial – HRA subsection 21(1)
The right of a defendant on a criminal trial to examine prosecution witnesses – HRA paragraph 22(2)(g)
The limitations on the application of the rule against the admissibility of evidence that has a hearsay character

Subclause 59(1) of the Bill provides that evidence that has a hearsay character is not admissible. The Explanatory Statement provides a straightforward illustration (which has been amended by the Committee) and a statement of the rationale of the rule:

> An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do [for the hearsay purpose of adducing evidence that the accused did do the particular act]. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

To continue this example, the friend should give the evidence so that the friend might be cross-examined by the accused about such matters as her or his ability to see what the accused did, or to remember the events, and so forth. This is necessary in the interests of a fair trial. Obviously the witness cannot be cross-examined about such matters. There are other reasons put forward to justify the hearsay rule, but this is probably the primary reason.

Since the evidence of the witness must necessarily be relevant (to satisfy subclause 56(1)), the rule in subclause 59(1) cuts across that aspect of the right to a fair trial. It may be justified however by having regard to the fair trial reason just stated. Then of course any relaxation of the hearsay rule cuts across this aspect of a fair trial. This aspect is often put in terms of it being a right of a party to confront (in the witness box) any person who gives evidence against the party. In the example above, it is the friend who in substance is giving evidence against the defendant.

The right to confrontation is applicable as much in a civil matter as on a criminal prosecution.

This issue arises in respect of all the clauses in the Bill that would provide for an exception to the rule in clause 59. It is perhaps most acute in relation to the exception on subclause 65(2), which, as stated in the Explanatory Statement, provides that the rule in clause 59 does not apply where the maker of the out-of-court statement[1] is not available to give evidence on a criminal defendant's trial, and the evidence of what this person said is given orally by a witness who heard what was said, and what was said was made:

(a) under a duty to make that representation; or

(b) when or shortly after the asserted fact occurred and in circumstances where it is unlikely that the representation is a fabrication; or

(c) in circumstances that made it highly probable that the representation was reliable; or

(d) against the interests of the maker at the time the representation was made and it was made in circumstances that make it likely it is reliable (from the Explanatory Statement).

The Explanatory Statement does not offer any justifications for the many hearsay rule exceptions. That an issue of HRA compatibility might arise is illustrated by recent decisions of the European Court of Human Rights, the English Supreme Court, and the Supreme Court of the United States.[2]

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

The right to a fair trial – HRA subsection 21(1)
The right of a defendant on a criminal trial to have adequate time to prepare his or her defence – HRA paragraph 22(2)(b)
The power of the trial judge to dispense with the requirement that a party wishing to adduce hearsay evidence under an exception in part 3.2.2 must give reasonable notice to any other party

[1] Such as the "friend"' in the example above, but this person might be a complete stranger to the person who heard the statement and who is then called by the prosecution as a witness on the trial. The person might not be available for any reason.
[2] See *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 26766/05; *R v Horncastle* [2009] UKSC 14; and *Crawford v Washington* 541 U.S. 36 (2004). For a useful commentary on *Horncastle*, see **http://www.hrlrc.org.au/year/2009/r-v-horncastle-ors-2009-uksc-14-9-december-2009**.

An important protection afforded by subclause 67(1) to a party against whom hearsay evidence is to be adduced pursuant to the particular exceptions in part 3.2.2 of the Bill is that the party who intends to present the evidence must give reasonable notice of that intention to any other party. Subclause 67(4) provides however that:

> (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that 1 or more relevant exceptions apply despite the party's failure to give notice.

There is no guidance provided to the trial judge as to how this discretion is to be exercised. In comparison, subclause 100(6) provides guidance in respect of a power to dispense with notice requirements concerning the admissibility of evidence under clauses 97 and 98. In this latter respect, the Explanatory Statement identified a fair trial issue arising out of the conferment on the trial judge of a power to dispense with the relevant notice requirement, and offered a justification. The Explanatory Statement made no reference to the similar issue arising under subclause 67(4), and in this case justification is more problematic given the lack of guidance given to the trial judge (and to the parties).

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

The right to a fair trial – HRA subsection 21(1)
The right to equal protection of the law – HRA subsection 8(3)
The religious confessions privilege

Part 3.10 of the Bill provides for certain categories of persons to claim a privilege to decline to provide evidence to a court, and these provisions necessarily derogate from the fundamental principle of a fair trial that all evidence relevant to an issue on the trial is admissible. Client legal privilege, the privilege against selfincrimination, and certain categories of evidence excluded in the public interest as stated in part 3.10.3 are so well-established at common law that there is unlikely to be a rights issue arising out of their statement in the Bill.

There may, however, be an issue arising out of the religious confessions privilege stated in clause 127. The Explanatory Statement summarised its provisions.

> [Clause 127] entitles members of the clergy to refuse to divulge both the contents of religious confessions made to them in their professional capacity and the fact that they have been made. However, this privilege does not apply if the communication involved in the religious confession was made for a criminal purpose.

This clause derogates from the right to a fair trial, and also appears to derogate from the right to equal protection of the law. Concerning the latter, the privilege applies only in favour of a person who made a "confession" to a member of some church or religious denomination. It is arguable that a person who made a confession to some other person with whom they have a confidential relationship is not afforded the equal protection of the law.

There are some other relevant points to be made. First, it seems odd that the privilege may be claimed only by the member of the clergy, and cannot be claimed by the person who made the confession. Secondly, the concept of a "confession" is not defined. In common law terms, a confession is a full admission of guilt of a crime, and it does not encompass an admission of some particular fact that does not by itself establish guilt, but only that there exists some fact that might form part of a circumstantial case of guilt. This narrows the scope of the privilege. On the other hand, it may be that the term is employed in a religious, rather than a legal sense. Thirdly, there is no definition of what kind of body might satisfy the concepts of a church or religious denomination.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.

ROAD TRANSPORT (THIRD-PARTY INSURANCE) AMENDMENT BILL 2011

This Bill would amend the *Road Transport (Third-Party Insurance) Act 2008* in a number of ways, including insertion of new frameworks for the assessment of both economic and non economic loss (and, in particular, in relation to the latter, providing that damages are not payable unless the required degree of permanent impairment threshold is met); creating procedures for undertaking medical assessments in order to work out the degree of permanent impairment of an injured motor accident claimant; and providing rules for the award of interest payable on awards of damages.

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

The right to security of the person - HRA subsection 18(1)
The restrictions on awards of damages where a person has by their negligence injured another person

The Explanatory Statement explains how the Bill would restrict the damages obtainable by a person injured in a motor accident where the driver of the vehicle negligently caused the injury. It is perhaps arguable that these restrictions limit the "right to … security of the person" stated in HRA subsection 18(1). Perhaps this right encompasses the common law right that a person is, by taking action in a court, entitled to recover those monetary damages that will, so far as is feasible, be recompense for all the injury – non-economic as well as economic – that was caused by the injury.[3]

Given that the Bill would restrict in some ways the amount of damages otherwise obtainable at common law, the issue becomes whether these restrictions are justifiable under HRA section 28. The Explanatory Statement does not put the issue this way, but it does refer (at

[3] The joint submission from the ACT Law Society, Australian Lawyers' Alliance and the Bar Association argues that entitlement to damages may be seen as a common law right; see **http://www.treasury.act.gov.au/compulsorytpi/CTP%20submission%20FINAL%20-%20Joint%20ACT%20Law%20Society,%20ALA%20and%20Bar%20Assoc.pdf**, at 25, where it is argued that "[t]ort law provides compensation when somebody has been wrongfully injured. This right is not the creation of governments. It is not the gift of the State provided under a statutory scheme to be expanded and contracted by the governments from time to time. It is everyone's right as a person not to be damaged physically, psychologically or economically by deliberate or negligent behaviour".

page 3) to the common law right, and acknowledges that it is relevant to assess the reasonableness of "any restrictions or controls that are put around damages".

It is for the Assembly to address the reasonableness of the restrictions proposed in the Bill, and the Committee makes no further comment.

The right to equal protection of the law – HRA subsection 8(3)

Is there a direct discrimination?

One particular rights issue arises out of the proposal to restrict damages awards only in respect of negligence actions arising out of motor vehicle accidents. It might be argued that the relevant plaintiffs are not, when compared to plaintiffs in other kinds of negligence actions, accorded the equal protection of the law. The contrary point might be that this is not a valid comparison, for motor vehicle accident plaintiffs constitute a discrete category given the advantages they possess arising from the fact that the CTP scheme guarantees that any defendant will be insured. All plaintiffs in this discrete group are treated in the same way.

Is there an indirect discrimination?

This question may be argued to arise in two respects.

1. By proposed section 155F of the Act, damages for non-economic loss (NEL) cannot be claimed unless (a) the degree of permanent physical impairment, excluding any psychological injury, is more than 15%; or (b) the degree of permanent psychological or psychiatric injury is more than 15%. "Non-economic loss" is defined as including "pain and suffering; loss of amenities of life; loss of expectation of life; disfigurement" (proposed section 155B).

It is argued that "NEL damages usually make up only a relatively small proportion of any given award. It makes up a larger proportion only for children with life-long injuries, the long-term 'unemployed' (including home parents) and the elderly (who have little quantifiable economic loss)".[4]

2. A second matter of concern is best stated in the words of the joint submission from the ACT Law Society, Australian Lawyers' Alliance and the Bar Association:

> Proposed section 155A provides that the current discount rate of 3% on lump sum payments for "future economic loss" (set by the High Court in *Todorovic v Waller* (1981) 150 CLR 402) will be increased to 5%. This applies to loss of earnings, loss of expectation of financial support and "the value of future services of a domestic nature or services relating to nursing and attendance" or "a liability to incur expenditure in the future". ...
>
> The rationale for discount rates is to account for the benefit gained by the plaintiff in receiving a payment today for losses and expenses incurred in the future. This sum can theoretically be invested at a reasonable rate of return. ...

[4] Ibid at 9.

After some analysis, the submission concludes that "[a]dopting a 5% discount rate would ... impact most severely on the youngest and most severely injured people, in particular those who will require a lifetime of care and support".

There may thus be an argument that proposed section 155A would lead to a form of indirect discrimination against the youngest and most severely injured people.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.

The right to fair trial – HRA subsection 21(1)
The "conclusive" nature of a medical assessment certificate

A key change proposed by the Bill is that damages for non-economic loss are not payable unless the required degree of permanent impairment threshold is met. The Bill would create the procedures for undertaking medical assessments in order to work out the degree of permanent impairment of an injured motor accident claimant.

By proposed subsection 155J(1) of the *Road Transport (Third-Party Insurance) Act 2008*, "[on] making a medical assessment, including a combined medical assessment, for an impairment dispute, a medical assessor must give the CTP regulator a medical assessment certificate", which must "set out the reasons for any findings by the medical assessor in relation to any matter stated in the certificate" (subsection 155J(2)). Then the CTP regulator "must allocate the medical assessment certificate to another medical assessor (the *peer review assessor*) to review the certificate to ensure it is not incorrect in a material respect" (subsection 155J(3)).

Then by proposed subsection 155J(4):

> A medical assessment certificate is conclusive proof in a proceeding of the matters certified if the peer review assessor for the certificate is satisfied that the certificate is not incorrect in a material respect.

On its face, this provision restricts the right of a plaintiff to a fair trial in that he or she could not adduce evidence relevant to proving that the assessment of the degree of impairment in the certificate was wrong. However, this restriction is qualified by the provision in proposed subsection 155K(2) that:

> [a] court may reject the medical assessment certificate if satisfied that admitting a matter in the certificate into the proceeding would cause a party to the proceeding substantial injustice.

Given that the assessment of impairment is critical to the ability of a plaintiff to obtain damages for non-economic loss, it might well be that a court would find that an error in the assessment would amount to a "substantial injustice". There is however a great deal of difficulty in predicting the effect of proposed subsection 155K(2).

One particular issue concerns the effect of proposed subsection 155S(3), which provides:

> A medical assessor is not compellable in a proceeding to give evidence or produce documents in relation to any matter in which the medical assessor was involved in the exercise of a function under this Act.

It is argued that this provision will reduce the value of the provision for court supervision, given that it means that a medical assessors "cannot be required to explain to a court or any other authority the basis for their WPI assessment".[5]

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2011-9 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2011 (No. 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2010-99 and determines the maximum fares relating to the hiring or use of a taxi.**

Disallowable Instrument DI2011-10 being the Public Sector Management Amendment Standards 2011 (No. 2) made under section 251 of the *Public Sector Management Act 1994* **ensures that persons who receive a special benefit payment because their appointment was ended before it was due to end cannot take up another ACT public sector appointment or position without the written approval of the Commission for Public Administration.**

Disallowable Instrument DI2011-16 being the Public Place Names (Watson) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new road in the Division of Watson.**

Disallowable Instrument DI2011-18 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 1) made under section 12 of the *Road Transport (General) Act 1999* **disapplies the road transport legislation to a road or road related area where a special stage of the Snowy Hydro SouthCare Ride Day is being conducted.**

Disallowable Instrument DI2011-19 being the Road Transport (Public Passenger Services) Regular Route Services Transitional Maximum Fares Determination 2011 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2010-96 and determines maximum fares payable on regular route services provided by ACTION and allows for the transition of fares to the MyWay smart card system.**

Disallowable Instrument DI2011-20 being the Radiation Protection (Council Member and Chair) Appointment 2011 (No. 1) made under sections 68 and 70 of the *Radiation Protection Act 2006* **appoints a specified person as a member and chair of the Radiation Council of the ACT.**

[5] Ibid at 20.

Disallowable Instrument DI2011-21 being the Radiation Protection (Council Member) Appointment 2011 (No. 1) made under section 68 of the *Radiation Protection Act 2006* **appoints a specified person as a member of the Radiation Council of the ACT.**

Disallowable Instrument DI2011-22 being the Radiation Protection (Council Member and Deputy Chair) Appointment 2011 (No. 1) made under sections 68 and 70 of the *Radiation Protection Act 2006* **appoints a specified person as a member and deputy chair of the Radiation Council of the ACT.**

Disallowable Instrument DI2011-23 being the Radiation Protection (Council Member) Appointment 2011 (No. 2) made under section 68 of the *Radiation Protection Act 2006* **appoints a specified person as a member of the Radiation Council of the ACT.**

Disallowable Instrument DI2011-25 being the Health Professionals (Veterinary Surgeons Board) Appointment 2011 (No. 2) made under the *Health Professionals Act 2004* **and section 10 of the** *Health Professionals Regulation 2004* **appoints a specified person as a member of the ACT Veterinary Surgeons Board.**

Disallowable Instrument DI2011-26 being the Public Trustee (Investment Board) Appointment 2011 (No. 1) made under section 48 of the *Public Trustee Act 1985* **appoints specified persons as members of the Public Trustee Investment Board.**

Disallowable Instruments—Comment

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

Exemptions from the requirements of the Government Agencies (Campaign Advertising) Act 2009

Disallowable Instrument DI2011-11 being the Government Agencies (Campaign Advertising) Exemption 2011 (No. 4) made under section 23 of the *Government Agencies (Campaign Advertising) Act 2009* **exempts the Medicare Change Your Address advertising campaign from the Act.**

Disallowable Instrument DI2011-12 being the Government Agencies (Campaign Advertising) Exemption 2011 (No. 5) made under section 23 of the *Government Agencies (Campaign Advertising) Act 2009* **exempts the Home Energy Advice Team advertising campaign from the Act.**

The Committee notes that the two instruments listed above exempt two specified advertising campaigns from the requirements of the *Government Agencies (Campaign Advertising) Act 2009*. The instruments are made under section 23 of the Act, which provides:

23 Exemptions

(1) The Minister may exempt a campaign from this Act.

(2) However, the Minister may exempt a campaign only if satisfied it is appropriate because of—

(a) an emergency; or

(b) extreme urgency; or

(c) other extraordinary circumstances.

(3) The Minister must tell the Legislative Assembly, in writing, about an exemption and the reasons for the exemption as soon as practicable after the exemption is given.

(4) An exemption is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The Committee notes that, in both instances, the Explanatory Statement for the instrument contains the following statement:

The failure of the Legislative Assembly to appoint an independent reviewer in accordance with the Act is an extraordinary circumstance and requires that any ACT Government advertising campaign exceeding $40,000 will require an exemption from the Minister before proceeding.

The Committee merely notes the explanation provided.

This comment does not require a response from the Minister.

How does this instrument operate?

Disallowable Instrument DI2011-13 being the University of Canberra (Academic Board) Statute 2011 made under section 40 of the *University of Canberra Act 1989* **revokes DI1990-94 and provides the authority for the Council of the University to make rules to regulate the membership of the Academic Board.**

The Committee notes that section 2 of this instrument revokes two specified statutes made under the *University of Canberra Act 1989*. Section 4 then provides:

4. Existing Rules

(1) The *University of Canberra Election of Academic Staff Members of Academic Board Rules 2010* are deemed to be made under this Statute.

(2) The *University of Canberra Election of Professorial Members of Academic Board Rules 2010* are deemed to be made under this Statute.

(3) The *University of Canberra Election of Student Members of Academic Board Rules 2010* are deemed to be made under this Statute.

The Committee notes that the three sets of rules mentioned above were made in 2010, pre-dating the making of this instrument (in 2011).

The Committee notes that section 40 of the University of Canberra Act is cited as the source of the power to make this instrument. Section 40 provides (in part):

(3) The statutes may empower any authority (including the council) or officer of the university to make rules or orders, not inconsistent with this Act or with any statute—

(a) regulating, or providing for the regulation of, any specified matter (being a matter in relation to which statutes may be made); or

(b) for carrying out or giving effect to the statutes.

(4) A rule or order made under a statute made under subsection (3) has the same force and effect as a statute.

The Committee is perplexed as to the basis on which section 4 of the instrument is made. It does not appear to be empowered by subsections 40(3) and (4) above, which contain no express power to *deem* existing instruments to be made under a later instrument. Equally, the Committee is (slightly) perplexed as to why it is considered necessary to deem the existing instruments to which section 4 refers to be made under this new instrument (though it may be that the existing instruments in question are revoked by the revocation of the three sets of Rules revoked by section 2 of this instrument).

The Committee would appreciate the Minister's advice as to the legal basis for section 4 of this instrument.

Positive comment

Disallowable Instrument DI2011-14 being the University of Canberra (Statutes Interpretation) Amendment Statute 2011 made under section 40 of the *University of Canberra Act 1989* **amends section 5 of the principal statute to incorporate reference to the Legislation Act.**

The Committee notes with approval that the Explanatory Statement of this instrument states:

> On 23 August 2010, the **Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)** raised concerns about the meaning of section 5 of the *University of Canberra (Statutes Interpretation) Statute 2010*, which was Notified on 22 July 2010 as DI2010/100. (Scrutiny Report 26, page 6)
>
> In reviewing section 5 the University concluded that the reference to the *Acts Interpretation Act 1901* (Cth.) was no longer appropriate. The jurisdiction for the University was transferred from the Commonwealth to the Australian Capital Territory on 1 December 1997 and, since that time, the *Legislation Act 2001* (ACT) had come into effect. The University had the option of deleting section 5 but chose instead to amend the section to incorporate reference to the *Legislation Act 2001* to recognise and emphasise the significance of the Act in interpreting the University's Statutes and Rules, in conjunction with this Statute.

This comment does not require a response from the Minister.

Positive comment

Disallowable Instrument DI2011-15 being the Plant Diseases (Phylloxera) Prohibition 2011 (No. 1) made under section 8 of the *Plant Diseases Act 2002* **revokes DI2010-265 and prohibits the introduction into, or transport within or through, the ACT of phylloxera.**

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

> The *Plant Diseases (Phylloxera) Prohibition 2011 (No 1)* revokes and replaces the *Plant Diseases (Phylloxera) Prohibition 2010 (No 1)*, which was notified on 30 September 2010. The prohibition is being remade to ensure that Australian Standard 4454 referred to in schedules 1 and 2 of the original disallowable instrument are effective in their application to this prohibition. Under section 47 of the *Legislation Act 2001* there is a requirement that when provision is made to apply a standard that standard is taken to be a notifiable instrument. However, Australian Standards are copyrighted material, which makes it necessary to displace the operation of section 47(5) of the Legislation Act. Section 47(7) of the Legislation Act authorises a disallowable instrument to provide that the requirements of section 47(5) of the Act do not apply to the relevant instrument.

The Committee notes that it raised a potential issue with the original instrument in its *Scrutiny Report No. 29* of the *7th Assembly*. The potential issue related to the possible incorporation by reference of Australian Standard 4454. Clearly, the making of this new instrument indicates that the Committee's concerns were warranted.

The Committee notes that, in addition to expressly incorporating Australian Standard 4454 by reference, this instrument disapplies subsection 47(5) of the *Legislation Act 2001*. As the Explanatory Statement notes, the effect of disapplying subsection 47(5) is that there is no obligation to publish Australian Standard 4454, as a notifiable instrument. The Committee also notes (with approval), however, that the reason for disapplying subsection 47(5) is also provided.

This comment does not require a response from the Minister.

How is paragraph 78(5)(b) of the Financial Management Act 1996 relevant to this appointment?

Disallowable Instrument DI2011-17 being the Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and paragraph 78(5)(b) of the** *Financial Management Act 1996* **appoints a specified person as a member of the Cultural Facilities Corporation.**

The Committee notes that this instrument appoints a specified person as a member of the Cultural Facilities Corporation. The formal part of the instrument indicates that it is made under section 9 of the *Cultural Facilities Corporation Act 1997* and paragraph 78(5)(b) of the *Financial Management Act 1996*.

Section 9 of the Cultural Facilities Corporation Act provides:

> **9 Establishment of governing board**
>
> The corporation has a governing board.
>
> *Note* An appointment of a governing board member is an appointment under this section (see *Financial Management Act 1996*, s 78 (5) (b)).

Subsection 78(5) of the Financial Management Act provides:

> (5) Also, unless the establishing Act otherwise provides, a person must not be appointed as a member if—
>
> (a) the person is a public servant; and
>
> (b) if the governing board has a maximum of 6 members or less— the appointment would result in more than 1 public servant being a member of the board; and
>
> (c) if the governing board has a maximum of more than 6 members—the appointment would result in more than 2 public servants being members of the board.

It is clear from subsection 78(5) that it only applies to the appointment of a public servant to a statutory position.

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

> The appointee is not a Public Servant ….

If the above statement in the Explanatory Statement is correct then, clearly, paragraph 78(5)(b) of the Financial Management Act cannot apply to this appointment.

The Committee would appreciate the Minister's confirmation that the reference to paragraph 78(5)(b) of the Financial Management Act is unnecessary.

Drafting issue

Disallowable Instrument DI2011-24 being the Health Professionals (Veterinary Surgeons Board) Appointment 2011 (No. 1) made under the *Health Professionals Act 2004* **and sections 5 and 10 of the** *Health Professionals Regulation 2004* **appoints a specified person as a member and president of the ACT Veterinary Surgeons Board.**

The Committee notes that this instrument appoints a specified person as a member and as the chair of the ACT Veterinary Surgeons Board. The formal part of the instrument indicates that the instrument is made under sections 5 and 10 of the *Health Professionals Regulation 2004*. Section 5 of the Health Professionals Regulation provides:

5 Board president

(1) The Minister must appoint a person to be president of a health profession board (the *board president*).

Note 1 The Minister must consult the board, and may consult other people, before appointing the board president (see s 11).

Note 2 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

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

(2) However, the Minister may appoint a person under subsection (1) only if the person—

(a) is a registered member of a health profession for which the health profession board was established; and

(b) has been registered for a continuous period of at least 3 years immediately before the day of appointment.

Example for par (a)

A single health profession board is established for health professions A and B.

The Minister may appoint Smith, who is and has been a member of health profession A for the required time, as president, because Smith is a registered member of a health profession for which the board was established (that is, health profession A). Similarly, the Minister may appoint Jones, who is and has been a member of health profession B for the required time, as president.

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

(3) An appointment must be for a term of not longer than 4 years.

Note A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 (1) (c)).

Section 10 of the Health Professionals Regulation provides:

10 Appointment of board members

(1) The Minister may appoint a person to be a member of a health profession board.

Note 1 The Minister must consult the board, and may consult other people, before appointing board members (see s 11).

Note 2 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3. In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

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

(2) However, the Minister may appoint a person under subsection (1) only if the person—

(a) is a registered member of a health profession for which the health profession board was established; and

(b) has been registered for a continuous period of at least 3 years immediately before the day of the appointment.

Example

A veterinary surgeon who has been registered for 4 years may be appointed to the ACT Veterinary Surgeons Board.

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

(3) An appointment must be for not longer than 4 years.

Note 1 A board member's appointment ends if the Minister ends the appointment or the member resigns (see Legislation Act, s 208 and s 210).

Note 2 A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def *appoint*).

(4) The Minister must appoint, from the community representative list, the number of community representatives to be board members that are required by the schedule that relates to the health profession.

Note There must be at least 1 community representative appointed as a board member (see the Act, s 24 (2) (c)).

(5) If a position on the health profession board to which someone was appointed under this section becomes free, the Minister must fill the position by appointing someone who satisfies the requirements for the position.

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

> The Board is comprised of three members elected by the profession, and three members appointed by the Minister, one of whom must be a community representative. The Minister must also appoint a member to be the President of the Board in accordance with section 5 of the Regulation.

The Committee notes that (unlike other legislation that establishes boards) section 5 of the Health Professionals Regulation does not expressly require that a person appointed as the president of a health profession board be a member of the Board. That being so (and unless the Committee is missing something), the Committee considers that it is not necessary, in the case of this appointment, either to refer to section 10 of the Health Professionals Regulation or to first appoint the person in question as a member of the relevant Board.

If the analysis set out above is incorrect, the Committee would appreciate the Minister's advice as to how section 10 applies to the appointment of the president of a health profession board.

Subordinate Laws—No comment

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

Subordinate Law SL2010-51 being the Court Procedures Amendment Rules 2010 (No. 2) made under section 7 of the *Court Procedures Act 2007* **inserts a new Division 2.4.4A in the Rules, which provides for separate representation of a defendant for the insurer's period on risk in a proceeding relating to a personal injury claim.**

Subordinate Law SL2011-3 being the Education Amendment Regulation 2011 (No. 1) made under section 155 of the *Education Act 2004* **amends Schedule 1 of the *Education Regulation 2005* to include the names of a new school and college.**

Subordinate Law SL2011-5 being the Planning and Development (Direct Sales) Amendment Regulation 2011 (No. 1) made under the *Planning and Development Act 2007* **clarifies the ACT Planning and Land Authority's role in the direct sales process and also provides for the direct sale of a lease after a failed tender.**

Subordinate Laws—Comment

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

Matters more appropriate for an Act/Human rights issues

Subordinate Law SL2010-52 being the Corrections Management Regulation 2010 made under the *Corrections Management Act 2007* **ensures that a detainee in the Alexander Maconochie Centre, the Symonston facility and the Magistrates Court and Tribunal and Supreme Court cells receives health care equivalent to that provided to the ACT community.**

This subordinate law (among other things) sets out a scheme for the compensation for and management of personal injuries suffered by detainees in the Alexander Maconochie Centre, the Symonston facility and the cells in the Magistrates Court, the ACT Civil and Administrative Tribunal and the Supreme Court. In particular, the subordinate law sets out amounts that detainees may receive for particular injuries (section 9 and Schedule 1) and also certain limitations on what an injured person may receive (see, for example, sections 20, 21 and 22). On their face, these might seem to be matters more appropriately dealt with in an Act of the Legislative Assembly, as that would allow the Legislative Assembly to consider the scheme provided for by this subordinate law (including the extent that it might be considered to limit the rights of detainees) *before* the scheme has taken effect, rather than the Assembly only having the opportunity to scrutinise the content of the scheme (as it were) after the event.

The Committee notes, however, that section 220 of the *Corrections Management Act 2007* provides:

> **220 Personal injury management—detainees etc**
>
> (1) This section applies if—
>
> (a) a detainee suffers injury that arises out of, or in the course of, the detainee's detention; or

(b) an offender, who is directed to do community service work under the *Crimes (Sentence Administration) Act 2005*, section 91, suffers injury that arises out of, or in the course of, the work.

(2) A regulation may make provision in relation to the injury, including provision in relation to the following:

(a) injury management;

(b) vocational rehabilitation;

(c) compensation for a permanent injury;

(d) death benefits.

(3) In this section:

injury includes—

(a) disease; and

(b) aggravation, acceleration and recurrence of an injury or disease.

This being so, the subordinate law is, in fact, squarely within the power given by the Legislative Assembly.

The Committee notes that the Explanatory Statement for this subordinate law states:

> The Act governs the treatment and management of detainees in the Territory. This includes detainees in the Alexander Maconochie Centre, the Symonston facility and the Magistrates Court and Tribunal and Supreme Court cells, as well as any future correctional centres.
>
> The Act prescribes the minimum conditions and management of people whose right to liberty is lawfully limited. Areas covered by the Act include admission, living conditions, searches, segregation, alcohol and drug testing, the use of force, disciplinary processes and leave processes.
>
> The Act is informed by human rights jurisprudence and is compatible with the Territory's *Human Rights Act 2004*. Human rights principles to be followed in application of the Act include:
>
> - the criminal justice system should respect and protect all human rights in accordance with the *Human Rights Act* and international law;
> - the deprivation of liberty is the punishment that flows from a sentence of imprisonment. The conditions of imprisonment and the management of prisoners are not to be so harsh as to create an additional punishment to the sentence;
> - the rehabilitation and reintegration of detainees into society should be promoted; and
> - detainees should be treated in a decent, humane and just way.
>
> In addition to adherence to human rights principles, the Government is bound to make sure that people found guilty of breaking the law are themselves treated lawfully. This will maintain the community's confidence in the criminal justice system.
>
> The Regulation ensures a detainee's right to health care is equivalent to that provided to the ACT community. This incorporates the right to compensation for injuries suffered at work.

The Regulation establishes a detainee injury compensation scheme modelled on the ACT Workers Compensation Scheme with appropriate modifications for the correctional setting. Like the ACT Workers Compensation Scheme, the Regulation details when a detainee is entitled to compensation for injury, medical treatment, damages and for death. An injury management process and a schedule outlining the amount of compensation payable dependant on the type of injury suffered are also set out.

The Committee makes no further comment on this subordinate law.

This comment does not require a response from the Minister.

Minor drafting query

Subordinate Law SL2010-53 being the ACT Teacher Quality Institute Regulation 2010 made under the *ACT Teacher Quality Institute Act 2010* **determines the administrative requirements for the effective operation of the Act.**

The Committee notes that section 5 of this subordinate law provides:

> **5 Offences against regulation—application of Criminal Code etc**
>
> Other legislation applies in relation to offences against this regulation.
>
> *Note 1 Criminal Code*
>
> The Criminal Code, ch 2 applies to all offences against this regulation (see Code, pt 2.1).
>
> The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg ***conduct***, ***intention***, ***recklessness*** and ***strict liability***).
>
> *Note 2 Penalty units*
>
> The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

The Committee also notes that, in fact, this subordinate law contains no offence provisions. That being so, it might be asked what purpose section 5 serves.

The Committee notes, however, that subsection 98(3) of the *ACT Teacher Quality Institute Act 2010* provides:

> (3) A regulation may also prescribe offences for contraventions of the regulations and prescribe maximum penalties of not more than 20 penalty units for offences against a regulation.

The Committee assumes that section 5 has been drafted in anticipation that the power in subsection 98(3) of the ACT Teacher Quality Institute Act will be used at a later date.

The Committee makes no further comment on this subordinate law.

This comment does not require a response from the Minister.

Strict liability offences

Subordinate Law SL2011-1 being the Environment Protection Amendment Regulation 2011 (No. 1) made under the *Environment Protection Act 1997* **amends the *Environment Protection Regulation 2005* to include a new section to prohibit the sale or supply of painted, chemically treated or chemically contaminated firewood.**

The Committee notes that section 5 of this subordinate law would insert a new section 14A into the *Environment Protection Regulation 2005*, which provides:

14A Unapproved sale or supply of painted etc firewood—offence

(1) A person commits an offence if the person—

(a) sells or supplies firewood that is painted, chemically treated or contaminated with a chemical; and

(b) does not have the following:

(i) an environmental authorisation to sell or supply firewood as mentioned in the Act, schedule 1, section 1.2, item 44 or item 45;

(ii) written approval from the authority and the chief health officer to sell or supply the firewood.

Maximum penalty: 10 penalty units.

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

The Committee notes that strict liability offences are, by definition, "a bad thing", in the sense that they take away what would otherwise be a requirement on those prosecuting an alleged offence to prove intent on the part of a person alleged to have committed an offence. In so doing, such offences impinge on what would otherwise be the rights of such persons. That said, the Committee has always accepted that there are circumstances in which offences of strict liability may be justified. As part of this acceptance, however, the Committee has consistently maintained that if legislation establishes a strict liability offence then the Explanatory Statement for the legislation should address 2 fundamental issues. First, the Explanatory Statement should provide a justification as to why the circumstances of the particular offence are such that a strict liability offence is required. Second, the Explanatory Statement should indicate what defences are nevertheless available to a person charged with the offence.

The Committee notes that the Explanatory Statement for this subordinate law contains no attempt to justify why a strict liability offence is required in this instance and no indication as to what (if any) defences are nevertheless available.

The Committee draws the Legislative Assembly's attention to this subordinate law, under principle (a)(ii) of the Committee's terms of reference (on the basis that it might be considered to trespass unduly on rights previously established by law) and under principle (b) of the Committee's terms of reference (on the basis that the Explanatory Statement for the subordinate law does not meets the technical or stylistic standards expected by the Committee.

Mandatory refusal of accreditation

Subordinate Law SL2011-2 being the Road Transport Legislation Amendment Regulation 2011 (No. 1) made under the *Road Transport (Public Passenger Services) Act 2001, Road Transport (Safety and Traffic Management) Act 1999 and Road Transport (Vehicle Registration) Act 1999* **deals with the mandatory grounds for refusing an application for accreditation and the length of time a taxi ballot reserve list remains in force after a ballot; amends the schedule of location codes for mobile speed cameras; and adds two new options for statements by a person regarding destruction of a registration label.**

Section 4 of this subordinate law substitutes subsection 8(1) of the *Road Transport (Public Passenger Services) Regulation 2002* with a new subsection 8(1). Prior to being amended by this subordinate law, subsection 8(1) provided:

8 Mandatory refusal of accreditation

(1) The road transport authority must refuse an application for accreditation (including renewal) if the authority believes, on reasonable grounds, that—

(a) the applicant is not a suitable person to operate the kind or size of regulated service to which the application relates; or

(b) the applicant does not have the capacity to meet the applicant's proposed service standards; or

(c) the proposed service standards do not adequately state how the applicant will comply with the approved minimum service standards for the regulated service to which the application relates; or

(d) compliance by the applicant with the proposed service standards will not ensure that the applicant will provide a safe, reliable and efficient regulated service.

The new subsection 8(1) (inserted by this subordinate law) provides:

8 Mandatory refusal of accreditation

(1) The road transport authority must refuse an application for accreditation (including renewal) if—

(a) the applicant is not an Australian citizen or permanent resident; or

(b) the authority believes on reasonable grounds that—

(i) the applicant is not a suitable person to operate the kind or size of regulated service to which the application relates; or

(ii) the applicant does not have the capacity to meet the applicant's proposed service standards; or

(iii) the proposed service standards do not adequately state how the applicant will comply with the approved minimum service standards for the regulated service to which the application relates; or

(iv) compliance by the applicant with the proposed service standards will not ensure that the applicant will provide a safe, reliable and efficient regulated service.

In essence, the new subsection 8(1) adds a new basis on which the road transport authority must refuse an application for accreditation as a public passenger service provider - that the person in question is not an Australian citizen or permanent resident. On its face, this discriminates against persons who are not Australian citizens or permanent residents.

The Committee notes that the Explanatory Statement for this subordinate law provides the following statement, by way of explanation for the new subsection 8(1):

> This clause makes a minor amendment to section 8 of the *Road Transport (Public Passenger Services) Regulation 2002* to include in new section 8 (1) (a) a mandatory ground for refusing an application for accreditation as a public passenger service provider, if the applicant for accreditation is not a permanent resident or citizen. The purpose of the amendment is to prevent people who are not permitted by Australian immigration law to work or otherwise generate income from a business in Australia from operating a public passenger service. The amendment is also consistent with promoting more effective regulation of the public passenger transport sector, as it is difficult for regulators to take

appropriate enforcement action in relation to accredited operators who obtain accreditation while holding a temporary residence visa and subsequently return overseas.

New section 8 (1) (b) (i) through to new section 8 (1) (b) (iv), inclusive, remakes the mandatory grounds for refusal in existing section 8 (1) (a) to (d). There are no changes to the substance of those grounds, which are relocated to accommodate the insertion of the new ground dealing with residency requirements.

The Committee also seeks the Minister's advice as to whether there might be persons who are not permanent residents (eg overseas students) who, in fact, are allowed under the terms of their visas, etc, to work. If that is the case, it would appear that such persons are permitted by Australian immigration law to work, but are subject to mandatory refusal of accreditation under this subordinate law. The Committee queries whether this is intended.

The Committee draws the Legislative Assembly's attention to the justification provided above.

"Henry VIII" clause

Subordinate Law SL2011-4 being the Fair Trading (Australian Consumer Law) (Transitional Provisions) Regulation 2011 made under the *Fair Trading (Australian Consumer Law) Act 1992* **provides that the definition of "fair trading legislation" in the dictionary to the Fair Trading (Australian Consumer Law) Act applies as if it included a reference to the Fair Trading (Motor Vehicle Repair Industry) Act.**

The Committee notes that section 3 of this subordinate law modifies Schedule 1 of the *Fair Trading (Australian Consumer Law) Act 1992*, in effect, to insert into the definition of ***fair trading legislation*** set out in the Fair Trading (Australian Consumer Law) Act a reference to the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*.

The power to make this amendment is contained in section 1.4 of Schedule 1 of the Fair Trading (Australian Consumer Law) Act, which provides:

1.4 Transitional—regulations

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the repeal of the repealed Acts.

(2) A regulation may modify this schedule (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this schedule.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

The Committee notes that section 1.4 is akin to a "Henry VIII" clause, as it allows (in effect) the amendment of primary legislation by subordinate legislation. The Committee also notes, however, that the Legislative Assembly has expressly authorised the making of such amendments. That being so, the Committee makes no further comment on that aspect of the provision.

The Committee notes that the power in section 1.4 is not unlimited. Subsection 1.4(1) requires that any amendment must be "transitional" and also "necessary or convenient to be prescribed because of the repeal of the repealed Acts". Subsection 1.4(2) more specifically provides that modifications may be made to Schedule 1 "to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in [the Schedule]".

Given that the amendment in question expires on 1 January 2014, it might be regarded as "transitional". As to the other elements of the powers in subsections 1.4(1) and (2), the Committee notes that the Explanatory Statement for this subordinate law offers the following explanation:

- The *Fair Trading (Australian Consumer Law) Amendment Act 2010* (FT (ACL) Amendment Act) was passed by the Legislative Assembly on 9 December 2010. The FT (ACL) Amendment Act amended the *Fair Trading (Australian Consumer Law) Act 1992* (FT (ACL) Act) to apply the ACL as a law of the Territory, and to make consequential amendments.
- The Explanatory Statement to the FT (ACL) Amendment Act indicates that the amendments were intended to preserve the Commissioner for Fair Trading's existing enforcement powers through the retention of part 3 of the (repealed) FT (CA) Act.
- The *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (FT (MVRI) Act) came into operation on 7 October 2010 to provide for the licensing and regulation of the motor vehicle repair industry. The *Fair Trading (Motor Vehicle Repair Industry) Bill 2009* amended the definition of 'fair trading legislation' in the now repealed *Fair Trading (Consumer Affairs) Act 1973* (FT (CA) Act) to include reference to the FT (MVRI) Act in order to ensure that the Commissioner for Fair Trading could exercise enforcement powers over this sector.
- Due to a technical omission, amendment 3.27 of the FT (ACL) Amendment Act did not include the FT (MVRI) Act in the dictionary definition of 'fair trading legislation' in the FT (ACL) Act.
- The passage of a transitional regulation will enable the Commissioner of Fair Trading to continue to exercise enforcement powers in relation to the motor vehicle repair industry which existed prior to the repeal of the *Fair Trading (Consumer Affairs) Act 1973*.

In the light of this explanation, the Committee makes no further comment on this subordinate law.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, dated 4 March 2011, in relation to comments made in Scrutiny Report 32 concerning the Courts Legislation Amendment Bill 2010, the Fair Trading (Australian Consumer Law) Amendment Bill 2010 and the Crimes Legislation Amendment Bill 2010.

The Committee wishes to thank the Attorney-General for his helpful comments.

Vicki Dunne, MLA
Chair

March 2011

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

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

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

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

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

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

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

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

Bills/Subordinate Legislation

Report 30, dated 15 November 2010
Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)
Discrimination Amendment Bill 2010 (PMB)

Report 33, dated 3 March 2011
Health Amendment Bill 2011

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
Legislative Assembly of the ACT
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Dear Mrs Dunne

Thank you for your Committee's scrutiny report dated 10 February 2011, which commented on the Courts Legislation Amendment Bill 2010, the Crimes Legislation Amendment Bill 2010 and my response to the Committee's comments on the Fair Trading (Australian Consumer Law) Bill 2010.

Courts Legislation Amendment Bill 2010

Trial by jury

I thank the Committee for its thorough analysis of the history of trial by jury in the common law tradition. I agree that the Explanatory Statement should contain further comment on the human rights implications of the increased summary jurisdiction, and to that end, I will table a Supplementary Explanatory Statement when the bill is brought on for debate.

The Galambany Court

The Committee considers that the establishment in legislation of the Galambany Court enlivens section 8(3) of the *Human Rights Act 2004* (HRA), which provides that 'everyone is equal before the law and is entitled to the equal protection of the law without discrimination'. I note that Aboriginal and Torres Strait Islander people who have offended and plead guilty and are referred to the Galambany Court for sentencing, have been engaged in the same criminal court procedure and system as all other offenders. The Galambany Court allows Aboriginal elders to make recommendations to the sentencing magistrate, thereby offering a culturally relevant sentencing option and providing support services that will assist the offender to overcome his or her offending behaviour. In this way, the Galambany Court supports the right of minorities as stated in section 27 of the HRA. Section 27 provides that 'Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language'.

The Family Violence Court

Similarly, the Committee has suggested that the establishment of the Family Violence Court in legislation may enliven section 8(3) of the HRA. Again, offenders who are referred to the Family Violence Court are subject to the same court procedure and law, to which all offenders are subject to. The establishment of a specialised court acknowledges that family violence is best addressed by the involvement of a range of agencies and services to deal with the underlying causes and work towards preventing reoffending. The specialised court facilitates that involvement, without varying the fundamental criminal procedures that all cases follow. Establishing a specialised court with the goal of minimising reoffending in the family violence context supports a range of human rights, particularly the right to life (s 9), protection from torture and cruel, inhuman or degrading treatment etc (s 10), and protection of the family and children (s 11).

International human rights jurisprudence now recognises that states have a positive obligation to protect and ensure the right to life, not merely refrain from violating it. Kenneth Roth, Executive Director of Human Rights Watch, argues that "[w]hen a state makes little or no effort to stop a certain form of private violence, it tacitly condones that violence. This complicity transforms what would otherwise be wholly private conduct into a constructive act of the state."[1]

Promoting the ACT response to family violence through the establishment of a Family Violence Court is a further step in meeting our obligations to confront family violence.

Transitional provisions

The Committee refers to my earlier correspondence regarding the interaction of transitional regulations and other Territory laws. I reiterate my earlier statement that it is unnecessary to insert a note for this type of provision. As I have previously advised, inserting such a note may result in undue confusion and potential limiting of the provision.

Explanatory Statement

Although I agree to provide a Supplementary Explanatory Statement to address trial by jury issues, I do not agree with the Committee's contention that the Explanatory Statement is deficient. The Committee states that the explanation of clause 1.42 does not appear to relate to proposed section 470 of the *Magistrates Court Act 1930*. Clause 1.42 inserts a new chapter 13 into the Magistrates Court Act, for the purpose of providing transitional provisions for the amended summary jurisdiction. The explanatory statement is focused on the substance of the provision and the overall effect, rather than simply restating the content of each section contained in the clause.

Fair Trading (Australian Consumer Law) Bill 2010

The Committee responded to my response in relation to earlier scrutiny comments on the Fair Trading (Australian Consumer Law) Bill 2010. Particularly, the Committee has asked that a revised Explanatory Statement be prepared.

I note that, as the bill has been debated, it is no longer possible to amend the Explanatory Statement for inclusion on the legislation register.

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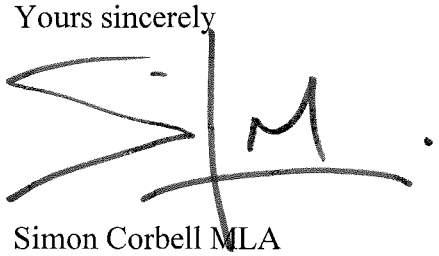
[1] Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 330 (Rebecca J. Cook ed., 1994).

Crimes Legislation Amendment Bill 2010

The Committee notes that the relatively brief human rights assessment contained in the Explanatory Statement may be appropriate, given that the offence of bestiality is of long-standing in our criminal law and has not been the subject of any objection. I agree with the Committee's observation and thank the Committee for its comment on this matter.

I trust that the information above, in addition to the Supplementary Explanatory Statement for the Courts Legislation Amendment Bill 2010, sufficiently addresses the Committee's comments.

Yours sincerely



Simon Corbell MLA
Attorney General
4.5.11