Legislative Assembly for the ACT

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

Scrutiny Report

3 May 2004

Report 47

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.

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

Legal Adviser: Mr Peter Bayne
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.

Appropriation Bill 2003-2004 (No 3)

This Bill would provide an appropriation of moneys for the purposes of the Territory for the financial year 2003-2004.

Charitable Collections Amendment Bill 2004

This Bill would amend the *Charitable Collections Act 2003* to clarify the bank account requirements for funds collected.

Health Professionals Legislation Amendment Bill 2004

This Bill would amend various laws of the Territory in consequence of recent reforms in relation to the law concerning the work of health professionals.

Statute Law Amendment Bill 2004

This Bill would amend various laws of the Territory for statute law revision purposes.

Bills - Comment

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

Health Professionals Bill 2003

This is a Bill for the regulation of the health professions. It seeks to increase the involvement of the community through measures such as Ministerial scrutiny, links with the Community and Health Services Complaints Commissioner, community representation on boards and panels, and an expectation that boards will engage the community both in terms of professional standards development and in terms of educating the community on the professional standards they should expect. An ACT Health Tribunal would hear serious misconduct and appeal matters.

(i) an undue trespass on personal rights and liberties

Strict liability offences

The Committee has addressed the rights dimensions of provisions that impose strict liability in recent Reports: see **Scrutiny Report No 38**, of 14 October 2003.

The Committee notes that a number of strict liability offences would be created by the Bill. It draws attention to: subclauses 71; 72; 74 and 75.

It also draws the attention of the Assembly to the absence in the Explanatory Statement of justification for these clauses.

In respect of two of the proposed strict liability offences (see clauses 71 and 72), imprisonment is a possible penalty. In **Scrutiny Report No 38**, the Committee drew attention to the serious rights objection to such provisions.

An inappropriate criminal offence?

By clause 34, a member of a board must not knowingly agree to a health profession board engaging in business that is outside of its functions. To do so is a criminal offence punishable by 50 penalty units ($5000).

It is not apparent why such a default should be a criminal offence. The activity of the board would be unlawful in itself, and the member(s) could be warned that board could be discharged (see clause 29).

Privileges in relation to disclosure of information under compulsion

The Committee suggests that in clauses 58 and 59, (relating to procedures of the ACT Health Tribunal), that there be at appropriate places a note making reference to sections 170 and 171 of the *Legislation Act 2001*.

The same comment applies in relation to clause 115.

Privacy and reputation

Section 12 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; and
> (b) not to have his or her reputation unlawfully attacked.

In this light, the Committee draws attention to certain provisions in Part 9 of the Bill. It is acknowledged that this Part is intended to facilitate the making of complaints against health professionals. The issue is whether in some respects, there is an undue trespass on the reputation rights of the affected professionals. At the heart of the matter is a question of the extent to which a professional should be the subject of, and/or called upon to answer, a complaint that does not reveal to the professional the name of the complainant, and/or does not disclose the full detail of the complaint.

By clause 78, "anyone" may make a report if they have a reasonable belief that a registered health professional may have been contravening or have contravened a required standard of practice, or does not satisfy the suitability to practise requirements.

By clause 81 (in the words of the Explanatory Statement), "[the] Bill intends that the legitimacy of a report be encouraged through requiring reports to be in writing, to be signed and to include details of the reporter's name and address. Where a reporter does not comply with these requirements the health board or commissioner may still take action on the report … however the Bill permits the Minister to make guidelines for exercise by the relevant board in relation to this matter."

It should be noted that the Minister is not required to make guidelines, and in their absence, the board or the Commissioner have a very wide discretion to accept a report that is not in writing, is not signed, and which does not include details of the reporter's name and address. It is made very clear by the Bill that the board or the Commissioner may accept a verbal report (see subclause 81(3)).

It is noted that a board might by subclause 83(1) require the complainant to verify a report by a statutory declaration, but it appears by subclause 83(3) that the board could still proceed even where this requirement is not met.

One difficulty in this scheme is that the ability of the board or commissioner to initiate the process of acting on the complaint on the basis of a report that does not satisfy the requirements of subclause 81(1) might undermine the legitimacy of the report. There is also the possibility that the board or commissioner will not understand the nature of the grievance of the complainant, thus creating room for confusion as the investigation proceeds. The person who is most likely to be adversely affected by this is the health professional against whom the allegations are made.

The Committee notes that by clause 82, the commissioner or an executive officer of a health profession board may assist someone to prepare a written report. This however raises the issue of whether it is appropriate for the person or body that will conduct the investigation to have been involved in framing the complainant (in effect the charge) that it will then investigate.

The Committee suggests that the Assembly consider whether the provisions of clause 81 provide adequate protection to the affected health professional.

The problem that may face the health professional would be compounded by clause 84. The Explanatory Statement explanation of clause 84 is as follows:

> The Bill requires that where a report is made about a health professional [the board or the Commissioner] must tell the health professional concerned. The form of advice must be in writing, and it must provide information in relation to the general terms of the report and the intention of board and the commissioner to consider the report.

Pausing here, it should be noted that the board or the Commissioner need inform the health professional only to the extent of saying "what the report is about in general terms" (paragraph 84(2)(c)). It is not explained why the health professional is not to be informed of the complete details of the report. On the face of it, such information is necessary for the health professional to make an adequate response to the report as the investigation against her or him proceeds. That this person has a right to "make written representations in relation to the report" is expressly provided for by paragraph 84(2)(e). Without full details of the report, this right may be illusory.

A more particular problem arises out of paragraph 84(2)(d). Even where the report contains the name of the complainant, the board or the Commissioner may decline to inform the health professional of this detail. As the Explanatory Statement explains:

> The advice to the health professional should also contain the name of the person making the report unless it is considered that the provisions of clause 129 of this Bill apply. The provisions of clause 129 [but note that the reference should be to clause 128] of the Bill … [prevent] the Commissioner from giving the provider information in circumstances where the Commissioner considers that the disclosure might –
> - put someone's health or safety at risk; or
> - cause some one to be provided with a community service or health service of a lower standard than the person would otherwise have received; or
> - prejudice the assessment of a report or an investigation by the commissioner.

Again, without information as to the identity of the complainant, the health professional may not be able to make effective "written representations in relation to the report".

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

Provisions that may operate retrospectively

The Committee notes that clauses in Part 15 (Transitional provisions) may have the effect of making subject to this Act activities that arose before the Act will commence. It considers, however, that these clauses are appropriate in the circumstance in which they apply and in effect continue in operation existing regimes for regulation of health professionals, which regimes would be repealed by this Act.

Para 2(c)(ii) – insufficient definition of administrative powers
Para 2(c)(iv) - inappropriate delegation legislative powers
Para 2(c)(v) - insufficient subjection of an exercise of legislative power to parliamentary scrutiny

Clause 130 of the Bill provides in substance that a Minister may exempt a health professional from a provision of this Act if satisfied that the public interest is served by doing so. An exemption is a notifiable (but not disallowable) instrument.

Apart from the reference to the public interest, there is no statement of the circumstances in which the Minister may grant a dispensation for the operation of the law in favour of a particular person.

The Committee has long expressed concern with provisions that empower a member of the executive branch of government to dispense with the operation of the law. It is fundamental that the law apply equally to all citizens. Any dispensation should be justified.

Dispensing clauses are also objectionable on the ground of their being an inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend 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.

As a general principle, a law should state a principle according to which persons might apply for an exemption, rather than simply empower a Minister or an executive officer to grant a dispensation. There is some indication in the text of clause 130 of the basis for the exercise of this significant administrative power. The issue is whether this goes far enough.

Consideration should also be given to empowering the Minister to issue guidelines as to how this power might be exercised.

Clarity of the provisions

It is suggested that the note to clause 54 should refer to "common law and statutory rules". Given the application in the Territory of the *Evidence Act 1995* (Cth), the great bulk of the rules of evidence are now found in statutory form.

Environmental Legislation Amendment Bill 2004

This Bill would amend the *Nature Conservation Act 1980* to ensure that any unlicensed clearing of native vegetation in a reserved area, or damaging of land in a reserved area, is illegal (subject to certain exemptions). It would also amend the *Environment Protection Act 1997*.

(i) an undue trespass on personal rights and liberties

Strict liability offences

The Committee has addressed the rights dimensions of provisions that impose strict liability in recent Reports: see **Scrutiny Report No 38**, of 14 October 2003.

The Committee notes that a number of strict liability offences would be created by the Bill. It draws attention to these proposed new sections of the *Nature Conservation Act 1980* (see in clause 7 of the Bill): sub-sections 60F(3); 60G(3); 60O(3); and 60P(3).

The Committee notes that in **none** of these cases is imprisonment a possible penalty. It does note, however, that the financial penalty for some offences is 100 penalty units, ($10,000 at present).

It also draws the attention of the Assembly to the absence in the Explanatory Statement of justification for these clauses.

The criminal liability of executive officers of corporations

The Explanatory Statement explains clause 10 in this way:

> Clause 10 introduces a new section 80AB [into the *Nature Conservation Act 1980*] this [perhaps should be "which"] explains the criminal liability of executive officers of corporations. In general terms an executive officer can be found guilty of an offence committed by the corporation if the officer should have done something about it.

Proposed new section 80AB is a very complex provision and is not adequately explained by saying that the officer is guilty if he or she "should have done something about it"; (the "it" presumably being that the corporation committed the offence).

Of course, a corporation may act only through its agents and employees. It may be liable for an offence against some provision of the *Nature Conservation Act* where the elements of the offence occur by reason of what is done by its agents and employees. The circumstances where this is so are provided for in Part 2.5 of the *Criminal Code 2002*.

Those agents and employees would also be liable. In relation to proposed new section 80AB, it is not explained why it is necessary to also impose liability on an executive officer of the corporation (in circumstances, that is, where he or she would not be liable directly for what they did or did not do).

There is also a great measure of vagueness in the statement about when the executive officer would have "failed to take reasonable steps to prevent the contravention" by the corporation; (see paragraph 80AB(1)(e)). By subsection 80AB(3):

> (3) In deciding whether the executive officer took (or failed to take) reasonable steps to prevent the contravention, a court must have regard to the following:
>
> (a) any action the officer took directed towards ensuring the following (to the extent that the action is relevant to the act or omission):
>
> (i) that the corporation arranges **regular professional assessments** of the corporation's compliance with the contravened provision;

(ii) that the corporation implements any **appropriate recommendation** arising from such an assessment;

(iii) that the corporation's employees, agents and contractors have a **reasonable knowledge and understanding** of the requirement to comply with the contravened provision;

(b) any action the officer took when the officer became aware that the contravention was, or might be, about to happen.

It will be very difficult for an executive officer to know from time to time and at all times whether he or she is taking or has taken actions of the kind described. Particular attention should be paid to the emboldened words.

An issue for the Assembly is whether such a degree of vagueness is appropriate in a criminal offence.

Gene Technology (GM Crop Moratorium) Bill 2004

This is a Bill for an Act to enable a moratorium to be imposed on the cultivation of certain genetically modified food plants in the Territory, in order to preserve the identity of genetically modified crops or non-genetically modified crops for marketing purposes. The moratorium would cease on 17 June 2006. This Bill would permit the Minister to make written orders to prohibit the cultivation of certain genetically modified food plants. It would provide for offences in relation to the cultivation and transfer of prohibited genetically modified plants.

Para 2(c)(iv) - inappropriate delegation of legislative powers
Para 2(c)(v) - insufficient subject of an exercise of legislative power to parliamentary scrutiny

Clause 7 is the key provision of the Bill, for the purposes of this comment, note needs be taken of clauses 8 and 10:

7 Moratorium orders

(1) The Minister may, in writing, make an order (a moratorium order) prohibiting the cultivation in the ACT of a stated GM food plant.

(2) A moratorium order is a disallowable instrument.

8 Exemptions

(1) The Minister may, in writing, exempt a person, area or anything else from the operation of a moratorium order.

(2) An exemption is a disallowable instrument.

…

10 Orders cannot be challenged

(1) This part does not create a right in relation to the making of a moratorium order or exemption.

(2) Without limiting subsection (1), a moratorium order or exemption in force under this Act—

(a) may not be challenged or called into question in any court; and
(b) is not subject to prohibition, mandamus or injunction in any court.

Clause 8 – a dispensing clause

The Committee has stated above its concern with provisions that empower a member of the executive branch of government to dispense with the operation of the law; (see comments on the *Health Professionals Bill 2003*).

There is no explanation in the Explanatory Statement as to why clause 8 is necessary.

The Committee also notes that there is no statement of the circumstances in which the Minister may grant a dispensation for the operation of the law in favour of a particular person.

The problem is to some extent ameliorated by the fact that an exemption is a disallowable instrument.

Clause 10 – a strong privative clause

It is today rare to find such a strong protection against judicial review of a piece of subordinate legislation. While common 50 years ago, such provisions protecting subordinate legislation are now rarely enacted.

It is arguable that clause 10 is contrary to the rule of law. While clause 7 of the Bill would be read by a court as stating some limits to the circumstances in which the Minister may make a valid moratorium order, the effect of clause 10 might be that a court could not have jurisdiction to enforce those limits. That is, while an order might be unlawful on the basis that it was not authorised under clause 7, a court could not provide or make a declaration of invalidity (such as, for example, in the course of a trial for an offence).

Scrutiny Committees have long regarded provisions such as clause 10 as amounting to an inappropriate delegation of legislative power. In addition, there could well be a breach of the principle stated in subsection 18(2) of the *Human Rights Act 2004*:

18(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

A deprivation of liberty (which may encompass imposition of a fine) by reason of the application of a law (being the moratorium order), the validity of which cannot be challenged, may be argued to be a deprivation on a ground that is not established by law.

The Committee notes the explanation given in the Explanatory Statement:

> The provision of an appeal mechanism (and the necessary provision of a stay to make the appeal meaningful) would frequently compromise the object of the Bill which is to provide Government with the ability to respond expeditiously to the need to:
>
> - prohibit the commercial cultivation of a GM food crop to prevent the possible contamination of non-GM produce for marketing purposes; and
> - enable activities exempt from a moratorium order to proceed or continue.

The Committee notes that

- this justification could be advanced in relation to very many schemes of regulation, and there appears to be no particular reason to treat this scheme differently; and
- the problem that an undesirable activity might continue on foot were a challenge to be made might be better addressed through making provision for interim injunctive relief – compare to proposed new section Part 8A of the *Nature Conservation Act 1980*, as proposed by clause 7 of the Environmental Legislation Amendment Bill 2004.

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

(i) an undue trespass on personal rights and liberties

An inappropriate criminal offence?

Clause 14 of the Bill is also a very unusual provision. It raises some rights issues. Clause 14 provides:

> **14 Offence—failing to report contravention of moratorium order**
>
> (1) A person who knows or suspects that a plant has been cultivated in contravention of a moratorium order must, within 2 days of first having the knowledge or suspicion, give the following information to the chief executive:
> (a) the location of the plant;
> (b) the location of the land where the plant has been cultivated;
> (c) the name of the owner or occupier of that land (if known);
> (d) the basis for the person knowing or suspecting that the plant has been cultivated in contravention of a moratorium order;
> (e) contact details for the person;
> (f) anything else prescribed under the regulations.
>
> Maximum penalty: 20 penalty units.

(2) Subsection (1) does not apply if the person believes on reasonable grounds that the chief executive has already been given the information.

(3) A person is not excused from giving the chief executive information under this section because of any duty of confidentiality and the giving of the information is not a breach of the duty by the person.

(4) Also, a person is not excused from giving the chief executive information under this section on the ground that it may tend to incriminate the person.

(5) However, any information obtained, directly or indirectly, because of the giving of the information is not admissible in evidence against the person in a criminal proceeding, other than a proceeding for an offence against this part or the Criminal Code, part 3.4 (False or misleading statements, information and documents).

The first comment is that this is a very unusual provision. It bears resemblance to the old common law offence of misprision of felony; (there was no offence of misprision of misdemeanour). The offence was constituted by a person knowing (and not merely suspecting) that a felony had been committed and yet failing to report this to the police. It may also be the case at common law that it is a defence to the charge that the person could not have reported the offence without incriminating her or himself in the commission of an offence.

It is apparent that the statutory offence that would be created by clause 14 is wider that the common law concept. The mental element would be satisfied by proof that the accused **knows or suspects** that a plant has been cultivated in contravention of a moratorium order; at common law the accused must know or believe that the offence was committed by another person. Moreover, by subclause 14(4), "a person is not excused from giving the chief executive information under this section on the ground that it may tend to incriminate the person". (The Explanatory Statement incorrectly states that the person is excused in this circumstance.)

While the Committee has not had time to research this point closely, the common law offence may well not exist in the Territory. This may be the result of a redefinition of the concept of "felony", or by reason that the *Criminal Code 2002* makes no provision for any equivalent concept.

If there is no common law or statutory offence of general application of failing to report a crime, the question arises as to why an offence of this nature should be created in respect of the offences that would be created by this Bill. It must also be remembered that the person who commits the 'substantive' offence of breaching an order may be prosecuted. (If there is a common law or statutory offence of general application, then is there a need for clause 14?)

No justification for clause 14 is offered by the Explanatory Statement. The Committee has a concern that this provision may well create a precedent. There are very many offences of a far more serious nature than those which would be created by this Bill. If a misprision type offence is justifiable here, why is it not appropriate in many other cases?

There are secondly some more particular issues.

- The prosecution need prove only that an accused merely **suspected** that an offence was committed by someone else. Even if the concept of failing to report is accepted as a basis for an offence, should proof merely of suspicion be enough?
- Subclause 14(3) provides that a person "is not excused from giving the chief executive information under this section because of any duty of confidentiality and the giving of the information is not a breach of the duty by the person". This raises some privacy issues; see **Report No 46**, commenting on clause 54 of the *Architects Bill 2004*. (It is not in any event clear how such an excuse could be raised as a defence to subclause 14(1)). It is arguable that there should be such a defence. What, for example, is the position of a lawyer who is consulted by a person who thinks that they may have committed an offence under the Bill?
- The prohibition by subclause 14(4) on a self-incrimination excuse is also problematic. The qualification in subclause 14(5) is of little value, for it does not apply in relation to the very offence with which the person is charged.

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

Strict liability offences

The Committee has addressed the rights dimensions of provisions that impose strict liability in recent Reports: see **Scrutiny Report No 38**, of 14 October 2003.

The Committee notes that a number of strict liability offences would be created by the Bill. It draws attention to subclauses 17(3) and 24(5).

The Committee notes that in **neither** of these cases is imprisonment a possible penalty.

It also draws the attention of the Assembly to the absence in the Explanatory Statement of justification for these clauses.

Enforcement provisions

The Committee does not have concerns with the bulk of the provisions concerning enforcement. The provisions concerning search and seizure conform to standards that the Committee has applied in the past.

It notes however that clause 16 provides merely that "The chief executive may appoint a person to be an inspector for this Act".

The Committee considers that some limit to the range of persons who may be appointed should be stated. It is common to provide that they be a Territory public servant.

Compensation provisions

The Committee has no concern with these provisions. It notes with approbation clause 34, which provides for a compensation safety net.

Subordinate Legislation – No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them:

Disallowable Instrument DI2004-28 being the Public Sector Management Amendment Standard 2004 (No 2) made under sub-sections 251(6) and 251(7) of the *Public Sector Management Act 1994* **amends the Management standards**.

Disallowable Instrument DI2004-29 being the Electricity Safety (Electrical Licensing Board) Appointment 2004 (No 1) made under sub-section 5(1) of the *Electricity Safety Act 1971* **reappoints specified persons as members of the Electrical Licensing Board**.

Disallowable Instrument DI2004-30 being the Gaming Machine (Social Impact Assessments) Guidelines 2004 (No 1) made under section 14AB of the *Gaming Machine Act 1987* **provide assistance or direction to applicants for gaming machine licences when completing a social impact assessment**.

Disallowable Instrument DI2004-31 being the Public Place Names (Fadden and Gowrie) Determination 2004 (No 1) made under section 3 of the *Public Place Names Act 1989* **details the name, origin and significance of the park name in the Divisions of Fadden and Gowrie**.

Disallowable Instrument DI2004-32 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2004 (No 1) made under sections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes Disallowable Instrument DI2003-315 and ensures the overtime cap is calculated correctly**.

Disallowable Instrument DI2004-33 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2004 (No 1) made under sections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes Disallowable Instrument DI2003-316 and ensures the overtime cap is calculated correctly**.

Disallowable Instrument DI2004-34 being the Cemeteries and Crematoria Appointment 2004 (No 2) made under section 33 of the *Cemeteries and Crematoria Act 2003* **revokes Disallowable Instruments DI2003-322 and DI2004-16 and appoints specified persons as members of the ACT Public Cemeteries Board**.

Disallowable Instrument DI2004-37 being the University of Canberra Council Appointment 2004 (No 1) made under sub-section 11(1)(d) of the *University of Canberra Act 1989* **appoints a specified person as a part-time member of the Council of the University of Canberra**.

Disallowable Instrument DI2004-38 being the University of Canberra Council Appointment 2004 (No 2) made under sub-section 11(1)(d) of the *University of Canberra Act 1989* **appoints a specified person as a part-time member of the Council of the University of Canberra**.

Disallowable Instrument DI2004-39 being the University of Canberra Council Appointment 2004 (No 3) made under sub-section 11(1)(d) of the *University of Canberra Act 1989* **appoints a specified person as a part-time member of the Council of the University of Canberra**.

Subordinate Legislation – Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them:

Incorrect reference to provision

The Committee notes that reference is made in paragraph 1 of the instrument to section 116 of the Act. A check on the Legislation Register reveals that section 116 refers to value of votes. Perhaps the correct reference should be to section 179 – Determination of Fees.

Disallowable Instrument DI2004-35 being the Hotel School Appointment 2004 (No 1) made under section 16 of the *Hotel School Act 1996* **appoints a specified person as a member of the Board of Management of the Australian International Hotel School**.

Disallowable Instrument DI2004-36 being the Hotel School Appointment 2004 (No 2) made under section 16 of the *Hotel School Act 1996* **appoints a specified person as an alternate member of the Board of Management of the Australian International Hotel School**.

The Committee notes that, in the explanatory statements to the above instruments, reference is made in the second paragraph to section 17 of the Act. A check on the Legislation Register reveals that section 17 refers to "Chairperson and deputy chairperson". Perhaps the correct reference should be to section 16 – Appointment and terms of office of non-executive members, as indicated on the instruments themselves.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Planning, dated 29 March 2004, in relation to comments made in Scrutiny Report No 45 regarding further comment on the Construction Occupations (Licensing) Bill 2003.
- The Attorney-General, dated 30 March 2004, in relation to comments made in Scrutiny Report No 44 regarding the Justice and Community Safety Legislation Amendment Bill 2003 (No 2).
- The Minister for Planning, dated 30 March 2004, in relation to comments made in Scrutiny Report No 46 regarding the Architects Bill 2004.
- The Chief Minister, dated 13 April 2004, in relation to comments made in Scrutiny Report No 46 regarding Disallowable Instrument DI2004-27 being the Public Sector Management Amendment Standard 2004 (No 1).
- The Minister for Urban Services, dated 20 April 2004, in relation to comments made in Scrutiny Report No 46 regarding the Litter Bill 2003.
- The Minister for Industrial Relations, dated 27 April 2004, in relation to comments made in Scrutiny Report No 45 regarding the Occupational Health and Safety Amendment Bill 2004.

The Committee thanks the Chief Minister, the Attorney-General, the Minister for Urban Services, the Minister for Planning and the Minister for Industrial Relations for their helpful responses and would like to add the following comments.

Further comment on strict and absolute offences

In its Report No 38 (5th Parliament), the Committee stated a general position in relation to clauses of Bills that imposed absolute or strict liability. It did so because such clauses raise a rights issue, and the general position taken is designed to draw the matter to the attention of the Assembly, and to assist any debate that may take place. The enactment of the *Human Rights Act 2004* gives this exercise greater point, although the currently applicable terms of reference of the Committee justify the Committee's raising the matter in its Reports.

The Committee notes that its task is not to offer definitive legal opinion about whether a particular clause imposing absolute or strict liability would breach the *Human Rights Act 2004* or, more generally, be an undue trespass on personal rights and liberties. Rather, and towards the end of facilitating Assembly debate, the Committee seeks to:

- identify clauses of Bills which do impose absolute or strict liability;
- provide a general comment on why such clauses may breach the *Human Rights Act 2004* or trespass on personal rights (which it did in Report No 38);
- make any more particular comment in relation to a particular clause (which, in particular, it does where the clause would impose imprisonment as a possible punishment); and
- draw attention to what the Explanatory Statement may or may not say about clauses which impose absolute or strict liability.

The Committee adds some further comment in the light of two recent government responses to Committee Reports concerning clauses which impose absolute or strict liability. These responses are contained in:

- a letter to the Committee from the Minister for Urban Services of 22 April 2004, in response to the Committee's comments in Report No 46 concerning the *Litter Bill 2003*, and
- a letter to the Committee from the Minister for Urban Services of 22 April 2004, in response to the Committee's comments in Report No 45 concerning the *Occupational Health and Safety Amendment Bill 2004*.

<u>There is a rights issue raised by absolute or strict liability offences</u>

In the light of the Committee's analysis of the Canadian case-law in Report No 38 that in terms of the *Human Rights Act 2004*, rights issue surrounding absolute and strict liability offences are likely to involve the application of these provisions of this Act:

18 Right to liberty and security of person

(1) Everyone has the right to liberty and security of person. …

22 Rights in criminal proceedings

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

28 Human Rights may be limited

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

Why these sections may create a problem for any provision which imposes absolute or strict liability is explained in Report No 38. Of course, we do not at this point know whether an ACT court will see any problem. But it may reasonably be guessed that at least in some cases it will. (In any event, the Assembly is not bound to take the same view as a court, and need not wait on a court giving an indication that a particular kind of provision raises a rights issue.)

The Committee paid particular attention to Canadian law (although drawing attention to European and English judicial commentary as well). The Committee should note here that it does not consider it inappropriate to pay attention to Canadian law. It notes that in Towards an ACT *Human Rights Act* (May 2003) at 5.22, it is stated that

> … we do not recommend that ACT be constrained by the jurisprudence of any one institution. Rather, we would recommend that the ACT develop its own understanding of the content of rights based on a broad comparative methodology. … This will require familiarity with international and comparative human rights jurisprudence … .

This report referred to case-law from many jurisdictions, including that from Canada; (see at 4.47, where Canadian law was noted as a possible guide to the interpretation of the reasonable limits clause – see now section 28 of the Act.)

Of course, there is room for much debate as to just how these sections of the *Human Rights Act 2004* apply in relation to a particular provision which imposes absolute or strict liability. But the Committee is clear that there is a real issue of compatibility arises when such a provision is proposed. The Committee's review of Canadian law in Report No 38 points to there being at least two major rights problems:

- the first is whether, in relation to the particular offence, there should be a qualification to the fundamental principle that a person should not be punished unless they intended to commit the acts that constitute the physical elements of the offence. The problem with offences of absolute or strict liability is that they have "the potential of convicting a person who really has done nothing wrong (i.e., has acted neither intentionally nor negligently)"; and
- the second is whether there must be some restriction to the level of punishment that my be inflicted on the offender. The problem in a particular case is that the punishment (such as imprisonment in particular) may conflict with the "principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime".

(The source for these quotations is found in Report No 38.)

The content of an Explanatory Statement

Explanation of the purpose of provisions imposing absolute or strict liability

Clause 2 (d) of the Committee's terms of reference require it to report on whether

> "the explanatory memorandum meets the technical or stylistic standards expected by the Committee".

(Such memorandums are now called Explanatory Statements.) There is room for debate as to just what an Explanatory Statement should contain. The Committee accepts the general proposition (stated in the letter to the Committee from the Minister for Urban Services of 22 April 2004) that "[t]he primary focus of Explanatory Statements is to explain the purpose and effect of the provisions of legislation, including, where relevant, how the existing law is being changed".

Given the rights issues that are thrown up by clauses of bills that would impose absolute or strict liability, the Committee has considered it important that there should by clear indication that the effect of a clause is to impose such liability. On the other hand, the letter from the Minister for Urban Services also states that it has not been considered necessary "to repeat in the Explanatory Statement, for each strict liability provision which is clearly identified as such, in the Bill, that the offence was one of strict liability". (A similar view is stated in the letter to the Committee from the Minister for Industrial Relations of 27 April 2004).

The Committee will continue its practice of identifying the relevant clauses.

The Committee has also considered it important that there should be some justification for the enactment of clauses that would impose strict or absolute liability. It sees this as a component of a statement of the purpose of the clauses. The Committee does not suggest that this be done with respect to each clause. It respectfully points to the kind of justification stated in the letter to the Committee from the Minister for Industrial Relations of 27 April 2004, in relation to the offences proposed in the *Occupational Health and Safety Amendment Bill 2004.* This reads:

> The justification for the inclusion of strict liability offences in the Bill is, in essence, the need to ensure that everyone with workplace safety responsibilities comply with their obligations at all times and act appropriately to secure the health, safety and welfare of employees at work. The Government considers that the public interest is best served by ensuring that health, safety and welfare of employees at work is secured, by establishing a regulatory regime that encourages people with workplace safety responsibilities to maintain a workplace that is as free as possible from harm or injury and to develop a "safety culture" or run the risk of being found in breach of the Act. The fostering of this safety culture would be more difficult to accomplish without the use of strict liability offences. It should be noted in several instances the Bill contains a cascade of offences, with the strict liability version of the offence having the lowest penalty. Where an offence involves acts or omissions that are done negligently or deliberately, the penalty is higher to reflect the greater degree of culpability.

Such statements will assist the Assembly, and the Committee will endeavour to draw attention to them when it reports on the relevant bill. They will no doubt also be of assistance to the courts.

Explanation of the purpose of provisions that provide for imprisonment as a possible penalty

The committee adheres to its view that there is particularly acute rights issue where a clause imposes strict or absolute liability and provides for imprisonment as a possible punishment. The Committee has also considered it important that there should be some justification for the enactment of clauses that provide for imprisonment as a possible penalty.

The letter to the Committee from the Minister for Urban Services of 22 April 2004 states that "[the Department of Justice and Community Safety] has confirmed its view that the option of imprisonment for terms of strict and absolute liability offences is not necessarily incompatible with the rights set out in the Human Rights Act and that whether it is appropriate will be a question of balance, having regard to the nature of the behaviour being regulated and the extent of any possible prison term which could be imposed".

The Committee respectfully agrees with this general assessment, although it feels that it is possible to be more precise about what rights are in issue (see above). In particular, the value of that right will be a factor in the balancing task.

The Minister went on to say, in relation to the Bill which was the subject of his response, that "[a]pplying this approach, the government is satisfied that it is appropriate to include, in the Litter Bill, strict liability offences for which imprisonment as a possible penalty".

The Committee considers it important that some such statement be made in explanation of any absolute or strict liability offences for which imprisonment as a possible penalty.

Bill Stefaniak MLA
Chair

May 2004

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

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
REPORTS – 2001-2004	
Report No. 1, dated 12 December 2001	
Nil	
Report No. 2, dated 19 February 2002	

Crimes Amendment Bill 2001 (No. 2) **(PMB)**	
Act citation: Crimes Amendment Act 2002 **(Passed 5.3.02)**…….	**No. 5**
Crimes (Abolition of Offence of Abortion) Bill 2001 **(PMB)**……..	
Health Regulation (Maternal Health Information) Repeal Bill 2001 **(PMB)**……	
Land (Planning and Environment) Legislation Amendment Bill 2001 **(PMB)**……	
Supreme Court Amendment Bill 2001 (No. 2) **(PMB)**……..	
Subordinate Law No 40 –Building Regulations Amendment…….	**No. 8**
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Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
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Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001……	**No. 10**
Health Professions Board (Procedures) Act – Determination No 221 of 2001……..	**No. 10**

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Health Professions Board (Procedures) Act – Determination Nos. 216-220, 222, 225 to 237 of 2001…….	**No. 10**
Independent Pricing and Regulatory Commission Act - Determination No. 291 of 2001…….	**No. 8**
Legislative Assembly (Members' Staff) Act - Determination No. 292 of 2001…….	**No. 23**
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001….	
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Commissioner for the Environment Act - Determination No. 315 of 2001…….	**No. 8**
Psychologists Act - Determination No. 318 of 2001……..	**No. 10**
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Drugs of Dependence Act – Determination No. 328 of 2001……	**No. 10**
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Rehabilitation of Offenders (Interim) Amendment Bill 2002 **(Passed 21.2.02)**……	
Report No. 4, dated 5 March 2002	
Inquiries Amendment Bill 2002 **(PMB)**…….	
Gene Technology Bill 2002 **(Passed 27.11.03)** ……	**No. 12**
Legislation Amendment Bill 2002 **(Passed 15.4.02)**…….	**No. 9**
Subordinate Law No 49 – Road Transport (Offences) Regulations 2001…….	**No. 8**
Road Transport (Safety and Traffic Management) Regulations 2000 – Disallowable Instrument No 4……..	**No. 8**
Road Transport (Driver Licensing) Regulations 2000 – Disallowable Instrument No 7……..	**No. 8**
Health and Community Care Services Act – Determinations Nos 5 and 15…….	
Report No. 5, dated 5 March 2002	
Nil	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Report No. 6, dated 7 March 2002	
Nil	
Report No. 7, dated 27 March 2002	
Drugs of Dependence Amendment Bill 2002 **(Passed 14.5.02)**…….	**No. 10**
Duties Amendment Bill 2002 **(Passed 11.4.02)**…….	**No. 8**
Fair Trading Amendment Bill 2002 **(PMB) (Passed 29.08.02)**…….	
Subordinate Law 2002 No 1 – Radiation Regulations 2002……..	**No. 10**
Report No. 8, dated 1 May 2002	
Discrimination Amendment Bill 2002 **(PMB) (Passed 5.6.02)…**……	
Gaming Machine (Women's Sports) Amendment Bill 2002 **(Passed 4.6.02)**…….…….	**No. 10**
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002…….	**No. 15**
Subordinate Law No. 4 – Community Title Regulations 2002……..	**No. 15**
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Public Place Names Act – Disallowable Instrument No. 24……..	**No. 15 (No. 32)**
Report No. 9, dated 7 May 2002	
Nil	
Report No. 10, dated 14 May 2002	
Building Amendment Bill 2002 **(Passed 16.5.02)**…….	**No. 16**
Report No. 11, dated 14 May 2002	
Nil	
Report No. 12, dated 16 May 2002	
Justices of the Peace Act – Disallowable Instrument No. 25…….	
Residential Tenancies Act – Disallowable Instrument No. 26…….	

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Report No. 13, dated 29 May 2002	
Cemeteries and Crematoria Bill 2002…….	**No. 15**
Duties (Insurance Exemptions) Amendment Bill 2002……..	**No. 15**
Road Transport Legislation Amendment Bill 2002…….	**No. 16**
Report No. 14, dated 4 June 2002	
Statute Law Amendment Bill 2002 **(Passed 29.08.02)**…….	**No. 15**
Report No. 15, dated 20 June 2002	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002….	**No. 17**
Remuneration Tribunal Act – Disallowable Instrument No. 34…….	**No. 23**
Hotel School Act – Disallowable Instrument No. 35…….	**No. 18**
Road Transport Act – Disallowable Instrument No. 39…….	**No. 17**
Commissioner for the Environment Act No. 38…….	**No. 17**
Report No. 16, dated 25 June 2002	
Maternal Health Legislation Amendment Bill 2002 **(PMB)**…….	
Medical Practitioners (Maternal Health) Amendment Bill 2002 **(Passed 21.08.02**) **(PMB)**……	
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Justice and Community Safety Legislation Amendment Bill 2002 **(Passed 22.08.02)**……	
Magistrates Court (Refund of Fees) Amendment Bill 2002 (**Passed 25.09.02)**……	
Planning and Land Bill 2002 **(Passed 12.12.02)**…….	**No. 20**
Plant Diseases Bill 2002 **(Passed 12.11.02)**……..	**No. 18**
Revenue Legislation Amendment Bill 2002 **(Passed 22.08.02)** …….	**No. 18**

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Land (Planning and Environment) ACT Heritage Council Appointments 2002 (No 1) - DI 2002—56……..	**No. 20**
Roads and Public Places (Fees) Revocation and Determination 2002 (No 1) - DI 2002—71…….	**No. 19**
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Roads Transport (General) (Fees) Revocation and Determination 2002 – DI2002—73…….	**No. 19**
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Animal Welfare (Fees) Revocation and Determination 2002 – DI2002-84……..	**No. 19**
Animal Diseases (Fees) Revocation and Determination 2002 – DI2002-85……..	**No. 19**
Road Transport (General) (Parking Permit Fees) Revocation and Determination 2002 – DI2002-86……..	**No. 19**
Road Transport (General) (Vehicle Impounding and Seizure/Speed Tests) Revocation and Determination 2002 – DI2002-89…….	**No. 19**
Report No. 18, dated 27August 2002	
Cooperatives Bill 2002…**(Passed 19.11.02)**……	**No 22**
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Adventure Activities (Liability) Bill 2002 **(PMB)**	
Civil Law (Wrongs) Bill 2002 **(Passed 26.09.02)**	**No. 20**

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Injuries Compensation Framework Bill 2002 **(PMB)**	
Prostitution Amendment Bill 2002 **(Passed 24.09.02)**	
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	**No. 22**
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Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	**No. 22**
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Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—130 being the Workers' Compensation (Fees) Revocation and Determination 2002	

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Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	**No. 22**
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	**No. 22**
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Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
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Civil Law (Wrongs) Amendment Bill 2002 **(Passed 4.03.03)**	
Criminal Code 2002 **(Passed 10.12.02)**.....	**No. 22**
Planning and Land Bill 2002 (Further response).....	**No. 22**
Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1)	**No. 24**
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1)	**No. 24**
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)....	**No. 24**
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Administrative Appeals Tribunal Amendment Bill 2002.....	**No. 23**
Building (Water Efficiency) Amendment Bill 2002 **(PMB)**	
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2).....	

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Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
Report No 22, dated 21 November 2002	
Civil Law (Wrongs) Amendment Bill 2002 (No 2) **(PMB)**	
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Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	**No. 24**
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	**No. 24**
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Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	**No. 24**
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Discrimination Amendment Bill 2002 (No 2) **(Passed 13.03.03)**	
Health and Community Care Services (Repeal and Consequential Amendments) Bill 2002 **(Passed 10.12.02)**	
Litter Amendment Bill 2002 **(PMB)**	
Report No 24, dated 28 January 2003	
ACTION Authority Amendment Bill 2002 **(Passed 18.2.03)**	
Taxation (Government Business Enterprises) Bill 2002 **(Passed 11.03.03)**	**No 27**

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Community Based Sentences (Transfer) Bill 2002 **(Passed 20.2.03)** ..	
Cemeteries and Crematoria Bill 2002 (No 2) **(Passed 6.03.03)**	**No 32**
Hawkers Bill 2002 **(Passed 6.03.03)**	**No 32**
Security Industry Bill 2002 **(Passed 20.2.03)**.....	
Report No 25, dated February 2003	
Confiscation of Criminal Assets Bill 2002 **(Passed 4.3.02)**.....	**No 26**
Crimes (Industrial Manslaughter) Amendment Bill 2002 **(Passed 27.11.03)**	
Disallowable Instrument DI2002-193 being the Supervised Drug Injection Trial Advisory Committee Appointments 2002 (No 1)...	**No 32**
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Land (Planning and Environment) (Compliance) Amendment Bill 2003.....	
Subordinate Law SL2003-1 being the Urban Services (Application of Criminal Code) Amendment Regulations 2002	**No 32**
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Disallowable Instrument DI2002-212 being the National Exhibition Centre Trust Appointment 2002 (No 2).....	**No 30**
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Disallowable Instrument DI2002-219 being the Health Professions Boards (Procedures) – Nurses Board of the ACT Appointments 2002 (No 2)	**No 32**
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Disallowable Instrument DI2002-225 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	**No 30**
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Disallowable Instrument DI2003-3 being the Hotel School Appointment 2003 (No 1)	**No 30**
Disallowable Instrument DI2003-5 being the Tree Protection (Interim Scheme) Determination of Criteria 2002	**No 32**
Report No 27, dated 11 March 2003	
Bushfire Inquiry (Protection of Statements) Bill 2003 **(PMB) (Passed 12.03.03)**	
Bushfire Reconstruction Authority Bill 2003 **(PMB)**	
Charitable Collections Bill 2002 **(Passed 1.04.03)**	**No 31**
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Disallowable Instrument DI2003-23 being the Occupational Health and Safety (Fees) Revocation and Determination 2003	**No 32**
Report No 30, dated 31 March 2003	
Agents Bill 2003 **(Passed 6.05.003)**	
Legislation (Statutory Interpretation) Amendment Bill 2003 **(Passed 3.04.03)**	
Report No 31, dated 11 April 2003	
Animal and Plant Diseases Amendment Bill 2003 **(Passed 25.09.03)**.	
Road Transport (Public Passenger Services) Amendment Bill 2003	**No 32**
Sentencing Reform Amendment Bill 2003 **(PMB)**	
Tertiary Accreditation and Registration Bill 2003 **(Passed 21.08.03)** .	
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Bushfire Reconstruction Levy Bill 2003	**No 34**
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Gaming Machine (Political Donations) Amendment Bill 2003	
Report No 34, dated 24 June 2003	
Bushfire Inquiry (Protection of Statements) Amendment Bill 2003 (No 2)	
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Disallowable Instrument DI2003-57 being the Scaffolding and Lifts (Fees) (Bushfire Emergency) Determination 2003	**No 39**
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Bail (Serious Offences) Amendment Bill 2003	
Civil Law (Sale of Residential Property) Bill 2003 **(Passed 28.08.03**.	**No 38**
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Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I am writing to you regarding recommendations in the Scrutiny Report No. 45 of 9 March 2004 on the Construction Occupations (Licensing) Bill 2003. This letter outlines the actions taken to address the comments and concerns raised.

The Committee advised that clauses 35 to 37 which relate to rectification orders, do not operate retrospectively, however the Committee strongly recommended that a cross-reference to clause 146 should be inserted in the Bill. Clause 146 provides an expanded definition of contraventions before commencement day, which is relevant to the operations of clauses 35 to 37. Another issue raised by the Committee was that the 10 year restriction in clause 37 should also appear in clause 36. Clause 37 deals with the issuing of rectification orders, and clause 36 deals with circumstances where it is not appropriate to issue a rectification order, and provides the alternative of authorising a licensee to rectify the work in question.

As you are aware, the Bill was debated in the Assembly on 11 March 2004. Having considered the recommendations of the Committee, I moved Government Amendments that inserted the cross-references recommended, and another amendment to include the 10 year restriction into clause 36. These amendments were supported during the debate and will appear in the Act when it commences.

I trust the information provided above adequately addresses the concerns of the Committee.

Yours sincerely

Simon Corbell MLA
Minister for Planning

29.3.04

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Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chairperson
Standing Committee on Legal Affairs
ACT Legislative Assembly
Canberra ACT 2601

Dear Mr Stefaniak

I am writing in response to comments raised by the committee in Scrutiny Report No 44 of 24 February 2004 concerning the Justice and Community Safety Legislation Amendment Bill 2003 (No 2). The committee notes, without comment, the creation of a non-custodial strict liability offence by the amendment to the *Cooperatives Act 2002.*

I have previously written to the committee on strict liability offences (in particular, I refer the committee to my response to the committee's queries about strict liability in relation to the *Consumer and Trader Tribunal Bill 2003*). I have previously noted that it would be unnecessarily repetitive and tedious to continue to repeat in each explanatory statement, the information about what types of offences the Government considers should be treated as strict liability offences. However, should the committee have concerns that it is not appropriate to treat a particular offence provision as creating a strict liability offence, the Government would welcome the opportunity to consider the specific reasons for the committee's concerns.

In the present case the strict liability offence is proposed in relation to section 375 of the *Cooperative Act 2002*. That section provides that a foreign cooperative (that is, a cooperative that may operate in the ACT, but which is registered in another state or territory) must file with the registrar particulars of any change to:

"(a) the rules or constitution of the foreign cooperative; or

(b) the directors of the foreign cooperative; or

(c) the agents of the foreign cooperative (or their addresses); or

(d) the person appointed as the person on whom notices and legal process may be served on behalf of the foreign cooperative; or

(e) the address of the registered office in the ACT or elsewhere of the foreign cooperative; or

(f) the name under which the foreign cooperative carries on business."

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This information is essential to the operation of the scheme, both locally and interstate. Having regard to the nature of this offence, the government is of the view that it is one appropriately dealt with as a non-custodial strict liability offence.

Yours sincerely

Jon Stanhope MLA
Attorney General

30 MAR 2004

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I am writing to you regarding recommendations in the Scrutiny Report No. 46 of 24 March 2004 on the Architects Bill 2004.

The substantive issue raised by the Committee relates to a possible breach of privacy through the operation of Clause 54 of the Bill. The clause relates to the giving of confidential information to the Architects Board by an architect subject to a disciplinary inquiry. The clause provides that the architect is not civilly liable for the giving of the information to the Architects Board.

The issue raised by the Committee is "whether such a deprivation of protection for the confidential information is a breach of a right to privacy." The Committee suggested that there may be a less rights restrictive approach to achieving the objective of the Clause. The suggestions made were that:

1. The owner of the confidential information could be informed of the disclosure of information and given the opportunity to make a submission to the inquiry;
2. The disclosure of confidential information to the Board during an inquiry be done in a non-public session; and/or
3. A person making any disclosure of the information other than for the purposes of the Bill would commit an offence.

Taking the clause in context, this provision only relates to confidential information divulged as part of a disciplinary process. Disciplinary processes, including inquiries, are not undertaken in public as there is a need to ensure that the rights of the architects subject to possible disciplinary action are protected. Because of the way in which the disciplinary process is undertaken, the giving of confidential information necessary to enable the Board to make a well informed decision is also protected. It is important to note that the confidential information must be relevant to the disciplinary grounds that gave rise to the commencement of the disciplinary process. If the Board received confidential information, it has the power to call the client (owner of the confidential information) as a witness in an

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inquiry, or seek further information directly from the client in relation to the confidential information received.

Because clause 54 only applies in the context of disciplinary proceedings, the divulging of confidential information outside of those processes could be subject to civil action.

In addition, clause 83 imposes secrecy obligations on the members of the board. A board member or any official performing functions on behalf of the board who divulged confidential information obtained at the hearing of a disciplinary matter other than in accordance with section 83 would commit an offence.

I believe that the provisions of the Bill as drafted provide sufficient safeguards for the handling of confidential information, and therefore do not consider it necessary to prepare any Government amendments to the Bill in relation to Clause 54.

I would like to thank the Committee for their timely consideration of the Architects Bill 2004, and I trust the information provided above adequately addresses the issues raised by the Committee.

Yours sincerely

Simon Corbell MLA
Minister for Planning
30 · 3 · 04

Jon Stanhope MLA

CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Stefaniak

I refer to comments on Disallowable Instrument DI2004-27 being the Public Sector Management Amendment Standard 2004 (No 1) made under section 251 of the *Public Sector Management Act 1994*, in Report No 46 of the Scrutiny of Bills and Subordinate Legislation Committee.

The instrument sets out that the amendments commence on 2 February 2004. The explanatory statement indicates that the amendments accommodate backdating to 2 February 2004, as this is the date that the 2004 Graduate Program commences.

Retrospectivity of these amendments was proposed as the circumstances fell within section 76 of the *Legislation Act 2001*. The provisions do not operate to the disadvantage of persons by adversely affecting their rights or imposing liabilities on a person.

I trust this addresses the concerns of the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

13 2004

13 APR 2004

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Bill Wood MLA

MINISTER FOR URBAN SERVICES MINISTER FOR ARTS AND HERITAGE
MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Stefaniak

I refer to Scrutiny Report No 46 of the Standing Committee on Legal Affairs and, in particular, the Committee's comments on the Litter Bill 2003.

The Committee has raised the following issues:

- the bill creates a number of strict liability offences, but the Explanatory Statement does not offer a general justification for this and, in respect of some clauses does not refer to the fact that the clause would create a strict liability offence;
- in respect of two strict liability offences imprisonment is a possible penalty and there is a rights objection to this;
- imprisonment is a possible penalty for the strict liability offence under subclause 11(1) but not the offence under subclause 11(2); and
- the offence under subclause 20(3) (failing to comply with a request to remove litter) is one of strict liability, whereas the offence under subclause 21(6) (failing to comply with a notice to remove litter) is not one of strict liability.

Taking each of these matters, in turn, the government's response to the Committee is as follows.

General justification for strict liability offences

The government indicated in a recent response to the Committee that it would include, in future explanatory statements, a general explanation about the use of strict liability offences, such as the one used in the Explanatory Statement for the Building Bill 2003. Of course, the Explanatory Statement for the Litter Bill was prepared well before this undertaking was given. Insofar as the Committee requires a general justification for the strict liability offences in the Bill, as the Committee has been previously advised, strict liability offences are generally offences arising in a

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regulatory context. A large proportion of the offences enacted by successive ACT Legislative Assemblies, are strict liability offences. The government maintains the view, previously expressed to the Committee, that whether a strict liability offence warrants a penalty which includes the possibility of imprisonment, is a question of balance. Matters for consideration include the nature and seriousness of the behaviour the offence is intended to protect against and the most appropriate means of upholding the public interest in ensuring that regulatory schemes are effective. It must also be acknowledged that this balancing exercise can include practical considerations such as whether it is realistic to require the proof of a subjective fault element for an offence.

The government has concluded, having regard to the nature of the offences to which the Committee has referred, that it is appropriate that they be offences of strict liability.

The government notes the Committee's comment that the Explanatory Statement does not, in respect of some clauses, note that the offence is one of strict liability. The primary focus of Explanatory Statements is to explain the purpose and effect of the provisions of legislation, including, where relevant, how the existing law is being changed. It had not been considered necessary, to achieve that purpose, to repeat in the Explanatory Statement, for each strict liability offence provision which is clearly identified as such, in the Bill, that the offence was a strict liability offence.

Rights objection to strict liability offences with imprisonment penalties

The Committee has raised, in earlier committee reports on other legislation, the issue of whether the option of imprisonment as a penalty for a strict liability offence is incompatible with the *Human Rights Act 2004*. The Department of Justice and Community Safety (DJACS) has administrative responsibility for the Human Rights Act and provides advice concerning the interpretation and legal effect of that Act. DJACS has confirmed its view that the option of imprisonment terms for strict and absolute liability offences is not necessarily incompatible with the rights set out in the Human Rights Act and that whether it is appropriate will be a question of balance, having regard to the nature of the behaviour being regulated and the extent of any possible prison term which could be imposed. Applying this approach, the government is satisfied that it is appropriate to include, in the Litter Bill, strict liability offences for which imprisonment is a possible penalty.

Possible anomaly in penalties

The Committee notes that for the offence in proposed section 11(1), of requiring a person to move a vehicle through a public place but failing to give that person means to adequately secure a load on the vehicle, the penalty includes the option of imprisonment for 6 months. The Committee contrasts this with the penalty for the offence under proposed section 11(2) which is committed by a person who drives a vehicle through a public place and fails to secure the vehicle's load so that it is not likely to fall or be dislodged. The penalty for this offence is purely monetary – there is no option of imprisonment.

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The government does not consider that these penalties are anomalous. The penalty for the offence under 11(1) has been proposed having regard to the fact that it would be committed by a person who has imposed a requirement on another person to act so as to commit an offence. The Explanatory Statement refers to concerns that persons in positions of authority, such as employers, do sometimes pressure their employees to cart loads which are not properly secured. The government considers that this behaviour warrants the possibility of a prison sentence.

Where a person simply commits the offence of driving a vehicle with a load not properly secured, the government considers that there is no need for the penalty to include the option of imprisonment.

The government considers that the relative degrees of seriousness of these offences justifies the difference in the proposed maximum penalties.

Offence under proposed section 21(6)

The Committee notes that the offence of failing to comply with a notice to remove litter is not stated to be a strict liability offence, whereas a similar offence – failure to comply with a request to remove litter, is stated to be strict liability offence. A government amendment to the Bill will clarify that the offence under section 21(6) is a strict liability offence.

I trust that this information is of assistance to the Committee.

Yours sincerely

B Wood

Bill Wood
Minister for Urban Services
28 · 4 · 04

KATY GALLAGHER MLA
MINISTER FOR EDUCATION, YOUTH & FAMILY SERVICES
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

Mr Bill Stefaniak
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly

Dear Mr Bill Stefaniak

I refer to the Standing Committee on Legal Affairs (the Committee) Scrutiny of Bills and Subordinate Legislation Report No. 45 of 9 March 2004 (the Report) and the comments in the Report concerning the Occupational Health and Safety Amendment Bill 2004 (the Bill).

At the outset, I would like to express my disappointment of the Committee's failure to acknowledge my response dated 11 February 2004 to Report No. 43 concerning comments on the Dangerous Substances Bill 2003. I note that many of the comments contained in the Report are identical to those raised by the Committee in Report No. 43 and subsequently dealt with in my response. I expect that had the Committee considered my response to Report No. 43, unnecessary duplication contained in the Report could have been avoided. As a result, my response to comments in the Report, with the exception of the right-of-entry provisions, is a reiteration of my previous response.

Right-of-entry provisions

In relation to the right-of-entry provisions generally, the Committee has noted that the "conferral on representatives of an employee organisation (trade union) of legal entitlements to enter upon workplace premises is recognised in the laws of all Australian jurisdictions [and] ... may be seen to derive from international treaty obligations". The Committee draws attention, in particular, to International Labour Organisation Convention 155 (OHS) and articles which establish the right of workers or their representatives to inquire into all aspects of OHS in their work. In this context, the Committee raises two specific areas of concern in relation to the proposed amendments to the Act.

First, the Committee raises the philosophical tension between the right of the employer to control the entry and activities of persons on their land, on the one hand, and the provision of a right-of-entry for employee representatives for the purpose of ensuring employee safety, on the other. The Committee has undertaken an analysis of the extent of powers available to authorised representatives once on the workplace in order to determine whether a balance is struck. In particular, the Committee notes in relation to new section 57E that the authorised representative may examine and copy documents without the involvement of the occupier of the premises which, in turn, will have an impact on the extent to which the occupier may make an effective claim of privilege in relation to disclosure under sections 170 and 171 of the *Legislation Act 2001*.

Second, the Committee also notes that the power to require a person to render assistance may be exercised in relation to "anyone at the premises". The Committee considers that this would appear to include a person who had no concern with employment conditions at the premises.

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I acknowledge the Committee's helpful comments in relation to its discussion of the Bill's right-of-entry provisions and advise that the Government will re-examine the provisions in the Bill with a view to their possible amendment in relation to the two matters raised.

Strict liability offences

The Committee has noted that the Bill contains a number of strict liability offences, not all of which have been identified as such in the Explanatory Statement. As the Bill itself identifies when strict liability attaches to an offence or to an element of an offence, the Explanatory Statement has noted in particular cases that strict liability applies to an offence to draw particular attention to this aspect of the proposed offence so as to stress the importance of compliance with the relevant provision.

The justification for the inclusion of strict liability offences in the Bill is, in essence, the need to ensure that everyone with workplace safety responsibilities comply with their obligations at all times and act appropriately to secure the health, safety and welfare of employees at work. The Government considers that the public interest is best served by ensuring that health, safety and welfare of employees at work is secured, by establishing a regulatory regime that encourages people with workplace safety responsibilities to maintain a workplace that is as free as possible from harm or injury and to develop a "safety culture" or run the risk of being found in breach of the Act. The fostering of this safety culture would be more difficult to accomplish without the use of strict liability offences. It should be noted in several instances the Bill contains a cascade of offences, with the strict liability version of the offence having the lowest penalty. Where an offence involves acts or omissions that are done negligently or deliberately, the penalty is higher to reflect the greater degree of culpability.

Absolute liability offences

The Committee is incorrect in identifying new sections 34C to 34E as absolute liability offences. Absolute liability applies to only one of the elements in the offences contained in these sections. As it does not apply to each offence as a whole, these offences cannot be categorised as "absolute liability offences". A similar approach to drafting was taken in clause 311 of the Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003. Page 24 of the Explanatory Statement for that Bill contains a useful explanation of the effect of providing that absolute liability applied to one element of an offence, usually the existence of a fact or circumstance, where the accused's state of mind about that fact or circumstance has no logical bearing on his or her culpability for that offence. I note that this approach is consistent with the comments by the Committee in its Scrutiny Report No. 38 of 2003, which recognises at page 14 that "absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant".

Privileges in relation to the exercise of powers to compel a person to give oral evidence or to produce a document

The Committee has suggested that it would be appropriate for the displacement of the privilege against selfincrimination in new section 75E(3) be justified. This provision has the effect of requiring people to provide information or documents requested under new section 75A, where the Chief Executive believes the information or documents are necessary to determine whether an offence against the Act has been committed. It should be noted that under new section 75A, the power to ask questions or require the production of documents can be exercised only where the Chief Executive believes on reasonable grounds that a person may have contravened, or may be contravening, the Bill. This limitation is important – it means that the Chief Executive cannot use the

power in new section 75A and the displacement of the privilege against selfincrimination as a "fishing expedition".

The Government considers that the displacement of the privilege will assist in bringing to light breaches of the Act, particularly breaches that have a significant potential to result in serious harm or injury to workers. Early detection of such offences will enable harm minimisation measures and other remedial or preventative action to be implemented. The Government considers that the impact on the rights of the individual is outweighed by the public interest in protecting workers from serious harm or injury caused by dangerous workplaces and work practices.

Provisions for compensation

The Committee has indicated its views that the compensation provisions in new section 67A contrast unfavourably with the compensation mechanism established by new sections 77L and 77M. In response, the Government draws attention to the fact that the mechanism in new section 67A automatically involves the Court in making a determination of compensation, whereas compensation can be awarded by the Minister without judicial intervention under the mechanism for new sections 77L and 77M. Judicial determination of compensation can also be costly and time consuming.

The Courts will only become involved in a Ministerial determination of compensation if the person claiming compensation is aggrieved by the decision, an application for judicial review is made and the application for judicial review proceeds to a hearing. Two matters should be noted: the fact that a decision is subject to the *Administrative Decisions (Judicial Review) Act 1989* means that the applicant must be accorded procedural fairness, the decision maker is required to act reasonably and without bias, and decisions must be supported by evidence. Secondly, the new Model Litigant Guidelines require, among other matters, the Territory's legal representatives to settle civil litigation wherever possible and not to act oppressively against legitimate claims.

In these circumstances, the Government does not see how it can be in the interests of claimants or the general community for the Committee to say that a mechanism that must always involve the Courts is "apparently more desirable" than a mechanism that will only involve the Courts in limited circumstances (ie. where the Minister and the Territory's legal representatives genuinely consider on reasonable grounds that an award of compensation would be inappropriate or unmerited and the claimant disagrees).

An unusual punishment provision

The Committee has commented that new section 93D is an unusual provision that raises a number of rights issues. In response, it should be noted that civil courts in defamation proceedings have been able to order that retractions be published and similar provisions are found in trade practices and corporations law. For example, organisations such as the Commonwealth Bank and Telstra have been required to publish statements indicating that they have engaged in misleading advertising. It is difficult to see how publication of a factual statement concerning a conviction recorded in open court can be considered as analogous to torture or as more "cruel, inhuman or degrading" than other criminal sanctions such as imprisonment.

The suggestion that the requirement in new section 93D breaches the proposed right of privacy is difficult to understand, given that (except in exceptional circumstances) criminal proceedings are open and convictions are routinely discussed in the media.

The suggestion that new section 93D is "degrading" because it has the effect of coercing a person into participating in his or her own punishment is also difficult to understand. Under the *Crimes*

Act 1900, the Courts already have a range of non-custodial criminal sanctions that require at least some degree of forced participation by the offender – obvious examples are participation in community service orders and attendance at periodic detention centres. On the Committee's suggested reasoning, the reparation order provisions in section 350 of the *Crimes Act 1900* could be seen as "degrading" because they too may "coerce" convicted offenders into participating in their own punishment.

The Committee has suggested that it may be inappropriate to vest this type of power in a Court. In response, the Government considers that to the extent that the requirement to publish a statement can be seen as punitive, it is entirely fitting for a court to exercise such a power, given that setting and determining punishments for offences is a traditional function of the criminal courts.

Yours sincerely

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