Legislative Assembly for the ACT

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

Scrutiny Report

6 FEBRUARY 2012

Report 47

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

CHILDREN AND YOUNG PEOPLE (TRANSITION FROM OUT-OF-HOME CARE) AMENDMENT BILL 2011

This is a Bill to amend the the *Children and Young People Act 2008* and incorporate the provision of support and assistance for young people transitioning from out of home care beyond the statutory age of 18 years up to 25 years.

GOVERNMENT PROCUREMENT AMENDMENT BILL 2011

This is a Bill to amend the *Government Procurement Act 2001* in relation to government contracts.

RACE AND SPORTS BOOKMAKING (VALIDATION OF LICENCES) AMENDMENT BILL 2011

This Bill would amend the *Race and Sports Bookmaking (Validation of Licences) Amendment Bill 2011* to ensure the validity of bookmakers' licences that transitioned from the *Bookmakers Act 1985* (repealed) to the *Race and Sports Bookmaking Act 2011* on its commencement.

WORK HEALTH AND SAFETY (BULLYING) AMENDMENT BILL 2011

This is a Bill to amend the *Work Health and Safety Act 2011* to require WorkSafe to appoint at least 3 inspectors that have specialised expertise or experience in dealing with bullying in the workplace and other workplace psychosocial issues, and to establish an expert advisory committee in relation to bullying in the workplace and other workplace psychosocial issues.

WORK HEALTH AND SAFETY (CONSEQUENTIAL AMENDMENTS) BILL 2011

This Bill would amend legislation because of the enactment of the *Work Health and Safety Act 2011*.

Bills—Comment

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

CIVIL UNIONS BILL 2011

This Bill would enable couples who are unable to marry under the Commonwealth *Marriage Act 1961* to enter into a legally recognised relationship. It sets out eligibility to enter a civil union, a process for entering a civil union and a process for ending a civil union.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

Enhancement of the right to equal protection of the law without discrimination

The Explanatory Statement states:

> The Civil Unions Bill enlivens rights protected under the *Human Rights Act 2004*, in particular, s 8 - the right to recognition and equality before the law. This bill promotes the right to recognition and equality before the law **as it relates to marriage** (emphasis added).

Section 8 provides:

> **8 Recognition and equality before the law**
>
> (1) Everyone has the right to recognition as a person before the law.
>
> (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
>
> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The Explanatory Statement discussion is directed to advancing a proposition that section 8 required that the Territory make provision for a form of same-sex marriage. That this is what a provision such as section 8 requires is well-supported by various persons and bodies who or which have responsibility for the administration of human rights instruments,[1] and is supported by some foreign case-law (as to which see the Explanatory Statement). The Explanatory Statement concludes its human rights assessment with the statement that "the effect of this bill is to redress the discriminatory nature of the existing construct of marriage as it relates to people in relationships other than the traditional man-woman model, to the extent that is possible within the ACT".

On the face of the Bill, this discussion is irrelevant to a human rights assessment. Subclause 6(2) states that "[a] civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage". That is, the purpose of the Bill is not to provide for same-sex marriage, but to create a different form of union between two same-sex people. The creation of this status does not engage HRA section 8 in the way identified by the Explanatory Statement.

The drafters of the Explanatory Statement appear to take the view that in substance a civil union is a form of same-sex marriage. If this is accepted, HRA section 8 is engaged and its purpose is advanced.

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

[1] See generally, Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs concerning an Inquiry into the Marriage Equality Amendment Bill 2009,* (10 September 2009) http://www.hreoc.gov.au/legal/submissions/2009/20090910_marriage_equality.html

Ending a civil union and the rights of the child

The Explanatory Statement does not address the issue of whether creation of the legal status of a civil union would be inconsistent with any other HRA provision. However, some may consider that the right of a child to the protection is implicated. The Human Rights Act states in subsection 12(2):

> Every child has the right to protection needed by the child because of being a child, without distinction or discrimination of any kind.

A party to a marriage cannot obtain a divorce unless certain conditions exist, and so far as concerns the protection of children:

- if there are children aged under 18, the court can only grant a divorce if it is satisfied that proper arrangements have been made for them; and
- if the parties have been married less than two years, then, before filing the application, the spouses must attend counselling with an approved family and child counsellor to discuss the possibility of reconciliation.

In contrast, once proper termination notice to end a civil union has been given, termination results from the effluxion of 12 months. There is no obligation on anybody to consider the interests of children to the union, nor any provision for counselling. On the face of it, there is an argument that these omissions derogate from the rights of the child as stated in HRA subsection 12(2).

If provision were to be made for consideration of the interests of the children to a civil union, there would then arise an issue as to which person or body should undertake that process. The Committee's view is that this process would be better undertaken by a court or judicial officer in preference to an administrative office-holder.

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

Derogation from the right to equal protection of the law without discrimination

Paragraph 7(c) of the Bill provides that a person may enter a civil union only if "(c) the person cannot marry the person's proposed civil union partner under the *Marriage Act 1961* (Cwlth)". On its face, this provision discriminates against a person who could marry the person's proposed civil union partner. **Its effect is to deny to different sex couples the opportunity to enter a civil union.**

In its submission to the Senate Committee, the Australian Human Rights Commission argued that:

> ... the Commission believes that a civil union scheme alone would not provide same-sex couples with full equality.
>
> 30. In the absence of a right to civil marriage for same-sex couples, a civil union scheme would continue to reinforce the different value placed on relationships between opposite-sex and same-sex couples (albeit that it would be a step in the right direction). The Commission also submits that any civil union scheme that exists should be open equally to both same-sex and opposite-sex couples.

> 31. This is because the principle of equality, when applied to this circumstance, requires that any form of relationship recognition be equally available to same-sex couples.

Presumably, the Commission would not object to this Bill, on the basis that "it would be a step in the right direction", but would object to paragraph 7(c). The principle of equality is found in HRA section 8. This does not of course conclude a human rights analysis, for derogation from section 8 might be justifiable under HRA section 28.

The Explanatory Statement does not recognise this as an issue, but in its note to clause 7 does state that

> [under] the [Commonwealth] Constitution, the Act [scil. ACT Assembly] cannot legislate on the subject of marriage between a man and a woman. Eligibility for a civil union must therefore be restricted to couples who do not fit this description but who wish to enter into a formally recognised and legally binding relationship.

This makes sense only if, contrary to what is stated in subclause 6(2), the Bill is legislating on the subject of marriage. If the Attorney-General is of the view that this Bill does not legislate on the subject of marriage, the Explanatory Statement justification for the discrimination evident in paragraph 7(c) cannot stand.

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

Does a clause of the Bill inappropriately delegate legislative power? Committee term of reference (c)(iv)

Clause 108 would confer on the executive a power, stated in a form now commonly found in Territory Acts, to make transitional regulations that may modify that part of the Act that governs the topic of "transitional matters". As such, it has the character of a Henry VIII clause; (see *Scrutiny Report No 45* of the *7th Assembly*, concerning the Business Names Registration (Transition to Commonwealth) Bill 2011.

The Explanatory Statement does not offer a justification for this provision. The Committee draws attention to what it said in *Scrutiny Report No 45* of the *7th Assembly*, concerning the Business Names Registration (Transition to Commonwealth) Bill 2011.

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

<u>Misleading provision</u>

Subclause 103(3) provides:

> (1) A regulation under subsection (2) has effect despite anything in another territory law.

On many occasions now, the Committee has pointed out that such a provision is misleading in that a provision of a Territory statute cannot limit the power of the Legislative Assembly to enact a later statute to amend an earlier statute. The public should be able to rely on what a plain reading of a statute suggests, and this is clearly not the case with subclause 23(1). It once again recommends that such clauses not be stated in a bill. The Committee refers to its comments in *Scrutiny Report No 46* of the *7th Assembly*, concerning the Retirement Villages Bill 2011.

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

CRIMES LEGISLATION AMENDMENT BILL 2011

This Bill would amend the *Crimes Act 1900* and the *Criminal Code 2002* to make changes to the law of self-defence, and the *Crimes (Sentencing) Act 2005* so that account is taken of a victim's special occupational vulnerability as a provider of an important public service.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?* Report under section 38 of the *Human Rights Act 2004

Restriction of the availability of the defence of self-defence.

By subsection 42(1) of the *Criminal Code 2002*, a person "is not criminally responsible for an offence if the person carries out the conduct required for the offence in self-defence". A person carries out conduct in self-defence only in defined circumstances, including "to prevent or end the unlawful imprisonment of himself or herself or someone else" (paragraph 42(2)(a)(ii)), and, in any circumstance, where "the conduct is a reasonable response in the circumstances as the person perceives them" (paragraph 42(b)). Subsection 42(3) then qualifies these provisions by stating circumstances in which the person "does not carry out conduct in self-defence", and clause 6 of the Bill proposes to add to these circumstances that where:

> (c) the person—
>
> (i) is, or is with someone else who is, under restraint by a police officer and it is reasonable to know the person carrying out the restraint is a police officer; and
>
> (ii) is responding to prevent or end the restraint because the person believes the restraint is an unlawful of himself or herself or the other person.

That is, the amendment to the *Criminal Code 2002* proposed by clause 6 would preclude a defendant from pleading self-defence to an offence where:

- the offence occurred when the defendant was, or was with someone else who was, "under restraint" by a police officer; and
- the victim of the offence (such as, for example, assault) is a police officer; and
- the acts that make up the offence were a response to prevent or end the restraint; and
- the defendant knew, or it was reasonable to suppose that the defendant should have known, that the victim is a police officer.

In simple terms, a person under restraint by a police officer will not be able to plead self-defence where they commit an offence to end an unlawful imprisonment, if the defendant knew, or it is reasonable to suppose that the defendant should have known, that the victim is or was a police officer. The person under restraint must in effect tolerate what they believe is a false imprisonment, and then raise the question of unlawfulness in some other way. The Explanatory Statement points out that such a person would be able to lodge a civil claim for damages, or make a complaint to the Professional Standards Unit of the AFP or the Ombudsman.

It is to be noted that the paragraph 42(3)(c) would apply only where the acts that make up the offence were a response to prevent or end the restraint. If the acts were directed to achieving some other purpose (such as preventing a harm or a threatened harm), then, subject of course to other limitations, the defence would be available.

Clause 4 proposes a similar amendment to the *Crimes Act 1900* by the insertion of a new section 293.

It is arguable that these limitations to the availability of the defence of self-defence engage at least the right to liberty and security of the person stated in HRA subsection 18(1). The issue then is whether these limitations can be justified under HRA section 28. There is an extensive discussion in the Explanatory Statement to which Members of the Assembly are referred.

The Committee draws attention to one point in this analysis. In effect, the Explanatory Statement argues (at page 1) that the principle currently embodied in paragraph 42(2)(a)(ii) of the Criminal Code (see above) has its origins in developments in the common law in the 17th century, and that one of the two reasons for its emergence was that "an unlawful arrest could lead to a long term of unlawful imprisonment before a trial was held". The Explanatory Statement argues also that this reasoning is no longer relevant, for

> [now], an unlawful arrest results in an accused person spending a matter of hours in custody before being brought before a judicial officer to apply for bail and/or challenge the lawfulness of their arrest.

It is difficult to see how the fact that a person can ***apply*** for bail removes the possibility that they may spend a considerable period on remand in prison before a trial is held. It cannot be assumed that bail will always be granted.

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

<u>The taking into account on sentencing of a victim's special occupational vulnerability as a provider of an important public service</u>

The Explanatory Statement notes that clause 5 proposes to amend section 33 of the *Crimes (Sentencing) Act 2005* "to add a requirement that the sentencing court give consideration (where relevant) to whether the victim was a member of a vulnerable or at-risk occupation providing services to the public". The Explanatory Statement continues:

In sentencing an offender, section 33(1)(d) of the Sentencing Act currently allows the court to consider the personal circumstances of any victim of the offence if those circumstances were known to the offender when the offence was committed. The amendment goes beyond this section as the defendant does not need to know of the victim's occupation for the new section to apply. Under the relevant considerations in section 33 the court will be able (although is not required) to consider whether the offender knew of the victim's occupation at the time of the offence and take this into account in sentencing.

The purpose of this amendment is to place emphasis on the seriousness of assaulting a police officer, or any other officer whose occupation is providing services to the public, as such occupation places them at particular risk.

Police officers and other community service workers such as nurses and emergency services workers like ambulance paramedics and care and protection workers deserve extra consideration as the providers of important social services. The Bill will ensure that the special occupational vulnerability of these workers is given appropriate weight in sentencing offenders for assaults against them.

The Explanatory Statement does not identify any human rights issue arising out of this proposal. It is however arguable that the right to liberty and security (HRA subsection 18(1)) is engaged. The defendant may receive a more severe punishment (and thus their right to liberty is limited) based on the existence of circumstances (that the victim was providing a service to the public etc) of which the defendant was unaware and could not reasonably have been aware. It might be argued that the lack of moral culpability of the defendant is such that it is difficult to justify the limitation of the right.

If it is considered that HRA subsection 18(1) is not limited, the argument might be that to punish a person in circumstances where they have no moral culpability is an undue trespass on their personal rights and liberties.

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

FOOD AMENDMENT BILL 2011

This Bill would amend the *Food Act 2001* to increase transparency in food regulation in the ACT, enhance consumer knowledge and emphasise safe food practices. The Bill would also harmonise the framing of the offences in the Act to accord with the principles of the *Criminal Code 2002*.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

The right to privacy

The Explanatory Statement contains a discussion of the possible ways a provision of the Bill might engage the right to privacy (HRA section 12).

The Committee refers Members of the Assembly to this discussion.

The Committee also notes that the Explanatory Statement discussion is limited to the content and application of a right to privacy as that right is stated in the Human Rights Act, and appears to take the view that a human rights assessment should be confined to the application of that Act. The Committee considers that this approach is inadequate, and overlooks the need for an Explanatory Statement to address the possible impact of a legislative proposal on "personal rights and liberties". The Committee draws attention to the comment it made in its ***Guide to writing an explanatory statement***:

> 3.19 It must be noted that the Scrutiny Committee is not confined to assessing the human rights compatibility of a provision of a bill in terms of the rights stated in the Human Rights Act. The Committee takes a broad and ambulatory view of what constitutes a personal right and liberty. Because the HRA does not state some rights that are well-accepted in common law, or stated in some law binding on the Territory, or in an international treaty, the Committee often identifies a rights issue that does not involve the HRA. The author of an explanatory statement should take the same approach. Of course, the concept of "personal rights and liberties" is vague, but some cases are obvious and, if in doubt, the drafter should err on the side of dealing with an issue, rather than not.

Strict liability offences

As a harmonisation exercise, the Bill would substitute a large number of the offences currently provided for in the Act with new provisions designed to align them with the principles in the *Criminal Code 2002*. Many of the new offences provisions would impose strict liability, and to some would attach a very heavy financial penalty.

The Explanatory Statement accepts that "[t]he application of strict liability has been accepted in the Territory as engaging the right to be presumed innocent (section 22(1) of the HRA) [and it] becomes necessary, therefore, to justify strict liability offences under section 28 of the HRA.

The Explanatory Statement offers the "regulatory offence" justification for strict liability offences, and it addresses the fact that the heavy penalties exceed those proposed as a norm by the Committee; (see *Scrutiny Report No 40* of the *7th Assembly*, concerning the Work Health and Safety Bill 2011[2]).

The Committee refers Members of the Assembly to this discussion.

The Committee commends the Explanatory Statement, in particular in respect of its justification for not including a "due diligence" defence, and for drawing to the attention of a reader the potential application of the "intervening conduct or event" defence in section 39 the Criminal Code. As the Committee noted in *Scrutiny Report No 40* of the *7th Assembly*, concerning the Work Health and Safety Bill 2011:

[2] See too Department of Justice and Community Safety, Guide for Framing Offences, version 2, April 2010, at 29.

The reason for the express reference to the latter is that it may provide the basis for a "reasonable steps" defence, a matter which the Minister for Environment, Climate Change and Water drew attention to in a response to the Committee on another bill.[3]

LONG SERVICE LEAVE (PORTABLE SCHEMES) AMENDMENT BILL 2011

This Bill would amend the *Long Service Leave (Portable Schemes) Act 2009* and includes adjustments to various kinds of entitlements provided for by the Act and a range of technical amendments.

Does clause 6 inappropriately delegate legislative power?—Committee term of reference (c)(iv)

Proposed subsection 11A(1A) (see clause 6) would vest in the Minister a power to declare that certain persons, or certain activities, are not to be affected by the Act where otherwise they would be affected. In effect, this would confer a power on the Minister to dispense with the operation of the Act in favour (or perhaps disfavour) of those persons.

In *Scrutiny Report No 40* of the *7th Assembly*, concerning the Work Health and Safety Bill 2011, the Committee reported in detail as to why such a power is undesirable. Its conferment violates long-standing constitutional principles, and the principle stated in subsection 8(3) of the Human Rights Act that "[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination".

If it is thought desirable to confer a dispensing power on a Minister or other official, then it can be expressed in terms that are more limited than an open-ended power to dispense. In *Scrutiny Report No 12* of the *7th Assembly*, concerning the Dangerous Goods (Road Transport) Bill 2009, the Committee commended a scheme for dispensation that specified: (a) the boundaries of the scope of the power to exempt, by reference to objective and closely defined criteria; (b) the detail of what must be contained in an exemption, including its duration; and (c) that certain kinds of exemption were to be notifiable instruments.

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

Do any provisions of the Bill make rights, liberties and/or obligations dependent upon non-reviewable decisions?—(term of reference (c)(iii))?
Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

<u>The right to privacy and correction of matter placed on a record maintained by the administration</u>

Under the Act, the registrar must place on a register certain information concerning an employer, a registered worker, or a person acting on behalf of an employer or worker. Proposed subsection 69(1) of the Act (see clause 23) would provide that the registrar must give to any such person who applies "a certified copy of any part of the register that relates to

[3] See *Scrutiny Report No 31* of the *7th Assembly*, letter from the Minister for the Environment, Climate Change and Water of 2 December 2010.

the employer or worker". That person may then object to the registrar about the accuracy of a matter stated in the copy, and "the governing board must decide the objection and if allowing the objection, give an amended certified copy to the person who objected".

Given that any false information on the register may impact adversely on the reputation of any an employer, a registered worker, or a person acting on behalf of employer or worker, it is arguable that paragraph 12(b) of the *Human Rights Act 2004* is engaged. If the protection to reputation afforded by paragraph 12(b) is not considered wide enough to catch this kind of case, then the argument that rights are engaged may be rested on the wider common law concept of privacy.

The means for seeking correction of the relevant record provided in proposed subsection 69(1), combined with a process for internal review by the governing board, is commendable and enhances the privacy interests of the applicant for amendment.

It appears however that there is no provision for further review by the ACT Civil and Administrative Tribunal. Many decisions by the registrar and the governing body are ACAT reviewable, and the significance of the decision by the latter under proposed subsection 69(4) is such that it should also be reviewable.

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

PUBLIC UNLEASED LAND BILL 2011

This Bill would repeal the *Road and Public Places Act 1937* and in its place enact a regime that regulates the use of public land. In particular, it would provide for a permit and approval system for the use of public land, providing a broad framework which allows for administrative arrangements that can support and promote the object of the Bill which is facilitating the use of public unleased land while ensuring that the amenity and natural value of public spaces is not diminished.

Do some provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? - (term of reference (c)(ii))?
Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

A point of uncertainty concerning the scope of the concept of the "use" of public unleased land

Clause 41 provides in relation to the term "***use***, public unleased land", that

> a person uses public unleased land if the person carries on an activity on the public unleased land in a way that excludes some or all members of the public from the place.

In clause 89 it is provided that

> ***public unleased land*** means unleased territory land that—
>
> (a) the public is entitled to use; or

(b) is open to, or used by, the public.

A note to clause 41 provides a number of examples of what a use of public unleased land would entail, such as "placing tables and chairs on the footpath outside a cafe", "placing a construction skip on a footpath", and "parking a car in a park". If these illustrations are based on a correct understanding of clause 41, then it would appear that many other commonplace uses of public unleased land would fall within the definition, perhaps such as "placing tables and chairs in a park", "setting up objects in a park for the purpose of playing some sport", "placing a construction skip on a nature strip", or "parking a car on a nature strip"; (this list is not to be read as exhaustive).

There may, however, be a question whether the examples provided in the note to clause 41 are based on a correct understanding of clause 41. It is to be noted that the "use" of the public unleased land must be such as to exclude some or all members of the public from the place. For example, does parking a car in a park exclude any member of the public from the park? It is true that a person would be excluded from the particular area occupied by the car, but is this enough?

This question of the scope of the definition is critical in two respects. The first is that it must be addressed by a person considering whether he or she needs to obtain a permit to use certain public unleased land. This issue raises a matter under the Committee's term of reference (c)(ii).

The second is that the scope of the definition is critical to the operation of the proposed offence of using public unleased land without a permit (subclause 43(1)). As the Committee has often pointed out, vagueness in the manner in which an offence provision states the elements of the offence will engage the HRA and otherwise may be seen as incompatible with the rights of a defendant.[4]

A court might find that minor uses of the land did not fall within the definition. It might do so by construing the term "use" in the light of the maxim of statutory interpretation embodied in the Latin phrase "*de minimis non curat lex*"—that is, that the law does not concern itself with trifles.[5] Bennion cites English cases that held that land was not "used as a racecourse" where a use of particular land for that purpose was merely trifling.[6]

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[4] Most recently in *Scrutiny Report No 46* of the *7th Assembly*, concerning the Retirement Villages Bill 2011.

[5] Discussed in Francis Bennion, *Statutory Interpretation* (1997) 868.

[6] *Hayes v Lloyd* [1985] 1 WLR 714. In relation to the use of land, see too *Randwick Municipal Council v Rutledge* [1959] HCA 63; (1959) 102 CLR 54 at 94, per Windeyer J. Several cases where the maxim was applied were noted by the Federal Court in *Farnell Electronic Components Pty Ltd v Collector of Customs* [1996] FCA 1135, and it was also noted that *Halsburys Law of England*, 4th edition, Vol 44(1), under the title Statutory Interpretation, stated (at para 1441): "De Minimis Principle. Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim de minimis non curat lex (the law does not concern itself with trifling matters); so if an enactment is expressed to apply to matters of a certain description it will not apply where the description is satisfied only to a very small extent."

Even if it could be predicted that a court would in every case resolve the issue of uncertainty (and thus avoid the "void for vagueness" objection), it might be thought unreasonable to require a person to take the risk that a court might not agree that the use made by the person was merely trifling.

If it is accepted that there is a problem with the apparent width of the definition in clause 41, it might be addressed by adding to subclause 43(3) (which states circumstances in which a person using public unleased land does not commit an offence if he or she does not hold a permit) a provision that permitted the director-general to make a statutory instrument that specified what activities would not constitute a use of the land. Otherwise, the definition of "***use***, public unleased land" might be more limited so as not to catch trivial uses.

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

Administrative discretions that are not conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis

There are some provisions in the Bill that condition the exercise of a discretion, or the making of a judgement, or the holding of a belief etc, upon the holder of the power acting upon "reasonable grounds" or some equivalent basis; see subclauses 12(5), 31(1), 34(1), 61(3), 81(3) and paragraph 82(b). There are however many provisions that do not; see subclauses 12(4), 19(4), 25(4), 46(1), 49(1), paragraphs 53(b), 55(b), 61(1), paragraph 61(2)(d), 68(1), and 72(2).

From a rights perspective, the conferment of a discretion in terms that it must be exercised upon the repository of the power having "reasonable grounds" to be satisfied that certain matters exist, is preferable to a provision that allows simply that the repository be "satisfied" of those matters.

In *Scrutiny Report No 34* of the *Sixth Assembly*, the Committee supported the proposal in the Health Legislation Amendment Bill 2006 (No. 2) to amend what at that time was the current subsection 100(1) of the *Public Health Act 1997*—which provided that "the Minister may … determine" certain matters in relation to a disease or medical condition—so that it would after amendment provide that the Minister could not make a determination "unless the Minister believes, on reasonable grounds, that the determination is necessary to protect public health".

The Explanatory Statement to the Bill stated that "This amendment is necessary to avoid incompatibility with the *Human Rights Act 2004*". In *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).

The Committee recommends that the Minister advise the Assembly why in each case the exercise of the relevant discretion could not be conditioned upon the holder of the power acting upon "reasonable grounds" or some equivalent basis.

Wide or unconfined discretions

From a rights perspective, it is desirable that a discretion be conferred in terms that indicate the matters that are relevant and/or irrelevant to the exercise of the power. The possibility that a court would "read down" apparently unconfined discretions is not an adequate justification for inserting them in legislation. Explicit confinement in the law provides some guidance to those who might be affected by an exercise of the power, and, for those who have the resources to challenge a decision, assists a court or tribunal considering a challenge.

Paragraph 61(1)(c) provides an example of an unconfined discretion. It provides that the director-general may impose a financial assurance condition on a public unleased land permit if satisfied that it is justified having regard to two specified matters and then "any other matter the director-general considers relevant".

Two aspects of this provision give rise to a rights issue. The first is that this power is cast in subjective terms – that is, it is a question merely of what the registrar considers to be relevant, rather than an objective test of what is in fact relevant. The second is that there is no statement of a criterion according to which relevance may be assessed.

Similar illustrations may be found in subclause 19(5), which states that an approval to carry out work on public unleased land may be made "conditional" by the director-general. There is no indication of what kinds of conditions might be imposed. A similar comment applies to subclause 57(3).

That powers of this kind can be conditioned is revealed by subclauses 12(5) and 25(6). It is hard to see why a similar restriction could not be placed on subclauses 19(5) and 57(3).

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

Consultation with third parties who might be affected by an exercise of administrative power

The director-general may grant a permit to a person to carry out an activity on public unleased land (see clause 57). A complicated process for assessing an application is provided for, and in circumstances where the director-general "considers that carrying on the activity on the public unleased land in accordance with the permit may have significant impact on people lawfully at adjacent or nearby places", he or she must require the applicant for the permit to give notice about the application that, inter alia, invites "anyone" to make a submission to the director-general (clause 53).

(There appears to be no provision requiring the director-general to have regard to any such submission, and the Committee recommends that there should be.)

There is however no similar requirement where the director-general "receives an application to amend a public unleased land permit under section 69" (see clause 70 for the power to amend), or where the director-general receives an application for the renewal of a permit (see clause 74 for the power to renew). An amendment to a permit might well affect a third party as much as an initial grant of a permit, and on a renewal a third party might be better placed to object on the basis of the experience of the exercise of the permit.

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

Compensation for damage caused by administrative action

Where graffiti on property on leased territory land is visible from public unleased land, an authorised person may remove the graffiti with the consent of the occupier of the land (subclause 38(2)). In addition, there are limited circumstances in which an authorised person may remove the graffiti without the consent of the occupier of the land (subclause 38(3)), and in such cases the graffiti removal work must be carried out only from public unleased land (subclause 38(4)). In all cases, the cost of the removal work is payable by the Territory, and the Territory "is liable for any damage caused to the property in carrying out graffiti removal work, other than any minor damage that is incidental to the removal of the graffiti" (subclause 39(2)).

The Committee raises no issue about these provisions, and cites them by way of contrasting them to those in clause 14. The latter is described in the Explanatory Statement:

> This clause sets out the process to be followed if the director-general temporarily closes a public road and considers that it is necessary to make a temporary road for use while the road is closed. If the land for the temporary public road is fenced, the director-general must tell the occupier or owner of the land about the temporary public road at least 24 hours before making the temporary public road unless there are urgent circumstances. Urgent circumstances could, for example, be flooding or a spillage.

Given that the temporary road might be constructed on leased land, there is a question whether the lessee should be entitled to compensation in the same manner as is provided for in clause 39.

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

Does a provision of the Bill make rights, liberties and/or obligations dependent upon non-reviewable decisions?—(term of reference (c)(iii))?

The Explanatory Statement explains the effect of clause 66:

> **Clause 66 – Financial assurance condition—recovery of extra costs**
>
> This clause applies if the director-general makes a claim on or realises a financial assurance condition under a public unleased land permit and the amount recovered by the director-general (the realised assurance) is less than the reasonable expenses that the director-general incurred, or will incur, in repairing the damage. The provision sets out the process and timelines for giving a written notice requiring the permit-holder to pay the reasonable difference between expenses and the realised assurance.
>
> If the permit-holder does not pay the stated amount then the amount that remains unpaid together with interest on the unpaid amount, is a debt due to the Territory by the permit-holder. The Minister can determine interest rates for this clause as set out under subsection 130(1)(b) of the Act.

The Committee calls upon the Minister to explain how a permit-holder might challenge the director-general's assessment that "the amount recovered by the director-general (the realised assurance) is less than the reasonable expenses that the director-general incurred, or will incur ...".

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

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties? **Report under section 38 of the *Human Rights Act 2004***

Strict liability offences

The Bill would create a number of strict liability offences. The Committee agrees with the comments in the Explanatory Statement (at page 3) on the compatibility of these provisions with the presumption of innocence stated in subsection 22(1) of the *Human Rights Act 2004* and does not call upon the Minister to make a response.

Enforcement of the scheme of the Bill

Part 4 of the Bill provides the enforcement of the various offences proposed by the Bill. Again, the Committee agrees in general with the comments in the Explanatory Statement (at page 4) on the compatibility of these provisions with the right to privacy (HRA paragraph 12(a).

There are some provisions that Members of the Assembly may wish to consider.

Subclause 92(2) requires a person to provide their name and address to a police officer where the latter believes on reasonable grounds that a person "(a) has committed, is committing or is about to commit an offence against this Act; or may be able to assist in the investigation of an offence against this Act. At common law a person is not obliged to assist the police in this way. The Committee notes that such a power is now commonly conferred on police and that the relevant officer must believe (and not simply suspect) that a direction is warranted.

Clause 96 provides that in defined circumstances a police-officer may direct a person to leave public unleased land. The Committee refers members to the Explanatory Statement comment (at page 3-4) on this power and its compatibility with HRA section 13 (freedom of movement).

Paragraph 107(1)(f) provides that an authorised person may

> at any time, enter premises if the authorised person believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary.

A power vested in an official to conduct a warrantless search raises a question as to its compatibility with the right to privacy (HRA paragraph 12(a), and should always be addressed specifically in an Explanatory Statement. This Explanatory Statement makes no reference to this power.

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

ROAD TRANSPORT (GENERAL) AMENDMENT BILL 2011

This is a Bill to amend the *Road Transport (General) Act 1999*, the *Road Transport (Offences) Regulation 2005* and the *Road Transport (Safety and Traffic Management) Act1999*, and in particular (a) would give police and authorised officers power to direct a person to remove an item that obscures all or part of the person's face, and (b) refine the concepts of "repeat offender" and "first offender" in Division 4.2 of the *Road Transport (General) Act 1999*.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?* Report under section 38 of the *Human Rights Act 2004

A number of rights in the *Human Rights Act 2004*, and rights viewed more generally, are engaged by the proposal in clause 5 to insert a new section 58B into the *Road Transport (General) Act 1999* under which a police officer or authorised person may direct removal of thing covering person's face. As stated in the Explanatory Statement, new section 58B would not be:

> a prohibition on wearing items that obscure the face. It is a power to direct the removal of items that wholly or partly obscure a person's face, for two specific purposes:
>
> - to establish the directed person's identity, in connection with a function under the road transport legislation; and
> - for conducting alcohol or drug testing under the *Road Transport (Alcohol and Drugs) Act 1977*.

The HRA rights engaged include, most obviously,

- the right of a person "not to have his or her privacy ... interfered with unlawfully or arbitrarily" (HRA paragraph 12(a)); and
- the right of everyone "to freedom of expression" (HRA subsection 16(2));

and, in some instances where the new section would apply,

- the right of a person to "the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching" (HRA paragraph 14(1)(b)), and
- the right of anyone "who belongs to an ethnic, religious or linguistic minority" "to enjoy his or her culture, to declare and practise his or her religion".

The Explanatory Statement addresses only the last two mentioned rights. The right to privacy is however significant, for there may well be instances where a person covers her of his face for a genuine reason not connected with the practice of any religion or cultural practice. It is not possible to foresee all cases where a person would have a genuine reason. One such would be a person whose face was disfigured, and might cover the face in order to

that its features remain private, and not subject to public view. It is not difficult to appreciate that this would be a privacy interest protected by HRA paragraph 12(a).

So far as the rights it identified, the Explanatory Statement offers a justification, in terms of HRA section 28, for their limitation.

Paragraph 28(2)(a) requires that consideration be given to "the nature of the right affected". Perhaps this is meant to suggest that some HRA rights are more worthy of protection than others, but the Act offers no guidance on this issue. It may be accepted that each of the rights identified above is significant, and should not be limited unless there is clear, weighty and demonstrated reasons to do so.

Paragraph 28(2)(b) next requires that consideration be given to "the importance of the purpose of the limitation" on the relevant rights. The Explanatory Statement addresses this matter as follows:

> This power is not enacted in response to any difficulties experienced with members of a religious or cultural group in the ACT. Neither ACT Policing nor the Office of Regulatory Services have encountered problems when dealing with members of communities who choose to wear items that identify them as belonging to a particular religious or cultural group. However, from time to time, some drivers and other road users whose identity is being checked under the road transport legislation have refused, for reasons not relating to religious or cultural observance, to remove facially obscuring items such as masks, balaclavas, "hoodies", scarves, sunglasses and helmets of various types. On occasions, it has been necessary to arrest a driver or rider and take the person into custody for an identity check, because there is currently no express power under the road transport legislation to direct the person to remove an item in order to compare the person's face with the photograph on the person's driver or rider licence.
>
> ...
>
> Public safety is the ultimate purpose of the limitation in this instance. The power to direct a person to remove an item that obscures the person's face is essential to enable police and authorised persons to establish the identity of a person in connection with a function under the road transport legislation, and for conducting alcohol or drug testing. Confirming the identity of participants in the various aspects of the regulatory scheme is essential, not least to ensure that those participants hold the required licence for the activity in which they are engaged. Police observation of a person during alcohol and drug testing is also essential to ensure that they can confirm the integrity of the sampling/testing process. The power is intrinsically linked to the effective enforcement of the road transport legislation. That legislation is directed at establishing a safe and orderly scheme for regulating traffic and transport in the ACT. A substantial volume of the legislation is devoted to road safety issues such as driver competency (including driver training and the road rules), driver impairment, vehicle management (including heavy vehicle loading and restraints) and vehicle standards.

This is clearly a significant purpose, and one that if achieved will enhance the right to security of the purpose stated in HRA subsection 18(1).

Paragraph 28(2)(d) requires that consideration be given to "the relationship between the limitation and its purpose". This amounts to asking whether the limitation proposed would assist to achieve its purpose, and in this instance it may be predicted that this relationship exists.

Paragraph 28(2)(d) requires that consideration be given to "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve".[7] This is a critical and difficult element in the exercise of applying HRA section 28. It may be applied by asking whether all reasonable measures that could have been taken to accommodate the needs of those persons to whom a direction may be given, (that is, those that wish to cover their face), have been taken in the framing of the power of a police officer.

The Explanatory Statement addresses this issue by pointing out that

> new sections 58B (2) and (3) have been drafted to allow for reasonable accommodation of genuine religious and cultural concerns. Section 58B (3) provides that a directed person may request permission to remove the item in front of a police officer or authorised person of the same sex and/or to remove the item in a place or manner that affords that person reasonable privacy.

New subsection 58B(4) requires the police officer to "take reasonable steps to comply with the request". This degree of amelioration of the limitation to the relevant rights is however seriously qualified by new subsection 58B(5). As explained in the Explanatory Statement :

> To avoid disputes as to whether the police officer or authorised person took 'reasonable steps' and/or in fact complied with a request, section 58B (5) provides that a failure to comply with a request does not become a ground for challenging actions that were taken or not taken under section 58B.

The effect of subsection 58B(5) would remove the possibility of a dispute about whether a police officer had taken reasonable steps, etc. However, the prospect that there may be a dispute about the extent of a limitation on power necessarily arises out of imposing that limitation by law. To preclude challenge to an exercise of the power on the basis that a limitation has not been observed removes the point of creating the limitation. Section 58B needs to be assessed as if subsections 58B(3) and (4) were not present. ***This then raises the question: why would it not be reasonable to make the requirement in subsection 58B(3) mandatory and subject to "dispute"?*** The Committee notes that this appears to be the course adopted in the recent amendments in New South Wales; see now the *Law Enforcement (Powers and Responsibilities) Act 2002*, subsection 19A(3).

The NSW provision also applies to any person to whom a direction is given, and not only to defined categories. ***This then raises the question: why would it not be reasonable to require that the procedure stated in subsection 58B(3) apply in every case where a direction is given?***

[7] Paragraph 28(2)(c), which requires that consideration be given to "the nature and extent of the limitation", may add little, and is considered together paragraph 28(2)(d). The Explanatory Statement took this approach.

A related issue arises out of the limited extent of the protection ostensibly afforded by subsections 58B(3) and (4). As noted above, there are persons other than those who have some genuine religious or cultural reason for wishing to cover their face, such as a person whose face was disfigured (and does not require medical treatment). The failure to provide some protection for such persons may amount to a failure to provide the "equal protection of the law" to them (HRA subsection 8(3)). That is, of the class of persons who have a genuine need to cover their face, protection is given to only a number of this class and not to all, and it is those, such as the person with a disfigured face, who are discriminated against.

One approach would be to expand the categories of those who would have a genuine reason and to permit the Executive to add more categories by a disallowable instrument; (compare section 19B of the *Law Enforcement (Powers and Responsibilities) Act 2002).* Another might be to provide that an offence is committed only where a person fails "without reasonable excuse" to comply with a direction of a police-officer. The person would carry an evidential burden to establish the particular reasonable excuse. (The Committee accepts that there is an objection to providing for a "reasonable excuse defence",[8] but notes too that Territory statutes frequently make such provision.) ***This then raises the question: is there some way to extend protection to more categories of persons?***

Another measure of protection to a person given a direction lies in new subsection 58(8), which, as the Explanatory Statement states, "provides a specific defence in relation to the non-removal of face coverings that are required for medical reasons". The Explanatory Statement adds:

> A person's ongoing medical treatment is accepted as legitimate reason for not removing an item that covers all or part of the person's face [footnote omitted]. The defendant has a legal onus in relation to this defence. This onus is placed on the defendant rather than the prosecution as the defendant's medical records are a private matter to which the prosecution will not usually have access.

Although not noted by the Explanatory Statement, placing a legal onus on defendant engages the presumption of innocence states in HRA subsection 22(1). ***This then raises the question: why would it not be reasonable to impose only an evidential burden on a defendant?***

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

[8] *Taikato v R* [1996] HCA 28.

Disallowable Instrument DI2011-262 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 7) made under section 12 of the *Road Transport (General) Act 1999* **disapplies the road transport legislation to a road or road related area where a special stage of the 2011 Shannon's Safari Rally is being conducted.**

Disallowable Instrument DI2011-285 being the Civil Law (Wrongs) Professional Standards Council Appointment 2011 (No. 3) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **re-appoints a specified person as a member of the Professional Standards Council, representing Queensland.**

Disallowable Instrument DI2011-286 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* **disapplies the road transport legislation to a road or road related area where a special stage of the 2011 National Capital Rally media day and the 2011 National Capital Rally is being conducted.**

Disallowable Instrument DI2011-287 being the Independent Competition and Regulatory Commission (Regulated Water and Sewerage Services) Terms of Reference Determination 2011 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission an investigation into, and the making of a price direction for, regulated water and sewerage services provided by ACTEW Corporation Limited.**

Disallowable Instrument DI2011-289 being the Civil Law (Wrongs) Professional Standards Council Appointment 2011 (No. 4) made under Schedule 4, sections 4.38 and 4.39 of the *Civil Law (Wrongs) Act 2002* **reappoints a specified person as a member, representing Victoria, and deputy chairperson of the Professional Standards Council.**

Disallowable Instrument DI2011-291 being the Road Transport (General) Application of Road Transport Legislation Declaration 2011 (No. 8) made under section 13 of the *Road Transport (General) Act 1999* **exempts the accredited operator of a hire car service and designated vehicles and drivers of those vehicles from the legislative requirements of the road transport legislation that apply to hire cars and buses.**

Disallowable Instrument DI2011-293 being the Civil Law (Wrongs) Law Society of South Australia Scheme 2011 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **approves The Law Society of South Australia Professional Standards Scheme.**

Disallowable Instrument DI2011-294 being the Major Events Security Declaration 2011 (No. 1) made under section 4 of the *Major Events Security Act 2000* **applies the provisions of the Act to the visit of the President of the United States of America to the Australian War Memorial.**

Disallowable Instrument DI2011-296 being the Animal Diseases (Exotic Diseases) Declaration 2011 (No. 1) made under section 12 of the *Animal Diseases Act 2005* **revokes DI2005-235 and updates the list of declared exotic diseases in the ACT.**

Disallowable Instrument DI2011-297 being the Animal Diseases (Endemic Diseases) Declaration 2011 (No. 1) made under section 16 of the *Animal Diseases Act 2005* **revokes DI2005-236 and updates the list of declared endemic diseases in the ACT.**

Disallowable Instrument DI2011-298 being the Canberra Institute of Technology (Advisory Council) Appointment 2011 (No. 8) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2011-299 being the Public Place Names (Kingston) Amendment Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends the notice published in Commonwealth of Australia Gazette No. 29 by revoking the extension of Newcastle Street north westerly to The Causeway and determines the names of two new roads in the Division of Kingston.**

Disallowable Instrument DI2011-300 being the Racing Appeals Tribunal Appointment 2011 (No. 2) made under section 40 and schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instrument DI2011-301 being the Racing Appeals Tribunal Appointment 2011 (No. 3) made under section 40 and schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instrument DI2011-302 being the Racing Appeals Tribunal Appointment 2011 (No. 4) made under section 40 and schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instruments—Comment

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

Is this a disallowable instrument? Who is the chair of this Council?

Disallowable Instrument DI2011-288 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council) Appointment 2011 (No. 1) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **appoints specified persons to be members of the Climate Change Council.**

This instrument appoints 6 specified persons as members of the Climate Change Council. The appointments are made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010*, which provides:

> **20 Membership**
>
> (1) The council consists of at least 5, but not more than 9, members appointed by the Minister.
>
> *Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.
>
> *Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).
>
> *Note 3* A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def ***appoint***).
>
> (2) The Minister must, to the greatest extent practicable, ensure that—
>
> (a) the council includes people with a broad range of skills and knowledge relating to addressing, or adapting to, climate change; and

(b) the following people are among the members appointed:

(i) a person to represent the interests of business;

(ii) a person to represent the community's interest in climate change;

(iii) a person to represent climate change science;

(iv) a person to represent environmental management;

(v) a person to represent the built environment;

(vi) a person to represent transport planning;

(vii) a person to represent people who are socially or financially disadvantaged;

(viii) an energy specialist;

(ix) a public employee.

(3) The Minister may appoint a person as a member only if satisfied that the person—

(a) is committed to addressing climate change; and

(b) has knowledge and experience in an area relevant to the operation of this Act.

(4) The conditions of appointment of a member are the conditions stated in the appointment.

Section 21 of the *Climate Change and Greenhouse Gas Reduction Act 2010* provides for the appointment of the chair of the Council

21 Chair

The Minister must appoint a member of the council (other than a member who is a public employee) to be the chair of the council.

The Committee notes that the Minister must appoint a member of the Council as chair.

The Explanatory Statement for the instrument states:

Prior to making this appointment, the Minister considered nominations from the community to ensure that the Council consists of at least 5 but not more than 9 members. To the greatest extent possible the Minister ensured that

a) The Council included people with a broad range of skills and knowledge relating to addressing, or adapting to climate change; and

b) Representatives of the following areas are among the members appointed:

i. a person to represent the interests of business;

ii. a person to represent the community's interest in climate change;

iii. a person to represent climate change science;

iv. a person to represent environmental management;

v. a person to represent the built environment;

vi. a person to represent transport planning;

vii. a person to represent people who are socially or financially disadvantaged;

viii. an energy specialist;

ix. a public employee.

The Minister appointed individuals to the Climate Change Council that:

a) are committed to addressing climate change; and
b) have knowledge and experience in an area relevant to the operations of the Act.

The Minister appointed a member of the Council (other than the public employee) to be the chair of the Council.

First, the Committee notes that there is nothing either on the face of the instrument or in the Explanatory Statement to indicate whether or not the various specified persons are public servants. There is only a statement that the (unspecified) person appointed as chair of the Council is not *the* public servant. This suggests that at least one on the persons appointed is a public servant.

The Committee notes that it has consistently maintained that instruments of appointment that are considered by the Committee should generally contain a statement to the effect that "the person appointed is not a public servant". This is intended to address the fundamental jurisdictional issue for the Committee, which is that (generally) statutory appointments are only disallowable by the Legislative Assembly (and, therefore, subject to the jurisdiction of the Committee) if they appoint persons who are not "public servants", as defined in the *Legislation Act 2001*. The legal basis for this is as follows.

Section 227 of the Legislation Act provides for the application of Division 19.3.3 of that Act, which contains the requirements, for statutory appointments, for (a) consultation with the relevant Legislative Assembly committees and (b) disallowance of an appointment by the Assembly. It provides:

227 Application—div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

(c) a person to a statutory position if the only function of the position is to advise the Minister.

"Public servant" is defined in Part 1 of the Dictionary for the Legislation Act:

public servant means a person employed in the public service.

"Public service" is then defined as follows:

public service means the Australian Capital Territory Public Service.

Note The *Public Sector Management Act 1994*, s 12 deals with the constitution of the public service.

The Committee would appreciate the Minister's clarification as to whether or not the various persons appointed by this instrument are public servants.

The second issue for the Committee concerns the appointment of one of the specified persons appointed (by this instrument) as members of the Council as the chair of the Council. While the Committee is prepared to accept the statement in the Explanatory Statement that the Minister *has* appointed a member of the Council as the chair of the Council, **the Committee**

would appreciate the Minister's advice as to the identity of the person appointed as chair. In making this request, the Committee assumes that there are no legal or practical reasons why this information cannot be provided to the Committee.

Is this a disallowable instrument?

Disallowable Instrument DI2011-290 being the Public Trustee (Investment Board) Appointment 2011 (No. 2) made under section 48 of the *Public Trustee Act 1985* **appoints specified persons as members of the Public Trustee Investment Board.**

This instrument appoints 2 specified persons as members of the Public Trustee Investment Board, with effect from 3 March 2012. The Explanatory Statement for the instrument states:

> This instrument appoints Christine Goode and Patrick McAullife as members of the Public Trustee Investment Board. The appointment is made under section 48 of the *Public Trustee Act 1985*.
>
> Mr McAuliffe is a public servant as defined under the Legislation Act 2001.
>
> As required by the Legislation Act 2001, the Standing Committee on Justice and Community Safety has been consulted on the appointments. The Committee has advised that it has no comments on the appointments of these members.

(The Committee notes that there is, in fact, a typographical error in the reference to the *Legislation Act 2001* in the version of the Explanatory Statement that appears on the ACT Legislation Register.)

The Committee notes that it has consistently maintained that instruments of appointment that are considered by the Committee should generally contain a statement to the effect that "the person appointed is not a public servant". This is intended to address the fundamental jurisdictional issue for the Committee, which is that (generally) statutory appointments are only disallowable by the Legislative Assembly (and, therefore, subject to the jurisdiction of the Committee) if they appoint persons who are <u>not</u> "public servants", as defined in the *Legislation Act 2001*. The legal basis for this is as follows.

Section 227 of the Legislation Act provides for the application of Division 19.3.3 of that Act, which contains the requirements, for statutory appointments, for (a) consultation with the relevant Legislative Assembly committees and (b) disallowance of an appointment by the Assembly. It provides:

> **227 Application—div 19.3.3**
>
> (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
>
> (2) However, this division does not apply to an appointment of—
>
> (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
>
> (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
>
> (c) a person to a statutory position if the only function of the position is to advise the Minister.

"Public servant" is defined in Part 1 of the Dictionary for the Legislation Act:

public servant means a person employed in the public service.

"Public service" is then defined as follows:

public service means the Australian Capital Territory Public Service.

Note The *Public Sector Management Act 1994*, s 12 deals with the constitution of the public service.

In this particular case, the Committee (and the Legislative Assembly) may be entitled to assume that the fact that the Explanatory Statement for the instrument states one of the persons appointed by this instrument is a public servant means that the other person appointed is *not* a public servant. It would be preferable, however, if the Explanatory Statement expressly identified the issue of whether or not each of the persons appointed are public servants. The Committee does not consider this to be an onerous requirement.

The Committee simply notes that the appointment of the person identified as a public servant need not have been implemented by means of a disallowable instrument.

The Committee would appreciate the Minister's clarification as to whether or not the various persons appointed by this instrument are public servants.

Is this a disallowable instrument?

Disallowable Instrument DI2011-292 being the Domestic Violence Agencies (Council) Appointment 2011 (No. 1) made under sections 6 and 6A of the *Domestic Violence Agencies Act 1986* **revokes DI2009-74 and appoints a specified person as a police officer member, and specified persons as community members, of the Domestic Violence Prevention Council.**

This instrument appoints a specified person as a community member and as the chairperson of the Domestic Violence Prevention Council. It appoints a further four specified persons as community members of the Domestic Violence Prevention Council. It appoints a specified police officer as a police officer member of the Council.

The Committee notes that the member appointments are made under section 6 of the *Domestic Violence Agencies Act 1986*, which provides:

6 Membership of council

(1) The council consists of—

(a) the coordinator; and

(b) 12 other members (each of whom is an *appointed member*) appointed by the Minister.

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

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act s 207).

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

(2) The appointed members must consist of—

(a) at least 6 people as community members, including—

(i) at least 1 person who the Minister considers is capable of representing the views and interests of people of Aboriginal and Torres Strait Islands descent; and

(ii) at least 1 person who the Minister considers is capable of representing the views and interests of people of non-English speaking background; and

(iii) at least 1 representative of the Domestic Violence Crisis Service Incorporated; and

(b) other people who are—

(i) statutory office holders; or

(ii) public servants; or

(iii) police officers.

(3) The instrument making or evidencing the appointment of a person as an appointed member must state the capacity in which the person is appointed.

(4) The Minister may appoint a person to the council as a community member only if the Minister considers that the person is familiar with the views and interests of the community on matters relating to domestic violence and is capable of representing those views and interests.

(5) The Minister may appoint a statutory office holder to the council only if satisfied that the exercise of the functions of the office requires its holder to have experience and expertise that would assist the council to exercise its functions.

(6) The Minister may appoint a public servant or police officer to the council only if—

(a) the person has a position the functions of which involve dealing with matters that are relevant to a function of the council; and

(b) the Minister considers that the person has the experience and expertise that would assist the council to exercise its functions.

The Explanatory Statement for the instrument states:

Section 6 of the Act stipulates that the Council is constituted by the Domestic Violence Project Coordinator and twelve other members appointed by the Minister. Paragraph 6(2)(a) specifies that the appointed members must consist of six or more community members, including at least:

- one person who the Minister considers is capable of representing the views of Aboriginal and Torres Strait Islander descent; and
- one person who the Minister considers is capable of representing people of non-English speaking background; and
- one representative of the Domestic Violence Crisis Service Incorporated.

Paragraph 6(2)(b) of the Act states that the Council membership must also consist of other people who are statutory office holders, public servants or police officers.

Section 229 of the *Legislation Act 2001* states that the instrument making an appointment, to which Division 19.3.3 of the Legislation Act applies, is a disallowable instrument.

Section 227 provides that the Division does not apply to those appointees who are public servants.

In accordance with section 6(3) of the Act, this instrument states the capacity in which each person is appointed. Each of the community members is appointed because the Minister considers that the person is familiar with the views and interests of the community on matters relating to domestic violence and is capable of representing those views and interests.

The Committee notes that the statement above that section 227 of the *Legislation Act 2001* "does not apply to those appointees who are public servants" is correct. However, it would assist the Committee (and the Legislative Assembly) if the Explanatory Statement also stated whether or not the persons appointed by the instrument are public servants, so that it is made clear to the Committee (and the Legislative Assembly) which of the particular appointments made engage the scrutiny powers (of both the Committee and the Legislative Assembly) set out in Division 19.3.3 of the Legislation Act. As the Committee continues to suggest, this would not seem to be an onerous requirement.

The Committee would appreciate the Minister's advice as to which, if any, of the persons appointed are public servants, for the purpose of the definition in the Legislation Act.

Is this appointment validly made?

Disallowable Instrument DI2011-303 being the Racing Appeals Tribunal Appointment 2011 (No. 5) made under section 40 and Schedule 1, section 1.1 of the ***Racing Act 1999*** **appoints a specified person as a member and president of the Racing Appeals Tribunal.**

This instrument appoints a specified person as a member and as the president of the Racing Appeals Tribunal.

The Committee notes that the appointment is made under section 40 of the *Racing Act 1999*, which provides:

40 Membership

(1) The tribunal must consist of—

(a) a president; and

(b) a deputy president; and

(c) 4 other members.

(2) The appointment and conditions of office of members of the tribunal must be in accordance with schedule 1.

The relevant provisions of the Schedule then provide:

1.1 Tribunal members—appointment

(1) Members of the tribunal are to be appointed by the Minister.

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

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

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

(2) The president and deputy president must be lawyers of not less than 5 years standing.

(3) A person is not eligible to be a member of the tribunal if the person is—

(a) an officer or employee of a controlling body;

(b) registered with or licensed by a controlling body under the approved rules (otherwise than as the owner of a horse or dog that is so registered or licensed); or

(c) registered with or licensed by a corresponding body (otherwise than as the owner of a horse or dog that is so registered or licensed), if the registration or licence is of a kind recognised by a controlling body for the approved rules.

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

The Explanatory Statement for the instrument states:

> Section 7G of the *Magistrates Court Act 1930* requires that a magistrate not accept appointment to another office under a law of the Territory without the written consent of the Attorney General. The provision also requires that the Attorney General consult with the Chief Magistrate before giving consent. Consequently, the Attorney General, following consultation with the Chief Magistrate, has consented to Magistrate Lalor's reappointment.
>
> Under section 229 (Appointment is disallowable instrument) of the *Legislation Act 2001* the instrument making the appointment is a disallowable instrument.
>
> The Standing Committee on Public Accounts has been consulted about this reappointment in accordance with section 228 (Consultation with appropriate Assembly committee) of the *Legislation Act 2001*. The Committee advised that it has no recommendation to make on the reappointment.

The Committee notes that there is no reference, either on the face of the instrument or in the Explanatory Statement, to the requirement in subitem 1.1 (2) of the Schedule that the President of the Tribunal be a lawyer of not less than 5 years standing

In making this observation, the Committee also notes the following issues. First, this appointment is, in fact, a re-appointment. Most recently, on 30 September 2008, the specified person was appointed, by DI2008-255, as President of the Tribunal, for a period of 3 years.

Second, the Committee notes that a person cannot be appointed as a magistrate unless he or she has been a lawyer for at least 5 years. Section 7A of the *Magistrates Court Act 1930* provides:

> **7A Eligibility for appointment as magistrate**
>
> A person is not eligible for appointment as a magistrate unless the person is a lawyer and has been a lawyer for at least 5 years.

This being so, the Committee (and the Legislative Assembly) is entitled to assume that the appointment of a magistrate as the President of the Tribunal clearly satisfies the requirement in subitem 1.1 (2) of the Schedule.

Third, however, the Committee notes that it has made a similar comment in relation to an earlier appointment of the magistrate in question as President of the Tribunal. In *Scrutiny Report No 48* of the *6th Assembly* (19 November 2007), in relation to DI2007-232, the Committee stated:

> The Explanatory Statement to this instrument contains no information as to the matters referred to in subitems 1.1(2) and (3) above. Nor does it indicate whether or not any of the persons appointed are public servants. While the Committee may be entitled to assume that, in relation to the 3 individuals who are being re-appointed, the eligibility requirements have been met and that there are no factors that make the persons in question ineligible for appointment, it would assist the Committee (and the Assembly) if all of these matters were dealt with in the Explanatory Statement. In any event, this does not apply to the 2 new appointments. Further, as the Committee has consistently maintained, it assists the Committee (and the Assembly) if all such Explanatory Statements indicate whether or not the person(s) appointed are public servants.

As the Committee has consistently stated, it does no consider it to be an onerous requirement for instruments of appointment, either on their face or in the Explanatory Statement, to demonstrate that any formal requirements in relation to the appointment have been met.

In making this comment, the Committee suggests that it is not merely being pedantic in relation to trying to ensure that any pre-requisites for a particular appointment have been met.

The Committee notes that, in 2011, in the case of Kutlu v Director of Professional Services Review ([2011] FCAFC 94 (28 July 2011), see http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html), the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth Health Insurance Act 1973, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel. In Kutlu, a medical practitioner challenged action taken against him on the basis that members of various committees appointed from the PSR Panel that were involved in the action against him were not properly appointed, because the AMA had not been consulted in relation to various appointments.

The Full Federal Court considered whether the statutory requirement to consult was a mandatory requirement, or merely direction that would not result in invalidity if not followed. The Court found that it was a mandatory requirement and that the requirements to consult were "essential preliminaries to the Minister's exercise of the power of appointment". The Full Court found that, as a result, various things done in relation to Dr Kutlu, by various committees, were invalid.

The Court stated (at para 32):

> [T]he scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices …

The wider effect of the decision in *Kutlu* was to invalidate scores of other investigations of other medical practitioners. Its effect was extremely damaging to the Commonwealth.

The decision in *Kutlu* (and its consequences) underlines the Committee's reasons for maintaining its diligence in relation to attempting to ensure that any pre-requisites for appointments that come before the Committee have been met.

This comment does not require a response from the Minister.

Subordinate Laws—Comment

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

Human rights compatibility

Subordinate Law SL2011-28 being the Road Transport (Vehicle Registration) Amendment Regulation 2011 (No. 1) made under the *Road Transport (General) Act 1999, Road Transport (Mass, Dimensions and Loading) Act 2009* and *Road Transport (Vehicle Registration) Act 1999* **incorporates changes to the nationally agreed vehicle standards, developed by the National Commission, into the *Road Transport (Vehicle Registration) Regulation 2000*.**

The Committee notes that the Explanatory Statement for this subordinate law contains the following statement:

> The amendments are considered to be consistent with human rights. They are aimed at protecting the interests and safety of all road users by providing for comprehensive vehicle standards. The amendments relating specifically to registration requirements and standards for public vehicles are aimed at ensuring that public vehicle transportation services are provided in clean, safe vehicles.

The Committee makes no further comment on this subordinate law.

This comment does not require a response from the Minister

Limitation of appeal rights

Subordinate Law SL2011-30 being the Planning and Development Amendment Regulation 2011 (No. 1), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation 2008 to respond to the problem of developments in the Kingston Foreshore area being delayed due to lengthy third party appeal processes.**

As acknowledged in the Explanatory Statement for this subordinate law, this subordinate law exempts certain matters in the "merit assessment track" for development applications from third-party merit review in the ACT Civil Appeals Tribunal (**ACAT**). In particular, it exempts development applications relating to the Kingston Foreshore from being the subject of applications for review, to ACAT, by third parties.

The way that this subordinate law achieves this is as follows.

Schedule 1 to the *Planning and Development Act 2007* provides for "reviewable decisions" under the Act. These reviewable decisions are reviewable, on their merits, by ACAT. As noted in the Explanatory Statement for this subordinate law, item 4 of Schedule 1 to the Act provides that the regulations may exempt certain applications under the Act from review.

This latter power is exercised in regulation 350 of the *Planning and Development Regulation 2008*, which provides:

350 Merit track decisions exempt from third-party ACAT review—Act, sch 1, item 4, col 2, par (b)

A development application in relation to a matter mentioned in schedule 3 (Matters exempt from third-party ACAT review), part 3.2 (Merit track matters exempt from third-party ACAT review) is exempt.

This subordinate law adds the Kingston Foreshore to Schedule 3, thereby exempting development applications relating to the Kingston Foreshore from "third-party ACAT review".

Clearly, by limiting what would otherwise be an entitlement for third parties to seek to have development applications relating to the Kingston Foreshore reviewed, on their merits, by ACAT, this subordinate law has an obvious impact in relation to principle (a) of the Committee's terms of reference, in that it might be considered to unduly trespass on rights previously established by law (contrary to principle (a)(ii) of the Committee's terms of reference) and/or make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions (contrary to principle (a)(iii) of the Committee's terms of reference). There might also be human rights implications, under the *Human Rights Act 2004*.

The Committee notes that these issues are canvassed extensively in the Explanatory Statement for this subordinate law. The Committee notes, in particular, the following passage:

> The *Human Rights Act 2004*, in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the proposed law.
>
> However, in relation to section 21, it would appear that case law (refer to Attachment A) indicates that human rights legislation does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial.
>
> In two ACAT cases (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46) agreed that some limitation on third party appeal rights is warranted when it delivers certainty and predictability for proponents. Specifically the Commissioner (in Thomson) commented that "...providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights.". In a further ACAT case (Tran) the Tribunal agreed with the approach in *Thomson*.
>
> Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.
>
> To the extent that the proposed law limits any rights afforded by the *Human Rights Act 2004*, these limitations must meet the proportionality test of section 28 of that legislation. In this case, the proposed law serves to improve the development assessment process within the Kingston Foreshore area by increasing certainty and reducing delays and costs. It should serve to facilitate development in this area which is of general benefit to the Territory. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. The proposed law does not affect rights persons may have under the *Administrative Decisions (Judicial Review) Act 1989*.

> As indicated above, schedule 1 of the Planning and Development Act, item 4, column 2, par (b) expressly allows the Executive to make regulations to exempt specified matters in the merit assessment track from being subject to third party ACAT merit review. This means the proposed law is within an express power granted by the Legislative Assembly.
>
> Amendments to widen the exemptions in a similar way have previously been passed by regulation (see for instance SL 2006-13 being the Land (Planning and Environment) Amendment Regulation 2006 (no.2) (the LP&E Regulation).
>
> The Scrutiny of Bills Committee (the Committee), in reviewing the proposed regulation raised concerns with that regulation under the Committee's terms of reference (paras (a)(ii), (iii) and (iv)) that require it to consider whether regulations unduly trespass on rights previously established by law, makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions or contains matters which should be properly dealt with in legislation.
>
> In [sic] was the Committee's view, that while the regulation, i.e. the LP&E Regulation, does trespass on previously established rights and makes rights dependent on unreviewable decisions, it does not do so unduly. In this regard, the Committee accepted the rationale for removing third party appeal rights put forward in the Explanatory Statement (for that regulation).
>
> The Committee had greater concern that the regulation dealt with matters that should more properly be dealt with in legislation as the regulation alters and redefines existing rights of review. The Committee, however, noted that the Land Act contains a clear power to make the regulation and that the Explanatory Statement justifies the regulation in unequivocal terms. The Committee indicated that the issue of the appropriate role of legislation and regulations will be raised by the Committee in its report on the Planning and Development Bill. (references omitted)

The Explanatory Statement then quotes a response from the then Minister, dated 14 July 2006, to concerns previously expressed by the Committee. The Explanatory Statement then states:

> In all these circumstances, it is submitted that the proposed law does not trespass unduly on previous rights established by the law nor does it make certain rights unduly dependent on non reviewable decisions.

The Committee considers that the Explanatory Statement for this subordinate law does a good job both of setting out the issues that arise for the Committee and also of addressing those issues. Whether or not the arguments made by the Explanatory Statement adequately address the issues that arise under principles (a)(ii) and (iii) of the Committee's terms of reference or under the Human Rights Act is a matter for the Legislative Assembly.

The Committee draws attention to this subordinate law under principles (a)(ii) and (iii) of the Committee's terms of reference and under section 38 of the *Human Rights Act 2004* (in that it might engage sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]) of the Human Rights Act).

Human rights compatibility

Subordinate Law SL2011-31 being the Road Transport (Driver Licensing) Amendment Regulation 2011 (No. 1) made under section 26 of the *Road Transport (Driver Licensing) Act 1999* **and section 233 of the** *Road Transport (General) Act 1999* **amends uncommenced provisions of the *Road Transport (Driver Licensing) Regulation 2000* that require persons who commit drink or drug driving offences to undertake alcohol or drug awareness courses to regain or retain their driver licence.**

This subordinate law contains amendments to the *Road Transport (Driver Licensing) Regulation 2000*, to require persons who commit drink or drug driving offences to undertake alcohol or drug awareness courses before they can regain or retain their driver's licence. The Committee notes that the Explanatory Statement for the subordinate law expressly addresses human rights issues that might be considered to arise from the amendments made by the subordinate law.

In relation to new subsection 73I(1A) (inserted by clause 22 of this subordinate law), the Explanatory Statement states:

> This clause amends section 73I to insert new section (1A), which permits the road transport authority to approve a course for low range first time offenders and a different course for mid range, high range and repeat offenders. Related amendments (see for example, clauses 4, 8, 14 and 16) require that offenders must complete the course specified for them by the road transport authority, in recognition of their different circumstances and rehabilitation needs. Although different courses are prescribed for offenders in different circumstances, this is not 'discrimination' within the meaning of the *Discrimination Act 1991* as the criteria for allocating an offender to a particular course are not attributes within section 7 of that Act.
>
> In terms of the right to equality before the law under section 8 of the *Human Rights Act 2004*, to the extent that prescribing different courses for offenders with different offending profiles and different needs engages that right, the proposed amendments are a reasonable limitation for section 28 of the *Human Rights Act 2004*. This is because offenders who are considered to be at higher risk of re-offending (and who may pose a higher road-safety risk for that reason) will be required to undertake a longer course with a particular emphasis on personal behavioural change strategies around substance use and driving, while offenders considered to have a lower risk of re-offending (lower road-safety risk) will undertake a shorter course.

In relation to new subsection 73R(1A) (inserted by clause 42 of this subordinate law), the Explanatory Statement states:

> This clause amends section 73R to insert new section (1A), which permits the road transport authority to approve a course for first time offenders and a different course for repeat offenders. Related amendments require that offenders must complete the course specified for them by the road transport authority, in recognition of their different circumstances and rehabilitation needs. As previously explained (see the clause notes for clause 22) it is not considered that this amendment amounts to unlawful discrimination, and it is also considered to be a reasonable limitation of rights for the purposes of section 28 of the *Human Rights Act 2004*.

The Committee draws the attention of the Legislative Assembly to the statements above.

This comment does not require a response from the Minister.

Incorporation of material by reference / Human rights compatibility

Subordinate Law SL2011-32 being the Road Transport Legislation Amendment Regulation 2011 (No. 2) made under sections 24 and 28 of the *Road Transport (Driver Licensing) Act 1999* **and section 44 of the** *Road Transport (Public Passenger Services) Act 2001* **makes amendments relating to the provision of taxi services within the ACT.**

Section 4 of this subordinate law inserts a new paragraph 62(3)(ha) into the *Road Transport (Driver Licensing) Regulation 2000*. The effect of the new provision is to add a further requirement into the eligibility requirements for persons seeking to obtain a public vehicle licence. Under the new requirement, a person seeking a licence to drive a taxi must be certified, by a registered training organisation, as meeting the national minimum English standard (**NMES**).

The Explanatory Statement for this subordinate law states that these amendments

> … implement the agreement by Ministers, meeting as the Australian Transport Council (ATC)1 to adopt a National Minimum English Standard for taxi drivers (the NMES). The NMES is based on assessed levels of English language proficiency under the International Second Language Proficiency Ratings. The purpose of the NMES is to ensure that there is consistency in English language competency in the taxi industry across Australia. Basic English competency is essential for taxi drivers who are required to take bookings, listen to directions from passengers, read maps and road signs, prepare receipts, understand the road rules and comply with directions from taxi operators, taxi networks, taxi regulators and police.

The Explanatory Statement then addresses human rights issues that might arise as a result of the amendment:

> This amendment will engage human rights, including the right to recognition and equality before the law (section 8 of the *Human Rights Act 2004*) and the right of members of a linguistic minority to use their language (section 27 of that Act). It also raises issues relating to discrimination on the basis of race, in the context of an attribute (in this instance, language skills) that persons of a particular race are generally presumed to have (see sections 7 (1) and (2) of the *Discrimination Act 1991*). To the extent that human rights are engaged, any limitation of those rights is considered to be reasonable for the purposes of section 28 of the *Human Rights Act 2004*, because the limitation is necessary to ensure that taxi clients are able to communicate effectively with taxi drivers, and that drivers can understand spoken and written English to the extent required to do their work properly. It should be noted that the industry is currently experience difficulty in recruiting drivers. In order to ensure the pool of potential drivers is not unnecessarily restricted, the nationally agreed standard has been set at the lowest level necessary to ensure that clients can communicate with drivers, and that drivers are otherwise able to complete the tasks involved in working safety and efficiently.
>
> The requirement to satisfy the NMES will be applied across Australia to every person seeking to enter the taxi industry as a driver, regardless of the person's country of origin. The person must undertake an assessment by a registered training organisation certifying the person's ability to speak, hear, read and write English to the specified standard, which was set following detailed consultation with national industry bodies and agreed by Ministers at ATC. This requirement is not considered to be unlawful discrimination within the meaning of the *Discrimination Act 1991* because the NMES for taxi drivers is considered to be an inherent job requirement for all taxi drivers.

The Committee draws this explanation to the attention of the Legislative Assembly.

The Committee also notes that the requirement in new paragraph 62(3)(ha) also relies on a new definition of ***national minimum English standard*** that is inserted by section 5 of this subordinate law. Section 5 inserts the following new subsections (5) and (6) into section 62 of the Road Transport (Driver Licensing) Regulation:

> (5) In this section:

national minimum English standard, for taxi drivers, means the following levels of English language proficiency under the International Second Language Proficiency Ratings (ISLPR):

General Proficiency Version for English, 2010 edition (the ***ISLPR***):

(a) listening—3;

(b) speaking—2+;

(c) reading—2;

(d) writing—1+.

Note The ISLPR does not need to be notified under the Legislation Act because s 47 (5) does not apply (see Legislation Act, s 47 (7)). The ISLPR is accessible at www.islpr.org.

registered training organisation—see the *Training and Tertiary Education Act 2003*, dictionary.

(6) The Legislation Act, section 47 (5) does not apply to the ISLPR.

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

As indicated in the note to new subsection (6), the effect of new subsection (6) is to disapply the requirement in subsection 47(5) of the *Legislation Act 2001*, which provides:

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

This means that there is no obligation to publish, on the ACT Legislation Register, the International Second Language Proficiency Ratings (ISLPR), on which the definition of ***national minimum English standard*** relies. The Committee notes that the Explanatory Statement provides the following explanation:

> New section 62 (5) contains definitions of concepts that are related to new section 62 (3) (ha), including ***national minimum English standard*** and ***registered training organisation.*** The levels of English language proficiency that comprise the NMES are specified in the definition, by reference to the International Second Language Proficiency Ratings, General Proficiency Version for English, 2010 Edition. The note to section 62 (5) explains where the Proficiency Ratings may be accessed.
>
> New section 62 (6) makes it clear that section 47 (5) of the *Legislation Act 2001* does not apply to this incorporation by reference. The Proficiency Ratings are a copyright document and the ACT Government does not own that copyright. The Proficiency Ratings are therefore not a notifiable instrument.

The Committee notes that the copyright issue is one that often arises in relation to the disapplication of the requirement in subsection 47(5) of the Legislation Act. The Committee also notes that the note to the definition helpfully indicates where the ISLPR may be accessed. It seems, however, that (even via the website address provided) the relevant document can only be accessed by ordering the document and paying $38. **If that is the case, the Committee seeks the Minister's views as to why public access to the document cannot be provided free of charge, say at a particular address, within business hours, as is the case with some other legislation that disapplies subsection 47(5) of the Legislation Act.**

No Explanatory Statement

Subordinate Law SL2011-33 being the Court Procedures Amendment Rules 2011 (No. 3) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules 2006.**

The Committee notes that no Explanatory Statement is provided for this subordinate law. The Committee also notes that, while there is no formal requirement to provide an Explanatory Statement, there is an expectation that an Explanatory Statement will be provided for every piece of legislation that is to be considered by the Committee and by the Assembly. The Committee considers that Explanatory Statements provide an important (and often invaluable) opportunity for the makers and proponents of legislation to explain matters relating to the legislation to the Committee and to the Legislative Assembly.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT

Subordinate Law SL2011-30 being the Planning and Development Amendment Regulation 2011 (No. 1), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation 2008 to respond to the problem of developments in the Kingston Foreshore area being delayed due to lengthy third party appeal processes.**

The Committee notes that principle (b) of its terms of reference requires it to consider whether (among other things) any regulatory impact statement meets the technical or stylistic standards expected by the Committee. Section 35 of the *Legislation Act 2001* sets out mandatory requirements for the content of regulatory impact statements. The Committee scrutinises regulatory impact statements to ensure that the requirements of section 35 are met. In particular, the Committee expects the regulatory impacts statements to meet the requirement set out in paragraph 35(h) of the Legislation Act, which is that a regulatory impact assessment contain:

> (h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

The Regulatory Impact Statement for this subordinate law states:

> The discussion below demonstrates that the proposed law is consistent with the Committee's principles.
>
> The matters that need to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is the fact that the proposed law takes away existing rights of review, that is, does it unduly trespass on rights previously established by law and make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. There is also the issue of whether the proposed law contains matter which should properly be dealt with in an Act of the Legislative Assembly.
>
> The proposed law can be considered to trespass on rights previously established by law. The issue is whether it does so unduly. In addition, by removing existing review rights, the proposed law makes certain rights, etc dependent on decisions that are (now) non-reviewable by ACAT. Again, the issue is whether it does so unduly.

The Committee notes that the Regulatory Impact Statement then goes on to canvass the relevant issues, by reference to the same material that the Committee has discussed above, in the context of the consideration of this subordinate law against the Committee's scrutiny principles and against the Committee's obligations under the *Human Rights Act 2004*.

The Committee has no further comment on this Regulatory Impact Statement.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 2 December 2011, in relation to comments made in Scrutiny Report 45 concerning the Business Names Registration (Transition to Commonwealth) Bill 2011.
- The Attorney-General, dated 6 December 2011, in relation to comments made in Scrutiny Report 45 concerning Disallowable Instrument DI2011-263, being the Road Transport (General) (Segway Exemption) Determination 2011 (No. 2).
- The Minister for Police and Emergency Services, dated 6 December 2011, in relation to comments made in Scrutiny Report 44 concerning Disallowable Instruments:
  - DI2011-264, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 1);
  - DI2011-265, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 2);
  - DI2011-266, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 3);
  - DI2011-267, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 4);
  - DI2011-268, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 5);
  - DI2011-269, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 6); and
  - DI2011-270, being the Emergencies (Bushfire Council Members) Appointment 2011 (No. 6).
- The Attorney-General, dated 8 December 2011, in relation to comments made in Scrutiny Report 46 concerning the Freedom of Information Amendment Bill 2011.
- The Minister for Territory and Municipal Services, dated 19 December 2011, in relation to comments made in Scrutiny Report 44 concerning Disallowable Instrument DI2011-246, being the Domestic Animals (Cat Curfew Area) Declaration 2011 (No. 1).

The Committee wishes to thank the Attorney-General, the Minister for Police and Emergency Services and the Minister for Territory and Municipal Services for their helpful comments.

Vicki Dunne, MLA
Chair

February 2012

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

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

Report 12, dated 14 September 2009
Civil Partnerships Amendment Bill 2009 (PMB)

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

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

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

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

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

Bills/Subordinate Legislation

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

Report 34, dated 24 March 2011
Road Transport (Third-Party Insurance) Amendment Bill 2011

Report 38, dated 27 June 2011
Disallowable Instrument DI2011-75—Territory Records (Advisory Council) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-76—Territory Records (Advisory Council) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-77—Territory Records (Advisory Council) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-78—Territory Records (Advisory Council) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-79—Territory Records (Advisory Council) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-80—Territory Records (Advisory Council) Appointment 2011 (No. 6)

Report 39, dated 28 June 2011
Electoral (Donation Limit) Amendment Bill 2011 (PMB)

Report 40, dated 11 August 2011
Crimes (Penalties) Amendment Bill 2011 (PMB)

Report 42, dated 15 September 2011
Children and Young People (Transition to Independence) Amendment Bill 2011 (PMB)

Report 43, dated 13 October 2011
Disallowable Instrument DI2011-194 - Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1)
Disallowable Instrument DI2011-228 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-229 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-231 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-232 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-233 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-234 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 6)

Bills/Subordinate Legislation

Disallowable Instrument DI2011-235 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7)
Disallowable Instrument DI2011-236 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8)
Disallowable Instrument DI2011-237 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9)
Subordinate Law SL2011-26 - Gene Technology Amendment Regulation 2011 (No. 1)

Report 46, dated 1 December 2011
Electoral (Election Finance Reform) Amendment Bill 2011 (PMB)
Gaming Machine Amendment Bill 2011
Retirement Villages Bill 2011 (PMB)

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 45 of 11 November 2011. I offer the following response in relation to the Committee's comments on the Business Names Registration (Transition to Commonwealth) Bill 2011.

The Committee expressed concern that proposed section 13 (2) of the Business Names Registration (Transition to Commonwealth) Bill 2011 (the Bill) may inappropriately delegate legislative power. The Committee also expressed concern that proposed sections 6 (3) and 13 (3) may be misleading, and may inappropriately delegate legislative power.

As the Committee has observed, a Henry VIII clause is one which would operate or be intended to operate to limit future enactments of the Legislative Assembly. The Business Names Registration (Transition to Commonwealth) Bill 2011 contains no such clauses.

This Bill puts in place provisions to enable the transfer of the business names registration function to the Commonwealth. Its scope is regulatory and uncontentious. The Bill provides for a specified transition period to facilitate the change to the new system — proposed section 5 of the Bill provides that the Act will expire 2 years after the change-over day. This is the relevant limitation in point of time for proposed section 13(2).

Proposed sections 6 (3) and 13 (3) are not Henry VIII clauses – they are not expressed, and are not intended, to limit future enactments of the Legislative Assembly. First, a regulation under section 13 (2) may only modify part 3 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. Second, any modification by regulation of part 3 of the Act has no ongoing effect after the expiry of part 3. Lastly, any modification regulation would be subject to Legislative Assembly scrutiny and disallowance.

I trust that the above response answers the Committee's concerns and I thank the Committee for its observations.

Yours sincerely

Simon Corbell MLA
Attorney General

November 2011

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Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No 45 of 10 November 2011 in relation to Disallowable Instrument DI2011-263.

I apologise if the explanatory statement for the instrument did not contain sufficient explanation as to any difference between this instrument and DI2011-251 or the reason why it has been necessary to revoke and re-make DI2011-251 so soon after it was made.

On 16 September 2011, I approved a limited exemption from the road transport legislation to provide for the commercial operation of Segways within the central basin area of the foreshores of Lake Burley Griffin.

The exemption provided a range of conditions under which Segways could operate, including three primary elements in relation to the insurance coverage, being:

- exclusion of Segways from the definition of vehicle;
- inclusion to the definition of 'you/yours' in relation to 'the ACT Government and the Nominal Defendant'; and
- inclusion of coverage for riders.

After further investigation it was determined that the inclusion of coverage for a rider was not available in the market. As a result, on 30 September 2011 I agreed to revoke the first exemption and issued a new exemption that does not require insurance coverage for a rider.

I trust this information is of assistance.

Yours sincerely

Simon Corbell MLA
Attorney-General
6.12.11

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ATTORNEY-GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES
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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair—Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2602

Dear Mrs Dunne

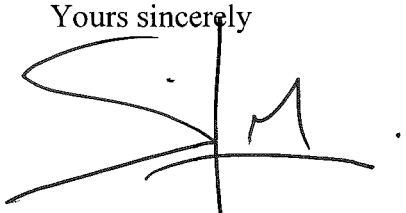
Thank you for your query regarding the appointment of a Deputy Chair of the Bushfire Council in the Scrutiny Report 44 of 24 October 2011.

I wish to advise you that a public servant, Mr Simon Katz, has been appointed as the Deputy Chair of the Bushfire Council.

As you are aware, Part 19.3.3 of the *Legislation Act 2001* does not require Standing Committee consultation on appointments of a public servant, or appointment by way of a notifiable instrument.

However, this appointment has subsequently been raised to the ACT Legislation Register so that there is no further confusion about the appointment of the Deputy Chair.

Yours sincerely



Simon Corbell MLA
Minister for Police and Emergency Services

6.12.11

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.46 (the Scrutiny Report) containing comments on the *Freedom of Information Amendment Bill 2011* (the Bill).

The Scrutiny Report helpfully draws the attention of Members to differences between the bill and the report of the Standing Committee Inquiry into the *Freedom of Information Act 1989* (the Committee Report), but has not recommended that I respond.

I note that the Government response to the Committee Report sets out the thinking behind these differences.

I thank the Committee for their consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney General
8.12.11

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Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

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

Dear Mrs ~~Dunne~~ Vicki

I refer to the comments of the Scrutiny of Bills and Subordinate Legislation Committee in report No 44 of 2011, regarding the commencement date of the *Domestic Animals (Cat Curfew Area) Declaration 2011 (No 1)* (DI2011-246) (the declaration).

The committee is correct in its assessment that the commencement date of the declaration is in conflict with section 81(3) of the *Domestic Animals Act 2000* (the Act). This was an unintentional drafting error.

I am advised that in situations such as this, the provisions of the Act prevail over the provisions of the declaration, and thus section 2 of the declaration is to be read as if it complied with the Act. This means that the declaration came into force on the day after the last day that it could have been disallowed, as per section 81(3) of the Act. As the declaration was tabled in the Assembly on 18 October 2011, the final day for disallowance was 15 November 2011, and the declaration came into force on 16 November 2011.

As domestic animal rangers have not yet begun enforcement activities in the recently-declared cat curfew areas, no citizens' rights have been adversely affected by this drafting error.

I have asked my directorate to ensure that the commencement dates of future cat curfew declarations comply with section 81(3) of the Act.

I thank the committee for its vigilance with regard to this matter.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Territory and Municipal Services

19 DEC 2011

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