



Legislative Assembly for the ACT

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

Scrutiny Report

7 MARCH 2005

Report 4

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:**Bills—No Comment****Animal Legislation (Penalties) Amendment Bill 2005**

This is a Bill to amend the *Animal Welfare Act 1992* and the *Animal Diseases Act 1993* to increase the penalties attaching to various offences under those Acts.

Appropriation Bill 2004-2005 (No 2)

This Bill would provide for an appropriation of moneys for the financial year 2004-2005.

Justice and Community Safety Legislation Amendment Bill 2005

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

Legal Aid Amendment Bill 2005

This is a Bill to amend the *Legal Aid Act 1977* with the object of improving the way in which the Legal Aid Commission may provide legal assistance. The amendments are aimed to provide the Commission with more options in respect of the level of assistance.

Bills—Comment

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

Domestic Violence and Protection Orders Amendment Bill 2005

This is a Bill to amend the *Protection Orders Act 2001*, in the first place to rename it the *Domestic Violence and Protection Orders Act 2001*, and then to make a number of amendments. The amendments do not alter the character of the law, but extend and modify its operation in various ways. In particular, the Bill would: expand the definition of domestic violence and of 'relative'; in relation to domestic violence orders, expand the definition of personal injury to include 'nervous shock'; and increase the punishment for a breach of an order.

Report under section 38 of the Human Rights Act 2004

A general rights perspective

Given that the amendments proposed by the Bill do not alter the character of the law, the Committee does not propose to canvass the question of whether a law of this kind is compatible with human rights. Modified to reflect the enactment of the *Human Rights Act 2004*, it may be useful to restate what was

said by the Committee in *Report No 12 of 1998*, being a response from the Attorney-General to *Report No 3 of 1998*, concerning the Domestic Violence (Amendment) Bill 1998.

A number of personal rights and liberties are implicated in an assessment of a domestic violence law. Its primary purpose is to provide an expeditious means for the protection of the physical safety and indeed the life of the aggrieved person. In terms of the *HRA*, there are a number of rights which, it may be argued, will be protected or enhanced by a domestic violence law.

Perhaps the most fundamental of all rights is the right to life, expressed in section 9(1): “Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.” Allied is section 18(1): “(1) Everyone has the right to liberty and security of person”.

It may be argued that these rights are directed not only at laws or administrative actions which deprive a person of her or his life or liberty. In addition, they impose on the State an obligation to protect persons from actions which threaten life or liberty; (see document extracted in H Steiner and P Alston, *International Human Rights in Context* (1996) at 527). Read in this way, a domestic violence law finds justification in sections 9 and 18.

(There may, however, be a question here as to whether the “security of person” to which section 18 refers is tied to the rights of a person subject to pre-trial criminal processes. A clearer basis for an argument that the “security of person” is a right independent of these processes is Article 3 of the *Universal Declaration of Rights*, which provides simply that “Everyone has the right to life, liberty and security of person”.)

This way of looking at sections 9 and 18 is supported by the statement in the Explanatory Statement that “the right to protection from cruel, inhuman or degrading treatment in section 10 of the *HRA* requires effective legislative measures against domestic and personal violence”.

Some interesting questions arise if *HRA* sections 9, 18 and 10 are relevant in the ways just described:

- Does this line of argument necessarily assume that the *HRA* binds individuals as well as all arms of government in the Territory?
- How is the requirement that there be effective legislative measures to be enforced?

The particular context in which domestic violence laws have been enacted suggests that *HRA* section 8 is relevant. It provides:

8 Recognition and equality before the law

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

(The ‘equal application of the law’ approach is stressed in D Q Thomas and M E Beasley, “Domestic Violence as a Human Rights Issue” (1993) 15 *Human Rights Quarterly* 36.)

Then, as the Explanatory Statement notes, justification for the Bill and the laws it amends may also be based on *HRA* section 11:

11 Protection of the family and children

Note Family has a broad meaning (see ICCPR General Comment 19 (39th session, 1990)).

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The objects of the law might also be seen to support the policy in *HRA* section 12:

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.

There are, then, several lines of justification for a domestic violence law. This is not in question. But when attention is paid to the precise detail of a domestic violence law, and in particular to the ways in which such a law bears upon the respondent to an order made under such a law, other rights may come into focus. The law may operate to impose significant limitations on the right to property, or the liberty of movement of a respondent, or to authorise a deprivation of liberty. A respondent might argue that her or his privacy, or their right to be part of a family is adversely affected.

This is far from a complete rights framework for an analysis of a domestic violence law, but it shows, as is commonly the case, that here rights are in conflict one with another.

Of course, where a conflict between the Bill and any right is perceived, the question would then become whether the derogation was justifiable under *HRA* section 28, which permits of reasonable limitations to rights.

The Committee proposes to comment on four particular issues.

The concept of ‘personal injury’

Summation

Is the concept of ‘personal injury’ appropriately defined?

The basic element of the scheme is found in section 8(1) of the *Protection Orders Act 2001*:

A person may apply under this Act for an order to protect an aggrieved person from domestic violence or personal violence by someone else (the *respondent*).

In clause 8, the Bill aims to broaden the scope of application of the scheme by amendment to certain key definitions. The Explanatory Statement states in relation to clause 8:

Clause 8 ... recognises that a person’s behaviour will be domestic violence if it causes personal injury, and not just physical injury, to someone. This provision reflects the realisation of mental injury as a domestic violence crime. The recognition of a wider range of harm associated with domestic violence is consistent with the definition in the *United Nations Declaration on the Elimination of Violence Against Women*, which includes psychological violence.

The notion of ‘domestic violence’ is currently defined to include conduct which causes physical or personal injury to a relevant person, and which is a threat of such injury. By proposed section 9(3), personal injury would now include “nervous shock”.

The Explanatory Statement equates the notion of “nervous shock” to “psychological violence”. Whether this is correct will be a matter of interpretation. Nervous shock is generally regarded as “an identifiable mental injury, capable of being recognized in medical terms as genuine ‘psychiatric illness’” (Balkin and Davis, *The Law of Torts* (2nd ed, 1996, 243). It is a misnomer to speak of ‘shock’, in that a person might be recognized in law as having suffered the condition even though they were not shocked by anything.

The concept of a person’s ‘relative’

Summation

Is the concept of ‘relative’ appropriately explained in the example?

The Explanatory Statement notes that:

Clause 9 expands the definition of ‘relative’ to include anyone else who could reasonably be considered to be a relative of the original person. This expansion reflects that for some members of the community the concept of ‘relative’ is wider than is ordinarily understood. This definition is consistent with the importance given to the protection of the family under section 11 of the *Human Rights Act 2004* (ACT) and the broad meaning given to ‘family’ under the *International Covenant on Civil and Political Rights*.

The Committee notes that the proposed amendment is simply as described—that is, it would include anyone “who could reasonably be considered to be a relative of the original person” (proposed section 10A(c)(ii)). It is not expressly or by implication confined to certain groups within society. The examples appended to proposed section 10A, which are designed to illustrate how this provision

might operate, may overstate the matter. Whether “a person regarded and treated by the original person as a relative” would fall within the proposed definition would be a matter for the relevant court to determine. It does not seem that the subjective belief of the putative relative would govern the resolution of the matter.

A restriction on the publicity attending a legal proceeding

Summation

- An issue arises as to whether proposed section 100 of the Act (see clause 33 of the Bill) is compatible with the “fair and public hearing” aspect of a fair trial, as that requirement is stated in *HRA* section 21. There may be a freedom of expression component in section 21; in any event it may be based on section 16(2).
- The qualifications in *HRA* section 21(2) include recognition of “the interest of the private lives of the parties”, and this may be a basis to avoid any finding of incompatibility between proposed section 100 of the Act and *HRA* section 21.
- Proposed section 100 might on its face be incompatible with *HRA* section 21(3). If so, the question would be whether that incompatibility was a reasonable limit that is demonstrably justifiable in a free and democratic society: *HRA* section 28.

By clause 33 of the Bill, section 100 of the Act would now read:

100 Restriction on publication of reports about proceedings

- (1) A person commits an offence if—
- (a) the person publishes (completely or partly) an account or report of a proceeding on an application for a protection order; and
 - (b) the account or report—
 - (i) identifies a party to the proceeding; or
 - (ii) identifies a person who is related to, or associated with, a party to the proceeding or is, or is claimed to be, in any other way concerned in the matter to which the proceeding relates; or
 - (iii) identifies a witness to the proceeding; or
 - (iv) allows the identity of a person mentioned in subparagraph (i), (ii) or (iii) to be worked out.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(There is qualification of section 100 in section 101.)

The question arises whether this provision would be inconsistent with provisions in section 21 of the *Human Rights Act 2004*. Section 21 provides:

21 Fair trial

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, the press and public may be excluded from all or part of a trial—
 - (a) to protect morals, public order or national security in a democratic society; or
 - (b) if the interest of the private lives of the parties require the exclusion; or
 - (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

This parallels a common law notion which goes somewhat further, and incorporates a freedom of expression in relation to what occurs in the courtroom. In *R v Shan Shan Xu (No 1)* [2005] NSWSC 73, Kirby J observed:

24 ... in *John Fairfax Publications v District Court of New South Wales* [2004] NSWCA 324, ... the Chief Justice dealt with the circumstances in which a non publication order or a suppression order may be appropriate. His Honour referred, amongst other things, to *John Fairfax and Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, where McHugh JA said, when sitting in the Court of Appeal, that the fundamental rule of common law was that the administration of justice must take place in open court. A court can only depart from that rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule.

25 His Honour went on to say that the principle of open justice also required that **nothing should be done to discourage the making of a fair and accurate report of what occurs in a courtroom**. Chief Justice Spigelman, with whom Handley JA and Campbell J agreed, characterised the principle of open justice as a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice [emphasis added].

A court might read section 21(1) as incorporating this freedom of expression element. In any event, it may be based on *HRA* section 16(2), insofar as it states: “Everyone has the right to freedom of expression”.

On the general issue of whether these principles may be displaced in the context of the legal proceedings affected by the Act, one author (citing a United Nations commentary), observes that it is accepted that an exception to the principle that there must be a public hearing of a

legal proceeding “when the interests of the private lives of the parties so require, i.e. hearings relating to family issues such as divorce and guardianship, and juvenile proceedings involving sexual offences, in so far as public proceedings would constitute a clearly unwarranted invasion of personal privacy”: N Jayawickrama, *The Judicial Application of Human Rights Laws* (2002) at 512-513.

There may, however, be an incompatibility between proposed section 100 of the Act and *HRA* section 21(3). If there is some incompatibility, the question is then whether this is justified under *HRA* section 28.

Land (Planning and Environment) (Unit Developments) Amendment Bill 2005

This is a Bill to amend the *Land (Planning and Environment) Act 1991* to create a scheme whereby new major multi-unit developments will include some public housing or other form of affordable housing, or in some situations, that the developer will contribute to affordable housing through a reasonable financial contribution.

Report under section 38 of the Human Rights Act 2004

Summation

- Would the proposal that the planning and land authority may only grant a lease authorising use of land for a major unit development if a provision has been made to dedicate at least 4% of the development to affordable housing promote or inhibit the policy of Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), that everyone has a “right ... to an adequate standard of living for himself and his family, including ... housing ...”?
- Would the proposal that there be a new condition for approval of major unit developments (which would essentially be the same as the requirements for new leases for relating major unit developments) amount to a deprivation of property?

It is important to note the two different ways by which the policy of the Bill would be achieved.

The first is provided for by clause 5, which is explained by the Explanatory Statement in these terms:

Clause 5 inserts a new subsection (2A) into section 161 of the *Land (Planning and Environment) Act*. This will put the main purpose of the bill into effect in situations where a new lease is to be granted for a major unit development. In this situation, the government, through the planning and land authority, would be setting the conditions for inclusion of affordable housing from the beginning of the life of the lease.

This section would establish that the planning and land authority may only grant a lease authorising use of land for a major unit development if a provision has been made to dedicate at least 4% of the development to affordable housing, and the lease includes a provision requiring compliance with the agreement.

Subject to the next comment, the Committee sees no rights issue arising out of this proposal. Proposed subsection 161(2A) would have no effect on any existing rights in relation to property.

Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises a “right of everyone to an adequate standard of living for himself and his family, including ... housing ...”. This right is not included in the *Human Rights Act 2004*, but section 7 of that Act provides:

7 Rights apart from Act

This Act is not exhaustive of the rights an individual may have under domestic or international law.

Examples of other rights

- 1 rights under the *Discrimination Act 1991* or another Territory law
- 2 rights under the ICCPR not listed in this Act
- 3 rights under other international conventions

On one line of argument, proposed subsection 161(2A) may be seen to be aimed at ensuring an adequate standard of housing for the persons who would benefit from the dedication of at least 4% of the development to affordable housing. On the other hand, if the result was that the erection of major unit development was discouraged, it might be argued that there would be less ‘non-affordable’ housing available for sale or rental in the Territory. This result might be seen as undermining Article 11 of the ICESCR. (The Committee notes that the 2005 issue of the *Australian Human Rights Journal* is devoted to discussion of the notion of a right to housing.)

The second way by which the policy of the Bill would be achieved is provided for by clause 8, which is explained by the Explanatory Statement in these terms:

This clause would establish a new condition for approval of major unit developments that are essentially the same as the requirements for new leases for relating major unit developments, as would be established by Clause 5. However, an additional option is provided for developers in this clause, in recognition of the difference between setting conditions for a new lease of land, and an approval for a change of use on an existing lease. The developer may, instead of setting aside a dedicate percentage of the development for affordable housing, choose to pay the Territory an affordable housing contribution.

The amount of the contribution would be determined by the relevant authority under new section 245AA, at a reasonable level, having regard to the matters set out in subclause 4: the extent of the need for affordable housing in the area; the scale of the development; whether the proposed development is likely to reduce the availability of affordable housing; and any dedication or contribution previously made by the applicant under the section or section 161 (granting of leases) in relation to the area.

The additional rights issue here concerns the right to property. While proposed section 245AA would not apply to a development application made before the commencement of the Act, it appears that it would apply to an application made later than that time, but in respect of land the lease for which was issued prior to the commencement of the Act. Section 245AA could well operate to defeat an expectation of the lease-holder that he, she or it could develop the land for multi-unit dwellings without any obligations such as would be imposed by section 245AA.

In this way, section 245AA might be viewed as a deprivation of property. If it was, the question would then be whether this was justified by some countervailing public interest. The way in which this question has been addressed by the European Court of Human Rights may be seen from this comment in N Jayawickrama, *The Judicial Application of Human Rights Laws* (2002) at 914:

The concept of ‘deprivation’ covers not only formal expropriation, but also de facto expropriation, i.e. a measure which can be assimilated to a deprivation of property. The withdrawal of a permit to exploit a gravel pit on one’s land may constitute a deprivation of property since it would seriously affect its value, but where the aim of revocation is the preservation of nature in the general interest, the measure will be considered as a control of the use of property [*Fredin v Sweden* (1991) 13 EHHR 784].

A right to property is recognised in Article 17 of the *Universal Declaration of Human Rights* (the foundational document of the international human rights framework):

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

In terms of Article 17, consideration of a countervailing public interest is probably justified by reason of the word “arbitrarily” in Article 17(2).

In the Territory, there is an additional dimension. Under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* "the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; ...". This right is, however, narrower than the broader right to property stated in Article 17 of the *Universal Declaration*. Whether it would apply to section 245AA is debatable. In relation to section 23, there is no balancing of a countervailing public interest.

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

Residential Tenancies Amendment Bill 2005
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This is a Bill to amend the *Residential Tenancies Act 1997* in various ways, including in particular: that a residential tenancy agreement, where the lessor is a prescribed crisis accommodation provider, may be terminated by the lessor on four weeks notice, if the premises are needed for crisis accommodation for someone other than the tenant, and if the tenant has been given information about alternative accommodation; creation of a privacy and access to information regime in relation to tenancy databases; conferral of a power on the Commissioner for Housing to rent premises at a rate that initially reflects the additional cost of a past debt, subject to endorsement by the Residential Tenancies Tribunal; clarification of the law concerning evictions; provisions governing the transfer of a public housing tenancy under a will; and provision for a penalty in relation to late lodgment of a tenancy bond.

Report under section 38 of the Human Rights Act 2004

<p>Summation</p> <p>There are two apparent rights brought into focus by this Bill.</p> <ul style="list-style-type: none"> • First, taking the Bill as a whole, the Assembly might ask whether the Bill promotes or inhibits the policy of Article 11 of the <i>International Covenant on Economic, Social and Cultural Rights</i> (ICESCR), that everyone has a “right ... to an adequate standard of living for himself and his family, including ... housing ...”? • Secondly, in relation to proposed Part 6A of the Act, the Committee notes that it is designed to promote the rights stated in section 12 of the <i>Human Rights Act 2004</i> (privacy).
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Clause 18 would insert a new Part 6A into the Act. In general terms, there would thereby be created a privacy and access to information regime in relation to tenancy databases. The scheme applies to personal information about an identified individual (including her or his name) which is included on a tenancy database. The latter concept broadly encompasses, as stated in the Explanatory Statement, “information on the tenancy history of tenants”.

It is critical to note, however, that the operative provisions of Part 6A “do not apply to a tenancy database kept by an entity for use only by the entity or by its employees”. In effect, this means that Part 6A will not apply to a database kept by a real estate agency where the purpose of the database is to inform the agency or its employees about the tenancy history of an ex-tenant. It appears that Part 6A is aimed at a tenancy database that may be used by others, such as those who lease their premises. The critical issue would be whether the database was “kept by an entity” for the purpose stated. The fact that a database might at times be used for some other purpose would be relevant, but not determinative, of whether it was kept for that purpose.

Part 6A is designed to promote the rights stated in section 12 of the *Human Rights Act 2004*:

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.

Is there an inappropriate delegation of legislative power? - Para 2(c)(iv)

The Committee notes that the effect of proposed section 40(3) of the Act (see clause 14) would be to empower the Minister to make regulations to prescribe “what is, or what is not, appropriate action to be taken under a warrant”.

Given the significance of the power of the police, acting under a warrant, to evict a person from premises, the Committee draws to the attention of the Assembly the question whether it is appropriate for a law of this kind to be made by regulation.

Utilities Amendment Bill 2005

This is a Bill to amend the *Utilities Act 2000* to provide legal authority for Territory officials, or those contracted to provide maintenance services, to go onto land, for the purpose of installing or maintaining streetlight or stormwater drainage infrastructure. The Bill would also create offences and permit the Territory to take action to stop interference with the networks.

Report under section 38 of the Human Rights Act 2004

<p>Summation</p> <p>In a general sense, the rights issue arising from this Bill is whether such diminution or interference with a person’s right to use their property as might occur in the exercise of powers conferred by the Bill are such as to be “demonstrably justified in a free and democratic society”.</p>
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The Explanatory Statement notes that the provisions of the Bill “mirror parts 7 and 8 of the *Utilities Act 2000*, which relate to entry to land by utilities for the purpose of installing or accessing electricity, gas, water or sewerage infrastructure”. This does not preclude the Assembly from taking a different view about the Bill, but it does indicate that the policies inherent in the provisions of the Bill have on a past occasion been approved by the Assembly.

The Explanatory Statement notes that the provisions of the Bill “mirror parts 7 and 8 of the *Utilities Act 2000*, which relate to entry to land by utilities for the purpose of installing or accessing electricity, gas, water or sewerage infrastructure”. This does not preclude the Assembly from taking a different view about the Bill, but it does indicate that the policies inherent in the provisions of the Bill have on a past occasion been approved by the Assembly.

The opinion of the Committee is that the provisions of the Bill:

- strike an appropriate balance between the rights of a land-holder and the public interest in the provision of municipal services to the people of the Territory;

- through provisions concerning authorized entry onto land, ensure that these powers are properly used;
- make provision for compensation or other redress in relation to disturbance of land; and
- provide for appropriate penalties and other remedies available where a person obstructs the provision of municipal services.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them:

Disallowable Instrument DI2004-259 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 13) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used when vehicles are competing in the ACT timed special stages of the Brindabella Motor Sport Club 2004 Rallye des Femmes.

Disallowable Instrument DI2004-263 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2004 (No. 6) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-78 and determines property value thresholds for eligible property and land value thresholds for eligible vacant block for the purposes of the calculation of duty payable under the Scheme.

Disallowable Instrument DI2004-265 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 14) made under section 13 of the *Road Transport (General) Act 1999* removes application of compulsory third party insurance provision from vehicles participating in the 18th Summernats Car Festival and their owners or drivers.

Disallowable Instrument DI2004-268 being the Liquor Licensing Board Appointment 2004 made under section 12 of the *Liquor Act 1975* appoints specified persons as members of the Liquor Licensing Board.

Disallowable Instrument DI2004-271 being the Dangerous Substances (Asbestos Assessment Task Force) Appointment 2004 (No. 1) made under section 47D of the *Dangerous Substances Act 2004* appoints a specified person as Chairperson of the Asbestos Assessment Task Force.

Disallowable Instrument DI2004-272 being the Dangerous Substances (Asbestos Assessment Task Force) Appointment 2004 (No. 2) made under subsection 47C(c) of the *Dangerous Substances Act 2004* appoints a specified persons as members of the Asbestos Assessment Task Force.

Disallowable Instrument DI2004-273 being the Attorney General (Fees) Amendment Determination 2004 (No. 4) made under section 13 of the *Court Procedures Act 2004* amends DI2004-106, as amended, and determines the fees payable for the purposes of the Act.

This instrument amends the Attorney-General's (Fees) Determination 2004 (DI2004-106), as amended. That Determination sets fees in relation to proceedings in various courts and tribunals. In some cases, the instrument increases the applicable fees. Based on the information contained in the Explanatory Notes, it would appear that:

- One fee would seem to be newly-imposed (item 208.2, imposing a \$125.00 charge in relation to admissions to practice, etc, with the charge being for a co-contribution scheme toward the costs of the Supreme Court Library);
- One fee increase is approximately 4.5 % (item 213, which increases a \$22.00 fee to \$23); and
- All other fee increases are less than 3%.

As required by paragraphs 56(5)(a) and (b) of the *Legislation Act 2001* (respectively) the original Determination provides for by whom a fee is payable and to whom it must be paid.

The Committee makes no comment on this instrument.

Disallowable Instrument DI2005-4 being the Legal Aid (Review Committee—Panel Member) Appointment 2005 made under subsection 37(5) of the *Legal Aid Act 1977* appoints a specified person as a part-time member of the panel of persons chosen by the Attorney-General for the purpose of constituting a Legal Aid Review Committee.

Disallowable Instrument DI2005-6 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 1) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used when vehicles are competing in the ACT timed special stages of the Brindabella Motor Sport Club 05 National Capital Rally.

Disallowable Instrument DI2005-7 being the Taxation Administration (Levy) Determination 2005 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-156 and determines a new relevant amount for the monthly ambulance levy paid by health benefits organisations.

Disallowable Instruments—Comment

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

Minor drafting issues

Disallowable Instrument DI2004-260 being the Health (Interest Charge) Determination 2004 (No. 1) made under section 37 of the *Health Act 1993* revokes Disallowable Instrument DI2003-313 and determines the amount of interest charged.

This instrument has a confusing citation. It revokes 'Determination of Interest Charge DI2003-313', which appears on the ACT Legislation Register as 'Health Determination of Interest Charge 2003-04 (No 1)'. The title of actual determination is 'Health—Determination of Interest Charge 2003-04 (No 1)'.

Minor drafting issues and delay in notification

Disallowable Instrument DI2004-261 being the Liquor Licensing Standards Manual Amendment 2004 (No. 1) made under section 34 of the *Liquor Act 1975* amends the liquor licensing standards manual to provide that licensees shall not encourage excessive or rapid consumption of alcohol by 'alcoholic vapour' in licensed premises.

Section 34 of the *Liquor Act 1975* allows the Liquor Licensing Board, with the Minister's written approval, to amend or repeal the licensing standards manual. This instrument amends paragraph 44 of the manual. The Explanatory Statement states that approval was given on 9 September 2004. There is no indication on the face of the instrument, however, that this is the case. The Committee contrasts this approach with that taken in DI2004-267, made under section 251 of the *Public Sector Management Act 1994* (see below), which allows for the Commissioner for Public Administration to make Management Standards, with the written approval of the Chief Minister. DI2004-267 contains a paragraph that evidences the Chief Minister's approval.

The Committee also notes that this instrument is dated 13 October 2004, but was not notified on the ACT Legislation Register until 20 December 2004.

Non-reviewable decisions and minor drafting issues

Disallowable Instrument DI2004-262 being the Taxation Administration (Amounts payable—Home Buyer Concession Scheme) Determination 2004 (No. 5) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-76 and determines the eligibility and methods of calculation for the Scheme.

In this instrument, '(Cwlth)' is the indicator that a reference is to a piece of Commonwealth legislation. In paragraph (m) of the definitions, '(Cwlth)' should presumably be added after the reference to the *Income Tax Assessment Act 1997*. The Explanatory Statement makes the same omission.

The absence of paragraph numbers in the instrument also makes citation of the provisions difficult.

The instrument contains 2 discretions on the part of the Commissioner for ACT Revenue. One is a discretion to extend the time for an applicant to comply with the residency requirement ('Eligible Home Buyer' part, paragraph (b)). The instrument states that the discretion is only exercisable where applicants 'genuinely need an extension of time to reside in the property' and is expressed to be limited to situations where an applicant is unable to reside in the property because of 'a compulsory or unforeseen circumstance, eg work or health related issues' and the request for an extension of time is made within the period within which compliance with the residency requirement must be satisfied.

The second discretion is to exempt an applicant from the requirement that, on the date of the grant, transfer or agreement for transfer, the applicant was 18 years of age. The Commissioner for ACT Revenue can exempt an applicant 'if there are good reasons to do so' ('Eligible Home Buyer' part, paragraph (b)).

There is no indication in the instrument that the exercise of either discretion is a reviewable decision under either section 252 of the *Duties Act 1999* or section 100 of the *Taxation Administration Act 1999*.

In that respect, the relevant provisions may offend paragraph (iii) of the Committee's terms of reference, by making rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The Committee draws the instrument to the attention of the Assembly.

Minor drafting issues

Disallowable Instrument DI2004-266 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 15) made under section 12 of the *Road Transport (General) Act 1999* determines exemptions of vehicles from sections 108, 109, 110 and 111 of the *Road Transport (Vehicle Registration) Regulation 2000*.

This instrument incorrectly states that it is made under section 12 of the *Road Transport (General) Act 1999*. The correct reference is to subsection 13(1) of that Act, as stated in the Explanatory Statement. The instrument correctly refers to the subject matter of section 12.

The Committee notes that, as a matter of law, however, a mistake made by a person exercising a power as to its source does not affect the validity of the decision if the person was otherwise authorised to make it: *Brown v West* (1990) 169 CLR 195, 203.

The Committee notes that the instrument has, in any event, expired (only being operative from 5 to 10 January 2005, in relation to Summernats).

Inaccessible legislation and minor drafting issues

Disallowable Instrument DI2004-267 being the Public Sector Management Amendment Standard 2004 (No. 8) made under section 251 of the *Public Sector Management Act 1994* clarifies the phrase 'competitive selection process' with regard to the selection process used when appointing, promoting or transferring a permanent or temporary employee and makes consequential changes as a result.

This instrument is made under section 251 of the *Public Sector Management Act 1994*, which allows for the Commissioner for Public Administration to make Management Standards, with the written approval of the Chief Minister. Unlike DI2004-261, this instrument contains a paragraph that evidences the Chief Minister's approval.

This instrument amends the Management Standards. It is not possible to work out what the Managements Standards provided *before* the amendment, however, without some effort. This is because the relevant part of the ACT Legislation Register directs the inquirer to the Public Sector Management Legislation and Standards website (www.psm.act.gov.au/legislation.htm) for the 'current version' of the Management Standards but that version is as amended by DI2004-267. This means that it is not possible to work out what the Management Standards contained prior to the amendments made by DI2004-267 without starting with the Management Standards as originally made and then tracking each amendment made since. This is not easily done. The earliest instrument on the ACT Legislation Register is the Public Sector Management Amendment Standards 2001 (DI2001-348). That instrument indicates that the original Management Standards were made by 'Instrument 1/1994'. That instrument is not readily locatable on the ACT Legislation Register.

Minor drafting issues

Disallowable Instrument DI2004-269 being the Public Place Names (Gungahlin) Determination 2004 (No. 4) made under section 3 of the Public Place Names Act 1989 determines the name of a new street in the Division of Gungahlin.

Paragraph 2 of the Explanatory Statement to this instrument refers to 'Part 254A of the *Legislation Act 2001*'. The reference should be to 'section 254A'.

Trespass on personal rights and liberties

Disallowable Instrument DI2004-270 being the Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1) made under section 234 of the Utilities Act 2000 and section 6 of the Utilities (Electricity Restrictions) Regulation 2004 provides for restrictions on the use of electricity in times of shortage.

This instrument approves an 'electricity restriction scheme'. This is authorized by section 6 of the *Utilities (Electricity Restrictions) Regulation 2004 (Regulation)*, which allows the Minister to approve a scheme to restrict the use of electricity if he or she is satisfied that the scheme is necessary to:

- facilitate, as far as practicable, the provision of efficient, reliable and sustainable electricity services by utilities to consumers; or
- protect the interests of consumers; or
- manage the safety and security of the electricity network; or
- protect public safety.

An approval is a disallowable instrument.

A scheme has no force of itself. What is required for it to operate is a declaration by the Minister under section 9 of the Regulation that a stage of the scheme is in force. Such a declaration is a notifiable instrument.

The scheme approved in the instrument is in 5 stages, set out in the Appendix to the instrument. The stages are described by reference to a series of measures and by the maximum period or periods each day that a restriction can be applied. Stage 1 is the least restrictive and Stage 5 the most. To illustrate the scaling of the restrictions:

- Stage 1 involves no restrictions on commercial/industrial use of electricity;
- Stages 2 to 5 involve restrictions on commercial/industrial use;
- Under State 1 restrictions, dishwashers, clothes dryers, vacuum cleaners, second TVs, domestic pool pumps and heaters and TVs used for computer games must not be used, with the maximum timing of the reduction being between 7.00 am and 9.00 pm (i.e. meaning that these items could be used between 9.00 pm and 7.00 am);
- Under Stage 3, 4 and 5 restrictions, use of the items listed above can be prohibited for up to 24 hours per day;
- Under Stages 4 and 5, commercial/industrial use of electricity for air conditioning and heating can be prohibited between 7.00 am and 9.00 pm (with no scope for restriction on such use in Stages 1 to 3).

The stage declared by the Minister depends on one or more of a number of variables. The variables include the electrical network operational requirement and conditions, the transmission and/or distribution capacity available for the supply of electricity services in the ACT, and any reduction in the ACT total electricity load to be achieved, for example, as required by the utility or requested by the National Electricity Market Management Company or as a result of inter-jurisdictional negotiation maximum electricity load.

The five stages of electricity restrictions, together with the restriction measures which may be imposed under each stage, the maximum period during which the measures may be imposed, and the target group of consumers (residential and commercial/industrial) are detailed in the Appendix to the scheme. The scheme also provides for a range of automatic exemptions from restrictions for certain specified classes of consumers to the extent required to directly support their health and safety.

Automatic exemptions are provided 'to the extent required to directly support the health and safety of:

- People with a terminal illness and receiving palliative care;
- People receiving Hospital in the Home treatment services;
- People dependant on life support systems;
- Women in the last three months of pregnancy with health complications;
- Babies and children under 5 years of age;
- People aged 70 and over;

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- People with a chronic illness or other chronic medical condition (including moderate to severe skin conditions) where their health will or could be adversely affected by the restrictions or associated climatic or other conditions; or
 - People with moderate to severe physical or mental disability.

Other exemptions can be granted if a consumer can demonstrate that the restrictions would cause them serious detriment.

The restrictions that might be imposed under the scheme might be considered to trespass on personal rights and liberties, under paragraph (i) of the Committee's terms of reference.

The Committee notes, however, that the scheme expressly does not preclude the declaration by the Chief Minister of a state of emergency under the *Emergencies Act 2004*, under which 'emergency' is defined as 'an actual or imminent event that requires a significant and coordinated response', including a 'shortage of electricity, gas or water'.

The Committee draws the instrument to the attention of the Assembly.

Compliance with formal requirements and minor drafting issues

Disallowable Instrument DI2005-1 being the Emergencies (Strategic Bushfire Management Plan) 2005 made under section 72 of the *Emergencies Act 2004* sets the strategic bushfire management plan.

This instrument makes a 'strategic bushfire management plan', under section 72 of the *Emergencies Act 2004*. Section 75 of the Act requires that, before making the plan, the Minister must prepare a 'consultation notice', stating that copies of the plan are available for consultation and inviting interested parties to provide written comments (section 75(1)). The consultation notice is a notifiable instrument (section 75(2)). While the text of the plan indicates that there was public consultation (see pp 5-6), neither the plan nor the Explanatory Statement indicate whether the section 75 requirements (which are mandatory) were complied with. Nor does there appear to be a consultation notice on the ACT Legislation Register (as required by section 19 of the *Legislation Act 2001*).

Inaccessible legislation

Disallowable Instrument DI2005-2 being the Public Sector Management Amendment Standard 2005 (No. 1) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

This instrument amends the Management Standards made under the *Public Sector Management Act 1994*. It is not possible to work out what the Management Standards provided *before* the amendment, however, without some effort. This is because the relevant part of the ACT Legislation Register directs the inquirer to the Public Sector Management Legislation and Standards website (www.psm.act.gov.au/legislation.htm) for the 'current version' of the Management Standards but that version is as amended by DI2004-267. This means that it is not possible to work out what the Management Standards contained prior to the amendments made by DI2004-267 without starting with the Management Standards as originally made and then tracking each amendment made since. This is not easily done. The earliest instrument on the ACT Legislation Register is the Public Sector Management

Amendment Standards 2001 (DI2001-348). That instrument indicates that the original Management Standards were made by 'Instrument 1/1994'. That instrument is not readily locatable on the ACT Legislation Register, meaning that even that even the laborious process of ascertaining the pre-amendment version of the Management Standards is not possible.

The instrument indicates that the name of the instrument was amended under section 60 of the *Legislation Act 2001*. There is no indication in the Explanatory Statement, however, as to what the name of the instrument was prior to the amendment.

Minor drafting issues

Disallowable Instrument DI2005-3 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 1) made under subsection 75A(2) of the Road Transport (Safety and Traffic Management) Regulation 2000 declares a specified organisation to be a Parking Authority.

This instrument refers to 'Section no 75A (2)' as the empowering provision. The 'no' is unnecessary. The Explanatory Statement does not repeat this error.

Subordinate Laws—No Comment

Subordinate Law SL2004-54 being the Supreme Court Amendment Rules 2004 (No. 5) made under section 36 of the Supreme Court Act 1933 provide for more cost-efficient and cost-effective procedures.

This subordinate law (**Amending Rules**) amends the *Supreme Court Rules*. Among other things, Schedule 2 of the Amending Rules substitutes a new Schedule 3 into the *Supreme Court Rules*, which sets out a scale of costs, for the purposes of Order 65 Rule 7, in relation to work done or services performed by solicitors. The Explanatory Statement advises that the new Schedule increases the existing scale components by 12.85%, rounded to the next 10 cents. The Explanatory statement further advises that the Schedule has not been adjusted since February 1982 and that the amount of the increase is based on a combination of the Consumer Price Index and Wage Cost Index and follows a similar consideration of costs by the Federal Costs Advisory Committee, whose reasoning was adopted.

The Committee makes no comment on this subordinate law.

Subordinate Law SL2004-55 being the Gungahlin Drive Extension Authorisation Regulation 2004 made under the Gungahlin Drive Extension Authorisation Act 2004 makes specified legislation relevant laws under the Act.

This subordinate law is made under section 13 of the *Gungahlin Drive Extension Authorisation Act 2004* (**GDE Authorisation Act**). Section 9(2) of the GDE Authorisation Act allows the Minister responsible for the GDE Act, in the Minister's absolute discretion and in writing, give any authorisation in relation to the GDE. 'Authorisation' is defined as an approval, licence, permit or consent required or allowed under any relevant law or anything else prescribed under the regulations that is required or allowed to be given under a relevant law. 'Relevant law' is defined in section 9(1) of the GDE Authorisation Act as:

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- (a) the *Environment Protection Act 1997*;
 - (b) the *Nature Conservation Act 1980*;
 - (c) the *Land (Planning and Environment) Act 1991*;
 - (d) a Territory law prescribed under the regulations.

This subordinate law adds 4 further laws to the definition of 'relevant law':

- the *Public Roads Act 1902*;
- the *Roads and Public Places Act 1937*;
- the *Road Transport (Safety and Traffic Management) Act 1999*; and
- the *Heritage Act 2004*.

The explanation given in the Explanatory Statement for the addition of these laws to the definition is that they are 'relevant to aspects of the construction of the Gungahlin Drive Extension project'.

The Committee makes no comment on this subordinate law.

Subordinate Law SL2004-57 being the Liquor Amendment Regulation 2004 (No. 2) made under the *Liquor Act 1975* corrects an incorrect reference made in an earlier amendment to the Liquor Regulations.

This subordinate law amends section 12A(2)(d) of the *Liquor Regulation 1979* (**Liquor Regulation**). Section 139 of the *Liquor Act 1975* makes it an offence to consume liquor in a 'prescribed public place', which is defined in section 139(5) to include a public place declared by the regulations to be a public place to which section 139 applies. Section 12A of the Liquor Regulation declares certain places to be alcohol-free public places for the purposes of Summernats.

This subordinate law omits paragraph (d) of the definition in section 12A(2) and replaces it with a new paragraph (d), on the basis that the replaced paragraph incorrectly placed the 2 boundary roads (Flemington Road and Randwick Road) in the suburb of Mitchell, when they are actually located in Lyneham. The new paragraph correctly places the roads in Lyneham. The Committee makes no comment on this subordinate law.

Subordinate Law SL2004-59 being the Road Transport (Driver Licensing) Amendment Regulation 2004 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* provides for the removal of demerit points from the demerit points register when an infringement notice is withdrawn.

Subordinate Law SL2004-60 being the Electricity (Greenhouse Gas Emissions) Regulation 2004 made under the *Electricity (Greenhouse Gas Emissions) Act 2004* prescribes greenhouse gas benchmarks.

Subordinate Law SL2004-62 being the Taxation Administration Regulation 2004 made under the *Taxation Administration Act 1999* prescribes the chief executive as a person who may access information to assist in economic analysis or revenue forecasting.

This subordinate law extends the range of persons to whom confidential information may be disclosed under the *Taxation Administration Act 1999* (**TA Act**). Under section 97(d)(x) of the TA Act, the regulations can prescribe a person to whom a 'permitted disclosure' can be made. This subordinate law designates disclosure to the chief executive of the Department of Treasury. As the Explanatory Statement notes, the chief executive may then delegate the power to require access to the information to a public sector employee.

The Explanatory Statement states:

In practice, the chief executive would delegate the power to access taxation information to the Treasury Officers responsible for economic analysis and revenue forecasting.

The Explanatory Statement states that section 98 of the TA Act prohibits a person receiving information under the authority of this provision from making any further disclosure.

The Committee makes no further comment on the subordinate law.

Subordinate Law SL2004-63 being the Court Procedures Regulation 2004 made under the *Court Procedures Act 2004* declares specified laws to be 'corresponding laws'.

Subordinate Laws - Comment

Subordinate Law SL2004-52 being the Health Professionals Amendment Regulation 2004 (No. 1) made under the *Health Professionals Act 2004* ensure the effective transitional provisions of the Act.

Retrospectivity

This subordinate law (**Amending Regulation**) amends the *Health Professionals Regulations 2004* (**Principal Regulation**). The Explanatory Statement states:

The amendments proposed in this Regulation are primarily to ensure that the transitional provisions of the *Health Professionals Act 2004* are as effective as they can be in respect of their application to health professionals registered under repealed health professional registration Acts and to improve the linkages between different parts of the *Health Professionals Act 2004* to make it clear that health professional boards are required to apply to the Health Professional Tribunal if they are seeking cancellation or suspension of a health professionals registration. The remaining amendments relate to validating the processes that have already commenced in respect of the election of the Medical Board and to ensure that future elections involving health professional boards under the new legislation are as valid as they can be.

As a result of the amendments made by section 4 of the Amending Regulation, the bulk of the amendments are retrospective to 18 November 2004. While it is not explained in the Explanatory Statement, it is evident that the purpose of this retrospective operation is to validate 'existing processes'. The Explanatory Statement gives no explanation as to what the issue is that the Amending Regulation seeks to address.

Section 76(1) of the *Legislation Act 2001* allows 'non-prejudicial' provisions of an instrument to operate retrospectively. 'Prejudicial' provisions cannot, unless the operation of section 76 is displaced by or under the authority of an Act (section 76(2)). Section 76(4) provides:

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.

There is nothing in the Explanatory Statement to indicate whether the amendments that are given retrospective operation are prejudicial or non-prejudicial provisions. In the absence of such information, the Committee draws the Assembly's attention to the subordinate law, on the basis that it may trespass unduly on personal rights and liberties, contrary to paragraph (a)(ii) of the Committee's terms of reference.

Trespass on personal rights and liberties

Subordinate Law SL2004-53 being the Supreme Court Amendment Rules 2004 (No. 4) made under section 36 of the *Supreme Court Act 1933* make comprehensive provision for the regulation of the Court's procedure in criminal proceedings.

This subordinate law (**Amending Rules**) amends the *Supreme Court Rules*. Among other things, the Amending Rules substitute Order 80 of the *Supreme Court Rules* with a new Order 80. Order 80 regulates the Supreme Court's procedure in criminal proceedings, including trials, sentencing proceedings and bail applications. New Order 80.2 allows the Supreme Court to dispense with compliance with any requirement of Order 80, before or after the time for compliance arises and on the conditions, if any, that it considers appropriate. There is no indication in the Explanatory Statement as to the basis for dispensing with the requirements of Order 80 or of the circumstances in which that might occur. While the Supreme Court would presumably, in exercising such a power, be mindful of common law principles that give an accused person a right to a fair trial, the provision may be considered to trespass unduly on rights previously established by law, contrary to paragraph 1(a)(ii) of the Committee's terms of reference. In this regard, the Committee notes that section 21 of the *Human Rights Act 2004* (**Human Rights Act**) states that everyone has the right to a fair trial.

The Committee refers to section 21 notwithstanding that under section 38 of the Human Rights Act, the Committee is required to report to the Assembly on human rights issues raised by bills presented to the Assembly. The result is that its role under section 38 does not apply in relation to the Amending Rules, which is a piece of subordinate legislation. On the other hand, under its terms of reference, the Committee does consider whether a clause of subordinate law “duly trespasses on rights previously established by law”. Given this, the Committee considers that its function under section 38 of the Human Rights Act should be extended to permit it to comment on subordinate laws to the same extent.

Strict and absolute liability offences

Subordinate Law SL2004-56 being the Dangerous Substances (General) Regulation 2004 made under the *Dangerous Substances Act 2004* repeals Subordinate Law SL2004-9 and establishes requirements for the safe handling and storage of certain dangerous substances and a licensing regime for prescribed security sensitive substances.

This subordinate law (**DS(G) Regulation**) is made under the *Dangerous Substances Act 2004*. It repeals the *Dangerous Substances (General) Regulation 2004* and incorporates the provisions of that regulation. New provisions establish additional requirements for the safe handling and storage of certain substances and a licensing regime for prescribed security substances. Consequential amendments are also made to the *Dangerous Substances (Explosives) Regulation 2004*.

The DS(G) Regulation contains numerous strict liability offences, which are identified in the Explanatory Statement. They are sections 218; 219; 221; 228; 229; 230; 231; 232; 233; 234; 235; 236; 237; 238; 239; 240; 241; 242; 243; 244; 245; 246; 247; 248; 249; 250; 252; 253; 254; 255; 256; 257; 258; 259; 262; 266; 268; 269; 270; 271; 272; 275; 276; 277; 278; 279; 281; 282; 283; 284; 285; 286; 287; 288; 289; 290; 291; 292; 293; 294; 295; 296; 297; 298; 299; 299B; 403; 413; 420; 425; 439; 446; 454; 455; 460; 463; 622; 646; 673.

Section 447(1)(f) creates an absolute liability offence, which excludes the application of defences such as mistake of fact.

As noted in *Report No 2 of the Sixth Assembly*, this is a recurring issue for the Committee. In *Report No 2 of the Sixth Assembly* (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred to principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences (at p 9).

In particular, the Committee noted that, in its *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 *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 Explanatory Statement to the DS(G) Regulation states (at p 5):

Section 7 instructs that the ACT *Criminal Code Act 2002* applies to offences under the regulation. There are a number of offences in the regulation which are 'strict liability' offences. Section 23 of the Criminal Code provides that if an offence is a strict liability offence, there are no fault elements for any of the physical elements of the offence. In addition to other defences, the defence of mistake of fact under section 36 of the [Criminal Code] also applies to strict liability offences. Section 23 of the Dangerous Substances Act provides that the maximum that can be imposed for an offence against a regulation made under the Act is 30 penalty units. A number of the more serious offences in this regulation attract a maximum penalty of 30 penalty units. This recognizes the serious consequences that can potentially arise from a contravention of the relevant provisions.

Clearly, this does not meet what the Committee proposed in its *Report No 38 of the Fifth Assembly*. In this regard, the Committee notes that, in its *Report No 2 of the Sixth Assembly*, it quoted the following statement of general approach contained in the Explanatory Statement to the *Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004*:

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in producing or distributing films, videos or publications as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations. The provisions are drafted so that, if a particular set of circumstances exists, a specified person is guilty of an offence. Unless some knowledge or intention ought be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

The Committee considers that a statement along similar lines in the Explanatory Statement for the DS(G) Regulations would have assisted the Assembly in deciding whether or not the various strict liability offences contained in the regulations could be justified.

As for the reference in the Explanatory Statement to sections 23 and 36 of the Criminal Code, the Committee notes that, in its *Report No 2 to the Sixth Assembly*, the Committee noted (at p 6) that:

- in relation to section 36 of the Criminal Code, a defendant cannot be mistaken about the facts unless he or she has considered whether or not facts existed. There is then, in effect, a duty of inquiry in circumstances where the defendant's conduct might result in the commission of the offence; and
- section 36 of the Criminal Code does not permit a defence:
 - of reasonable ignorance of the facts;
 - of reasonable ignorance of the law; or
 - that reasonable steps were taken by the defendant to obey the law.

The strict and absolute liability offences

The DS(G) Regulation creates a number of offences of strict liability and one of absolute liability. In no case, however, has imprisonment been stated as a possible punishment, and in no case does the penalty exceed 30 penalty points.

The Explanatory Statement contains no justification for the provisions creating offences of strict and absolute liability.

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

Strict liability offences and powers of entry and search

Subordinate Law SL2004-61 being the Utilities (Electricity Restrictions) Regulations 2004 made under section 234 of the Utilities Act 2004 provides for the introduction and enforcement of an electricity restriction scheme in the ACT.

This subordinate law contains 2 strict liability offences, which are set out in sections 14 and 16. The offence in section 14 offence deals with the use of electricity on premises in breach of electricity restriction measures and applies to occupiers of premises. The Explanatory Statement states that it is a defence to a charge if the occupier did not know that an electricity restriction had been imposed.

Section 16 imposes a strict liability offence if a person fails to comply with a direction given under section 15 by an authorized person.

As stated in the Committee's *Report No 2 of the Sixth Assembly* (and as discussed above), the Committee considers that a statement in the Explanatory Statement along similar lines to that contained in the Explanatory Statement for the *Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004*: would have assisted the Assembly in deciding whether or not the various strict liability offences contained in the regulations could be justified.

Section 17 of the *Utilities (Electricity Restrictions) Regulation 2004* gives an 'authorised person' a right to enter and inspect 'anything' on premises if he or she believes, on reasonable grounds, that electricity is being or has been used in contravention of an electricity restriction. The authorized person may enter the premises 'with any necessary assistance and force'. Under section 114 of the *Utilities Act 2000*, an 'authorised person' is a person appointed by a utility.

Section 17 contains a power of entry and search. As the Senate Standing Committee for the Scrutiny of Bills has pointed out in its *Fourth Report of 2000—Entry and search provisions in Commonwealth legislation* (6 April 2000), as a matter of common law, every unauthorized entry onto private property is a trespass. The Scrutiny of Bills Committee has pointed out that the modern authority to enter and search premises is essentially a creation of statute and, as such, it should always be regarded as an exceptional power, not a power granted as a matter of course. Further, the Scrutiny of Bills Committee has stated that any statutory provisions that authorize search and entry should conform with certain principles. These include that:

- the intrusion involved in a power of entry and search is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- the power to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;
- when granting powers to enter and search, Parliament should do so expressly, and **through primary, not subordinate, legislation;**
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;
- in considering whether to grant a power to enter and search, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two—in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;

The Explanatory Statement to the *Utilities (Electricity Restrictions) Regulation 2004* does not address any of the criteria above. It provides no justification for the Assembly granting a power of entry and search under this subordinate law. Fundamentally, of course, there is the issue that a power of entry and search is granted by subordinate, rather than primary, legislation.

The Committee notes that the Regulatory Impact Statement (**RIS**) that accompanies the *Utilities (Electricity Restrictions) Regulation 2004* indicates that Utilities (Shortage of Essential Utility Service) Bill 2005 is proposed for introduction in May 2005 and that this Bill will incorporate the regime that is instituted by this subordinate law. The RIS goes on to state that the subordinate law is required 'as an interim measure', 'given the volatility and sensitivity of the electricity supply situations forecasted by NEMMCO and Transgrid for the summer 2004/05', to ensure that mandatory restrictions can be implemented efficiently, should they be required prior to the passage of the Bill.

The strict liability offences

The *Utilities (Electricity Restrictions) Regulation 2004* creates 2 offences of strict liability. In neither case, however, has imprisonment been stated as a possible punishment, and in neither case does the penalty exceed 10 penalty points.

The Explanatory Statement contains no justification for the provisions creating offences of strict liability.

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

The power of entry and search

The *Utilities (Electricity Restrictions) Regulation 2004* gives authorized persons the power to enter and search premises (and to use force, if necessary). The Explanatory Statement contains no justification for the provision.

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

Subordinate Law SL2004-64 being the Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2) made under the Civil Law (Sale of Residential Property) Act 2003 amends the commencement provisions of the Act.

This subordinate law (**Amending Regulation**) amends the commencement provision of the *Civil Law (Sale of Residential Property) Regulation 2004 (Principal Regulation)*. Prior to the Amending Regulation, section 2(1) of the Principal Regulation provided that sections 7(3), 7(4), 7(5), 10(3), 10(4), 10(5), 11 and 12 of the Principal Regulation commenced on a day fixed by the Minister by written notice. Regulation 2(2) provides that the remaining provisions commence on 1 July 2005.

The Amending Regulation omits section 2 of the Principal Regulation and substitutes a new section 2 which simply provides that sections 7(4), 10(4) and 12 commence on 4 April 2005. The Notes to the new section state that:

- sections 7(3), 7(5), 10(3) 10(5) and 11 commenced on 1 October 2004 (referring to CN 2004-24); and
- the remaining provisions automatically commenced on 1 July 2004 (as per the 'old' section 2(2) of the Principal Regulation).

It is not clear what the Amending Regulation is trying to achieve. Given that they were not commenced by CN 2004-24, sections 7(4), 10(4) and 12 would ordinarily have commenced on 1 January 2005 (being 6 months after the notification day), as a result of the operation of section 79(1) of the *Legislation Act 2001*. The effect of the amendment made by the Amending Regulation is to override the operation of section 79(1). No indication is given as to the reasons for this amendment. The Explanatory Statement merely gives background on the general scheme of the *Civil Law (Sale of Residential Property) Act 2003*, under which the Principal Regulation (and the Amending regulation) was made.

INTERSTATE AGREEMENTS

The Committee has not been advised of any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS

The Committee has examined the following Regulatory Impact Statement and offers these comments:

Subordinate Law SL2004-61 being the Utilities (Electricity Restrictions) Regulations 2004 made under section 234 of the *Utilities Act 2004*.

The Committee notes that the Regulatory Impact Statement (**RIS**) that accompanies the *Utilities (Electricity Restrictions) Regulation 2004* indicates that Utilities (Shortage of Essential Utility Service) Bill 2005 is proposed for introduction in May 2005 and that this Bill will incorporate the regime that is instituted by this subordinate law. The RIS goes on to state that the subordinate law is required 'as an interim measure', 'given the volatility and sensitivity of the electricity supply situations forecasted by NEMMCO and Transgrid for the summer 2004/05', to ensure that mandatory restrictions can be implemented efficiently, should they be required prior to the passage of the Bill.

GOVERNMENT RESPONSE

The Committee has received a response from:

- The Minister for Environment, dated 21 February 2005, in relation to comments made in Scrutiny Report 1 regarding Disallowable Instrument DI2004-221 being the Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2) and Disallowable Instrument DI2004-220 being the Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1).

The Committee thanks the Minister for Environment for his helpful response.

Bill Stefaniak MLA
Chair

March 2005

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

REPORTS—2004-2005

RESPONSES

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
<u>Report 1, dated 9 December 2004</u>	
Disallowable Instrument DI2004-180 - Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1)	No. 2
Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004	No. 2
Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1)	
Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2)	
Disallowable Instrument DI2004-220 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1)	No. 4
Disallowable Instrument DI2004-221 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2)	No. 4
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)	
Disallowable Instrument DI2004-232 - University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2)	
Disallowable Instrument DI2004-246 - Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1)	
Disallowable Instrument DI2004-258 - Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1)	No. 3
Subordinate Law SL2004-41 - Health Professionals Regulations 2004	No. 2
Subordinate Law SL2004-48 - Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1)	No. 2

Report 2, dated 14 February 2005

Classification (Publications, Films and Computer Games)
 (Enforcement) Amendment Bill 2004

Fair Work Contracts Bill 2004

Government Procurement Amendment Bill 2004 *Act citation:*
Government Procurement Amendment Act 2005 (Passed
15.02.05)

Justice and Community Safety Legislation Amendment Bill 2004
 (No. 2) *Act citation: Justice and Community Safety Legislation*
Amendment Act 2005 (Passed 17.02.05)

Water Efficiency Labelling and Standards Bill 2004

No. 3

Report 3, dated 17 February 2005

Dangerous Substances (Asbestos) Amendment Bill 2005 **(Passed**
17.02.05)

Health Records (Privacy and Access) Amendment Bill 2005
(Passed 17.02.05).....



Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 1 of 9 December 2004. I offer the following response in relation to the matters raised by your Committee.

- 1. Disallowable Instrument DI2004-221 being the Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2) made under section 18 of the *Nature Conservation Act 1980* appoints specified persons as Chairperson and Deputy Chairperson of the Flora and Fauna Committee.**

The Committee notes that paragraph 3 of this instrument refers to the appointment of Chair and Deputy Chair to the Fauna Committee and wonders whether the title of the Committee should, in fact, be the Flora and Fauna Committee. The Committee also notes the paragraph numbering on the instrument is incorrect.

The explanatory statement to this instrument also appears to contain an error, in that paragraph 3 states that this instrument appoints 6 members.

The errors to DI2004-221, are of a typographical and formatting nature. Parliamentary Counsel's Office advise that these errors do not affect the validity of the instrument.

- 2. Disallowable Instrument DI2004-220 being the Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1) made under section 17 of the *Nature Conservation Act 1980* appoints specified persons as members of the Flora and Fauna Committee.**

The Committee notes that, one of the appointees is a public servant and that, under Division 19.3.3 of the Act, the appointment of a public servant cannot be disallowed. The committee suggests that such an appointment should be made under a separate process and not included in an instrument that is disallowable.

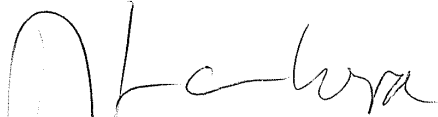
ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433



The comments of the Committee in relation to DI2004-220 are noted and a separate process will be followed in the future.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Stanhope'.

Jon Stanhope MLA
Minister for the Environment

21 FEB 2005