Legislative Assembly for the ACT

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

Scrutiny Report

12 DECEMBER 2005

Report 20

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bill—No comment

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

CIVIL LAW (PROPERTY) BILL 2005

This is a Bill to consolidate the law of property in the ACT into one easily accessible body of law. It would repeal a number of statutes and re-enact their provisions.

Bills—Comment

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

CASINO CONTROL BILL 2005

The Bill would repeal the *Casino Control Act 1988* and related laws, and make amendments to a number of other related laws, and thereby establish a scheme for the regulation of casinos in the Territory. It would regulate the eligibility of the casino licensee and the issue or transfer of a casino licence, and also more subsidiary matters such as casino employee licensing, operating hours, approval of casino games and their rules, approval of gaming equipment, approval of supply contracts and approval of the casino's operational procedures.

Report under section 38 of the Human Rights Act 2004 and report on whether a clause of the Bill unduly trespasses on personal rights and liberties

Strict liability offences

Summation

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

In the light of the justification offered, and the attention that has been given to provision of specific defences where appropriate, the Committee considers that the only issue for consideration is whether a maximum penalty of 100 penalty points is appropriate where the defendant is a casino corporation.

Provision for strict liability offences are to be found in a number of the clauses of the Bill. The relevant clauses are: 41, 49, 54, 61, 65, 75, 77, 80, 85, 86, 89, 98, 99, 100, 101, 102, 103, 104, 106, 107, 124, 132, and 133.

A number of matters should be noted.

(a) In some instances, there is provision for a specific defence (in addition, that is, to those available under the *Criminal Code 2002*). The relevant provisions are:

clause 54: a "reasonable excuse" defence under subclause 54(4);
clause 80: a belief about the age of a child under subclause 80(3);
clause 85: a "reasonable grounds to believe" defence under subclause 85(3);
clause 106: a belief about the age of a child under subclause 106(4);
clause 124: a "reasonable steps" defence under subclause 124(4); and
clause 133: a "reasonable steps" defence under subclause 133(5).

Provision of such defences ameliorates any concern there might be that the relevant strict liability offence provision is incompatible with the presumption of innocence.

(b) The level of penalty

The Committee's view is that 50 penalty points might be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 5 of the 6th Assembly*. In many instances, the maximum punishment provided for by the clauses of the Bill does not exceed 50 penalty points.

In some instances, however, the maximum punishment does exceed 50 penalty points, up to a maximum of 100 penalty points. These are cases where the defendant is the casino licensee as a corporation. The Explanatory Statement addresses this issue:

> The strict liability offences have penalties that generally range between 20 and 50 penalty units for casino employees and up to 100 penalty units for the casino licensee as a corporation. The higher penalty for the casino corporation is considered appropriate because the corporation carries a higher level of responsibility and will be more aware of their obligations under their licence and the legislation. Therefore in these circumstances a breach by the casino licensee will be a serious matter and should be able to be adequately dealt with by the judicial system.

(c) The justification offered for imposition of strict liability offences

The Committee notes that a specific justification for these provisions is provided in the Explanatory Statement. In particular, it is said:

> Strict liability offences generally arise in a regulatory context where, for reasons such as public safety or protection of the public revenue, it is necessary to ensure the integrity of the regulatory scheme. In these circumstances, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement in the particular industry, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded.

This rationale is relevant in the tightly regulated casino industry where trained and licensed casino employees engaged in performing functions in the casino (as opposed to members of the general public or persons in some other professions) can be expected to be aware of their duties, obligations and responsibilities. Additionally, the potential effect on the government's gambling harm minimisation strategies and, as a consequence, the potential effect on casino patrons and the level of problem gambling of a failure by the casino licensee (or any other person given authority under that licence) to adequately fulfil the requirements of that licence or authority further justifies strict liability. As outlined above, the Bill adds specific additional defences where appropriate and relevant to individual provisions in the Act.

Right to liberty and security of the person: detention of person in a casino

Is clause 121, by providing for the detention of a person by a casino official, incompatible with HRA subsection 18(1), 18(2) or section 19?

There is an issue whether clause 121 of the Bill is compatible with subsection 18(1) of the *Human Rights Act 2004*. The former provides:

121 Detention of suspected person

(1) This section applies if a casino official suspects, on reasonable grounds, that a person (the suspected person) in the casino is committing, or has committed, an offence.

(2) The official must detain the suspected person in a suitable place in the casino until a police officer arrives.

(3) The official commits an offence if—

(a) the official detains the suspected person; and

(b) does any of the following in relation to the suspected person:

(i) uses more force than is necessary and reasonable;

(ii) fails to tell the suspected person of the reasons for the detention;

(iii) fails to immediately tell a police officer of the detention and the reasons for the detention.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

HRA subsections 18(1) and (2) provide:

18 Right to liberty and security of person

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

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

The basic issue is whether a detention of a person by a casino official acting under clause 121 is an "arbitrary" detention in terms of HRA subsection 18(1). Account must also be taken of HRA subsection 19(1):

> (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(There are further provisions in section 18 which afford protection where a person is "arrested", or "arrested or detained on a criminal charge". These provisions may not apply to an exercise of power by a casino official under clause 121 of the Bill. If they do, there would then be further questions about the compatibility of clause 121 with HRA section 18.)

The Explanatory Statement does not identify any HRA issue, but it does point, directly or indirectly, to:

- the circumstances in which the power may be exercised – that is, that a casino official suspects, on reasonable grounds, that a person in the casino is committing, or has committed, an offence;
- the protections afforded by subclause 121(3);
- the facilities within a casino – such as "camera surveillance along with trained surveillance and security officers", which mean that "there is high probability of detecting criminal activity in the casino"; and
- the close monitoring of the activity of a casino licensee and a casino employee in this regard by the Commission.

The Committee also notes some provisions in HRA section 18 may operate where a casino official detains a person under clause 121. Thus, that person:

- "is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful" (HRA subsection 18(6)); and
- if detained unlawfully, "has the right to compensation for the … detention" (HRA subsection 18(7)).

On the other hand, there are some matters that might be thought to give rise to a concern about whether clause 121 is compatible with HRA sections 18 and/or 19:

- the clause imposes an obligation (and not a discretion) to detain a person;
- the obligation arises when the casino official "suspects" on reasonable grounds, etc. Suspicion is a lower threshold than belief;
- "casino official" is very widely defined to embrace any "casino employee" (Dictionary to the Act);

- there is no time limit to a detention other than "until a police officer arrives". Ordinarily, this may be a short time, but it is noted that there is no obligation on the police to proceed to the casino;
- there is no provision as to the evidentiary status in a later court proceeding of any statements – and in particular of admissions – made by the detainee while in detention. In contrast, a person detained by the police is protected in this respect;
- clause 121 does not impose on the casino official any obligation to permit the person detained to communicate with any other person;
- there is no provision as whether the casino official must be of the same sex as the detainee (compare to the search provisions in clause 120);
- the only limitation on the manner of detention is that it be "in a suitable place"; and
- the person who may detain – a "casino official" – may be subject to monitoring by the gambling and racing commission, but is nevertheless a private individual on whom is conferred a significant power.

There is no explanation of why casino operators should be given a particular power to detain, as against their simply exercising a citizen's power to make an arrest.

If it is considered that there is an incompatibility between clause 121 and one or other, or both, of HRA sections 18 and 19, the issue is then whether this is justifiable under HRA section 28. The Committee's report on the Crimes (Offences Against Pregnant Women) Amendment Bill 2005 provides a framework for this assessment – see below.

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

Right to liberty and security of the person: lack of clarity in the definition of the offence of cheating

Is there such lack of clarity in statement of the elements of the offence of cheating in clause 108 that there is a failure to provide sufficient certainty?

Given its potential significance as a basis for a casino official to act under clause 121 to detain a person, a lack of clarity in the definition of the offence of cheating (as provided for by clause 108) assumes significance. The latter provides, in part:

> **108** (1) A person commits an offence if—
>
> (a) the person is in the casino; and
>
> (b) the person **dishonestly**—
>
> (i) obtains for the person or someone else; or
>
> …
>
> money, chips, benefit, advantage, valuable consideration or security; and

(c) the person does so by—

(i) trick, device, sleight of hand or representation; or

(ii) a scheme or practice; or

…

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

A gambler might employ a "practice" – such as "counting the cards" – which does not involve any element of trickery. Such a practice will only be a basis for finding the person guilty of this offence if it is employed "dishonestly". What this concept involves is therefore of critical significance.

The rights issue may be posed in the form: is the qualifying factor that action be taken "dishonestly" too vague to be acceptable as a standard for the application of the criminal law?

The issue can perhaps be stated as one arising under HRA subsection 18(2). That is, that the notion that a deprivation of liberty is justified only on "grounds … established by law" requires that the law "must be sufficiently precise for the individual to be able to regulate his conduct in accordance with the law" (B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (2001), at 2-81, and see at 2-10-2-91, and 10-01-10-34).

Put simply, the notion is that an offence provision must be capable of being understood by those to whom it is directed. If the definition of the offence is too vague, the law has not in effect specified what is punishable. In *Polyukovitch v Commonwealth* (1991) 172 CLR 501 at 609, Deane J quoted English writers who emphasised the need for offences to be prescribed by law:

> The basic tenet of our penal jurisprudence is that every citizen is "ruled by the law, and by the law alone". The citizen "may with us be punished for a breach of law, but he can be punished for nothing else" (Dicey, *Introduction to the Study of the Law of the Consitution*,10th ed. (1959), p 202). Thus, more than two hundred years ago, Blackstone taught (see *Commentaries*, (1830), vol. I, pp 45-46) that it is of the nature of law that it be "a rule prescribed" …

(See generally the discussion in *Report No 6 of 2000*, concerning the Adult Entertainment and Restricted Material Bill 2000; and *Report No 20 of the Fifth Assembly*, concerning the Criminal Code 2002.)

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

Does a clause of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

Does a clause of the Bill make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?

The Committee notes that a number of clauses of the Bill confer administrative power in terms that are largely undefined; see clause 22, subclause 44(7), subclause 84(1), subclause 87(2), and subclause 96(2). However, the exercise of any of these powers is reviewable, (see clause 137), and thus the notice given to the person affected of an exercise of the power would state specific reasons for the decision; (this is the effect of clause 139). The Committee raises no concern about these powers.

On the other hand, the discretionary powers in subclause 27(5) (concerning waiver of a late payment penalty), and subclause 68(2) (exemption of a casino operating at core trading hours) are not reviewable.

Consideration might be given to providing for review of an exercise of these powers.

CRIMES (OFFENCES AGAINST PREGNANT WOMEN) AMENDMENT BILL 2005

This Bill would amend the *Crimes Act 1900* to create a number of "aggravated" offences in circumstances where an existing offence is committed against a pregnant woman, and the commission of the offence causes the loss of, or serious harm to, the pregnancy or the death of, or serious harm to, a child born alive as a result of the pregnancy.

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

1. The key elements of the Bill

A key provision is proposed subsection 48A(2) of the *Crimes Act 1900*, which would provide:

> (2) The **offence is an aggravated offence if**—
>
> (a) the offence was **committed against a pregnant woman; and**
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> (b) the commission of the offence **caused**—
>
> (i) the loss of, or serious harm to, the pregnancy; **or**
>
> (ii) the death of, or serious harm to, a child born alive as a result of the pregnancy.

The **offences** in the *Crimes Act 1900* **to which this provision applies are** manslaughter, intentionally inflicting grievous bodily harm, recklessly inflicting grievous bodily harm, wounding, inflicting actual bodily harm, assault occasioning actual bodily harm, and culpable driving of a motor vehicle; see proposed subsection 48A(1), and clauses 4 to 16 of the Bill.

Where an offence against one of these offences is an aggravated offence, the **result is that the penalty for that offence is greater than is the case where the offence is not aggravated**. For example, whereas the punishment for manslaughter is a maximum of imprisonment for 20 years, where the offence is aggravated, the punishment is a maximum of 26 years; see clause 4 of the Bill.

Where the Crown seeks to prove that the elements of an aggravated offence have been committed, it must first prove beyond reasonable doubt that the elements of the "simple" offence (such as manslaughter) have been committed.

The Crown must then prove beyond reasonable doubt that there exist those facts which establish that the offence is "aggravated" in the way described in proposed subsection 48A(2). The human rights issue arises out of the way proposed section 48A makes provision concerning proof of these circumstances**.**

In the first place, the result of proposed subsections 48A(3) is that the Crown must state in the charge the particular factors of aggravation it alleges exist. That is, the Crown must charge that "the offence was committed against a pregnant woman" (proposed paragraph 48A(2)(a)), and, in addition, charge that one or other of the circumstances stated in proposed paragraph 48A(2)(b) exist.

Secondly, the Crown must prove beyond reasonable doubt that in the circumstances of the case these factors charged do exist.

Thirdly, proposed subsection 48A(4) provides:

> "It is not necessary to prove that the person who committed the offence had a fault element in relation to any factor of aggravation."

The concept of a "fault element" is not defined in the Bill. The concept is defined in subsection 17(1) of the *Criminal Code 2002* to mean "intention, knowledge, recklessness or negligence", (and then those terms are further defined). This definition cannot be imported directly into the Bill because proposed subsection 48A(5) provides (inter alia) that section 17 does not apply to an offence to which section 48A applies. Perhaps, however, as a matter of ordinary language, this is what the concept of "fault element" in proposed subsection 48A(4) would be taken to mean.

The effect of proposed subsection 48A(4) is that the Crown need not prove that the defendant had any knowledge that the victim was a pregnant woman, or that her or his actions might cause harm to the pregnancy, or to a child born alive as a result of the pregnancy. (The operation of this provision is further explained below.)

There is thus **a significant issue concerning the compatibility of proposed subsection 48A(4) with the presumption of innocence** stated in subsection 22(1) of the *Human Rights Act 2004*.

2. Explanation of proposed subsection 48A(5)

Before turning to that issue, it is desirable to clarify a matter which, on a first reading of the Bill, might have been thought to give rise to a rights issue. This is the question whether a person charged with a "simple" offence of a kind to which proposed section 48A applies can raise any defence to that charge.

Part of the answer to this question is provided by subsection 48A(5):

> (5) To remove any doubt, the Criminal Code, chapter 2 (other than the applied provisions) does not apply to an offence to which this section applies, whether or not it is an aggravated offence.

This makes it clear that a defendant to a charge of a "simple" offence, or to an aggravated offence, cannot invoke any of the defences permitted by Division 2.3 the *Criminal Code 2002*. (Briefly, the relevant provisions permit a defendant to prove (but only to the evidential burden standard) matters such as mistake or ignorance of fact, claim of right, intervening conduct or event, duress, sudden or extraordinary emergency, self-defence or lawful authority. Upon such proof, the prosecution must then prove beyond reasonable doubt that the relevant matters do not exist.)

But the "doubt" about the application by Division 2.3 of the *Code* to which subsection 48A(5) refers arose only in respect of the case where a person was charged with an aggravated offence of one of the kinds described in proposed subsection 48A(1).

Where the person is charged only with a "simple" offence, the defendant cannot invoke any of the defences permitted by Division 2.3 of the *Criminal Code 2002* for the reason that until 1 July 2007 these provisions of the *Code* do not apply to pre-2003 offences (see sections 8, 9 and 10 of the *Code*).

On the other hand, where the person is charged with the aggravated offence of inflicting actual bodily harm, it would have been arguable that this was a new offence (that is, not a pre-2003 offence), and thus Division 2.3 of the *Criminal Code 2002* did apply. The object of proposed subsection 48A(5) is to remove this doubt. While this provision applies to both aggravated and simple offences, the inclusion of the latter was probably not necessary.

However, while it is thus clear that the defendant to a "simple" or an aggravated charge cannot invoke any of the defences permitted by Division 2.3 of the *Criminal Code 2002*, most of these *Code* defences have common law or statutory counterparts.

[The Committee suggests that the explanation of proposed subsection 48A(5) in the Explanatory Statement might mislead the reader. The statement - "Subclause 5 provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to an offence to which the section applies …" – might be taken to suggest that unless such provision was made by proposed subsection 48A(5) these general principles would apply. As explained above, it is only because of some doubt about the application of the *Code* to the *aggravated* offences that made it necessary to enact proposed subsection 48A(5).

The Committee also suggests that the effect of proposed subsection 48A(5) would be made clearer if the position concerning common law and non-*Code* statutory defences was explained.]

3. The sentencing discretion where a defendant is convicted of an aggravated offence

Finally, in order to provide a setting for consideration of the human rights issues, it is also necessary to take note of proposed paragraph 342(1)(w) of the *Crimes Act 1900*. Subsection 342(1) begins with the words:

> (1) In determining the sentence to be imposed on a person, the matters to which a court shall have regard include, but are not limited to, such of the following matters as are relevant and known to the court: … .

Thus, proposed **paragraph 342(1)(w) would add to the range of matters to which a court "shall have regard" when imposing a sentence**. These matters are:

> (w) if a victim of the offence was a pregnant woman—
>
> (i) whether the person knew, or ought reasonably to have known, that the woman was pregnant; and
>
> (ii) whether the person intended to cause, or was reckless about causing, loss of or harm to the pregnancy; and
>
> (iii) the loss of or harm to the pregnancy; and
>
> (iv) whether the person intended to cause, or was reckless about causing, the death of or harm to a child born alive as a result of the pregnancy; and
>
> (v) the death of or harm to a child born alive as a result of the pregnancy.

4. Rights issues: the presumption of innocence

Is proposed subsection 48A(4) incompatible with the presumption of innocence?

The *Human Rights Act 2004*, subsection 22(1) states:

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

This presumption incorporates the value that a finding by a court that a person is guilty of an offence is justified only where the person bears moral responsibility for what they did, and that this is established only on proof by the prosecution (arguably beyond reasonable doubt) of the person:

- having committed the acts that comprise the conduct as a voluntary act of will, and

- having had an intention to commit those acts (or of having performed the acts with an analogous state of mind – see statement in the *Criminal Code 2002* of what states of mind may amount to a "fault element").

Thus, if one of these "ultimate" facts is not proved to the satisfaction of the trier of fact, the person remains "innocent".

In other words, the presumption of innocence requires that the prosecution must prove that the defendant committed the physical elements of the offence, **and** did so with a particular state of mind – such as that they intended to so, or with some analogous state of mind.

On its face, proposed section 48A of the *Crimes Act 1900* is incompatible with the presumption of innocence stated in HRA subsection 22(1). This may be illustrated in the following way.

Section 21 of the *Crimes Act 1900* provides: "A person who intentionally wounds another person is guilty of an offence …". This is one of the "simple" offences referred to in proposed subsection 48A(1). In section 21 there is an explicit provision concerning what should be the "fault element" of this offence. Where the defendant is charged only with an offence against section 21, the prosecution must prove that the defendant:

- wounded another person, and
- intended to wound that person.

Thus, section 21 is compatible with HRA subsection 22(1).

But where the defendant is charged with an offence against section 21, and in addition the prosecution alleges that it is an *aggravated* offence, the prosecution must prove that the defendant:

- wounded another person, and
- intended to wound that person,

and in addition,

- "the offence was committed against a pregnant woman" (see proposed paragraph 48A(2)(a)), ***and either***
- the commission of the offence caused "the loss of, or serious harm to, the pregnancy" (see proposed paragraph 48A(2)(b)(i)); or
- the commission of the offence caused "the death of, or serious harm to, a child born alive as a result of the pregnancy" (see proposed paragraph 48A(2)(b)(ii)).

Each of these matters of fact is described as a "factor of aggravation" (see proposed subsection 48A(6)).

Thus, the effect of proposed subsection 48A(4) is that proof of a "factor of aggravation" is achieved merely by the prosecution proving to the satisfaction of the trier of fact beyond reasonable doubt the existence of the relevant factor – such as that "the offence was committed against a pregnant woman". The prosecution need not prove – or adduce any evidence about – whether the defendant had any intention to wound a pregnant woman, (or had any comparable state of mind on the question of whether the person wounded was a pregnant woman).

Is any incompatibility justifiable under HRA section 28?

This effect of proposed subsection 48A(4) brings about an incompatibility with HRA subsection 22(1). The question then becomes whether this derogation can be justified under HRA section 28, so that, in the end, one can say that there is no incompatibility with the HRA taken as a whole. Section 28 provides:

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

(It would also be possible for a Member of the Assembly to reason that while there may be incompatibility with the HRA taken as a whole, proposed subsection 48A(4) should become law. There is an analogy here with the case where the Attorney-General provides a statement that a bill is incompatible with the HRA (section 37). It is clearly contemplated that a bill might be passed notwithstanding such a statement.)

The Explanatory Statement assumes that a limitation on the right in HRA subsection 22(1) (although it refers to an "engagement" of that right) may be justified under HRA section 28 if it is "a justifiable limit on the right to be presumed innocent and is relevant, rational and proportionate to the objective served by the aggravated offence provisions". However, the analysis that then follows suggests that the first requirement is satisfied if proposed subsection 48A(4) is "relevant, rational and proportionate" to its objective. That is, it is argued that proposed subsection 48A(4) is "a justifiable limit" if it is established that it is "relevant, rational and proportionate" to its objective.

While not in fundamental disagreement with the thrust of this approach, the Committee considers that the rights issues thrown up by proposed subsection 48A(4) may be better appreciated if a more detailed framework is stated.

5. What does an assessment under HRA section 28 involve?

While most bills of rights make allowance for derogation from the rights stated, HRA section 28 is very close in its terms to the derogation clauses in section 1 of the *Canadian Charter of Rights and Freedoms*, and in section 5 of the *New Zealand Bill of Rights Act 1990*; (the text of these provisions is found in R Clayton and H Tomlinson, *The Law of Human Rights* (2000, and supplements) at 6.62, and 6.68). The approach taken by the Supreme Courts of these jurisdictions is therefore instructive. (This approach is in any event in substance that taken by

other common law courts, and by the European Court of Justice and European Court of Human Rights.)

In *R v Oakes* 1986 CanLII 46 (S.C.C.), Dickson CJC, in a widely approved statement, said:

> The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee.
> …
> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society.
>
> **First, the objective to be served by the measures limiting a Charter right must be sufficiently important** to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, **an objective must relate to societal concerns which are pressing and substantial** in a free and democratic society before it can be characterized as sufficiently important.
>
> **Second**, the party invoking s. 1 must **show the means to be reasonable and demonstrably justified**. This involves a form of proportionality test involving three important components. To begin, the **measures must be fair and not arbitrary**, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, **the means should impair the right in question as little as possible**. Lastly, **there must be a proportionality between the effects of the limiting measure and the objective** -- the more severe the deleterious effects of a measure, the more important the objective must be.

6. Application of this framework to proposed subsection 48A(4).

(a) The first two elements of the *Oakes* test may be taken together.

Does proposed subsection 48A(4) meet a pressing and substantial objective?
Is there a rational connection between subsection 48A(4) and the achievment of the objective?

Concerning the first question, the Supreme Court of Canada has held that the focus is on "the objective of the measure that establishes the limit on the right, rather than the objective of the law as a whole" (P Rishworth et al, *The New Zealand Bill of Rights* (2003) 178). In relation to this bill, the measure that establishes the limit on the presumption of innocence is of course proposed subsection 48A(4), as has been explained above.

Concerning the second question, the Supreme Court of Canada takes a view favourable to satisfaction of this test. It will be met where "it is arguable that the objective of the law is in some way advanced by the measures chosen" (ibid at 179).

The Explanatory Statement states that the "relevance" and "rationality" of proposed subsection 48A(4) is at the most general level to be found in the existence of "a strong community interest in affording special protections for pregnant women from acts of violence and for appropriate sanctions for malicious acts against pregnant women". The Explanatory Statement assumes that it is relevant and rational to pursue this objective "by allowing for higher penalties to be imposed where a relevant offence is committed against a pregnant women and the commission of the offence causes the loss of or serous harm to the pregnancy or child born alive as a result of the pregnancy".

It is arguable that the removal of a fault element so far as concerns the proposed subsection 48A(2) elements of an aggravated offence is not rationally connected to the objective of punishing "malicious acts", for the reason that an offender could not, for example, be said to have wounded a pregnant women maliciously if he was unaware that the woman was pregnant.

On the other hand, the Committee accepts that there is a rational connection between proposed subsection 48A(2) and the pressing and substantial objective of affording special protections for pregnant women from acts of violence. The Committee also notes that proposed subsection 48A(4) provides protection to "the right to liberty and security of the person" (HRA, subsection 18(1)). To the extent that the "special protection" is incompatible with HRA section 8 (in its right to equality before the law aspect), the provision is justifiable under HRA section 28.

(b) The third and fourth elements of the *Oakes* test may be taken together.

Does proposed subsection 48A(4) minimally impair the presumption of innocence?
Whether or not it does, how is the impairment to be balanced against its impact on the presumption of innocence?

These two questions are usually accepted as the twin elements of the question whether the law is a proportionate way of meeting its objective.

Concerning the third element, the question is whether the limit on the particular rights in issue have been minimised to the extent possible (P Rishwoth et al, 179 at footnote 54.)

The Canadian case-law, no doubt influenced by the reference to "reasonable limits" in section 1 of the Charter (and see HRA section 28) may take an approach which is, in theory at least, more favourable to satisfaction of this test than the view taken by some other courts. In *R v Sharpe* [2001] SCR 45 at paras 96-97, McLachlin CJC said:

> [96] … it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: … .

> [97] This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal.

Concerning the fourth element, in *R v Sharpe* [2001] SCR 45 at para 102, McLachlin CJC said:

> the third and final branch of the proportionality inquiry [is] whether the benefits the law may achieve in [pursuit of its objective] outweigh the detrimental effects of the law on the right [affected]. The final proportionality assessment takes all the elements identified and measured under the heads of Parliament's objective, rational connection and minimal impairment, and balances them to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental *Charter* right is demonstrably justifiable in a free and democratic society.

At this final step in particular, it must be recognised that this framework will often leave very much to individual judgement. There are no scales to balance even metaphorically the impact of the value of the impairment against impact on the rights, for these are incommensurable values.

In relation to the Bill, it may assist discussion to treat the culpable driving offences separately.

(i) The culpable driving offences

Is proposed subsection 48A(4), when operating in respect of culpable driving offences, a proportionate means of achieving its object? In particular, does it strike an appropriate balance between the object of the law and the presumption of innocence?

In effect, the Explanatory Statement states that it is "rational" to displace the presumption of innocence (through proposed subsection 48A(4)) "because in a high proportion of cases the protection of pregnant women would be rendered ineffective if there is a requirement for the defendant to know the woman was pregnant". (The Explanatory Statement is referring here to the factor of aggravation in proposed paragraph 48A(2)(a)).

However, the example given to illustrate this point applies to only two of the offences to which proposed section 48A applies.

> For example, in the context of the culpable driving offences the aggravated offence would be unworkable if the prosecution is required to prove fault in relation to whether a driver knew the occupant of a car or victim was pregnant. In a high proportion of culpable driving offences a defendant would not generally be aware of any details of the occupant in another vehicle. Further, the state of mind or intent of the defendant in relation to causing the death of or harm to a victim or even the existence of a victim is not relevant to the elements of the simple offence.

The reference to "the simple offence" is to the offences – stated in subsections 29(2) and (3) of the *Crimes Act 1900* - of culpable driving of a motor vehicle causing death, or of causing grievous bodily harm.

The Explanatory Statement continues:

> This would also make an alternative option such as reversing the onus of proof ineffective. For these reasons the engagement of rights is proportionate.

The drafters of the Explanatory Statement were alive to the third of the *Oakes* factors – that is, whether there are means to achieve the objective that are less restrictive of the presumption of innocence. The Explanatory Statement makes the point that, given what are the elements of the offences of culpable driving, etc, it would not be appropriate to make provision as in proposed subsection 48A(4), but then qualify its effect by permitting a defendant to prove matters that would show that a factor of aggravation did not exist – such as that he or she did not know, and could not reasonably be expected to know, that a person who was injured by their culpable driving was a pregnant woman; (this example draws on what is provided for by proposed paragraph 342(1)(w) – see clause 20 of the Bill.)

The Explanatory Statement thus argues that because there is no alternative to simply removing the fault element, this is a proportionate way of pursuing the objective of proposed section 48A.

The Committee accepts this reasoning so far as it goes. It also notes that proposed paragraph 342(1)(w) can operate to ameliorate the operation of proposed subsection 48A(4) in relation to the culpable driving offences. Thus, the potential for a sentencing judge to adjust the penalty to take into account a defendant's lack of knowledge makes it easier to argue that proposed section 48A is a "proportionate" means of pursuing its objective.

But, in the end, it is arguable that this response does not confront the fourth question (or, the second element of a proportionality assessment), which is whether, in relation to the culpable driving offences, and allowing that proposed subsection 48A(4) is a minimal means of removing a fault element so far as concerns proof of the factors of aggravation in proposed subsection 48A(2), the result is one that strikes an appropriate balance between the object of the law and the presumption of innocence?

<u>The other offences</u>

Is proposed subsection 48A(4), when operating in respect of the other offences, a proportionate means of achieving its object? In particular, does it strike an appropriate balance between the object of the law and the presumption of innocence?

As the Explanatory Statement acknowledges, the reasoning it employed to justify the culpable driving offences does not apply in the context of the other offences to which proposed section 48A would apply. This distinction is probably drawn on the basis that in these other cases, the state of mind or intent of the defendant in relation to causing the death of or harm to a victim, and the existence of a victim, are facts relevant to the elements of the simple offence.

In these cases, the Explanatory Statement appears to argue that displacement of the presumption of innocence is justifiable because:

> the aggravated version of the offence would not come into effect until the prosecution can prove all elements of the simple offence beyond reasonable doubt. In relation to causing grievous bodily harm offences, for example, there is still the requirement to prove that the defendant intended or was reckless about the fact that grievous bodily harm would result or the offence could not be made out.

This is so, but this hardly advances the argument so far as concerns what is in effect the new offence of causing grievous bodily harm in circumstances of aggravation as described in proposed section 48A(2). The Explanatory Statement continues, however, to make an argument that does confront the problem.

> Most significantly, the absence of a fault element is balanced by clause [20] which requires a court to have regard to the harm caused to the pregnancy and the state of mind of the victim in relation to the existence of the pregnancy and the harm caused to the pregnancy when determining the sentence to be imposed on the person. It is considered that a judge is in the best position to ascertain in all of the circumstances what penalty should be imposed having regard to what the defendant knew. If the defendant did not know that the victim was pregnant, this would be an important factor in reducing the level of penalty that might otherwise be imposed.
>
> This balancing provision supports the proportionately of the engagement of the right to be presumed innocent and is further discussed in relation to clause 20. The provision has been carefully designed to counter the interference with the right to be presumed innocent and to ensure that this engagement of rights is not arbitrary, unfair or excessive.

[Query—Should it be “proportionality” rather than “proportionately”?]

Later, in relation to clause 20, the Explanatory Statement states:

> This additional consideration [in proposed paragraph 342(1)(w) of the *Crimes Act 1900*] is an important balance to [proposed subsection 48A(4). Proposed subsection 48A(4)] provides that it is not necessary to prove a fault element in relation to a factor of aggravation, effectively this enables a person to be found guilty of an aggravated offence although the person was not aware of the factor of aggravation. The person’s knowledge and state of mind when committing the simple offence would be taken into account by a court on sentencing.

> Being convicted of an aggravated offence does not mean that a court must impose the penalty for the aggravated offence. The aggravated offence penalty is a maximum penalty a court can impose. Where a statutory term of imprisonment is attached to an offence the term may be reduced by a court. For example, if the maximum penalty for a simple offence is ten years imprisonment, a court has the power to impose any term of imprisonment up to or including ten years imprisonment. Where the maximum penalty for the aggravated offence is 13 years, the court has the power to impose any term of imprisonment up to or including 13 years imprisonment.

The Committee acknowledges the force of this argument. On the other hand, some may argue that insufficient regard has been paid to the principle that there should be minimal impairment of the presumption of innocence. In particular, an alternative approach so far as concerns these other offences would be to permit a defendant to prove – as defence to the aggravated offence charged – matters that would show that a factor of aggravation did not exist – such as that he or she did not know, and could not reasonably be expected to know, that a person who was injured by what they did (which constitutes the simple offence) was a pregnant woman.

In the end, there also remains the fourth question: whether, in relation to these other offences, the result is one that strikes an appropriate balance between the objective of the law and the presumption of innocence?

Comments on the Explanatory Statement

The reference at mid-page 7 to clause 19 should be to clause 20, and it is suggested that this paragraph will be clearer if some reference is made to when a court would have regard to proposed paragraph 342(1)(w) of the *Crimes Act 1900* (which provision is alluded to by a reference to clause 20). Thus, this sentence might read:

> "Most significantly, the absence of a fault element is balanced by clause 20 which requires a court, when sentencing an offender under subsection 342(1)(w) of the *Crimes Act 1900,* to have regard to ---"

The references to subclause 18(4) in the first full paragraph at page 9 should be to "proposed subsection 48A(4)".

WORKERS COMPENSATION AMENDMENT BILL 2005 (NO 2)

This Bill would amend the *Workers Compensation Act 1951* and repeal the *Workers Compensation Supplementation Fund Act 1980*. The primary objective is to insert into the *Workers Compensation Act 1951* the provisions now found in the *Workers Compensation Supplementation Fund Act 1980* concerning safety net arrangements designed to ensure that all injured workers have access to benefits on injury. The Bill would also establish a scheme for the provision to interested persons of certificates of currency, which would provide information about the coverage of a compulsory insurance policy held by an employer.

Report under section 38 of the Human Rights Act 2004 and report on whether a clause of the Bill unduly trespasses on personal rights and liberties

Strict liability offences

Summation
The provision for strict liability offences raises issues canvassed in Report No 2 of the 6th Assembly. In essence, the issue is whether the derogation from the presumption of innocence (HRA s 22(1)) is justified by reason of the nature of the activity the subject of the offence (HRA s 28).
The Committee notes that a rights issue arises, but does not consider that the provision for strict liability offences in the Bill amounts to an undue trespass on rights and liberties.

Provision for strict liability offences are to be found in a number of the proposed amendments to the *Workers Compensation Act 1951*. The relevant page references to the Bill as presented are: 16-17, 27, 37,51, 56, and 59.

In no case does the maximum punishment exceed 50 penalty points. (The Committee's view is that 50 penalty points might be taken as a guide to the appropriate maximum level of punishment for strict liability: see Report No 5 of the 6th Assembly.)

The Committee notes that a general justification for these provisions is provided in the Explanatory Statement, and that the effect of the offences in proposed section 161 of the *Workers Compensation Act 1951* is ameliorated by provision for a defence of reasonable excuse: see clause 42.

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

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2005-244 being the National Exhibition Centre Trust Appointment 2005 (No. 3) made under section 8 of the *National Exhibition Centre Trust Act 1976* **appoints a specified person as a member of the National Exhibition Centre Trust.**

Disallowable Instrument DI2005-246 being the Betting (ACTTAB Limited) Rules of Betting Determination 2005 made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2001-8 and determines the Rules of Betting.**

Disallowable Instrument DI2005-247 being the Heritage (Council Chairperson) Appointment 2005 (No. 1) made under section 17 of the *Heritage Act 2004* **revokes DI2005-63 and appoints a specified person as chairperson of the ACT Heritage Council.**

Disallowable Instrument DI2005-248 being the Residential Tenancies (Tribunal) Selection 2005 (No. 2) made under subsection 112(5) of the *Residential Tenancies Act 1997* **appoints specified persons as members of the Residential Tenancies Tribunal of the Australian Capital Territory.**

Disallowable Instrument DI2005-249 being the Occupational Health and Safety (National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment) Revocation 2005 made under section 206 of the *Occupational Health and Safety Act 1989* **revokes approval of DI1996-256 being the National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment [NOHSC:1006(1995)].**

Disallowable Instruments—Comment

Minor drafting issues

Disallowable Instrument DI2005-241 being the Public Place Names (Phillip) Amendment 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes the name of a specified street in the division of Phillip.**

Disallowable Instrument DI2005-242 being the Public Place Names (Bonython) Amendment 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes the names of three unbuilt roads in the Division of Bonython.**

These instruments "revoke" the names of certain streets and roads. According to the Explanatory Statements, this is being done because the relevant streets/roads are either closed or unbuilt. The Explanatory Statement to DI2005-241 also indicates that this is being done so that the name can be re-used in a new location.

The instruments seek to achieve this result by *amending* the notice in the *Commonwealth Gazette* when the streets/roads were originally named and then *revoking* the names in question. While the Committee does not suggest that the instruments are invalid, the Committee considers that it may have been more appropriate for the instruments to amend the relevant Gazette notice by **omitting**, rather than revoking, the names.

Is this instrument disallowable?

Disallowable Instrument DI2005-243 being the Children and Young People (Childrens Services Council) Appointment 2005 (No. 1) made under section 36 of the *Children and Young People Act 1999* **appoints specified persons as members and chair of the Childrens Services Council.**

The Committee notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the Legislation Act operates to exclude public servant appointments from the operation of Part 19.3.3. Two people are included in this

instrument who, according to the Explanatory Statement, are public servants. That being so (and as the Committee has previously observed), there is no need to include references in the instrument to the persons concerned.

The Committee notes that there are inconsistent references in the instrument and the Explanatory Statement to the "**Children's** Services Council" and the "***Childrens*** Services Council". The Committee notes that the latter is the correct reference.

Finally, the Committee notes that the instrument is expressly retrospective (to 1 December 2003) in effect. The need for the retrospectivity is, however, explained in the Explanatory Statement, which also indicates that the retrospectivity does not adversely affect rights or impose liabilities. That being so, the Committee makes no further comment on the instrument.

Subordinate Laws—No comment

The Committee has examined the following subordinate laws and offer no comment on them:

Subordinate Law SL2005-29 being the Magistrates Court (Domestic Animals Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Domestic Animals Act 2000***.**

Subordinate Law SL2005-30 being the Magistrates Court (Food Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Food Act 2001***.**

Subordinate Law SL2005-31 being the Magistrates Court (Sale of Motor Vehicles Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Sale of Motor Vehicles Act 1977***.**

Subordinate Law SL2005-32 being the Magistrates Court (Plant Diseases Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Plant Diseases Act 2002***.**

Subordinate Law SL2005-33 being the Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Nature Conservation Act 1980***.**

Subordinate Law SL2005-34 being the Magistrates Court (Pest Plants and Animals Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Pest Plants and Animals Act 2005***.**

Subordinate Law SL2005-35 being the Security Industry Amendment Regulation 2005 (No. 1) made under the *Security Industry Act 2003* **exempts casino security employees from the requirements of the Act.**

Subordinate Law SL2005-36 being the Liquor Amendment Regulation 2005 (No. 1) made under the *Liquor Act 1975* **determines specified locations as prescribed public places.**

Subordinate Law SL2005-37 being the Magistrates Court (Environment Protection Infringement Notices) Regulation 2005 made under the *Magistrates Court Act 1930* **provides for the issuing of infringement notices for certain offences against the** *Environment Protection Act 1997***.**

INTERSTATE AGREEMENTS:

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

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Urban Services, dated 18 July 2005, in relation to comments made in Scrutiny Report 11 concerning DI2005-55, being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 2).
- The Chief Minister, dated 18 November 2005, in relation to comments made in Scrutiny Report 18 concerning the Administration (Interstate Agreements) Repeal Bill 2005.
- The Minister for Urban Services, dated 21 November 2005, in relation to comments made in Scrutiny Report 17 concerning DI2005-198, being the Domestic Animals (Dog Control Areas) Declaration 2005 (No. 1).
- The Minister for Health, dated 22 November 2005, in relation to comments made in Scrutiny Report 18 concerning the Health Records (Privacy and Access) Amendment Bill 2005 (No. 2).
- The Minister for Urban Services, dated 23 November 2005, in relation to comments made in Scrutiny Report 18 concerning DI2005-206, being the Territory Records (Advisory Council) Appointment 2005 (No. 1).
- The Minister for Children, Youth and Family Services, dated 25 November 2005, in relation to comments made in Scrutiny Report 18 concerning DI2005-219, being the Children and Young People Official Visitor Appointment 2005 (No. 3).
- The Treasurer, dated 1 December 2005, in relation to comments made in Scrutiny Report 18 concerning DI2005-218, being the Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2005 (No. 1).
- The Treasurer, dated 9 December 2005, in relation to comments made in Scrutiny Report 19 concerning the Revenue Legislation Amendment Bill 2005 (No. 2).

The Committee wishes to thank the Chief Minister, the Minister for Urban Services, the Minister for Health, the Minister for Children, Youth and Family Services and the Treasurer for their helpful responses.

PRIVATE MEMBER'S RESPONSE:

The Committee has received a response from Dr Foskey, dated 9 December 2005, in relation to comments made in Scrutiny Report 16 concerning the Court Procedures (Protection of Public Participation) Amendment Bill 2005.

Bill Stefaniak, MLA
Chair

December 2005

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

REPORTS—2004-2005

RESPONSES

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Report 1, dated 9 December 2004	
Disallowable Instrument DI2004-180 – Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1)	**No. 2**
Disallowable Instrument DI2004-194 – Construction Occupations Licensing (Fees) Determination 2004	**No. 2**
Disallowable Instrument DI2004-213 – Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1)	**No. 6**
Disallowable Instrument DI2004-214 – Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2)	**No. 6**
Disallowable Instrument DI2004-220 – Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1)	**No. 4**
Disallowable Instrument DI2004-221 – Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2)	**No. 4**
Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No. 1)	
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No. 1)	
Disallowable Instrument DI2004-232 – University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2)	**No. 14**
Disallowable Instrument DI2004-246 – Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1)	**No. 10**
Disallowable Instrument DI2004-258 – Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1)	**No. 3**
Subordinate Law SL2004-41 – Health Professionals Regulations 2004	**No. 2**
Subordinate Law SL2004-48 – Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1)	**No. 2**
Report 2, dated 14 February 2005	
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004. *Act citation: Classification (Publications, Films and Computer Games) (Enforcement) Amendment Act 2005* **(Passed 8.03.05)**	**No. 5**
Fair Work Contracts Bill 2004	**No. 6**

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Government Procurement Amendment Bill 2004. *Act citation: Government Procurement Amendment Act 2005* **(Passed 15.02.05)**	**No. 3**
Justice and Community Safety Legislation Amendment Bill 2004 (No. 2). *Act citation: Justice and Community Safety Legislation Amendment Act 2005* **(Passed 17.02.05)**	**No. 11**
Water Efficiency Labelling and Standards Bill 2004. *Act citation: Water Efficiency Labelling and Standards Act 2005* **(Passed 10.03.05)**	**No. 5**
Report 3, dated 17 February 2005	
Dangerous Substances (Asbestos) Amendment Bill 2005. **(Passed 17.02.05)**	**No. 6**
Health Records (Privacy and Access) Amendment Bill 2005. **(Passed 17.02.05)**	
Report 4, dated 7 March 2005	
Disallowable Instrument DI2004-260 – Health (Interest Charge) Determination 2004 (No. 1)	
Disallowable Instrument DI2004-261 – Liquor Licensing Standards Manual Amendment 2004 (No. 1)	**No. 11**
Disallowable Instrument DI2004-262 – Taxation Administration (Amounts payable-Home Buyer Concession Scheme) Determination 2004 (No. 5)	**No. 6**
Disallowable Instrument DI2004-266 – Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 15)	**No. 6**
Disallowable Instrument DI2004-267 – Public Sector Management Amendment Standard 2004 (No. 8)	**No. 6**
Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No. 4)	
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1)	
Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management Plan) 2005	
Disallowable Instrument DI2005-2 – Public Sector Management Amendment Standard 2005 (No. 1)	
Disallowable Instrument DI2005-3 – Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 1)	**No. 6**
Domestic Violence and Protection Orders Amendment Bill 2005 **(Passed 17.03.05)**	**No. 6**
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**	
Residential Tenancies Amendment Bill 2005 **(Passed 18.08.05)**	**No. 6**

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Subordinate Law SL2004-52 – Health Professionals Amendment Regulation 2004 (No. 1)	
Subordinate Law SL2004-53 – Supreme Court Amendment Rules 2004 (No. 4)	**No. 12**
Subordinate Law SL2004-56 – Dangerous Substances (General) Regulation 2004	**No. 6**
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004	
Subordinate Law SL2004-64 – Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2)	**No. 10**
Utilities Amendment Bill 2005 **(Passed 17.03.05)**	**No. 6**
Report 5, dated 14 March 2005	
Disallowable Instrument DI2005-11 – Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2005 (No. 1)	**No. 10**
Disallowable Instrument DI2005-12 – Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1)	
Disallowable Instrument DI2005-18 – Emergencies (Fees) Determination 2005	**No. 10**
Disallowable Instrument DI2005-8 – Community and Health Services Complaints Appointment 2005 (No. 1)	
Report 6, dated 4 April 2005	
Animal Diseases Bill 2005 **(Passed 7.04.05)**	**No. 10**
Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-28 – Road Transport (Public Passenger Services) Exemption 2005 (No. 1)	**No. 10**
Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**	
Pest Plants and Animals Bill 2005 **(Passed 5.05.05)**	**No. 10**
Stock Bill 2005 **(Passed 7.04.05)**	**No. 10**
Subordinate Law SL2005-4 – Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1)	**No. 11**
Tree Protection Bill 2005 **(Passed 22.09.05)**	**No. 10**
Report 7, dated 6 April 2005	
Workers Compensation Amendment Bill 2005 **(Passed 7.04.05)**	**No. 10**

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Report 10, dated 2 May 2005	
Crimes (Child Sex Offenders) Bill 2005 **(Passed 23.06.05)**	**No. 11**
Crimes (Sentencing) Bill 2005	**No. 11**
Crimes Amendment Bill 2005 **(PMB)**	
Disallowable Instrument DI2005-21 – Waste Minimisation (Fees) Amendment Determination 2005 (No. 1)	**No. 11**
Disallowable Instrument DI2005-32 – Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 1).....	**No. 11**
Disallowable Instrument DI2005-34 – Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1).....	
Human Rights Commission Bill 2005 **(Passed 23.08.05)**.....	**No. 11**
Report 11, dated 20 June 2005	
Disallowable Instrument DI2005-33 – Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-41 – Domestic Violence (Prevention Council) Appointment 2005.....	**No. 13**
Disallowable Instrument DI2005-53 – Legal Aid Commission Appointment 2005.....	**No. 13**
Disallowable Instrument DI2005-54 – Liquor Licensing Board Appointment Amendment 2005.....	**No. 13**
Disallowable Instrument DI2005-55 – Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 2)	**No. 20**
Subordinate Law SL2005-7 – Road Transport (Safety and Traffic Management) Amendment Regulation 2005 (No. 1).....	**No. 13**
Subordinate Law SL2005-8 – Utilities (Gas Restrictions) Regulation 2005.....	**No. 13**
Water Resources Amendment Bill 2005 **(Passed 18.08.05)**	**No. 13**
Report 12, dated 27 June 2005	
Children and Young People Amendment Bill 2005 **(Passed 1.07.05)**...	**No. 14**
Disallowable Instrument DI2005-58 – Water Resources (Fees) Determination 2005 (No. 1)	**No. 17**
Disallowable Instrument DI2005-61 – Radiation (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-62 – Heritage (Council Members) Appointment 2005 (No. 1)	**No. 17**
Disallowable Instrument DI2005-66 – Vocational Education and Training Authority Appointment 2005 (No. 1).....	**No. 16**
Disallowable Instrument DI2005-71 – Public Sector Management Amendment Standard 2005 (No. 5)	
Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)	

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Disallowable Instrument DI2005-77 – Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 1)	**No. 16**
Disallowable Instrument DI2005-78 – Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 2)	**No. 16**
Report 13, dated 9 August 2005	
Disallowable Instrument DI2005-104 – Education (Government Schools Education Council) Appointment 2005 (No. 2)	**No. 16**
Disallowable Instrument DI2005-111 – Architects (Fees) Determination 2005 (No. 1)	**No. 16**
Disallowable Instrument DI2005-112 – Building (Fees) Determination 2005 (No. 1)	**No. 16**
Disallowable Instrument DI2005-114 – Community Title (Fees) Determination 2005 (No. 1)	**No. 16**
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JOHN HARGREAVES MLA

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

MEMBER FOR BRINDABELLA

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

Dear Mr Stefaniak

I refer to Scrutiny of Bills Report No.11 dated 20 June 2005. I offer the following response in relation to the matter raised by your Committee.

1. **Disallowable Instrument DI2005-55 – Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No 2)**

The Instrument states that it is made under the Road Transport (Safety and Traffic Management) Regulation 2000, Section no 75A (2) (Parking Authorities).

The Committees comment that the "no" is superfluous has been noted.

Yours sincerely

John Hargreaves
Minister for Urban Services

18 July 2005

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak

I refer to Report 18 of the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) and particularly the comments on the Administration (Interstate Agreements) Bill 2005 (the Bill).

I would like to thank the Committee for its comments.

The Committee's comments relate to certain aspects of the implementation of the *Administration (Interstate Agreements) Act 1997*, which will be repealed by the Bill. In these circumstances I do not believe the Committee's comments require any amendments to the Bill.

Yours sincerely

Jon Stanhope MLA
Chief Minister
18 NOV 2005

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

JOHN HARGREAVES MLA

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

MEMBER FOR BRINDABELLA

The Secretariat
Scrutiny of Bills Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Secretariat

I refer to Scrutiny of Bills Report No.17 dated 17 October 2005. I offer the following response in relation to the matters raised by your committee.

1. **Disallowable Instrument DI2005-198 – Domestic Animals (Dog Control Areas) Declaration 2005 (No 1)**

The Committee noted that the Instrument indicates that it is made under sections 40 and 41 of the *Domestic Animals Act 2000.* It is not necessary to state that the instrument is made under section 41 of the Act. Section 41 refers to prohibited areas, which is not required as a Disallowable Instrument.

The Committee's comments in Report No 17 have been noted and the necessary action has been taken to prevent this occurring in the future.

Yours sincerely

John Hargreaves MLA
Minister for Urban Services

21 November 2005

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495

building our city
building our community

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Bill Stefaniak,

I refer to your Committee's comments in the Scrutiny of Bills Report No 18 of 14 November 2005 relating to the *Health Records (Privacy and Access) Amendment Bill 2005 (No 2).*

I note the Committees comments that in respect of nearly all the amendments it is of the view that the proposed changes would not appear to detract from privacy protection that would amount to an incompatibility with section 12 of the *Human Rights Act 2004* and that in several cases the Committee is of the view that the proposed changes will enhance privacy protection for example the creation of a regime to govern the destruction of health records after a set period of time.

I note, however, that the Committee has raised particular concerns regarding Principle 10(3) and (8). The Committee has drawn attention to:

- the scope of entities to whom information may be disclosed;
- the ability to disclose where it is impracticable to obtain consent; and
- the lack of guidelines on information management procedures of entities.

In respect of the first point it is considered that the proposed amendment is primarily providing an exception to the principle of nondisclosure for the purposes of conducting research. It is agreed, however, that there are grounds for including a public interest test in regards to this research and a further amendment to this effect is proposed.

It is the Government's view, that the importance of the objective served by the research and statistical compilation and the real contributions made by those activities to the improvement of health delivery and health outcomes in the ACT outweighs the limitations that may be placed on individual human rights by conducting those activities.

It should be noted that the personal information to be disclosed for research purposes often relates to episodes of care in public hospitals for people who no longer reside in the ACT or who have since died. The strict requirement to obtain consent in every instance would therefore be very difficult. It would also be inconsistent with the National Health Privacy Code. It is agreed, however, with the Committee that the privacy of individuals could be

ACT LEGISLATIVE ASSEMBLY

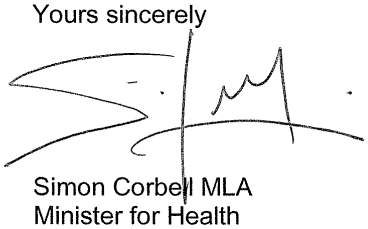
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535

better protected if the entity was required to comply with oversight and internal procedure guidelines.

To this end it is proposed that a further Government amendment to Principle 10(3) to provide for appropriate internal procedures and oversight guidelines for researchers and research organisations receiving identifiable information. To this end the Government is proposing a further amendment so that the use or disclosure is conducted in accordance with guidelines. The further amendment would also allow for these guidelines to be issued as a regulation under the Act.

I hope that the above information satisfies the concerns that have been raised by the Committee.

Yours sincerely



Simon Corbell MLA
Minister for Health

22.11.05

JOHN HARGREAVES MLA

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

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

I refer to Scrutiny of Bills Report No.18 dated 14 November 2005. I offer the following response in relation to the matters raised by your committee.

1. **Disallowable Instrument DI2005-206 – Territory Records (Advisory Council) Appointment 2005 (No 1)**

The Committee reports that the Explanatory Statement does not state that the remaining appointments are not public servants.

The Committees comments are noted and steps are being taken to ensure that Explanatory Statements are more explicit in the future.

The typographical error in the Explanatory Statement has also been noted.

Yours sincerely

John Hargreaves MLA
Minister for Urban Services

23 November 2005

Cc Secretariat
Scrutiny of Bills Committee

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495

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

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

Dear Mr ~~Stefaniak~~ Bill

I refer to your Committee's comments in the Scrutiny of Bills report No 18 of 14 November 2005 relating to Disallowable Instrument DI 2005-219, the Children and Young People Official Visitor Appointment 2005 (No 3) made under subsection 41(2) of the *Children and Young People Act 1999.*

I would like to thank the Committee for its comment that noted the Explanatory Statement to the instrument did not mention that the appointments to the position were not public servant appointments and thus raised the question of whether the instrument was in fact disallowable.

I can confirm that the appointments to the position were not public servants. The Explanatory Statement made implied reference to this fact through information provided in conformance with Division 19.3.3 of the *Legislation Act 2001* including consultation with the Standing Committee on Education, Youth and Training. This would not have been the case if the appointments were public servants, as Division 19.3.3 does not apply to public servant appointments.

My Department is aware of the above comments and will endeavour to make explicit reference to the status of statutory appointees when drafting future Disallowable Instruments under Division 19.3.3.

I trust that this response meets with the Committee's satisfaction.

Yours sincerely

Katy Gallagher
Minister for Children, Youth and Family Services
25/11/05

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030

Ted Quinlan MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM
MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING
MEMBER FOR MOLONGLO

Mr Bill Stefaniak
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Stefaniak, Bill

I refer to the recent Scrutiny Report No. 18 of the Standing Committee on Legal Affairs. In that Report, the Committee referred to the drafting of Disallowable Instrument DI2005-218, the *Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2005 (No 1)* (the Determination). The Determination was made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* (the Act).

I note the Committee's observation that the Reference made under section 15 of the Act is a notifiable instrument, and that the Terms of Reference made under section 16 of the Act are a disallowable instrument.

When drafting, it was considered desirous for one determination to provide for the reference to the Independent Competition and Regulatory Commission, and, subject to disallowance, establish Terms of Reference. I accept the Committee's concerns, however, that the drafting of this Determination did not sufficiently differentiate those matters that were notifiable and those that were subject to disallowance by the Assembly.

In future, I shall consider disaggregating each individual determination instrument.

Yours sincerely

Ted Quinlan MLA 1.12.05
Treasurer

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0001 Fax (02) 6205 0135

Ted Quinlan MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM
MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

I refer to comments made by the Standing Committee on Legal Affairs in its Scrutiny Report 19 of 21 November 2005 relating to the *Revenue Legislation Amendment Bill 2005 (No 2)*.

The Committee commented on the important question of whether provisions that authorise the forced sale of the property of a tax defaulter are compatible with a person's right to property. The Report provided a comprehensive analysis of the tension between these provisions and the right to property. This right is a fundamental element of our society, and is enshrined in the *Human Rights Act 2004*. I note that the comments suggest that the concerns are addressed within the proposed legislation.

I agree with that assessment, and would draw the Committee's attention to the Human Rights Compatibility Statement, received from the Attorney General, confirming that the *Revenue Legislation Amendment Bill 2005 (No 2)* is consistent with the *Human Rights Act 2004*.

I note that the Committee states on page 4 of the Report, that section 46 of the *Rates Act 2004* institutes the power of the Commissioner to defer rates liabilities on residential land in certain circumstances. This is inaccurate, as the power currently exists in the *Rates Act 2004* and the provision has simply been recast to distinguish deferment of rates on application by the taxpayer from the new power of the Commissioner to defer rates without an application under the new section 47.

I trust that this clarifies the provisions and I thank the committee for its comments.

Yours sincerely

9.12.05

Ted Quinlan MLA
Treasurer

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0001 Fax (02) 6205 0135

Deb Foskey MLA
Member for Molonglo

Bill Stefaniak MLA
Chair
Legal Affairs (Scrutiny of Bills) Committee
Legislative Assembly of the ACT
GPO Box 1020
Canberra ACT 2601

Dear Mr Stefaniak,

I am writing in response to some issues raised by the Scrutiny of Bills Committee in regard to the Court Procedures (Protection of Public Participation) Amendment Bill 2005.

The Committee argues that this Bill would deny a hearing to plaintiffs specifically taking action (albeit without a reasonable prospect of success) so as to inhibit public participation, and would seem to be arguing that such an approach could be seen as discriminatory. It would be a curious proposition to assert that plaintiffs should have an unimpeded right to pursue litigation which has no reasonable prospects of success and which is brought for an improper purpose (in order to stifle lawful criticism), merely because plaintiffs in matters which fall outside the definition of public participation do not face such obstacles. Similarly 'discriminatory' principles already apply to participants in political affairs whose right to maintain private defamation actions have been curtailed by the High Court in cases which recognise an implied right of political discussion (see *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, *Nationwide News Ltd. v Wills* (1992) 177 CLR 1 and *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104).

I remind the Committee that the courts already have the power to reject litigation on the basis of abuse of process, and – on occasion – to dismiss matters on the basis that there is no real prospect of success (see Order 17 of the ACT *Supreme Court Rules 1937*). This Bill draws the attention of the courts to a particular concern regarding such improper use of litigation. That does not seem unreasonable, particularly when the intent is to support the right of individuals and groups of individuals to legitimately participate in public affairs.

This Bill is based on various North American models. While there are a number of constitutional differences, the North American experience indicates that mere summary dismissal powers are not sufficient to deal with the threat to democratic participation posed by so-called SLAPP suits. SLAPP is an acronym meaning 'Strategic Litigation Against Public Participation'. At least 26 US states have anti-SLAPP legislation and another 10 have anti-SLAPP Bills before their parliaments. The experience with this type of legislation in the USA seems to be that it is generally effective in stymieing the use of court processes to improperly silence and damage critics whose rights of democratic expression on subjects of public interest needs legislative protection.

The Committee questions the proportionality of a provision that would in normal circumstances halt a plaintiff's action until the court has decided on an application by the defendant for an order dismissing the proceedings.

Dr. Deb Foskey
Member for Molonglo
Phone: 02 6205 0161
Fax: 02 6205 0007
foskey@parliament.act.gov.au

ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

The Greens
Australian Capital Territory

However, as acknowledged in the scrutiny report, the court is required to deal with the application as soon as practicable. If "as soon as practicable" ends up being an unreasonable period of time, then that would seem to be an issue for the courts and for Government overall, nor a problem of this Bill. Assuming that costs will follow the event, a plaintiff who is ultimately successful will end up getting their costs of these proceedings reimbursed. Alternatively, if an undue delay in proceedings was likely to result in the continuation of illegal behaviour by the defendants that would impose significant costs on a plaintiff, there is nothing preventing a plaintiff from applying for an injunction to prevent that behaviour. In any event, the court is not required to halt proceedings on every application, and can order otherwise.

I would also remind the Committee that the practice of requiring community organizations to meet restrictions such as security of costs is a much harsher, more disproportionate, barrier to access to the courts than the requirement of this Bill for the plaintiff to demonstrate a proper purpose in taking action. There are good arguments (which have been upheld in a few judicial judgements) for waiving security for costs in public interest cases. Similarly, in *Oshlack v Richmond River Council* (1998) 193 CLR 72, the High Court established principles to determine whether to award costs in environmental cases. I suggest that these principles should be codified and incorporated into ACT legislation, but that is a subject that is best dealt with elsewhere.

The particular point that the plaintiff might be required to prove a negative is not accepted. The plaintiff is only required to demonstrate that (s)he indeed had a proper purpose. And in that context, it is worth bearing in mind that the court would have to conclude the plaintiff "could have no reasonable expectation that the proceeding would succeed" among other matters, to find otherwise.

And while the Committee questions if "the scheme – or elements of it – [are] a proportionate response to the mischief at which the scheme is aimed" there is no discussion of that mischief itself. In responding to the concerns raised by the Committee, I take the opportunity to remind it that there is a growing trend in Australia and elsewhere for corporations to pursue (tax-deductible) strategic litigation in order to limit the rights and damage the financial capacities of individuals and community organisations to express their concerns and views on matters of public importance in a non-violent and law-abiding fashion. Such actions effectively confine the discussion of these matters to an essentially private dispute fought on narrow quasi-legal grounds and technicalities.

A fair and considered analysis of this Bill in that context might conclude that it is disproportionately weak in its defence of civil and political rights, most particularly the right to freedom of expression. Indeed, it may be preferable to strengthen the prohibition on legal actions brought to stifle public commentary, even where there is some legitimate, but ultimately trivial legal basis for the action. Nonetheless, I have taken the view that this Bill is a reasonable step in the right direction, and that further action including potential amendments to defamation law in the ACT might also be in order, if the mischief that this bill seeks to address continues in other legal guises.

One factor that makes SLAPP-type suits attractive to Australian corporations is that there is no Australian equivalent to the American 'Bill of Rights' constitutional provisions, or the European *Convention on the protection of human rights and Fundamental Freedoms*. This Bill goes some way to addressing this deficiency. I believe that it complements the ACT's Human Rights Act, and the Government's proposed Uniform Defamation Law initiatives (assuming that they will preclude corporations from suing for defamation).

The Committee also raised concerns regarding subsection 37F(3) which gives the court power to dismiss proceedings if it is satisfied "there is a realistic possibility that, when viewed objectively, the proceeding was brought or is being maintained for an improper purpose." I note that under s.140(2) of the Evidence Act (Cth), in deciding whether it is satisfied on the balance of probabilities, the court may take into account (inter alia):

(a) the nature of the cause of action or defence; and
(b) the nature of the subject-matter of the proceeding; and
(c) the gravity of the matters alleged.

To a large extent this is a codification of the *Briginshaw* standard of proof in civil actions, and I expect that identical considerations will apply in determining standards of proof in matters brought under this proposed Bill.

Furthermore, the court is not necessarily being asked to make a judgement on evidence but rather to undertake an analysis of the statement of claim, and make a finding as to the purpose of the action. My view is that this should be done, so far as possible, in a way that mirrors the court's current powers to dismiss for abuse of process, which is often done on the pleadings, where the question of rules of evidence is not pertinent. However, if a plaintiff feels that there is a need for the court to hear evidence on oath and/or to view relevant documentation, they will have this opportunity under proposed section 37 I.

On the other hand the notion of "reasonable prospect of success," which is also questioned by the Committee, is used as a benchmark in a considerable body of law, including the ACT Civil Law Wrongs Act. Justice Barrett of the NSW Supreme Court offered some helpful guidelines in interpreting "reasonable prospect of success" in the recent Degiorgio v Dunn (No 2) [2005] NSWSC 3 decision earlier this year.

Finally, the assertion that the term public participation is unduly vague is also rejected. This Bill provides a specific public context that is recognised as an area of debate that ought not to be subject to actions except where statements are made maliciously. This is no more complex than other areas of qualified privilege. For instance, in an action for defamation, absolute privilege provides protection regardless of a publisher's motive for publication, whereas proof that the publisher was motivated by malice will defeat a defence of qualified privilege.

I trust that the Committee will give consideration to this detailed response to its earlier assessment of our Bill.

Yours Sincerely

Dr Foskey MLA
9 Dec 2005