



Legislative Assembly for the ACT

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

Scrutiny Report

31 MARCH 2008

Report 52

TERMS OF REFERENCE

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

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS

Bill—No comment

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

UTILITIES (NETWORK FACILITIES TAX) REPEAL BILL 2008
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This Bill would repeal the *Utilities (Network Facilities Tax) Repeal Bill 2008*.

Bills—Comment

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2008

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

Proposed amendment of the *Human Rights Commission Act 2005 (HRC Act)*

Report under section 38 of the Human Rights Act 2004

Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?

Privacy and reputational interests of a person who is the subject of a complaint to the Human Rights Commission – *Human Rights Act 2004* section 12

Is the proposal to relieve the Human Rights Commission in certain circumstances of the obligation to notify the subject of complaint of the fact of the complaint having been made compatible with the right to privacy in HRA section 12?
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There is a question whether the right to privacy stated in HRA section 12 is limited by the proposal to insert new subsections 45(3) and (4) in the HRC Act. Section 12 provides:

12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

Currently, subsection 43(1) of the HRC Act requires the Commission to “deal with complaints promptly and efficiently”. By paragraph 43(2)(c) it must “before considering the complaint, tell the complainant and the person complained about, in writing, that the complaint is to be considered”. It may be argued that there is a privacy rationale for this latter provision. In many cases, the complaint would reflect adversely on the reputation of the subject of the complaint, and he or she should be in a position to deal with the allegations made.

The Bill proposes to qualify the obligations in subsection 43(1) and paragraph 43(2)(c) by inserting into the Act two new subsections to section 43.

- Proposed subsection 43(3) would provide that the Commission need not consider a complaint in various circumstances, including that it is “is frivolous, vexatious or not made honestly” (paragraph 43(3)(a)(i)), or “lacks substance” (paragraph 43(3)(a)(ii)).

- Proposed subsection 43(4) would provide that the Commission need not give a notice under paragraph 43(2)(c) to the person complained about “if, because of subsection (3), it decides - (a) not to consider the complaint; or (b) not to consider the complaint further”.

Paragraph 43(2)(c) would also be amended to cross-refer to subsection 43(3). The Committee raises the question whether in paragraph 43(2)(c) it would be more appropriate to cross-refer to subsection 43(4).

The Explanatory Statement refers to proposed subsection 43(3) and asserts that its statement of the circumstances in which a complaint need not be considered may be characterised as ones “where it would be inappropriate” for the commission to consider a complaint. It then states:

The new subsection also exempts the commission from notifying people complained about in cases where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance.

This statement is not accurate in that (1) it is proposed subsection 43(4) that states the exemption, and (2) the latter is not limited to “cases where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance”. For example, and of significance, is that subsection 43(4) would apply where a complaint is not considered where it “is to be referred to another statutory officer-holder” (paragraph 43(3)(a)(iii)).

The Committee considers that there are good grounds to argue that the person complained about should be made aware that the complaint is to be referred to another statutory officer-holder.

It may also be argued that this person should also be made aware even where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance. As noted above, a complaint will often reflect adversely on the reputation of the subject of the complaint, and he or she should be in a position to deal with the allegations made. It is not suggested that the person should be able to require the commission to undertake any investigation. The Committee notes, however, that under the *Privacy Act 1988* (Commonwealth), and the *Freedom of Information Act 1989* (ACT), the person might require the commission to attach a statement from the person to any record kept by the commission of the complaint. Of course, the person cannot take advantage of this facility unless they are made aware that a record exists. The force of this argument depends on what happens to any record of a complaint, and on this issue the Committee considers that the Minister provide advice to the Assembly.

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

TOBACCO AMENDMENT BILL 2008

This Bill would amend the *Tobacco Act 1927* to prohibit the display of smoking products at point of sale; remove the ministerial exemption to allow tobacco advertising and sponsorship; amend the definition of vending machine; ban rewards for smoking product purchases; include a power for the Minister to declare certain smoking products to be prohibited; prohibit split packets, and harmonise the Act to the principles of the *Criminal Code 2002*.

Report under section 38 of the Human Rights Act 2004

Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?

Freedom of expression – HRA subsection 16(2)

Are the ways 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)?

Several of the provisions of the Bill engage 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’,¹ and on this basis the relevant provisions appear to be:

- proposed subsection 9(2) (clause 8) – governing where a price ticket for a product line for sale must be located;
- proposed section 20 (clause 10) – creating an offence where a smoking product is displayed at a smoking outlet;
- proposed section 23 (clause 11) – creating offences where smoking is advertised;
- proposed section 25 (clause 13) – creating offences where an object or entitlement promotes certain things;
- proposed section 18 (Schedule 1.3) – creating an offence where a person sells or imports food or toys where the sale or the importation publicises or promotes certain things;
- proposed section 26 (Schedule 1.6) – creating an offence where a person supplies a smoking product for free and the supply promotes the sale of any smoking product for value; and
- proposed section 27 (Schedule 1.6) – creating an offence where a person conducts a competition that promotes 1 or more of certain things.²

The Explanatory Statement does not however address the significance of HRA subsection 16(2) to an assessment of the compatibility of the Bill with the HRA. The Committee can do no more than sketch out the issues relevant to a human rights assessment of the proposed amendments.

The issue in relation to each provision is whether the government has shown the limitation of freedom of expression 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.

Do the limitations on freedom of expression pursue a legitimate objective?

The answer to this question is probably ‘yes’.

¹ 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.”

² It is possible that provisions that compel the making of statements also engage the right to freedom of expression (for example, proposed section 66 (Schedule 1.11)).

The Explanatory Statement does outline some objectives, but in rather limited terms. It states that the proposed prohibition on the display of smoking products at point of sale “will remove one of the last remaining means for the tobacco industry to promote its products”. This objective underlies several other proposed amendments.

It is also stated that a requirement for the placing smoking products out of sight (clause 8) “will remove the incentive for opportunistic purchases, particularly by young people”. The proposal to ban split packets (clause 10) is based on a “concern that the packets were likely to induce young people to purchase split packets”. It is proposed that the Minister may make a declaration to prohibit a smoking product that has “a distinctive fruity, sweet or confectionary-like character and that the nature of the product or its packaging may be attractive to children” (clause 10). The proposal that a person will commit an offence if in direct or indirect association of the sale of a smoking product the person provides or offers to provide a prize, gift, discount, voucher, ticket, points or credit in a customer reward scheme is designed “to reduce tobacco consumption rates and sends prospective customers a clear message that tobacco smoking is not an activity worthy of a reward” (clause 13).

In a recent decision, the Canadian Supreme Court generally endorsed the objectives of the legislation under consideration in that case:

“to provide a legislative response to a national public health problem of substantial and pressing concern ...” and, more particularly, “to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases”; “to protect young persons and others from inducements to use tobacco products and the consequent dependence on them”; “to protect the health of young persons by restricting access to tobacco products”; and “to enhance public awareness of the health hazards of using tobacco products”.³

The Court accepted that these objectives were “pressing and substantial”, and a similar conclusion may be accepted so far as concerns the Territory.

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”⁴?; and

³ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), para 18.

⁴ See Human Rights Amendment Bill 2007, clause 4, proposing a new 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.*”

- 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?”⁵

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 deal in tobacco products 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.

Strict liability offences

Some provisions of the Bill amend the *Tobacco Act 1927* to create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable limitation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

Proposed sections 8, 9, 10 (see clause 8) and 19 (see clause 10) of the Tobacco Act would create strict liability offences.

The Explanatory Statement states a general justification:

Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and protection of the revenue. People who opt into a licensing scheme for the purpose of selling tobacco are considered to be professionals who can reasonably be expected to be aware of their duties and obligations. As such, strict liability offences are more readily justified when a defendant can reasonably be expected, because of his or her professional involvement, to be aware of the requirements of the law. A defendant’s frame of mind for some regulatory offences is irrelevant, unless some knowledge or intention ought to be required to commit a particular offence. Penalties for strict liability offences contained in the Bill do not exceed more than 50 penalty units and do not propose a term of imprisonment.

These offences are regulatory in nature, and the penalty within an acceptable range for a strict liability offence.

Several other provisions of the Act would be amended to create a strict liability offence to the effect of ‘harmonising’ the Act with the *Criminal Code 2002*. The Explanatory Statement explains:

⁵ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII) para 45.

By undertaking harmonisation it is ensured that the Criminal Code applies to all the offences in the Tobacco Act rather than only to those offences amended in the substantive part of the Bill. For the offences to operate effectively, to ensure that they continue to operate as they were intended, it was important for all of the offences contained in the Act to be restructured to conform to the general principles contained in the Code.

The Committee notes that the penalties for these offences contained do not exceed more than 50 penalty units and do not propose a term of imprisonment.

The Committee considers it very unlikely that there is in any respect an incompatibility with the HRA in respect of strict liability, but draws the rights issues involved in the creation of strict liability offences to the attention of the Legislative Assembly.

Comment on explanatory statement

The Committee does not consider that the explanatory statement meets the technical and stylistic standards expected. At some places, the explanatory statement:

- did not explain the substance of the relevant clause of the Bill;
- did not state that substance accurately;
- in one case where it identified a potential incompatibility with the HRA, did not identify the relevant right; and
- provided an explanation that is very difficult to follow.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2007-309 being the Health Professionals (Podiatrists Board) Appointment 2007 (No. 1) made under the *Health Professionals Act 2004* and the *Health Professionals Regulation 2004* appoints specified persons as members of the ACT Podiatrists Board.

Disallowable Instrument DI2007-310 being the Board of Senior Secondary Studies Appointment 2007 (No. 10) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as Chair of the ACT Board of Senior Secondary Studies.

Disallowable Instrument DI2007-311 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2007 (No. 2) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person as the acting appointee representing the interests of employers to the ACT Accreditation and Registration Council.

Disallowable Instrument DI2007-312 being the Taxation Administration (Ambulance Levy) Determination 2007 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2006-251 and determines the relevant amount for the purposes of calculating the ambulance levy.

Disallowable Instrument DI2007-313 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2007 (No. 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2007-113 and determines rates of duty payable under the Duties Act 1999.

Disallowable Instrument DI2007-314 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 7) 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 for ACT registered vehicles participating in the Street Machine Magazine 21st Summernats Car Festival.

Disallowable Instrument DI2007-315 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 8) 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 21st Summernats Car Festival.

Disallowable Instrument DI2007-316 being the Public Places Names (Macgregor) Determination 2007 (No. 2) made under section 3 of the *Public Place Names Act 1989* revokes DI2007-308 and determines the names of new roads in the Division of Macgregor.

Disallowable Instrument DI2007-317 being the Radiation Protection (Council Member) Appointment 2007 (No. 1) made under sections 68 and 70 of the *Radiation Protection Act 2006* appoints specified persons as chairperson and member of the Radiation Council.

Disallowable Instrument DI2007-318 being the Radiation Protection (Council Member) Appointment 2007 (No. 2) made under sections 68 and 70 of the *Radiation Protection Act 2006* appoints specified persons as deputy chairperson and member of the Radiation Council.

Disallowable Instrument DI2007-319 being the Radiation Protection (Council Member) Appointment 2007 (No. 3) made under section 68 of the *Radiation Protection Act 2006* appoints a specified person as a member of the Radiation Council.

Disallowable Instrument DI2007-320 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2007-175 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2007-321 being the Health (Fees) Determination 2007 (No. 3) made under section 192 of the *Health Act 1993* revokes DI2007-161 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2007-322 being the Health (Interest Charge) Determination 2007 (No. 1) made under section 193 of the *Health Act 1993* revokes DI2006-241 and determines interest charged for the purposes of the Act.

Disallowable Instrument DI2008-12 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 2) 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 timed special (competitive) stages of the 2008 Solartec Renewables Blue Range Rally (Light Car Club of Canberra).

Disallowable Instrument DI2008-13 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2008 (No. 1) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* refers the provision of a price direction for the supply of electricity to franchise customers to the Independent Competition and Regulatory Commission.

Disallowable Instrument DI2008-15 being the Canberra Institute of Technology (Advisory Council—Chair) Appointment 2008 (No. 1) made under section 32 of the *Canberra Institute of Technology Act 1987* appoints a specified person as chair of the Canberra Institute of Technology Advisory Council.

Disallowable Instrument DI2008-17 being the Public Place Names (Franklin) Determination 2008 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Franklin.

Disallowable Instrument DI2008-18 being the University of Canberra (Honorary Degree) Statute 2008 made under section 42 of the *University of Canberra Act 1989* repeals DI1992-191 and permits the awarding of Honorary Degrees at all levels.

Disallowable Instruments—Comment

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

No explanatory statement / Under what provision is this instrument made?

Disallowable Instrument DI2007-323 being the Auditor-General Acting Appointment 2007 made under clause 6 of the Schedule to the *Auditor-General Act 1996* appoints a specified person to act as Auditor-General.

This instrument appoints a specified person to act as Auditor-General. It states that it is made “[u]nder clause 6 of the Schedule to the *Auditor-General Act 1996*”. Clause 6 of Schedule 1 provides:

6 Acting auditor-general

Before the Executive appoints a person to act as auditor-general, the Minister must consult the presiding member of the public accounts committee about the proposed appointment.

Clearly, clause 6 does not provide the power to appoint an acting Auditor-General. The Committee considers that it is more likely that section 209 of the *Legislation Act 2001* provides the power to make the appointment.

As there is no Explanatory Statement for this instrument, the Committee (and the Legislative Assembly) is given no indication as to whether or not the presiding member of the Public Accounts Committee has been consulted about the proposed appointment. As a result, the Committee draws this instrument to the attention on the Legislative Assembly, as it may not be in accord with the general objects of the Act under which it is made, contrary to principle (a) (i) of the Committee’s terms of reference.

Retrospectivity

Disallowable Instrument DI2008-19 being the Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1) made under section 11 of the *Domestic Violence Agencies Act 1986* appoints a specified person as the Domestic Violence Project Coordinator.

This instrument appoints a specified person as the Domestic Violence Project Coordinator, under section 11 of the *Domestic Violence Agencies Act 1986*. The appointment is made retrospectively, with operation from 22 May 2007. The *Legislation Act 2001* imposes significant limitations on the retrospective operation of instruments. It 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.

The Explanatory Statement to the instrument refers to section 76 of the *Legislation Act*:

Section 76 of the *Legislation Act 2001* provides that a statutory instrument may commence retrospectively if it does not operate prejudicially. The retrospective appointment does not impose any liabilities on any person. It ensures that Ms Holder's right to legal immunity in relation to the performance of her function as DVPC extends to the period in which she was acting in the position.

While the above statement, on its face, makes sense, the Committee seeks from the Minister some further information in relation to the proposition that the retrospective operation of the appointment does not operate prejudicially. If the effect of the instrument is to give Ms Holder a legal immunity, retrospectively, the Committee considers that it is conceivable that a person or entity might have accrued a legal right against Ms Holder in the period during which she *did not* have the immunity and that the effect of this instrument is to take away that person or entity's legal right. If that is the case, there is an issue with section 76 of the *Legislation Act*. While the Committee recognises that this may seem like a fanciful proposition, it is a fact that the retrospective granting of a legal immunity could also have an impact on persons whose legal rights are thwarted by the granting of that immunity.

Subordinate Law—No comment

The Committee has examined the following subordinate law and offers no comments on it:

Subordinate Law SL2008-1 being the Crimes (Sentence Administration) Amendment Regulation 2008 (No. 1) made under the *Crimes (Sentence Administration) Act 2005* declares NSW to be a participating jurisdiction for the purposes of formally transferring and enforcing community-based sentences between the ACT and NSW.

Subordinate Laws—Comment

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

Strict liability offence

Subordinate Law SL2008-2 being the Planning and Development Regulation 2008, including a regulatory impact statement, made under the *Planning and Development Act 2007* supplements the provisions of the Act.

Section 76 of this instrument provides for a strict liability offence, in relation to the conducting of inquiries by an “inquiry panel” established under section 228 of the *Planning and Development Act 2007*. Section 76 provides:

76 Inquiries to be public

- (1) An inquiry panel must conduct its inquiry in public.
- (2) However, an inquiry panel may—
 - (a) direct that the inquiry or any part of it be conducted in private, and give directions about who may be present during any private hearing; or
 - (b) give directions prohibiting or restricting the publication of information given to the inquiry, or of matters contained in documents lodged with the inquiry.
- (3) In making a direction under subsection (2), an inquiry panel must consider—
 - (a) the principle that it is desirable that the inquiry should be conducted in public, and that information given to the inquiry, and documents lodged with the inquiry, should be available to interested people and to the public; and
 - (b) in the circumstances, whether confidentiality is required.
- (4) A person must not contravene a direction under subsection (2).
Maximum penalty: 10 penalty units.
- (5) An offence against this section is a strict liability offence.

As noted in *Scrutiny Report No 2 of the Sixth Assembly*, strict liability offences are a recurring issue for the Committee. In *Scrutiny Report No 2* (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.

In particular, the Committee noted that, in its *Scrutiny Report No 38 of the Fifth Assembly*, it had proposed 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 contains the following statement:

Section 76(3) sets out what an inquiry panel must consider in deciding to conduct an inquiry in private or restrict publication of information. It is a strict liability offence to contravene a direction under section 76(2) and the maximum penalty is 10 penalty units. A penalty unit is defined in the *Legislation Act 2001* (the Legislation Act) and is currently \$100.

This statement does not in any way address the Committee's oft-stated requirements in relation to strict liability offences. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a) (ii) of the Committee's terms of reference.

Strict liability offence (positive comment) / Accessibility of legislation / Exemptions from merits review

Subordinate Law SL2008-3 being the Building (General) Regulation 2008, including a regulatory impact statement, made under the Building Act 2004 repeals the Building Regulation 2004 and caters for reforms under the Planning System Reform Project.

The Committee notes that section 45 of this subordinate law creates 2 strict liability offences. The Committee notes with approval that the Explanatory Statement to this subordinate law provides a detailed explanation as to:

- why a fault element (or guilty mind) is not required; and,
- what defences are nevertheless available to a person charged with one of the relevant offences.

The Committee also notes that this explanation is further enhanced by the inclusion of a discussion as to the human rights issues that are raised by the inclusion of these strict liability offences in the subordinate law.

The Committee commends to other agencies the approach taken in the Explanatory Statement to this instrument in relation to strict liability offences.

Section 45 of this subordinate law disapplies subsection 47 (5) of the *Legislation Act 2001*. It provides:

45 Non-application of Legislation Act, s 47 (5)

The Legislation Act, s 47 (5) does not apply to the asbestos removal code or the tolerances guide.

Subsection 47 (5) of the Legislation Act provides:

- (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

Both “asbestos removal code” and “tolerances guide” are defined in the Dictionary to this subordinate law, which provides:

asbestos removal code means a code of practice for the safe removal of asbestos approved by the Minister under the Act, section 139B.

Section 139B of the *Building Act 2004* provides:

139B Approval of asbestos code

- (1) The Minister may approve codes of practice for this Act.

Note A power given under an Act to make a statutory instrument (including a code of practice) includes power to amend or repeal the instrument (see Legislation Act, s 46 (1)).

- (2) A code of practice may—
- (a) set out practices, standards and other matters about building work if the work involves the use, handling or disposal of asbestos; and
 - (b) be approved as in force from time to time.

- (3) An approved code of practice is a disallowable instrument.

Note 1 A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Note 2 An amendment or repeal of a code of practice is also a disallowable instrument (see Legislation Act, s 46 (2)).

- (4) The construction occupations registrar must make a copy of the asbestos code, and any instrument (or provision of an instrument) applied (with or without change) by the asbestos code, available for public inspection during ordinary office hours at—

- (a) the office of the construction occupations registrar; or
- (b) another place prescribed by regulation.

- (5) In this section:

applied includes adopted and incorporated.

It is not entirely clear to the Committee what is the intended effect of section 45 of this subordinate law in disapplying subsection 47 (5) of the Legislation Act in relation to the asbestos removal code. There is no express power in section 139B of the Building Act to apply the law of another jurisdiction. There is, however, the power to approve a code of practice “as in force from time to time”.

The Explanatory Statement to this subordinate law states:

Section 45 is intended to disapply the requirement of the Legislation Act, s 47 (5), to notify the asbestos removal code and the tolerances guide on the legislation register. Those documents are mentioned in the section and the provision that mentioned them indicates where the documents can be accessed on the internet. The reason for not requiring the documents to be notified is that they are freely available on the internet and are subject to copyright limitations.

This being so, it seems that it is intended that the obligation to notify the asbestos removal code on the ACT Legislation Register is to be dispensed with. The Committee notes, however, that the Explanatory Statement indicates that the relevant empowering provisions indicate where (on the internet) the documents in question can be accessed. While this may be the case with the tolerances guide (see below), the Committee is unsure of the basis of this assertion in relation to the asbestos removal code.

The Committee would appreciate the Minister's advice as to the purpose of section 45 of this subordinate law and, in particular, on where (other than on the ACT Legislation Register) the asbestos removal code is publicly available.

Turning to the "tolerances guide", the Committee notes that that term is defined in the Dictionary to this subordinate law as follows:

tolerances guide, for schedule 3 (Fundamentally noncompliant building work)—see schedule 3, section 3.1.

Section 3.1 of Schedule 3 to this subordinate law then defines "tolerances guide" as follows:

tolerances guide means the Guide to Standards and Tolerances 2007, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disappplied (see s 47 (7)).

Note 2 The Legislation Act, s 47 (5) is disappplied in relation to the tolerances guide by s 45.

Note 3 The tolerances guide can be viewed at, or downloaded from, www.buildingcommission.com.au/publicationslibrary.

As the Committee has already noted above, the Explanatory Statement to this subordinate law states that the empowering provision for the tolerances guide indicates where it can be accessed on the internet. The Committee has been able to confirm that the tolerances guide is, in fact, available on the website identified (though perhaps not using the specific address provided). As a result, the Committee has no further comment on this particular aspect of the subordinate law. The Committee would, however, appreciate the Minister's advice in relation to its comments above about the accessibility of the asbestos removal code.

A related accessibility issue is the reference, in various provisions of this subordinate law (sections 13, 16, 17, Schedule 1 and the Dictionary) to various Australian Standards. The Committee notes that, in each case, the relevant Australian Standard is defined as applying "as in force from time to time". An example is section 17 of the subordinate law, which contains the following provision:

(8) In this section:

AS 1684 means Australian Standard 1684 (*Residential timber-framed construction—design criteria*), as in force from time to time.

AS 2870 means Australian Standard 2870 (*Residential slabs and footings—construction*), as in force from time to time.

AS 3623 means Australian Standard 3623 (*Domestic metal framing*), as in force from time to time.

AS 3700 means Australian Standard 3700 (*Masonry structures*), as in force from time to time.

The application, by reference, of "external", non-disallowable instruments is generally determined by section 47 of the Legislation Act, which provides (in part):

47 Statutory instrument may make provision by applying law or instrument

(1) This section applies if an Act, subordinate law or disallowable instrument (the *authorising law*) authorises or requires the making of a statutory instrument (the *relevant instrument*) about a matter.

(2) The relevant instrument may make provision about the matter by applying an ACT law—

- (a) as in force at a particular time; or
- (b) as in force from time to time.

(3) The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.

Note For information on the operation of s (3), see the examples to s (9).

(4) If the relevant instrument makes provision about the matter by applying a law of another jurisdiction or an instrument, the following provisions apply:

- (a) if subsection (3) is displaced by, or under authority given by, an Act or the authorising law—the law of the other jurisdiction or instrument is applied as in force from time to time;

Note For the displacement of s (3), see s 6, examples 1 and 2.

- (b) if subsection (3) is not so displaced and the relevant instrument does not provide that the law of the other jurisdiction or instrument is applied as in force at a particular time—the law or instrument is taken to be applied as in force when the relevant instrument is made.

.....

(5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

(6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

- (a) the law or instrument as in force at the time the relevant instrument is made;
- (b) each subsequent amendment of the law or instrument;
- (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
- (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

(7) The authorising law or, if the relevant instrument is a subordinate law or disallowable instrument, the relevant instrument may provide that—

- (a) subsection (5) or (6) does not apply to the relevant instrument; or
- (b) subsection (5) or (6) applies with the modifications stated in the authorising law or relevant instrument.

(8) If a provision of an Act, subordinate law or disallowable instrument authorises or requires the application of a law or instrument, the provision authorises the making of changes or modifications to the law or instrument for that application.

(9) This section is a determinative provision.

.....

(10) In this section:

ACT law means an Act, subordinate law or disallowable instrument.

Note A reference to an Act, subordinate law or disallowable instrument includes a reference to a provision of the Act, law or instrument (see s 7, s 8 and s 9).

applying includes adopting or incorporating.

Note See also s 157 (Defined terms—other parts of speech and grammatical forms).

disallowable instrument, for a Commonwealth Act, means an instrument that can be disallowed under the *Legislative Instruments Act 2003* (Cwlth), part 5 (Parliamentary scrutiny of legislative instruments), including that part, or provisions of that part, applied by another Commonwealth law.

instrument includes a provision of an instrument, but does not include an ACT law or a law of another jurisdiction.

law of another jurisdiction means—

- (a) a Commonwealth Act or a disallowable instrument under a Commonwealth Act; or
- (b) a State Act, or any regulation or rule under a State Act; or
- (c) a New Zealand or Norfolk Island Act, or any regulation or rule under a New Zealand or Norfolk Island Act; or
- (d) a provision of a law mentioned in paragraphs (a) to (c).

In brief, the general rule is that instruments incorporated by reference, unless they are ACT laws and subject to the scrutiny of the Legislative Assembly, apply as they exist “only at a particular time” (see subsection 47 (3)). The purpose of this requirement is to ensure that the Legislative Assembly retains control over the content of what is incorporated by reference. Further, the general rule is that the content of instruments that are incorporated by reference (including, where provided for, any amendments to those instruments) are “notifiable instruments” for the purposes of the Legislation Act (see subsection 47 (6)). This means that they must be published on the ACT Legislation Register. The purpose of this requirement is to ensure that the public can easily access the content of such instruments, in order to familiarise themselves with the content of such instruments.

These general rules are, however, able to be “displaced”. In the case of the Building Act, this displacement is provided for in section 152 of the Building Act, which provides:

152 Regulation-making power

(1) The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(2) The regulations may make provision in relation to-

- (a) the approval of building work in relation to particular buildings; and
- (b) anything else in relation to the approval of building work on particular buildings.

(3) The regulations may make provision about a matter by applying, adopting or incorporating (with or without change) a standard, or a provision of a standard, as in force from time to time.

(4) The Legislation Act, section 47 (6) does not apply in relation to an Australian Standard, or an Australian/New Zealand Standard, applied, adopted or incorporated as in force from time to time under the regulations.

(5) The regulations may also prescribe offences for contraventions of the regulations and prescribe maximum penalties of not more than 10 penalty units for offences against the regulations.

The effect of subsection 152 (3) is that regulations can be made that apply instruments such as Australian Standards, as they exist from time to time. The effect of subsection 152 (4) is that such instruments (and any amendments to them) are not notifiable instruments, with the effect that the public has no easy access to them. As a result, the Committee acknowledges that the Legislative Assembly has expressly provided for the incorporation of reference of Australian Standards, as they exist from time to time, and for the limitations on public accessibility to such instruments. As a result, the Committee makes no further comment on the provisions in question.

Part 3.2 of Schedule 3 to this subordinate law exempts “merit track matters” from third-party review in the Administrative Appeals Tribunal. Part 3.3 of Schedule 3 exempts “impact track matters” from third-party AAT review. The Explanatory Statement has the following to say in relation to Schedule 3:

Schedule 3, part 3.1

Schedule 3, part 3.2, column 2 prescribes the element of building work that is taken to be fundamentally non-compliant if the degree of non-compliance of the aspect of the element is as mentioned in column 3 or exceeds that degree.

Under section 50 and the Act a certifier who becomes aware of fundamentally noncompliant work is required to notify the construction occupations registrar of the noncompliance.

An example of the effect of item 9 in Schedule 3, part 3.2 is set out after the part.

Principle (a) (ii) of the Committee’s terms of reference requires it to consider whether a subordinate law unduly trespasses on rights previously established by law. Principle (a) (iii) of the Committee’s terms of reference requires it to consider whether a subordinate law makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. On its face, Schedule 3 to this subordinate law offends against both of these principles. No explanation is provided in the Explanatory Statement. As a result, the Committee draws the Legislative Assembly’s attention to Schedule 3 to this subordinate law, on the basis that it may be considered to offend against principles (a) (ii) and (iii) of the Committee’s terms of reference.

REGULATORY IMPACT STATEMENTS

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

Subordinate Law SL2008-2 being the Planning and Development Regulation 2008, including a regulatory impact statement, made under the *Planning and Development Act 2007* supplements the provisions of the Act.

This subordinate law is accompanied by a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

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:

.....

- (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.

The regulatory impact statement for this instrument contains the following statement:

Consistency with the policy objectives of the authorising law and impact analysis

The proposed regulation is consistent with the Legislative Assembly's Scrutiny Committee principles, and with the policy objectives of the *Planning and Development Act 2007*.

The following table provides in summary form:

- 1) a brief description of the purpose and function of the provisions;
- 2) a statement on consistency of the provisions with the policy objectives of the authorising law;
- 3) an indication of whether the provisions are
 - a) existing ones carried over unchanged, or carried over as streamlined versions of existing provisions, from previous legislation (Act, regulation or disallowable instrument); or
 - b) new ones consistent with objectives of the new Act and arising out of consultation etc;
- 4) a general statement of the costs and benefits of the provision.

While the Committee acknowledges that this regulatory impact statement appears to be otherwise detailed and comprehensive, the Committee does not consider that it meets the requirement in paragraph 35 (h) of the *Legislation Act*. The Committee does not consider that the mere assertion that the proposed regulation is "consistent with the Legislative Assembly's Scrutiny Committee principles" meets the requirement that a regulatory impact assessment contain "a brief assessment of the consistency of the proposed law with the scrutiny committee principles". As a result, 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.

Subordinate Law SL2008-3 being the Building (General) Regulation 2008, including a regulatory impact statement, made under the *Building Act 2004* repeals the *Building Regulation 2004* and caters for reforms under the Planning System Reform Project.

This subordinate law is accompanied by a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

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:

-
- (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.

The regulatory impact statement for this instrument contains no such assessment. In making this comment, the Committee notes that it has already drawn attention to the fact that the Explanatory Statement that accompanies this subordinate law does not address the criteria that the Committee has consistently laid out in relation to the justification of strict liability offences. The Committee also notes that it has already drawn attention to the fact that this subordinate law expressly exempts various matters from merits review by the Administrative Appeals Tribunal. As a result, 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.

GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, dated 25 February 2008, in relation to comments made in Scrutiny Report 48 concerning:

- Disallowable Instrument DI2007-229, being the Residential Tenancies Tribunal Appointment 2007 (No. 1);
- Disallowable Instrument DI2007-230, being the Residential Tenancies Tribunal Appointment 2007 (No. 2); and
- Disallowable Instrument DI2007-231, being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3).

The Committee wishes to thank the Attorney-General for his helpful response.

Bill Stefaniak, MLA
Chair

March 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)
Members' Hiring Arrangements Approval 2004 (No 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-
holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)
Determination 2004 (No 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)
Approval 2004 (No 1)
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (**PMB**)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination
2005 (No 1)
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination
2005 (No 1)
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination
2005 (No 1)
Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval
2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 (**PMB**)

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
 Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
 Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
 Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
 Hotel School (Repeal) Bill 2005
 Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 (PMB)

Report 19, dated 21 November 2005

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 (PMB)
 Terrorism (Preventative Detention) Bill 2006 (PMB)

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
 Education (School Closures Moratorium) Amendment Bill 2006 (PMB)
 Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006

Crimes Amendment Bill 2006 (PMB)
 Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007

Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 43, dated 13 August 2007

Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)
 Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)
 Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007

Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)
 Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007

Crimes (Street Offences) Amendment Bill 2007 (PMB)
 Legal Profession Amendment Bill 2007

Bills/Subordinate Legislation

Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

Report 47, dated 12 November 2007

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 48, dated 19 November 2007

Subordinate Law SL2007-33 - Poisons Amendment Regulation 2007 (No. 1)

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)

Sentencing Legislation Amendment Bill 2007 (PMB)

Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)

Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)

Disallowable Instrument DI2007-271 - Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-276 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-277 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-278 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-279 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4)

Disallowable Instrument DI2007-283 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-284 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-285 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4)

Gene Technology Amendment Bill 2007

Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)

Human Cloning and Embryo Research Amendment Bill 2007

Long Service Leave (Private Sector) Bill 2007 (PMB)

Medicines, Poisons and Therapeutic Goods Bill 2007

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008

Disallowable Instrument DI2007-297 - Gene Technology Advisory Council Appointment 2007 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007

Disallowable Instrument DI2007-307 - Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1)

Planning and Development Legislation Amendment Bill 2008

Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Subordinate Law SL2007-42 - Public Health Amendment Regulation 2007 (No. 1)



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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



Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 48 of 19 November 2007. I offer the following response in relation to Disallowable Instrument DI2007-299 being the Residential Tenancies Tribunal Appointment 2007 (No. 1), Disallowable Instrument DI2007-230 being the Residential Tenancies Tribunal Appointment 2007 (No. 2), and Disallowable Instrument DI2007-231 being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3).

Disallowable Instruments DI2007-299 and DI2007-230

These instruments are made under subsections 112(1) and 113(1) respectively of the *Residential Tenancies Tribunal Act 1997* and appoint a specified person as President of the Residential Tenancies Tribunal and Acting President of the Residential Tenancies Tribunal respectively.

The report noted that there was no Explanatory Statement for these instruments, and that the Committee can only assume that the persons appointed are magistrates and the appointments are not public servant appointments. I confirm that the persons appointed are magistrates and are not public servants. Further, I have arranged for an Explanatory Statement to be prepared for both of these instruments, and I attach copies of the Explanatory Statements for your information.

Disallowable Instrument DI2007-231

This instrument is made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* and appoints a specified person as a member of the ACT Professional Standards Council (ACT Council).

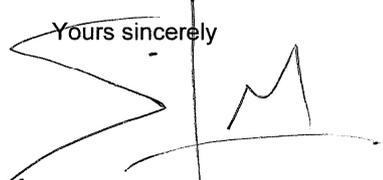
I note the Committee's comment that the Explanatory Statement for DI2007-231 does not indicate whether the person appointed is a public servant.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

In responding to the Scrutiny of Bills Report No. 44 of 27 August 2007 on Disallowable Instruments DI2007-120 and DI2007-131 I advised and confirmed that the person now being re-appointed under Disallowable Instrument DI2007-231 is not an ACT public servant.

I trust that this information addresses the concerns raised by the Committee.

Yours sincerely

Simon Corbell MLA
Attorney General
25.2.08

Australian Capital Territory

Explanatory Statement

Residential Tenancies Tribunal Appointment 2007 (No1)

Disallowable Instrument DI 2007- 229

made under the

Residential Tenancies Act 1997, Section 112(1)

Under subsection 112(1) of the *Residential Tenancies Act 1997* the Minister may appoint by instrument a magistrate to be President of the Residential Tenancies Tribunal.

The Residential Tenancies Tribunal is a body established under Part 7 of the Act to deal with applications, provide assistance with respect to those applications and refer persons to a range of private and public sector services providing residential tenancy advice.

The signed Disallowable Instrument reappoints Magistrate Ronald John Cahill as President of the Residential Tenancies Tribunal following the expiry of his appointment under a previous instrument. The appointment is until 30 June 2008.

The Standing Committee of Legal Affairs has been consulted as required under the provisions of the *Legislation Act 2001*. The Committee advised that it had no concerns with the appointments.

Australian Capital Territory

Explanatory Statement

Residential Tenancies Tribunal Appointment 2007 (No 2)

Disallowable Instrument DI 2007- 230

made under the

Residential Tenancies Act 1997, Section 113(1)

Under subsection 113(1) of the *Residential Tenancies Act 1997* the Minister may appoint by instrument a magistrate to be Acting President of the Residential Tenancies Tribunal.

The Residential Tenancies Tribunal is a body established under Part 7 of the Act to deal with applications, provide assistance with respect to those applications and refer persons to a range of private and public sector services providing residential tenancy advice.

The signed Disallowable Instrument reappoints Magistrate Peter Geoffrey Dingwall as Acting President of the Residential Tenancies Tribunal following the expiry of his appointment under a previous instrument. The appointment is until 30 June 2008.

The Standing Committee of Legal Affairs has been consulted as required under the provisions of the *Legislation Act 2001*. The Committee advised that it had no concerns with the appointments.



Legislative Assembly for the ACT

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

Scrutiny Report

31 MARCH 2008

Report 52

TERMS OF REFERENCE

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

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS

Bill—No comment

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

UTILITIES (NETWORK FACILITIES TAX) REPEAL BILL 2008
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This Bill would repeal the *Utilities (Network Facilities Tax) Repeal Bill 2008*.

Bills—Comment

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2008

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

Proposed amendment of the *Human Rights Commission Act 2005 (HRC Act)*

Report under section 38 of the Human Rights Act 2004

Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?

Privacy and reputational interests of a person who is the subject of a complaint to the Human Rights Commission – *Human Rights Act 2004* section 12

Is the proposal to relieve the Human Rights Commission in certain circumstances of the obligation to notify the subject of complaint of the fact of the complaint having been made compatible with the right to privacy in HRA section 12?
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There is a question whether the right to privacy stated in HRA section 12 is limited by the proposal to insert new subsections 45(3) and (4) in the HRC Act. Section 12 provides:

12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

Currently, subsection 43(1) of the HRC Act requires the Commission to “deal with complaints promptly and efficiently”. By paragraph 43(2)(c) it must “before considering the complaint, tell the complainant and the person complained about, in writing, that the complaint is to be considered”. It may be argued that there is a privacy rationale for this latter provision. In many cases, the complaint would reflect adversely on the reputation of the subject of the complaint, and he or she should be in a position to deal with the allegations made.

The Bill proposes to qualify the obligations in subsection 43(1) and paragraph 43(2)(c) by inserting into the Act two new subsections to section 43.

- Proposed subsection 43(3) would provide that the Commission need not consider a complaint in various circumstances, including that it is “is frivolous, vexatious or not made honestly” (paragraph 43(3)(a)(i)), or “lacks substance” (paragraph 43(3)(a)(ii)).

- Proposed subsection 43(4) would provide that the Commission need not give a notice under paragraph 43(2)(c) to the person complained about “if, because of subsection (3), it decides - (a) not to consider the complaint; or (b) not to consider the complaint further”.

Paragraph 43(2)(c) would also be amended to cross-refer to subsection 43(3). The Committee raises the question whether in paragraph 43(2)(c) it would be more appropriate to cross-refer to subsection 43(4).

The Explanatory Statement refers to proposed subsection 43(3) and asserts that its statement of the circumstances in which a complaint need not be considered may be characterised as ones “where it would be inappropriate” for the commission to consider a complaint. It then states:

The new subsection also exempts the commission from notifying people complained about in cases where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance.

This statement is not accurate in that (1) it is proposed subsection 43(4) that states the exemption, and (2) the latter is not limited to “cases where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance”. For example, and of significance, is that subsection 43(4) would apply where a complaint is not considered where it “is to be referred to another statutory officer-holder” (paragraph 43(3)(a)(iii)).

The Committee considers that there are good grounds to argue that the person complained about should be made aware that the complaint is to be referred to another statutory officer-holder.

It may also be argued that this person should also be made aware even where the commission is satisfied that the complaint is frivolous, vexatious or not made honestly, or where the complaint lacks substance. As noted above, a complaint will often reflect adversely on the reputation of the subject of the complaint, and he or she should be in a position to deal with the allegations made. It is not suggested that the person should be able to require the commission to undertake any investigation. The Committee notes, however, that under the *Privacy Act 1988* (Commonwealth), and the *Freedom of Information Act 1989* (ACT), the person might require the commission to attach a statement from the person to any record kept by the commission of the complaint. Of course, the person cannot take advantage of this facility unless they are made aware that a record exists. The force of this argument depends on what happens to any record of a complaint, and on this issue the Committee considers that the Minister provide advice to the Assembly.

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

TOBACCO AMENDMENT BILL 2008

This Bill would amend the *Tobacco Act 1927* to prohibit the display of smoking products at point of sale; remove the ministerial exemption to allow tobacco advertising and sponsorship; amend the definition of vending machine; ban rewards for smoking product purchases; include a power for the Minister to declare certain smoking products to be prohibited; prohibit split packets, and harmonise the Act to the principles of the *Criminal Code 2002*.

Report under section 38 of the Human Rights Act 2004

Do any the clauses of the Bill “unduly trespass on personal rights and liberties”?

Freedom of expression – HRA subsection 16(2)

Are the ways 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)?

Several of the provisions of the Bill engage 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’,¹ and on this basis the relevant provisions appear to be:

- proposed subsection 9(2) (clause 8) – governing where a price ticket for a product line for sale must be located;
- proposed section 20 (clause 10) – creating an offence where a smoking product is displayed at a smoking outlet;
- proposed section 23 (clause 11) – creating offences where smoking is advertised;
- proposed section 25 (clause 13) – creating offences where an object or entitlement promotes certain things;
- proposed section 18 (Schedule 1.3) – creating an offence where a person sells or imports food or toys where the sale or the importation publicises or promotes certain things;
- proposed section 26 (Schedule 1.6) – creating an offence where a person supplies a smoking product for free and the supply promotes the sale of any smoking product for value; and
- proposed section 27 (Schedule 1.6) – creating an offence where a person conducts a competition that promotes 1 or more of certain things.²

The Explanatory Statement does not however address the significance of HRA subsection 16(2) to an assessment of the compatibility of the Bill with the HRA. The Committee can do no more than sketch out the issues relevant to a human rights assessment of the proposed amendments.

The issue in relation to each provision is whether the government has shown the limitation of freedom of expression 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.

Do the limitations on freedom of expression pursue a legitimate objective?

The answer to this question is probably ‘yes’.

¹ 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.”

² It is possible that provisions that compel the making of statements also engage the right to freedom of expression (for example, proposed section 66 (Schedule 1.11)).

The Explanatory Statement does outline some objectives, but in rather limited terms. It states that the proposed prohibition on the display of smoking products at point of sale “will remove one of the last remaining means for the tobacco industry to promote its products”. This objective underlies several other proposed amendments.

It is also stated that a requirement for the placing smoking products out of sight (clause 8) “will remove the incentive for opportunistic purchases, particularly by young people”. The proposal to ban split packets (clause 10) is based on a “concern that the packets were likely to induce young people to purchase split packets”. It is proposed that the Minister may make a declaration to prohibit a smoking product that has “a distinctive fruity, sweet or confectionary-like character and that the nature of the product or its packaging may be attractive to children” (clause 10). The proposal that a person will commit an offence if in direct or indirect association of the sale of a smoking product the person provides or offers to provide a prize, gift, discount, voucher, ticket, points or credit in a customer reward scheme is designed “to reduce tobacco consumption rates and sends prospective customers a clear message that tobacco smoking is not an activity worthy of a reward” (clause 13).

In a recent decision, the Canadian Supreme Court generally endorsed the objectives of the legislation under consideration in that case:

“to provide a legislative response to a national public health problem of substantial and pressing concern ...” and, more particularly, “to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases”; “to protect young persons and others from inducements to use tobacco products and the consequent dependence on them”; “to protect the health of young persons by restricting access to tobacco products”; and “to enhance public awareness of the health hazards of using tobacco products”.³

The Court accepted that these objectives were “pressing and substantial”, and a similar conclusion may be accepted so far as concerns the Territory.

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”⁴?; and

³ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), para 18.

⁴ See Human Rights Amendment Bill 2007, clause 4, proposing a new 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.*”

- 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?”⁵

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 deal in tobacco products 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.

Strict liability offences

Some provisions of the Bill amend the *Tobacco Act 1927* to create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable limitation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

Proposed sections 8, 9, 10 (see clause 8) and 19 (see clause 10) of the Tobacco Act would create strict liability offences.

The Explanatory Statement states a general justification:

Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and protection of the revenue. People who opt into a licensing scheme for the purpose of selling tobacco are considered to be professionals who can reasonably be expected to be aware of their duties and obligations. As such, strict liability offences are more readily justified when a defendant can reasonably be expected, because of his or her professional involvement, to be aware of the requirements of the law. A defendant’s frame of mind for some regulatory offences is irrelevant, unless some knowledge or intention ought to be required to commit a particular offence. Penalties for strict liability offences contained in the Bill do not exceed more than 50 penalty units and do not propose a term of imprisonment.

These offences are regulatory in nature, and the penalty within an acceptable range for a strict liability offence.

Several other provisions of the Act would be amended to create a strict liability offence to the effect of ‘harmonising’ the Act with the *Criminal Code 2002*. The Explanatory Statement explains:

⁵ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII) para 45.

By undertaking harmonisation it is ensured that the Criminal Code applies to all the offences in the Tobacco Act rather than only to those offences amended in the substantive part of the Bill. For the offences to operate effectively, to ensure that they continue to operate as they were intended, it was important for all of the offences contained in the Act to be restructured to conform to the general principles contained in the Code.

The Committee notes that the penalties for these offences contained do not exceed more than 50 penalty units and do not propose a term of imprisonment.

The Committee considers it very unlikely that there is in any respect an incompatibility with the HRA in respect of strict liability, but draws the rights issues involved in the creation of strict liability offences to the attention of the Legislative Assembly.

Comment on explanatory statement

The Committee does not consider that the explanatory statement meets the technical and stylistic standards expected. At some places, the explanatory statement:

- did not explain the substance of the relevant clause of the Bill;
- did not state that substance accurately;
- in one case where it identified a potential incompatibility with the HRA, did not identify the relevant right; and
- provided an explanation that is very difficult to follow.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2007-309 being the Health Professionals (Podiatrists Board) Appointment 2007 (No. 1) made under the *Health Professionals Act 2004* and the *Health Professionals Regulation 2004* appoints specified persons as members of the ACT Podiatrists Board.

Disallowable Instrument DI2007-310 being the Board of Senior Secondary Studies Appointment 2007 (No. 10) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as Chair of the ACT Board of Senior Secondary Studies.

Disallowable Instrument DI2007-311 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2007 (No. 2) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person as the acting appointee representing the interests of employers to the ACT Accreditation and Registration Council.

Disallowable Instrument DI2007-312 being the Taxation Administration (Ambulance Levy) Determination 2007 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2006-251 and determines the relevant amount for the purposes of calculating the ambulance levy.

Disallowable Instrument DI2007-313 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2007 (No. 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2007-113 and determines rates of duty payable under the Duties Act 1999.

Disallowable Instrument DI2007-314 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 7) 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 for ACT registered vehicles participating in the Street Machine Magazine 21st Summernats Car Festival.

Disallowable Instrument DI2007-315 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 8) 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 21st Summernats Car Festival.

Disallowable Instrument DI2007-316 being the Public Places Names (Macgregor) Determination 2007 (No. 2) made under section 3 of the *Public Place Names Act 1989* revokes DI2007-308 and determines the names of new roads in the Division of Macgregor.

Disallowable Instrument DI2007-317 being the Radiation Protection (Council Member) Appointment 2007 (No. 1) made under sections 68 and 70 of the *Radiation Protection Act 2006* appoints specified persons as chairperson and member of the Radiation Council.

Disallowable Instrument DI2007-318 being the Radiation Protection (Council Member) Appointment 2007 (No. 2) made under sections 68 and 70 of the *Radiation Protection Act 2006* appoints specified persons as deputy chairperson and member of the Radiation Council.

Disallowable Instrument DI2007-319 being the Radiation Protection (Council Member) Appointment 2007 (No. 3) made under section 68 of the *Radiation Protection Act 2006* appoints a specified person as a member of the Radiation Council.

Disallowable Instrument DI2007-320 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2007-175 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2007-321 being the Health (Fees) Determination 2007 (No. 3) made under section 192 of the *Health Act 1993* revokes DI2007-161 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2007-322 being the Health (Interest Charge) Determination 2007 (No. 1) made under section 193 of the *Health Act 1993* revokes DI2006-241 and determines interest charged for the purposes of the Act.

Disallowable Instrument DI2008-12 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 2) 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 timed special (competitive) stages of the 2008 Solartec Renewables Blue Range Rally (Light Car Club of Canberra).

Disallowable Instrument DI2008-13 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2008 (No. 1) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* refers the provision of a price direction for the supply of electricity to franchise customers to the Independent Competition and Regulatory Commission.

Disallowable Instrument DI2008-15 being the Canberra Institute of Technology (Advisory Council—Chair) Appointment 2008 (No. 1) made under section 32 of the *Canberra Institute of Technology Act 1987* appoints a specified person as chair of the Canberra Institute of Technology Advisory Council.

Disallowable Instrument DI2008-17 being the Public Place Names (Franklin) Determination 2008 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Franklin.

Disallowable Instrument DI2008-18 being the University of Canberra (Honorary Degree) Statute 2008 made under section 42 of the *University of Canberra Act 1989* repeals DI1992-191 and permits the awarding of Honorary Degrees at all levels.

Disallowable Instruments—Comment

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

No explanatory statement / Under what provision is this instrument made?

Disallowable Instrument DI2007-323 being the Auditor-General Acting Appointment 2007 made under clause 6 of the Schedule to the *Auditor-General Act 1996* appoints a specified person to act as Auditor-General.

This instrument appoints a specified person to act as Auditor-General. It states that it is made “[u]nder clause 6 of the Schedule to the *Auditor-General Act 1996*”. Clause 6 of Schedule 1 provides:

6 Acting auditor-general

Before the Executive appoints a person to act as auditor-general, the Minister must consult the presiding member of the public accounts committee about the proposed appointment.

Clearly, clause 6 does not provide the power to appoint an acting Auditor-General. The Committee considers that it is more likely that section 209 of the *Legislation Act 2001* provides the power to make the appointment.

As there is no Explanatory Statement for this instrument, the Committee (and the Legislative Assembly) is given no indication as to whether or not the presiding member of the Public Accounts Committee has been consulted about the proposed appointment. As a result, the Committee draws this instrument to the attention on the Legislative Assembly, as it may not be in accord with the general objects of the Act under which it is made, contrary to principle (a) (i) of the Committee’s terms of reference.

Retrospectivity

Disallowable Instrument DI2008-19 being the Domestic Violence Agencies (Project Coordinator) Appointment 2008 (No. 1) made under section 11 of the *Domestic Violence Agencies Act 1986* appoints a specified person as the Domestic Violence Project Coordinator.

This instrument appoints a specified person as the Domestic Violence Project Coordinator, under section 11 of the *Domestic Violence Agencies Act 1986*. The appointment is made retrospectively, with operation from 22 May 2007. The *Legislation Act 2001* imposes significant limitations on the retrospective operation of instruments. It 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.

The Explanatory Statement to the instrument refers to section 76 of the *Legislation Act*:

Section 76 of the *Legislation Act 2001* provides that a statutory instrument may commence retrospectively if it does not operate prejudicially. The retrospective appointment does not impose any liabilities on any person. It ensures that Ms Holder's right to legal immunity in relation to the performance of her function as DVPC extends to the period in which she was acting in the position.

While the above statement, on its face, makes sense, the Committee seeks from the Minister some further information in relation to the proposition that the retrospective operation of the appointment does not operate prejudicially. If the effect of the instrument is to give Ms Holder a legal immunity, retrospectively, the Committee considers that it is conceivable that a person or entity might have accrued a legal right against Ms Holder in the period during which she *did not* have the immunity and that the effect of this instrument is to take away that person or entity's legal right. If that is the case, there is an issue with section 76 of the *Legislation Act*. While the Committee recognises that this may seem like a fanciful proposition, it is a fact that the retrospective granting of a legal immunity could also have an impact on persons whose legal rights are thwarted by the granting of that immunity.

Subordinate Law—No comment

The Committee has examined the following subordinate law and offers no comments on it:

Subordinate Law SL2008-1 being the Crimes (Sentence Administration) Amendment Regulation 2008 (No. 1) made under the *Crimes (Sentence Administration) Act 2005* declares NSW to be a participating jurisdiction for the purposes of formally transferring and enforcing community-based sentences between the ACT and NSW.

Subordinate Laws—Comment

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

Strict liability offence

Subordinate Law SL2008-2 being the Planning and Development Regulation 2008, including a regulatory impact statement, made under the *Planning and Development Act 2007* supplements the provisions of the Act.

Section 76 of this instrument provides for a strict liability offence, in relation to the conducting of inquiries by an “inquiry panel” established under section 228 of the *Planning and Development Act 2007*. Section 76 provides:

76 Inquiries to be public

- (1) An inquiry panel must conduct its inquiry in public.
- (2) However, an inquiry panel may—
 - (a) direct that the inquiry or any part of it be conducted in private, and give directions about who may be present during any private hearing; or
 - (b) give directions prohibiting or restricting the publication of information given to the inquiry, or of matters contained in documents lodged with the inquiry.
- (3) In making a direction under subsection (2), an inquiry panel must consider—
 - (a) the principle that it is desirable that the inquiry should be conducted in public, and that information given to the inquiry, and documents lodged with the inquiry, should be available to interested people and to the public; and
 - (b) in the circumstances, whether confidentiality is required.
- (4) A person must not contravene a direction under subsection (2).
Maximum penalty: 10 penalty units.
- (5) An offence against this section is a strict liability offence.

As noted in *Scrutiny Report No 2 of the Sixth Assembly*, strict liability offences are a recurring issue for the Committee. In *Scrutiny Report No 2* (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.

In particular, the Committee noted that, in its *Scrutiny Report No 38 of the Fifth Assembly*, it had proposed 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 contains the following statement:

Section 76(3) sets out what an inquiry panel must consider in deciding to conduct an inquiry in private or restrict publication of information. It is a strict liability offence to contravene a direction under section 76(2) and the maximum penalty is 10 penalty units. A penalty unit is defined in the *Legislation Act 2001* (the Legislation Act) and is currently \$100.

This statement does not in any way address the Committee's oft-stated requirements in relation to strict liability offences. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a) (ii) of the Committee's terms of reference.

Strict liability offence (positive comment) / Accessibility of legislation / Exemptions from merits review

Subordinate Law SL2008-3 being the Building (General) Regulation 2008, including a regulatory impact statement, made under the Building Act 2004 repeals the Building Regulation 2004 and caters for reforms under the Planning System Reform Project.

The Committee notes that section 45 of this subordinate law creates 2 strict liability offences. The Committee notes with approval that the Explanatory Statement to this subordinate law provides a detailed explanation as to:

- why a fault element (or guilty mind) is not required; and,
- what defences are nevertheless available to a person charged with one of the relevant offences.

The Committee also notes that this explanation is further enhanced by the inclusion of a discussion as to the human rights issues that are raised by the inclusion of these strict liability offences in the subordinate law.

The Committee commends to other agencies the approach taken in the Explanatory Statement to this instrument in relation to strict liability offences.

Section 45 of this subordinate law disapplies subsection 47 (5) of the *Legislation Act 2001*. It provides:

45 Non-application of Legislation Act, s 47 (5)

The Legislation Act, s 47 (5) does not apply to the asbestos removal code or the tolerances guide.

Subsection 47 (5) of the Legislation Act provides:

(5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

Both “asbestos removal code” and “tolerances guide” are defined in the Dictionary to this subordinate law, which provides:

asbestos removal code means a code of practice for the safe removal of asbestos approved by the Minister under the Act, section 139B.

Section 139B of the *Building Act 2004* provides:

139B Approval of asbestos code

(1) The Minister may approve codes of practice for this Act.

Note A power given under an Act to make a statutory instrument (including a code of practice) includes power to amend or repeal the instrument (see Legislation Act, s 46 (1)).

(2) A code of practice may—

- (a) set out practices, standards and other matters about building work if the work involves the use, handling or disposal of asbestos; and
- (b) be approved as in force from time to time.

(3) An approved code of practice is a disallowable instrument.

Note 1 A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Note 2 An amendment or repeal of a code of practice is also a disallowable instrument (see Legislation Act, s 46 (2)).

(4) The construction occupations registrar must make a copy of the asbestos code, and any instrument (or provision of an instrument) applied (with or without change) by the asbestos code, available for public inspection during ordinary office hours at—

- (a) the office of the construction occupations registrar; or
- (b) another place prescribed by regulation.

(5) In this section:

applied includes adopted and incorporated.

It is not entirely clear to the Committee what is the intended effect of section 45 of this subordinate law in disapplying subsection 47 (5) of the Legislation Act in relation to the asbestos removal code. There is no express power in section 139B of the Building Act to apply the law of another jurisdiction. There is, however, the power to approve a code of practice “as in force from time to time”.

The Explanatory Statement to this subordinate law states:

Section 45 is intended to disapply the requirement of the Legislation Act, s 47 (5), to notify the asbestos removal code and the tolerances guide on the legislation register. Those documents are mentioned in the section and the provision that mentioned them indicates where the documents can be accessed on the internet. The reason for not requiring the documents to be notified is that they are freely available on the internet and are subject to copyright limitations.

This being so, it seems that it is intended that the obligation to notify the asbestos removal code on the ACT Legislation Register is to be dispensed with. The Committee notes, however, that the Explanatory Statement indicates that the relevant empowering provisions indicate where (on the internet) the documents in question can be accessed. While this may be the case with the tolerances guide (see below), the Committee is unsure of the basis of this assertion in relation to the asbestos removal code.

The Committee would appreciate the Minister's advice as to the purpose of section 45 of this subordinate law and, in particular, on where (other than on the ACT Legislation Register) the asbestos removal code is publicly available.

Turning to the "tolerances guide", the Committee notes that that term is defined in the Dictionary to this subordinate law as follows:

tolerances guide, for schedule 3 (Fundamentally noncompliant building work)—see schedule 3, section 3.1.

Section 3.1 of Schedule 3 to this subordinate law then defines "tolerances guide" as follows:

tolerances guide means the Guide to Standards and Tolerances 2007, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disappplied (see s 47 (7)).

Note 2 The Legislation Act, s 47 (5) is disappplied in relation to the tolerances guide by s 45.

Note 3 The tolerances guide can be viewed at, or downloaded from, www.buildingcommission.com.au/publicationslibrary.

As the Committee has already noted above, the Explanatory Statement to this subordinate law states that the empowering provision for the tolerances guide indicates where it can be accessed on the internet. The Committee has been able to confirm that the tolerances guide is, in fact, available on the website identified (though perhaps not using the specific address provided). As a result, the Committee has no further comment on this particular aspect of the subordinate law. The Committee would, however, appreciate the Minister's advice in relation to its comments above about the accessibility of the asbestos removal code.

A related accessibility issue is the reference, in various provisions of this subordinate law (sections 13, 16, 17, Schedule 1 and the Dictionary) to various Australian Standards. The Committee notes that, in each case, the relevant Australian Standard is defined as applying "as in force from time to time". An example is section 17 of the subordinate law, which contains the following provision:

(8) In this section:

AS 1684 means Australian Standard 1684 (*Residential timber-framed construction—design criteria*), as in force from time to time.

AS 2870 means Australian Standard 2870 (*Residential slabs and footings—construction*), as in force from time to time.

AS 3623 means Australian Standard 3623 (*Domestic metal framing*), as in force from time to time.

AS 3700 means Australian Standard 3700 (*Masonry structures*), as in force from time to time.

The application, by reference, of "external", non-disallowable instruments is generally determined by section 47 of the Legislation Act, which provides (in part):

47 Statutory instrument may make provision by applying law or instrument

(1) This section applies if an Act, subordinate law or disallowable instrument (the *authorising law*) authorises or requires the making of a statutory instrument (the *relevant instrument*) about a matter.

(2) The relevant instrument may make provision about the matter by applying an ACT law—

- (a) as in force at a particular time; or
- (b) as in force from time to time.

(3) The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.

Note For information on the operation of s (3), see the examples to s (9).

(4) If the relevant instrument makes provision about the matter by applying a law of another jurisdiction or an instrument, the following provisions apply:

- (a) if subsection (3) is displaced by, or under authority given by, an Act or the authorising law—the law of the other jurisdiction or instrument is applied as in force from time to time;

Note For the displacement of s (3), see s 6, examples 1 and 2.

- (b) if subsection (3) is not so displaced and the relevant instrument does not provide that the law of the other jurisdiction or instrument is applied as in force at a particular time—the law or instrument is taken to be applied as in force when the relevant instrument is made.

.....

(5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

(6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

- (a) the law or instrument as in force at the time the relevant instrument is made;
- (b) each subsequent amendment of the law or instrument;
- (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
- (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

(7) The authorising law or, if the relevant instrument is a subordinate law or disallowable instrument, the relevant instrument may provide that—

- (a) subsection (5) or (6) does not apply to the relevant instrument; or
- (b) subsection (5) or (6) applies with the modifications stated in the authorising law or relevant instrument.

(8) If a provision of an Act, subordinate law or disallowable instrument authorises or requires the application of a law or instrument, the provision authorises the making of changes or modifications to the law or instrument for that application.

(9) This section is a determinative provision.

.....

(10) In this section:

ACT law means an Act, subordinate law or disallowable instrument.

Note A reference to an Act, subordinate law or disallowable instrument includes a reference to a provision of the Act, law or instrument (see s 7, s 8 and s 9).

applying includes adopting or incorporating.

Note See also s 157 (Defined terms—other parts of speech and grammatical forms).

disallowable instrument, for a Commonwealth Act, means an instrument that can be disallowed under the *Legislative Instruments Act 2003* (Cwlth), part 5 (Parliamentary scrutiny of legislative instruments), including that part, or provisions of that part, applied by another Commonwealth law.

instrument includes a provision of an instrument, but does not include an ACT law or a law of another jurisdiction.

law of another jurisdiction means—

- (a) a Commonwealth Act or a disallowable instrument under a Commonwealth Act; or
- (b) a State Act, or any regulation or rule under a State Act; or
- (c) a New Zealand or Norfolk Island Act, or any regulation or rule under a New Zealand or Norfolk Island Act; or
- (d) a provision of a law mentioned in paragraphs (a) to (c).

In brief, the general rule is that instruments incorporated by reference, unless they are ACT laws and subject to the scrutiny of the Legislative Assembly, apply as they exist “only at a particular time” (see subsection 47 (3)). The purpose of this requirement is to ensure that the Legislative Assembly retains control over the content of what is incorporated by reference. Further, the general rule is that the content of instruments that are incorporated by reference (including, where provided for, any amendments to those instruments) are “notifiable instruments” for the purposes of the Legislation Act (see subsection 47 (6)). This means that they must be published on the ACT Legislation Register. The purpose of this requirement is to ensure that the public can easily access the content of such instruments, in order to familiarise themselves with the content of such instruments.

These general rules are, however, able to be “displaced”. In the case of the Building Act, this displacement is provided for in section 152 of the Building Act, which provides:

152 Regulation-making power

(1) The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(2) The regulations may make provision in relation to-

- (a) the approval of building work in relation to particular buildings; and
- (b) anything else in relation to the approval of building work on particular buildings.

(3) The regulations may make provision about a matter by applying, adopting or incorporating (with or without change) a standard, or a provision of a standard, as in force from time to time.

(4) The Legislation Act, section 47 (6) does not apply in relation to an Australian Standard, or an Australian/New Zealand Standard, applied, adopted or incorporated as in force from time to time under the regulations.

(5) The regulations may also prescribe offences for contraventions of the regulations and prescribe maximum penalties of not more than 10 penalty units for offences against the regulations.

The effect of subsection 152 (3) is that regulations can be made that apply instruments such as Australian Standards, as they exist from time to time. The effect of subsection 152 (4) is that such instruments (and any amendments to them) are not notifiable instruments, with the effect that the public has no easy access to them. As a result, the Committee acknowledges that the Legislative Assembly has expressly provided for the incorporation of reference of Australian Standards, as they exist from time to time, and for the limitations on public accessibility to such instruments. As a result, the Committee makes no further comment on the provisions in question.

Part 3.2 of Schedule 3 to this subordinate law exempts “merit track matters” from third-party review in the Administrative Appeals Tribunal. Part 3.3 of Schedule 3 exempts “impact track matters” from third-party AAT review. The Explanatory Statement has the following to say in relation to Schedule 3:

Schedule 3, part 3.1

Schedule 3, part 3.2, column 2 prescribes the element of building work that is taken to be fundamentally non-compliant if the degree of non-compliance of the aspect of the element is as mentioned in column 3 or exceeds that degree.

Under section 50 and the Act a certifier who becomes aware of fundamentally noncompliant work is required to notify the construction occupations registrar of the noncompliance.

An example of the effect of item 9 in Schedule 3, part 3.2 is set out after the part.

Principle (a) (ii) of the Committee’s terms of reference requires it to consider whether a subordinate law unduly trespasses on rights previously established by law. Principle (a) (iii) of the Committee’s terms of reference requires it to consider whether a subordinate law makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. On its face, Schedule 3 to this subordinate law offends against both of these principles. No explanation is provided in the Explanatory Statement. As a result, the Committee draws the Legislative Assembly’s attention to Schedule 3 to this subordinate law, on the basis that it may be considered to offend against principles (a) (ii) and (iii) of the Committee’s terms of reference.

REGULATORY IMPACT STATEMENTS

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

Subordinate Law SL2008-2 being the Planning and Development Regulation 2008, including a regulatory impact statement, made under the *Planning and Development Act 2007* supplements the provisions of the Act.

This subordinate law is accompanied by a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

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:

.....

- (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.

The regulatory impact statement for this instrument contains the following statement:

Consistency with the policy objectives of the authorising law and impact analysis

The proposed regulation is consistent with the Legislative Assembly's Scrutiny Committee principles, and with the policy objectives of the *Planning and Development Act 2007*.

The following table provides in summary form:

- 1) a brief description of the purpose and function of the provisions;
- 2) a statement on consistency of the provisions with the policy objectives of the authorising law;
- 3) an indication of whether the provisions are
 - a) existing ones carried over unchanged, or carried over as streamlined versions of existing provisions, from previous legislation (Act, regulation or disallowable instrument); or
 - b) new ones consistent with objectives of the new Act and arising out of consultation etc;
- 4) a general statement of the costs and benefits of the provision.

While the Committee acknowledges that this regulatory impact statement appears to be otherwise detailed and comprehensive, the Committee does not consider that it meets the requirement in paragraph 35 (h) of the *Legislation Act*. The Committee does not consider that the mere assertion that the proposed regulation is "consistent with the Legislative Assembly's Scrutiny Committee principles" meets the requirement that a regulatory impact assessment contain "a brief assessment of the consistency of the proposed law with the scrutiny committee principles". As a result, 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.

Subordinate Law SL2008-3 being the Building (General) Regulation 2008, including a regulatory impact statement, made under the *Building Act 2004* repeals the *Building Regulation 2004* and caters for reforms under the Planning System Reform Project.

This subordinate law is accompanied by a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

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:

-
- (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.

The regulatory impact statement for this instrument contains no such assessment. In making this comment, the Committee notes that it has already drawn attention to the fact that the Explanatory Statement that accompanies this subordinate law does not address the criteria that the Committee has consistently laid out in relation to the justification of strict liability offences. The Committee also notes that it has already drawn attention to the fact that this subordinate law expressly exempts various matters from merits review by the Administrative Appeals Tribunal. As a result, 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.

GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, dated 25 February 2008, in relation to comments made in Scrutiny Report 48 concerning:

- Disallowable Instrument DI2007-229, being the Residential Tenancies Tribunal Appointment 2007 (No. 1);
- Disallowable Instrument DI2007-230, being the Residential Tenancies Tribunal Appointment 2007 (No. 2); and
- Disallowable Instrument DI2007-231, being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3).

The Committee wishes to thank the Attorney-General for his helpful response.

Bill Stefaniak, MLA
Chair

March 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)
Members' Hiring Arrangements Approval 2004 (No 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-
holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)
Determination 2004 (No 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)
Approval 2004 (No 1)
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (**PMB**)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination
2005 (No 1)
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination
2005 (No 1)
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination
2005 (No 1)
Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval
2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 (**PMB**)

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
 Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
 Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
 Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
 Hotel School (Repeal) Bill 2005
 Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 (PMB)

Report 19, dated 21 November 2005

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 (PMB)
 Terrorism (Preventative Detention) Bill 2006 (PMB)

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
 Education (School Closures Moratorium) Amendment Bill 2006 (PMB)
 Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006

Crimes Amendment Bill 2006 (PMB)
 Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007

Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 43, dated 13 August 2007

Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)
 Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)
 Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007

Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)
 Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)
 Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007

Crimes (Street Offences) Amendment Bill 2007 (PMB)
 Legal Profession Amendment Bill 2007

Bills/Subordinate Legislation

Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

Report 47, dated 12 November 2007

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 48, dated 19 November 2007

Subordinate Law SL2007-33 - Poisons Amendment Regulation 2007 (No. 1)

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)

Sentencing Legislation Amendment Bill 2007 (PMB)

Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)

Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)

Disallowable Instrument DI2007-271 - Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-276 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-277 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-278 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-279 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4)

Disallowable Instrument DI2007-283 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-284 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-285 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4)

Gene Technology Amendment Bill 2007

Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)

Human Cloning and Embryo Research Amendment Bill 2007

Long Service Leave (Private Sector) Bill 2007 (PMB)

Medicines, Poisons and Therapeutic Goods Bill 2007

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008

Disallowable Instrument DI2007-297 - Gene Technology Advisory Council Appointment 2007 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007

Disallowable Instrument DI2007-307 - Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1)

Planning and Development Legislation Amendment Bill 2008

Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Subordinate Law SL2007-42 - Public Health Amendment Regulation 2007 (No. 1)



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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



Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 48 of 19 November 2007. I offer the following response in relation to Disallowable Instrument DI2007-299 being the Residential Tenancies Tribunal Appointment 2007 (No. 1), Disallowable Instrument DI2007-230 being the Residential Tenancies Tribunal Appointment 2007 (No. 2), and Disallowable Instrument DI2007-231 being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3).

Disallowable Instruments DI2007-299 and DI2007-230

These instruments are made under subsections 112(1) and 113(1) respectively of the *Residential Tenancies Tribunal Act 1997* and appoint a specified person as President of the Residential Tenancies Tribunal and Acting President of the Residential Tenancies Tribunal respectively.

The report noted that there was no Explanatory Statement for these instruments, and that the Committee can only assume that the persons appointed are magistrates and the appointments are not public servant appointments. I confirm that the persons appointed are magistrates and are not public servants. Further, I have arranged for an Explanatory Statement to be prepared for both of these instruments, and I attach copies of the Explanatory Statements for your information.

Disallowable Instrument DI2007-231

This instrument is made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* and appoints a specified person as a member of the ACT Professional Standards Council (ACT Council).

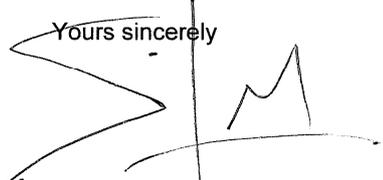
I note the Committee's comment that the Explanatory Statement for DI2007-231 does not indicate whether the person appointed is a public servant.

ACT LEGISLATIVE ASSEMBLY

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In responding to the Scrutiny of Bills Report No. 44 of 27 August 2007 on Disallowable Instruments DI2007-120 and DI2007-131 I advised and confirmed that the person now being re-appointed under Disallowable Instrument DI2007-231 is not an ACT public servant.

I trust that this information addresses the concerns raised by the Committee.

Yours sincerely

Simon Corbell MLA
Attorney General
25.2.08

Australian Capital Territory

Explanatory Statement

Residential Tenancies Tribunal Appointment 2007 (No1)

Disallowable Instrument DI 2007- 229

made under the

Residential Tenancies Act 1997, Section 112(1)

Under subsection 112(1) of the *Residential Tenancies Act 1997* the Minister may appoint by instrument a magistrate to be President of the Residential Tenancies Tribunal.

The Residential Tenancies Tribunal is a body established under Part 7 of the Act to deal with applications, provide assistance with respect to those applications and refer persons to a range of private and public sector services providing residential tenancy advice.

The signed Disallowable Instrument reappoints Magistrate Ronald John Cahill as President of the Residential Tenancies Tribunal following the expiry of his appointment under a previous instrument. The appointment is until 30 June 2008.

The Standing Committee of Legal Affairs has been consulted as required under the provisions of the *Legislation Act 2001*. The Committee advised that it had no concerns with the appointments.

Australian Capital Territory

Explanatory Statement

Residential Tenancies Tribunal Appointment 2007 (No 2)

Disallowable Instrument DI 2007- 230

made under the

Residential Tenancies Act 1997, Section 113(1)

Under subsection 113(1) of the *Residential Tenancies Act 1997* the Minister may appoint by instrument a magistrate to be Acting President of the Residential Tenancies Tribunal.

The Residential Tenancies Tribunal is a body established under Part 7 of the Act to deal with applications, provide assistance with respect to those applications and refer persons to a range of private and public sector services providing residential tenancy advice.

The signed Disallowable Instrument reappoints Magistrate Peter Geoffrey Dingwall as Acting President of the Residential Tenancies Tribunal following the expiry of his appointment under a previous instrument. The appointment is until 30 June 2008.

The Standing Committee of Legal Affairs has been consulted as required under the provisions of the *Legislation Act 2001*. The Committee advised that it had no concerns with the appointments.