



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

16 JUNE 2011

Report 37

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:

APPROPRIATION BILL 2011-2012

This Bill would appropriate of monies for the 2011-2012 financial year.

FINANCIAL MANAGEMENT (ONE A.C.T. PUBLIC SERVICE) AMENDMENT BILL 2011

This Bill would amend the *Financial Management Act 1996* to reflect the single agency structure for the ACT public service as is proposed by the Public Sector Management (One ACT Public Service) Amendment Bill 2011.

PAYROLL TAX BILL 2011

This is a Bill to impose payroll tax and is a re-write of the *Payroll Tax Act 1987* so that the Territory law on this topic is in harmony with the payroll tax laws of other Australian jurisdictions, and in particular with the *Payroll Tax Act 2007* of New South Wales.

PUBLIC SECTOR MANAGEMENT (ONE A.C.T. PUBLIC SERVICE) AMENDMENT BILL 2011

This Bill would amend the *Public Sector Management Act 1994* to establish an ACT Public Service (ACTPS) comprised of administrative units (directorates); to create a “head of service” with overarching responsibility for whole-of-Government matters, for employment matters at all levels of the ACTPS, and for organisational structures within the ACTPS; and to recast “chief executives” as “directors-general” responsible for their respective directorates’ performance and contribution to the single entity.

STATUTE LAW AMENDMENT BILL 2011
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This is a Bill for the purposes of statute law revision.

Bills—Comment

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

EDUCATION AND CARE SERVICES NATIONAL LAW (A.C.T.) BILL 2011
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This is a Bill for an Act to apply a national law relating to regulation of education and care services for children, and for other purposes, to be achieved by adopting the Education and Care Services National Law (National Law) as set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria.

Background

The object of the Bill would be achieved by the enactment of clause 6.

6 Adoption of Education and Care Services National Law

The Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—

- (a) applies as a territory law; and
- (b) as so applying may be referred to as the Education and Care Services National Law (ACT); and
- (c) so applies as if it were part of this Act.

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 Bill for this Act contains 23 clauses, and each of these is explained. The national law as set out in the Victorian Act contains 324 sections, and the Explanatory Statement explains these provisions by incorporating notes on the provisions that were prepared by the Victorian government. There is however no citation to a source – such as a website – where may be found the text of the adopted Victorian Act and its schedule.

The Explanatory Statement contains a section headed “Human Rights compliance with the *ACT Human Rights Act 2004*” and which at the outset states that:

[i]n relation to addressing Human Rights compliance the following general statements are made about a number clauses, that relate to similar issues, for convenience, rather than addressing these issues in several places.

The following three paragraphs refer to a large number of sections of the national law that engage the right to privacy and reputation (HRA section 12). These sections are divided into three groups and in relation to each group it is argued that in no case is the limitation on the right unlawful or arbitrary. There is no reference to HRA section 28 or proportionality analysis that would satisfy the terms of section 28; for example, there is no consideration in respect of any of these limitations of whether there are “any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve” (paragraph 28(2)(e)). Some other elements of the section 28 analysis are adverted to, although not explicitly.

This approach may have been taken on the basis that if a limitation of the rights in HRA section 12 is not unlawful or arbitrary, there is no need to refer to section 28. Technically this is correct, but given that it is generally understood that to avoid being arbitrary a limitation should be “reasonable in the particular circumstances”,¹ the framework stated in section 28 is a valuable tool for an analysis of whether the limitation is arbitrary.

The content of the three paragraphs raises a puzzle. In many parts, the text is identical to the compatibility statement tabled in the Victorian parliament; (see below for the reference). This suggests that the drafter of the Explanatory Statement was aware of this statement. Yet the provisions of the national law referred to in the Explanatory Statement are not the same as those in the compatibility statement, and some of those referred to in the Explanatory Statement appear to have nothing to do with the topic of the relevant paragraph. For example, the Explanatory Statement states that “[s]ections 12, ... [of the national law] ... provide for the sharing of information between bodies in different jurisdictions in a range of circumstances”. Section 12 does not appear to be concerned with the sharing of information. The note to section 12 that forms part of the Explanatory Statement does not mention this topic. There are several other examples of this sort of discrepancy.

The Committee recommends that the Minister address this issue generally so that the Assembly may be assured that the specific sections of the national law referred to at pages 8 and 9 do relate to the topics indicated in the paragraphs.

There is however no reference in *this* section of the Explanatory Statement to the many other sections that engage other HRA rights or common law rights. There is however reference in the text of the notes to the sections of the national law, although without in many cases any reference to the Human Rights Act. The notes address the rights issue arising from a particular section, and comment generally on whether the section is justifiable. There are two problems with this approach; the earlier part of the Explanatory Statement did not signal that this is what was going to happen, and, more significantly, the notes do not refer to the Territory’s Human Rights Act and, in particular, does not address the justification for derogating from a right in terms of the requirements of HRA section 28.

While this is not completely satisfactory, the Explanatory Statement might have referred to the compatibility statement tabled in the Victorian parliament. This document identifies many respects in which the national law engages a provision of the Victorian Charter of Rights, and given the similarity between that Charter and the HRA, the compatibility statement is a very useful guide to the rights issues raised by the national law. The discussion in the compatibility statement is more focussed on the impact of human rights than that in the notes to the sections. The web site reference is:

<http://tex.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.one&house=ASSEMBLY%0a&pageno=3584&date1=2&date2=September&date3=2010&speech=6176&title=EDUCATION+AND+CARE+SERVICES+NATIONAL+LAW+BILL%0a&db=hansard91&query=>

The Committee has reviewed the provisions of the national law, the Victorian compatibility statement, and the notes to the sections that form part of the Explanatory Statement. While there are deficiencies, the Committee considers that this material provides sufficient guidance to the Assembly concerning the human rights issues that arise out of the national law.

¹ S Joseph et al, *The international Covenant on Civil and Political Rights* (2nd ed, 2004), at 482.

The national scheme dimension of the Bill

The Committee considers that the explanatory statement should identify all respects in which a provision of the Bill affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws. If there are no such provisions, then this should be indicated.

In this respect, the Committee notes that subclause 7(2) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law”, being the *Criminal Code 2002*, the *Freedom of Information Act 1989*, and the *Legislation Act 2001*. Subclause 7(3) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law, except to the extent that that Law and those instruments apply to the Regulatory Authority and the employees, decisions, actions and records of the Regulatory Authority”, being the *Annual Reports (Government Agencies) Act 2004*, the *Auditor-General Act 1996*, the *Financial Management Act 1996*, the *Ombudsman Act 1989*, the *Public Sector Management Act 1994*, and the *Territory Records Act 2002*.

The displacement of these laws, and in particular those affected by subclause 7(1), is a matter of concern, in that these laws create or afford protection to certain human rights. So far as concerns the laws affected by subclause 7(1), the Committee notes that sections 263 and 264 of the national law provide for the application of the Commonwealth Freedom of Information Act and of the Privacy Act. The Committee also notes that the displacement of the laws mentioned in subclause 7(3) is of a limited nature.

The explanatory statement should also explain whether any amendment to the adopted national law will apply in the Territory, and also whether any regulation made under that law will apply. There should also be an explanation of what capacity there will be for the Legislative Assembly to be made aware of any amendment or regulation and for the Assembly to make an amendment or reject any amendment to the national law or regulation.

The Committee makes no further comment on these provisions.

GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011

This Bill would amend the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* in relation to the governance of clubs in the ACT.

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

In this connection, the Committee notes that, while the power of the commission to be conferred by proposed section 148B (see clause 21 of the Bill) is conditioned on the commission believing in a state of affairs “on reasonable grounds”, the power to be conferred on the commission by proposed section 147C is not qualified in this way.

The Committee recommends that the Minister explain why the two powers are treated differently.

**PLANNING AND DEVELOPMENT (LEASE VARIATION CHARGES)
AMENDMENT BILL 2011**

This Bill would amend the *Planning and Development Act 2007*, the *Planning and Development Regulation 2008*, and the *Taxation Administration Act 1999* to change the process for determining lease variation charges, primarily by making a large number of lease variation charges determinable by reference to a code or matrix.

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 property and compensation for loss thereof

Under this heading, the Committee will simply identify an effect of the operation of the proposed scheme that might be argued to engage the common law right to property and compensation for loss thereof. This issue is indirectly addressed in the *Final Report on the Review of the Change of Use Charges System in the ACT* (the Report), but not from a rights perspective.

The purpose of a charge or tax such as the proposed lease variation charge (LVC) is “to take account of the fact that, upon a lease variation, the land may have become more valuable to the lessee” (Report 2.1.2). In contradistinction to earlier methods employed in the Territory, the Bill proposes to “[make] a large number of lease variation charges determinable by reference to a code or matrix (ie a black and white process of looking up a table without any need for valuation estimates). The Bill refers to this code as the ‘LVC Determination’” (Explanatory Statement paragraph 6). Many, probably the vast majority, of residential leaseholders, will be affected by this code.

The Report noted that:

The use of land market indexes under residential codification, rather than the valuation specific to a specific property used under the current CUC system means some property holders may be disadvantaged, while others will be advantaged. This will be a permanent impact stemming from codification and has been judged by AVO to be unquantifiable but negligible as explained below in Section 6.3.2.5. (Report 6.2.2.5)

Later, it is said:

6.3.2.5 Cost associated with residential valuations based on the use of market indexes rather than site specific assessments

The total cost associated with using valuations based on indexes rather than site specific valuations has been determined by the AVO to be unquantifiable. Importantly this potential cost only applies to residential properties because there are no site specific factors used for the estimation of the LVC payable in residential cases (unlike industrial or commercial cases). The AVO have also advised that for every loser under codification there is likely to be an offsetting winner given that they have allowed a 90 per cent confidence interval (+/- 5 per cent) in preparing the residential market index values for

each suburb. Given these factors the average cost to residential property associated with the adoption of market indexes under codification is likely to be small or nil (footnote omitted).

The reference here to “residential property” is to such property considered in the aggregate. Some individual owners of residential leases will of course suffer a loss under this scheme when compared to earlier schemes. Moreover, an owner will pay the same LVC as a neighbour would pay for an identical site notwithstanding that the value of the former property is less than the neighbour; for example where the former lease is affected by the operation of the *Tree Protection Act 2005*, or the *Heritage Protection Act 2004*. These examples are mentioned because they illustrate that the value of a lease may, subsequent to its purchase by the lease-holder seeking to vary the lease, be adversely affected by legislative change.

The Committee draws attention to this matter and recommends that the Minister explain what consideration was given to compensation or amelioration of the scheme in respect of lease-holders who will suffer loss arising out of the operation of the scheme proposed.

Does a clause of the Bill inappropriately delegate legislative power?

The wide nature of the matters that may be prescribed by regulation

A number of significant topics may or must be prescribed by regulation. The Committee notes the powers:

- to prescribe a variation as a chargeable variation (proposed section 276);
- to determine a lease variation charge (proposed subsection 276D(1));
- to approve guidelines in relation to lease variation charges (proposed section 276E);
- to prescribe matters in relation to the application of proposed section 277A; and
- to prescribe the amount by which the commissioner for revenue must increase a lease variation charge for a chargeable variation of a nominal rent lease (proposed section 279).

(The power to determine a lease variation charge (proposed subsection 276D(1)) is dealt with more extensively immediately below).

These are situations in which the Assembly may wish to consider varying the normal scheme that applies where delegated legislation is disallowable. There are at least two options.

To preclude the possibility of the subordinate law taking legal effect on its making,² its operation might be delayed until after the time for its disallowance has expired. For example, it might be provided that:

² For example, a disallowance would not alter the legal effect of a charge that was imposed on a person under the disallowed regulation.

Unless the [relevant subordinate law] is disallowed by the Legislative Assembly, the determination commences—

- (a) 2 weeks after the last day when it could have been disallowed; or
- (b) if the determination provides for a later commencement—on that later commencement.³

To enhance parliamentary control, it might also be provided that the relevant subordinate law not take effect until approved by a positive resolution of the Assembly.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister explain why it is desirable to delegate legislative power in these ways.

The Minister and the power to fix the rate of a tax

By proposed section 276D of the Act, the Treasurer would be empowered to determine the rate of a “charge”:

276D Lease variation charges—LVC determination

- (1) The Treasurer may determine a lease variation charge for a prescribed chargeable variation.
- ...
- (2) A determination must be made in accordance with any guidelines approved under section 276E.
- ...
- (4) A determination is a disallowable instrument.

It is also the Treasurer who approves the guidelines referred to in proposed subsection 276D(2), and it is to be noted that any guidelines are disallowable.

While described in the provision as a “charge”, the impost is in effect a tax, as acknowledged in the Explanatory Statement.⁴ A tax is generally defined as a “compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered”.⁵ The LVC would not characterised as a charge or a fee because there is no discernable relationship with the value of what is acquired upon payment of the LVC.

³ See *Scrutiny Report No 50* of the 5th Assembly, concerning the Crimes Legislation Amendment Bill 2004, at 10.

⁴ Explanatory Statement, paragraph 49(a).

⁵ *Matthews v The Chicory Marketing Board (Victoria)* (1938) 60 CLR 263 at 276.

There is thus raised an issue that has been addressed in past Reports. In *Scrutiny Report No 14 of 1999*,⁶ the Committee noted that many scrutiny committees operate according to the principle that “[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so”.⁷ This approach reflects the long-standing constitutional position that “the raising and expenditure of public revenue have long been under the control of Parliament”.⁸

Given that proposed subsection 276D(1) appears to confer a discretion on the Treasurer as to whether or not a charge will be imposed, it is open to the objection that the Assembly would in effect have conferred on the Treasurer a power to levy a tax.

There may be no constitutional objection to a law of the Assembly, “whether expressly or by implication, and whether directly or indirectly”,⁹ conferring a taxing power on the Treasurer. The strength and longevity of the constitutional principle is, however, such that the Treasurer should offer a justification for proposed subsection 276D(1).

It might be considered that proposed subsection 276D(1) has in effect authorised the levying of a tax, and simply left it to the Treasurer to determine its rate. On this basis, there is still an issue to be raised.

The Senate Committee has accepted that:

[w]here the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations than by enabling statute. If a compelling case can be made for the rate to be set by subordinate legislation, the Committee seeks to impose some limit on the exercise of this power. For example, the Committee will seek to have the enabling Act prescribe either a maximum figure above which the relevant

⁶ See too *Scrutiny Report No 5 of 2000*.

⁷ This quotation is from Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. This Committee also said “[t]he vice to be avoided is taxation by nonprimary legislation”.

⁸ *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579 per Brennan J. The basis of the principle is explained simply by McHugh J in *Combet v Commonwealth* [2005] HCA 61 at [44]: “For centuries before the enactment of the Constitution, the Crown conducted the day to day business of government - as theoretically it still does today. But the business of government, ancient and modern, requires access to a continual supply of money. Taxation of the income or property of the subject is an obvious way of raising money for the business of government. Historically, taxation and loans have been the principal means by which governments have raised money. From an early period in the history of English constitutional law, however, the House of Commons insisted on its right to control the levying of direct taxes on the subjects of the Crown and others. It “repeatedly asserted that taxes were not to be imposed without its consent” [Maitland, *The Constitutional History of England*, (1908) at 181.]. By the 17th century, the House of Commons had also insisted on its right to control the levying of indirect taxation [Saunders, “Parliamentary Appropriation”, in Saunders et al, *Current Constitutional Problems in Australia*, (1982) 1 at 2.]. These demands of the Commons culminated in the promulgation of the Bill of Rights 1689 (UK) and its insistence “that levying money for or to the use of the Crown by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal”. As a result, for more than three centuries, a fundamental rule of English constitutional law has been that the Crown cannot levy a tax without parliamentary authorisation [*Attorney-General v Wilts United Dairies Ltd* (1920) 37 TLR 884 at 886.].

⁹ *Atkin LJ in Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 886.

regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated.¹⁰

The Standing Committee on Justice and Community Safety of this Assembly, acting in its scrutiny role, accepts this general approach as appropriate. In that light, it notes however:

- (1) that the Explanatory Statement does not seek to make a case for the rate to be set by delegated legislation; and
- (2) the Bill does not prescribe either a maximum figure above which the Minister cannot determine a rate, or, alternatively, a formula by which the rate can be calculated. It also makes no provision for the kinds of matters that the Minister may or must take into account in fixing the rate of tax.

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:

Disallowable Instrument DI2011-44 being the ACT Teacher Quality Institute (Fee) Determination 2011 (No. 1) made under section 95 of the *ACT Teacher Quality Institute Act 2010* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2011-45 being the Public Place Names (Acton) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a bridge in the Division of Acton.

Disallowable Instrument DI2011-46 being the Public Place Names (City) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new road in the Division of City.

Disallowable Instrument DI2011-47 being the Taxation Administration (Amounts payable—Utilities (Network Facilities Tax)) Determination 2011 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2010-39 and determines a new rate for the calculation of Utilities (Network Facilities tax) payable under the *Utilities (Network Facilities) Tax Act 2006*.

Disallowable Instrument DI2011-50 being the Public Place Names (Harrison) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of two new roads in the Division of Harrison.

¹⁰ *The Work of the Committee during the 39th Parliament November 1998– October 2001, (June 2002), at 82 (para 5.31).*

Disallowable Instrument DI2011-51 being the Public Place Names (Belconnen) Amendment Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends the notice published in the Commonwealth of Australia Gazette No. P25, dated 31 August 1988, by revoking a specified street name in the Division of Belconnen.

Disallowable Instruments—Comment

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

Has this instrument been validly made?

Disallowable Instrument DI2011-48 being the Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011 (No. 1) made under section 10 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* revokes DI2010-42 and determines that the Premium Rate for Micro Renewable Energy Generators is 45.7 cents per kilowatt hour (exclusive of GST).

The Committee notes that this instrument is made under section 10 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008*, which provides:

10 Determination of premium rate

- (1) For each financial year, the Minister must, not later than 3 months before the financial year, determine the premium rate for amounts payable by an electricity supplier under section 6 (Feed-in from renewable energy generators to electricity network) during the year.

- (2) A determination is a disallowable instrument.

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

- (3) In making a determination, the Minister—
 - (a) must seek the advice of the Independent Competition and Regulatory Commission to assist the Minister to determine the premium rate; and
 - (b) must give priority to the following:
 - (i) the desirability of costs under this Act impacting equitably on all electricity users;
 - (ii) the need to encourage the generation of electricity from renewable sources;
 - (iii) the need to reduce emissions from greenhouse gases;
 - (iv) the need to reduce the likely effects of climate change;
 - (v) the desirability of eligible entities being able to recoup investment on renewable energy generators within a reasonable time; and
 - (c) must have regard to the following:
 - (i) the amounts payable under this Act by an electricity distributor;
 - (ii) the amounts payable under this Act by an electricity supplier;

- (iii) any additional metering costs passed on to an eligible entity because of section 6 (2) (c);
 - (iv) any advice received from the Independent Competition and Regulatory Commission in response to a request under paragraph (a);
 - (v) anything else the Minister considers relevant.
- (4) If the Minister receives any advice requested under subsection (3) (a), the Minister must—
- (a) present a copy of the advice to the Legislative Assembly within 3 sitting days after receiving the advice; and
 - (b) give a copy of the advice to each member of the Legislative Assembly—
 - (i) at least 14 days before the Minister makes the determination; but
 - (ii) within 30 days after receiving the advice.

The Committee notes that there is no indication, either in the instrument itself or in the Explanatory Statement that accompanies the instrument, that the Minister has sought the advice of the Independent Competition and Regulatory Commission, as required by paragraph 10(3)(a) of the *Electricity Feed-in (Renewable Energy Premium) Act 2008*.

The Committee notes that it made a similar comment in relation to the instrument that this instrument revokes and replaces, DI2010-42. In *Scrutiny Report No 23* of the 7th Assembly, the Committee stated:

In making this comment, the Committee notes that the making of the instrument might, of itself, be taken to be evidence that the pre-requisites for making the instrument have been met. That is, one might be entitled to assume that the Minister has sought the advice of the Commission, etc. While that may be the case, the Committee notes that it has consistently made the point that where there are mandatory pre-requisites for the making of an instrument (or a subordinate law), either the instrument itself or the Explanatory Statement for the instrument should state that the mandatory requirements have been met. As the Committee has consistently observed, this is not an onerous requirement.

The Minister for Energy responded to the above comment in a letter dated 29 June 2010. The letter was reproduced in the Committee's *Scrutiny Report No 25* of the 7th Assembly. The response states (in part):

I will endeavour in future to include specific mention of the advice requested and received in the Explanatory Statement to the Determination.

In the light of the above, the Committee is disappointed to be making the same comment about this instrument as it did about DI2010-42.

Minor drafting issues

Disallowable Instrument DI2011-49 being the Public Sector Management Amendment Standards 2011 (No. 3) made under section 251 of the *Public Sector Management Act 1994* amends the Standards to bring greater alignment between the Standards and other parts of the ACT Public Service legislative employment framework.

This instrument makes various amendments to the *Public Sector Management Standards 2006*, at least in part as a response to the report by Dr Alan Hawke, titled *Governing the City State: One ACT Government – One ACT Public Service* Report, released on 15 February 2011, which provided 76 recommendations around reforming the ACT Public Service.

Section 5 of the instrument inserts a new Part 2.1 into the Standards, including the following provision:

7 Consumption of alcohol

An officer must not drink alcohol while on duty or on government premises during core hours without prior approval of a senior manager on special occasions, like Christmas parties, the Melbourne Cup and farewells.

This amendment seems to prohibit the consumption of alcohol by officers on special occasions (without the prior approval of a senior manager) but does this mean that the consumption of alcohol outside of special occasions is permitted? While the Committee accepts that this might be a far-fetched interpretation of the provision, the Committee notes that the Explanatory Statement for the instrument does not shed any light on this issue, as it does not deal with the new section 7.

Also included in the new Part 2.1 is section 8, which provides:

8 Alcohol in government vehicles

- (1) Alcohol must not be carried in or on government vehicles except where prior approval has been given for a special occasion by a senior manager.
- (2) Alcohol must not be consumed in or on a Government vehicle.

The Committee notes that the inconsistent capitalization of the “G” in “Government” is in the original instrument.

The Committee notes that a later provision in the Standards also deals with the carrying and consumption of alcohol in Government vehicles. Subsection 541(3) of the Standards provides:

- (3) A driver of an ACTPS vehicle must not:
 - (a) smoke in an ACTPS vehicle;
 - (b) consume alcohol in an ACTPS vehicle; or
 - (c) carry alcohol in or on an ACTPS vehicle unless special approval has been given by the relevant Chief Executive.

The Committee seeks the Minister’s advice as to how the two provisions mentioned above are intended to interact. The Committee notes that neither “Government vehicle” (or “government vehicle”) or “ACTPS vehicle” appear to be defined. The Committee also notes that the Explanatory Statement for this instrument is of no assistance in relation to this issue.

Section 14 of the instrument inserts (among other things) a new Part 5.3 into the Standards. The heading to the new Part 5.3 is as follows:

Part 5.3 Underperformance

Note Terms used in this Part have the same meaning as in the Act, section 139, see Legislation Act, s 148.

Note 2 The procedures that apply to underperformance by an officer are—

- (a) if an industrial instrument applies to the officer and includes procedures for underperformance—the underperformance procedures in the industrial instrument; or
- (b) in any other case the procedures approved by the Commissioner.

The Committee notes that, for consistency, the first note should be numbered as “Note 1” and should be italicised.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Transport, dated 3 May 2011, in relation to comments made in Scrutiny Report 36 concerning:
 - the Road Transport Legislation Amendment Bill 2011; and
 - the road Transport (Alcohol and Drugs) Legislation Amendment Bill 2011.
- The Minister for Health, dated 9 May 2011, in relation to comments made in Scrutiny Report 33 concerning the Health Amendment Bill 2011.
- The Attorney-General, dated 24 May 2011, in relation to comments made in Scrutiny Report 36 concerning the Criminal Proceedings Legislation Amendment Bill 2011.
- The Minister for the Environment and Sustainable Development, dated 30 May 2011, in relation to comments made in Scrutiny Report 34 concerning Subordinate Law SL2011-1, being the Environment Protection Amendment Regulation 2011 (No. 1).

The Committee wishes to thank the Minister for Transport, the Minister for Health, the Attorney-General and the Minister for the Environment and Sustainable Development for their helpful comments.

PRIVATE MEMBER’S RESPONSES

The Committee has received responses from Ms Le Couteur, in relation to comments made in:

- Scrutiny Report 12, concerning the Eggs (Cage Systems) Legislation Amendment Bill 2009, dated 19 April 2011.

- Scrutiny Report 36, concerning the Animal Welfare Legislation Amendment Bill 2011, dated 1 May 2011.

The Committee wishes to thank Ms Le Couteur for her helpful comments.

Vicki Dunne, MLA
Chair

June 2011

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

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill
2008

Report 2, dated 4 February 2009

Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code)
Determination 2009

Report 10, dated 10 August 2009

Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee)
Determination 2009 (No. 2)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)

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

Disallowable Instrument DI2011-13 - University of Canberra (Academic Board) Statute 2011
Disallowable Instrument DI2011-17 - Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 1)
Road Transport (Third-Party Insurance) Amendment Bill 2011

Report 36, dated 28 April 2011

Electoral (Casual Vacancies) Amendment Bill 2011
Electoral Legislation Amendment Bill 2011
Food (Nutritional Information) Amendment Bill 2011 (PMB)



Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

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 the Scrutiny of Bills Committee's Report No 36 of 29 April 2011 regarding both the Road Transport Legislation Amendment Bill 2011 and the Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2011.

Road Transport Legislation Amendment Bill 2011

In commenting on the proposed offence in clause 7 of the Bill, which will be relocated from the Road Transport (General) Act 1999 to become new section 31A of the Road Transport (Driver Licensing) Act 1999, the Committee made two recommendations in relation to strict liability offences.

Firstly, it stated that 'an Explanatory Statement should make reference to both the "mistake of fact" defence, the "intervening conduct or event" defence'. In response it should be observed that the Explanatory Statement for this Bill did not state that the mistake of fact defence was the only possible defence that might be available. It is noted that section 23 (3) of the *Criminal Code 2002* (the Code) states, after explicitly advertng to the availability of the mistake of fact defence:

(3) The existence of strict liability does not make any other defence unavailable.

Thus, in addition to mistake of fact and 'intervening conduct or event', there may be also other defences available under the general principles of criminal law (such as duress, involuntariness, sudden or extraordinary emergency) in particular circumstances. Listing every possible defence is not considered either practicable or useful, given that these defences are codified in the *Criminal Code 2002*, and the application of that Code is specifically referenced in the amended Act.

Further, while it is true that the defence in section 39 of the *Criminal Code 2002* is theoretically available to all strict and absolute liability offences, it is difficult to see how that defence could arise in practice in the context of the particular offence concerned here. In context of 'drive while suspended' offences, the offence occurs as soon as the

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suspended person drives the vehicle. The Dictionary to the *Road Transport (General) Act 1999* defines 'drive' as being 'in control of the steering, movement or propulsion of the vehicle'.

Essentially, if as a result of some external force the person is not in control of the steering, movement or propulsion of the vehicle or riding it, the person is not 'driving' that vehicle within the meaning of the road transport legislation and no offence is committed. If the person becomes suspended while driving the vehicle and either does not or could not know that he or she has been suspended, the relevant defence would be mistake of fact rather than intervening conduct or event. In this context, it should be noted that the suspension of a person's right to drive will have resulted from the person's own prior conduct, and therefore the second element of the intervening conduct or event defence (that the person could not reasonably have been expected to guard against the bringing about of the physical element) would not have an application in that context.

In relation to the Committee's comments regarding the availability of a 'reasonable ignorance' defence in the context of 'reasonable steps' or 'due diligence', the suggested defence is not considered to be necessary or appropriate for this offence. The 'mistake of fact' defence already covers the circumstance where the driver was ignorant of the suspension. The mistake of fact defence has been pleaded successfully before the Courts, both here and in other jurisdictions, in the context of 'drive while suspended' offences. Drivers are able to check their licence status by phoning Canberra Connect or contacting the road transport authority. Once a driver is aware of the suspension, the only 'reasonable steps' that could be taken to avoid the offence (assuming duress or similar defences do not arise) would be to refrain from driving while the suspension remains in force.

Road Transport (Alcohol and Drugs) Legislation Amendment Bill 2011

I thank the Committee for its positive comment relating to the quality of the Explanatory Statement.

In relation to the Committee's comments regarding the use of extrinsic material as an aid to interpretation, and the Committee's caveat about the use of material such as explanatory statements and Ministerial speeches in a debate on proposed legislation, the Government notes that the comments by Spigelman CJ in *Harrison v Melhem* primarily concern extrinsic material consisting of speeches in Hansard and do not specifically apply to explanatory statements. The Government acknowledges the Court's role in interpretation and agrees with the Chief Justice's position that it is for the Courts to determine whether to use extrinsic material and that these items do not "prevail over the words of a statute".

However, that is not what is proposed here. The references to particularly extrinsic material in the Bill's Explanatory Statement are not included to 'prevail' over the words in clause 18C (4) - they were included to assist users of the Act (including police) to interpret words that are, objectively, susceptible of a range of meanings. The Government believes it is reasonable to anticipate that an explanatory statement may be used to ascertain the intended meaning or scope of a provision where different interpretations are possible. This use is recognised legislatively in sections 141 and 142 of the *Legislation Act 2001* - this use is one of the reasons for including Explanatory Statements on the Legislation Register [see section 19 (1) (j) and (k) of the *Legislation*

Act 2001]. As recently as 2 March 2011, Chief Magistrate Burns cited the explanatory statement for the Road Transport (Alcohol and Drugs) Legislation Amendment Act 2010 in his reasons for decision in *Stuart Wood v Chief of Police* (ACT Magistrates Court, KP 2011/9 at paragraph 8). While it is possible that justices in superior courts may be less inclined than magistrates to access this type of extrinsic material, the vast majority of road transport legislation matters are decided by the ACT Magistrates Court and therefore Government believes it is not unreasonable to anticipate that Magistrates may choose to have regard to the explanatory statement in relevant proceedings.

The Committee commented that the scope of the power in proposed section 18C is very broad. This breadth is intentional, as the range of items that may be found during a search that could pose a safety risk is also very broad.

The Government acknowledged that on occasion a preventative search may result in the location of other items that are not directly relevant to the original purpose of the search. The same situation arises whenever searches are undertaken by police, e.g. in executing a search warrant in relation to one offence, the police may unexpectedly uncover evidence of a separate offence. It would defeat the interests of justice if that evidence were to be made unavailable in relation to a subsequent prosecution for that separate offence merely because it was inadvertently discovered during the course of a lawful search. Allowing items that may be evidence of another offence to be seized and retained is believed to be a reasonable limitation of human rights within section 28 of the *Human Rights Act 2004*.

The Committee commented on proposed section 18C (3) which explicitly refers to instances where the retention of items found during a search is authorised by another law. It was not considered appropriate to list every enactment or subordinate law (which may include Commonwealth laws that apply to officers in ACT Policing) that might authorise such retention, as the content and source of those laws may vary over time. Laws relating to prohibited weapons and the possession of drugs are obvious examples, but it may be laws relating to the possession of prohibited data or images (for example, child pornography or security-classified information) might be relevant on occasion in relation to items that are not intrinsically dangerous.

Different considerations would arise, of course, if the search itself went outside the scope of lawful authority – it is acknowledged that the law usually excludes improperly obtained evidence from admissibility in criminal proceedings.

The Committee has commented that the explanation of the proposed power “appears to significantly understate the scope of the kind of search that may be undertaken.” The explanation of the clause was intended to make it clear that the power does not extend to strip searches, as demonstrated by the use of the words “the removal **only** [emphasis added] of the person’s overcoat, coat, jacket or a similar article of clothing and any footwear, gloves or headwear.” The explanation given is believed to be consistent with the use of the word “only” when describing the items of clothing that may be removed and examined during the search. Thus, any search of the person’s body is limited to an external search of the clothed individual, which is sometimes referred to as a ‘pat-down’.

The aim is to detect items that could be accessed immediately by the person during the person’s short time in custody as it is these items that may pose a safety risk. Items hidden in inner garment present a lower-order risk as the detained person will have

extremely limited opportunity, if any, to access those items while in custody. The concealment of drugs in underwear or other concealed places in or on the person's body may be an issue where the purpose of the search is to combat drug smuggling generally. In the context of section 18C, however, the purpose of the search is to prevent the person from accessing items that readily come to hand.

I trust these comments are of assistance to the Committee.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Jon Stanhope', written in a cursive style.

Jon Stanhope MLA
Minister for Transport

03 MAY 2011



Katy Gallagher MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

GBC 11/56

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs ^{Vicki} Dunne

I refer to the Scrutiny Report No 33 dated 3 March 2011. The report commented on the *Health Amendment Bill 2011* (HAB). I offer the following response to those comments and offer you my sincere apology for the delay in providing these comments.

The Scrutiny of Bills and Subordinate Legislation Committee (the Committee) has commented on whether the HAB unduly trespasses on personal rights and liberties as required by section 38 of the *Human Rights Act 2004* (the HRA). The HAB engages a number of human rights.

The obtaining of information by a committee and the removal of the protection of breach of confidence law: HRA paragraph 12(a) – the right to privacy

The Committee has commented that there should be justification for permitting protected information to be given to a scope of clinical practice committee under section 64(1) and the removal of the common law protection of the breach of confidence law under section 64(3), which are limitations of the right to privacy stated in the HRA paragraph 12 (a) .

I understand that notwithstanding that the proposed subsection 64(1) is not new and the proposed amendment simply replaces within this section the term "clinical privileges committee" with "scope of clinical practice committee," that as these previous provisions were made prior to the passage of the HRA it is still necessary to provide justification for any limitations on a person's right to privacy on the basis that the limitation is not arbitrary and is therefore justifiable under section 28 of the HRA.

In order for the scope of clinical practice committees to function effectively as with the clinical privileges committees before them it is necessary that appropriate information be provided that would usually be protected by the right of privacy. In both these instances the right of privacy of the clinician and any common law protections against using confidential information has to be balanced against the rights of patients to be treated safely at a public health facility.

It would be unreasonable for a clinician to claim that comments or admissions made in confidence regarding unsafe practices that have been used by them in a public health setting should not be taken into account in determining the scope of clinical practice for a clinician in

ACT LEGISLATIVE ASSEMBLY

order to protect the safety of members of the public who access health services at a public health facility in the ACT.

There are protections which apply to protected information under the legislation which seek to minimise the limitation on the right to privacy. For example, any information obtained under this section is to be treated in confidence and is subject to limits as to how it can be used and in what circumstances it can be used. There are also limits as to who the information can be disclosed to and that the information obtained can only be acted on in situations where the clinical practice in a health facility poses a threat to the safety of members of the public. These additional restrictions are designed to further minimise the impact of the proposed limits to a person's right to privacy.

Provision for procedural fairness (natural justice) in respect of some Committee functions: HRA subsection 21(1) – the right to fair trial

The Committee has also commented on two cases where a measure of procedural fairness could be provided, that is, in relation to the power of a scope of clinical practice committee and the CEO of a health facility to make an emergency decision to amend or withdraw a scope of clinical practice with immediate effect (subsections 65(1) and 69(1) refer, respectively). We believe the Committee's reference to subsection 65(1) should be read as a reference to subsection 66(1).

Currently, subsections 66(3) and 69(3)(a) state that an emergency decision under subsections 66(1) or 69(1) has effect until the CEO decision on a Scope of Clinical Practice Report takes effect. Additionally, subsection 69(3)(b) states that, in any other case, an emergency decision under subsection 69(1) has effect until the CEO, by notice in writing, revokes the amendment or withdrawal.

We consider any opportunity to submit information should only occur after a scope of clinical practice committee or the CEO of a health facility has exercised the power in accordance with the relevant factors required to be considered to make an emergency decision under subsections 66(1) or 69(1). Any opportunity for the affected person to submit to a decision maker that a particular emergency decision should be changed prior to being implemented would not be optimal because it would mean the decision could not be implemented immediately and expeditiously. This would defeat the purpose of having emergency decisions which are justified in a limited range of circumstances in order to protect the safety of patients. Rights of review of the decision once it is implemented are maintained to ensure procedural fairness requirements are preserved.

While the process under section 65 has been retained for situations that do not immediately pose a threat to the safety of members of the public using a health facility in the ACT, a different approach is required in situations where the scope of clinical practice of the dentist or doctor at a health facility does pose a threat to the safety of the member of the public. In these situations, it is necessary that an emergency or interim withdrawal or amendment to the scope of clinical practice be made immediately otherwise serious harm to patients could be allowed to continue to occur in a health facility from scopes of clinical practice that have not been amended or withdrawn. It should be noted that the making of these interim and emergency amendments to a scope of clinical practice does not affect the ability of the person affected to seek review of the scope of clinical practice decisions at any time under section 130.

In addition, decisions regarding interim or emergency withdrawal or amendment of scope of clinical practice under section 66 are subject to particular criteria namely that the clinical practice committee has to be of the view that the clinical practice of the doctor or dentist at a health facility

poses a threat to the safety of members of the public. Likewise a CEO of a health facility has to be satisfied under section 69 that the concerns raised regarding the clinical practice of a dentist or doctor at a health facility are of sufficient seriousness to warrant the immediate withdrawal or amendment of the scope of clinical practice of the doctor or dentist.

These interim and emergency decisions are subject to a full review of the situation by the scope of clinical practice committee or by the CEO to which the affected clinician can make representations. In addition to these internal reviews, the affected person can also commence an ACAT review of these decisions at any time under section 130.

Prohibition on the disclosure of evidence to a court: HRA subsection 21(1) - The right to a fair trial

The Committee has commented that subsection 75(1) limits the right to a fair trial because it makes the following inadmissible as evidence in a proceeding before a court: an oral statement made in a proceeding before a scope of clinical practice committee; a document prepared for, and given to, a scope of clinical practice committee; and a document prepared by a scope of clinical practice committee.

Proposed subsection 75(1) is not new and the amendment made to this section simply replaces the term “clinical privileges committee” with the term “scope of clinical practice committee”. However, as these existing provisions were made prior to the passage of the HRA it is still necessary to provide justification for any limitations on a person’s right to privacy on the basis that the limitation is not arbitrary and is therefore justifiable under section 28 of the HRA.

The proposed subsection engages the right to a fair trial under s 21(1) of the HRA. Any purported limitations imposed on this right by section 75(1) are reasonable and proportionate. There are two issues in regard to the limitation. The first relates to the qualification suggested by the Committee and why the qualification would not be appropriate in the current circumstances, and secondly, whether the limitation imposed on a person’s right to a fair trial is reasonable and proportionate.

In regard to the first issue we are reticent to accept the Committees suggested qualification as it would undermine the policy imperative of the subsection which is to allow for full and frank disclosures to the scope of clinical practice committees regarding unsafe practices at health facilities in the ACT. To allow evidence to be rendered admissible under other legislation as suggested by the Committee would make a provision of this nature redundant.

The Committee has suggested that subsection 75(1) be amended to include the words “unless it is necessary to do so for this Act or another Territory law, or any other law applying in the Territory.” It would not be appropriate to include the qualification as suggested by the Committee. To do so would expose providers of information to scope of clinical practice committees to unnecessary litigation that would be costly and would ultimately prevent the clinical practice committees from receiving information necessary in order to carry out its functions of protecting the safety of members of the public from unsafe practices of doctors and dentists at health facilities.

Excluding evidence from a court proceeding is required in order to prevent a material risk to the safety of the public which would arise from the disincentive to report unsafe practices due to a fear of potential court litigation which would greatly undermine the purpose of the scope of clinical practice committees.

If oral statements and other documents were rendered admissible under another statute the intended protective effect of the proposed clause would be undermined and would greatly reduce the ability of the scope of clinical practice committee to protect the safety of patients from unsafe practices carried out at a health facility in the ACT.

Providing that oral statements and other documents intended only for the clinical practice committee's consideration are inadmissible in a court proceeding creates a greater incentive for full and frank reportage of poor clinical practices and procedures and substandard clinician conduct. If complainants are reluctant to report to the clinical practice committee because of concerns that their statements may be admissible in a cause of action against them, poor clinical practices will prevail, leading to wider ramifications for the health and safety of the community if such practices continue unabated. The policy intent behind the provision is to avoid creating a disincentive for full and frank disclosures to the clinical practice committee regarding unsafe practices at health facilities in the ACT.

The materials specified in section 75(1) are of a limited class and in most cases the majority of material adduced to a scope of clinical practice committee would be admissible as they would be documents that are already available within the health facility.

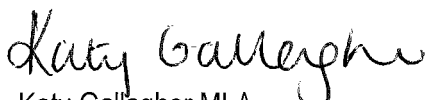
The Committee has also sought confirmation as to whether the reference to "section 66" in subsection 67(1)(b) should be read as "section 65". I confirm that subsection 67(1)(b) should make reference to "section 65" because this is the relevant section dealing with the provision of a Recommendation Notice by a scope of clinical practice committee to a doctor or dentist. A government amendment will be moved to correct this typographical error.

In addition, we have identified a typographical error in subsection 67(1)(a) in that "section 65" should be replaced with "section 59". We believe section 59 is the relevant section dealing with the functions of a scope of clinical practice committee to review the scope of clinical practice of a doctor or dentist. In the proposed legislation, "section 65" correctly refers to the review of clinical privileges by a clinical privileges committee.

The Committee's comments in relation to the explanatory statement are noted and will be taken into account in the preparation of any future statements.

I thank the Committee for its comments regarding the HAB.

Yours sincerely


Katy Gallagher MLA
Minister for Health

- 9 MAY 2011



Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER

MINISTER FOR ENERGY

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 36 of 28 April 2011 and for the Standing Committee on Justice and Community Safety's comments on the Criminal Proceedings Legislation Amendment Bill 2011.

I note the Committee's recommendation that I provide a justification for removing the ability of some accused people to request a judge-alone trial. I also note, however, that the Committee is not asserting that the Bill's provisions are not human rights compliant but rather the report discusses the conflicting standpoints.

It remains the Government's position, as stated in the Explanatory Statement to the Bill, that the right contained in section 21 of the *Human Rights Act 2004* (HRA) is to have a criminal charge "decided by a competent, independent and impartial court or tribunal after a fair and public hearing". This encompasses trials heard by the magistracy, juries and a judge alone. The Government considers that the proposed reforms to section 68B of the *Supreme Court Act 1933* (SCA), to remove the ability to waive a jury trial for certain offences, does not derogate from section 21 of the HRA.

In essence, the right to a fair trial contained in the international conventions and as formulated in the HRA, is concerned with the propriety of the adjudicative action and not the nature of the decision maker. It focuses on whether the decision maker has jurisdiction to examine all questions of law and fact and is impartial and independent. Recent judicial consideration of the right to a fair trial in section 21 affirms that it is a procedural human right that entitles a person to a particular process i.e. a decision by a competent, independent and impartial court or tribunal (*Thomson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38).

In further support of the Government's position, I would refer you to the case of *R v Fearnside* [2009] ACTCA 3 (24 February 2009) in which the ACT Court of Appeal considered whether section 68B(1)(c) of the SCA offended the right to a fair trial. The defendant had failed to file his

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election in accordance with the section and had lost the ability to elect for trial by judge alone. One of the questions under consideration in *Fearnside* was whether this breached section 21 of the HRA.

In delivering the Court of Appeal's ruling, Justice Besanko stated:

"It might be said that it would be a surprising conclusion that a trial by jury would not secure to all accused persons a fair hearing by a competent, independent and impartial court having regard to the facts that before the Supreme Court (Amendment) Act 1993 (ACT) all charges of serious criminal offences were tried by jury, that in some other jurisdictions in Australia a trial must be by jury and there is no right in an accused person to elect for trial by judge alone and that in the case of Commonwealth offences trial by jury is prescribed by s80 of the Constitution".

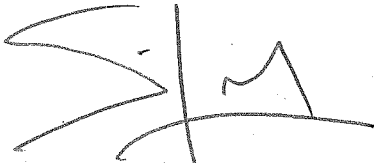
Besanko J went on to state that sources of international law indicated that a jury is a competent independent and impartial body and that:

"In my opinion, the right to elect for trial by judge alone is not part of, or an aspect of, the right to a fair trial in section 21 of the HRA".

I understand that there may be concerns that factors such as complexity, length of trial and pre-trial publicity have the potential to impact on the trial process. However, it should be remembered that juries have always had to hear matters outside their everyday knowledge or expertise and the fairness of proceedings is protected by a wide variety of provisions concerning the exclusion of evidence and judicial directions to the jury. I have already made public my intention to further support the fairness of jury trials by prohibiting the publication of certain pre-trial evidence.

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

Yours sincerely

A handwritten signature in black ink, appearing to be 'Simon Corbell', written over a horizontal line.

Simon Corbell MLA
Attorney General

24.5.11



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
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the Standing Committee on Justice and Community Safety's Scrutiny Report No 34 of 24 March 2011, in relation to the Explanatory Statement of Subordinate Law 2011-1 being the Environment Protection Amendment Regulation 2011 (No1). I apologise for the delay in responding.

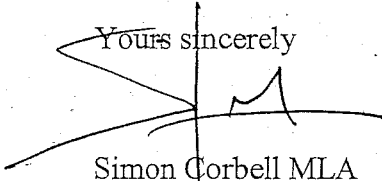
The Committee notes that the Explanatory Statement of the Subordinate Law fails, in its view, to address principle (a)(ii) to consider undue trespasses on rights established by law. However, principle (a)(ii) of the Committee's terms of reference would appear to address the legislative instrument itself rather than any ancillary documents, with principle (b) of its terms of reference specifically addressing explanatory statements.

The Committee's concerns regarding the deficiency of the Explanatory Statement for Subordinate Law 2011-1 in addressing the strict liability component is covered under the overarching explanatory statement for the *Environment Protection Regulation 2005*. The explanatory statement for the whole Regulation refers to strict liability offences and possible defences under the Regulation.

The Committee further noted its view that the Explanatory Statement is inconsistent with principle (b) of the Committee's terms of reference, that it did not meet the technical or stylistic standards expected by the Committee. I note that I have received a draft copy of the Committee's *Guide to writing an explanatory statement*, and I will seek to ensure that my officers comply with this guidance once it is finalised.

I thank the Committee for its vigilance and have asked my Department to exercise greater diligence in its checking of instruments.

Yours sincerely


Simon Corbell MLA
Minister for the Environment and Sustainable Development

30/5/11
cc Deputy Clerk, ACT Legislative Assembly

ACT LEGISLATIVE ASSEMBLY

19 April 2011

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 the Scrutiny of Bills and Subordinate Legislation Committee Report No 12 of 2009 and the comments on the Eggs (Cage Systems) Legislation Amendment Bill 2009.

The Committee considered whether section 7 of the Bill was a limitation on freedom of expression that was "demonstrably justified in a free and democratic society" under section 28 of the Human Rights Act. The Committee concluded that "it is probable that the provisions of this Bill will be upheld as 'demonstrably justified in a free and democratic society'. I agree with this assessment, and would emphasise that the limitation proposed in the Bill – the requirement to display signage about the types of eggs being sold – is a very minor limitation. It is not difficult for retailers to comply with this requirement. It also has a significant impact in ensuring purchasers know which products they are buying and can make an informed choice.

The Committee also considered whether the way the bill sought to regulate the sale of eggs would be inconsistent with the provision of section 69 of the *Australian Capital Territory (Self-Government) Act 1988* that trade and commerce between the Territory and a State, and between the Territory and other Territories, shall be absolutely free. The Committee concluded that it would be highly unlikely that the degree of regulation of the sale of imported eggs involved would be inconsistent with section 69. I agree with this assessment. I would also note that the bill does not prevent interstate trading in eggs, merely the way they are displayed in ACT stores, nor does the Bill operate in a protectionist way to favour ACT producers.

I thank the Committee for commenting on these issues.

Yours sincerely

A handwritten signature in cursive script, reading "Caroline Le Couteur".

Caroline Le Couteur MLA

01 May 2011

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 the Scrutiny of Bills Report No 36 of 2011 in relation to the Committee's comments on the *Animal Welfare Legislation Amendment Bill 2011*. I appreciate the feedback that the Committee has provided on the Bill and have responded to your concerns below.

The right to privacy and the regulation of the means of obtaining cats and dogs

The Committee points out that regulating the means of obtaining cats and dogs may engage the right to privacy under s12(a) of the Human Rights Act, noting that the degree of protection the right affords is a matter of much debate.

I note the Committee recognised that while the explanatory statement does not explicitly address potential limitations on the right to privacy, it does in substance address the matters relevant to an assessment of whether the limitations on human rights are arbitrary.

In addition, I would point out that animals have a special status as sentient creatures and there is a strong case for controlling how people may treat them. Animals are not the same as other regular goods or chattels, which would more clearly engage the right to privacy. What an individual does with his or her own clothes or furniture for example may be considered their own private business. However an animal has competing rights, and a person cannot treat an animal however they wish, even if they are the legal owner. A variety of laws - such as those governing animal cruelty - already place restrictions on how a person can treat an animal, and the new provisions under the Bill are only minor extension of these limitations.

The presumption of innocence and proposed subsection 94

The Committee points out that subsection 94(2) creates a defence which the defendant bears the onus of proving (on the balance of probabilities). The Committee's report states that this is a limitation on the right to the presumption of innocence.

The proposed section 94(1) creates a new obligation on the sellers of animals to ensure that they do not sell animals to people under 18 years of age. The requirement to prove certain matters only applies in relation to the availability of an explicit defence (effectively that the seller was shown a false ID) which will acquit them of recklessness. The other elements of the offence – in particular that the defendant was reckless in the first place – must still be proved by the prosecution.

My view is that the presumption of innocence is not limited in this circumstance. Rather, the accused person enjoys this presumption until the prosecution proves beyond reasonable doubt both the physical and fault elements of the offence. The defendant then has an additional opportunity to prove on the balance of probabilities that a particular circumstance existed and therefore that they haven't committed an offence. The obligation remains with the prosecution to prove the offence occurred and the availability of specific defences and the requirements for those defences to be successful does not alter the fundamental presumption of innocence.

The wording of the offence parallels the offence for selling tobacco products to a minor under the Tobacco Act 1927. It is important for giving efficacy to scheme by encouraging retailers to actively ensure they do not sell animals to minors, and check IDs if necessary. It should also be noted that the onus applies to people who already operate in a regulated business environment and who should be aware of the various rules applicable to them.

Providing procedural fairness to a licensee seeking renewal of a breeders licence

The Committee notes that proposed section 73J governs some aspects of the renewal of a breeders licence, but does not make provision for the affording of procedural fairness to the person seeking renewal. In contrast, where the registrar decides to amend a licence on her or his own initiative, the Registrar must give the breeder a fair opportunity to respond. The situations are different in that s73T will generally apply to a situation where new information has come to the registrar's attention about the breeder or the breeding operation, and it is fair to allow the breeder to respond; 73J will be brought about the lapse of three years, rather than by new information.

However, I do agree with the Committee that it is still preferable in this situation to afford the breeder the opportunity to respond under s73J, especially considering the registrar does have the power to refuse the renewal of a licence under this section. I will therefore introduce an amendment to the bill to achieve this.

I thank the Committee for commenting on these issues.

Yours sincerely

A handwritten signature in cursive script that reads "Caroline Le Couteur". The letters are fluid and connected, with a prominent capital 'C' at the beginning.

Caroline Le Couteur MLA