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

14 SEPTEMBER 2009

Report 12

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)
Ms Mary Porter AM, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

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

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

EMERGENCIES (BUSHFIRE WARNINGS) AMENDMENT BILL 2009

This bill would amend the *Emergencies Act 2004* to make provision in relation to the preparation and promulgation of emergency warnings for bushfires.

EMERGENCIES (ESA) AMENDMENT BILL 2009

This bill would amend the *Emergencies Act 2004* to make provision for the establishment of a statutory authority to manage emergency services in the Territory.

FIRST HOME OWNER GRANT AMENDMENT BILL 2009 (NO 2)

This Bill would amend the *First Home Owner Grant Act 2000* provide the statutory requirements for the continued administration of the First Home Owner Boost Scheme.

GAMING MACHINE (SUSPENSION OF TRANSFERS) AMENDMENT BILL 2009

This Bill would amend the *Gaming Machine Act 2004* to provide that a **prospective licensee** must not apply to the commission for the transfer of a licence from the current licensee during the period starting on 26 August 2009 and ending on 31 December 2009.

LEGISLATION (PENALTY UNITS) AMENDMENT BILL 2009

This Bill would amend the Legislation Act 2001 to increase the amounts defined for penalty units from $100 to $110 for individuals and from $500 to $550 for corporations.

PLANNING AND DEVELOPMENT AMENDMENT BILL 2009

This Bill would amend the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008* to insert into the Act modifications to the Act that are at present contained in the regulations.

Bills—Comment

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

ADOPTION AMENDMENT BILL 2009

This is a bill to amend the *Adoption Act 1993* to reflect contemporary adoption practices and needs.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)

Is it justifiable in the circumstances to permit the Minister to fix by written notice the date for the commencement of the Act?

Clause 2 provides that the proposed Act is to commence on a day to be fixed by written notice by the Minister. This is in effect a delegation to the executive of a power to choose a time for commencement which is within the 6 months following the notification day.[1] As such it gives the Minister a limited role in the legislative process and raises an issue under the term of reference noted above.

The Explanatory Statement does not address this issue.

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

Report under section 38 of the Human Rights Act 2004
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

Do the provisions of the Bill providing for particular consideration be given to the placement for adoption of a child who is an Aboriginal or Torres Strait Islander engage the right to equal protection of the law in HRA subsection 8(3), and, if so, is any derogation of that principle justifiable under HRA section 28?

The Explanatory Statement addresses this issue briefly. It firstly noted proposed subsection 5(1) of the Act (see clause 5 of the Bill), which provides:

> (1) A person making a decision under this Act in relation to a child or young person, must regard the best interests of the child or young person as **the paramount consideration** (emphasis added).[2]

It then noted that proposed section 6 of the Act "outlines the additional matters that decision makers must consider when making decisions under the Bill in relation to Aboriginal or Torres Strait Islander children and young people". This provision requires that a decision-maker must

> (a) take into account the need for the child or young person to maintain a connection with the lifestyle, culture and traditions of **the child's** or young person's Aboriginal or Torres Strait Islander **community**; and
>
> (b) seek and consider submissions about the child or young person made by or on behalf of any Aboriginal or Torres Strait Islander people or organisations identified by the chief executive as providing ongoing support services to the child or young person or the child's or young person's family; and

[1] This is the effect of section 79 of the *Legislation Act 2001*. See section 28 concerning the day of notification.
[2] Oddly, the Explanatory Statement quoted article 3 of the the *Convention on the Rights of the Child*, which says less clearly that ", the best interests of the child shall be a primary consideration".

(c) take into account Aboriginal and Torres Strait Islander traditions and cultural values (including kinship rules) as identified by reference to the **child's** or young person's family and kinship relationships and the **community** with which the child or young person has the strongest affiliation (emphasis added).

The Explanatory Statement then notes that the importance of these principles is emphasised by proposed section 39G of the Act (see clause 19). Proposed section 39G(2) provides that an adoption order

> must not be made for an Aboriginal or Torres Strait Islander child or young person unless the court is satisfied that—
>
> (a) the additional requirements mentioned in section 6 (Aboriginal and Torres Strait Islander child or young person—additional requirements) have been complied with; and
>
> (b) it is not practicable for the child or young person to remain in the care of the birth parents or a responsible person; and
>
> (c) the choice of the adoptive parents has been made having regard to the desirability of the child or young person—
>
> (i) being in the care of a person who is a member of **an Aboriginal or Torres Strait Islander community**; and
>
> (ii) being able to establish and maintain contact with his or her birth parents, any responsible person and the Aboriginal or Torres Strait Islander community of which the child or young person is or was a member (emphasis added).

The words of paragraph 39G(2)(c)(i) emphasised add significantly to the statements of principle in proposed section 6 in that paragraph 39G(2)(c)(i) directs that preference be given to the placement of the child with adoptive parents who are members of **any** community, and not necessarily one with which the child has a connection.

In relation to the Human Rights Act, the Explanatory Statement states (in relation to proposed section 6):

> This principle engages the right to equal protection of the law without discrimination, at section 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004* because the proposed affirmative measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and the impact of past adoption practices upon Aboriginal and Torres Strait Islander communities.
>
> Application of this clause also takes account of the ACT Aboriginal and Torres Strait Islander community as being diverse, with no single set of traditions and/or culture, hence the importance of consultation with relevant persons.

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

CIVIL PARTNERSHIPS AMENDMENT BILL 2009

This is a Bill for an Act to amend the *Civil Partnerships Act 2008* to provide a mechanism for two people, regardless of their sex, and if they so choose, to enter a civil partnership by making a declaration before a civil partnership notary, and to establish the registration of civil partnership notaries.

Do some provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? - (term of reference (c)(ii))?

The Committee raises this question in relation to the power that would be vested in the registrar-general to refuse to register an applicant for appointment as a civil partnership notary. This matter is governed by proposed section 11A (see clause 9).

Should the power of the registrar-general to register an applicant for appointment as a civil partnership notary "if satisfied" of certain matters (subclause 11A(2)) be expressed as a power to register "if satisfied on reasonable grounds" of those matters?

On an application, the registrar-general may register the applicant "if satisfied" of certain matters (subclause 11A(2)), these being that the applicant

(a) is an individual aged 18 years or older; and

(b) has the knowledge and the skills or experience necessary to exercise the functions of a civil partnership notary under this Act; and

(c) is a suitable person to be registered as a civil partnership notary.

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

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

The Explanatory Statement to the Bill stated that "This amendment is necessary to avoid incompatibility with the *Human Rights Act 2004*". In *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).[3]

The Committee recommends that consideration be given to rephrasing proposed subclause 11A(2) so that it be expressed as a power to register "if satisfied on reasonable grounds" of the specified matters.

Should the power of the registrar-general in proposed subclause 11A(5) to determine whether an applicant "is a suitable person to be a civil partnership notary" by reference to "anything else the registrar-general considers relevant" be more narrowly expressed?

In deciding under subclause 11A(2)(c) whether an applicant "is a suitable person to be registered as a civil partnership notary", the registrar must have regard to specific matters listed in subclause 11A(4), and, under subclause 11A(5):

> In deciding whether a person is a suitable person to be a civil partnership notary, the registrar-general may have regard to anything else the registrar-general considers relevant.

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

If a "catch-all" statement is required, then an alternative statement might be:

> In deciding whether a person is a suitable person to be a civil partnership notary, the registrar-general may have regard to any other matter that on reasonable grounds is relevant to an assessment of suitability.

This would provide a much firmer basis upon which an unsuccessful applicant for registration could challenge a refusal based on a judgment of the registrar made under subclause 11A(5), and would also make the provision safer from HRA challenge.

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[3] The Committee notes that, in *Scrutiny Report No. 3* of the *Seventh Assembly*, concerning the Justice and Community Safety Legislation Amendment Bill 2009, and more particularly in relation to amendments proposed to proposed sections 40A(3) and 40C(5) of the *Crimes (Forensic Procedures) Act 2000*, the Assembly amended the Bill in a way which agreed with the Committee's proposal that the powers of a magistrate being conditioned on he or she having "reasonable grounds" for a particular belief.

The Committee notes two further matters. First, it is aware that proposed subclause 11A is closely modelled on a provision in the Commonwealth Marriage Act that governs the appointment of a marriage celebrant (see *Marriage Act 1961* paragraph 39C(2)(h))[4]. It must be noted however that the Commonwealth law was not framed having regard to provisions of the *Human Rights Act 2004* or any similar law.

Secondly, the Committee notes that while it is true that any discretion conferred on an administrative decision-maker must be exercised in accordance with the scope and purpose of the legislation in which it is located, the point of requiring more specific statement of the relevant factors is to give guidance to a person who might be affected by the exercise of the discretion, and to provide a firmer basis upon which an exercise of the discretion might be challenged.

The Committee recommends that consideration be given to rephrasing the proposed catch-all statement of relevant factors in proposed subclause 11A(5).

CRIMES (ASSUMED IDENTITIES) BILL 2009

This is a bill for an Act to authorise the use of assumed identities in the ACT that can also be used in other jurisdictions with corresponding law. Conversely, the Bill will enable other jurisdictions with corresponding law to use their authorised assumed identities in the ACT.

As recorded in the Explanatory Statement, "[a]n assumed identity is a false identity that is used by an officer or other person for a period of time for the purpose of investigating an offence or gathering intelligence. Assumed identities provide protection for undercover operatives engaged in investigating crimes and infiltrating organised crime groups". It also records that

> [t]he Bill will create a statutory framework for:
>
> - the authorisation of assumed identities;
> - the lawful provision of fictitious documentation by relevant government and non-government entities;
> - the lawful amendment of relevant records to support fictitious documentation;
> - protection of law enforcement officers, agencies and other authorised operatives from civil or criminal action arising from the lawful creation or use of assumed identities;
> - mutual recognition of laws with other corresponding jurisdictions; and
> - compliance and monitoring of the use of assumed identities.

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[4] The Committee notes that some specific factors stated in subsection 39C(2) of the Marriage Act are not replicated in proposed subclause 11A(4), such as "whether the person is committed to advising couples of the availability of relationship support services"; "whether the person is of good standing in the community"; "whether the person has an actual or potential conflict of interest between his or her practice, or proposed practice, as a marriage celebrant and his or her business interests or other interests"; and "whether the person's registration as a marriage celebrant would be likely to result in the person gaining a benefit in respect of another business that the person owns, controls or carries out".

Report under section 38 of the *Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

Entrapment is not authorised by the Bill

The Explanatory Statement notes that "[a]ssumed identities can engage the right to fair trial, under section 21 of the *Human Rights Act 2004* if an operation using an assumed identity results in entrapping a person to commit a criminal offence or improperly inducing a person to commit an offence.". But it further notes that "this Bill will not modify the law on entrapment or improper police inducement".

The Committee accepts this view and makes no further comment.[5]

Displacement of the *Freedom of Information Act 1989* and the *Territory Records Act 2002*

Should the bill displace the operation of the *Freedom of Information Act 1989* and the *Territory Records Act 2002*?

Clause 7 of the Bill provides simply that these Acts "do not apply in relation to activities, documents, and records under this Act". In this way the provision engages elements of the right to freedom of expression in HRA subsection 16(2).[6]

The Explanatory Statement justifies clause 7 in these words: "The Government is of the view that the public interest in protecting the identity of police, operatives, the assumed identities and agencies authorised by the Bill outweighs the public interest in disclosing information under the Acts listed".

An alternative view is that the exemptions in the *Freedom of Information Act 1989* are sufficiently wide to protect the interests identified, noting in particular section 37 (documents affecting enforcement of the law and protection of public safety). The processes of review under that Act also ensure that there is an external check on claims that disclosure of documents would harm the interests identified.

The Committee draws this matter to the attention of the Assembly, and recommends that the Minister address this issue.

The grant of immunity from criminal liability

Having regard to the rule of law, and/or to HRA subsection 8(2), is it appropriate that a state official be granted an immunity from criminal liability in respect of the creation of false information to support a false identity?

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[5] The Committee commented on this issue in *Scrutiny Report No 57* of the *Sixth Assembly*, concerning the Crimes (Controlled Operations) Bill 2008.
[6] See the brief discussion in *Scrutiny Report No 2* of the *Seventh Assembly*, concerning the Freedom of Information Amendment Bill 2008.

The issue arises with respect to clause 23, the effect of which is summarised in the Explanatory Statement: “Clause 23 provides government and non-government agencies with a protection from criminal liability if the agency creates fictitious evidence for an assumed identity in accord with a lawful request”.

This raises an issue of constitutional significance. On the face of it, the grant of immunity from criminal liability to a state official violates the “rule of law” in the second sense stated by A V Dicey – that “[i]t means … equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals”.[7] This issue is discussed more extensively in in *Scrutiny Report No 57* of the *Sixth Assembly*, concerning the Crimes (Controlled Operations) Bill 2008, where it is noted that the judges of the High Court in *Ridgeway v The Queen* [1995] HCA 66 did not speak with one voice on the issue of whether “law enforcement officers need to engage in illegal activities as part of investigations”.

The Committee draws this matter to the attention of the Assembly, and recommends that the Minister address this issue.

DANGEROUS GOODS (ROAD TRANSPORT) BILL 2009

This is a bill for an Act to make provision for safety in the transport of dangerous goods by road as part of the system of nationally consistent road transport laws, and for other purposes.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)

Is it justifiable in the circumstances to permit the Minister to fix by written notice the date for the commencement of the Act?

Clause 2 provides that the proposed Act is to commence on a day to be fixed by written notice by the Minister. This is in effect a delegation to the executive of a power to choose a time for commencement which is within the 6 months following the notification day.[8]

The Explanatory Statement addresses this issue, and the Committee does not consider that there is inappropriate delegation of legislative power.

Is there an inappropriate delegation of legislative power in that a competent authority may by written notice exempt a person from compliance with a provision of a regulation in relation to the transport of stated dangerous goods by road?

[7] A.V. Dicey, *Introduction to the study of the law of the Constitution* (10th ed, 1959) at 202-203.

[8] This is the effect of section 79 of the *Legislation Act 2001*. See section 28 concerning the day of notification.

Clause 151 would create a scheme whereby a competent authority may by written notice exempt a person from compliance with a provision of a regulation in relation to the transport of stated dangerous goods by road. The Committee has in other reports pointed to objections from a rule of law standpoint of such provisions.[9]

Subject to one point, the Committee does not raise any concern and **commends the scheme in clause 151 as a model** for such provisions. The scheme states:

(a) the boundaries of the scope of the power to exempt, by reference to objective and closely defined criteria;

(b) the detail of what must be contained in an exemption, including its duration; and

(c) that certain kinds of exemption are notifiable instruments.

The point to be raised is that the competent authority may grant an exemption "if satisfied" of certain matters. From a rights perspective, it is preferable that the phrase be "if satisfied on reasonable grounds".

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

Report under section 38 of the Human Rights Act 2004
Are some provisions of the Bill an undue trespass on rights and liberties? - (term of reference (c)(i))?

Strict liability offences

Some 18 provisions of the Bill would create strict liability offences. These provisions engage the right to liberty and security (HRA subsection 18(1)) and/or the presumption of innocence (HRA subsection 22(1)). Derogation of these rights might be justifiable under HRA section 28.

The Explanatory Statement offers a justification for these provisions, pointing to the regulatory nature of the proposed offences. The Committee agrees with this line of justification and refers members to the Explanatory Statement. It also notes that in some instances the Bill provides for defences in addition to the defences available under the *Criminal Code 2002*.

In relation to justifiability under subclause 28(1), however, the level of the penalty that would attach to a conviction for one offence raises a serious question about the HRA compatibility of the provision.

[9] *Scrutiny Report No 7* of the *Seventh Assembly*, concerning the Road Transport (Mass, Dimensions and Loading) Bill 2009.

Is a derogation of the presumption of innocence (HRA subsection 22(1)), and/or of the right to liberty in (HRA subsection 18(1)) involved in the creation of an offence of strict liability by subclause 28(1), justifiable where the penalty upon conviction may amount to imprisonment?

Subclause 28(1) provides:

(1) A prime contractor must not use a vehicle to transport dangerous goods (other than as the driver of the vehicle) if—

(a) a regulation requires the vehicle to be licensed to transport the goods; and

(b) the vehicle is not licensed as required.

Maximum penalty: 500 penalty units, imprisonment for 2 years or both.

By subclause 28(4), strict liability applies to subclause 28(1). Thus, on a prosecution, it would not be material for the court to inquire whether the defendant believed that the vehicle was licensed.

In *Scrutiny Report No 38* of the *Fifth Assembly*, the Committee drew attention to the possibility that derogation of the rights in HRA subsection 22(1), and/or subsection 18(1), would not be justifiable where the potential punishment included imprisonment. In that report, it quoted the words of Lamer CJ of the Supreme Court of Canada in *R v Wholesale Travel Group Inc* [1991] 3 S.C.R. 154 at 184:

> The rationale for elevating mens rea from a presumed element … to a constitutionally required element, was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime.

Moreover, the severity of the punishment for an offence may be such that it will derogate from the HRA right not to be "treated or punished in a cruel, inhuman or degrading way": HRA paragraph 10(1)(b). To imprison a person for committing an act they did not intend to commit might well be regarded as breaching this right.

Since the commencement of the HRA, the Committee has, on a number of occasions, raised the issue whether a strict liability offence to which attaches a punishment of imprisonment can be regarded as a justifiable derogation of the relevant HRA rights. It considers that there is a serious question about the compatibility of such provisions. At no point does the Explanatory Statement to this bill address this issue.

The Committee considers that there is a serious question as to whether subclause 28(4) is compatible with the Human Rights Act. The Committee draws this matter to the attention of the Assembly and recommends that the Minister address this issue.

The provision of defences to some offence provisions

A decision to create of a criminal offence, and then to define its scope and the scope of defences, are matters requiring close attention given impact a conviction may have on the liberty (HRA subsection 18(1)) and reputation (HRA paragraph 12(b)) of a person convicted of the offence.

In relation to several provisions creating an offence, the Bill makes provision for a defence that would be in addition to the defences available under the Criminal Code. Where the offence is one of strict liability, such provision would assist a conclusion that the derogation of the HRA rights involved in the creation of such an offence is, in terms of the assessment that must be made under HRA section 28, a proportionate response to achieving the objective of creating an offence. Where the offence is not one of strict liability, provision of an additional defence would assist a conclusion that the derogation of the HRA right in subsection 18(1) (right to liberty) is a proportionate response.

Some of these provisions are noted before turning to offence provisions which lack an additional defence.

- By subclause 60(1), it would be an offence to fail to comply with a direction given under subclause 59(1) concerning the production of records. This is a strict liability offence, and by subclause 60(3), subclause 60(1) "does not apply to a person if the person **has a reasonable excuse for failing to comply** with the direction". Similar provision is made in subclauses 121(2) as a defence to an offence of a very similar kind that is not one of strict liability (and see subclause 123(2)).

- Some provisions provide for a more specifically directed defence analogous to the reasonable excuse defence. By subclause 62(1), it would be an offence to fail to comply with a direction given under subclause 61(1) concerning the production of certain information, and by subclause 62(3), subclause 62(1) "does not apply to a person if the person did not know, and could not be reasonably expected to know or find out, the information required under the direction". By subclause 77(1), it would be an offence to fail to comply with a direction given under subclause 76(1) that "a person who is involved in the transport of dangerous goods … give reasonable assistance to the authorised person to allow the authorised person effectively to exercise a function in relation to goods with which the person is involved", and by subclause 77(4) it is a defence if the defendant proves that "(a) the defendant took reasonable steps to comply with the direction; and (b) it was not possible for the defendant to comply with the direction because of an act or event over which the defendant had no control".

- Some defences are more specifically tailored to the particular offence; see subclauses 33(4), 42(3), and 46(3). An element of these defences is that it was "not practicable" for the defendant to do something.

In relation to some provisions that create an offence, should provision be made for a defence that would be in addition to the defences available under the Criminal Code?

The Committee raises this question in relation to the offences in these provisions: subclauses 28(1), 28(3), 36(1), 37(1), 40(1), 44(1), 48(1), 50(1), 52(1), 58(1), 87(1), 136(1), 152 and 153.

Given what is said above about subclause 28(1), this question is particularly acute in this instance.

The Committee draws this matter to the attention of the Assembly, and recommends that the Minister address the issues identified above.

The displacement of the privilege against self-incrimination

Are some provisions of the Bill an undue trespass on rights and liberties? - (term of reference (c)(i))?

Is the displacement of the privilege against self-incrimination in clause 67 an undue trespass on the common law privilege?

Subclause 59(1) provides:

(1) An authorised person may, for compliance purposes, direct a person to produce—

(a) a record required to be kept under this Act by the person; or

(b) a record required to be kept under this Act in the person's possession or under the person's control; or

(c) **a record**, device or other thing that contains or may contain a record, in the person's possession or under the person's control, **relating to or indicating an offence against this Act** (emphasis added).

(Under section 60, a person who refuses to comply with a direction commits an offence, unless the person has a "reasonable excuse" for non-compliance.)

On a literal reading, paragraph 59(1)(c) requires the person to produce the record even if the document might be relevant in some way to the proof of an element of a subsequent charge of the person with a criminal offence against the Act (or indeed any other kind of offence). Ordinarily, however, this literal interpretation would not be taken because of the provision in subsection 170(1) of the *Legislation Act 2001* which provides:

(1) An Act or statutory instrument must be interpreted to preserve the common law privileges against selfincrimination and exposure to the imposition of a civil penalty.

Viewed as a common law right, the privilege against self-incrimination permits a person to refuse to provide to a state appointed or authorised person or body any information that might be relevant in some way to the proof of an element of a subsequent charge of the person with a criminal offence. This privilege applies whether that information is sought by

the answering of questions directed to the person, or by the provision or seizure of documents or real evidence by the person.[10]

Thus, ordinarily, the effect of subsection 170(1) of the Legislation Act would be that under subclause 59(1)(c) of the Bill a person could not be validly directed to produce a record where production would violate the privilege against self-incrimination.[11]

What has just been said about the effect of paragraph 59(1)(c) applies also to the power of an authorised person under subclause 61(1) to direct a person "involved in the transport of dangerous goods to give information to the authorised person about a vehicle or any load or equipment carried, or intended to be carried, by a vehicle".[12] A failure to comply with a direction is an offence under subclause 62(1).

But the operation of section 170 can be displaced, and this is the effect of clause 67:

67 Protection from incrimination

(1) A person is not excused from a requirement to comply with a direction under [specified divisions that include subclauses 59(1) and 61(1)] on the ground that complying with the requirement might incriminate the person or make the person liable to a penalty.

(2) However, the following is not admissible in evidence against the person in a criminal proceeding (except a proceeding for an offence against [specified divisions]):

(a) a statement made or any information or answer given or provided by an individual in compliance with a direction under [specified divisions];

(b) information directly or indirectly derived from a statement, information or answer mentioned in paragraph (a).

(3) Any document produced by a person in compliance with a direction under [specified divisions] is not inadmissible in evidence against the person in a criminal proceeding on the ground that the document might incriminate the person.

Note The Legislation Act, s 170 deals with the application of the privilege against selfincrimination.

(The addition of this note might mislead, given that it appears clause 67 displaces section 170 in relation to the relevant clauses of the Bill.)

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[10] A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) 23.16.2.

[11] Given section 170, it would not be necessary for the person to rely on the "reasonable excuse" defence in subclause 60(3) to avoid conviction under subclause 60(1). There is no equivalent defence in subclause 62 in relation to the offence in subclause 61(1).

[12] From a rights perspective, paragraph 59(1)(c) is particularly objectionable in that it is clear that the compulsion to produce the record occurs in the course of an investigation as to whether some other offence has been committed. That is, compulsion occurs in the course of a criminal investigation – as distinct from an administrative investigation before a criminal investigation is put in train. Given the definition of "compliance purposes" in clause 9, the same may perhaps be said about subclause 61(1). However, the common law privilege applies to a compulsion in the course of an administrative investigation.

This presents a rights issue under the Committee's term of reference paragraph (c)(i) to consider whether a clause of a bill "unduly trespass[es] on personal rights and liberties".

Clearly the effect of subclause 67(1) is to trespass on the personal right to claim the privilege against self-incrimination. In past reports, the Committee has considered whether this trespass is undue by having regard to whether the bill also provides for an immunity (to the person compelled to self-incriminate) against the use of the information produced under compulsion in any subsequent criminal prosecution.

Subclause 67(2) does provide for such immunity in respect of both direct use (see paragraph 67(2)(a)) and indirect (or derivative) use (see paragraph 67(2)(b)) of a statement, information or answer given in response to a direction under the relevant provisions of the Bill. *There are however significant limits to the immunity*. (The claim in the Explanatory Statement that the bill "provides full derivative use immunity against self-incrimination" is significantly overstated.)

First, the immunity is qualified in that it does not apply to a proceeding for an offence against a provision contained in specified divisions of the Bill – see subclause 67(2). It is to be noted that the offences in these divisions relate to a failure to comply with directions of various kinds given by authorised officers, (including the directions that may be given under clauses 59 and 61), in respect of which the penalties are light. In contrast, the immunity provided for in subclause 67(2) would apply in relation to the much more serious offences provided for in part 3.1 of the bill in relation to matters such as, for example the transport of dangerous goods (see clause 33), in respect of which the penalties are heavy.

This contrast points towards the trespass not being undue. In respect of clauses 59 and 61 however, it may be objected that it is an undue trespass to require a person to provide information designed explicitly to assist a criminal investigation.

Secondly, the immunity is qualified in that has no application to a document produced by a person in compliance with a direction under either clause 59 or clause 61. Given the high probative value of documents, this is a major qualification on the scope of the immunity.

There is a serious question as to whether clause 67 amounts to an undue trespass on a significant personal right, and the Committee draws this matter to the attention of the Assembly and recommends that the Minister address the issues identified above.

Report under section 38 of the Human Rights Act 2004

The privilege against self-incrimination is dealt with explicitly in HRA paragraph 22(2)(i), which provides that

> Anyone **charged with a criminal offence** is entitled to the following minimum guarantees, equally with everyone else: … (i) not to be compelled to testify against himself or herself or to confess guilt (emphasis added).

On the face of it, this provision has no application to clause 67 of the Bill inasmuch as it will have effect prior to a person being charged with an offence. In the light of this specific provision in HRA paragraph 22(2)(i), it would be difficult to argue that the broader common

law privilege is encompassed under some right, such as the right to a fair trial in HRA subsection 21(1).

On the other hand, it is not beyond the bounds of possibility that HRA paragraph 22(2)(i) will be interpreted to encompass the common law privilege. The matters noted above in relation to whether a trespass on the common law privilege was "undue" would also be relevant to an assessment of whether a derogation of paragraph 22(2)(i) was justifiable under HRA section 28.

An earlier Ministerial response to a provision substantially identical to clause 67

In relation to both the issue of whether a trespass on the common law privilege was "undue", and whether a derogation of paragraph 22(2)(i) was justifiable under HRA section 28, the Committee notes the response of the Minister for Transport of 18 June 2009 to the Committee's comments on a provision in the Road Transport (Mass, Dimensions and Loading) Bill 2009 that is substantially similar to clause 67 of the Dangerous Goods (Road Transport) Bill 2009; (see S*crutiny Report No 7* of the *Seventh Assembly*).

The Committee refers Members to this response, and offers these brief comments.

First, although it is not clear, the Minister's response may be directed only towards the protection offered in the Human Rights Act to the privilege against self-incrimination. If so, it does not address the issue of the scope of the common law privilege. The response does say that

> [t]he Government's view is that the privilege against self-incrimination is only engaged during criminal (or quasi-criminal) proceedings, or during a pre-trial or investigative procedure where there is no immunity governing the admission of evidence collected as part of that procedure in subsequent court proceedings.

The Committee accepts the thrust of this view, but this leaves open for debate in a particular instance – as in relation to clause 67 – of just what degree of immunity it provides. As discussed above, it is heavily qualified.

Secondly, the response suggests that the privilege against self-incrimination applies only in respect of "communications brought into existence by the exercise of state compulsion". This is not the position at common law, and if adopted would rob the privilege of much of its value. Moreover, this principle cannot deal with a compulsion to answer questions.

Thirdly, the Minister's response argues that a decision of the Supreme Court of Canada in *Fitzpatrick v The Queen* [1995] 4 SCR 154 "provides a useful framework through which to examine the current issue". That case dealt with a very different issue, that being whether the privilege against self-incrimination was breached by a law that required a person to keep and provide to the government records which were at a later time used by the government as evidence in a prosecution of the person. Clause 59 of this bill is not limited to records that are in the government's possession, nor is it limited to records that the relevant person was required to create or keep as a condition of a licence or such like.

A good Samaritan[13] provision

The good Samaritan doctrine "is a legal principle that prevents a rescuer who has voluntarily helped a victim in distress from being successfully sued for "wrongdoing". Its purpose is to keep people from being reluctant to help a stranger in need for fear of legal repercussions if they were to make some mistake in treatment".[14] In substance this is the content and the objective of clause 192 of the Bill, which in its critical parts provides:

> (1) A helper does not incur personal civil liability for an act done or omission made honestly and without recklessness in assisting, or attempting to assist, in a situation in which an emergency or accident involving dangerous goods happens or is likely to happen.
>
> …
>
> (5) In this section:
>
> ***helper*** means a person who acts without expectation of payment or other consideration.

The apparent object of such a law may be readily seen to promote the "right to life" stated in HRA subsection 9(1). On the other hand, such a law diminishes the common law right of a person injured (or whose injuries are exacerbated) by the good Samaritan/helper as a consequence of a tort (such as negligence) of the helper.

If it is decided to enact such a law, a range of choices in the detail is presented. Without being exhaustive, questions such as the following arise:

- Should any person however unqualified for the task, qualify as a helper? Or should the category of helper be qualified in some way? A narrow view would limit the category to persons who have some medical expertise, such as a doctor, a nurse, or a person who has some stated qualification to render first aid. These categories may not be appropriate in relation to clause 192, but the general question is one to be addressed. One particular issue is whether, where an injured person is helped, there should be a limitation of the kind just noted.

- How imminent or grave should be the peril that justifies the helper helping? In clause 192, the relevant situation is that there is "an emergency or accident involving dangerous goods happens or is likely to happen". Why was this choice made?

- Where an injured person is helped, do the normal rules of informed consent to treatment apply?

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[13] "Good Samaritan laws take their name from a story told by Jesus as contained in Luke 10:25-37, which recounts the aid given by a traveller to a person in need who had been beaten and robbed by bandits. While this traveller (a Samaritan) had no national, cultural, or religious affiliation to the injured man (in the story, assumed to be a Jew, with whom the Samaritans had had a long history of enmity), in compassion he aided the injured man, and did all in his power to ensure his welfare and recovery"; (Wikipedia- see next footnote).

[14] This section relies heavily on the Wikipedia entry "Good Samaritan law" http://en.wikipedia.org/wiki/Good_Samaritan_law

- A fundamental question is whether a person injured by the negligence of the helper should be entitled to compensation from the Territory.

There is nothing in the Explanatory Statement by way of explanation of the policy behind clause 192 or any indication of whether any of the issues raised above were addressed.

The Committee draws this matter to the attention of the Assembly, and recommends that the Minister address the issues identified above.

EGGS (CAGE SYSTEMS) LEGISLATION AMENDMENT BILL 2009

This is a Bill for an Act to amend the *Animal Welfare Act 1992* and the *Eggs (Labelling and Sale) Act 2001* to prohibit the practice of keeping chickens for egg production in a cage system; to regulate the display of cage eggs for retail sale; and to require the relevant Minister to take all reasonable steps to promote a permanent ban by the Territory and the States on the keeping of poultry in cage systems, and to improve the living conditions for poultry.

Report under section 38 of the *Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

Freedom of expression – HRA subsection 16(2)

In relation to clause 11 of the Bill, concerning the regulation of the retail display of cage eggs, is the way in which the Bill proposes to limit the right to freedom of expression in HRA subsection 16(2) "demonstrably justified in a free and democratic society" (HRA section 28)?

Clause 11 of the Bill would insert a new section 7 into the *Eggs (Labelling and Sale) Act 2001*. Its effect and purpose are described in the Explanatory Statement:

> The Bill proposes to change the way that cage eggs can be displayed by retailers in the ACT. Retailers will need to display cage eggs separately from other eggs. Cage eggs will also be accompanied by a sign explaining that cage egg production is banned in the ACT, and stating the dimensions of the minimum cage sizes. The intention is to clearly inform consumers at the point of sale that the eggs come from a cage system. This will overcome the problems caused by the often confusing labeling on egg cartons. The sign also alerts consumers that the ACT is a jurisdiction that does not support cage egg production. Providing these changes at point of sale will be simple and cheap for retailers to implement.

The proposed section 7 probably engages the right to freedom of expression stated in HRA subsection 16(2):

> (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

It is highly probable that this right will be found by the courts to include "commercial free speech".[15] While HRA section 6 states that "only individuals have rights", it cannot be assumed that all retailers of cage eggs are corporations; some will probably be "individuals".[16]

Thus the issue in relation proposed section 7 is whether the limitation on freedom of expression imposed is "demonstrably justified in a free and democratic society" under HRA section 28. In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. This test can be broken down into more specific questions.

Do the limitations on freedom of expression pursue a legitimate objective? The answer to this question is probably "yes". The Explanatory Statement spells out objectives that are rational and achievable.

Are the means provided in the Bill for the attainment of these objectives "proportionate"?

In general terms, this analysis has three components:

- is there a rational connection between the means and the objective?;
- are there, in comparison to the means proposed in the Bill, "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve"[17]?; and

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[15] In *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), the Supreme Court of Canada said: "When the Charter was adopted, the question arose of whether the free expression guarantee extended to commercial expression by corporations. This Court ruled that it did: *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927. The Court premised this conclusion on an examination of the values protected by the free expression guarantee: individual self-fulfilment, truth seeking and democratic participation. It concluded that, given the Court's previous pronouncements that Charter rights should be given a large and liberal interpretation, there was no sound reason for excluding commercial expression from the protection of s. 2(b). It noted that commercial speech may be useful in giving consumers information about products and providing a basis for consumer purchasing decisions: *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (S.C.C.), [1988] 2 S.C.R. 712, at pp. 766-67."

[16] See the Committee's response to a response by the Minister to its report on the Tobacco Amendment Bill 2008 in *Scrutiny Report No 54* of the *Sixth Assembly*.

[17] HRA paragraph 28(2)(e). This aspect of the proportionality test is difficult to apply. The Canadian Supreme Court (above at para 43) qualified the similar Canadian test: " … a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (S.C.C.), [1986] 2 S.C.R. 713; *Irwin Toy*": *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), para 43.

- is there is a proportionality between the effects of the measure that limits the right and the law's objective? "This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[18]

This inquiry can be quite complex and its resolution productive of much difference of opinion. It is in the first place a matter for the proponent of a Bill to address. In this assessment, the value embodied in the right to freedom of expression should not be neglected. Commercial speech is not necessarily of low value, and the Bill is not aimed at false or misleading speech. Those who sell caged eggs may argue that since their business is not illegal, they should be permitted means to advertise the sale of their products. Against this interest must of course be weighed the strength of the objectives of the Bill outlined above. Based on the results of cases decided in foreign jurisdictions, it is probable that the provisions of this Bill will be upheld as "demonstrably justified in a free and democratic society" (HRA section 28).

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

In relation to clause 11 of the Bill, is the way in which the Bill proposes to regulate of the retail display of cage eggs inconsistent with the provision of section 69 of the *Australian Capital Territory (Self-Government) Act 1988* that trade and commerce between the Territory and a State, and between the Territory and other Territories, shall be absolutely free?

Section 69 of the *Australian Capital Territory (Self-Government) Act 1988* provides:

69 Trade and commerce to be free

(1) Subject to subsection (2), trade, commerce and intercourse between the Territory and a State, and between the Territory and the Northern Territory, the Jervis Bay Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, shall be absolutely free.

(2) Subsection (1) does not bind the Commonwealth.

The prohibition in proposed section 9A the *Animal Welfare Act 1992* on the keeping of hens in a cage system (see clause 4 of the Bill) will not commence until 1 January 2011 (see subclause 2(3)). Thus, after this date, the regulation of the retail display of cage eggs in proposed section 7 of the *Eggs (Labelling and Sale) Act 2001* will apply only to cage eggs produced inter-state and imported into the Territory.

Without analysis, it is highly unlikely that the degree of regulation of the sale of imported eggs involved would be inconsistent with section 69 of the *Australian Capital Territory (Self-Government) Act 1988.*

[18] *Canada (Attorney General) v. JTI-Macdonald Corp.,* 2007 SCC 30 (CanLII) para 45.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2009-167 being the Exhibition Park Corporation (Governing Board) Appointment 2009 (No. 2) made under section 8 of the *Exhibition Park Corporation Act 1976* **and section 78 of the** *Financial Management Act 1996* **appoints specified persons as members of the governing board of the Exhibition Park Corporation.**

Disallowable Instrument DI2009-170 being the Health Records (Privacy and Access) (Fees) Determination 2009 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2008-186 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-172 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 7) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 78 of the** *Financial Management Act 1996* **reappoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employers.**

Disallowable Instrument DI2009-173 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 8) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 78 of the** *Financial Management Act 1996* **reappoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employers.**

Disallowable Instrument DI2009-174 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 9) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 78 of the** *Financial Management Act 1996* **reappoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employees.**

Disallowable Instrument DI2009-175 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 10) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employees.**

Disallowable Instrument DI2009-176 being the Children and Young People (Children and Youth Services Council) Appointment 2009 (No. 1) made under Part 2.2, subsections 30(1) and 31(1), of the *Children and Young People Act 2008* **appoints specified persons as chair, deputy chair and members of the Children and Youth Services Council.**

Disallowable Instrument DI2009-177 being the Civil Law (Wrongs) Professional Standards Council Appointment 2009 (No. 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints a specified person as the Commonwealth member of the Professional Standards Council.**

Disallowable Instrument DI2009-178 being the Electricity Safety (Fees) Determination 2009 (No. 1) made under section 64 of the *Electricity Safety Act 1971* **revokes DI2008-163 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-179 being the Gas Safety (Fees) Determination 2009 (No. 2) made under section 67 of the *Gas Safety Act 2000* **revokes DI2009-149 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-180 being the Planning and Development (Fees) Determination 2009 (No. 3) made under section 424 of the *Planning and Development Act 2007* **revokes DI2009-141 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-181 being the Water and Sewerage (Fees) Determination 2009 (No. 2) made under section 45 of the *Water and Sewerage Act 2000* **revokes DI2009-125 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-182 being the Health Professionals (Fees) Determination 2009 (No. 4) made under section 132 of the *Health Professionals Act 2004* **revokes DI2007-306 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-183 being the Public Place Names (City) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a park in the Division of City.**

Disallowable Instrument DI2009-184 being the Health Professionals (Fees) Determination 2009 (No. 5) made under section 132 of the *Health Professionals Act 2004* **revokes DI2008-229 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-185 being the Public Sector Management Amendment Standards 2009 (No. 7) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards to increase the base monthly lease rate for executive vehicles.**

Disallowable Instrument DI2009-187 being the Gas Safety (Codes of Practice) Approval 2009 made under section 65 of the *Gas Safety Act 2000* **approves the code of practice for connecting gas to uninspected consumer piping systems.**

Disallowable Instrument DI2009-190 being the Education (Non-government Schools Education Council) Appointment 2009 (No. 4) made under section 109 of the *Education Act 2004* **appoints a specified person as an education member of the Non-government Schools Education Council.**

Disallowable Instrument DI2009-191 being the Education (Government Schools Education Council) Appointment 2009 (No. 1) made under section 57 of the *Education Act 2004* **appoints a specified person as a community member of the Government Schools Education Council.**

Disallowable Instruments—Comment

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

Is this appointment valid?

Disallowable Instrument DI2009-169 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2009 (No. 1) made under Part 11, subsection 121(1), of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as an Official Visitor.

This instrument appoints a specified person as an Official Visitor. The role of an Official Visitor is to visit and inspect mental health facilities and to inquire into (among other things) the adequacy of services provided to persons receiving treatment or care for mental dysfunction or mental illness. The appointment is made under section 121 of the *Mental Health (Treatment and Care) Act 1994*, which provides (in part):

121 Appointment etc

(1) For this Act, the Minister may appoint 1 or more official visitors for an approved mental health facility.

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

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

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

(2) A person is eligible for appointment as an official visitor if the person—

(a) is a legal practitioner who has not less than 5 years practising experience; or

(b) is a medical practitioner; or

(c) has been nominated by a body representing consumers of mental health services; or

(d) has experience and skill in the care of persons with a mental dysfunction or mental illness.

(3) A person shall not be appointed an official visitor if the person—

(a) is a public servant; or

(b) has a direct interest in a contract with an approved mental health facility or a mental health care provider; or

(c) has a financial interest in a private hospital.

(4) A person shall not be appointed as an official visitor unless the Minister is satisfied that the person has appropriate qualifications and experience to exercise the functions of an official visitor.

The Committee notes that neither the disallowable instrument nor the Explanatory Statement for the instrument indicates that the person appointed either has the qualifications and experience mentioned in subsections 121(2) and (4) nor that the person is not excluded by the matters mentioned in subsection 121(3). In making this comment, the Committee also notes that the person in question is being re-appointed by this instrument. This being so, it arguably may be assumed that the person in question both has the relevant qualifications, etc and is not subject to any of the exclusions. This may also arguably be assumed from the fact that the Explanatory Statement states that the Standing Committee on Health and Disability has considered the appointment and not made any comment on it. The Committee notes, however, that the relevant factors could have changed since the earlier appointment. The specified person could, for example, have acquired a financial interest in a private hospital. This being so, it would assist the Committee (and the Legislative Assembly) in being satisfied that the appointment is valid if the Explanatory Statement for the interest expressly addressed the relevant qualifying (and disqualifying) criteria for the appointment. The Committee does not consider this to be an onerous requirement. In this respect, the Committee commends the approach taken in the Explanatory Statement for DI2009-176.

Is this appointment valid?

Disallowable Instrument DI2009-171 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 6) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 79 of the** *Financial Management Act 1996* **reappoints a specified person as chair of the ACT Building and Construction Industry Training Fund Board.**

This instrument re-appoints a specified person as chair of the ACT Building and Construction Industry Training Fund Board. The appointment is made under section 7 of the *Building and Construction Industry Training Levy Act 1999*, which provides (in part):

7 Governing board members

(1) The governing board has 6 members.

Note A chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

(2) Two of the governing board members must be appointed to represent the interests of employers in the building and construction industry.

(3) Two of the governing board members must be appointed to represent the interests of employees in the building and construction industry.

(4) The chair must not be a representative mentioned in subsection (2) or (3).

The Committee notes that neither the disallowable instrument nor the Explanatory Statement for the instrument indicates that the person appointed does not represent either employers or employees in the building and construction industry. In making this comment, the Committee also notes that the person in question is being re-appointed by this instrument. This being so, it arguably may be assumed that the person in question is not excluded by subsection 7(4). This may also arguably be assumed from the fact that the Explanatory Statement states that the Standing Committee on Education, Training and Young People has considered the appointment and not made any comment on it. The Committee notes, however, that the relevant factors could have changed since the earlier appointment. The specified person could, for example, have acquired a status that he might be considered to represent the interests of either of the sectors identified. This being so, it would assist the Committee (and the Legislative Assembly) in being satisfied that the appointment is valid if

the Explanatory Statement for the interest expressly addressed the relevant qualifying (and disqualifying) criteria for the appointment. The Committee does not consider this to be an onerous requirement. In this respect, the Committee commends the approach taken in the Explanatory Statement for DI2009-176.

Minor drafting issue

Disallowable Instrument DI2009-185 being the Public Sector Management Amendment Standards 2009 (No. 7) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards to increase the base monthly lease rate for executive vehicles.**

The Committee notes that section 2 of this instrument states:

> This instrument commences on the 10 August 2009.

The Committee considers that, in the above provision, "the" is superfluous.

Determination of fees

Disallowable Instrument DI2009-186 being the Adoption (Fees) Determination 2009 (No. 1) made under section 118 of the *Adoption Act 1993* **revokes DI2008-127 determines fees payable for overseas and step parent adoptions.**

This instrument determines fees payable in relation to overseas and step parent adoptions. It revokes a previous determination and determines new, increased fees. The Explanatory Statement for the instrument states:

> The Office for Children, Youth and Family Support has increased these ongoing fees and charges for the 2009-2010 financial year by the Consumer Price Index (CPI) of 1.75%.

In its *Scrutiny Report No. 11* of the *Seventh Assembly*, the Committee observed that, in previous years, it has observed a wide variation in the explanations given, in Explanatory Statements accompanying fees determinations, for the increasing of the various fees dealt with in the scores of fees determinations that the Committee examines each year. The Committee went on to note that, in recent years, the Committee has been pleased to observe both a greater willingness of agencies to indicate the magnitude of any fees increases and to explain the basis of those fees increases. The Committee stated that it had also been pleased to observe a much greater consistency in the explanations given for increasing fees.

The Committee went on to note that, for the fees determinations considered in *Scrutiny Report No. 11* of the *Seventh Assembly*, the majority of the Explanatory Statements for those fees determinations contained a statement along the following lines:

> This instrument increases fees in accordance with the Wage Price Index estimates for 2009-10 of 3.5%. Rounding to the nearest dollar has occurred in relation to the increases. [from DI2009-94]

The Committee also noted, however, that the Explanatory Statements for a significant number of fees determinations contained a different statement, along the following lines:

> The fees determined for the 2009-10 financial year represent the 2008-09 financial year fees increased in accordance with Treasury's inflation factor of 3.5%. Rounding to the dollar has occurred in relation to the increases. [from DI2009-149]

The Committee notes that the Explanatory Statement for this instrument provides a *different* explanation for the fees increases made by the instrument to either of the explanations that the Committee noted in *Scrutiny Report No. 11* of the *Seventh Assembly*, ie that they are based on a CPI increase of 1.75%. In the light of the Committee's earlier comments, the Committee would appreciate the Minister's advice as to why there is a different basis for the fees increases made by this instrument.

Inadequate Explanatory Statements

Disallowable Instrument DI2009-188 being the Education (School Boards of Schools in Special Circumstances) Telopea Park School Determination 2009 made under section 43 of the *Education Act 2004* **determines the composition of the school board of Telopea Park School.**

Disallowable Instrument DI2009-189 being the Education (School Boards of School-Related Institutions) Murrumbidgee Education and Training Centre Determination 2009 made under section 43 of the *Education Act 2004* **determines the composition of school boards of Murrumbidgee Education and Training Centre.**

The instruments listed above determine the composition of the school boards of 2 schools. The instrument is made on the basis that each of the schools in question is a "school in special circumstances". The relevant power is contained in section 43 of the *Education Act 2004*, which provides:

43 Composition of school boards of school-related institutions and other schools in special circumstances

(1) This section applies to a school that is—

(a) a school-related institution; or

(b) declared, in writing, by the chief executive to be a school to which special circumstances apply.

(2) If the school is a school-related institution, the chief executive must, if practical, determine the composition of the school board of the school.

Example

It may not be practical to establish a school board for a school-related institution with fewer than 3 staff.

Note 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 Legislation Act, s 126 and s 132).

(3) Subsection (2) does not prevent the chief executive from determining the composition of a single school board for 2 or more institutions.

(4) If the chief executive makes a determination under subsection (2) for the school, the chief executive may also determine—

(a) the members who are required to be present at a meeting of the board; and

(b) the members who may not vote at a meeting of the board.

(5) If the school is a school to which special circumstances apply, the chief executive may determine the following:

(a) the composition of the school board of the school;

(b) the members who are required to be present at a meeting of the board;

(c) the members who may not vote at a meeting of the board.

(6) The chief executive may make a determination under subsection (2), (4) or (5) only with the Minister's written approval.

(7) Before making the determination the chief executive must, if practical, consult with the parents of students at the school, at a general meeting of the parents, about the composition of the board.

(8) In deciding whether or not to give the approval, the Minister must have regard to—

(a) the need for the principal of the school to be a member of the board; and

(b) the need for the chief executive to be represented on the board; and

(c) whether staff of the school and students at the school have been consulted about the composition of the board; and

(d) any comments made by the staff and students at the school about the composition of the board; and

(e) the administrative needs, educational or related objectives, and any special characteristics of the school.

(9) The chief executive may appoint a person in accordance with the determination to be a member of the board of the school.

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

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

(10) A member of the board is appointed for the term stated in the instrument making or evidencing the appointment.

(11) A determination under subsection (2), (4) or (5) must be in writing and is a disallowable instrument.

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

The Explanatory Statements for the instruments indicate that they are made under subsection 43(5) of the Education Act. The Committee notes that subsection 43(6) states that a determination can only be made under subsection 43(5) with the Minister's written approval. The Explanatory Statements contain no indication that such approval was given. Nor do the Explanatory Statements offer any information as to the requirements set out in subsection 43(8), which the Minister must have regard to in deciding whether or not to give approval. Similarly, the Committee notes that the Explanatory Statements contain no information as to the requirement in subsection 43(7), that the chief executive must, if practical, consult with the parents at the school, at a general meeting of the parents, about the composition of the school.

The Committee considers that these issues should all have been addressed in the Explanatory Statements for the instruments. In making this comment, the Committee notes that this is not an onerous requirement.

The Committee draws the Legislative Assembly's attention to these instruments, under principle (b) of the Committee's terms of reference, on the basis that the Explanatory Statements for the instruments do not meet the technical or stylistic standards expected by the Committee.

Subordinate Laws—No comment

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

Subordinate Law SL2009-36 being the Charitable Collections Amendment Regulation 2009 (No. 1) made under the *Charitable Collections Act 2003* **declares that specified activities by trustee corporations, including the Public Trustee for the ACT, involving charitable trust funds, are not collections under the Act.**

Subordinate Law SL2009-41 being the Planning and Development (Concessional Leases) Amendment Regulation 2009 (No. 1) made under paragraph 235(1)(c)(v) of the *Planning and Development Act 2007* **expands the list of lease types excluded from the definition of "concessional lease".**

Subordinate Law SL2009-42 being the Education Amendment Regulation 2009 (No. 1) made under section 155 of the *Education Act 2004* **amends the** ***Education Regulation 2005*** **to include the name of a new school that commenced operation in 2009.**

Subordinate Law SL2009-43 being the Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 2), including a regulatory impact statement made under the *Dangerous Substances Act 2004* **amends the Dangerous Substances (Explosives) Regulation 2004 to ban the use of fireworks by members of the public.**

Subordinate Laws—Comment

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

Minor drafting issue

Subordinate Law SL2009-37 being the Children and Young People Regulation 2009 made under the *Children and Young People Act 2008* **defines "light work" as work that may be undertaken by a child or young person in accordance with the Act.**

This subordinate law helps to define the concept of "light work", for section 793 of the *Children and Young People Act 2008*. Section 795 of the Children and Young People Act prohibits the employment of children and young people who are under school-leaving age. This prohibition is subject to an exception set out in section 796 of the Children and Young People Act, which allows the employment of children and young people under school-leaving age if the child or young person is employed for 10 hours per week or less and the work is "light work". Section 793 of the Children and Young People Act defines "light work". It provides:

793 What is *light work*?

In this part:

light work means work that—

(a) is not contrary to the best interests of a child or young person; and

(b) is declared by regulation to be light work.

This subordinate law is made under paragraph 793(b). It provides

4 Meaning of *light work*—Act, s 793 (b)

Note 1 The Act, s 793 defines ***light work*** to mean work that—

(a) is not contrary to the best interests of a child or young person; and

(b) is declared by regulation to be light work.

Note 2 For the meaning of employment ***contrary to the best interests of a child or young person***—see the Act, s 782.

(1) Work is ***light work*** if it is work undertaken by a child or young person that is—

(a) suitable for the physical, emotional and developmental capacity of the child or young person; and

(b) adequately supervised; and

(c) done under conditions where appropriate work safety standards to protect the child or young person from exposure to hazards or potential hazards are in place.

(2) In this section:

adequately supervised means—

(a) for a child 3 years of age or younger—supervision by a parent or guardian at all times; and

(b) for a child more than 3 years of age but under 12 years of age—

(i) supervision by a parent or guardian; or

(ii) supervision by a responsible adult approved by a parent or guardian; and

(c) for a young person—supervision by a responsible adult.

Examples—light work

- going on errands
- casual work in or around a private home
- work related to sporting activities such as being an umpire, referee, golf-caddy or **court attendant**
- clerical work
- work as a cashier
- gardening
- taking care of children in or around a private home
- providing entertainment at a place used for providing entertainment or amusement or at sporting activities

- singing, dancing or playing a musical instrument
- performing in a radio, television or film program or production
- modelling
- a photographic subject, whether still or moving

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

(emphasis added)

The Committee notes that one of the examples given above is "work related to sporting activities such as being an umpire, referee, golf-caddy or court attendant". Given that the context is "work related to sporting activities", the Committee assumes that the reference to "court attendant" is to work as an attendant at a tennis or basketball court (for example) and not a court of law.

"Henry VIII" clause

Subordinate Law SL2009-38 being the Planning and Development Amendment Regulation 2009 (No. 9) made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation 2008.**

The Committee notes that section 13 of this subordinate law inserts 2 new provisions into Schedule 20 of the *Planning and Development Regulation 2008*. The Explanatory Statement for the subordinate law indicates that it is made under section 429 of the *Planning and Development Act 2007*, which provides:

429 Transitional regulations

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Building Legislation Amendment Act 2007*, the *Planning and Development (Consequential Amendments) Act 2007* or this Act.

(2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

Section 410 of the Planning and Development Regulation provides:

410 Modification of Act, ch 15—Act, s 429

(1) The Act, chapter 15 is modified by schedule 20.

(2) This section, and schedule 20, expire on 31 March 2010.

This means that the inclusion of a provision in Schedule 20 of the Planning and Development Regulation has the effect of modifying the operation of Chapter 15 of the Planning and Development Act. Chapter 15 deals with "transitional" issues.

This subordinate law has the effect of amending a piece of primary legislation. This means that the law under which it is made (ie section 429 of the Planning and Development Act) is equivalent to a "Henry VIII" clause in effect. The Committee also notes, however, that the Legislative Assembly has expressly authorised this exercise of legislative power, by enacting subsection 429(2) of the Planning and Development Act, which allows the making of regulations to modify the operation of Chapter 15 of the Planning and Land Development Act if, in the opinion of the Executive, anything is not adequately or appropriately dealt with by Chapter 15.

The Committee notes that, according to the Explanatory Statement, the effect of the substantive amendments of the Planning and Development Act is to "clarify" the operation of certain provisions of the Act.

In the light of all the above, the Committee makes no further comment on this subordinate law.

Exemptions from requirement for development approval, etc

Subordinate Law SL2009-39 being the Planning and Development Amendment Regulation 2009 (No. 10), including a regulatory impact statement made under the *Planning and Development Act 2007* amends the Planning and Development Regulation 2008 to allow the Minister for Planning to declare a former school site, or a site adjacent to a school, to be an "existing school".

This subordinate law amends the *Planning and Development Regulation 2008*, by replacing the definition of "existing school" in Schedule 1 of the Planning and Development Regulation with a new definition. Schedule 1 deals with exemptions from the requirement for development approval that otherwise (generally) applies to developments in the ACT. The effect of the new definition is to add to the definition the following:

1.96A Meaning of *existing school*—div 1.3.6A

…

(b) land that—

(i) either—

(A) has been a type of school mentioned in paragraph (a) (i) to (iii) [ie schools within the original definition of "existing school"] that existed before the commencement day; or

(B) is adjacent to something mentioned in paragraph (a); and

(ii) is being developed or redeveloped to be, or be part of, a type of school mentioned in paragraph (a) (i) to (iii); and

(iii) is declared by the Minister to be an existing school.

Examples

1 land adjacent to a primary school that is being developed as part of a staged expansion of the school

2 a site that was a high school but is not currently operating while being redeveloped as a school

A new subsection (2) makes a declaration for paragraph (b)(iii) above a "notifiable instrument".

Prior to the amendments made by this subordinate law, certain proposed developments in relation to an "existing school" were exempted from the requirements for development approvals. The effect of the amendments made by this subordinate law is to expand that definition and, therefore, to expand the exemption, to premises that *have been* schools (ie in the past) and to land adjacent to schools.

The Explanatory Statement states:

> On 3 February 2009, the Commonwealth announced a $14.7b *Building the Education Revolution* funding package which is a component of the $42b *Nation Building and Jobs Plan* (the Commonwealth Plan), which is providing a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn. The funding for the Commonwealth Plan is the subject of the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth).
>
> The ACT Government has also allocated significant additional stimulus funding for various school projects to help counter the effects of the economic downturn on the ACT economy. Among the projects to be funded are P-10 schools (i.e. schools catering for preschool to year 10 on the one campus) to be built at Harrison and Kambah. The Government previously announced these new schools as part of the *Towards 2020: Renewing our schools* policy initiative, which is bringing significant reform to the ACT's public education system, and will ensure access to a range of high quality public schools for Canberra students. The Government's '*Towards 2020'* policy and the decision to build the Harrison and Kambah P-10 schools has been the subject of extensive community consultation.
>
> Given the availability of the ACT government project funding and the importance of the proposed school projects it was deemed necessary to amend the *Planning and Development Regulation 200*8 (the regulation) in order to limit the potential for the construction of these two major school projects to be substantially held up as a result of delays in the development assessment or appeals process.

The Explanatory Statement goes on to state:

> The *Planning and Development Amendment Regulations 2009* Nos 2 and 4 introduced development approval exemptions and limited public notification for a wide range of building projects at existing schools. This was to ensure that the Canberra community could receive the substantial but strictly time-limited funding under the Commonwealth's *Building the Education Revolution* funding package and associated Territory stimulus funding measures.
>
> The proposed law allows the Minister for Planning to declare a former school site, or a site adjacent to a school, to be an 'existing school'. This is intended to deal with a limited number of school developments – in particular the Harrison and Kambah P-10 schools, but possibly others should a need arise, to ensure that the development will be subject to the recent amendments to the regulations in relation to schools. This enables these projects to be correctly seen as maintenance of effort in relation to building programs for school campuses – failure to deliver such programs could result in loss of Commonwealth funding under the stimulus package.

Significantly, the Explanatory Statement then states:

It was always intended that these schools should be covered by the *Planning and Development Amendment Regulations 2009* Nos 2 and 4. However, it has been decided that the proposed law is necessary for a very small number of schools to avoid doubt that these can be covered by the regulation. The proposed law therefore extends the existing provisions in the regulation to a school which is declared by the Minister for Planning to be an existing school. (emphasis added)

The Explanatory Statement then sets out a useful summary of the effect of the amendments made by this subordinate law:

1. For school developments subject to development approval

School developments which are undertaken on a school site declared by the Minister to be an existing school, and which are included in items 7 and 8, schedule 2 of the regulation will:

- require notification to adjoining premises only, with a notification period of 10 days
- not be subject to 3rd party appeal in relation to the DA decision
- be time limited to expire on 31 March 2013

2. For school developments that are exempt from development approval

School developments which are undertaken on a school site declared by the Minister to be an existing school, and which is a development or activity covered by subdivision 1.3.6A.2, schedule 1 will:

- not require development approval
- not be subject to third party appeal (as no decision on development approval is required, there is no reviewable decision under schedule 1 of the *Planning and Development Act 2007*)
- be time limited in some circumstances (s1.99C and s1.99D expire on 31 March 2013; other exemption provisions for minor structures and activities are not time limited by the existing regulation)

Exemptions for straightforward developments

A key goal of the Government's reform of the planning system and the introduction of the *Planning and Development Act 2007* (the Act) was to enhance the timeliness, transparency and efficiency of the planning processes. One of the ways that the Act achieves this goal is by allowing straightforward developments of low significance to be exempt from requiring a development approval (DA) (see Act, s 133). This recognizes that there is little value added by requiring a DA in such cases, given that typically the DA process would simply verify that the development is compliant with the relevant codes, but would not enhance the quality of the proposed development. The Act provides for the removal of the need to obtain development approval for such straightforward or minor projects, for example, for new code compliant single residences, and minor structures such as sheds, garages and pergolas etc. Applying this approach, Division 1.3.6A (Exempt developments – schools) of the regulation lists a range of school developments and structures that are exempt from development approval.

It is not entirely clear to the Committee how the paragraph immediately above relates particularly to the amendments made by this subordinate law.

The Explanatory Statement continues:

Public notification

Public notification of development applications allows third parties (neighbours, etc) to comment on the proposals. There are statutory requirements in relation to public notification of development applications (the Act, Division 7.3.4). Notification can involve letters to neighbours, posting a sign on the land and placing a notice in the newspaper. Anyone can make a representation about a development application that has been publicly notified under the Act (see section 156). Such representations must be made during the relevant public consultation period which varies from 10 to 15 working days and can be extended by the planning and land authority (the authority).

Due to the time limits on the funding by the Commonwealth and the need for both the Commonwealth and Territory funding to achieve the objective of stimulating the economy, the Government chose the option of expediting development applications for school projects which are not exempt development and therefore, still require development approval, by temporarily limiting the public notification requirements for such applications.

Under section 152 of the Act the authority must publicly notify certain types of development applications. Section 152(1)(a) requires that the authority must undertake public notification of merit track development applications prescribed by regulation in the manner prescribed in section 152(2). Under section 152(2), the authority may prescribe, by regulation, public notification under either section 155 (Major public notification) or section 153 of the Act (Public notice to adjoining premises – i.e. “limited” public notification). Section 27 of the regulation prescribes public notification of merit track applications for sections 152(1)(a) and 152(2).

Under section 27(3) of the regulation, applications in the merit track set out in schedule 2 of the regulation must be notified in accordance with section 152(2)(b), that is, under section 153 (Public notice to adjoining premises). Section 157 of the Act provides for the regulation to set out the length of the public notification period.

Section 28 of the regulation states that a limited public notification matter has a public consultation period of 10 working days unlike major public notification matters which have a public consultation period of 15 working days.

Third party appeals

The proposed law has the effect of applying limited public notification to the school development application matters specified in items 7 and 8 of schedule 2 of the regulation to a school declared by the Minister to be an existing school under s1.96A(1)(b).

Under item 4 of schedule 1 of the Act, third party appeals do not apply to merit track applications that need only be publicly notified under section 153 of the Act (i.e. limited public notification). In addition, item 1 of schedule 3 of the regulation (Merit track matters exempt from third-party ACAT review) provides that a development to which schedule 2 applies is exempt from third party appeals. Items 7 and 8, schedule 2 only apply to projects that are funded by a ‘declared funding’ program (i.e. an economic stimulus program see s405, 406). Thus, the amending regulation means development applications relating to existing schools are not subject to third party appeals.

> The streamlining of the public notification requirements and the elimination of third party appeals for those matters means that schools can take advantage of the Commonwealth and Territory stimulus funding in a much shorter time frame. This ensures that the benefits in terms of school projects and stimulus to the economy can be realised in a timely manner, and any risk of losing access to the funds due to delays is minimised. It should also be noted that the removal of third party appeals under the proposed law is temporary and will expire on 31 March 2013.
>
> The exemption of third party appeals in relation to the school projects in this amending regulation are not the first exclusions of this sort under the Act. There is a range of matters already in schedule 2 of the regulation which excludes third party appeals and also schedule 3 of the regulation excludes certain third party appeals.

At pages 5 to 6, the Explanatory Statement goes on to address the limitations imposed by the amendments as a human rights issue, by reference to sections 12 (right to privacy) and 21 (right to a fair trial, including a hearing) of the *Human Rights Act 2004* (HRA). Key elements of that discussion are:

- that case law in relation to human rights legislation containing the equivalent of section 12 of the HRA suggests that the adverse impacts of a development authorised through a planning decision must be "quite severe" in order to constitute an unlawful and arbitrary interference with a person's right to privacy;
- that case law from "related jurisdictions" indicates that human rights law containing the equivalent to section 21 of the HRA does not guarantee a right of appeal in civil matters;
- that the opportunity to make "input" into planning and development applications, together with the existence of a right of judicial review, had been held "in many cases" to satisfy the requirement of the right to a fair trial;
- that judicial review, under the *Administrative Decisions (Judicial Review) Act 1989*, was nevertheless available.

The discussion concludes with the following statements:

> On balance, the social and economic benefits that will flow to the ACT community from securing the substantial funding available for school building projects, both under the Commonwealth Plan and Territory Government's *Towards 2020: Renewing our schools* policy, outweigh the limited foregoing of third party appeal rights on development assessment decisions. This is especially the case given that the restrictions are limited to projects on existing school campuses; time limited to 31 March 2013; and restricted to projects that are funded by declared funding programs.
>
> Schedule 2 achieves an appropriate balance between the general benefit to the ACT community of facilitating development and the protection of the interests of residents and others likely to be affected by such development. In all these circumstances, the proportionality test of section 28 is met.

On their face, the inclusion of additional matters in Schedule 1 of the Planning and Development Regulation offends against principle (a)(ii) of the Committee's terms of reference, in that this trespasses on rights previously established by law. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments "unduly" trespass on existing rights. Similarly, on their face, the amendments made by this subordinate law also offend against principle (a)(iii) of the

Committee's terms of reference, in that they make rights, liberties and/or obligations dependent upon non-reviewable decisions. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments "unduly" limit review rights.

Exemptions from requirement for development approvals, etc

Subordinate Law SL2009-40 being the Planning and Development Amendment Regulation 2009 (No. 11), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation 2008 to extend reforms implemented through the planning system reform project.**

This subordinate law amends the *Planning and Development Regulation 2008* to:

- provide further exceptions to the general requirement that a survey certificate is required in relation to development applications; and
- modify the exemptions (set out in Schedule 1 of the Planning and Development Regulation) from the general requirement that a development approval is required for all development applications in the ACT.

The Explanatory Statement states that the amendments proposed by this subordinate law "[extend] reforms implemented through the planning reform project", the main object of which was "to improve timeliness, transparency and efficiency in the planning processes".

The amendments to Schedule 1 are of the most interest to the Committee. The Explanatory Statement indicates that the effect of the Schedule 1 amendments is to:

- omit general exemption criterion 1.13 from Schedule 1;
- make additional development approval exemptions for:
  - external shades;
  - resealing driveways – residential;
  - flag poles;
  - demolition of class 10 buildings or structures;
  - rebuilding "damaged" buildings;
  - bores;
- amend the criteria for existing exemptions in Schedule 1:
  - to allow for a larger building or structure (section 1.45);
  - to allow for a larger building or structure (section 1.46);
  - to allow for a larger water tank (section 1.55);
  - so that an exempt single dwelling does not have to comply with Rule 33 or 66 of the Territory Plan (as a result of the general exemption criterion being omitted by this subordinate law) (section 1.100);
  - for reasons of clarification (section 1.103);
- amend the criteria set out in sections 1.75 to 1.78 in Schedule 1, to remove the need to comply with the general exemption criteria.

Section 1.13 of Schedule 1 (which is omitted by this subordinate law) provides:

1.13 Criterion 3—metallic, white and off-white exterior finishes in residential zones

(1) The building or alteration of an external wall or roof of a building or structure must not cause any part of the exterior of any metal lining sheet for the wall, or metal roofing sheet, to have a metallic, white or off-white finish.

(2) A development in a residential zone that involves the building of a fence, other than a fence for an open space boundary, must not cause any part of the exterior of any metal sheet for the fence to have a metallic, white or off-white finish.

(3) In this section:

white or off-white, for a finish—see the territory plan (3.2 Residential Zones—Single Dwelling Housing Development Code, R33).

The "additional" exemptions are largely self-explanatory. A Note in Schedule 2 of the Planning and Development Regulation states:

> A class 10 building or structure is a non-habitable building or structure (see building code).

The Explanatory Statement acknowledges that, by broadening the circumstances in which development may occur without development approval, this subordinate law "will impact on the ability to comment on such development and consequently it may be perceived as an erosion of community opportunity to comment on development proposals". The Explanatory Statement goes on to state:

> However in the most there has been very little public complaint about DA exemptions and the type of things which are exempt. Industry who in the most deal with proponents and work daily with exempt developments, acknowledge the benefits that DA exempt development offers.
>
> Exempt development does not have a public notification requirement because during the development of the Act and the relevant Territory Plan Codes extensive public consultation was conducted. Therefore, the resultant rules around exempt development are designed to deliver acceptable community outcomes ie they do not create any material detriment (which is the only grounds for third party appeal). The criteria for the type of development, that the amending regulation introduces, maintains these type of parameters and has been consulted on with industry and responds to operational experience in the DA assessment process.

The Explanatory Statement then goes on to address human rights issues raised by this subordinate law. Oddly the relevant part of the Explanatory Statement is headed "Human rights issues in relation to schedule 2". It is not clear to the Committee what "schedule 2" refers to. This issue aside, the Explanatory Statement states:

> The types of changes proposed by the amending regulation are not considered to impact on Human rights unduly. This is because the types of development that are affected by the amending regulation are in the most not significant and in many cases are adjustments to existing exemptions.

The removal of third party appeal rights could be seen as a impinging on *human rights*. The *Human Rights Act 2004* (the HRA), in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the expanding DA exemptions. However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.

To the extent that schedule 1 of the regulation limits any rights afforded by the HRA, these limitations must meet the proportionality test of section 28 of that legislation. The schedule serves to improve the development assessment process within the Territory by ensuring that only matters which have the potential to significantly impact on residential areas are open to third party appeals. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. Rights of judicial review under the *Administrative Decisions (Judicial Review) Act 1989* remain.

On their face, the inclusion of additional matters in Schedule 1 of the Planning and Development Regulation offends against principle (a)(ii) of the Committee's terms of reference, in that this trespasses on rights previously established by law. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments "unduly" trespass on existing rights. Similarly, on their face, the amendments made by this subordinate law also offend against principle (a)(iii) of the Committee's terms of reference, in that they make rights, liberties and/or obligations dependent upon non-reviewable decisions. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments "unduly" limit review rights.

REGULATORY IMPACT STATEMENTS

Regulatory Impact Statement – No Comment

The Committee has examined the following regulatory impact statement and offers no comment on it:

Subordinate Law SL2009-40 being the Planning and Development Amendment Regulation 2009 (No. 11), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation 2008 to extend reforms implemented through the planning system reform project.**

Regulatory Impact Statements – Comment

The Committee has examined the following regulatory impact statements and offers the following comments on them:

Subordinate Law SL2009-39 being the Planning and Development Amendment Regulation 2009 (No. 10), including a regulatory impact statement made under the *Planning and Development Act 2007* amends the Planning and Development Regulation 2008 to allow the Minister for Planning to declare a former school site, or a site adjacent to a school, to be an "existing school".

The Committee notes that the regulatory impact statement for this subordinate law attaches and relies upon the regulatory impact statements for 2 other subordinate laws – SL2009-8 and SL2009-14. The reason given for this approach is (in essence) that it was always intended that the schools affected by this subordinate law would be covered by the 2 subordinate laws relied upon.

The Explanatory Statement states:

> **Relationship of this RIS to those for prepared for SL2009-8 / SL2009-14**
>
> Given that the proposed law does not introduce any substantive element that was not dealt with by the regulatory impact statement for *Planning and Development Amendment Regulations 2009* No 2 (SL2009-8) and No 4 (SL2009-14), and that those regulations (and their associated regulatory impact statements and explanatory statements) have recently been examined by the Scrutiny of Bills Committee, the relevant earlier regulatory impact statements are attached. It is the view of the authority that relying on the detail provided in these recent regulatory impact statements – SL2009-8 was notified on 20 March 2009; and SL2009-14 notified on 23 April 2009 – is likely to provide a clearer explanation of the matters involved and the need for the proposed law will be more readily understood by the Assembly and the public if considered in the that context. This was considered a more reasonable and transparent approach than simply 'cutting and pasting' the information from the previous regulatory impact statements into a new document.

The Committee makes no further comment on the regulatory impact statement.

Subordinate Law SL2009-43 being the Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 2), including a regulatory impact statement made under the *Dangerous Substances Act 2004* amends the Dangerous Substances (Explosives) Regulation 2004 to ban the use of fireworks by members of the public.

The Committee notes that the regulatory impact statement for this subordinate law states:

> This RIS has been prepared in accordance with the *Legislation Act 2001* and the ACT Government *Best Practice Guide for Preparing Regulatory Impact Statements*, dated December 2003.

Section 35 of the *Legislation Act 2001* sets out the requirements for the content of regulatory impact statements. It provides:

> **35 Content of regulatory impact statements**
>
> A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) **must** include the following information about the proposed law in clear and precise language:
>
> (a) the authorising law;
>
> (b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

(i) a brief explanation of the relationship with the other law; and

(ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs; and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

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

(emphasis added)

It is important to note that these are mandatory requirements for the content of a regulatory impact statement.

The Committee can identify no assessment of the consistency of the relevant subordinate law with the scrutiny committee principles. This being so, it is difficult to understand how the regulatory impact statement can state that it is prepared in accordance with the Legislation Act.

The Committee draws the Legislative Assembly's attention to this regulatory impact statement, under principle (b) of the Committee's terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

Vicki Dunne, MLA
Chair

September 2009

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

REPORTS—2008-2009

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
Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)
Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)
Education Amendment Bill 2008 (PMB)
Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009
Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009
Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1)

Report 8, dated 22 June 2009
Disallowable Instrument DI2009-65 - Fair Trading (Fitness Industry) Code of Practice 2009
Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009
Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009
Subordinate Law SL2009-19 - Fair Trading (Consumer Product Standards) Regulation 2009

Report 10, dated 10 August 2009
Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)
Subordinate Law SL2009-22 - Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1)
Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

Bills/Subordinate Legislation

Subordinate Law SL2009-26 - Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 1)
Subordinate Law SL2009-27 - Medicines, Poisons and Therapeutic Goods Amendment Regulation 2009 (No. 1)

Report 11, dated 24 August 2009
Disallowable Instrument DI2009-100 - Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 1)
Disallowable Instrument DI2009-101 - Taxation Administration (Rates) Determination 2009 (No. 1)
Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)
Disallowable Instrument DI2009-107 - Health (Fees) Determination 2009 (No. 2)
Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009
Disallowable Instrument DI2009-126 - Education (Government Schools Education Council) Appointment 2009 (No. 5)
Disallowable Instrument DI2009-127 - Education (Government Schools Education Council) Appointment 2009 (No. 6)
Disallowable Instrument DI2009-128 - Education (Non-government Schools Education Council) Appointment 2009 (No. 3)
Disallowable Instrument DI2009-130 - Board of Senior Secondary Studies Appointment 2009 (No. 1)
Disallowable Instrument DI2009-131 - Board of Senior Secondary Studies Appointment 2009 (No. 2)
Disallowable Instrument DI2009-132 - Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-133 - Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-137 - Planning and Development (Reduction of Change of Use Charge) Policy Direction 2009 (No. 1)
Disallowable Instrument DI2009-140 - Planning and Development (Change of Use Charge on Disused Service Station Sites) Policy Direction 2009 (No. 1)
Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009
Disallowable Instrument DI2009-153 - Nature Conservation (Fees) Determination 2009 (No. 2)
Subordinate Law SL2009-29 - Environment Protection Amendment Regulation 2009 (No. 1)
Subordinate Law SL2009-31 - Planning and Development Amendment Regulation 2009 (No. 7), including a regulatory impact statement
Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)