Legislative Assembly for the ACT

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

Scrutiny Report

15 AUGUST 2005

Report 14

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

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

ROLE OF THE COMMITTEE

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

BILLS:

Bills—No Comment

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

EMERGENCIES AMENDMENT BILL 2005

This is a Bill to amend the *Emergencies Act 2004*, the *Fuels Control Act 1979* and the *Occupational Health and Safety Act 1989*, to the effect of making corrective and clarifying amendments, and a small number of minor policy related amendments.

ENVIRONMENT PROTECTION (FIRE HAZARD REDUCTION) AMENDMENT BILL 2005

This is a Bill to amend the *Environment Protection Act 1998* (ACT) as it relates to the authorisation and conduct of bushfire fuel hazard reduction burns.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2005 (NO 2)

This is a Bill to make minor or technical amendments to a number of laws administered by the ACT Department of Justice and Community Safety.

LAND (PLANNING AND ENVIRONMENT) AMENDMENT BILL 2005

This is a Bill to amend the *Land (Planning and Environment) Act 1991* to provide for a definition of the concept of "concessional lease".

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION AMENDMENT BILL 2005

This is a bill to amend the *Dangerous Substances Act 2004*, the *Long Service Leave Act 1976* and the *Occupational Health and Safety Act 1989*, primarily to amend the review-of-Act provisions in the first two mentioned Acts.

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2005 (NO 2)

This is a Bill to amend the *Public Sector Management Act 1994* to formally recognise the Legislative Assembly secretariat, improve administrative efficiency in the process for appointment of an acting clerk who is not the deputy clerk, and relocate a number of powers currently vested with the Executive in the Speaker. The Bill would amend the Act to require the Public Service Commissioner to seek the approval of the Speaker to conduct a review of the secretariat; to widen the prescribe the timing and regularity in relation to such disclosures.

UNIVERSITY OF CANBERRA AMENDMENT BILL 2005

This is a Bill to amend the *University of Canberra Act 1989* to meet the requirements of the National Governance Protocols for universities, and thus to ensure higher education provider funding provided by the Commonwealth.

Bills—Comment

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

CRIMINAL CODE (ADMINISTRATION OF JUSTICE OFFENCES) AMENDMENT BILL 2005

This is a bill to amend the *Criminal Code 2002* to insert a new Chapter 7, dealing with offences directed to ensuring the proper administration of justice in the ACT, including, in particular, perjury and aggravated perjury; falsifying, destroying or concealing evidence; interfering with witnesses, interpreters, jurors and court officers, including deceiving, corrupting, threatening or causing reprisals against witnesses; perverting the course of justice and related matters, including publications that cause a miscarriage of justice and false accusation of an offence; and accessories after the fact.

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

Is it a derogation of their "right to liberty" stated in HRA subsection 18(1) to prescribe that a person can be found guilty of committing the offence even though, when carrying out the conduct required for the offence, the person is mistaken about, or ignorant of, the existence or content of a law that creates the offence?

The effect of clauses 6, 7 and 8 is described in the Explanatory Statement as "technical in nature and … aimed at clarifying the intended effect of what is currently subsection 37(1) of the Criminal Code". This is true, but the effect produced does raise a rights issue of a kind that warrants the Committee making this report under HRA section 38.

Clauses 6 and 7 amend section 12 of the *Criminal Code 2002* to insert a new subsection 12(2), so that (omitting the Notes) the entire section would read:

12 **Establishing guilt of offences**

(1) A person must not be found guilty of committing an offence unless the following is proved:

(a) the existence of the physical elements that are, under the law creating the offence, relevant to establishing guilt;

(b) for each of the physical elements for which a fault element is required - the fault element or 1 of the fault elements for the physical element.

(2) However, unless the law creating the offence otherwise expressly provides, a person can be found guilty of committing the offence even though, when carrying out the conduct required for the offence, the person is mistaken about, or ignorant of, the existence or content of a law that creates the offence.

It might be argued that a person who is ignorant of the fact that what they propose to do is in breach of some law lacks moral culpability and it is thus unfair to hold them in breach of the law. It might be argued that to hold the person in breach of the law and to penalise them is a derogation of their "right to liberty" stated in HRA subsection 18(1).

Whatever might be thought about the merits of this line of argument, it can be predicted fairly confidently that a court would not accept it. It is a fundamental of our legal system that "ignorance of the law is no excuse", and it is very unlikely that a court would read any HRA provision as contradicting that principle. The principle was addressed by some High Court judges in *Ostrowski v Palmer* [2004] HCA 30. Gleeson CJ and Kirby J said (at [1]-[2]):

> Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence [Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 451]. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that, if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.
>
> **The reason for the rule that ignorance of the law is no excuse**
>
> 2. For present purposes, we use the expression "elements of the offence" to embrace matters of exculpation, and without regard to any special consideration as to onus of proof that might exist in relation to particular offences. Ignorance of the legal consequences that flow from the existence of the facts that constitute an offence is ordinarily not a matter of exculpation, although it may be a matter of mitigation, and in some circumstances it may enliven a discretion not to prosecute. In *Blackpool Corporation v Locker* [[1948] 1 KB 349 at 361], Scott LJ called the rule that ignorance of the law is no excuse "the working hypothesis on which the rule of law rests in British democracy". His Lordship went on to make the point that the corollary of the rule is that information as to the content of the law should be readily accessible to the public. In a society in which many personal, social and commercial activities are closely regulated, and the schemes of regulation are frequently changed, the detail of regulation may be difficult for citizens and their lawyers to keep up with.

Justice McHugh added that

> [53] It is irrelevant that [a defendant's] mistake was induced by the conduct of an employee of Fisheries WA. That conduct cannot convert a mistake as to the applicable law into a mistake of fact. If a defendant knows all the relevant facts

> that constitute the offence and acts on erroneous advice as to the legal effect of those facts, the defendant, like the adviser, has been mistaken as to the law, not the facts. … [54] … the bare fact that the adviser or official may have been mistaken as to the state of the law does not convert the defendant's mistake into one of fact. Both the adviser or the official and the defendant operate under a mistake of law.

The cases cited by McHugh J included those where the mistaken adviser was a lawyer.

It should also be noted that the *Criminal Code* 2002 does not purport, (nor, of course, could it have the effect of) precluding another statute from stating the elements of an offence in such a way that the defendant cannot be guilty unless he or she did have knowledge of some law; the Explanatory Statement provides an illustration.

CRIMES (SENTENCE ADMINISTRATION) BILL 2005

This is a Bill for an Act to provide for the administration of the sentencing options provided by the Crimes (Sentencing) Act 2005, and to consolidate a number of existing sentencing laws. The Bill would also create and define the functions of a Sentence Administration Board.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?
Has there been an inappropriate delegation of legislative power?

Treatment of sentenced offenders and remandees

Does any provision of the Bill amount to a cruel, inhuman or degrading form of punishment?

Section 10 of the *Human Rights Act 2004* provides:

> **10 Protection from torture and cruel, inhuman or degrading treatment etc**
>
> (1) No-one may be—
>
> (a) tortured; or
>
> (b) treated or punished in a cruel, inhuman or degrading way.

On its face, no provision of the Bill is in breach of this provision.

Are the provisions in clause 7 of the Bill undesirably obscure in certain respects?

On the other hand, some aspects of clause 7 of the Bill warrant comment. In part, subclause 7(1) states:

7 Treatment of sentenced offenders

(1) Functions under this Act in relation to a sentenced offender must be exercised, **as far as practicable**, as follows:

(a) to respect and protect the offender's human rights;

(b) to ensure the offender's decent, humane and just treatment;

(c) to preclude torture or cruel, inhuman or degrading treatment; … [emphasis added].

(A similar provision is found in subclause 8(1), concerning remandees.)

On its face, it is odd that the law would contemplate that considerations of practicability might require treatment that was not "decent, humane and just", or treatment which amounted to "torture or cruel, inhuman or degrading treatment". This reading of the Bill was no doubt not intended, but the Committee must draw attention to this matter.

On the other hand, the effect of subclause 7(2) is obscure and might create problems for the administration of sentences. It provides:

(2) Also, functions under this Act in relation to an offender serving a sentence of imprisonment (whether by full-time or periodic detention) must be exercised, as far as practicable, to ensure—

(a) the offender is not subject to further punishment (in addition to deprivation of liberty) only because of the conditions of detention; … .

The Explanatory Statement states:

> Clause 7 provides that the Bill's functions are to be implemented in a manner that upholds human rights. Consistent with section 28 of the *Human Rights Act 2004*, the Bill sets out reasonable limitations upon a sentenced offender's human rights, or a detainee's rights, consistent with the object of the Bill.
>
> This clause makes it clear that there is no arbitrary power or right for the government to inflict additional punishments on prisoners. Prisoners and detainees retain their rights as human beings with the exception of those rights lost as a consequence of their sentence or remand.
>
> Subclause 7(2) ensures that the totality of the conditions of the sentence or remand do not create a further form of punishment or cruel treatment beyond the sentence itself. For example, the purposeful creation of hot conditions, conditions resulting IN sleep deprivation etc.

On one reading however, subclause 7(2) states a policy that the only punishment that an offender should suffer as a result of being detained is a deprivation of liberty; (and presumably what this means is that the prisoner cannot move about in society as they would normally). In other words, subclause 7(2) may mean that the conditions of the detention should not inflict any greater restriction on the ability of a person to do whatever they can lawfully do out of prison. But does it thus follow that within the prison the prisoner must be able to do whatever they would normally do, subject only to restrictions which arise out of the fact that they cannot move about in society as they would normally? If so, this is a significant restriction on the way a prison may be managed.

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

Natural justice

Is the effect of the Bill that in the exercise of a non-supervisory function the Board would not be obliged to observe natural justice?

Dealing with the manner in which the Sentence Administration Board (henceforth, "the Board") must act on an inquiry, subclause 195(1) states:

> For an inquiry, the board is not bound by the rules of evidence and may be informed of anything in any way it considers appropriate, but, for the exercise of a **supervisory** function, must observe natural justice.

The Committee notes that the supervisory functions of the Board embrace its very significant functions in relation to periodic detention, parole, and release on licence. It might well be, however, that an exercise of some function other than a supervisory function of the Board would, at common law, be obliged to observe natural justice. Yet the effect of subclause 195(1) might well be taken to exclude this obligation in such a case.

The Explanatory Statement states:

> Clause 195 specifies that the board is not bound by the rules of evidence. In this sense the board may behave in an inquisitorial way, but the board is still bound by natural justice.

Given this statement, it may not be intended that subclause 195(1) be read as excluding an obligation on the Board to observe natural justice in relation to its exercise of non-supervisory functions, and it is difficult to see why there should be any exclusion.

The uncertainty created might be addressed by a clarifying amendment and the Committee draws this matter to the attention of the Assembly. The words "but, for the exercise of a supervisory function, must observe natural justice" could well be omitted, given that as a matter of common law, this would in any event be the result.

A privative clause?

Is subclause 195(6) a privative clause, and, if so, should it be enacted?

The Committee canvassed the rights issues thrown up by a privative clause in *Report No 11 of the Sixth Assembly*. In general, an attempt to prevent a person challenging the legality of government action is undesirable and may amount to a breach of the *Human Rights Act 2004*.

In many respects, the Bill would prescribe the procedure to be followed by the Board. For example, it has been noted that by subclause 195(1), the Board must, for the exercise of a supervisory function, observe natural justice. But subclause 195(6) then provides:

(6) A decision of the board is not invalid only because of any informality or lack of form.

The Explanatory Statement states: "Clause 195(6) ensures that board decisions are upheld in substance rather than defeated in form".

This provision is problematic in that it might – depending on how a court would read it - defeat the point of prescribing procedural requirements, including the obligation to observe natural justice. It might not, for the courts might regard compliance with procedure - and in particular with natural justice - as a matter of substance. On the other hand, the courts do take account of matters of 'substance' when deciding whether to grant a remedy and are not attracted to granting a remedy for some lack of merely formal compliance.

In the end, it is difficult to see what provisions such as subclause 195(6) add, other than an undesirable degree of obscurity.

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

Privileges

The Committee suggests that at clause 204 there should be a cross-reference to sections 170 and 171 of the *Legislation Act*, as there is with respect to clause 198.

Victims of crime

While not acknowledged in the *Human Rights Act 2004*, it is generally recognised that the victim of a crime has a right to have her or his views taken into account in relation to the sentencing of an offender. In several respects, this Bill gives great weight to this 'right'; see, for example, Chapter 10, governing victim and offender information, and the particular provisions requiring that the views of a victim be sought (see some references below).

The Committee notes, however, two areas where an issue arises.

The release on licence scheme

In relation to the release on licence scheme, does the Bill take into account sufficiently the views and interests of the victim of a crime in relation to the sentencing of an offender?

The first issue arises in relation to decisions of the Executive to grant, or refuse to grant, a particular kind of offender a licence to be released from imprisonment under the offender's sentence. Briefly

- the scheme applies in relation only to an offender serving a sentence of life imprisonment for an offence against a territory law who has served at least 10 years of the sentence: clause 287;
- the process is initiated by the Attorney-General asking the Board to make a recommendation: clause 289;
- the Board holds an inquiry and makes a recommendation;
- the Executive makes the decision whether to release; and
- the Board has power to supervise the particular offender after release and may go so far as to cancel the release.

In clause 291 there is a detailed statement of the obligation of the Board to seek the views of a relevant victim. There is, however, no obligation on, or perhaps any power vested in the Board to record submissions of a victim in or accompanying a recommendation of the Board to the Executive as to whether the latter should release the offender on licence.

When the Executive determines whether to act on a recommendation of the Board as to whether an offender should be released on licence, it is not obliged to give any opportunity to the victim to make representations to it.

Nor is the Executive obliged to give any reasons for its decision whether to act on a recommendation of the Board. Clause 297 only obliges the Executive to give notice of its decision, (and this is a qualified obligation to "take reasonable steps to tell each relevant victim of the offender" of the decision: see subclause 297(4)).

A more generous recognition of the rights of the victim might be accorded by:

- imposing on the Executive an obligation to seek submissions from a relevant victim; or
- requiring the Board to make a report to the Executive of what steps it took to seek submissions from a relevant victim, and the results of those steps, including, in particular, what submissions were made and how the Board took them into account.

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

Should there be clarification of the roles of the Executive and the Board in relation to offenders released on licence by the Executive?

While dealing with the role of the Executive, the Committee notes a possible point of obscurity that could give rise to a significant problem in practice. By clause 289, the process of consideration for release on licence of an offender can be started only by the Attorney-General asking the Board to recommend whether an offender should be released from imprisonment on licence. It is, however, only the Executive who can determine whether to release the offender (clause 294). But the Board may then subsequently decide to make an inquiry whether the release on licence continued to be appropriate (see subclause 305(2)), and the Board may cancel the release (see paragraph 307(1)(e)).

Thus, the Board may, in effect, overrule a decision of the Executive to release an offender on licence. The question which then arises is whether the Attorney-General could again recommence the process by asking the Board to recommend whether an offender should be released from imprisonment on licence. This would then give the Executive a power to reinstate its decision to release the particular offender on licence.

This is a matter which should perhaps be clarified, and the Committee draws this matter to the attention of the Assembly.

Remissions and pardons

In relation to the scheme concerning remissions and pardons, does the Bill take into account sufficiently the views and interests of the victim of a crime in relation to the sentencing of an offender?

The second area for comment arises in relation to decisions of the Executive in connection with remissions and pardons under Part 13.2 (clauses 312 and 313). These potentially very significant powers are set out in full.

312 **Remission of penalties**

The Executive may, in writing, remit partly or completely any of the following in relation to a person convicted or found guilty of an offence:

(a) a sentence of imprisonment;

(b) a fine or other financial penalty;

(c) a forfeiture of property.

313 **Grant of pardons**

(1) The Executive may, in writing, pardon a person in relation to an offence of which the person has been convicted or found guilty.

(2) The pardon discharges the person from any further consequences of the conviction or finding of guilt for the offence.

Arising from its terms of reference and HRA section 38, the Committee notes a number of aspects of these powers:

- there is no statement of any procedure to be followed by the Executive when making these decisions;

- there is no obligation on the Executive to seek submissions from a relevant victim;

- there is no statement of what considerations are or may be relevant to an exercise of these powers (compare, for example, the way the discretion of the Board in relation to recommendation for release on licence is confined and structured by clause 292); and

- there is no obligation on the Executive to give reasons for its decision, or to notify any person or body, or to make public its decision in any way.

The Committee notes that the Explanatory Statement records that "Chapter 13 re-makes remedies available to Executive Government that have their origins in the royal prerogative of mercy. The prerogative, being an incident of the common law can be abrogated or conditioned by statutory law". That is so, but, does not provide a justification for the statutory restatement of these old powers of the Crown.

The Committee draws these matters to the attention of the Assembly.

Has there been an inappropriate delegation of legislative power?

Is there an inappropriate delegation of legislative power in that the Executive may, by way of a regulation made under subclause 9(4), modify the Act?

Clause 9 of the Bill deals very generally with a person "detained in lawful custody". It states some general principles to govern the way functions under the proposed Act must be exercised in relation to such a person. The point is explained in the Explanatory Statement:

> Clause 9 ensures that anyone held in custody is recognised and that any of the Bill's functions applicable to this category of person are to be implemented in a manner that upholds human rights.

Subclause 9(4) states:

(4) A regulation may make provision in relation to the application of this Act (other than this section) to the person, including modifications of the Act in its application to the person.

The Explanatory Statement does not, however, explain the rationale for subclause 9(4).

A long standing concern of the Committee is that a bill does not inappropriately delegate legislative powers. Two particular concerns are that a clause does not

- permit subordinate legislation to amend statute law (the Henry 8th clause); or
- confer a dispensing power on a Minister or the Executive.

Is there an undesirable Henry 8th clause?

The 'Henry 8th clause' empowers a person (such as a Minister) or body (such as the Executive) to amend a statute by means of a subordinate law. Such powers derogate from the legislative authority of the legislature. In addition, a regulation will have legal effect prior to any time on which the regulation is disallowed (if that be possible), or revoked by an Act.

Many such clauses that are technically of this kind do not in substance encroach on the legislative authority of the Legislative Assembly. Such is a clause that confers on the Executive a power, exercisable by regulation, to modify the transitional provisions of the Bill. An example is clause 348 of this Bill. Such provisions are not regarded by the Committee as raising any concern in that they are usually limited in relation to:

- subject matter - in that it cannot be used to make changes of a policy nature; and
- time - in that the section would expire at some time (usually 1 or 2 years) after it commences.

The Committee takes the view that in relation to clauses of this kind, no purpose is served by its drawing attention to it.

The Committee will, however, draw attention to Henry 8th clauses that have a broader application. Such is the case with subclause 9(4) of the Bill, for it appears to confer on the Executive a power to modify the Act in any way it would consider desirable.

Is there an undesirable dispensing clause?

The second problem with subclause 9(4) is that it appears to confer a dispensing power on the Executive – that is, a power to set aside the statutory scheme as it would normally apply to a particular person. The effect of such a clause may be to permit the executive to (in effect) re-write the Act by taking out of its purview persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intended should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined.

Given these two aspects of subclause 9(4), there is a serious question as to whether it is an inappropriate delegation of legislative power to the Executive.

The Committee draws these matters to the attention of the Assembly.

Discretionary powers and their review

The Committee notes the provisions for administrative review of certain powers vested in the chief executive, and does not suggest that there is a need for any more specific provision for review of the powers of the chief executive and the Board.

Provision for review

While many discretionary powers are vested in the chief executive, the Bill makes provision for only three kinds of power to be the subject of review by the Sentencing Board. The three powers are stated in subclause 70(1) and embrace the powers

- to approve, in respect of a periodic detainee, that he or she not perform detention for a period, or to report up to 4 hours late for a detention period: subclause 55(1);

- to direct, in respect of a periodic detainee, in circumstances where the offender reports for the detention period, that he or she not perform detention for a particular period (with the consequence that the periodic detention period is extended): subclause 58(3); and

- to direct, in respect of a periodic detainee, in circumstances where the offender is considered not to be fit for detention, that he or she not perform detention for a particular period (with the consequence that the periodic detention period is extended): subclause 60(1).

In addition, the power of the Board to make an inquiry into the manner of treatment of an offender subject to the various sentencing options, and as a consequence to give directions to the chief executive, may operate as a means for review of how the chief executive dealt with a particular offender: see subclauses 72(1) and 74(1)(c) (periodic detention); subclauses 154(1) and 147(1)(c), and 152(1) and 155(1)(b) (parole orders).

The Committee does not suggest that there need be any more specific provision for review of the powers of the chief executive and the Board. It notes that (except in the respect noted above), there is no attempt to restrict the availability of judicial review and of the Ombudsman.

A problem with the provisions dealing with the work to be done by an offender

The Committee draws attention to potentially troublesome provisions dealing with the work to be done by an offender.

By subclause 28(2), it is provided that an offender who is a full-time detainee "is not required to do work (including community service work), or participate in an activity, that the offender is not capable of doing". The Explanatory Statement states:

> If the offender is not able to do the work directed, they are not required to do it. Clause 28(2) is not prescriptive about what may inform an offenders incapacity to do the work. The onus is upon the offender to explain or demonstrate why they are incapable of doing the work whether for medical reasons or otherwise.

Two comments are warranted. First, it is far from clear from the wording of subclause 28(2) that any "onus" would rest on the offender. The provision reads as an obligation imposed on the relevant authorities, and not as a matter of excuse to be offered by the detainee.

Secondly, in what kind of proceeding or process would the issue or proof or disproof of the offender's capacity arise? It may be contemplated that an offender must raise the issue, and, if no concession was made, refuse to undertake the work, under pain of some penalty, whereupon the person making the decision whether to inflict the penalty would determine whether the work was not suitable.

The Committee considers that there should be greater clarity on this significant issue, as it may well be a point upon which conflict will arise.

A similar issue arises under clauses 58 (periodic detainees) and 90 (community service work).

A drafting error?

The reference to "par (b)" in the examples which follow subclause 17(3) should probably be to "par (a)".

CRIMINAL CODE HARMONISATION BILL 2005

This is a Bill to amend a number of ACT Acts and subordinate laws to bring offence provisions created before 1 January 2003 into line with the general principles of criminal responsibility contained in the *Criminal Code 2002*. It is the first of a series of bills that will see the eventual harmonisation of all ACT legislation with the Code.

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

The Bill would create a large number of offences of strict liability (albeit in many cases as a restatement of the existing law). In each case, the issue which arises is whether there is thus an incompatibility with the presumption of innocence stated in HRA subsection 22(1). The Committee draws attention to the lack of explanation and justification in terms of compliance with this provision.

Background

The Explanatory Statement explains the process of harmonisation as follows:

> Harmonisation is essentially the process of reviewing and revising ACT offence provisions to ensure that they are in a form consistent with the principles of the [*Criminal Code 2002*]. …

> The general approach in harmonising the offences has been to reformulate offence provisions in line with chapter 2 [of the *Code*], to state more clearly the physical and fault elements of an offence. A physical element of an offence may be conduct, a result of conduct, or a circumstance in which result or conduct occurs and forms the basic description of an offence. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. The Code provides for an implied fault element where an offence does not specify a fault element in relation to a particular physical element or at all.

The last proposition follows from section 22 of the *Code*:

> **22 Offences that do not provide fault elements**
>
> (1) If the law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.
>
> (2) If the law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

But section 22 does not state that the law creating the offence must provide for a fault element, and indeed subsection 11(2) states "the law that creates the offence may provide that there is no fault element for some or all of the physical elements". The *Code* indicates two different ways in which this may be done: first, by providing that the offence is one of strict liability (section 23), or, secondly, by providing that the offence is one of absolute liability (section 24). In either case, the result is that "there are no fault elements for any of the physical elements of the offence"; (the difference between the two cases is that in relation to the first, but not the second, the defence of mistake of fact (see *Code* section 36) is available).

Thus, in relation to a particular statutory offence to which it applies, (being all offences created *after* 1 January 2003 – see below), the effect of section 22 is that if the offence is *not* specified to be one of strict liability, or of absolute liability, a court must take it as a fault offence as described in section 22. (Of course, the statute creating the offence may prescribe some different fault element).

Chapter 2 of the *Criminal Code* does not generally apply to a pre-2003 offence: subsection 8(1). In relation to the default rule in section 22, the reason for this temporal limitation is that many offence provisions enacted prior to 1 January 2003 are not stated to be ones of strict or absolute liability, but would probably be found by the courts to be of this effect. Thus, to avoid the result that on the operation of section 22 these offences would necessarily be construed as *not* imposing strict or absolute liability, section 22 does not apply to offence provisions enacted prior to 1 January 2003. The point of this temporal limitation is to allow time for a 'harmonisation process' – that is, for the assessment, in stages, of all offence provisions enacted prior to 1 January 2003 to determine whether or not they should be reformulated in a way that states expressly that the offence is to be one of strict (or, alternatively, absolute) liability. This Bill is the first stage of this process. It repeals offence provisions in 32 Acts and 6 regulations, and in some cases replaces them with provisions which state expressly that the relevant offence is one of strict liability. (There is no proposal to create an offence of absolute liability.)

Thus, this Bill would create a significant body of criminal law. Of course, in most cases, there would be no change to the substance of the existing law. But this Committee must report on every provision of a Bill. Moreover, the *Human Rights Act 2004* has a significant effect on the way principles of criminal liability may be stated, and on what conduct may be made criminal. To restate the substance of the existing law in a new provision does not obviate the need for scrutiny in HRA terms. Thus, every provision of the Bill should be scrutinised, in particular to determine if a rights issue arises.

This is however a difficult task, given the dearth of explanation in the Explanatory Statement. This Committee report must then take a broad brush approach, and will begin by stating basic principles concerning criminal liability stated in both the *Criminal Code* and the *Human Rights Act 2004*.

Basic principles concerning criminal liability and the impact of the *Human Rights Act 2004*

(a) The physical and fault elements of an offence

Subsection 11(1) of the *Code* states the long accepted notion that "[a]n offence consists of physical elements and fault elements". Simplifying matters for the sake of explanation:

- a physical element may be "conduct" - and conduct means (among other things) "an act"; and
- a fault element for a particular physical element - which may (among other comparable states of mind) be an intention to do the acts which make up the conduct that comprises the physical elements of the offence.

For example, proposed subsection 14(1) of the *Animal Welfare Act 1992* (see Schedule 1, amendment 1.11 of the Bill) would provide:

> (1) A person must not use spurs with sharpened or fixed rowels on an animal.
>
> Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

This provision states the physical element of the offence – that is, the act of using spurs with sharpened or fixed rowels on an animal. It should be noted that the conduct of a person using spurs, etc could not amount to the physical element of this offence unless the conduct was "voluntary" – that is, that the conduct "is a product of the will of the person whose conduct it is" (subsection 15(2)).

This provision does not state the fault element for the offence. More specifically, it does not state that the person must have intended to do the acts which comprise the conduct which is the fault element. (Saying this allows for the possibility that a person might as a product of their will (that is, voluntarily) use spurs, etc, but without the intention of so doing. For the sake of explanation, it is not necessary to consider a particular example.) However, the effect of the default rule in *Code* subsection 22(1) is that intention is the fault element for the physical element. Thus, proposed subsection 14(1) of the *Animal Welfare Act 1992* must be read as if it stated that a person must not intend to use spurs, etc.

(b) Establishing guilt

Sections 12, 56 and 57 then state basic principles to govern how guilt of an offence must be established. Section 12 provides:

> **12 Establishing guilt of offences**
>
> A person must not be found guilty of committing an offence unless the following is proved:
>
> (a) the existence of the physical elements that are, under the law creating the offence, relevant to establishing guilt;
>
> (b) for each of the physical elements for which a fault element is required—the fault element or 1 of the fault elements for the physical element.

[For completeness, it should be noted that by the Criminal Code (Administration of Justice Offences) Amendment Bill 2005 it is proposed to renumber the clause above as subclause 12(1), and add a subclause 12(2) – see above.]

Subsection 56(1) provides that the prosecution "has the legal burden of proving every element of an offence relevant to the guilt of the person charged", and subsection 57(1) that a legal burden of proof on the prosecution "must be discharged beyond reasonable doubt".

(c) The impact of the *Human Rights Act 2004*

The principles just stated are consistent with, and might be required by the *Human Rights Act 2004*. HRA subsection 22(1) states:

> 22 (1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

A major effect of this presumption is that the prosecution must prove that the defendant committed the physical elements of the offence, and intended to so do so (or had a comparable state of mind). That is, only by such proof can the presumption of innocence be overcome. (It is arguable that the presumption embodies the principle that such proof must be beyond reasonable doubt, but this is debateable and does not need to be further considered here.)

It may also be said that a person cannot be said to be guilty – in other words, not be innocent - unless the offence provision does state a fault element of intention. It might be said that guilt lies in the person's moral responsibility for what they did, and that this is established only on proof of their

- having committed the acts that comprise the conduct as a voluntary act of will, and
- having had an intention to commit those acts.

If this analysis is correct, (and it is supported by a great deal of judicial interpretation of other human rights instruments), then there is a human rights issue arising out of the HRA whenever an offence is worded so that

- the fault element of intention (or a comparable state of mind) is not prescribed as an element of the offence – for example, where the offence is stated to be one of strict liability, or of absolute liability; or

- in some other way there is in effect a presumption that the defendant committed the physical elements of the offence, and/or intended to so do so.

Where either is the case, there is on the face of it an incompatibility with HRA subsection 21(1). There will then be an issue whether that incompatibility is justifiable under HRA section 28:

> **Human rights may be limited**
>
> 28 Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

This question can only be answered in the context of the particular offence provision. Taking the common case where an offence is stated to be one of strict liability, it will be relevant to take into account:

- that the defendant may invoke defences permitted by the *Criminal Code*, such as, in particular, the mistake of fact defence under section 36, (which does not, however, permit the person to submit that they took reasonable care to avoid committing the physical elements of the offence);

- whether there is specific provision for a reasonable care, or reasonable excuse defence, or some other defence, and whether in respect of any defence the defendant bears a legal burden of proof or only an evidential burden; and

- the "policy" justifications offered for derogating from the right to fair trial and/or the presumption of innocence, which in general terms could include the nature of the conduct prohibited, and in particular whether it is a regulatory offence, and the difficulties of proof of some matter faced by the prosecution, compared to the ease of proof of that matter by the defendant (in which case proof of that matter is with more justification placed on the defendant).

In relation to the second dot point, the Committee acknowledges that qualification of an offence of strict liability with an allowance that the defendant may rely on a defence of reasonable excuse operates to confer on the courts "the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision": *Taikato v The Queen* (1996) 186 CLR 454 at 464-466, per Brennan CJ, Toohey, McHugh and Gummow JJ. Thus, provision for such a defence does create a problem, for it is undesirable that the legislature in effect delegates its legislative power to the courts. The Committee's point however is that provision for such a defence to an offence of strict liability

will make it easier to justify the derogation of the presumption of innocence and/or of a fair trial that occurs when the offence does not contain a fault element. The absence of such a defence makes justification harder.

Placing a burden of proof on a defendant – sometimes called a reverse burden of proof – does not by itself necessarily raise a rights issue. The rights issue arises whenever the offence provision places on a defendant a burden to establish to the court that he or she did *not* commit one of the physical elements of the offence, or did *not* intend to commit the acts that make up the physical element. Relieving the prosecution of its obligation to prove that the defendant both committed the physical elements of the offence, and intended to so do so, gives rise to an incompatibility with HRA section 18 and/or section 21. The presence of a reverse burden of proof clause in the offence will indeed make it easier, in terms of HRA section 28, to justify relieving the prosecution of this task where the matter of defence to be proved by the defendant would show that he or she lacked moral responsibility for their actions. The reason why there is a focus on whether the defendant bears a legal burden to establish the matter of defence, rather than the lower level evidential burden (see below), is that the former will make justification more difficult. (Of course, the absence of either such allowance to the defendant will make the task of justification harder.)

Illustration of how a link between the provision of strict liability and a reverse burden of proof may affect assessment of justification under HRA section 28

The three dot points stated just above provide a very general framework for an assessment of whether a particular strict liability offence is compatible with the *Human Rights Act 2004*. Consideration of 3 provisions of the Bill will illustrate the complexity of the task. The Committee cannot take its commentary further because the Explanatory Statement provides very little detail in the way of explanation.

(i) Where the offence is stated to be one of strict liability and, apart from the *Code* defences, the defendant has **no** opportunity to prove facts which would establish a basis for a finding of not guilty.

This sort of case is illustrated by proposed subsection 27A of the *Adoption Regulation 1993* (see Schedule 1, amendment 1.6 of the Bill):

> **27A Offence to destroy etc register**
>
> (1) A person commits an offence if the person destroys, defaces or damages the register of adoptions.
>
> Maximum penalty: 5 penalty units.
>
> (2) An offence against this section is a strict liability offence.

In this case, that this is an offence of strict liability gives rise to an incompatibility with HRA section 18 and/or section 21, and in assessing whether this is justifiable under HRA section 28, account would be taken of:

- the lack of any kind of allowance for a defendant to avoid guilt by proving in any way that he or she took reasonable care to avoid destroying, defacing or damaging the register – this factor would point to lack of justification under HRA section 28;

- that the defendant could adduce evidence (to the standard of the evidential burden) that he or she had made a mistake of fact (see *Code* section 36), or to make out some other defence allowed for in *Code* part 2.3) - this factor provides some basis in support of justification; and

- the 'policy' justifications offered for derogating from the right to fair trial and/or the presumption of innocence – these factors are context dependent and may point for or against justification.

(ii) Where the offence is stated to be one of strict liability and, in addition to the *Code* defences, the defendant **is** given an opportunity to discharge a **legal burden** of proof in relation to facts which would establish a basis for a finding of not guilty.

This kind of case is illustrated by proposed subsections 12A(3), (4) and (5) of the *Animal Welfare Act 1992* (see Schedule 1, amendment 1.11 of the Bill), which provides:

> (3) A person commits an offence if—
>
> (a) the person lays a poison; and
>
> (b) there is a reasonable likelihood that the poison will kill or injure a domestic or native animal.
>
> Maximum penalty: 10 penalty units.
>
> (4) An offence against subsection (3) is a strict liability offence.
>
> (5) It is a defence to a prosecution for an offence against subsection (3) if the defendant proves that the defendant took all reasonable steps to avoid death or injury to domestic and native animals.

The analysis of this case would be different to that in the first example. Here, a defendant could seek to avoid guilt by proving that he or she took reasonable steps to avoid death or injury. This factor would provide some basis in support of justification. However, detracting from the force of this factor is that the defendant would (as a result of the use of the words "if the defendant proves") carry a legal burden of proof to establish that they had taken reasonable steps, etc: see *Code* paragraph 59(b).

(In this Bill, see too: proposed sections 12A and 20 of the *Business Names Act 1963* (see Schedule 1, amendment 1.74 of the Bill); proposed section 58 of the *Community Title Act 2001* (see Schedule 1, amendment 1.85 of the Bill); and proposed section 24 of the *Lakes Act 1976* (see Schedule 1, amendment 1.190 of the Bill)).

(iii) Where the offence is stated to be one of strict liability and, apart from the *Code* defences, the defendant **is** given an opportunity to discharge **only an evidential burden** of proof in relation to facts which would establish a basis for a finding of not guilty.

This kind of case is illustrated by proposed section 12 of the *Animal Welfare Act 1992* (see Schedule 1, amendment 1.11 of the Bill), which provides:

> **12 Administering poison**
>
> (1) A person commits an offence if the person administers poison to a domestic or native animal.
>
> Maximum penalty: 100 penalty units, imprisonment for 1 year or both.
>
> (2) This section does not apply if —
>
> (a) the person has a reasonable excuse; or … .

It is likely that this provision would *not* be read as casting on the prosecution – as a necessary part of its case-in-chief - a legal burden to prove that a defendant did not have a "reasonable excuse". Rather, to avoid guilt (and assuming that the prosecution proves the physical elements of the offence, that is, that the defendant administered poison, etc), the defendant would need to prove, according to the *evidential burden standard*, that they had a reasonable excuse. What this means is that they would need to present or point to "evidence that suggests a reasonable possibility that the matter exists or does not exist" (see *Code* subsection 58(7)). If they did so, then the prosecution then has the *legal burden* of disproving that the defendant had a reasonable excuse: see *Code* subsection 56(2). What this means is that the prosecution would need to establish to the court beyond reasonable doubt that the defendant did not have the reasonable excuse which the defendant has shown to exist as a reasonable possibility. (The prosecution could choose to attempt to do so in a case-in-reply to the case of the defendant.)

The analysis of this case would be different to that in the first and second examples. Here, a defendant could seek to avoid guilt by proving that he or she had a reasonable excuse, and would need to do so only to the evidential burden standard. Given the lighter nature of this burden (see above), this factor would provide a better basis in support of justification than is the case in relation to example (ii).

(In this Bill, see too: proposed section 49 of the *Bail Act 1963* (see Schedule 1, amendment 1.45 of the Bill); proposed sections 11A and 108 of the *Residential Tenancies Act 1997* (see Schedule 1, amendment 1.231 and 1.232 of the Bill); and proposed section 49 of the *Fisheries Act 2000* (see Schedule 1, amendment 1.148 of the Bill)).

<u>The Committee's comments on the Bill</u>

Against this background, the Committee offers the following comments on the rights issues that arise from the provisions of the Bill.

1. Taking the same view as the Scrutiny of Bills Committee of the Senate has done in relation to 'harmonisation' bills, the Committee suggests that the Explanatory Statement should confirm in relation to each new offence provision that no new strict liability offences have been created; (compare Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, para 2.108).

The Explanatory Statement for this Bill contains a very general statement to this effect:

> The Bill does not propose to create any new strict liability offences, [but] only to state strict liability where a number of factors, including the nature of the offence, the language employed and the level of penalty infers a legislative intent for strict liability. Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue.

2. Given that the offences are being restated after the commencement of the operation of the *Human Rights Act 2004*, there is a need for justification in any case where the restatement creates an offence of strict liability. It is not sufficient that on some date prior to the HRA, the Assembly passed an equivalent provision. In the current era, derogation of a right to a fair trial, and/or of a presumption of innocence, requires explicit justification.

3. A particular rights issue which arises is the extent to which the restatement of an offence affects the availability of defences that are currently available in respect of that offence. There is an inroad made on existing rights where the proposed provision does not restate a defence now found in the relevant offence provision; in particular, where that defence would enable the defendant, by showing for example the existence of a reasonable excuse, to show that he or she was not morally culpable.

4. Coming now to the Bill, the Explanatory Statement (at pp 2-3) indicates that one question addressed was whether it was desirable to retain a specific defence provided for in the particular pre-1 January 2003 offence, or, on the other hand, to reformulate the provision so that the matter that was formerly a matter of defence would now be stated as an element of the offence, with the result that it was a matter to be established by the prosecution. The Committee raises no issue at all about such provisions, given that in taking this step, the new provision better protects the presumption of innocence.

Secondly, the Bill does provide, but in very brief terms, a justification for the creation of offences of strict liability. It states merely:

> Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and the protection of the revenue.

This statement does not permit an evaluation of the policy justifications for the imposition of strict liability.

A third question addressed was whether in relation to any specific defence, the defendant would carry an evidential burden, or a legal burden. The Explanatory Statement indicates that the general common law approach has been adopted, to the effect that in only a few cases has a legal burden been imposed. The Explanatory Statement also acknowledges that, in such cases, the possibility of conflict with HRA subsection 22(1) becomes more acute. In this respect, the Explanatory Statement states:

> The Bill largely imposes only an evidential burden except in section 12A of the *Animal Welfare Act 1992*; sections 12A and 20, *Business Names Act 1963*; section 58, *Community Title Act 2001* and section 24, *Lakes Act 1976*. Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the *Human Rights Act 2004* (HRA), but it is considered imposing the burden on the defendant is permissible in each case as a reasonable limitation under section 28 of the HRA. For example, section 20 of the *Business Names Act 1963* provides that it is for the defendant to prove they took reasonable steps to comply with the requirements for the use and display of their business name. The matter to be proven furthers the regulatory objective that a business name is used and displayed in compliance with the section. Also, the reasonable steps taken by the defendant will be matters that are peculiarly within the knowledge of the defendant. Other indications that it is a reasonable limitation upon the right are the low maximum penalty of $500 (5 penalty units) and no imprisonment.

The Committee notes that no justification is offered so far as concerns the other provisions mentioned.

Finally, the Explanatory Statement addresses the question of whether the existing reasonable excuse defences should be retained. It states:

> In addition, amendments have been made in the Bill rationalising the use of the reasonable excuse defence. What constitutes a reasonable excuse largely depends on the purpose of the offence provision as well as the circumstances of the particular case. This introduces a high level of uncertainty into the application of the defence. In many cases the defence is unnecessary because the excuses it is intended to cover are now covered by the defences contained in part 2.3 of the Code. Information was sought from ACT Government agencies about the excuses that might have been intended to be covered by existing reasonable excuse provisions. In the majority of cases the advice was that the general defences in part 2.3 covered the excuses. However, reasonable excuse has been retained for the offences in the *Bail Act 1992,* the *Residential Tenancies Act 1997* and for notice to produce offences (see for example, section 49(3), *Fisheries Act 2000*) because it is impracticable to attempt to specify every possible justifiable excuse that may apply.

In the Committee's view, this explanation is deficient in that it does not specifically indicate where a reasonable excuse defence which currently attaches to a pre-1 January offence, is proposed by the Bill to be removed in the restatement of that offence in this Bill. This should not be a difficult or time-consuming exercise, and if undertaken it will place the Assembly in a position where it can assess whether a reasonable excuse defence should be retained.

The Committee also suggests that the Assembly should treat with caution an argument resting on what someone (however well-informed) in an agency of government has to say about the intention behind an existing provision of a statute. It is the Assembly which makes the law, not the sponsoring government agency. Even if one can speak of the Assembly having a collective intention, it cannot be assumed that whatever was in the mind of the public servants within the sponsoring agency was in the mind of the Assembly. This line of argument has some force only if some document placed before the Assembly, or some statement by a Minister in debate, spelt out the 'intention' of the particular offence provision.

The Committee draws these matters to the attention of the Assembly.

DOMESTIC ANIMALS (CAT CONTAINMENT) AMENDMENT BILL 2005

This is a Bill to amend the *Domestic Animals Act 2000* and the Domestic Animals Regulation 2001, primarily to introduce additional provisions for cat management arising from the declaration of the suburbs of Forde and Bonner in Gungahlin, and the adjacent Mulligans Flat and Goorooyarroo Nature Reserves, as areas where domestic cats must be permanently confined to their keeper's or carer's premises, or within purpose-built cat runs (enclosures), for twenty-four hours a day. The amendments would provide for enforcement of cat containment within the declared areas; compulsory identification of cats by microchip in the cat containment area, and progressive introduction of identification of cats over 12 weeks of age by microchip at point of sale for the rest of Canberra over a three year period; seizure of stray cats; temporary housing of seized stray cats; and identification, release to their owners or disposal of seized cats.

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

Is restriction of the privacy interests (if any) of a cat owner justifiable in terms of HRA paragraph 12(a) itself, and/or HRA section 28?

The content of HRA sections 12 and 28 are set out in other parts of this report. The Committee acknowledges that the policy of this Bill raises the general issue of whether the ability to own a cat and make decisions about how it lives is an aspect of a person's privacy and, if so, whether the degree of regulation proposed by the Bill is an arbitrary interference with that right to privacy, or assuming it is, whether that interference is justifiable under HRA section 28. In this context it is apparent that the countervailing interests would include the interests of those who see value in protecting birds and animals that may be hunted by cats.

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28).

The Bill would create three strict liability offences:

(1) Proposed section 82 of the Act (see clause 8), in respect of which:

- there is provision for a defence of reasonable excuse, to be made out by the defendant to the standard of the evidential burden;
- the maximum penalty is 10 penalty points; and
- no justification is offered in the Explanatory Statement.

(2) Proposed section 84 of the Act (see clause 9), in respect of which:

- there is no provision for any defence of reasonable excuse;
- the maximum penalty is 5 penalty points; and
- no justification is offered in the Explanatory Statement.

(3) Proposed regulation 12 of the Regulations (see clause 19), in respect of which:

- there is no provision for any defence of reasonable excuse;
- the maximum penalty is 10 penalty points; and
- no justification is offered in the Explanatory Statement.

In neither case does the maximum punishment exceed 50 penalty points. (The Committee's view is that 50 penalty points might be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 5 of the 6th Assembly*.)

In relation to proposed section 82 of the Act, the provision for a defence of reasonable excuse further diminishes any concern that there is an unwarranted derogation from the presumption of innocence.

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

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

The Committee does not consider that rights, liberties and/or obligations have been made unduly dependent upon an insufficiently defined administrative power, and commends the conferral on the Minister of a power to make mandatory guidelines to control the exercise of the discretionary powers.

The Bill would vest in an authorised officer a structured discretionary power in respect of the return of a seized cat to its keeper, and of the waiver of any fee otherwise payable by the keeper (proposed section 92, see clause 10). The Minister would be empowered to issue mandatory guidelines to the officers (proposed section 93, see clause 10).

The registrar may waive the liability of a person to pay a bank fee incurred by the government as a result of a dishonoured cheque that had been made out in respect of a fee (proposed regulation 17, see clause 19), and the Minister would be empowered to issue mandatory guidelines to the registrar (proposed regulation 17, see clause 19).

HUMAN RIGHTS COMMISSION (CHILDREN AND YOUNG PEOPLE COMMISSIONER) AMENDMENT BILL 2005

This is a Bill to amend primarily the *Human Rights Commission Act 2005* to create the office of Children and Young People Commissioner within the Human Rights Commission, and to vest in the Commission the responsibility for oversight of the delivery of services for children and young people and their carers, and the function of dealing with complaints and conciliation of complaints, inquiries, and community education in relation to children and young people and their carers.

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

The Committee draws attention to the statement in the Explanatory Statement which relates the Bill to human rights instruments:

> The establishment of a Commissioner aligns with the *United Nations Convention on the Rights of the Child 1990,* where Article 12 provides the right for a child or young person to express their views. Section 11 of the *Human Rights Act 2004* provides a right about the protection of the family and children generally reflecting Articles 23 and 24 of the *International Covenant on Civil and Political Rights (ICCPR).*

Are rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?

Is it desirable to restrict the power of the ombudsman office to investigate agency action in relation to the provision of a disability service, a health service, a service for children and young people or a service for older people?

The Committee draws attention to the proposal (Schedule 1, clause 1.2) to amend section 5(2)(n) of the *Ombudsman Act 1989* to provide that the ombudsman is **not** authorised to investigate

> (n) action taken by an agency—
>
> (i) for the purpose or in the course of providing, or purporting to provide, a disability service, a health service, a service for children and young people or a service for older people; or
>
> (ii) in refusing to provide a disability service, a health service, a service for children and young people or a service for older people; … .

The Explanatory Statement says in justification:

> Clause 1.2 changes section 5(2)(n) of the *Ombudsman Act 1989* so that the Ombudsman cannot investigate the provision or refusal to provide services for children and young people or services for older people. The Commissioners in the Human Rights Commission and the Public Advocate will perform investigation of these activities.

The *Ombudsman Act 1989* confers on the ombudsman a broad power to "investigate action that relates to a matter of administration" (paragraph 5(1)(a)), and then to deal with the complaint in a flexible and informal way, (including, as is noted below, a broad discretion to decline to investigate). This informality is justified in part by reference to the ombudsman's lack of power to do anything other than make a recommendation that the agency alter its decision in some way. While this restriction on power stands in contrast to the powers of a court or of a tribunal to revoke or change agency decisions, the ombudsman provides an inexpensive means of seeking redress to the ordinary person who cannot afford the cost, in terms of money and time, of resort to the courts or administrative tribunals.

One particular virtue of the ombudsman scheme is that the very broad grant of jurisdiction to the ombudsman in paragraph 5(1)(a) avoids the legal complexity which arises out of grants of jurisdiction to the courts and to tribunals. An ombudsman's office is founded on the basic principle that its jurisdiction should extend to investigation of complaints against all agencies of the executive and administrative branches of government (excluding actions of Ministers, who are seen as responsible to the legislature, and of the courts so far as concerns the exercise of their judicial functions). This principle, if carried through in the particular ombudsman scheme, reduces jurisdictional complexity to a minimum, and thus makes it easier for the ordinary person to use he scheme. Furthermore, it promotes the even application of principles of good administration across the whole of the administrative arms of government.

Qualification of this principle is thus to be avoided if possible. The Committee appreciates that, over time, there have been additions to the list of agency actions which, under subsection 5(2), may not be investigated by the ombudsman, and that proposed paragraph 5(2)(n) of the *Ombudsman Act 1989* adds to the list. The Committee is nevertheless concerned that the ombudsman's general grant of jurisdiction has been qualified, both as a matter of general principle and having regard to the particular difficulties that would be created by proposed paragraph 5(2)(n) of the *Ombudsman Act 1989*.

In terms of proposed paragraph 5(2)(n), it may be the case that what might be investigated under the concept of "action taken by an agency … for the purpose or in the course of providing, or purporting to provide, a disability service, [etc]" is wider than what may be investigated by the Human Rights Commission (HRC) and the Public Advocate. In particular, an agency of government that does not "provide" a disability service, etc, and which thus might not fall to be investigated by the HRC or the Public Advocate, might nevertheless take action "for the purpose of" providing such a service. The effect of the amendment would be that neither the ombudsman of the HRC could investigate a complaint in relation to the action. In other words, the words of exclusion of the Ombudsman's jurisdiction may be wider than the words of inclusion of the jurisdiction of the HRC.

Jurisdictional disputes of this kind can be difficult and time-consuming, and serve no end of substance. The virtue of the ombudsman process is that it is inexpensive and not complicated by difficult questions of law.

Two alternatives to what is proposed in the Bill present themselves. First, the ombudsman might simply refer a complaint of the kind stated in proposed paragraph 5(2)(n) to the HRC or the Public Advocate. Under paragraph 6(b)(iii) of the *Ombudsman Act 1989*, the ombudsman has a broad discretion to decide not to investigate the action where the subject of the complaint "is not warranted having regard to all the circumstances".

Secondly, a stronger form of qualification of the ombudsman's powers would be by amendment of section 6A of the *Ombudsman Act 1989*, which provides:

6B Mandatory referral

(1) If the ombudsman decides that it would be more appropriate for a complaint to be investigated by any of the following entities, the ombudsman must refer the complaint to the entity:

(a) the commissioner for the environment;

(b) the commissioner for health complaints;

(c) the essential services consumer council.

(2) If a complaint is referred to an entity, the ombudsman must give the entity the relevant documents and information about the complaint.

In other words, the HRC and the Public Advocate could be added to this list.

Of course, under either alternative, the agency to which the ombudsman refers the complaint might decline on the basis that it lacks jurisdiction. But this would leave the ombudsman with power to take up the matter, and avoid the legal impasse (which could only be sorted out by the Supreme Court) that can be created by provisions (such as the proposed amendment to paragraph 5(2)(n) of the *Ombudsman Act 1989*) which prescribe a lawfulness limit to what the ombudsman may investigate.

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

LITTER AMENDMENT BILL 2005

This is a Bill to amend the *Litter Act 2004*, primarily to empower an authorised person to require a person to state their name and home address if the authorised person believes, on reasonable grounds, that the person is committing or has just committed an offence against this Act.

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

Proposed subsection 17(1) of the *Litter Act 2004* would empower an authorised person to require a person to state the person's name and home address if the authorised person believes, on reasonable grounds, that the person is committing or has just committed an offence against this Act.

While, in the end, the Committee does not see a significant rights issue arising out of this provision, it is worthwhile examining the various ways a rights analysis could proceed.

Is there a deprivation of liberty and/or a detention?: HRA section 18

Does the power of an authorised officer to require a person to state their name and address derogate from the right to liberty and security of the person stated in HRA section 18(1)? Is any such derogation justifiable under HRA section 28?

In the first place, subsections 18(1) and (2) of the *Human Rights Act 2004* may be relevant.

> **18 Right to liberty and security of person**
>
> (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
>
> (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The next step is to recognise that the actions of an authorised person acting under proposed subsection 17(1) of the *Litter Act 2004* may be seen as one or the other, or perhaps both, of being

- a "detention" of the person who is required to provide their name and address; or
- a "deprivation of the liberty" of that person.

It is not inevitable that this is how the Supreme Court would view the matter. Taking first the issue of whether the exercise of this power would involve a detention, a narrow view of the concept might hold that a person is detained, or deprived of their liberty, only if they are placed in some custodial setting, such as being removed to a building, or placed in a vehicle; (see Meredith Wilkie, "Police Powers and the Convention on the Rights of the Child" (1995, unpublished paper), citing a United nations document). On the other hand, as Wilkie points out, Australian common law has taken the view that "the notion of not being able to leave at will … encapsulates the critical essence of 'deprivation of liberty'". She cites a South Australian case (*Gibson v Ellis*) in which the court held, in considering the legality of a "frisk search", that "[t]he power to search necessarily incorporates the power to restrict the liberty of the suspect should it be required to render effective such search". Wilkie argues that "[i]f police have the power to demand name and address, and if to refuse is an offence, then the contact involved in making the demand is a deprivation of liberty". Equally, it may be said that there has been a detention for that period of time.

Subsection 18(1) then provides that "no-one may be arbitrarily … detained". It is clear from the reports of the United Nations Human Rights Committee, and from courts in other countries, that a detention may be "arbitrary" even if it is authorised by a law. It is accepted, as summarised by Hamilton J in *Manga v Attorney-General* [2000] 2 NZLR 65 at 71, that

> [a]ll unlawful detentions arbitrary, *and* lawful detentions may *also* be arbitrary if they exhibit features of inappropriateness, injustice, or lack of predictability or proportionality.

Turning now to subsection 18(2), which deals with a deprivation of liberty, this provision might be thought to afford a narrower protection to a person, for it appears to permit a deprivation "on the grounds and in accordance with the procedures established by law". There is here no limitation in terms that a deprivation not be arbitrary. This reading is probably not correct. Rather, subsection 18(2) states an additional requirement - that is, a deprivation of liberty necessarily amounts to a detention, and, in addition to that deprivation not being "arbitrary" (subsection 18(1)), it must also be "on the grounds and in accordance with the procedures established by law" (subsection 18(2). What this adds is that the detention "must be specifically authorized and sufficiently circumscribed by law": S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) [11.10]; (see also the same point made concerning HRA section 12, below). (It would also be possible to read subsection 18(1) as stating that unless the law is of this character, there would necessarily be an "arbitrary" detention. There is clearly some overlap between subsections 18(1) and (2).)

Is proposed subsection 17(1) of the *Litter Act 2004* incompatible with one or the other, or both, of subsections 18(1) and (2)? As a matter of common law rights, the Committee considered this issue in *Report No 7 of 1999.* It said there:

> What personal rights and freedoms are implicated? The common law recognised "the right of the individual to refuse to answer questions put to him by persons in authority": *Rice v Connolly* [1966] 2 QB 414 at 419. This may be regarded as a dimension of the "right to silence", or, more particularly, of the privilege against self-incrimination; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at paras 8.1 and 8.8.
>
> Today, this right might also be seen as a dimension of a right to privacy, in particular where the person questioned is not suspected of committing a crime.
>
> <u>When is it justifiable to impose on a person an obligation to provide their name and address?</u>
>
> There are statutory provisions that impose on a person an obligation to provide their name and address if a state official believes that the person might be able to assist in inquiries in relation to the commission of an offence. There is a general provision to this effect in section 349V of the *Crimes Act 1900*.
>
> The ALRC noted that while "[s]tatutory power to require a person to furnish his name and address exists at present in most jurisdictions only in relation to traffic offences[, it] is nonetheless, a power which policemen need, and exercise in practice": ALRC at para 79. The Commission thus recommended:
>
> > The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person's name and address is sought, and there should be a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity: ALRC at para 322.

> The Gibbs Committee approved of this general approach; see Review of Commonwealth Criminal Law (*Fifth Interim Report*, June 1991) at para 8.8.
>
> It is, however, critical to note that the ALRC linked its recommendations to the means it recommended for enforcing safeguards against an excess of the powers of the police. In this respect, it instanced "disciplinary action, the exclusionary rule, and the civil action for false imprisonment": ALRC at para 81, footnote 107, and see too at para 204, and see paras 301-302.
>
> The first of these reasons has much less force where the person exercising the power is not a police officer. In relation to the police, there is a distinct regime for making of complaints and discipline.

On this view of the matter, proposed subsection 17(1) of the *Litter Act 2004* is compatible with one or the other, or both, of subsections 18(1) and (2), subject only to a concern that arising from the fact that the power to demand name and address is not vested in a police officer. Whether the Supreme Court would see this as a problem is entirely conjectural. It is to be noted that under the Act, an authorised person must be a public servant. It is of course arguable that such a person is also subject to a regime of discipline and supervision as much as is a police officer.

Is there an interference with the right to privacy?: HRA section 12

Does the power derogate from the right to privacy stated in HRA section 12?
Is any such derogation justifiable under HRA section 28?

Paragraph 12(a) of the *Human Rights Act 2004* provides:

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

It is not difficult to see that proposed subsection 17(1) of the *Litter Act 2004* would interfere with the right to privacy of the person whose name and address is required by the authorised officer. The question then is whether that interference is unlawful or arbitrary.

The United Nations Human Rights Committee has considered these concepts as stated in Article 17 of the *International Covenant on Civil and Political Rights*, from which HRA section 12 is derived. S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) noted the effect of this consideration:

> [16.08] The Committee [has specified] that the law must be precise and circumscribed, so as not to give decision-makers too much discretion in authorizing interferences with privacy:
>
> > [8] [R]elevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such an authorised

> interference must be made only by the authority designated under the law, and on a case-by-case basis; [quoting *General Comment 16*].
>
> …
>
> [16.11] Prohibition of 'unlawful' interferences with privacy … is necessarily supplemented by the prohibition of arbitrary interferences with privacy.

To elucidate the concept of an 'arbitrary interference', the authors quoted from *General Comment 16*:

> [4] The concept of 'arbitrary interference' is also relevant to the protection of the right provided for in Article 17. In the Committee's view the expression 'arbitrary interference' can also extend to an interference provided for under law. The introduction of the concept of arbitrariness is intended to guarantee that even an interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

Applying this theory to the provisions of the Bill, for the reasons applicable to the analysis of HRA subsection 18(1), the power of an authorised officer under proposed subsection 17(1) of the *Litter Act 2004* to require a person to state their name and address probably does not derogate from the right to privacy.

The Committee does however note that a privacy issue arises out of the mere collection of information about a person's name and address. The ability of government to store personal information in electronic data bases, and to match and swap it around government adds much force to this concern. The collection, storage and use of personal information is of course subject to the *Privacy Act 1988* (Cth), and this may be considered a sufficient protection of the right to privacy.

MENTAL HEALTH (TREATMENT AND CARE) AMENDMENT BILL 2005

This is a Bill to amend the *Mental Health (Treatment and Care) Act 1994* to allow for the Mental Health Tribunal to make an involuntary emergency electroconvulsive therapy (ECT) order.

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

The compatibility of the Bill with the *Human Rights Act 2004* involves three basic issues:

- is the Bill incompatible with HRA subsection 10(2) in that it would operate to subject a person to medical treatment without their consent;
- is the Bill incompatible with HRA paragraph 12(a) in that it would interfere with the right of privacy of the person the subject of the electroconvulsive therapy; or
- is the Bill incompatible with HRA subsection 18(1) in that it would operate to subject a person to medical treatment without their consent; and, in any of these cases,
- is any derogation justifiable under HRA section 28?

There would seem little doubt that the administration of electroconvulsive therapy to a person without their consent would be incompatible with each of HRA subsection 10(2), paragraph 12(a), and subsection 18(1). They provide:

> **10** (2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.
>
> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; … .
>
> **18 Right to liberty and security of person**
>
> (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
>
> (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The issue then is whether the derogation of these rights can be justified under HRA section 28. In this respect, the "Statement of Reasons" prepared by the Department of Justice and Community Safety (JACS), (which is appended to this report), is a measured and comprehensive statement of the way this issue may be approached, and the Committee commends it to the Assembly.

The Committee notes that the Mental Health Tribunal may make an emergency electroconvulsive therapy order in relation to a person if satisfied of certain matters, including, critically, that

> (c) the person is, because of the mental illness, incapable of weighing the considerations involved in deciding whether or not to consent to the administration of electroconvulsive therapy: proposed paragraph 55N(1)(c).

This is a judgement on which minds may differ, and will turn on the quality of the information provided to the tribunal.

The Committee also notes that the JACS statement acknowledges that the treatment can have "short term side effects", and, "in rare cases, [cause] longer-term memory loss".

Having regard to both these matters, the Assembly may wish to consider whether a decision of the tribunal, and the manner in which it arrived at that decision, should be subject to review by a magistrate or even perhaps a Supreme Court judge. Such a review need not require a formal hearing, but might be by way of the kind of process adopted when a warrant for a search is issued. It might be – although this is very much conjectural – that the Supreme Court would find that some such opportunity for judicial review is necessary in order to accommodate the scheme to the HRA; (compare to the holding of the majority of the High Court in *Marion's case* (1992) 175 CLR 218 at 250).

PUBLIC ADVOCATE BILL 2005

This Bill would provide for the appointment of a public advocate and specify the functions of this office-holder. The Bill would repeal the *Community Advocate Act 1991*.

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

Privacy rights

There are issues as to:

- whether a conflict with *HRA* s 12 is involved in the displacement of existing rights to protection of confidential information, and similar information, in respect of information given to the public advocate, and, if so,
- whether any such incompatibility may be justified under HRA section 28.

In various ways, the public advocate may be given information by a person, and in many such cases the information would concern the affairs or interests of some other person. Clause 15 of the Bill provides a very broad grant of protection to the person providing the information:

> **15 Giving of information protected**
>
> (1) This section applies if any information is given honestly and without recklessness to the public advocate.
>
> (2) The giving of the information is not—
>
> (a) a breach of confidence; or
>
> (b) a breach of professional etiquette or ethics; or
>
> (c) a breach of a rule of professional conduct.
>
> (3) Civil or criminal liability is not incurred only because of the giving of the information.

The protection afforded by clause 15 may operate to interfere with the privacy of a third person. Given that the provision of the information may amount to a breach of confidence, or may be defamatory in nature, the giving of the information could well impact adversely on a third party, such as the confider (or "owner") of confidential information who would be protected by the law of breach of confidence; and the person defamed in the statement of the information given to the public advocate. Clause 15 would also sanction a breach of professional ethics or conduct, and many such ethical principles are designed to protect the privacy interests of the clients of the professional person.

HRA section 12 provides:

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

Whether the interference with the privacy of a third person that is protected by clause 15 is arbitrary turns on matters such as whether clause 15 specifies in sufficient detail the precise circumstances in which an interference is permitted, and whether an interference is in accord with the provisions, aims and objectives of the HRA and, in any event, is reasonable in the particular circumstances; (see references above to S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004)). Assessment of reasonableness involves assessment of whether clause 15 is a proportionate response to the problem addressed by clause 15.

If clause 15 does amount to an interference with privacy prohibited by HRA section 12, the issue would then be whether the abrogation is justified under HRA section 28.

One difficulty with clause 15 is its lack of precision as to when the person giving the information is protected by clause 15. It speaks of "information … given honestly and without recklessness". But "honest" in what respect? And what might the person be reckless about? In their context, these terms might convey the notion that the person should believe in the veracity of the information they provide. The issue is, however, complicated by the statement in the Explanatory Statement that "[c]lause contains new provisions that protect a person who for genuine reasons gives information to the Public Advocate". This suggests a less restrictive concept of "honesty".

As to whether clause 15 is a proportionate response to the problem addressed by clause 15, the Committee notes that the only justification provided in the Explanatory Statement is that "The provision comes from section 46 of the *Children and Young People Act 1999* and has been included because it relates to the functioning of the office of the Public Advocate". The Committee notes that the replication in a bill of a provision found in an existing statute does not obviate the need for a close review of whether the bill complies with the *Human Rights Act 2004*. It has introduced new and rigorous standards for assessment of human rights compliance.

It may be that the purpose of clause 15 is to encourage persons to provide information to the public advocate, but the question then is whether it goes too far in interfering with the privacy interests of third parties.

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

SENTENCING AND CORRECTIONS REFORM AMENDMENT BILL 2005

This is a Bill to amend the *Crimes Act 1900* and the *Criminal Code 2002*, primarily to increase the penalties applicable in relation to number of offences created by those Acts, and in addition to create new offences relating to actions taken against police officers.

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

The penalty provisions

Is the severity of any penalty such that it is so disproportionate to the acts committed that the penalty is in breach of HRA subsection 10(1)?

In relation to any penalty provision, an issue which arises is whether it is of such severity that the penalty is so disproportionate to the acts committed that the penalty is in breach of HRA subsection 10(1):

> **10 Protection from torture and cruel, inhuman or degrading treatment etc**
>
> (1) No-one may be—
>
> (a) tortured; or
>
> (b) treated or punished in a cruel, inhuman or degrading way.

The Committee does not suggest that any provision of the Bill is in breach of section 10, but, given that most of the Bill is designed to increase the severity of existing penalties, it notes that compliance with section 10 is an issue arising from the terms of the Bill.

Strict liability offence

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28).

By clause 17 of the Bill, proposed subsection 35A(1) of the *Crimes Act 1900* would provide:

> **35A Assault, stalking etc of police officer**
>
> (1) A person commits an offence if—
>
> (a) the person assaults or stalks, harasses or intimidates another person; and
>
> (b) the other person is a police officer acting in the course of the officer's duty.
>
> Maximum penalty: imprisonment for 7 years.

Proposed subsection 35A(4) then provides (in part): "(4) Strict liability applies to subsections (1) (b) …".

The result would be that a person could be found guilty of the offence notwithstanding that he or she had not been reckless about whether person stalked was a police officer acting in the course of the officer's duty; (given that this physical element is a "circumstance", recklessness (and not intention) is the appropriate fault element – see Code subsection 22(2)). This being so, there is an issue whether there is thus an incompatibility with HRA subsection 22(1) – see the commentary to the Criminal Code Harmonisation Bill 2005.

In relation to this offence, resolution of the issue might be addressed by contrasting two sets of competing considerations. Those that point towards incompatibility are that:

- this is an offence punishable by 7 years imprisonment, a severe punishment which it might be said is warranted only on proof by the prosecution that the defendant was reckless about whether the person stalked was a police officer; and
- there is no provision for a defendant to raise any defence other than those allowed by the *Criminal Code 2002*, and, in particular, could not plead that they took reasonable care to ensure that the person they planned to stalk was not a police officer.

Pointing towards compatibility is the fact that a defendant could rely on the defence of 'mistake of fact' provide for by subsection 36(1) of the *Criminal Code 2002*:

> **36 Mistake of fact - strict liability**
>
> (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if—
>
> (a) when carrying out the conduct making up the physical element, the person considered whether or not facts existed, and was under a mistaken but reasonable belief about the facts; and
>
> (b) had the facts existed, the conduct would not have been an offence.

A defendant would carry an evidential burden of proof in relation to the defence (Code subsection 58(2)). Reversal of the burden of proof to this extent could be justified by pointing to the nature of the fact to be established – that is, whether the defendant had reasonably mistaken the person they planned to stalk to not be a police officer. That is, this is a matter peculiarly within the knowledge of the defendant, who might thus be called on to establish that it was reasonably possible that they made the mistake.

To support this argument, it might be said that this defence is sufficient accommodation to the presumption of innocence, and that it is not necessary to go further and provide that a defendant might plead that they took reasonable care to ensure that the person they planned to stalk was not a police officer. This activity is inherently immoral, and should not in any event be undertaken. (This might point to justifying the omission of a mistake of fact defence too, but this cannot be a reason to include a more extensive defence.)

The Committee also notes that there is no Explanatory Statement accompanying the Bill and thus no policy justification. Thus, it cannot comment on how the policy justifications might be put in to the balancing task (apart from the ease of proof justification, which has been noted).

SUBORDINATE LEGISLATION:

The Committee considered no subordinate legislation in the context of this report.

INTERSTATE AGREEMENTS:

The Committee did not consider any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Children, Youth and Family Support, dated 9 August 2005, in relation to comments made in Scrutiny Report 12 concerning the Children and Young People Amendment Bill 2005.
- The Minister for Education and Training, dated 11 August 2005, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2004-232 being the University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2).
- The Chief Minister, dated 11 August 2005, in relation to comments made in Scrutiny Report 11 concerning the Water Resources Amendment Bill 2005.

The Committee thanks the Minister for Children, Youth and Family Support and the Minister for Education and Training for their helpful responses. In particular, the Committee thanks the Chief Minister for the attention he gave to the amendment of the Water Resources Amendment Bill 2005 in order to accommodate the issues raises by the Committee.

Bill Stefaniak, MLA
Chair

August 2005

LEGISLATIVE ASSEMBLY
RECORD
SIXTH ASSEMBLY
30 JUN 2005
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ACT DEPARTMENT OF JUSTICE
& COMMUNITY SAFETY

Statement of Reasons

Supporting the Compatibility Statement for the Mental Health (Treatment and Care) Amendment Bill 2005

Summary

It is clear from the consultation process leading up to its introduction that the Mental Health (Treatment and Care) Amendment Bill 2005 has created a considerable level of public interest. On this basis, the Department of Justice and Community Safety has taken the unusual step of providing a summary of the reasons supporting the compatibility statement under the *Human Rights Act 2004*.

It must, of course, be emphasised that this statement is not an authoritative pronouncement on the consistency or otherwise of the Mental Health Bill with the Human Rights Act. It remains open for the Standing Committee on Legal Affairs and the Supreme Court, in exercising their respective functions under the Human Rights Act, to draw their own conclusions on human rights consistency.

The following statement of reasons provides:

- A brief overview of the Bill;
- An analysis of the provisions of the Bill which engage one or more of the sections of the Human Rights Act, including, where relevant, the justificatory material in each instance; and
- Our conclusion as to the Bill's consistency with the Human Rights Act.

Overview of the Bill

Under the *Mental Health (Treatment and Care) Act 1994*, involuntary electroconvulsive therapy (ECT) can only be administered where it has been authorised by the Mental Health Tribunal. As proceedings before the Tribunal cannot commence unless parties have been given three days notice, 'in a very few number of cases the notification period delays commencement of emergency treatment'. The Bill seeks to address this limitation by amending the *Mental Health (Treatment and Care) Act 1994* to enable the Tribunal to make involuntary emergency ECT orders.

What is ECT?

The Explanatory Statement to the Bill describes ECT as 'an evidence-based treatment for specific severe mental health conditions' like medication resistant severe depression, mania and severe catatonia. The medical literature indicates that ECT is an important treatment that can save lives, particularly in cases of severe depression, when no other treatment has been effective or available.

We understand that the ability to save life may arise in circumstances where, due to the fact that a depressive illness has proven unresponsive to medication or other treatment, a person is at increased risk of causing life-threatening self-harm or of avoiding potentially life-saving treatment. In such circumstances, we understand that ECT can have short-term benefits by simultaneously improving mood and energy, thereby allowing the safe administration of anti-depressant medication.

It can also have short-term side effects which the Explanatory Statement notes may include 'mild headaches, muscle stiffness and a brief period of confusion immediately following the procedure'. They may also include short-term memory loss, and, in rare cases, longer-term memory loss.

Human Rights Issues

Section 10(2) HRA: Right to consent to or to refuse medical treatment

> *No-one may be subjected to medical ... treatment without his or her free consent.*

Section 10(2) of the Human Rights Act protects a person's right to autonomy and personal, mental and bodily integrity in the context of medical treatment. The UN Human Rights Committee has stated that medical treatment without consent may meet the general definition of cruel, inhuman and degrading treatment when it causes suffering or degradation.[1] The right to refuse applies whether or not the treatment will harm or benefit the person, or would save his or her life.[2] A person is presumed to have capacity to consent to medical treatment unless he or she is unable to give valid consent because of incapacity. To be valid, consent must be informed, voluntary and free of coercion.

Involuntary treatment is likely to also engage related rights, such as the prohibition on inhuman or degrading treatment (section 10(1)); the right to liberty and security of the person (section 18); the right to humane treatment when deprived of liberty (section 19); the right to privacy (section 12); protection of children (section 11); and right to equality and non-discrimination (section 8).

Section 28 HRA: Reasonable limits

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

In effect, section 28 requires that any limitation or restriction of rights must pursue a legitimate

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[1] See Concluding Comments on Japan (1998) UN doc. CCPR/C/79/Add. 102, para.31.
[2] *Mallette v Shulman* [1991] 2 Med LR 162; *Re MB* [1997] 8 Med LR 21; *Airedale NHS Trust v Bland* [1993] AC 789 at 863 – 4

objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. Proportionality requires that the limitation be necessary and rationally connected to the objective; be the least restrictive in order to accomplish the objective; and not have a disproportionately severe effect on the person to whom it applies.

That is, it is a matter of weighing:

- the significance in the particular case of the values of the HRA;
- the importance in the public interest of the intrusion on the particular right;
- the limits sought to be placed on the application of the particular right in the particular case; and
- the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

In essence, the inquiry into the proportionality of a limitation on rights is two-fold.

- whether the provision serves an important and significant objective; and
- whether there is a rational and proportionate nexus between that objective and the limitation.

International law and jurisprudence may be considered when interpreting human rights (section 31).

Important and significant objective

The *Mental Health (Treatment and Care) Act 1994* currently permits the administration of ECT in various circumstances (section 55). ECT may only be given where a person gives informed consent (section 55(1)) or where the Mental Health Tribunal authorises it in association with a Psychiatric Treatment Order (PTO) (section 55(2)). In effect, involuntary ECT can only be administered where the Tribunal is satisfied that a PTO and an ECT order are appropriate in all the circumstances.

The Act currently does not provide for emergency ECT treatment. Because proceedings before the Tribunal cannot commence unless parties have been given three days notice, this has resulted in delays to the commencement of emergency treatment in a few cases. The Act also does not provide for the administration of ECT to individuals without capacity who are not subject to a PTO. As a result, emergency treatment to such individuals is further delayed while a PTO hearing is conducted.

The amendments allow for an urgent application to the Mental Health Tribunal for emergency ECT treatment where such treatment is necessary to save a person's life. In such a case, the amendments seek to ensure that such treatment is not unnecessarily delayed by providing for limited ECT treatment under an order of the Tribunal while the outcome of a hearing is pending.

We consider that this objective is significant and important.

Rational and proportionate response

(i) Is the involuntary treatment necessary and rationally connected to the objective?

An application for an emergency ECT order may only be where a doctor and the Chief Psychiatrist believe on reasonable grounds that the administration of ECT is necessary to save the person's life (cl 55M(1)). In making the order, the Tribunal must also be satisfied that that the administration of ECT is necessary to save the person's life (s 55N(1)(d)).

Before making the order, the Tribunal must also be satisfied that the person is incapable of giving informed consent (cl 55N(1)(c)). We therefore note that an emergency ECT order cannot be made in relation to a person who has capacity to give consent but refuses to do so.

We therefore consider that any limitation on the right to consent to or to refuse medical treatment is necessary and rationally connected to the objective of saving the individual's life.

(ii) Is the involuntary treatment the least restrictive in order to accomplish the objective?

In making an emergency ECT order, the Tribunal must be satisfied **either** that all other reasonable forms of treatment available have been tried without success **or** that ECT is the most appropriate treatment reasonably available (cl 55N(1)(e)). The essential precondition is that emergency ECT will only be administered where it is necessary to save life.

Further, in order to prevent emergency treatments from being used to facilitate a full course of ECT treatment, and thereby bypassing the general requirements on ECT, an emergency ECT order must specify the number of occasions on which ECT may be given (a maximum of 3) and must also state the number of days that the order remains in force (a maximum of 7) (cl 55O). An emergency order is superseded by any subsequent order made by the Tribunal (for example after a full hearing).

We also note that under the stated objects of the *Mental Health Act 1994*, treatment of mentally dysfunctional or mentally ill persons must, in all circumstances, be 'the least restrictive of their human rights' (s 7(a)), and it must promote their dignity and self respect (s 7(c)).

We therefore consider that provisions of the Bill satisfy this limb of the proportionality test.

(iii) Does the involuntary treatment have a disproportionately severe effect on the person to whom it applies?

The Bill sets clear and stringent limits on the provision of ECT in emergency situations:.

- A high threshold criterion so that the emergency treatment is restricted to saving life;
- Emergency ECT treatment is prohibited for people with capacity to withhold consent.
- Emergency ECT orders must be made by a full Tribunal comprising a presidential member; a psychiatrist, psychologist or health services member; and a community member;
- A second doctor's opinion is required prior to seeking an application;
- Records must be kept in relation to each occasion on which ECT is administered
- A copy of an emergency ECT order must be given to a range of interested parties within 24 hours, including the person subject to the order, the parents of the person (if the person is a minor) and the Public Advocate;
- The number of treatments is capped, in accordance with international standards;
- A prohibition on emergency ECT treatment for minors under 16 in light of lack of data supporting the safety and need of this form of treatment in minors.

The Bill does not provide for express recognition of advance directives. However, we note that in comparable jurisdictions, the recognition of advance directives generally does not extend to emergency situations. For example, the United Kingdom Joint Committee on Human Rights, in its report on the 2002 draft Mental Health Bill, recommended 'the right of patients to give directions about their future treatment, during periods when they are capable of doing so, should be respected where doing so would not present a threat of death or serious harm to the patient or anyone else'.

Nevertheless, we note that the Tribunal must consider the views of people appearing at the hearing and, as far as practicable, the views and wishes of the person and of the people responsible for his or her care (cl 55N(2)). Persons entitled to give evidence before an emergency ECT order, who would know of the views of the patient regarding ECT, include: a person's parents (where the person is a child); the person's guardian; and a representative of the person. A further safeguard exists in that a person who has been granted a power of attorney must be notified of the making of an Emergency Order under section 105 of the Act. All of the persons mentioned above would have the opportunity to appeal the making of the Order to the Supreme Court. The Supreme Court has the power to issue injunctions to restrain implementation of the Order and to declare the Order void for *ultra vires*, &c.

We consider that these safeguards and procedures are adequate to ensure that this limb of the proportionality test is met.

Conclusion

The Department of Justice and Community Safety considers that the measures used to achieve the objective stated above are rational and proportionate. It follows that the provisions that might limit the rights affirmed in the Human Rights Act are justifiable under section 28 of that Act.

Tim Keady
Chief Executive
Department of Justice and Community Safety
30 June 2004

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

REPORTS—2004-2005

RESPONSES

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
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Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004	**No. 2**
Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1)	**No. 6**
Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2)	**No. 6**
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Disallowable Instrument DI2004-230 - Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No. 1)	
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Subordinate Law SL2004-56 - Dangerous Substances (General) Regulation 2004	**No. 6**
Subordinate Law SL2004-61 - Utilities (Electricity Restrictions) Regulations 2004	
Subordinate Law SL2004-64 - Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2)	**No. 10**
Utilities Amendment Bill 2005 **(Passed 17.03.05)**	**No. 6**
Report 5, dated 14 March 2005	
Disallowable Instrument DI2005-8 - Community and Health Services Complaints Appointment 2005 (No. 1)	
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Report 6, dated 4 April 2005	
Animal Diseases Bill 2005 **(Passed 7.04.05)**	**No. 10**
Disallowable Instrument DI2005-20 - Public Place Names (Dunlop) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-22 - Public Place Names (Watson) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-23 - Public Place Names (Bruce) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-28 - Road Transport (Public Passenger Services) Exemption 2005 (No. 1)	**No. 10**
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Pest Plants and Animals Bill 2005 **(Passed 5.05.05)**	**No. 10**
Stock Bill 2005 **(Passed 7.04.05)**	**No. 10**
Subordinate Law SL2005-4 - Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1)	**No. 11**
Tree Protection Bill 2005	**No. 10**
Report 7, dated 6 April 2005	
Workers Compensation Amendment Bill 2005 **(Passed 7.04.05)**	**No. 10**

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Crimes (Sentencing) Bill 2005	**No. 11**
Crimes Amendment Bill 2005 **(PMB)**	
Disallowable Instrument DI2005-21 - Waste Minimisation (Fees) Amendment Determination 2005 (No. 1)	**No. 11**
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Disallowable Instrument DI2005-41 - Domestic Violence (Prevention Council) Appointment 2005.....	**No. 13**
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Disallowable Instrument DI2005-54 - Liquor Licensing Board Appointment Amendment 2005.....	**No. 13**
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Subordinate Law SL2005-7 - Road Transport (Safety and Traffic Management) Amendment Regulation 2005 (No. 1).....	**No. 13**
Subordinate Law SL2005-8 - Utilities (Gas Restrictions) Regulation 2005.....	**No. 13**
Water Resources Amendment Bill 2005.....	**No. 13, No. 14**
Report 12, dated 27 June 2005	
Children and Young People Amendment Bill 2005 *Act citation:* **(Passed 1.07.05)**.....	**No. 14**
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Disallowable Instrument DI2005-61 - Radiation (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-62 - Heritage (Council Members) Appointment 2005 (No. 1)	
Disallowable Instrument DI2005-66 - Vocational Education and Training Authority Appointment 2005 (No. 1).....	

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Disallowable Instrument DI2005-71 - Public Sector Management Amendment Standard 2005 (No. 5)	
Disallowable Instrument DI2005-73 - Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)	
Disallowable Instrument DI2005-77 - Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 1)	
Disallowable Instrument DI2005-78 - Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 2)	
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Disallowable Instrument DI2005-83 - Public Sector Management Amendment Standard 2005 (No. 6)	
Disallowable Instrument DI2005-88 - Education (Government Schools Education Council) Appointment 2005 (No. 1).....	
Disallowable Instrument DI2005-89 - Children and Young People Official Visitor Appointment 2005 (No. 1)	
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Disallowable Instrument DI2005-95 - Tertiary Accreditation and Registration Council Appointment 2005 (No. 1).....	
Disallowable Instrument DI2005-97 - Hawkers (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-98 - Roads and Public Places (Fees) Determination 2005 (No. 2).....	
Disallowable Instrument DI2005-99 - Domestic Animals (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-104 - Education (Government Schools Education Council) Appointment 2005 (No. 2).....	
Disallowable Instrument DI2005-111 - Architects (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-112 - Building (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-114 - Community Title (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-115 - Construction Occupations Licensing (Fees) Determination 2005 (No. 2).....	
Disallowable Instrument DI2005-116 - Electricity Safety (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-117 - Land (Planning and Environment) (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-118 - Surveyors (Fees) Determination 2005 (No. 1).....	

Bills/Subordinate Legislation	**Responses received—Scrutiny Report No.**
Disallowable Instrument DI2005-119 - Unit Titles (Fees) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-120 - Water and Sewerage (Fees) Determination 2005 (No. 1).....	

KATY GALLAGHER MLA
MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Bill Stefaniak

Thank you for your Scrutiny of Bills Report No. 12 dated 27 June 2005. I offer the following response in relation to the matter raised by your Committee.

Children and Young People Amendment Bill 2005

I would again like to place on record my gratitude to the Committee for so quickly turning to this Bill in time for the debate and I appreciate the Committee's response and comments. You would also be aware that I provided a preliminary verbal response to the Committee's comments during the debate on the Bill on 1 July 2005.

The issues addressed in this Bill ensure the laws and practices that underpin the running of institutions such as Quamby and Marlow Cottage in the ACT are valid.

The purpose of the legislation, as was clearly set out in the Committee Report, is "to provide for the making of Standing Orders for places of detention; to expand on the regulation making power under the Act; and to give retrospective statutory effect to a number of instruments made under the Act."

The essential aim of these measures is to prevent unnecessary and fruitless litigation arising out of a technical oversight dating back to the beginning of self-government in the ACT.

There are 3 principal points raised in your Committee's Report. These are:

- *The principle against the retrospective operation of the law*
- *Privative clauses*
- *Appropriate delegation of legislative power*

I am grateful for this dialogue and turn to address, in principle, each of these matters.

In addressing the retrospective standing orders to be made under proposed section 418(2) the Committee provides two case scenarios, namely (case 1) whether in effect the existing standing orders are going to be re-made or (case 2) whether in effect new orders will be made.

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Essentially, the main thrust of the retrospective powers of the Bill fall into the case 1 scenario. That is, the Bill does not deal with new rules or new standing orders but rather takes the opportunity to regularise what has been occurring by bringing the law into line with that which all concerned believed was the case, until the contrary came to light. Wherever possible, the intention is not to change standing orders that have been in effect from self-Government, but rather ensure that they are legally effective.

However, the Government will also take the opportunity to have a preliminary human rights review before these orders are regularised.

There may be a problem with the existing orders, not only in form (that is, the statutory authority behind the orders) but also in substance (that is, the range of actions permitted under the orders), which is why the Government, through the Bill, seeks to do three basic things. These are:

- To provide a legislative basis for the making of standing orders under the Act
- To provide an ability to make new interim orders within 28 days
- To ensure the new interim orders will be subject to the Human Rights Act.

In the 28 day window the standing orders will be reviewed and improved to ensure that they are within the framework of the law, and the Human Rights Act. The standing orders will be within the matters set out in clause 403 of the Bill including things such as safety, management and good order, powers of search, use of force and medical care and examinations.

These new interim orders will apply until more fully developed orders can be developed. The sunset clause contained in the Bill will cause the relevant section to expire in 12 months. This ties in with the review of the whole of the Act and allows the inclusion of these matters to be part of that process.

As to the matters raised by the Committee in relation to proposed section 418 (4), and the question of retrospective operation of laws and standing orders, it is clear that this is to be subject to the whole of the Human Rights Act and this is the Government's intention.

The intention is for the standing orders to be within the authority of section 403 and to address any possible previous inconsistency that may have existed.

Any alteration to the standing orders is not intended to expose detainees to new criminal penalties. Nor is it intended to expose staff to any new criminal penalties, and any exposure to civil action would be subject to the immunity in existing section 407(2)(a).

It would be extremely unlikely that a court would interpret such provisions as retrospectively criminalising the actions of detainees or staff in the absence of clear and express language. This is a fundamental presumption of the common law that is reinforced through the operation of the Human Rights Act.

It is therefore important to clarify how the Human Rights Act will operate. We have made it clear that, although the standing orders will operate as if they had been "enacted by an Act", they must be "subject to the Human Rights Act".

In our view, this means that the standing orders must be consistent with the human rights protected by that Act and may only be subject to limitations that are demonstrably justifiable in a free and democratic society. In this respect we affirm the conclusion drawn by the Committee.

Furthermore, it means that any standing orders made under clause 403, will be subject to the jurisdiction of the courts against a range of human rights standards. These standards provide greater substantive protection for the rights of juvenile detainees than do any limits that may be drawn from section 403 of the *Children and Young People Act 1999* or the broader scope, purpose and object of that Act.

With this in mind, the Bill also requires the Chief Executive of my Department to review the Standing Orders and provide me with a report within three months of the commencement of these amendments. This clause is necessary, as the Standing Orders will be redeveloped over this period, on the basis of advice from the Human Rights Commissioner, in relation to compliance with the Human Rights Act 2004.

The Human Rights Commissioner has conducted a audit of Quamby, which concluded on 30 June 2005. The purpose of this audit was to gain her advice on what changes were necessary to enshrine the principles of human rights in the practices at Quamby. We will be guided by her advice in reviewing the Standing Orders during this three month period.

In areas of security and facility operational matters the Government considers that some of these matters should not be put in the public arena so as to cause risk to operations, personnel and others.

This is why certain standing orders will be excluded from provisions of the Legislation Act. Clause 403B makes provision as to persons who the Chief Executive must ensure copies of the Standing Orders be made available, including any exempt provisions. This is a reasonable safeguard as it is mandatory, and of course does not exclude the chief executive from making the Standing Orders available to others.

In order to ensure that relevant statutory oversight officers and the judiciary have access to the full set of Standing Orders - including those relating to security provisions - the Bill provides that the Chief Executive must always make all of the Standing Orders available for inspection by a judge or magistrate; or the community advocate; or the human rights commissioner; or an official visitor; or the ombudsman.

I am pleased to have received the support of members of the ACT Legislative Assembly for this Bill, which was passed on 1 July 2005. I look forward to ongoing debate regarding the positive progress we are making with both Quamby Youth Detention Centre and in changes to the *Children and Young People Act 1999*.

Yours sincerely

Katy Gallagher

Katy Gallagher
Minister for Children, Youth and Family Support

9 August 2005

KATY GALLAGHER MLA
MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Bill Stefaniak

Thank you for your Scrutiny of Bills Report No 1 of 9 December 2004. I offer the following response in relation to Disallowable Instrument DI2004-232, being the University of Canberra (Courses and Awards) Amendment Statute 2004 (no 2) made under section 40 of the *University of Canberra Act 1989.*

The Committee noted that paragraphs 3 and 4 of the explanatory statement referred to the instrument as the "Courses and Awards Amendment Statute 2004" when the correct reference should be "Courses and Awards Amendment Statute 2004 (No 2).

The Manager of Government Business tabled the required minor amendments to the explanatory statement in the Legislative Assembly on 15 February 2005. The amended explanatory statement was placed on the Legislation Register.

I hope this information addresses the Committee's concerns.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Education and Training
11/8/05

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MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

I have previously written to you in relation to your Scrutiny Report No. 11 of 20 June 2005, and the comments in that Report on the *Water Resources Amendment Bill 2005*.

The Standing Committee on Legal Affairs made a number of comments on the provisions in the *Water Resources Amendment Bill 2005* that deals with declaring a moratorium. These are:

1. Whether there has been an inappropriate delegation of legislative power;

2. Whether rights, liberties and/or obligations are made unduly dependent upon insufficiently defined administrative powers;

3. Whether there has been a trespass on personal rights and liberties; and

4. Whether the privative clause is inconsistent with the *Human Rights Act 2004*.

While the Committee raised these matters for the attention of the Assembly without concluding that there was a necessity to amend the Bill, I have come to the conclusion that there is a way forward which satisfies these concerns and still meets the intention of the legislation.

The provisions in the amendment that deal with the moratorium have been refined. The *Water Resources Amendment Bill 2005* that was tabled enabled the Minister to declare a moratorium by means of a disallowable instrument. In the amended Bill, the moratorium is enabled through clauses in the Bill itself. This change provides the Assembly with authority to instigate a moratorium. The issue of inappropriate

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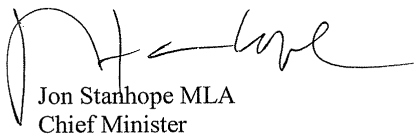
delegation of legislative power disappears as the decision to hold a moratorium would lie with the Assembly and not the Minister.

Additionally, the need for the privative clauses in 63B are no longer required and have been removed. This change addresses the concern of the Committee in relation to trespass on personal rights and liberties, and consistency of the privative clauses with the *Human Rights Act 2004*

I trust that this additional information addresses matters raised and is useful to the Committee.

Yours sincerely



Jon Stanhope MLA
Chief Minister

11 AUG 2005