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

18 OCTOBER 2010

Report 28

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

ROLE OF THE COMMITTEE

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

TABLE OF CONTENTS

BILLS **1**

Liquor (Consequential Amendments) Bill 2010 ..... **1**

Criminal Code Amendment Bill 2010 ..... **1**

Territory Records Amendment Bill 2010 ..... **5**

Gaming Machine (Problem Gambling Assistance) Amendment Bill 2010 ..... **9**

SUBORDINATE LEGISLATION **10**

Disallowable Instruments—No comment **10**

Disallowable Instrument—Comment **11**

GOVERNMENT RESPONSES **12**

OUTSTANDING RESPONSES ..... **i**

BILLS

Bill—No comment

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

LIQUOR (CONSEQUENTIAL AMENDMENTS) BILL 2010

This is a bill to amend legislation consequent upon the enactment of the *Liquor Act 2010*.

Bills—Comment

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

CRIMINAL CODE AMENDMENT BILL 2010

This Bill would amend the *Criminal Code 2002* to create a general defence to the possession of an otherwise prohibited item if the possession is for a law enforcement purpose.

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 apparent limitation by proposed subsection 43A(3) of what is ordinarily understood to be the scope of the right to appeal against conviction

Proposed section 43A of the Code would insert a defence of lawful possession into Chapter 2 of the Code. The Explanatory Statement states:

> [b]y including this defence in Chapter 2 of the Code the Government is providing certainty to those people employed in the criminal justice system that they will not be held criminally responsible for the possession of a material, item or thing, of which the possession is otherwise prohibited.

Limiting the focus to proposed section 43A, whether such a person is criminally responsible turns, in the end, on whether on a trial for the relevant offence the fact-finder (the jury, or judge-alone) finds that the elements of the defence, on the facts found, exist or not. If the person is convicted, they may appeal to a higher court. The scope of that appeal turns on the precise wording of the law permitting the appeal. There is current law on this topic, but it may of course be amended from time to time. A commonly employed means of restricting the right to appeal is to exclude appeal on a question of fact, so that the appeal court cannot entertain an appeal on the basis that the fact-finder made an erroneous finding of fact. It is on the assumption that either the current law, or some future expression of the law, employs this approach that the following comment is made.

The Explanatory Statement summarises the elements of the proposed defence (subsection 43A(1)) this way:

this Bill will provide a defence to prosecution for those people who can satisfy the court that their possession of a material or item is:

- as a result of their work or employment within the parameters of the criminal justice system;
- for a law enforcement purpose; and
- reasonable in the circumstances for the law enforcement purpose in which the person was engaged in.

Subsection 43A(2) defines when possession of a particular material or thing is for a law enforcement purpose. Proposed subsection 43A(3) then provides:

> (3) In determining a person's criminal responsibility, the question of whether a person's possession of a particular material or thing is for a law enforcement purpose is a question of fact.

Depending on how the right to appeal is expressed, this provision could limit that right.

Whether on the facts found by the fact-finder, and having regard to the proposed defence in subsection 43A, a person charged with an offence is guilty or not, requires the fact-finder to engage in a three step process, being:

(1) fact-finding – that is, making a decision about what facts exist or not that are relevant to deciding whether the elements of the defence exist or not; these are often called the "primary facts". At this stage, the fact-finder may need to choose between competing views about what are the primary facts, and these decisions are clearly about questions of fact;

(2) rule-stating – that is, making a decision about what the relevant law means. The law is stated in section 43A, but this may require interpretation. The trial judge will, if sitting alone, direct her or himself on this issue or, if sitting with a jury, direct the jury, as to the law. A mistake about the law in this sense would not be classified as a question of fact as a result of subsection 43A(3); and

(3) rule application – that is, "when the law correctly stated is applied to the facts found in order to produce a conclusion"[1] or, in other words, to decide whether the ultimate facts in issue exist or not. What are the ultimate facts is determined by the elements of the defence; for example, given that possession of the relevant thing must be for a "law enforcement purpose" (paragraph 43A(1)(b)(i)), and having regard to the definition of this term in subsection 43A(2), an ultimate fact in issue might be (depending on how the defendant ran her or his case) whether the possession was "necessary for … the administration of justice" (paragraph 43A(2)(c)). At stage (3), the fact-finder is engaged in fact-finding, but in this process an error of law may occur. As stated authoritatively by Glass JA in *Azzopardi*:

[1] *Azzopardi v Tasman UEB Breweries Ltd* [1984] 4 NSWLR 139 at 156, per Glass JA.

> an ultimate finding of fact, even in the absence of a misdirection, may reveal error of law if the primary facts found are necessarily within or outside the statutory description and a contrary decision has been made … .[2]

More plainly, there is an error of law in the application of the statutory standard to the facts when the conclusion reached by the fact-finder is one that was not reasonably open.[3]

The issue that is raised by proposed subsection 43A(3) is whether it has the effect that a convicted person who relied on the defence in subsection 43(1) could continue to rely on the *Azzopardi* principle to avoid a limitation in the law governing the right to appeal that excluded appeal on a question of fact. The answer appears to be "no", for subsection 43A(3) seems clearly enough to state that the application of the statutory standard of "law enforcement purpose" to the primary facts is always a "question of fact". If this is so, then the provision diminishes the right of appeal of a convicted person below the level of what is normally accepted as appropriate.

This raises a rights issue of some significance.[4] First, the notion of a "personal right" in the Committee's terms of reference encompasses an adequate right to appeal against a conviction, and there is a question whether proposed section 43 trespasses unduly on that right.

Secondly, the policy behind this Bill is to ameliorate the reluctance of "individuals engaged or employed in the criminal justice system … to receive and/or review evidence from the police, or have the material tendered as evidence for fear that they themselves are committing an offence", by providing "certainty to those people … that they will not be held criminally responsible for the possession of a material, item or thing, of which the possession is otherwise prohibited". The element of uncertainty about what proposed subsection 43(3) means runs counter to that policy. Given that this policy is protective of the rights of the law enforcement officers, etc, the Committee considers that it may make this comment.

The Explanatory Statement makes no reference to this issue, and does not address subsection 43A(3) at all.

The Committee draws this matter to the attention of the Minister and recommends that the Minister respond and, in particular, explain the purpose and intent of this provision.

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[2] Ibid. This principle applies where the statutory standard – here, the term "law enforcement purpose" and its components - is used in a technical (in contrast to an "ordinary meaning") sense. This appears to be the case here.

[3] Ibid at 157.

[4] In terms of the *Human Rights Act 2004*, it might be said to engage subsection 22(4): "Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law". The final words – "in accordance with law" – raise some doubt, in that they might be construed to mean only that there must be a law on the topic, and that subsection 22(4) has nothing to say about the content of that law.

Where does the burden of proof lie?

The Explanatory Statement does not address the issue of the application of the rules concerning the burden of proof in relation to the elements of the defence in proposed section 43A. The Committee's understanding – based on subsection 58(2) of the Criminal Code – is that a defendant would carry only an evidential burden. The Explanatory Statement, however, speaks of the person charged having to "show" that certain facts exist, or of having to "satisfy" a limb of the defence, and these comments suggest that the defendant carries a legal burden of proof.

This is a matter of significance that should be clarified.

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

Should there be an objective test applicable to the question whether the possession of material, etc by the defendant was for a law enforcement purpose?

The third element of the defence is that it must be found that the defendant's possession of the relevant material or item was reasonable in the circumstances for the law enforcement purpose in which the person was engaged. The Explanatory Statement explains:

> This limb introduces an objective test, and even if a person can satisfy the first two limbs, if the Court is of the view that the person's possession of the item is not reasonable in the circumstances, then the person cannot rely on the defence of lawful possession for criminal responsibility under new section 43A.

This raises some issues.

First, a competing way of stating this element of the defence is that it would be sufficient that a defendant subjectively (and genuinely of course) considered that in the circumstances of the matter it was appropriate that he or she possess the material or item. It might be argued that this way is more consistent with the basis for imposing criminal liability.

Secondly, the bare phrase "reasonable in the circumstances" has the effect of leaving it up to the trial judge to direct the jury (or her or himself) as to when the act of possession would or would not be reasonable. This is objectionable on rule of law grounds. To adapt somewhat the words of the majority of the High Court in *Taikato v R* [1996] HCA 28:

> The chief difficulty in a court interpreting ["reasonable in the circumstances"] for possession [in a particular case] is to find a principled way of distinguishing cases where the legislature could not conceivably have envisaged such a defence arising and those where it may well have envisaged such a defence being available. …

> If the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different. Consequently, … courts will have to formulate various conditions which disqualify some, but not all, individuals … from taking advantage of the ["reasonable in the circumstances"] protection afforded by [subsection 43A(1)]. That means that, under [that] label …, the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments … .

Thirdly, the element of uncertainty introduced in this way about what proposed subsection 43(3) means also runs counter to the policy of the Bill.

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

TERRITORY RECORDS AMENDMENT BILL 2010

This Bill would amend the *Territory Records Act 2002* in a number of ways, and would repeal the *Executive Documents Release Act 2001* and incorporate its provisions in the *Territory Records Act 2002*.

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

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

Freedom of expression (HRA section 16), the right to participate in public life (HRA section 17), and the removal of records from the coverage of the Territory Records Act

The *Territory Records Act 2002* (the Act) provides for the keeping and the management of the records of the Territory executive and of agencies of Territory government. One aspect of this Bill is to clarify the relationship between Territory records and health records as dealt with by the *Health Records (Privacy and Access) Act 1997*. The Committee makes no comment on this aspect of the Bill. Nor does the Committee comment on the provision for a separate regime for legal services records, which are to be governed by amendments proposed to the *Legal Aid Act 1977*. Nor is there comment on the incorporated provision of the *Executive Documents Release Act 2001*, inasmuch as these provisions were considered at an earlier time by a predecessor to this Committee.

There are two particular matters for comment. In terms of human rights, both may be considered to raise an issue as to whether the relevant provision of the Bill is a justifiable limitation to the right to freedom of expression stated in section 16 of the *Human Rights Act 2004*, and/or to the right to take part in public life stated in section 17. Sections 16 and 17 read:

16 Freedom of expression

(1) Everyone has the right to hold opinions without interference.

(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

17 Taking part in public life

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

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

(b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and

(c) have access, on general terms of equality, for appointment to the public service and public office.

These rights are arguably relevant to the matters for comment for the reason that the Territory Records Act also provides for a regime for access by any person to a record of an agency where 20 years has elapsed since the record, or the original of which it is a copy, came into existence (section 26). The incorporated provision of the *Executive Documents Release Act 2001* also provides for a regime for access to executive documents that are (somewhat inexactly speaking) more than 10 years old.

In previous reports, this Committee has noted that it is arguable that the rights in HRA sections 16 and 17 oblige the Legislative Assembly to make provision for an effective regime of access to government-held records.[5] Territory statutes do make provision for access, most notably the *Freedom of Information Act 1989*, the Territory Records Act, and the Executive Documents Release Act. However, assuming that HRA sections 16 and 17 oblige the Legislative Assembly to make provision for an effective regime of access, there is always a question as to whether restrictions on the right to access are justifiable limitations to these rights.

It is not possible to predict how the Territory Supreme Court and the High Court might find in relation to the relevance of the HRA in this way. The Committee notes, however, that in *XYZ v Victoria Police*,[6] a recent decision of the Victorian Civil and Administrative Tribunal, (and after an exhaustive review of the "international jurisprudence"[7]), Justice Bell held the words "to seek, receive and impart information and ideas" in the Victorian Charter of Rights equivalent to HRA subsection 16(2) did "implicitly" make provision for a positive obligation on the government to provide access to government-held information on request by a person. His Honour's conclusions were stated as follows:

[5] See *Scrutiny Report No 36* of the *6th Assembly*, concerning the Freedom of Information Amendment Bill 2006, at 9-10.

[6] [2010] VCAT 255, 16 March 2010.

[7] Justice Bell's reliance on a decision of the Court of Appeal for Ontario, Canada, is weakened by reason that the Supreme Court of Canada reversed this decision; see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 [2010] 1 S.C.R. 815.

> 557. The trunk right in s 15(2) of the [*Charter of Human Rights and Responsibilities Act 2006*] is freedom of expression, of which the freedom to 'seek, receive and impart information and ideas' are branches. There are natural limits to the weight of meaning which these words can bear, but the right to freedom of expression at least includes the positive right to obtain government-held information. I draw that implication from the cognate values and purposes of the right and from each of the illustrative words 'seek, receive and impart'. What point is a right to seek information from government if there can be refusal without justification, or even explanation? What point is a right to receive information from government when there is no obligation to give, even on a subject of vital public interest? What point is a right to impart government-held information when the government does not even have to reply to a request for it to be obtained?
>
> 558. In conclusion, the right to freedom of expression in s 15(2) of the Charter implicitly imposes a positive obligation on the government to give access to government-held documents (freedom of information). The obligation I am specifying does not extend to creating documents, collecting data or disseminating information which has not been sought. The right to obtain government-held documents is not absolute and is subject to justifiable exceptions for objective, proportionate and reasonable purposes. The government has a margin of appreciation in this regard.

In the Territory, this line of argument derives additional support from HRA section 17.

Whether or not this reasoning is adopted by a court with jurisdiction in the Territory, the Committee considers that it should draw the Assembly's attention to provisions in a bill that could be employed to restrict statutory rights to information, in this case by removing records from the coverage of the Territory Records Act. There are two provisions in this Bill which appear to have this effect.

1. Clause 12 would insert a new subsection 23(2A) into the Territory Records Act. In a division headed "Protection of records", subsection 22(1) provides that an agency "must ensure the safekeeping and proper preservation of its records". Section 23 states certain "protection measures" including, in subsection 23(1):

> (1) An agency must not—
>
> (a) abandon or dispose of a record; or
>
> (b) transfer or offer to transfer, or be a party to arrangements for the transfer of, the possession or ownership of a record; … .

One object of these measures is, of course, to preserve the right of a person to seek access to the records under the access provisions in part 3 of the Act. The point of clause 12 and of proposed subsection 23(2A) is to qualify the protection measure in paragraph 23(1)(b), in that, despite this provision,

> the director may approve, in writing, the transfer of the possession or ownership of a record of an agency to a public body of the Commonwealth or a State if the director is satisfied—

(a) that the record is not a record the agency should retain control over; or

(b) in relation to any other matter prescribed by regulation for this subsection (proposed subsection 23(2A)).

A number of issues are raised:

(a) The Explanatory Statement provides examples of situations where this power might be employed. There is a question for the Assembly as to whether these situations provide sufficient justification for the creation of this power in the director.

(b) Assuming that such a power is justified, it is to be noted that the statutory expression of the power is unqualified, and does not state what matters would be relevant to its exercise. As noted, the effect of its being employed is to permit Territory records to be removed from Territory control, thus contradicting the policy evident in section 22 of the Act and in the access regime. The issue is whether this discretionary power in the director should be qualified, at least by requiring that officer to act only where satisfied on "reasonable grounds" of the matters stated in paragraphs (a) and (b) of proposed subsection 23(2A).

(c) It is not clear what this power would add to the existing scheme of the Act, given that by paragraph 23(2)(c), "an agency does not contravene subsection (1) by doing … (c) anything with the written approval of the director or in accordance with a practice or procedure approved by the director". The Committee recommends that the Minister explain why proposed subsection 23(2A) is necessary.

(d) No justification is offered for conferring on the Minister a power to legislate to extend the circumstances in which the director's power might be exercised. Given the significance of an extension, there is a question whether this is an appropriate delegation of legislative power.

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

2. Proposed section 23A is explained very briefly in the Explanatory Statement as acknowledging "that on occasion a body or agency is established that crosses jurisdictional boundaries and allows for records management arrangements to be made for that body". This explanation fails to elucidate key elements of the scheme proposed. These are:

- the section would apply to an agency that exercises functions (inter-government functions) under a law, or under an agreement or other arrangement between governments, that provides for the exercise of functions by the agency jointly or in cooperation with a public body of the Commonwealth or a State;

- the director may enter into an agreement (an inter-government records agreement) with the agency about the agency's rights and obligations in relation to the making, keeping, protection and control of and access to the agency's inter-government records; and

- such an agreement may exclude or modify the operation of a provision of this Act in its application to inter-government records.

An inter-government record, of an agency, means a record of the agency that relates to its inter-government functions.

There would thus be conferred on the director a power to set aside any provision of the Act so far as concerns inter-government records. The agency concerned would, however, continue to be a body created under Territory law and part of Territory government (see the definition of "agency" in section 7 of the Act).

An issue is whether it is desirable to confer such a wide power on the director. It is to be noted that there is no express limit to the power of the director to agree to excluding or modifying the operation of the Act. There is no obligation to report to the Assembly, or to obtain its agreement to the displacement of its law. There is no power in the Assembly to disallow an agreement. Again, the protective measures in the Act, and the access regime, might be set aside, thus raising the issue of HRA compatibility noted above.

All aspects of this scheme should be addressed and justified.

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

GAMING MACHINE (PROBLEM GAMBLING ASSISTANCE) AMENDMENT BILL 2010

This Bill would amend the *Gambling and Racing Control Act 1999* to require the Gambling and Racing Commission to establish, as a banking account, a "problem gambling assistance fund", which would be used to deliver problem gambling services. The Commissioner would be required to report on how the money is distributed. A licensee under the Act would each month pay into the fund a required percentage of the gaming machine revenue earned by the licensee.

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

From the commencement date of the Act (1 January 2011), the required percentage is 0.375% (proposed subsection 163A(2)). From 1 July 2011, proposed subsection 163A(2) (assuming it is enacted) would be replaced by three provisions, as provided for by clauses 2 and 5 of the Bill. These provisions (clause 5) follow:

(2) The required percentage is—

(a) 0.75%; or

(b) if the Minister determines a different percentage under subsection (2A)—that percentage.

(2A) The Minister may determine a percentage, higher than 0.75%, for subsection (2) (b).

(2B) A determination is a disallowable instrument.

The sum of money paid by a licensee as a required percentage is in effect a tax on the gaming machine activity of the licensee. There is a long-standing constitutional objection to vesting in a Minister (or other person) a power to levy a tax, this being a function that must be exercised by the legislature.[8] This objection is weaker (although depending on the rate of increase) where the levying of the tax is by operation of a statute, and a Minister, etc is empowered to alter the rate of the tax from time to time. The latter is the case here, and there are two further matters that ameliorate the force of the objection, these being (i) that the Minister is the authority in whom the power is reposed, and is thus amenable to questioning in the Assembly, and (ii) the Assembly is empowered to disallow a determination by the Minister. Nevertheless, some justification for these provisions is normally called for.

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2010-192 being the Planning and Development (Namadgi National Park) Plan of Management 2010 made under section 330 of the *Planning and Development Act 2007* **approves the Namadgi National Park Plan of Management 2010.**

Disallowable Instrument DI2010-193 being the Public Sector Management Amendment Standards 2010 (No. 4) made under section 251 of the *Public Sector Management Act 1994* **amends sections of the Standards relating to executive vehicles.**

Disallowable Instrument DI2010-194 being the Nature Conservation (Species and Ecological Communities) Declaration 2010 made under section 38 of the *Nature Conservation Act 1980* **revokes DI2008-53 and determines specified species to be vulnerable species, endangered species and endangered communities.**

Disallowable Instrument DI2010-195 being the Public Place Names (Hall) Determination 2010 (No. 2) made under section 3 of the *Public Place Names Act 1989* **repeals DI2010-165 and determines the names of roads in the division of Hall.**

[8] *In Scrutiny Report No 4* of the *5th Assembly* (5 March 2002), concerning the Gene Technology Bill 2002, the Committee referred to an earlier discussion in *Scrutiny Report No 14* of *1999*, where the Committee noted that many scrutiny committees operate according to the principle that "[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so": Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. The Senate Committee said: "[t]he vice to be avoided is taxation by non-primary legislation". Reference may also be made to *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579, per Brennan J, who referred to the long-standing constitutional position that "the raising and expenditure of public revenue have long been under the control of Parliament".

Disallowable Instrument—Comment

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

Is this appointment validly made?

Disallowable Instrument DI2010-191 being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2010 made under paragraph 16(1)(c)(iv) of the *Legal Aid Act 1977* **appoints a specified person, nominated by the executive committee of the ACT Council of Social Services, as a commissioner of the Legal Aid Commission.**

The Committee notes that this instrument indicates that it is made under paragraph 16(1)(c)(iv) of the *Legal Aid Act 1977*. The Committee notes that section 16 of the Legal Aid Act provides:

16 Constitution of board

(1) The board consists of the following members (each of whom is a ***commissioner***):

(a) the president of the commission;

(b) the chief executive officer;

(c) 5 other members of whom—

(i) 1 member represents the Minister; and

(ii) 1 member is chosen from a panel of not less than 3 people nominated by the council of the bar association; and

(iii) 1 member is chosen from a panel of not less than 3 people nominated by the council of the law society; and

(iv) 1 member is chosen from a panel of not less than 3 people nominated by the executive committee of the Council of Social Service of the Australian Capital Territory; and

(v) 1 member has expertise in financial management;

(d) 1 member who has qualifications, training or experience that will enable the member to give other specialist assistance to the commission in the exercise of its functions.

(2) The Minister must appoint the members of the board other than the chief executive officer.

(3) However, the Minister must only appoint a member mentioned in subsection (1) (d) if, in the opinion of the Minister, the commission requires specialist assistance in the exercise of its functions.

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

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

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

(4) A person appointed as a member by the Minister is appointed on a art-time basis.

The Committee notes that the requirement for paragraph 16(1)(c)(iv) (under which this appointment is made) is that the member appointed be a person "chosen from a panel of not less than 3 people nominated by the executive committee of the Council of Social Service of the Australian Capital Territory". The Committee also notes that the Explanatory Statement for this instrument states:

> Paragraph 16(1)(c)(iv) of the Act provides that the Commission must be served by at least 1 member who has been nominated by the ACT Council of Social Service (ACTCOSS).
>
> This instrument appoints [the specified person] as a member of the Commission nominated by the ACTCOSS, pursuant to section 16(1)(c)(iv) of the Act for the period commencing on 20 August 2010 and ending on 20 August 2013.

Though it is not expressly stated in either the Explanatory Statement or the instrument itself, the Committee assumes that the person appointed was, in fact, chosen (by the Minister) from a panel of not less than 3 people nominated by ACTCOSS.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 21 September 2010, in relation to comments made in Scrutiny Report 26 concerning Disallowable Instrument DI2010-132, being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2010 (No. 1).
- The Attorney-General, dated 22 September 2010, in relation to comments made in Scrutiny Report 27 concerning the Justice and Community Safety Legislation Amendment Bill 2010 (No. 3).
- The Minister for Education and Training, dated 22 September 2010, in relation to comments made in Scrutiny Report 26 concerning Disallowable Instrument DI2010-162, being the Canberra Institute of Technology (Advisory Council) Appointment 2010 (No. 2).
- The Minister for Planning, dated 23 September 2010, in relation to comments made in Scrutiny Report 27 concerning the Planning and Development (Public Notification) Amendment Bill 2010 and Subordinate Law SL2010-34, being the Planning and Development (Transitional) Amendment Regulation 2010 (No. 1).
- The Minister for Education and Training, dated 28 September 2010, in relation to comments made in Scrutiny Report 26 concerning Disallowable Instruments:
  - DI2010-100, being the University of Canberra (Statutes Interpretation) Statute 2010; and
  - DI2010-169, being the University of Canberra (Academic Board) Amendment Statute 2010.

- The Attorney-General, dated 1 October 2010, in relation to comments made in Scrutiny Report 26 concerning:
  - Disallowable Instrument DI2010-141, being the Attorney General (Fees) Amendment Determination 2010 (No. 1);
  - Disallowable Instrument DI2010-172, being the Civil Law (Wrongs) Professional Standards Council Appointment Amendment 2010 (No. 1); and
  - Subordinate Law SL2010-27, being the Crimes (Child Sex Offenders) Amendment Regulation 2010 (No. 1).

The Committee wishes to thank the Minister for Health, the Attorney-General, the Minister for Education and Training and the Minister for Planning for their helpful responses.

Vicki Dunne, MLA
Chair

October 2010

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

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

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

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

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

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

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

Bills/Subordinate Legislation

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

Report 24, dated 28 June 2010
Disallowable Instrument DI2010-65 - Auditor-General (Standing Acting Arrangements) Appointment 2010
Subordinate Law SL2010-18 - Road Transport (General) Amendment Regulation 2010 (No. 1)

Report 25, dated 9 August 2010
Road Transport (Drink Driving) Legislation Amendment Bill 2010

Report 27, dated 20 September 2010
Children and Young People (Death Review) Amendment Bill 2010 (PMB)
Disallowable Instrument DI2010-180 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 1)
Disallowable Instrument DI2010-181 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 2)
Disallowable Instrument DI2010-182 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 3)
Disallowable Instrument DI2010-183 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 4)
Disallowable Instrument DI2010-184 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 5)
Disallowable Instrument DI2010-185 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 6)
Disallowable Instrument DI2010-186 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2010 (No. 7)
Working with Vulnerable People (Background Checking) Bill 2010

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

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

Dear Vicki
Mrs Dunne

I refer to Scrutiny Report No. 26 dated 23 August 2010, and the Committee's comments relating to DI2010-132, being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2010 (No. 1).

I note that the Committee has commented on the authorising provision of the instrument and its view of the correct provision. Section 194 of the *Medicines, Poisons and Therapeutic Goods Act 2008* establishes the Medicines Advisory Committee. A reference to section 635 of the Medicines, Poisons and Therapeutic Goods Regulation 2008 could also have been included to make it clear this is the section that authorises the appointments. There is no effect, however, on the validity of the instrument (section 212, *Legislation Act 2001* refers). For future instruments, a reference will be included to both authorising sections.

The Committee has also sought clarity about the nominees for the required entities and why the Office of Multicultural Affairs might have been consulted. It is agreed that it would have been beneficial for the Explanatory Statement to indicate, of the appointees, who is the nominee of the ACT Branch of the Australian Medical Association (AMA), and the person with experience in the teaching, or practice of psychiatry. I can advise the Committee that Dr Charles Howse is the nominee of the AMA and the Chair, Dr Katherine Lubbe, is an experienced psychiatrist.

As to the consultation with the Office of Multicultural Affairs, as Committee members would be aware, it is Government policy when an appointment is proposed to a committee to seek to achieve 50% representation of persons from culturally and linguistically diverse backgrounds. This policy also applies to seeking advice from the Office of Women. I understand both offices maintain a database of persons who may be available to be considered for appointment to ACT Government Boards and Committees.

Thank you for raising these concerns.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

21 September 2010

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

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
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.27 (the Report) containing comments on the Justice and Community Safety Legislation Amendment Bill 2010 (the Bill). I offer the following response to those comments.

The committee suggests that proposed subsection 3.3(2), which states: "This section applies despite any other territory law.", is misleading.

I respectfully disagree with the Committee's suggestion that this proposed subsection is misleading. This type of provision is commonly used in legislative drafting and has an accepted and understood meaning. As indicated in my response dated 3 May 2010 to the Committee's comments on the Emergencies Amendment Bill 2010 in *Scrutiny Report No.*22, this type of provision is used to make it clear that it prevails over other territory laws in the event of any inconsistency.

Part of the accepted and understood meaning of this type of provision is that it would not restrain the power of the Legislative Assembly to make laws. It is understood that this provision can be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides the effect of this law if necessary.

I am convinced that it is unnecessary to insert a note, as recommended by the Committee, stating this accepted and understood meaning. Inserting such a note may result in undue confusion and potential limiting of the provision.

The Committee also commented on proposed amendments to section 68 of the *Supreme Court Act 1933*. The Committee seeks the Minister's advice on what effect the change will have on the normal rules and principles applicable where there is an appeal from the judge-alone verdict on the basis that a particular warning, direction, or comment was not referred to in the judgment.

As stated in the Explanatory Statement it was always the intention that the status of trials, regardless of whether they are conducted before a judge or judge and jury, be conducted on equal terms and

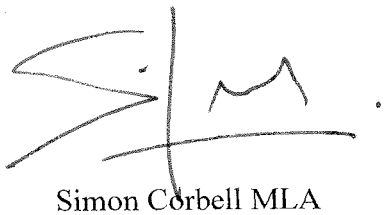
ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

equal footing. Consequently, the same considerations that apply when arguing and considering the grounds for appeals from judge and jury trials will apply where a trial has been conducted by judge alone. A failure to provide any particular warning or direction will not, of itself, necessarily determine the outcome of an appeal.

I thank the Committee for their consideration of this bill.

Yours sincerely



Simon Corbell MLA
Attorney General
22.9.10

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to the Scrutiny of Bills and Subordinate Legislation Committee's Report 26 dated 23 August 2010.

On page 12 of this report the Committee identifies a minor typographical error in the Explanatory Statement for Disallowable Instrument number DI2010-162 for the appointment of a member of the Canberra Institute of Technology (CIT) Advisory Council.

I appreciate the Committee's feedback on this issue and have been assured by the Chief Executive of CIT that he has put in place measures to ensure that this error does not occur again.

Thank you for bringing this matter to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training
22/ 9 /10

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No. 27 of 20 September 2010 and the Committee's comments regarding *Planning and Development (Public Notification) Amendment Bill 2010* and *Planning and Development (Transitional) Amendment Regulation 2010 (No 1)* (SL2010-34).

I would like to thank the Committee for its consideration of these items of legislation and positive comments.

Yours sincerely

Andrew Barr MLA
Minister for Planning

23 SEP 2010

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO 1020
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to the Standing Committee on Justice and Community Safety (the Committee) Scrutiny Report No 26 of 23 August 2010. I thank the Committee for its comments. I note those related to the disallowable instruments created under the *University of Canberra Act 1989*. I have received advice from the University of Canberra which has sought external legal advice on these matters.

Disallowable Instrument DI2010-100 – *University of Canberra (Statutes Interpretation) Statute 2010*
The Committee raised issues relating to section 5 of the *University of Canberra (Statutes Interpretation) Statute 2010* and sought advice on the meaning of the section that relates to the *Acts Interpretation Act 1901* (Cth), an Act of the Commonwealth Parliament, and its application to the University of Canberra.

This issue can be described as an issue arising from the transition to Territory self-government. When the University was first established as the Canberra College of Advanced Education in 1967 the enabling Act was an Act of the Commonwealth Parliament. When the College became the University of Canberra from 1 January 1990, the enabling Act, the *University of Canberra Act 1989*, was also an Act of the Commonwealth Parliament and the University was established as a statutory authority under Commonwealth jurisdiction. On 1 December 1997, jurisdiction for the University passed to the Australian Capital Territory. References to the *Acts Interpretation Act 1901* (ACT) was incorporated into the Canberra College of Advanced Education enabling law in 1967.

Notes in the *University of Canberra Act 1989* (ACT) indicate that the relevant Act in relation to statutory interpretation is now the *Legislation Act 2001* (ACT). Section 5(1) of the *University of Canberra (Statutes Interpretation) Statute 2010* should refer to the *Legislation Act 2001* (ACT) instead of the *Acts Interpretation Act 1901* (Cth). This was a drafting error.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

However, section 13 of the *Legislation Act 2001* defines a statutory instrument and the definition, taken together with Chapter 14 of the Act, clearly establishes the *Legislation Act 2001* as the authority in relation to the interpretation of the University's statutes and rules.

Consequently, section 5(1) of the *University of Canberra (Statutes Interpretation) Statute 2010* is redundant and the University will amend the Statute to repeal section 5(1). Section 5(2) will be retained, although referring instead to the *Legislation Act 2001*, to emphasise to the University community the application of the Act to the statutes and rules of the University.

Disallowable Instrument DI2010-169 – *University of Canberra (Academic Board) Amendment Statute 2010*

The Committee noted a drafting error in the Statute. The amending Statute should have referred to section 4(4) instead of 4.4. The University has, over the last three years, reviewed and revised most of the statutes and rules of the University and implemented a process to ensure the statutes and rules are evaluated and reviewed on a regular basis and revised as necessary. This is the first comprehensive review of the University's legislative instruments. Only two statutes remain to be reviewed, the *Academic Board Statute 1990* and the *Traffic Statute 1995*. A revised *Academic Board Statute 2010* will be submitted to the University's Legislation Committee on 19 November 2010 and the University's Council on 3 December 2010. The new statute will repeal the *Academic Board Statute 1990*. The drafting error identified by the Committee will be addressed in the new statute.

I have written separately to Professor Ingrid Moses, the Chancellor of the University of Canberra indicating the need to clarify and correct the matters.

Yours sincerely

Andrew Barr

Andrew Barr MLA
Minister for Education and Training

28 SEP 2010

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
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 26 of 23 August 2010. I offer the following response in relation to Disallowable Instrument DI2010-141 being the Attorney General (Fees) Amendment Determination 2010 (No 1), Disallowable Instrument DI2010-172 being the Civil Law (Wrongs) Professional Standards Council Appointment Amendment 2010 (No 1) and Subordinate Law SL2010-27 being the Crimes (Child Sex Offenders) Act 2005.

Disallowable Instrument DI2010-141
The Committee's minor comment regarding the listing of Acts is noted, and will be taken into account in relation to the drafting of future amending instruments. I also thank the Committee for its positive comments regarding the explanatory material for the amending instrument.

Disallowable Instrument DI2010-172
The Committee noted that the instrument amends an earlier instrument of appointment rather than making new appointments. The earlier instrument appointed nine members and one deputy member to the ACT Professional Standards Council. As the Committee notes one of these members resigned and it was considered more practical to amend the existing instrument to give effect to the replacement appointment, rather than commence a new appointment process that would also require re-appointing the other nine members.

Subordinate Law DI2010-27
The Committee noted that the explanatory statement addressed human rights issues raised by the subordinate law and made no further comment.

I trust that the above response addresses the Committee's comments in relation to the above subordinate legislation and I thank the Committee for its observations.

Yours sincerely

Simon Corbell MLA
Attorney General

1.10.10

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au