Legislative Assembly for the ACT

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

Scrutiny Report

31 MAY 2012

Report 53

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

TABLE OF CONTENTS

BILLS

Bills—No comment

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

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Aboriginal and Torres Strait Islander Elected Body Act 2008* to allow declared candidates for positions on the Aboriginal and Torres Strait Islander Elected Body to effectively promote their candidature.

DISABILITY SERVICES AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Disability Services Act 1991* to empower the Minister to make regulations and to approve disability service standards.

DUTIES (LANDHOLDERS) AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Duties Act 1999* to improve consistency with New South Wales in relation to landholder provisions.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2012 (NO 2)

This is a Bill for an Act to amend a number of laws administered by the Justice and Community Safety Directorate.

NATIONAL ENERGY RETAIL LAW (CONSEQUENTIAL AMENDMENTS) BILL 2012

This is a Bill for an Act to amend existing ACT legislation because of the enactment of the *National Energy Retail Law (ACT) Act 2012*.

Bills—Comment

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

AUDITOR-GENERAL AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Auditor-General Act 1996*, primarily to establish the Auditor-General as an independent officer of the Legislative Assembly, to make provision concerning the conduct of various kinds of audits, and to provide for an annual strategic review of the office.

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

Suspending and ending the appointment of the Auditor-General

The Executive must suspend the Auditor-General under proposed section 9J (see clause 8) if the Legislative Assembly passes a resolution to the effect that the Auditor-General should be suspended from office on the basis of either of two kinds of incapacity.

There is no provision for giving to the Auditor-General:

- notice of a proposed suspension;
- reasons for a proposed suspension;
- an opportunity to state a case against a proposed suspension;[1]

nor for:

- the length of the suspension; or
- any kind of review of the need for the suspension to continue past certain points.

In relation to the last two points, there might be, for example, provision that the suspension must be removed after a certain period unless the Auditor-General had been removed from office.[2]

Similar provision is made for the removal of the Auditor-General, except that the additional ground that "the the Auditor-General becomes bankrupt or personally insolvent" would be added.

There is no provision for giving to the Auditor-General:

- notice of a proposed removal;
- reasons for a proposed removal; or
- an opportunity to state a case against a proposed removal.[3]

The Ombudsman (sometimes styled as the "Parliamentary Commissioner for Administration") has a position analogous to the Auditor-General, and it is common to find some or all of these safeguards in the relevant legislation. The Committee addressed this general issue of procedural fairness for independent office-holders in *Scrutiny Report No. 4* (15 March 2012), concerning the Legislative Assembly (Office of the Legislative Assembly) Bill 2012.

[1] Compare to section 67 of the *Ombudsman Act 2001* (Queensland).
[2] Compare to section 4 of the *Ombudsman Act 1973* (Victoria).
[3] Compare to section 67 of the *Ombudsman Act 2001* (Queensland).

The Committee considers that the issue is one of significance and requests the Chief Minister to advise the Assembly of what consideration was given to it. The Committee acknowledges that, in respect of procedural safeguards, there are choices to be made. It notes that regard could be had to the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* concerning the position of the Clerk of the Assembly.

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

The Explanatory Statement (at 3 to 7) identifies provisions that arguably limit the rights to privacy and equality and provides a justification. The Committee refers this discussion to the Assembly.

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

BAIL AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Bail Act 1992* to further define the power of police to arrest a child without warrant on the ground that the child has failed to comply, or will not comply, with a bail condition.

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

The rights of children (HRA section 11) and the arrest of a child on bail

Subsection 56A(2) of the Bail Act provides that a police officer may arrest without warrant a person who has been granted bail if the officer believes on reasonable grounds that the person failed to comply, or will not comply, with a bail condition.

By clause 4 of the Bill, by the insertion of proposed subsection 56A(2A), a police officer may arrest a child only if the police officer believes on reasonable grounds both that the arrest is in the best interests of the child, and that it would be in accordance with the principles in the *Children and Young People Act 2008*, section 94 (youth justice principles). Where a child is not arrested, the officer "may refer the child to any relevant service the police officer considers appropriate" (proposed subsection 56A(2B)).

The Explanatory Statement notes that the Bill engages the rights of a child in the sense of enhancing them. It might also be noted that the provisions would enhance the right to liberty.

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Children and Young People Act 2008* in a number of ways.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (c)(i) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The right to humane treatment when deprived of liberty (HRA subsection 19(1)) and the use of force

Subsections 223(1) and (2) of the Act contain provisions concerning the management of force in relation to a young detainee. By clause 4 of the Bill, it is proposed to add one more management principle, as follows:

> (3A) The director-general must give notice to a treating doctor or a nurse if force is used in relation to a young detainee.
>
> (3B) However, subsection (3A) does not apply to the planned use of restraint in relation to a young detainee when the detainee is outside a detention place.
>
> **Example**
>
> the use of handcuffs on a young offender who has been assessed as being at risk of attempting to escape while being transported to court

The Explanatory Statement notes that some of the HRA rights are engaged, but other than noting that other management principles apply, does not address the issue further.

The Committee's concern is that the basis for the non-application of the salutary principle in proposed subsection 223(3A) is cast in very wide language, for it appears that it is enough that a use of a particular restraint must merely be "planned".

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

CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2012

This is a bill for an Act to amend legislation about corrections management and sentencing, and in particular to reform the detainee discipline system.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (c)(i) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

HRA issues identified in the Explanatory Statement

The Explanatory Statement states that:

> [t]he key purpose of the Bill is to support the human right to fair trial and procedural fairness by implementing a more responsive and efficient detainee discipline system. This will result in improved safety, security and good order at adult correctional centres and ensure effective and efficient corrections administration in the ACT.
>
> At present, detainee discipline provisions impose overly burdensome administrative requirements on the officers. These requirements lead to confusion among detainees about how the process functions.
>
> The Bill seeks to streamline the detainee discipline scheme … .

The Explanatory Statement notes and then elaborates on the point that the Bill supports the HRA rights in section 19 (humane treatment when deprived of liberty) and 21 (right to a fair trial).

The Committee refers the Assembly to this discussion at the Explanatory Statement pages 2-3.

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

Comment on the Explanatory Statement

The Committee commends the Explanatory Statement both in respect of its discussion of issues arising under the Human Rights Act and the detailed explanation of how the proposed amendments would affect the operation of the relevant Act.

COURTS LEGISLATION AMENDMENT BILL 2012

This is a Bill to amend the *Crimes (Sentencing) Act 2005* and the *Supreme Court Act 1933* to support the introduction in the Supreme Court of new case-management procedures.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (c)(i) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The right to a fair trial (HRA subsection 21(1)) and trial by judge-alone

The amendment proposed to section 68B of the Supreme Court Act provides that the election for a judge-alone trial must be made prior to the identity of the trial judge being known to the accused or to his or her legal representatives and before any time limit prescribed under the Court Procedures Rules.

The Explanatory Statement considers that this change to the law engages the right to a fair trial, but that it does not limit that right.

The Committee refers the Assembly to the Explanatory Statement.

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

CRIMES LEGISLATION AMENDMENT BILL 2012

This is a bill for an Act to amend the *Crimes Act 1900*, the *Criminal Code 2002*, and other legislation relating to criminal justice.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (c)(i) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The presumption of innocence (HRA subsection 22(1)) and the reversal of the burden of proof

Proposed subclause 55A(1) provides:

(1) A person commits an offence if—

(a) the person engages in sexual intercourse with a young person; and

(b) the young person is under the person's special care.

Maximum penalty: imprisonment for 10 years.

[Similar provision is made in relation to an act of indecency; see clause 10, proposing a new subsection 61A of the *Crimes Act 1900*.]

In addition, proposed section 55A of the *Crimes Act 1900* would:

- define "young person" to be a person who is at least 16 years old, but not an adult (thus setting an upper age limit of 18);
- provide a non-exhaustive list of "position of authority" relationships to determine whether the young person is under special care;
- state two circumstances in which the offence "does not apply" to certain persons; and
- provide that "[i]t is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant believed on reasonable grounds that the young person was at least 18 years old" (subclause 55A(4)).

It is critical to note in respect of subclause 55A(4) that a defendant would carry a legal burden of proof to the effect that he or she must satisfy the fact-finder (the jury or a judge-alone) that they had the requisite belief, and to the standard of the balance of probabilities (that is, that this was more likely than not).

Looking first at subclause 55A(1) alone, it may be said that "[t]he act of consensual sexual intercourse is not of itself an offence. The offence consists in a particular accompanying state of affairs or circumstance (relevantly, age)".[4] Such offences have a long history, and the courts have long-grappled with the issue of how they are to deal with a case where the defendant claims that they were mistaken as to the age of the young person. This question was dealt with by the High Court in *CTM v The Queen*. The answer given by the majority was that such offences should be construed in accordance with a presumption of interpretation[5] that has two related aspects, being that:

- absent clear provision to the contrary, an "honest and reasonable belief that the other party to sexual activity is above the [relevant] age ... is an answer to a charge of a contravention of [the relevant provision]", and
- "[t]he evidential burden of establishing such a belief is in the first place upon an accused. If that evidential burden is satisfied, then ultimately it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly believe, on reasonable grounds, that the other party was above the [relevant age]".[6]

(For proposed subsection 55A(1), the relevant age is any age between 16 and 18 years.)

[4] *CTM v The Queen* [2008] HCA 25 (majority judgment).
[5] These principles form part of the corpus of the "presumption of liberty".
[6] Above at [35], per Gleeson CJ, Gummow, Crennan and Keifel JJ.

The particular provision before the High Court created an offence where any person had sexual intercourse with another person who was of or above the age of 14 years and under the age of 16 years. For this offence, the person was liable to imprisonment for 10 years. As such, it can be seen to bear a strong resemblance to proposed subsection 55A(1). Kirby J noted that conviction had "serious penal consequences. This is an important consideration, repeatedly recognised by this Court, favouring the application of the normal presumption".[7]

The High Court employed the concept of "evidential burden" in the way it is defined in the *Criminal Code 2002*. It is the burden of "presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist" (Code subsection 58)7)). This burden is not easily discharged in the context of a provision such as proposed subsection 55A(1). It is not merely a matter of the defendant asserting that he or she believed that the young person was at least 18, but also of pointing to evidence that permits an objective assessment by the court that this belief was reasonable. This will require attention to facts other than the defendant's belief and to the inferences that can be drawn from those facts. To persuade the court that he or she had the requisite belief, and perhaps of other facts, the defendant may need to give evidence, and thus be open to cross-examination about any fact in issue.[8]

Proposed subsection 55A does not follow the common law position. The result of combining proposed subclauses 55A(1) and (4) is that the prosecution must prove beyond reasonable doubt that the person with whom the defendant had sexual intercourse was in fact a "young person" as defined. Assuming that the fact-finder would be satisfied of this proof of this fact (and of the matters in paragraph 55A(1)(b)), to avoid conviction the defendant must in her or his case adduce evidence, and/or point to evidence adduced by the prosecution, that will satisfy the fact-finder (the jury, or judge-alone) that it is more likely than not (that is, on the balance of probabilities) that he or she "believed on reasonable grounds that the young person was at least 18 years old".

In contrast, if the common law position had been taken, a defendant would need only present or point to evidence "that suggests a reasonable possibility" that he or she had an honest and reasonable belief that the young person was at least 18 years old. If this evidential burden was discharged, the prosecution would then need to satisfy the fact-finder beyond reasonable doubt that the defendant did not hold this belief.

In terms of the Committee's terms of reference, the issue may be seen either:

- whether the failure to give effect to the presumption of liberty concerning the interpretation of statutory offences in an undue trespass on a personal right or liberty, or
- in terms of the right to the presumption of innocence in HRA subsection 22(1), of whether justification has been shown for the reversal of the burden of proof inherent in proposed subsection 55A(1).

[7] Ibid at [63], citing *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523 at 530 per Gibbs CJ (Mason J agreeing), 567 per Brennan J, 595 per Dawson J.
[8] Compare ibid at [36]-[39], per the majority.

The Explanatory Statement contains a justification that addresses the elements of HRA section 28, and the Committee refers this to the Legislative Assembly. There is however no mention of the issue identified above. To crystallise it, the issue is whether the object of the new offence would not be met adequately by provision that a defendant need discharge an evidential burden of the matter of whether he or she had a belief on reasonable grounds that the young person was at least 18 years old. The Committee draws attention in particular to what it has said about how this burden might need to be discharged in this context.

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

The presumption of innocence (HRA subsection 22(1) and the reversal of the burden of proof—clause 23

This rights issue also arises in respect of the proposed insertion into the Criminal Code of section 612A. Somewhat inexactly, the Explanatory Statement states that "[t]his clause will amend the possessing controlled precursor offence at section 612 (5) of the *Criminal Code 2002* by inserting a presumption that will apply to one of the two intent fault elements for the offence" What is does is to leave subsection 612(5) in its present form and to add a new section 612A containing a presumption.

Subsection 612(5) of the Code provides:

> (5) A person commits an offence if the person possesses a controlled precursor —
>
> (a) with the intention of using any of it to manufacture a controlled drug; and
>
> (b) with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug.
>
> Maximum penalty: 700 penalty units, imprisonment for 7 years or both.

Proposed section 612A provides:

> **612A Possessing offence—presumption if controlled precursor possessed to manufacture controlled drug**
>
> (1) This section applies if, in a prosecution for an offence against section 612 (5) (Possessing controlled precursor), it is proved that the defendant possessed a controlled precursor with the intention of using any of it to manufacture a controlled drug.
>
> (2) It is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence.
>
> *Note* The defendant has a legal burden in relation to the matters mentioned in s (2) (see s 59).

As is noted and discussed at length in the Explanatory Statement, this addition engages and limits the presumption of innocence in HRA subsection 22(1).

The Committee refers the Assembly to this discussion at Explanatory Statement pages 18-23. It adds two points:

- a court may not be sympathetic to the argument that the difficulties of enforcing the law can justify reversal of the presumption of innocence by placing a legal burden on the defendant to establish a fact necessary to avoid conviction; and
- the Explanatory Statement does not address the question of whether a less restrictive means for reversing the presumption could be achieved by placing only an evidential onus on the defendant.

The Committee notes that case-law of other jurisdictions, such as that relevant to the European Convention on Human Rights and the Victorian Charter of Rights (including the *Momcilovic* cases[9]) indicate quite clearly that the courts are very reluctant to accept that a defendant may be required to prove the existence or non-existence of facts in order to avoid conviction. At least, the courts require clear and persuasive justification for reversing the burden of proof.

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

Do any clauses of the Bill inappropriately delegate legislative power? (Committee term of reference (c)(iv)

As noted, proposed subsection 55A(2) of the *Crimes Act 1900* would provide only a non-exhaustive list of "position of authority" relationships, in that it states that the list of such relationships in the subsection does not limit the scope of the phrase "under the person's special care" in proposed subsection 55(1). The Explanatory Statement justifies this approach:

> Providing a non-exhaustive list ensures that the court has discretion to determine further 'positions of authority' that are appropriately included within the definition but exclude positions where no authority, trust or special care relationship is created. This ensures that the principle of equality before the law is recognised and upheld. Principles of statutory interpretation provide that the list of 'positions of authority' is to give guidance to the courts and the community as to which people, by virtue of their position with respect to a young person, are prohibited from sexual relations with that young person and which people are not.

It is hard to follow the reasoning in the last sentence. The use of the words "without limiting subsection (1)" appear expressly designed to preclude a court from deducing a genus from the list provided, and then reasoning that any court-created categories must fall within this genus. In any event, supposing this approach was taken, it still leaves to a court wide scope to add to the list.

[9] In the High Court, see *Momcilovic v The Queen* [2011] HCA 34. Of more direct relevance to the issue presented by this Bill is the decision of the Victorian Court of Criminal appeal, which is summarised at **www.federationpress.com.au/pdf/Momcilovic_v_The_Queen_Ch_15.pdf**

This is largely a legislative exercise, and amounts to a delegation of legislative power to the courts.[10] Even if the need for delegation is accepted, there is a question appropriate for the courts to exercise the power.

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

The right not to be treated or punished in a cruel, inhuman or degrading way (HRA section 10) and the sentence prescribed for the offence of damaging property

The Explanatory Statement states that the effect of the enactment of clause 13 would be to "omit the destroying or damaging property offence at section 116 (3) [of the Crimes Act] and ... remake the offence at section 116A".

The Explanatory Statement accepts (as the Committee has proposed) that the right in HRA paragraph 10(1)(a) not to be "treated or punished in a cruel, inhuman or degrading way" "may be engaged where the prescribed penalty is so grossly disproportionate to the offence, that it may be found to be 'cruel, inhuman or degrading'". It is probably more correct to say that in such circumstances the right would be limited, and the limitation require justification. The Explanatory Statement recognises that the sentence prescribed in relation to the re-made definition of the offence would amount to an increase in the maximum penalty from 6 months imprisonment to 2 years.

The Committee refers the Assembly to the Explanatory Statement HRA section 28 analysis of this proposal.

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

FINANCIAL MANAGEMENT (INVESTMENT) LEGISLATION AMENDMENT BILL 2012

This is a Bill for an Act to amend the *Financial Management Act 1996* and the *Territory Superannuation Provision Protection Act 2000* to prohibit certain Territory investments, create a mechanism for prioritising certain investments, and to create an Investment Advisory Board which will have responsibility for preparing investment directions.

Do any clauses of the Bill inappropriately delegate legislative power? (Committee term of reference (c)(iv))

Proposed subsection 129D(1) of the Financial Management Act would provide that that the Investment Advisory Board

[10] Compare *Taikato v R* [1996] HCA 28 (per Brennan CJ, Toohey, McHugh and Gummow JJ) where a majority of the High Court said that "under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other".

must prepare directions (an ***investment direction***) about—

(a) making investments, under an investment law, in relation to relevant bodies with revenue attributable to a relevant activity; and

(b) the Territory or a territory authority exercising a right to vote as a security holder in relation to an investment made under an investment law.

The term "relevant bodies" is defined in proposed section 127, and covers corporations and the like, and the more critical term "relevant activity" is defined in proposed subsection 129D(7) to cover seven broadly defined activities (such as, for example, "the operation of gambling facilities", and "the mining, processing or sale of coal"). Proposed subsection 129D(3) would provide that "[a]n investment direction may prohibit stated investments or describe the circumstances in which investments are prohibited".

This is a significant delegation of legislative power to a body that is independent of the Executive, but by reason that an investment direction is a disallowable instrument (proposed subsection 129D(6)), the Assembly might disallow an instrument.

The Committee refers the Assembly to justification in the Explanatory Statement at page 3. This might be a circumstance in which the Assembly should consider whether a direction requires the positive approval of the Assembly before it can take effect[11].

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

NATIONAL ENERGY RETAIL LAW (A.C.T.) BILL 2012

This is a Bill for an Act to apply in the Territory. The National Energy Retail Law set out in the schedule to the *National Energy Retail Law (South Australia) Act 2011*, together with the national energy retail rules and regulations, which latter will be made by the relevant South Australian authority on behalf of all participating jurisdictions. In general, the adopted National Energy Retail Law will establish a national energy customer framework for the regulation of the retail supply of energy to customers, and make provision for the relationship between the distributors of energy and the consumers of energy.

Do any clauses of the Bill inappropriately delegate legislative powers?—paragraph (c)(iv) of the Committee's terms of reference

Subclause 6(1) of the Bill provides that the National Energy Retail Law ("the Law") set out in the schedule to the *National Energy Retail Law Act 2011* (South Australia) applies "as amended from time to time". By enactment of this clause the Assembly is thus permitting the legislature of another Australian jurisdiction to make a law that will have the status of an Act of the Legislative Assembly. This amounts to a very significant delegation of the Assembly's legislative power. This issue is not addressed in the Explanatory Statement, but the Committee notes that the Minister's presentation speech outlines what are said to be a number of benefits to the Territory arising out of its participation in the national scheme.

[11] See, for example, clause 12 of the Planning and Development (Public Notification) Amendment Bill 2012, commented upon in *Scrutiny Report No. 51.*

Paragraph 6(1)(a) provides that the Law "applies as a Territory law", and this includes the *Human Rights Act 2004*. The Attorney-General's compatibility statement is therefore intended to cover this Bill and also the Law. The Explanatory Statement recognises this fact and includes a section on how the HRA affects some aspects of the Law. However, this obligation will not attach to South Australian Acts that automatically change the Law, and in this respect a critical safeguard in the HRA is displaced.

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

Paragraph 7(a) provides that regulations made under the National Energy Retail Law, "as amended from time to time", "apply as a regulation in force for the National Energy Retail Law". This too amounts to a very significant delegation of the Assembly's legislative power, and is not addressed in the Explanatory Statement. Again, the Minister might point to the comments in the presentation speech.

The Explanatory Statement notes the existence of this power in words that state that these regulations "are to be adopted by each jurisdiction". The Committee's understanding is that there is no need for the Territory to "adopt" regulations made by the relevant South Australian authority, because such regulations will automatically apply. The Committee requests that the Minister clarify this issue.

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

The Explanatory Statement notes that "National Energy Retail Rules are to be made under the National Energy Retail Law and will apply in the participating jurisdictions". This presumably refers to the power of the Australian Energy Market Commission (AEMC) to make rules under part 10 of the Law, and in particular section 236.

The Committee requests the Minister to explain the relationship between Territory law and these Rules, and whether the Assembly has any power to disallow these Rules.

Subclause 9(3) makes clear that, in contrast to the Law, the *Legislation Act 2002* applies to the proposed[12] National Energy Retail Law (ACT) Act 2012 ("the Act"). The starting point is then that the provisions of the Legislation Act dealing with subordinate laws apply to any such laws made under the Act. In clauses 20, 23 and 24, a Minister or the Executive are empowered to make certain kinds of subordinate laws.

The operation of the Legislation Act in relation to the Act is however qualified by proposed subclause 9(3), which provides that chapter 5 of the Legislation Act (which requires the preparation of regulatory impact statements in relation to subordinate laws) does not apply to such laws made under clauses 20, 23 or 24 of the Act. The Explanatory Statement does not appear to state any justification for this provision.

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

[12] That is, by this Bill.

On the other hand, chapter 7 of the Legislation Act will apply to subordinate laws made under the Act. By section 8 of the Legislation Act, a subordinate law is a regulation, rule or by-law (whether or not of a legislative nature) that is made under an Act. Chapter 7 contains provisions concerning the disallowance of subordinate laws and other instruments that are declared to be disallowable.

Clauses 23 and 24 of the Act empower the Executive to make regulations. Subclause 24(1) in particular empowers the making of regulations "that are local instruments for the [law]". But subclause 24(3) then provides that the Minister "may make local instruments that are not regulations", and such an instrument is only a notifiable instrument.

By relying on subclause 24(3), the Minister can preclude the Assembly from considering whether to disallow the instrument. The Explanatory Statement does not appear to state any justification for this provision.

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

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

Provisions of the National Energy Retail Law

The right to privacy—HRA section 12

At pages 4 to 6, the Explanatory Statement identifies a number of provisions in the law that engage the right to privacy in HRA section 12. This passage of the Explanatory Statement is almost entirely word for word identical to the compatibility statement tabled in the Legislative Assembly of the Victorian Parliament in relation to the Victorian bill that made provision for the application of the Law in Victoria.

The Explanatory Statement acknowledges the point often made by this Committee that whether an interference with a person's privacy is "arbitrary" requires assessment of whether "the restrictions it imposes are reasonable, just and proportionate to the end sought". The Committee's position is that this requires an analysis that in substance is the same as that required by HRA section 28, and this is acknowledged in the Explanatory Statement. However, the justification in the Explanatory Statement does not meet the standard set by HRA section 28, and in particular of whether there are less restrictive means available to achieve the purpose of the restrictions to privacy.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister provide an adequate HRA section 28 justification.

The right to property[13]

The compatibility statement tabled in the Legislative Assembly of the Victorian Parliament identified a provision of the Law (section 141) that would terminate a contract between a "failed retailer" and a customer.

In accordance with the framework it spelt out in *Scrutiny Report No 51* (concerning the Animal Welfare Legislation (Factory Farming) Amendment Bill 2012), the Committee considers that a contractual right is a property right, and that any statutory abrogation of the right should be justifiable in terms of the framework in HRA section 28.

This issue is not identified in the Explanatory Statement, and the Assembly may be assisted by the statement in the Victorian compatibility statement:

> [Section 141 and accompanying provisions] apply in circumstances where the retailer is unauthorised or otherwise unable to further engage in the activity of selling energy. The object of the provisions is to protect customers and ensure the continuity of the sale of energy to customers.

The position of corporations

The Explanatory Statement expresses the view that so far as HRA rights[14] are concerned,

> Section 6 of *Human Rights Act 2004* states that only individuals have human rights. This Bill imposes obligations on retailers and distributors. Although an individual could be an energy retailer or distributor, in practice, energy retailers and distributors are, and in the foreseeable future will be, corporations. The Bill does however concern the retail supply of energy to customers, which includes individuals. The human rights issues identified and discussed below are of relevance to those individuals.

It may well be that "in the foreseeable future" retailers and distributors will be corporations. This is however irrelevant. To adapt language used by the High Court when characterising a Commonwealth law, the legal character of a Territory law is ascertained by examining what the law does by way of affecting legal rights and obligations. The Explanatory Statement concedes (although it does not identify them) that as a matter of law some provisions of the Law that raise HRA issues are capable of application to individual energy retailers and distributors. This should be enough to require a rights analysis of those provisions.

[13] It should be noted that the Victorian Charter of Rights provision concerning the right to property offers far less protection than the rights stated in the international instruments identified by the Committee in *Scrutiny Report No 51.*

[14] It also appears that the Explanatory Statement drafter assumed that it was not necessary to address any rights applicable in the Territory other than those stated to be human rights for the purposes of the HRA. In particular, the Explanatory Statement did not address the right to property. The Committee's view is that this is not an appropriate response so far as scrutiny of proposed laws is concerned; see *Scrutiny Report No 51*, concerning the Road Transport (General) Amendment Bill 2012.

In any event, the Explanatory Statement does not provide any factual basis for its assertion as to what will happen in the foreseeable future and, moreover, in many instances where this opinion is formed it will be contestable.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister identify the HRA provisions referred to obliquely in the Explanatory Statement and offer a rights analysis.

Provisions of the Bill (other than the adopted National Energy Retail Law)

The right to privacy (HRA section 21) and the disclosure of confidential information by the Territory independent competition and regulatory commission (ICRC)

In the words of the Explanatory Statement:

> **Clause 21** provides that the ICRC may provide assistance or information to the [Australian Energy Regulator (AER)], on its own initiative or at the request of the AER, if certain criteria are met.
>
> The criteria are that:
>
> a) if information is provided, it is reasonably required by the AER for the purposes of this Bill, the regulations, the National Energy Retail Law (ACT) or any instrument made under the National Energy Retail Law (ACT); and
>
> b) if assistance is provided, it is reasonably required by the AER to perform a function or duty or exercise a power conferred or imposed under this Bill, the regulations, the National Energy Retail Law (ACT) or any instrument made under the National Energy Retail Law (ACT).
>
> The ICRC may authorise the AER to disclose such provided information, even if it was provided to the ICRC in confidence and the balance of the clause provides a statutory immunity for the ICRC in doing so.
>
> The intention of this provision is to facilitate a smooth transition of regulatory functions to the national framework.

In the respect at least of providing that the giving of the information is not a breach of confidence, this clause would remove a major common law protection of the right to privacy stated in HRA paragraph 12(a).

This issue is not addressed in the Explanatory Statement, and the limitation of HRA paragraph 12(a) requires justification, either on the basis that this limit is not arbitrary or, which amounts to the same thing, that it is justifiable under HRA section 28. To merely state the intention of the provision is not sufficient.

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

A misleading provision

Subclause 21(2) of the Bill provides:

> Despite any other Act or law, the ICRC may authorise the AER to disclose information provided under subsection (1) even if the information was given to the ICRC in confidence.

The Committee has pointed out on many occasions that without following the entrenching provision[15] in the *Australian Capital Territory (Self-Government) Act 1988*, it is legally impossible to provide that a provision of a statute must prevail over any other law of the Territory enacted or made at a later point of time than the provision. It is misleading for such a provision to be enacted.

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

OFFICIAL VISITOR BILL 2012 (NO 2)

This is a Bill for an Act to provide for the appointment of official visitors for various Acts, and to set out their functions, inspecting visitable places, handling complaints from entitled people and reporting on those matters.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (c)(i) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The Explanatory Statement states that the Bill "proposes an improved monitoring and complaints system for people who are being held in government institutions or are staying in a community facility and are dependent on the service provider or accommodation manager supporting them". It notes that there are currently official visitors "for corrections, mental health and children and young people who are staying in institutions owned and operated by the ACT Government", and proposes to "create(s) new official visitor roles" for people with disabilities; people experiencing homelessness; and children and young people who are from an Aboriginal and Torres Strait Islander background and in a juvenile justice or care and protection facility.

HRA issues identified in the Explanatory Statement

The Explanatory Statement notes that the Bill "better protects the human rights of vulnerable people by facilitating their access to an independent complaints process and providing improved oversight of the accommodation and services which they are dependent on", and specifically discusses how some provisions might engage the right to privacy (HRA section 21) and the right to equality before the law (HRA subsection 8(3)).

[15] Section 26.

The Committee refers the Assembly to this discussion at the Explanatory Statement pages 2-3.

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

Equality of law (HRA subsection 8(3))—special protective provision for Aboriginal or Torres Strait Islander persons

At least one official visitor for the *Children and Young People Act 2008*, and one official visitor for the *Corrections Management Act 2007* must be "an Aboriginal or Torres Strait Islander person" (clause 19 of the Bill). Such a person is defined to mean:

> a person who—
>
> (a) is a descendant of an Aboriginal person or Torres Strait Islander person; and
>
> (b) identifies as an Aboriginal person or Torres Strait Islander person; and
>
> (c) is accepted as an Aboriginal person or Torres Strait Islander person by an Aboriginal community or Torres Strait Islander community.

The purpose of these provisions "to ensure such an official visitor is always appointed" (Explanatory Statement page 1).

While the Explanatory Statement does not explicitly acknowledge that these provisions engage the right to equality before the law in HRA subsection 8(3), it does state (at page 6) that

> [r]equiring the appointment of an official visitor for Aboriginal and Torres Strait Islander children and young people in correctional settings recognises the continuing over representation of Aboriginal and Torres Strait Islander people within the justice system and assists in appropriately responding to their unique cultural needs.

It also notes that the definition of "an Aboriginal or Torres Strait Islander person" "has been taken from the *Aboriginal and Torres Strait Islander Elected Body Act 2008*."

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

SUBORDINATE LEGISLATION

<u>Disallowable Instruments—No comment</u>

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

Disallowable Instrument DI2012-40 being the Victims of Crime (Victims Advisory Board) Appointment 2012 (No. 1) made under section 22D of the *Victims of Crime Act 1994* **revokes NI2011-716 and appoints a specified person as the ACT Courts member of the Victims Advisory Board.**

Disallowable Instrument DI2012-41 being the Education (School Boards of School-Related Institutions) Early Childhood Schools Determination 2012 made under section 43 of the *Education Act 2004* **determines the composition of school boards of Early Childhood Schools.**

Disallowable Instrument DI2012-42 being the Road Transport (Public Passenger Services) (Defined Right Conditions) Determination 2012 (No. 1) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* **determines the defined right conditions to be allocated in a ballot of defined rights for restricted taxi licences for wheelchair accessible taxis.**

Disallowable Instrument DI2012-43 being the ACT Teacher Quality Institute Ministerial Direction 2012 (No. 1) made under section 25 of the *ACT Teacher Quality Institute Act 2010* **directs the ACT Teacher Quality Institute to provide summary details of its income and expenses for a financial year in its annual report.**

Disallowable Instrument DI2012-45 being the Health Professionals (Veterinary Surgeons Fees) Determination 2012 (No. 1) made under section 132 of the *Health Professionals Act 2004* **revokes DI2010-63 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-47 being the Public Place Names (Casey) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of three new roads in the Division of Casey.**

Disallowable Instrument DI2012-48 being the Public Place Names (Franklin) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of two new roads in the Division of Franklin.**

Disallowable Instrument DI2012-52 being the Public Place Names (Hume) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of a new road in the Division of Hume.**

Disallowable Instrument DI2012-53 being the Public Place Names (Watson) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of a new road in the Division of Watson.**

Disallowable Instrument DI2012-54 being the Public Place Names (Casey) Determination 2012 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of five new roads in the Division of Casey.**

Disallowable Instrument DI2012-55 being the Education (Government Schools Education Council) Appointment 2012 (No. 1) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member of the Government Schools Education Council, representing the Canberra Preschool Society.**

Disallowable Instrument DI2012-56 being the Canberra Institute of Technology (Advisory Council) Appointment 2012 (No. 1) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2012-62 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **approves two specific areas within Manuka Oval to be determined as sports bookmaking venues.**

Disallowable Instrument DI2012-63 being the Financial Management (Directorates) Guidelines 2012 made under section 133 of the *Financial Management Act 1996* **prescribes certain directorates for the purposes of the Act.**

Disallowable Instruments—Comment

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

Positive comment—Correction of error

Disallowable Instrument DI2012-44 being the Betting (ACTTAB Limited) Rules of Betting Determination 2012 (No. 2) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2012-35 and determines the Rules of Betting.**

The Committee notes that, as indicated in the Explanatory Statement, this instrument revokes and replaces the Betting (ACTTAB Limited) Rules of Betting Determination 2012 (No. 1), which was notified on the ACT Legislation Register on 22 March 2012. The Explanatory Statement states:

> Schedule 1 has been amended to define the term "lowest List Number", which was incorrectly defined in DI2012-35 dated 15 March 2012.

The Committee notes with approval that the Explanatory Statement expressly acknowledges that the current instrument was made to correct an error in the previous instrument.

This comment does not require a response from the Minister.

Incorrect citation of empowering provision / Is this acting member appointment valid?

Disallowable Instrument DI2012-50 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2012 (No. 1) made under Schedule 2 section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as an acting member of the Work Safety Council, representing the interests of employers.**

Disallowable Instrument DI2012-51 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2012 (No. 1) made under Schedule 2 section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.**

These instruments appoint specified persons as a member and an acting member, respectively, of the Work Safety Council.

As a preliminary issue, the Committee notes that, for both instruments, both the face of the instruments and the Explanatory Statements for the instruments indicate that they are made under section 2.3 of the *Work Health and Safety Act 2011*. The Committee notes that, in fact, the appointments are made under section 2.3 *of Schedule 2* to the *Work Health and Safety Act 2011*. However, the Committee notes that section 212 of the *Legislation Act 2001* provides:

> **212 Appointment not affected by defect etc**
>
> An appointment, or anything done under an appointment, is not invalid only because of a defect or irregularity in or in relation to the appointment.

Leaving that issue aside, the Committee notes that the second of the instruments mentioned above appoints a specified person to the Council as an acting member, to represent the interests of employees. The Explanatory Statement for the instrument states:

> Acting members of the Council can fulfil the role of the member for whom they are appointed as an acting member. This would only occur when the member cannot exercise the functions of their position as provided for in section 209 of the Legislation Act. This might include short absences of that member due to illness or other unavailability or if a permanent vacancy arises, for no longer than 12 months.

It is not clear who "the member for whom they are appointed as an acting member" referred to in the above statement actually is, as there is nothing in either the instrument itself or the Explanatory Statement to identify such a person. The instrument and the Explanatory Statement merely indicate that the acting appointment is made in relation to "represent[ing] the interests of employees".

The Committee notes that the appointment is made under section 2.3 of Schedule 2 to the *Work Health and Safety Act 2011* which provides:

2.3 Membership

The council consists of—

(a) 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employees; and

(b) 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employers; and

(c) 4 other members appointed by the Minister; and

(d) the commissioner.

The first issue is to ask which of those 4 members appointed under paragraph (a) is the person appointed by this instrument intended to act for? Or is the person intended to act in relation to any of the 4 members, should the circumstances for an acting appointment arise? If this is the case then there are 2 further questions—why is this not stated and *can*, in fact, an acting appointment be made on this basis? As indicated above, the Explanatory Statement for the instrument cites section 209 of the *Legislation Act 2001*. That section provides:

209 Power of appointment includes power to make acting appointment

(1) If the appointer's power is the power to make an appointment to a position, the power to make the appointment also includes power to appoint a person, or 2 or more people, to act in the position—

(a) during any vacancy, or all vacancies, in the position, whether or not an appointment has previously been made to the position; or

(b) during any period, or all periods, when the appointee cannot for any reason exercise functions of the position.

Examples—par (b)

1 the appointee is ill or on leave

2 the appointee is acting in another position

3 the appointee is outside the ACT or Australia

Note 1 ***Function*** is defined in the dictionary, pt 1 to include authority, duty and power.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

(2) The power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make the appointment.

Example

If the appointment power is exercisable only on the recommendation of a body, the power to appoint a person to act is exercisable only on the recommendation of the body.

These provisions do not appear to contemplate a person being appointed to act in the absence of any of a group of appointees.

A final issue arises from a search of the page of the ACT Legislation Register relating to disallowable instruments made under the Work Health and Safety Act. At the time of the Committee's report, the following instruments are listed (at http://www.legislation.act.gov.au/a/2011-35/di.asp):

- Attorney General (Fees) Amendment Determination 2011 (No 2); and
- Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2012 (No 1) (this instrument); and
- Work Health and Safety (Work Safety Council Employer Representative) Appointment 2012 (No 1).

If these are all the appointments made, an *acting* employee representative has been appointed to the Council but no **actual** employee representative.

In making this comment, the Committee acknowledges that some confusion may be created as a result of the transition from the *Work Safety Act 2008* (which has been repealed), under which the Council's predecessor existed. However, it is certainly the case that what is discussed above is confusing. **The Committee would appreciate the Minister's clarification in relation to the issues raised in relation to this acting appointment. In particular, the Committee would appreciate the Minister's advice as to whether, in fact, the acting appointment in this case is properly made under the Legislation Act.**

Positive comment

Disallowable Instrument DI2012-57 being the Racing Appeals Tribunal Appointment 2012 (No. 1) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member and president of the Racing Appeals Tribunal.**

Disallowable Instrument DI2012-58 being the Racing Appeals Tribunal Appointment 2012 (No. 2) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instrument DI2012-59 being the Racing Appeals Tribunal Appointment 2012 (No. 3) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instrument DI2012-60 being the Racing Appeals Tribunal Appointment 2012 (No. 4) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

Disallowable Instrument DI2012-61 being the Racing Appeals Tribunal Appointment 2012 (No. 5) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

The instruments appoint five specified persons to the Racing Appeals Tribunal. The Committee notes with approval that, in each case, the Explanatory Statement for the instrument states that the specified person meets the formal requirements for appointment to the Tribunal.

This comment does not require a response from the Minister.

Subordinate Laws—No comment

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

Subordinate Law SL2012-13 being the Liquor Amendment Regulation 2012 (No. 1) made under the *Liquor Act 2010* **removes the legal obligation on liquor retailers to give information about the volume of annual liquor sales to government.**

Subordinate Law SL2012-14 being the Civil Law (Wrongs) Amendment Regulation 2012 (No. 1) made under the *Civil Law (Wrongs) Act 2002* **prescribes a process for the disclosure of confidential information in general reports requested by a public servant.**

Subordinate Law SL2012-15 being the Magistrates Court (Fair Trading Motor Vehicle Repair Industry Infringement Notices) Regulation 2012 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for specified offences under the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*.**

Subordinate Law SL2012-16 being the Road Transport (Driver Licensing) Amendment Regulation 2012 (No. 1) made under sections 26 and 28 of the *Road Transport (Driver Licensing) Act 1999* **amends provisions of the Road Transport (Driver Licensing) Regulation relating to the licensing, training and testing requirements for novice motorcycle riders.**

Subordinate Law SL2012-17 being the Magistrates Court (Smoking in Cars with Children Infringement Notices) Regulation 2012 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for prescribed offences under the *Smoking in Cars with Children (Prohibition) Act 2011*.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Industrial Relations, dated 7 May 2012, in relation to comments made in Scrutiny Report 48 concerning Subordinate Law SL2011-36, being the Work Health and Safety Regulation 2011.
- The Minister for Community Services, dated 9 May 2012, in relation to comments made in Scrutiny Report 48 concerning the Education and Care Services National Law Regulation.
- The Chief Minister, dated 30 May 2012, in relation to comments made in Scrutiny Report 50 concerning Disallowable Instrument 2012-23, being the Public Sector Management Amendment Standards 2012 (No. 2).

The Committee wishes to thank the Chief Minister, the Minister for Industrial Relations and the Minister for Community Services for their helpful responses.

Vicki Dunne, MLA
Chair

May 2012

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

REPORTS—2008-2009-2010-2011-2012

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

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

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

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

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

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

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

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

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

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

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

Bills/Subordinate Legislation

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

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

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

Report 43, dated 13 October 2011
Disallowable Instrument DI2011-194 - Tobacco (Compliance Testing Procedures) Approval 2011 (No. 1)
Disallowable Instrument DI2011-228 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-229 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-231 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-232 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-233 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-234 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 6)
Disallowable Instrument DI2011-235 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7)
Disallowable Instrument DI2011-236 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8)
Disallowable Instrument DI2011-237 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9)
Subordinate Law SL2011-26 - Gene Technology Amendment Regulation 2011 (No. 1)

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

Bills/Subordinate Legislation

Report 47, dated 6 February 2012
Crimes Legislation Amendment Bill 2011
Disallowable Instrument DI2011-292 - Domestic Violence Agencies (Council) Appointment 2011 (No. 1)

Report 48, dated 20 February 2012
Disallowable Instrument DI2011-322 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 6)
Disallowable Instrument DI2011-323 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 7)
Disallowable Instrument DI2011-324 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2011 (No. 8)

Report 49, dated 15 March 2012
Animal Welfare Legislation Amendment Bill 2012 (PMB)
Crimes (Offences Against Police) Amendment Bill 2012 (PMB)
Road Transport (General) (Infringement Notices) Amendment Bill 2012 (PMB)

Report 50, dated 26 March 2012
Subordinate Law SL2012-8 - Taxation (Government Business Enterprises) Amendment Regulation 2012 (No. 1)

Report 51, dated 26 April 2012
Human Rights Amendment Bill 2012

Report 52, dated 7 May 2012
Disallowable Instrument DI2012-38 - Nature Conservation (Special Protection Status) Declaration 2012 (No. 1)

Dr Chris Bourke MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR INDUSTRIAL RELATIONS
MINISTER FOR CORRECTIONS

MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the Standing Committee on Justice and Community Safety's Scrutiny Report No 48 of 20 February 2012 in relation to the Work Health and Safety Regulation 2012 ('the Regulation').

Before addressing the one outstanding issue in the Report, I would like to thank the Committee for its comments and for the general support of the principles behind the development of the Regulation. I am pleased that the Committee accepts the Government's commitment to the harmonisation of occupational health and safety legislation as part of the Council of Australian Governments national reform agenda. I also acknowledge the Committee Members ongoing support for worker safety in the Territory.

The Committee has asked if limited public access could be made available, free of charge and during business hours, to the various Australian Standards relied on in the Regulation. I am pleased to advise the Committee that WorkSafe ACT has agreed to provide such public access at its offices at Woden. This continues the arrangement that existed under the previous *Work Safety Act 2008*. Advice to this effect will be placed on the WorkSafe ACT website.

Thank you again for the Committee's report.

Yours sincerely

Dr Chris Bourke MLA
Minister for Industrial Relations
7 May 2012

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 2244 Fax (02) 6205 0332 Email: bourke@act.gov.au

Joy Burch MLA

MINISTER FOR COMMUNITY SERVICES
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR AGEING
MINISTER FOR WOMEN
MINISTER FOR GAMING AND RACING
MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

Mrs Vicki Dunne MLA
Chair Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for the Standing Committee on Justice and Community Safety comments in the 20 January 2012 Scrutiny Report in regard to the *Education and Care Services National Regulations.*

I understand the Chief Minister responded on 13 April 2012 in regard to the handling of national law disallowable instruments.

I am writing to clarify your query as the meaning of 'a majority of the participating jurisdictions' in subsection 303(5) of the *Education and Care Services National Law (ACT) Act 2011.* This phrase does mean half of the participating jurisdictions plus one.

Yours sincerely

Joy Burch MLA
Minister for Community Services
9 May 2012

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0020 Fax (02) 6205 0495 Email BURCH@act.gov.au

Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety – Scrutiny of Bills
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for the Committee's comments in the Scrutiny Report of 26 March 2012 about the technical amendment made to the Public Sector Management Amendment Standards 2012 (No.2) [DI-2012-23].

The Committee has requested confirmation on the explanation provided in the Explanatory Statement. I can confirm that there is no prejudicial retrospectivity with the application of this instrument.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Chief Minister

30 MAY 2012

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au