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

23 FEBRUARY 2009

Report 3

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, 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.

BILLS

Bill—No comment

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

ELECTRICITY FEED-IN (RENEWABLE ENERGY PREMIUM) AMENDMENT BILL 2009

This Bill would amend the *Electricity Feed-in (Renewable Energy Premium) Act 2008* to clarify issues of the eligibility of Government agencies and other parties to benefit under the Scheme established by the original Act; the scale of installations that qualify for Scheme coverage and benefit under the Act; and the definition of the "normal cost of electricity".

Bill—Comment

The Committee has examined the following Bill and offers these comments on it:

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2009

This is a Bill to amend a number of laws administered by the Department of Justice and Community Safety.

Do provisions of the Bill trespass unduly on personal rights and liberties? – term of reference (c)(i)
Report under section 38 of the *Human Rights Act 2004*

The proposed amendments to the Crimes (Forensic Procedures) Act 2000 *– part 1.3 of Schedule 1 of the Bill*

As the Explanatory Statement points out, under the Crimes (Forensic Procedures) Act, a magistrate may make an order for the taking of forensic materials from a suspect who is not in police custody.[1] The purpose of the proposed amendments is to confer on a magistrate a power to make an order for the arrest of the suspect for the purpose of carrying out the forensic procedure; and for the removal of the suspect to the place where the forensic procedure is to be carried out (proposed section 40A). A police officer must use the minimum amount of force necessary to arrest or remove the suspect, and before removing the suspect, explain the reason for the arrest (proposed section 40B). A magistrate may also issue to an authorised applicant a warrant to enter premises to arrest the suspect (proposed section 40C).

Although this matter is not mentioned in the Explanatory Statement or the Compatibility Statement, these proposed amendments engage various rights in the *Human Rights Act 2004* (HRA), most obviously the right to "liberty and security of the person" (subsection 18(1)).

[1] By paragraph 8(a) of the Act, a "suspect" includes " person suspected by a police officer, on reasonable grounds, to have committed an offence".

Subject to one matter, the Committee does not consider that an issue of potential incompatibility arises. The policy of permitting the taking of forensic samples is not in issue. The amendments are designed to enable an existing provision of the Act to be effective. The powers and the limitations on the powers of the magistrate and the police are reasonable and are in a standard form.

The one issue to address may be seen to arise under term of reference of the Committee.

Does a clause of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? – term of reference (c)(ii)

The power of a magistrate under proposed subsection 40A(3) to make an arrest and removal order is conditioned on the magistrate being "satisfied that" certain matters exist. Similar provision is made concerning the power of a magistrate to issue a warrant under proposed subsection 40A(5).

In contrast, under proposed subsection 40D(2), a police officer may decide not to comply with subsection 40D(1) only if he or she holds a relevant belief "on reasonable grounds".

This latter form of restriction on the exercise of a power may require the power-holder to consider the matter more carefully, and affords greater protection to the person affected should they seek some judicial review. The issue is whether the powers of the magistrate under proposed subsections 40A(3) and (5) should be qualified in a similar way. That is, the magistrate might be required to be "satisfied on reasonable grounds that" certain matters exist.

Lest it be thought that it would be offensive to the judiciary to require a magistrate to act on reasonable grounds, the Committee notes that at least one power vested in a magistrate under the Act is conditioned on he or she having "reasonable grounds" for a particular belief (see paragraph 34(1)(b)).

The Committee draws this matter to the attention of the Assembly and suggests that the powers of a magistrate be conditioned on the magistrate having "reasonable grounds" for being satisfied of a particular matter.

The proposed amendments to the Liquor Act 1975 *– part 1.6 of Schedule 1*

This amendment would insert a new part 1.6 in the Act, to the effect that the appointment of Robyn Davies as a member of the Liquor Licensing Board, purportedly made by the Minister on 17 October 2008, is taken to be, and always to have been, validly made. In addition, it is provided that anything done, or purporting to have been done by Robyn Davies under the appointment is taken to be, and always to have been, validly done.

The need to provide for retrospective validation of this appointment arose because the Minister made it without having, after consultation, received a recommendation from the relevant Standing Committee of the Assembly. The terms of the prohibition on the Minister making an appointment, as stated in subsection 228(3) of the *Legislation Act 2001*, are cast in mandatory language (see below), and the result as it stands now is probably that the appointment is not valid.

A rights perspective can be approached on two bases.

1. Suppose that a consequence of the invalidity of the appointment is that all acts of Robyn Davies in that capacity are invalid from the outset.

A person whose rights are **adversely** affected by the retrospective validation is one who suffered some adverse result from such a decision. That is, such a person might be said to have lost the opportunity to challenge by judicial review the validity of the relevant decision.

Is there a social benefit arising from a retrospective validation that overcomes the loss by a person of the opportunity to seek judicial review?

***On the one hand*, the person who would benefit from being able to seek judicial review might argue** that they had a right to have their matter before the Board resolved in the manner intended by the Legislative Assembly – that is, by members each of whom had been appointed after compliance with subsection 228(3). This right, and the right to seek to enforce it by judicial review proceedings, would be frustrated by the retrospective validation. There is moreover a public interest in compliance with the rule of law,[2] which interest would also be frustrated. Inconvenience is not a sufficient reason to retrospectively validate a manifest breach of the law.[3]

***On the other hand*, a person whose interests would be adversely affected were a judicial review to succeed might argue** that he or she had a legitimate expectation that the acts of Robyn Davies, who apparently had power to act, were valid.[4] A party to the relevant Board proceeding could not have expected that a decision beneficial to their interests might subsequently be found to be invalid. The public interest lies in avoiding the disturbance and cost involved in a redetermination of all affected proceedings.[5]

2. Suppose that notwithstanding the invalidity of the appointment, the acts of Robyn Davies in that capacity are not invalid. This would be the result were a court to apply the common law "de facto officers" doctrine. This "operates to validate certain acts by persons purporting to exercise powers reposed in occupants of a certain public office, notwithstanding that the person in question is not entitled to occupy that office".[6] It operates where:

(a) "the office occupied and exercised must be an office de jure". This is apparently the case here, in that the office Robyn Davies purported to occupy does as a matter of law (de jure) exist;

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[2] See *G J Coles & Co Limited v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 520 per Kirby P and Hope JA.

[3] Ibid.

[4] See *Parks Holdings Pty Ltd (trading as Gladstone Chemicals)and CEO of Customs* [2001] AATA 562 at [127], quoting *Reference re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 at 28: "[the de facto officers doctrine] recognises and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws".

[5] (1987) 7 NSWLR 503 at 526 per McHugh JA.

[6] Enid Campbell, "De Facto Officers" 2 *Australian Journal of Administrative Law* at 5. The qualification that the defect must be unknown to members of the public means that it cannot apply where at the outset of a particular proceeding of the relevant officer, court or tribunal, there is a challenge to the validity of the officer, etc. The officer must consider the challenge and if it is sustained cannot exercise any power.

(b) "the acts of a de facto officer must have been within the scope of the authority of this office de jure". This again is apparently the case here; and

(c) the "person claiming to be a de facto officer must have the reputation of being an officer de jure or the defect in his or her title must be unknown to members of the public".[7] This again is apparently the case here.

There is thus good reason to think that notwithstanding the invalidity of the appointment, the acts of Robyn Davies in that capacity are **not invalid**. If this be the case, this retrospective validation of the appointment of Robyn Davies will not deprive a person of the right to obtain judicial review of any act of Robyn Davies.

The courts will not however apply the de facto officers doctrine where to do so would defeat a "clear statutory policy".[8] This qualification requires attention to the terms of section 228 of the Legislation Act. It provides:

> **228 Consultation with appropriate Assembly committee**
>
> (1) Before making an appointment to a statutory position, a Minister **must consult** —
>
> (a) a standing committee of the Legislative Assembly … .
>
> (2) The committee may make a recommendation to the Minister about the proposed appointment.
>
> (3) **The Minister must not make the appointment until** the Minister has received a recommendation or 30 days have passed since the consultation took place, whichever happens first.
>
> (4) In making the appointment, the **Minister must have regard to any recommendation** received (emphasis added).

The question is whether the terms of section 228 are such that it may be said that the Legislative Assembly intended that a failure to comply with its terms meant not only that a particular appointment was invalid from the outset, but also that any purported action taken by the appointee is also invalid. In other words, does section 228 operate to displace the operation of the de facto officers doctrine?

Prediction of how a court may apply this doctrine and its qualifications is always difficult. In *G J Coles & Co Limited v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503, the Court of Appeal of NSW dealt with a case where the statute required that a body making an industrial award comprise a judge acting with the non-binding advice of two assessors. The judge acted alone in making an award, and the Court of Appeal held that the de facto officers doctrine could not operate to save the award from invalidity. Kirby P and Hope JA noted that the case involved "the complete failure of the Tribunal to meet as such and to be constituted as Parliament provides", and that the "widespread operation of the purported award [is] a reason to insist upon due observance of the law".[9]

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[7] See Patten AJ in *World Best Holdings Limited v Abul Sarker* [2004] NSWSC 1164 at [41].
[8] Ibid.
[9] (1987) 7 NSWLR 503 at 520.

In *Shankar v The State* [2006] FJSC 14[10] at [18], the court said that the doctrine would not have applied on the facts in *Shankar*:

> Had it been established that any person purporting to act as an assessor was not competent in English, the *de facto* doctrine relating to the validity of a public officer would not operate. The task of the court in this context is "to determine the meaning of the legislation and to ensure that the legislative purpose is fulfilled**":** *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 549 per Kirby P and Hope JA. The intention of the legislature as reflected in ss 264 and 265 is plain in this respect. Lack of the requisite knowledge of English would be so fundamental a defect that it could not be cured.

The *Coles* and *Shankar* cases are however distinguishable from the case that would arise as a consequence of the invalid appointment of Robyn Davies. Kirby P and Hope JA said that what was involved in *Coles* "was not merely a suggested irregularity in the appointment of particular members of a Tribunal as in *Ellis v Bourke* (1889) 15 VLR 163". In this case, the Full Court of Victoria, when hearing a special case arising out of the conviction of a licensee and the forfeiture of his licence, refused to admit evidence that the licensing court was not properly constituted. The *Ellis* case has often been cited with approval,[11] and it suggests that the de facto officers doctrine would apply, with the result that the acts of Robyn Davies could not be challenged successfully by judicial review.

In the end, however, it is always a question of resolving the issue in the particular statutory framework, and it is not beyond reason to think that the terms of section 228 would operate to displace the operation of the de facto officers doctrine, so that the acts of Robyn Davies could be challenged.

Conclusion

A Member of the Assembly is not bound to approach the question of whether to vote to amend the Liquor Act in the way proposed in part 1.6 of Schedule 1 of the Bill out of regard for whether or not the acts of Robyn Davies could be challenged successfully. The Committee has set out this analysis to inform the Assembly of the complexity of the legal situation.

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

The proposed amendments to the Residential Tenancies Act 1997 *– part 1.9 of Schedule 1*

This amendment would insert a new part 1.9 in the Act, to the effect that appointments of Allan Anforth and Jennifer David as members of the Residential Tenancies Tribunal, purportedly made by the Minister on 17 October 2008, are taken to be, and always to have been, validly made. In addition, it is provided that anything done, or purporting to have been done by these members under their appointments, is taken to be, and always to have been, validly done.

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[10] Supreme Court of the Fiji Islands. The court was constituted by French, Handley and Ipp JJ. French J is now Chief Justice of the High Court of Australia.

[11] *Shankar* at [18].

The rights issues arising are the same as those arising with respect to the proposed amendments to the Liquor Act by part 1.6 of Schedule 1. See the preceding discussion.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-272 being the Residential Tenancies Tribunal Selection 2008 (No. 4) made under subsection 112(5) of the *Residential Tenancies Act 1997* **appoints specified persons as members of the Residential Tenancies Tribunal.**

Disallowable Instrument DI2008-273 being the Liquor Licensing Board Appointment 2008 (No. 2) made under paragraph 12(1)(c) of the *Liquor Act 1975* **appoints a specified person as a member of the Liquor Licensing Board.**

Disallowable Instrument DI2008-274 being the Public Place Names (Macgregor) Determination 2008 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Macgregor.**

Disallowable Instrument DI2008-275 being the Public Place Names (Crace) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Crace.**

Disallowable Instrument DI2008-277 being the Children and Young People (Drug Testing) Standards 2008 (No. 1) made under section 887 of the *Children and Young People Act 2008* **determines the standards to address the conduct of drug testing under a drug use provision in a care and protection order or interim care and protection order.**

Disallowable Instrument DI2008-278 being the Public Sector Management Amendment Standards 2008 (No. 4) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards to provide for an increase in the value of parking spaces for executive vehicles for the purpose of payment in lieu.**

Disallowable Instrument DI2008-279 being the Public Place Names (Bruce) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new road in the Division of Bruce.**

Disallowable Instrument DI2008-280 being the Public Sector Management Amendment Standards 2008 (No. 5) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards to allow for the short-term engagement of a person in the position of Chief Executive, Department of the Environment, Climate Change, Energy and Water, without an independent job evaluation being undertaken.**

Disallowable Instrument DI2008-282 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 10) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drivers participating in the Rallye des Femmes.**

Disallowable Instrument DI2008-284 being the Radiation Protection (Fees) Determination 2008 (No. 1) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2007-224 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-285 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2008 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-80 and determines the property value thresholds for an eligible property and the land value thresholds for an eligible vacant block for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2008-286 being the Taxation Administration (Amounts Payable—Eligibility—Home Buyer Concession Scheme) Determination 2008 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-76 and determines the income test and thresholds, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.**

Disallowable Instrument DI2008-287 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2008 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-79 and determines the property value thresholds for an eligible property and the land value thresholds for an eligible vacant block for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2008-288 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2008 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-78 and continues a three year moratorium on payment of the full amount of duty in relation to the grant or transfer of a crown lease.**

Disallowable Instrument DI2008-289 being the Public Sector Management Amendment Standards 2008 (No. 6) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards with regard to the establishment of the ACT Public Service Joint Council.**

Disallowable Instrument DI2008-290 being the Public Place Names (Harrison) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of block 12 section 120 in the Division of Harrison.**

Disallowable Instrument DI2008-291 being the Taxation Administration (Ambulance Levy) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2007-312 and determines the relevant amount for the purposes of calculating the ambulance levy.**

Disallowable Instrument DI2008-292 being the Civil Law (Wrongs) Engineers Australia (ACT) Scheme 2008 (No. 1) made under section 4.10, schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the Engineers Australia Australian Capital Territory Scheme.**

Disallowable Instrument DI2008-293 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 11) made under section 13 of the *Road Transport (General) Act 1999* **removes application of the compulsory third party insurance provisions of the ACT road transport legislation from certain unregistered and ACT registered vehicles participating in the Street Machine Magazine 22nd Summernats Car Festival.**

Disallowable Instrument DI2008-294 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 12) made under section 13 of the *Road Transport (General) Act 1999* **exempts vehicles and their drivers from certain provisions of the Road Transport (Vehicle Registration) Act 1999 and the Road Transport (Vehicle Registration) Regulation 2000 whilst participating in the Street Machine Magazine 22nd Summernats Car Festival.**

Disallowable Instrument DI2008-296 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2008 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2008-106 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-297 being the Road Transport (General) (Numberplate Fees) Determination 2008 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2008-107 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-298 being the Health (Fees) Determination 2008 (No. 3) made under section 192 of the *Health Act 1993* **revokes DI2008-261 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-299 being the Road Transport (General) (Vehicle Registration) Exemption 2008 (No. 2) made under section 13 of the *Road Transport (General) Act 1999* **exempts a specified vehicle from the provisions of paragraph 32B(2)(b) of the Road Transport (Vehicle Registration) Regulation 2000.**

Disallowable Instrument DI2008-302 being the Road Transport (General) (Pay Parking Area Fees) Determination 2008 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2008-141 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2008-303 being the Public Place Names (Bonner) Determination 2008 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Bonner.**

Disallowable Instrument DI2008-304 being the Public Place Names (Casey) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Casey.**

Disallowable Instrument DI2008-305 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2008 (No. 2) made under section 15 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the provision of a price direction for the supply of electricity to franchise customers for the period 1 July 2009 to 30 June 2010.**

Disallowable Instruments—Comment

The Committee has examined the following items of subordinate legislation and offers the following comments on them:

Retrospectivity - Positive comment

Disallowable Instrument DI2008-276 being the Attorney General (Fees) Amendment Determination 2008 (No. 2) made under section 221 of the *Workers Compensation Act 1951* **amends DI2008-145 to correct an error that listed fees payable by an insurer or exempt employer as being inclusive of GST.**

The Committee notes that this instrument, which amends a fees determination, has a retrospective effect, to 1 July 2008. The Committee also notes, however, that the Explanatory Statement that accompanies the instrument indicates both that the amendment is to correct an error in the previous instrument and that the retrospectivity "does not adversely affect any person's rights or impose liabilities on any person".

Minor drafting error

Disallowable Instrument DI2008-281 being the Children and Young People (Family Group Conference) Standards 2008 (No. 1) made under section 887 of the *Children and Young People Act 2008* **determines the standards for the conduct of family group conferences.**

The Committee notes that section 11.1 of this instrument states:

> Participants have the right to have complaints lodged and managed through of the Department's complaints handling procedure.

Clearly, there are either missing words after "of" or the "of" is superfluous.

Minor drafting error

Disallowable Instrument DI2008-295 being the Road Transport (General) (Driver Licence and Related Fees) Determination 2008 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2008-105 and determines fees payable for the purposes of the Act.**

The Committee notes that there is a minor drafting error in the first line of subsection 6 (2) of this instrument ("item13").

Retrospectivity / Drafting errors

Disallowable Instrument DI2008-300 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2008 (No. 2) made under subsections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2008-124 and provides revised salary allocations and conditions for non-executive members for the period 30 October 2008 to 30 June 2009.**

Disallowable Instrument DI2008-301 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2008 (No. 2) made under subsections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2008-128 and provides revised conditions under which the Speaker may employ staff and engage consultants and contracts for the period 30 October 2008 to 30 June 2009.**

The Committee notes that the formal part of the first of the instruments listed above indicates that it is made under:

> **Legislative Assembly (Members' Staff) Act 1989, s 10 (2) (Members may employ staff) and s 20 (3) (Members may engage consultants and contractors)**

The references to the Act appear to be in error. The Committee notes that the power to make the relevant appointments (ie as reflected by the bracketed words) is, in fact, contained in subsections 10 (1) and 20 (1) of the Act. The power to determine conditions that are to be complied with in the making of such appointments is, in fact, contained in subsections 10 (3) and 20 (4) of the Act.

The Committee notes that the heading to the Explanatory Statement for this instrument makes the same error. Paragraph 2 of the text of the Explanatory Statement correctly identifies subsections 10 (1) and 20 (1) as the source of the power of Members to employ staff and engage consultants or contractors but incorrectly identifies subsections 10 (2) and 20 (3) as the source of the power to determine conditions.

The Committee notes that subsections 10 (2) and 20 (3) were the source of the power in the Act, as is existed up to and including 29 October 2008. This instrument is dated 19 December 2008 (or, in fact, "19 December 20082008") but is expressed to operate from 30 October 2008. While the 30 October 2008 commencement date does not explain the incorrect legislative references, it does, nevertheless, indicate that the instrument has a retrospective operation.

The Committee notes that there is a general rule that legislation does not operate retrospectively. An exception to this general rule is where legislation has a non-prejudicial effect on persons other than the Territory or a territory authority. This exception is reflected in section 76 of the *Legislation Act* 2001, which provides:

> **76 Non–prejudicial provision may commence retrospectively**
>
> (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
>
> (2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.
>
> **Example**
>
> The *Locust Damage Compensation Determination 2003* (a hypothetical disallowable instrument) sets out (among other things) the people who are eligible for compensation under a compensation fund. Previously, there was no restriction on who was eligible. The determination provides that it is taken to have commenced on 1 July 2003, but it is not notified until 15 August 2003. There is nothing in the Act under which the determination is made (or any other Act) that authorises the retrospective commencement.
>
> The provision of the determination that limits who can apply for compensation is a prejudicial provision (ie it adversely affects some people's right to receive compensation) and cannot commence retrospectively. Instead, it would commence on the day after the determination's notification day (see s 73 (3)).
>
> (3) This section is a determinative provision.
>
> *Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.
>
> (4) In this section:
>
> ***non-prejudicial provision*** means a provision that is not a prejudicial provision.

> ***prejudicial provision*** means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—
>
> (a) adversely affecting the person's rights; or
>
> (b) imposing liabilities on the person.

While it may be appropriate to assume that an instrument such as this is "non-prejudicial", as defined in subsection 76 (4) of the Legislation Act, the Committee considers that it is preferable that the Explanatory Statement to an instrument such as this contain a statement that the amendments made are non-prejudicial. Such a statement allows the Committee (and the Legislative Assembly) to be satisfied that the instrument does not involve any invalid retrospectivity. The Committee does not consider this to be an onerous requirement.

The Committee notes that similar errors are made in the second of the instruments listed above (other than the "19 December 20082008" error).

It appears that the errors made demonstrate the potential pitfalls in relying on previous instruments as templates for future instruments, especially when the empowering legislation is subsequently amended.

Positive comment

Disallowable Instrument DI2009-1 being the Road Transport (Safety and Traffic Management) Approval of Child Restraints Determination 2009 (No. 1) made under paragraph 66(1)(b) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2000-90 and determines specified child restraints as suitable for use as approved child restraints.**

Disallowable Instrument DI2009-2 being the Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2009 (No. 1) made under paragraph 66(1)(c) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2000-91 and determines specified protective helmets to be suitable protective helmets for use by motorbike riders.**

The Committee notes that the Explanatory Statement for the first of the instruments listed above states:

> This instrument specifies that child restraints marked with the letters AS 1754 or child restraints marked with the certification trade mark registered under the Trade Marks Act 1955 of the Commonwealth in respect of child restraints and Australian Standard 1754-1975 are suitable for use as approved child restraints.
>
> An error has been identified with the existing Instrument (No 90 of 2000) which was posted to the ACT Government Legislation Register on 1 March 2000 and authorized under section 17(1) of the *Road Transport (General) Act 1999*.
>
> The title and formatting of this instrument is incorrect in that it refers to the *Road Transport General) Act 1999* [sic] and approval for the use of child restraints can only be made under Section 66(1)(b) of the *Road Transport (Safety and Traffic) Management Regulation* by persons who have the delegated power provided by the Road Transport Authority under Section 17(1) of the *Road Transport (General) Act 1999.*

> The revocation of instrument 90 of 2000 corrects this technical error and amends the formatting of the instrument but does not make any changes to standards for child restraints.

The Committee notes the minor typographical error in the third paragraph extracted above.

The second of the instruments listed above corrects a similar error. A similar explanation is provided in the Explanatory Statement for that instrument (though without the minor typographical error contained in the Explanatory Statement for the first instrument).

The Committee commends both the correction of the technical errors referred to and the unambiguous explanation provided by the Explanatory Statements to these instruments.

Positive comment / Minor typographical error

Disallowable Instrument DI2009-3 being the Public Place Names (Casey) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes DI2008-304 and determines the names of new roads in the Division of Casey.**

The Committee notes that this instrument, dated 15 January 2009, revokes and re-makes DI2008-304, dated 22 December 2008. The Explanatory Statement for the instrument states:

> Therkelsen Street as notified in the road plan of DI2008-304 was incorrectly spelt and is corrected by this determination.

The Committee commends the fact that the Explanatory Statement is unambiguous in explaining why the earlier instrument has had to be revoked and re-made so soon after having been made. The Committee notes, however, that the named place is, in fact, Therkelsen **Lane**.

Subordinate Laws—No comment

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

Subordinate Law SL2008-46 being the Legal Profession (Barristers) Rules 2008 made under subsection 579(1) of the *Legal Profession Act 2006* **repeals SL2006-35 and amends rule 74(d) to expand the scope of what falls within the meaning of "barristers' work".**

Subordinate Law SL2008-47 being the Road Transport Legislation Amendment Regulation 2008 (No. 2) made under the *Road Transport (General) Act 1999, Road Transport (Safety and Traffic Management) Act 1999* and *Victims of Crime Act 1994* **repeals DI1997-194 and amends the scheme for heavy vehicle parking in residential areas.**

Subordinate Law SL2008-48 being the Road Transport (Third-Party Insurance) Amendment Regulation 2008 (No. 3) made under the *Road Transport (Third-Party Insurance) Act 2008* **includes electrically powered motorcycles within the vehicle classification structure for compulsory third party insurance premium pricing purposes.**

Subordinate Law—Comment

The Committee has examined the following subordinate law and offers these comments on it:

Strict liability offences

Subordinate Law SL2008-55 being the Firearms Regulation 2008 made under the *Firearms Act 1996* **repeals SL1997-13 and includes a modernised licensing scheme and increased regulation-making powers for the licensing of entities to operate approved shooting and paintball ranges.**

The Committee notes that this subordinate law contains two strict liability offences. The Explanatory Statement to the subordinate law states:

> Two offences in the Regulation have been made strict liability offences. Strict liability applies where:
>
> - a licensed target pistol shooter fails to inform their club of a change to their name or address (clause 10); and
> - a category C licensee uses a licensed prohibited firearm other than during a shooting competition and under the rules of the Australian Clay Target Association (clause 14(2)).
>
> In a prosecution for these offences there is no requirement to prove a mental element such as intention or recklessness. Strict liability is appropriate in these instances as licensees are advised of their obligations by the ACT Firearms Registry when they apply for their application. Furthermore, the offence is concerned with the nature of the conduct rather than the state of mind of the individual.

The Committee (and its predecessors) has consistently paid close attention to strict liability offences, which are a recurring issue for the Committee. In *Scrutiny Report No 2* of the *Sixth Assembly* (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred (at p 9) to principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences.

The Committee's approach to strict liability offences can be traced back to the Committee's *Scrutiny Report No 38* of the *Fifth Assembly*, where the Committee suggested that where a provision of a Bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Scrutiny Report No 38* of the *Fifth Assembly*, the Committee went on to say:

> The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged.
>
> There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that the Explanatory Statement accompanying this subordinate law addresses the first of the Committee's requirements in relation to strict liability offences. It does not address the second requirement (ie as to the availability of defences).

In making this comment, the Committee notes that section 5 of the subordinate law states:

> **5 Offences against regulation—application of Criminal Code etc**
>
> Other legislation applies in relation to offences against this regulation.
>
> *Note 1* *Criminal Code*
>
> The Criminal Code, ch 2 applies to all offences against this regulation (see Code, pt 2.1).
>
> The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg ***conduct***, ***intention***, ***recklessness*** and ***strict liability***).
>
> *Note 2* *Penalty units*
>
> The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

While this provision is of some assistance in addressing the issue of what defences are nevertheless available in relation to a strict liability offence, the Committee considers that it is not too much to expect (nor does it involve a particularly onerous requirement) for the Explanatory Statement for a subordinate law that contains a strict liability offence to address the Committee's (oft-stated) second requirement (ie to address the issue of defences). As a result, the Committee draws the Legislative Assembly's attention to this Explanatory 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.

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for the Environment, Climate Change and Water, dated 5 February 2009, in relation to comments in Scrutiny Report 1 concerning Subordinate Law SL2008-34, being the Environment Protection Amendment Regulation 2008 (No. 1).

- The Attorney-General, dated 10 February 2009, in relation to comments made in Scrutiny Report 2 concerning the Classification (Publications, Films and computer Games) (Enforcement) Amendment Bill 2008 (No. 2).
- The Minister for Territory and Municipal Services, dated 10 February 2009, in relation to comments made in Scrutiny Report 2 concerning the Crimes (Bill Posting) Amendment Bill 2008.
- The Minister for Territory and Municipal Services, dated 10 February 2009, in relation to comments made in Scrutiny Report 2 concerning the Dangerous Substances and Litter (Dumping) Legislation Amendment Bill 2008.
- The Attorney-General, dated 10 February 2009, in relation to comments made in Scrutiny Report 2 concerning the Crimes (Murder) Amendment Bill 2008.
- The Treasurer, dated 16 February 2009, in relation to comments made in Scrutiny Report 2 concerning Subordinate Law SL2008-38, being the Duties (Transitional Provisions) Regulation 2008.

The Committee wishes to thank the Minister for the Environment, Climate Change, and Water, the Attorney-General, the Minister for Territory and Municipal Services and the Treasurer for their helpful responses.

COMMENTS ON THE RESPONSES

Crimes (Bill Posting) Amendment Bill 2008

The Committee appreciates the reasoned response to the Committee's comments.

It notes that on the day the Bill was debated, the Chief Minister (as Minister for Territory and Municipal Services) circulated an undated Memorandum of Compatibility issued out of the Human Rights Unit of the Department of Justice and Community Safety. Had the Committee been provided with this document at the time the Bill was tabled, it would not have been critical of the failure of the government to address the freedom of expression issues that the Committee had raised in *Scrutiny Report No 51* of the *Sixth Assembly*, concerning the Crimes Amendment Bill 2008.

The Committee again suggests that legal advice of this nature be made available to the public and thus to the Committee in a timely fashion so that the Committee (and indeed the public) may take it into account.

The Committee also notes that the Minister has referred to a means under the *Roads and Public Places (Removable Signs) Code of Practice 2005* whereby "community groups can place up to 20 signs on public property to advertise their events". The Committee accepts that this facility will have a bearing on any judicial assessment of the justifiability of the Bill in terms of HRA section 28, although it does not appear to accommodate the concern that the Bill unduly restricts political expression. The Committee also notes that if the existence of this facility was in the minds of the drafters of the Explanatory Statement, it would have been helpful to have made mention of it there.

So far as concerns the Memorandum of Compatibility, the Committee offers these very brief comments.

1. As a matter of courtesy, mention might have been made in the Memorandum to the discussion of these issues by the Committee, using the same leading Canadian case, in *Scrutiny Report No 51* of the *Sixth Assembly*.

2. The Human Rights Unit provides advice to the Government concerning the possible fate of its law in a Supreme Court challenge, and it is thus relevant to speculate on the possible use by the court of HRA section 30 to interpret a law in a way that is compatible with the HRA.

The Committee, however, considers that this consideration is irrelevant to the question of whether the Assembly should pass a bill that on its face, as the Memorandum of Compatibility seems to acknowledge, may not be a justifiable derogation of the right to freedom of expression in HRA section 16. Rather, the question for the Assembly is whether the Bill should be amended to remove any doubt about its compatibility, so that it is not left to the courts to engage in an interpretative exercise that comes close to legislating.

The Committee notes that this Bill has been referred to the Standing Committee on Planning, Public Works and Territory and Municipal Services and draws its attention to the Scrutiny Committee's comments on this Bill in Scrutiny Report No. 2, to the Memorandum of Compatibility, and to these comments in response to the Memorandum.

Dangerous Substances and Litter (Dumping) Legislation Amendment Bill 2008

The Committee appreciates the reasoned response to the Committee's comments.

While it notes that the impounding provisions of the Bill were not adopted by the Assembly, it also notes that the response did not address the issue whether the impounding provisions derogate from the right to property (which they appear to do), and whether any derogation is reasonably justifiable.

Vicki Dunne, MLA
Chair

February 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 DI2008-213 - Health Professionals (Medical Radiation Scientists Board) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)

Disallowable Instrument DI2008-231 - Children and Young People (Visiting Conditions) Declaration 2008

Disallowable Instrument DI2008-241 - Utilities (Dam Safety Code) Variation Determination 2008 (No. 1)

Disallowable Instrument DI2008-250 - Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2008 (No. 3)

Disallowable Instrument DI2008-252 - Heritage (Council Chairperson) Appointment 2008 (No. 1)

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Subordinate Law SL2008-37 - Road Transport (Third-Party Insurance) Regulation 2008

Subordinate Law SL2008-41 - Planning and Development Amendment Regulation 2008 (No. 4)

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne MLA

In *Scrutiny Report No. 1*, the Committee made comment on **Environment Protection Amendment Regulation 2008 (No. 1) (SL2008-34).**

The Committee noted that although there was use of a 'Henry VIII' clause, it was entirely within the express power given by the Legislative Assembly.

The Executive has acted within the power given to it by the Assembly and makes no further response.

Thank you for raising the matter.

Yours sincerely

Simon Corbell MLA
Minister for the Environment, Climate Change, and Water
5 FEB 2009

cc Deputy Clerk, ACT Legislative Assembly

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MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mrs ~~Dunne~~ Vicki

Thank you for the Committee's comments on the Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2008 (No. 2) in Scrutiny Report Number 2.

I note the Committee is satisfied that the Bill's strict liability provisions do not unduly trespass on personal rights and liberties.

Yours sincerely

Simon Corbell MLA
Attorney General

10.7.09

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Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

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

Dear Mrs Dunne

I refer to the Committee's comments in relation to the *Crimes (Bill Posting) Amendment Bill 2008* (the Bill) contained in the Scrutiny Report No 2 of 3 February 2009.

The Bill (among other things) amends section 120 of the *Crimes Act 1900*. This provision was originally inserted last year by the *Crimes Amendment Act 2008*. The Scrutiny Committee for the Sixth Assembly (the former committee) made a number of recommendations concerning the original amendment. I note that your Committee has expressed disappointment in the Attorney-General failing to address those recommendations. On this point, I draw your committee's attention to the Attorney-Generals' remarks in the Assembly debate on 1 April 2008 on the *Crimes Amendment Bill 2008*.

Your Committee has expressed the view that the Explanatory Statement to the Bill does not completely address the human rights concerns raised by the former committee.

I note that in the Canadian case of *City of Peterborough v Ramsden* [1993] 2 SCR 1084 the Canadian Supreme Court was considering a blanket ban on bill-posting. The current Bill does not provide for a blanket ban. In *Guinard v R* [2002] 1 SCR 472 the Canadian Supreme Court accepted as a general principle that the prevention of visual pollution is a reasonable objective to justify some limits on free expression.

In the light of the considerations expressed in the above Canadian cases, and in addition to the matters discussed in the Explanatory Statement, I draw the Committee's attention to the *Roads and Public Places (Removable Signs) Code of Practice 2005* (the Code), an instrument made under the *Roads and Public Places Act 1937*. The operation of the Code provides another means whereby community groups can place up to 20 signs on public property to advertise their events. While there are restrictions on the size and location, these restrictions are not onerous and focus on safety aspects of the movable signs. Obviously the onus is on individuals to remove their signs once

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their event has passed. I consider that the ability to lawfully place notices on public property under the Code, together with the other matters referred to in the Explanatory Statement, provide a proportionate approach to the problem of bill-posting.

The former committee also questioned the use of the term "unlawfully" in relation to the offence provisions of the previous amendment, which is also reflected in the wording of this Bill. The Government acknowledges this difficulty and to reduce uncertainty, I have asked the Department of Territory and Municipal Services to clearly label authorised bill-posting sites accordingly. In addition, I have asked the Department to make a list of all authorised sites available and to make that list available on its internet site.

The Committee also expressed concern about the justification in the Explanatory Statement for the strict liability offence. It should be noted at the outset that the on-the-spot fine arrangement is an adjunct to the court system and not its replacement. An individual can elect to have the Territory prove its case against them in the courts. The offence is, I would suggest, typical of offences of a minor regulatory character, with a minor non-custodial penalty (a $200.00 on the spot fine) and where the resources required to establish an intent element (tying up government and court resources) outweigh the penalty being applied.

I also note that the defence of mistake of fact continues to be available – see sections 23(1)(b) and 36 of the *Criminal Code 2002*.

Given the factual elements of the offence and the probative force of the evidence that would ordinarily be adduced in court in a prosecution – typically, an eyewitness observing another person with adhesives and posters and actually affixing them to a structure – the Government considers that it is not necessary to require an additional fault element. However the requirement for the Police or an authorised officer to observe the actual commission of the offence is built into the infringement notice scheme. I draw the Committee attention to section 8 of the *Magistrates Court (Crimes Infringement Notices) Regulation 2008* which states:

> An authorised person is taken not to have reasonable grounds for believing that a person committed an infringement notice offence unless the authorised person witnessed the person committing the offence.

Therefore it is not possible for a person to be served with an infringement notice for affixing notices to a structure after the event. A person seen walking with glue and posters under their arm in the vicinity of other freshly posted bills cannot be issued with an infringement notice, unless they are actually observed posting a bill.

I thank the committee for their comments.

Yours sincerely

Jon Stanhope MLA
Minister for Territory and Municipal Services

10 FEB 2009

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

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

Dear Mrs Dunne

I refer to the Committee's comments in relation to the *Dangerous Substances and Litter (Dumping) Legislation Amendment Bill 2008* (the Bill) contained in the Scrutiny Report No 2 of 3 February 2009.

The Government notes that the Committee has referred to its earlier comment on the *Road Transport (Safety and Traffic Management) Bill 2006* where it suggested that the seizure of a vehicle before a person is convicted might amount to a disproportionate punishment, and breach section 10 of the HRA.[1]

The Government does not believe that the temporary impoundment of a car pending trial amounts to cruel, inhuman or degrading treatment within the meaning of section 10 of the HRA. In *Keenan v United Kingdom* [2001] 33 EHRR 913, the European Court of Human Rights observed that in order for treatment to be inhuman or degrading it must "attain a minimum level of severity" and that:

> In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 ... This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance... or as driving the victim to act against his will or conscience.

The Government does not believe that impounding a person's car pending a trial meets the threshold required for it to be cruel, inhuman or degrading: such a course of action would not, in the ordinary course of events, humiliate or debase the person to such an

[1] Scrutiny Report No. 28 of the 6th Assembly.

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extent as to break their "physical or moral resistance", and nor would it "effect their personality" in a manner inconsistent with the HRA.

Similarly, even if one was to accept that temporarily impounding a car could be seen as punitive, it would not be so disproportionate as to breach section 10 of the HRA. Generally, a punishment might be said to be cruel or inhuman if it is "grossly disproportionate": *Soering v United Kingdom* [1989] 11 EHRR 439; *State v Makwanyane* [1995] SA 391. In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045, the Canadian Supreme Court observed that in order for a punishment to be "cruel and unusual" in contravention of section 12 of the *Canadian Charter of Rights and Freedoms* it must be "so excessive as to outrage the standards of decency". To the best of the Government's knowledge, only punishments involving sentences of imprisonment have been found to be so grossly disproportionate as to be cruel or inhuman.

The Government also notes that the Committee has suggested that impounding vehicles pending a trial might also engage section 12(a) of the HRA if one was accept an extensive interpretation of "home". The Government notes that in *London Borough of Harrow v Quazi* [2003] UKHL 43, Bingham LJ held that a person's 'home', for the purpose of Article 8(1) (which is similar to section 12(a) of the HRA), is the place where a person "lives and to which he returns and which forms the centre of his existence." Similarly, in *Hatton v United Kingdom* [2003] ECHR 36022/97, the European Court of Human Rights held that "a home will usually be the place, the physically defined area, where private life and family develops." In light of this jurisprudence, the Government does not believe that the concept of "home" extends to a vehicle, particularly a commercial vehicle.

The Government also notes that the *Road Transport (Safety and Traffic Management) Act 1999* does not contain a power for police to conduct a general search of impounded vehicles, and as such, issues relating to police searches and arbitrary interference with privacy do not arise.

The Government is of the view that the principal right engaged by the power of police and the courts to temporarily impound cars is the presumption of innocence in section 22(1) of the HRA. However, in the Government's view, the question of whether the presumption of innocence is engaged will turn on whether temporarily impounding a car can be seen as a punishment. In the Government's view it cannot. In determining whether action is punitive, regard must be had, *inter alia,* to the purpose of the action or provision: *Engel v The Netherlands* (No. 1) [1976] 1 EHRR 647; *R v Dover Magistrates Court* [2003] Q.B. 1238. The purpose of the power to temporarily impound cars is not to punish or deter, but to protect the community from the potential for dangerous or unlawful use of motor vehicles. Although this may arguably have a punitive effect, this does not make it a punishment *per se.*

The Government believes it is a justifiable limitation on the right under section 28 of the HRA. In this vein, the Government notes that there are numerous other provisions in Territory law which allow for property to be temporarily seized pending a final determination of a matter at trial, e.g. evidence relating to criminal proceedings, or legally registered firearms which are believed to have been used in an unlawful manner. In considering whether the limitation is proportionate, it is important to note that the power

of police to impound cars is subject to independent oversight by the Magistrates Court[2], and Magistrates retain an overarching discretion to order the return of a car where to impound it would cause injustice or hardship[3].

The Committee also expressed concern about the justification in the Explanatory Statement for the strict liability offence. The Government considers that a strict liability offence is warranted, given the fact that the offence does not carry a term of imprisonment.

In addition the infringement notice ("on-the-spot fine") arrangement is an adjunct to the court system and not its replacement. An individual can elect to have the Territory prove its case against them in the courts.

The Government considers that the offence is regulatory in character and that the resources required to establish an intent element (tying up Government and court resources) would seriously outweigh the penalty (a $1,000 on the spot fine) to be applied.

As with all strict liability offences the defence of mistake of fact continues to be available – see sections 23(1)(b) and 36 of the *Criminal Code 2002*. In areas of problem dumping, the Department of Territory and Municipal Services places warning signs alerting individuals to the fact that dumping in the area is illegal.

The Government also considers that, having regard to the factual elements of the proposed offence and the probative force of the evidence that would typically be presented in court in a prosecution – typically, an eyewitness observing a person drive their vehicle off a road into bushland and then to dump rubbish out of the vehicle or trailer – it is not necessary to include an additional fault element.

I thank the Committee for their comments.

Yours sincerely

Jon Stanhope MLA
Minister for Territory and Municipal Services

10 FEB 2009

[2] Section 10H, *Road Transport (Safety and Traffic Management) Act 1999.*
[3] Section 10H(2)(b)(ii), *Road Transport (Safety and Traffic Management) Act 1999.*

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

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

Dear Mrs ~~Dunne~~ Vicki

I thank the Standing Committee on Justice and Community Safety (Committee) for the scrutiny comments provided in relation to the Crimes (Murder) Amendment Bill 2008 (Bill).

I note that the comments made by the Committee support the recommendations of the Model Criminal Code Officers Committee (MCCOC) in its 1998 discussion paper, and the Law Reform Commission of Western Australia's (LRCWA) review of the law of homicide in 2007. MCCOC advocated that the offence of murder should not include the third limb proposed in the Crimes (Murder) Amendment Bill 2008, and that the offence of murder should be drafted in terms very similar to those that currently exist in section 12 *Crimes Act 1900*. While I acknowledge the analysis that this discussion paper brings to the debate on the topic, the Government considers that having experienced the law in that form for 18 years, it is well placed to make a decision that the law needs amendment to better reflect the needs of the community that the Government represents. I also note that despite the recommendation being made 10 years ago, no other Australian jurisdiction has adopted the recommendations of MCCOC.

The Committee reports that the LRCWA advocates a narrower definition of "grievous bodily harm" in relation to the harm that must be intended in order to establish the offence of murder. The Government considers the distinctions drawn by the Committee and the LRCWA about the level of harm are fine distinctions, and contends that the definition of 'serious harm' contained in the Criminal Code, and adopted by the Bill, is an appropriately defined level of harm. While the Committee contends that an intention to cause permanent injury to health is not sufficiently serious to warrant a charge of murder should the victim die from the injury, the Government's position is that there are many situations where an intention to cause permanent injury to health that results in death would not only warrant a charge of murder, but would also give rise to an expectation in the community that a charge of murder would apply.

I note the Committee's analysis of the High Court's position in *Wilson v R* [1992] HCA 31 is not helpful to the analysis of the Bill, as it addresses an analysis of the law of manslaughter based on

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the commission of a dangerous act. The intent required to prove this offence is quite different from that required to establish that a person had an intention to cause serious harm, and simply serves to confuse the issue.

The Committee calls for clarification from the Attorney-General on the question of whether the test for the effect of harm is a subjective or objective test. The Government's position is that the intention that is required is an intention to cause serious harm, and that it is therefore a subjective test.

In response to the Committee's comments in paragraphs 6.5 -6.7 I note that while the other jurisdictions in Australia do not have an offence identical in every way to the one proposed by the Bill, each jurisdiction apart from the ACT, has an offence of 'constructive murder'. While the definitions of harm that make up these offences may differ in minor ways, the nature of the offences is the same, with each of these jurisdictions having a wider range of violent behaviours causing death that fall under the offence of murder, than the current narrow definition found in section 12 *Crimes Act 1900.*

Human Rights Compatibility

The Government welcomes the Committee's comments on the compatibility of the Bill with the *Human Rights Act 2004* (HRA) and the Memorandum of Compatibility that was tabled with the Bill. I make the following comments on the Committee's report:

Relevance of the views of the United Nations Human Rights Committee

As a preliminary matter, I note that the Committee has raised a question about "whether the comments of the United Nations Human Rights Committee should have much influence in how an Australian Court should interpret the HRA as the Committee is not, in any sense, a court."[1] I do not share the Committee's doubt.

Section 31(1) of the HRA provides that "international law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting a human right." The definition of "international law" in the dictionary to the HRA makes it clear that it includes the "general comments and views of United Nations human rights treaty bodies."[2] The United Nations Human Rights Committee is responsible for monitoring the implementation of the *International Covenant on Civil and Political Rights* (ICCPR), and is a United Nations human rights treaty body for the purpose of the definition of "international law" in the HRA. Many of that Committee's views are expressed through the opinions it delivers in respect of the complaints it hears. As such, the Government is of view that it is clearly open to an Australian court interpreting the HRA to have regard to the United Nations Human Rights Committee's views. Indeed, the explanatory statement to the HRA makes it clear that in interpreting the HRA, "the opinions, decisions, views and judgments of the UN Human Rights Committee and European Court of Human Rights are particularly relevant."[3] Given that the rights contained in the HRA are modelled on the ICCPR, and are expressed in substantially similar terms to the rights in that document, the Government would expect any court interpreting the HRA to show considerable deference to the views of that Committee.

Consistently with this approach the Government has relied heavily on the United Nation's Committee's comments in assessing the Bill for compatibility with the HRA.

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[1] ACT Legislative Assembly Standing Committee on Justice and Community Safety (Scrutiny of Bills), Scrutiny Report No. 2, (3 February 2009), p. 18

[2] See the definition of 'international law', subsection (b), *Human Rights Act 2004.*

[3] Explanatory Statement, *Human Rights Bill 2003,* p. 5.

The approach to interpreting and applying section 18(1) of the HRA

The Committee seems to be suggesting that any offence punishable by imprisonment could be taken to be *prima facie* incompatible with section 18(1) of the HRA and will need to be assessed for proportionality under section 28 of that Act.[4] Also, the Committee has expressed doubt the concept of arbitrariness has any bearing on the issues raised by the Bill.[5]

The Government is of the view that such an approach to interpreting section 18(1) of the HRA would be overly simplistic. Section 18(1) provides that "everyone has the right to liberty and security of the person. In particular, no-one may be arbitrarily detained or arrested." Section 18(1) consists of two sentences, and they should be read together. In the Government's view, the words "in particular" at the beginning of the second sentence are crucial, and clarify the scope of the right. These words make it clear that that in assessing the right to liberty, the 'primary' or 'particular' focus should be on whether any limitation on the right is unlawful or arbitrary. Indeed, some Bills of Rights, for example the *New Zealand Bill of Rights Act 1990* (NZ)[6], express the right to liberty purely in terms of a right to be free from arbitrary or unlawful arrest or detention.

If the Committee's suggested approach was to be taken in assessing all Territory laws for compatibility with the HRA, then the second sentence in section 18(1) would effectively become redundant: almost every question as to whether section 18(1) has been breached could be resolved without resorting to the second sentence of the section and the concepts of arbitrariness or unlawfulness. The Government does not believe that this was the purpose of that section, and in any event, it would be inconsistent with the ordinary rule of statutory construction that each section must be read as a whole such that "no clause, sentence, or word shall prove superfluous, void or insignificant, if by another construction they may all be made useful and pertinent": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13.

I am not aware of any other international or domestic court or tribunal, or any United Nations treaty monitoring body, taking an approach to interpreting the right to liberty similar to that suggested by the Committee. When the United Nations Human Rights Committee considers complaints concerning alleged violations of Article 9(1) of the ICCPR, it has noted that the principal issue before the Committee is whether the detention is arbitrary.[7]

It is also worth noting that Article 5(1) of the *European Convention on Human Rights* is structured in similar terms to section 18(1) of the HRA in that both sections protect liberty, and both provisions consist of more than one sentence, with the first sentence expressing a right to liberty in general terms, with the substance of the right being expanded upon in the proceeding sentences. In *Engel v Netherlands* (No 1) [1976] 2 EHRR 245, the European Court of Human Rights observed that the aim of that article is to ensure that "no one should be deprived of his liberty in an arbitrary fashion." Again, the focus is on arbitrariness, and the court has not gone straight into a proportionality inquiry upon it being established that a person's liberty has been interfered with.

The United Nations Human Rights Committee considers that Article 9(1) of the ICCPR (and hence section 18(1) of the HRA) is "applicable to all deprivations of liberty whether in criminal cases or other cases": *Shafiq v Australia* (Communication No. 1324/2004, 13 November 2006). Given that imprisonment is a deprivation of liberty, the ACT Government believes that section 18(1) of the HRA requires that all laws providing for a term of imprisonment must be assessed for arbitrariness[8].

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[4] Ibid, p.6
[5] Ibid. p. 17.
[6] section 22, *New Zealand Bill of Rights Act 1990* (NZ).
[7] see, for example, *Hugo Van Alphen v The Netherlands* (Communication No. 305/1988, 15 August 1990), paragraph 5.6;
[8] See paragraphs 16 and 17 of the Government's memorandum of compatability.

Therefore, in the context of this Bill, it is necessary to assess whether amending the offence of murder such that a person can be convicted on the basis of a *mens rea* of intent to commit serious bodily harm can be said to be arbitrary. The Government believes that it cannot.

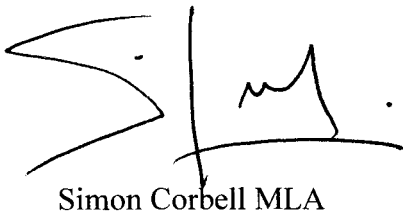
The views of the United Nations Human Rights Committee are further instructive where it has stated that "the notion of arbitrariness must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness or injustice": *Shafiq v Australia* (Communication No. 1324/2004, 13 November 2006).

In assessing whether a law could be said to be unjust or inappropriate, the Government accepts the view that the analytical approach taken by the Canadian Supreme Court in assessing whether something is encapsulated by the 'fundamental principles of justice' is informative, although by no means conclusive or determinative on the issue. In this regard I understand in the case of *Canadian Foundation for Children, Youth and the Law v Canada* [2004] 1 SCR 76, the Canadian Supreme Court held that, in order for a law or principle to be said to amount to a 'fundamental principal of justice' there must, *inter alia,* be "sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice"". The Court continued that "the principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens."

Applying this approach, it is clear that a *mens rea* of murder limited to subjective foresight as to death is not, and never has been, considered to be a fundamental principal of justice: it has been the policy of the common law and the law of every other state and territory legislature that murder be defined to include a *mens rea* of intent to cause grievous bodily harm. As was discussed in the Memorandum of Compatibility, the Government also considers the decision of the Hong Kong Court of Final Appeal in *Lau Cheong v HKSAR* [2002] 2 HKLRD 612 is relevant authority on this point.

In all the circumstances the Government remains of the view that the Bill is compatible with the HRA.

Yours sincerely



Simon Corbell MLA
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10.2.09

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DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly

Dear Ms Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 2 of 2 February 2009 in relation to the *Duties (Transitional Provisions) Regulation 2008* (SL2008-38) and the Committee's observations regarding its "Henry VIII" clause and a minor error in its explanatory statement.

I apologise for the error in the explanatory statement that mistakenly cited section 441 of the *Duties Act 1999* instead of section 442 of that Act. I will endeavour to ensure that similar errors do not occur again in the future.

I agree with the Committee's observations regarding the "Henry VIII" clause in the regulation.

I trust these comments assist the Committee and address its concerns.

Yours sincerely

K. Gallagher

Katy Gallagher MLA
Treasurer
16.2.09

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