



Legislative Assembly for the ACT

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

## Scrutiny Report

9 DECEMBER 2009

Report 17

## **TERMS OF REFERENCE**

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

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - (i) is in accord with the general objects of the Act under which it is made;
  - (ii) unduly trespasses on rights previously established by law;
  - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
  - (i) unduly trespass on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (e) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

## **MEMBERS OF THE COMMITTEE**

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

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

## **ROLE OF THE COMMITTEE**

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

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## BILL

### Bill—Comment

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

#### **CIVIL PARTNERSHIPS AMENDMENT BILL 2009 (NO. 2)**

This is a Bill for an Act to amend the *Civil Partnerships Act 2008* to provide a mechanism for two people, who cannot marry under the *Marriage Act 1961* (Cwlth), to enter a civil partnership by making a declaration before a civil partnership notary, to be followed by registration of the partnership by the registrar-general.

### Background

The *Civil Partnerships Amendment Act 2009* amended the Act to provide a mechanism for two people, being people who cannot marry under the *Marriage Act 1961* (Cwlth), to enter a civil partnership by making a declaration before a civil partnership notary. The object of this amending Bill is to provide that where such people choose this option, they must, in addition, procure the registration of the partnership by the registrar-general. Clause 4, proposing an amendment to paragraph 6A(b) of the Act, would, if enacted, bring about this change when it is read with the other provisions of the Bill.

Section 6A currently provides:

Two adults who are in a relationship as a couple, regardless of their sex, and who meet the eligibility criteria in section 6, may enter into a civil partnership by—

- (a) having their relationship registered under section 8; or
- (b) unless the couple may marry under the *Marriage Act 1961* (Cwlth), making a declaration before a civil partnership notary under section 8B (Declaration of civil partnership).

The amendment proposed by clause 4 involves the repeal of paragraph 6A(b) and its replacement by a new paragraph 6A(b):

- (b) unless the couple may marry under the *Marriage Act 1961* (Cwlth), making a declaration of civil partnership under section 8B (Declaration of civil partnership) **and having their relationship registered under section 8BA (Registration of relationship after declaration of civil partnership)**. (Emphasis added).

Thus, the amendment would repeal the whole of existing paragraph 6A(b), and replace it with a new paragraph 6A(b), which will add to the existing provision the words highlighted above.

**Report under section 38 of the *Human Rights Act 2004***

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

*Equality protection of the law without discrimination – HRA subsection 8(3)*

As an alternative to choosing to bring about a civil partnership by the route allowed for by paragraph 6A(b), parties who are not eligible to marry under the *Marriage Act* may choose to have their relationship registered by the route allowed for by paragraph 6A(a). That is, they may choose to apply to the Registrar-General for the registration of the partnership under section 8. Registration does not involve any kind of public ceremony.

Parties who are eligible to marry under the *Marriage Act 1961* may choose the paragraph 6A(a) option of registration, but may not choose the paragraph 6A(b) option. On its face, the result is to engage subsection 8(3) of the *Human Rights Act 2004*:

Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

If this result derogates from HRA subsection 8(3), then clause 4 is incompatible with the HRA unless it can be demonstrated by the Minister to be justifiable under HRA section 28. This Bill is accompanied by a Compatibility Statement that reads: “In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*”.

Thus the issue in relation to clause 4 is whether the limitation on freedom of expression imposed is “demonstrably justified in a free and democratic society” under HRA section 28. In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. This test can be broken down into two questions.

First, do the limitations on freedom of expression pursue a legitimate objective?

Secondly, if so, 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”; and
- is there 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?”.<sup>1</sup>

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

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<sup>1</sup> *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII) para 45.

The Committee notes that the wording of the proposed new paragraph 6A(b) of the Act that is the subject of this comment replicates the wording of the existing paragraph 6A(b). Ordinarily, where this situation occurs, and the Act to be amended was enacted after the commencement of the *Human Rights Act 2004*, the Committee would refer back to its comment, if any, on the bill for the Act. In this case, however, the Committee did not address the relevant wording of that clause in the Civil Partnerships Amendment Bill 2009 for the reason that this provision was not contained in the Bill as it stood at the time of the Committee's report.

## **CONSIDERATION OF GOVERNMENT AMENDMENTS**

The Committee had not considered the Government amendments to the Civil Partnerships Amendment Bill 2009, which amended the Act which this Bill now seeks to amend, as it was not required to do so under the standing and temporary orders. This highlights a gap in the scrutiny process and, therefore, the Committee recommends that the issue of scrutiny of amendments to all bills be reconsidered by the Standing Committee on Administration and Procedure.

## **GOVERNMENT RESPONSE**

The Committee has received a response from the Chief Minister, dated 9 December 2009, in relation to comments made in Scrutiny Report 16 concerning proposed Government amendments to the Crimes (Bill Posting) Amendment Bill 2008.

The Committee wishes to thank the Chief Minister for his helpful response.

Vicki Dunne, MLA  
Chair

December 2009

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

**REPORTS—2008-2009**

**OUTSTANDING RESPONSES**

**Bills/Subordinate Legislation**

**Report 1, dated 10 December 2008**

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill  
2008

**Report 2, dated 4 February 2009**

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

**Report 3, dated 23 February 2009**

Subordinate Law SL2008-55 - Firearms Regulation 2008

**Report 4, dated 23 March 2009**

Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence  
Administration Board) Appointment 2009 (No. 1)

**Report 8, dated 22 June 2009**

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code)  
Determination 2009  
Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association  
Nominee) Appointment 2009

**Report 10, dated 10 August 2009**

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

**Report 11, dated 24 August 2009**

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009  
(No. 1)  
Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009

## **Bills/Subordinate Legislation**

Disallowable Instrument DI2009-132 - Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2)  
Disallowable Instrument DI2009-133 - Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2)  
Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009  
Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

### **Report 12, dated 14 September 2009**

Civil Partnerships Amendment Bill 2009 (PMB)  
Crimes (Assumed Identities) Bill 2009  
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)  
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

### **Report 13, dated 12 October 2009**

Education Amendment Bill 2009

### **Report 14, dated 9 November 2009**

Building and Construction Industry (Security of Payment) Bill 2009  
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)  
Education (Participation) Amendment Bill 2009

### **Report 15, dated 16 November 2009**

Disallowable Instrument DI2009-205 - Surveyors (Chief Surveyor) Practice Directions 2009 (No. 2)  
Disallowable Instrument DI2009-210 - Attorney General (Fees) Amendment Determination 2009 (No. 3)  
Disallowable Instrument DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009  
Disallowable Instrument DI2009-221 - Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1)  
Subordinate Law SL2009-45 - Work Safety Regulation 2009, including a regulatory impact statement  
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)  
Subordinate Law SL2009-51 - ACT Civil and Administrative Tribunal (Transitional Provisions) Amendment Regulation 2009 (No. 1)

### **Report 16, dated 7 December 2009**

Fair Trading (Motor Vehicle Repair Industry) Bill 2009  
Racing Amendment Bill 2009  
Workers Compensation Amendment Bill 2009



## Jon Stanhope MLA

### CHIEF MINISTER

MINISTER FOR TRANSPORT    MINISTER FOR TERRITORY AND MUNICIPAL SERVICES  
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT    MINISTER FOR LAND AND PROPERTY SERVICES  
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS  
MINISTER FOR THE ARTS AND HERITAGE

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MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

(performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee)

ACT Legislative Assembly

London Circuit

CANBERRA ACT 2601

Dear Mrs Dunne,

Thank you for your Committee's comments in relation to the proposed government amendments to the Crimes (Bill Posting) Amendments Bill 2008. I note that the Committee has substantially commented favourably on the proposed amendments.

The Committee queried some comments in the Supplementary Explanatory Statement regarding the giving of lawful authority to affix posters etc to government property. The Committee stated that "...Without authority conferred by law, an executive body cannot change the law or set it aside in a particular case." The committee quoted as the basis for this proposition the High Court case of *O'Donoghue [sic] v Ireland* [2008] HCA 14 at 46.

The reference by the Committee to this case is perhaps unfortunate, as the High Court at that point was referring only to the submissions of one of the parties to the case. The court went on to say (at paragraph 47) "As will appear, these proceedings may be resolved without a determination of whether that requirement for State legislative, rather than executive, approval is sound doctrine." In other words, the High Court did not accept (nor did it reject) the proposition referred to by the Committee.

Similarly, the reference (via the High Court case) to the New Zealand case of *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 623 is, with respect, not relevant here. The New Zealand case involved the purported cancellation of a statutory right by way of ministerial fiat, unsupported by law. Here, no such denial of rights or entitlements is occurring; conversely, the executive arm of government is *permitting* individuals to do things which would otherwise be unlawful on its property.

Whether one accepts the principle quoted in the High Court case or not, the comments in the Explanatory Statement do not indicate that an executive body is changing a law or setting it aside in a particular case without authority.

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#### ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601    GPO Box 1020, Canberra ACT 2601  
Phone (02) 6205 0104    Fax (02) 6205 0433    Email [stanhope@act.gov.au](mailto:stanhope@act.gov.au)

That authority is to be found in section 120 (and also, incidentally, in section 119) of the Crimes Act.

Proposed section 120(2) states:

"A person commits an offence if the person **unlawfully** [my emphasis] affixes a placard or paper, or makes a mark with chalk, paint or any other material, on public property."

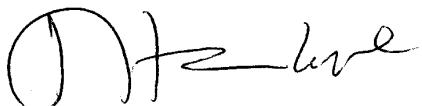
The use of the word "unlawfully" is deliberate. It should not be limited in its meaning to "not permitted under statute" (which appears to be what the Committee is inferring). The Government considers that the word should be given a wide meaning.

The common law also provides a basis of establishing what is, and is not, unlawful (for example the law of trespass). Therefore establishing what is "lawful" (as the opposite of "unlawful") in this situation, one can have regard not only to legislative means of providing a lawful basis for action, but also common law means. The common law principles of licence, contract, waiver, election and estoppel all are means of potentially making lawful something that would otherwise be unlawful. None of these mechanisms are substantially based in legislation and remain rooted in the common law. The Government contends that these mechanisms should continue to be available and "lawfulness" should not, in this situation, merely be conferred by way of a legislative mechanism, although that remains a means of doing so.

The Government has previously indicated to the Committee and the Assembly how it might inform members of the public that it is consenting to the use of its property for graffiti, street art or bill posting. The Government has indicated that it will put signs on bill-posting silos indicating that they are places where bill-posting is lawful. It has indicated that it will list sites on an internet site. The Government amendment inserting new section 128 is another mechanism. The Government's long standing, published policy on street art provides another means.

I trust this clarifies the Government's position on this aspect of the Bill.

Yours sincerely



Jon Stanhope MLA  
Chief Minister

- 9 DEC 2009