



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

3 FEBRUARY 2009

Report 2

TERMS OF REFERENCE

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

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

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Ms Mary Porter, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

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

ROLE OF THE COMMITTEE

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

BILLSBills—No comment

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

ADOPTION AMENDMENT BILL 2008

This Bill would amend the *Adoption Act 1993* to delete the requirement for a court to be satisfied there are “exceptional circumstances” to justify an adoption order for a person aged 18 years or over, and to make it clear that an adoption order may be made in respect of a person who is or has been married.

CLIMATE CHANGE (GREENHOUSE GAS EMISSIONS TARGETS) BILL 2008 (NO. 2)
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This is a Bill for an Act to create a regime for the setting of targets for reductions in greenhouse gas emissions for the medium and long-term and to provide a mechanism for reporting on and reviewing these targets.

DUTIES (FIRST HOME OWNER EXEMPTION) AMENDMENT BILL 2008
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This Bill would amend the *Duties Act 1999* in relation to the duty payable (or not payable) on a dutiable property where the transfer is to a person who meets the eligibility criteria for a first home owner grant under the *First Home Owner Grant Act 2000*.

GOVERNMENT AGENCIES (CAMPAIGN ADVERTISING) BILL 2008

This is a Bill for an Act to state general principles to apply to the use of public funds for a government campaign to inform the public about a government program, policy or matter which affects their entitlements, rights or obligations, including a campaign to explain the program, policy or matter. It would provide for the Auditor-General to review certain programs, and for the Minister to make guidelines to give content to the principles.

LAW OFFICER AMENDMENT BILL 2008
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This Bill would amend the *Law Officer Act 1992* to expand the functions of the Attorney-General such that this officer would ensure litigation that is instituted and conducted on behalf of the Crown in right of the Territory, the Territory, a Minister, or a person suing or being sued on behalf of the Territory, is started and conducted in accordance with proper standards.

LEGISLATIVE ASSEMBLY (MEMBERS’ STAFF) AMENDMENT BILL 2008 (NO. 2)
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This Bill would amend the *Legislative Assembly (Members’ Staff) Act 1989* to permit one Member of the Assembly to allocate part or all of their salary allocation to another Member, or for the purpose of engaging consultants and contractors.

REVENUE LEGISLATION AMENDMENT BILL 2008 (NO. 2)

This Bill would amend the *Duties Act 1999* to clarify the duty liability on the application to re-register a motor vehicle in the ACT, and the *First Home Owner Grant Act 2000* to permit a debt created by the requirement to repay the grant, which may include penalties and interest, to be collected from a third party.

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2008 (NO. 2)

This Bill would amend the *Road Transport (Driver Licensing) Act 1999* and the *Road Transport (Driver Licensing) Regulation 2000* in relation to suspending or cancelling driver licences when a driver incurs excessive demerit points, in particular in a situation where a driver incurs a demerit points suspension while her or his licence is already suspended.

Bills—Comment

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

**CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES)
(ENFORCEMENT) AMENDMENT BILL 2008 (NO 2)**

This is a Bill to amend the *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* to facilitate the integration of the Office of Film and Literature Classification into the Commonwealth Attorney-General's Department; to remove the need to reclassify a film that has been modified, or a compilation of classified films, on a disc; and to remove the prohibition on advertising unclassified films and provide for industry self-assessment of the likely classification of advertisements.

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

The amendments proposed by the Bill would, if enacted, create strict liability offences and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1)) and/or of the presumption of innocence (HRA subsection 22(1)).

As explained in the explanatory statement, the offences are regulatory in nature, and the Committee notes that the penalties provided are within the range considered acceptable where there is provision for strict liability. The Explanatory Statement says:

The rationale is that professionals engaged in producing or distributing films, videos, computer games 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 these provisions comply with the HRA and are not otherwise an undue trespass on personal rights and liberties.

CRIMES (BILL POSTING) AMENDMENT BILL 2008
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This is a Bill to amend the *Crimes Act 1900* to (1) extend the operation of the strict liability offence against marking private or public property in section 120 of the Act to include the unlawful affixing of paper or placards to such property; and (2) create a statutory duty directed at the promoters of events to take reasonable practicable steps to ensure their event is promoted without contravening section 120. A promoter who recklessly fails to comply with the duty would be guilty of an offence.

Do provisions of the Bill trespass unduly on personal rights and liberties? – term of reference (c)(i)

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

Freedom of expression – HRA subsection 16(2)

Is the proposal to repeal the existing section 120 of the <i>Crimes Act 1900</i> and replace it with a new provision compatible with the right to freedom of expression (HRA subsection 16(2)) and, if not, is any limitation of that right justifiable under HRA section 28?

Clause 6 would repeal existing section 120 of the *Crimes Act 1900* and replace it with a new provision. Under the new section, a person commits an offence where he or she “affixes a placard or paper, or makes a mark with chalk, paint or any other material”:

- on *private premises*, without (as the case may be) the consent of the occupier, or owner or person in charge of the premises – proposed subsection 120(1); or
- on *public property* - proposed subsection 120(2).

The offence is punishable by 10 penalty units (and is a strict liability offence – see below).

The Committee considered a very similar provision in *Scrutiny Report No 51* of the 6th Assembly, concerning clause 7 of the Crimes Amendment Bill 2008, which proposed to insert a new section 119 into the Act. The Committee outlined the human rights issues:

HRA subsection 16(2) provides that “everyone has the right to freedom of expression”. It is arguable that at least some of the acts that may constitute the physical elements of the offence (of affixing, etc) are each an exercise of the right to freedom of expression. That is, some such acts will amount to an attempt to convey or attempt to convey a meaning (footnotes omitted).

The question then is whether the limitation of this right is in the circumstances justifiable 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.

The Committee elaborated, and noted that in relation to both limbs of section 119, there was a question whether the provision was a disproportionate means of controlling the affixing of placards, etc. It noted in particular that some forms of such expression have a high value where they were directed to conveying a political message, and commented that this factor makes it more difficult to support a finding of proportionality.

The Committee for the Sixth Assembly recommended that the Minister should address these questions. The Minister has not responded to the Committee's comments on the Crimes Amendment Bill 2008, and the Committee finds this disappointing.

It notes however the Explanatory Statement to the Crimes (Bill Posting) Amendment Bill 2008 does address the freedom of speech issue. In full, it states as follows:

The government further considers that the amendment does not unduly infringe individuals' right to freedom of expression, as protected by section 16 of the *Human Rights Act 2004* on the following grounds:

First, the provision does not provide a blanket ban on all bill-posting. The government has provided locations, such as public notice boards and information pillars, where advertisements, posters and placards can be affixed without fear of prosecution.

The nature of the content of most placards should be considered. Most placards which are currently illegally affixed are advertisements for events or entertainment venues and are commercial in nature. It is a form of advertising where the business taking the commercial benefit from the advertisement shifts some of the costs associated with its advertising from themselves to private property owners or the government. Further many of the businesses enjoying the commercial benefit of their illegally posted advertisements are likely to be corporations, rather than individuals.

Alternative means of expression are available – and more effective at letting interested parties know about events and venues – such as electronic social networking, SMS phone messaging, internet advertising; all of which can now be accessed by mobile telephone.

The cost of removal of posters and placards and the cost of damage that can be caused to property, which are borne by property owners (in the case of private property) or the government (in the case of public property) should also be taken into account. Advertisements affixed to heritage listed buildings have the additional potential to cause damage to fragile structures or components and can detract from the heritage values which heritage registration is intending to protect.

The glues used to affix placards, when indiscriminately painted onto surfaces, or splashed onto the ground, quickly become discoloured with dirt and in the case of starch based adhesives, can attract vermin.

This explanation does not address some of the free speech issues identified by the previous Committee in its comments on the Crimes Amendment Bill 2008. The Committee recommends that reference to those comments be made by Members of the Assembly who wish to pursue the free speech issue.¹

¹ <http://www.parliament.act.gov.au/downloads/reports/6scrutiny51.pdf>

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

Strict liability offences

The offences under the new section 120 of the *Crimes Act 1900* proposed by clause 6 would be ones of strict liability, and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable limitation of the right to liberty and security (HRA subsection 18(1)) and/or of the presumption of innocence (HRA subsection 22(1)).

This was an issue addressed in *Scrutiny Report No 51* of the 6th Assembly,² concerning a clause in the *Crimes Amendment Act 2008* that resulted in the enactment of the current section 120 of the Act. Clause 6 of the Crimes (Bill Posting) Amendment Bill 2008 proposes to replace section 120 with a new provision.

The Explanatory Statement does not acknowledge that a rights issue arises, and offers only a brief explanation:

The government considers that the extension of the strict liability offence in section 120 as contemplated by this amendment is warranted, as the offence is only concerned with the conduct described, and not any degree of moral blameworthiness.

This justification suffers from the same deficiency as that offered in relation to the *Crimes Amendment Act 2008*. It is not enough to describe the legal effect of the provision – that is, that there is no provision for a fault element (which is the consequence of it being stated to be a strict liability offence) because the offence is not concerned “with any degree of moral blameworthiness”. The Committee said in *Scrutiny Report No 51* of the 6th Assembly:

this description of the provision cannot provide justification for the imposition of strict liability offence. What needs to be justified is why the prosecution need not be concerned to establish any degree of moral blameworthiness on the part of the defendant. This is the question that the explanatory statement should have addressed.

The Committee recommends that the Explanatory Statement be amended to address this question.

CRIMES (MURDER) AMENDMENT BILL 2008

This is a Bill for an Act to amend section 12 of the *Crimes Act 1900* to the effect that a person may be found guilty of murder if it is proved beyond reasonable doubt that they intended to cause serious harm to any person.

² <http://www.parliament.act.gov.au/downloads/reports/6scrutiny51.pdf>

Do provisions of the Bill trespass unduly on personal rights and liberties? – term of reference (c)(i)

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

Is the proposal that a person may be found guilty of murder if it is proved beyond reasonable doubt that they intended to cause serious harm (as defined in the *Criminal Code 2002*) to any person compatible with the right to liberty and security (HRA subsection 18(1)), and/or with the ethical principle that there should be a close correlation between moral culpability and legal responsibility?³

Introduction and the rights issue posed

1.1 The most obviously acceptable definition of the crime of murder is one that encompasses the case where a person caused and intended to cause the death of the deceased.⁴ By the modern period, the common law came to express the definition somewhat more widely. The current definition for Territory law in section 12 of the *Crimes Act 1900* narrows the common law. The amendment to section 12 proposed by this Bill would extend significantly the common law definition. This proposal raises a significant rights issue, the general nature of which is first discussed. Then the issue is addressed by considering the common law, section 12 and the proposals for the reform of the law of murder contained in the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) Discussion Paper *Fatal Offences Against the Person* (June 1998) (henceforth MCCOC DP).

1.2 It is not clear how the rights issue might be framed. One view is that the reform to section 12 engages subsection 18(1) of the *Human Rights Act 2004* (HRA). This states:

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.⁵

It might be argued that inasmuch as a conviction for murder may result in a loss of liberty, this right is potentially breached by a law that states a basis for such a conviction. This is true of every law that provides for imprisonment as a possible punishment upon conviction of a crime, and if this is right, every serious criminal offence is on its face incompatible with HRA subsection 18(1). But that incompatibility will not however render the legislation HRA incompatible if the proponent of the law can establish to the satisfaction of a reviewing court that it is a “reasonable limit” that is “demonstrably justified in a free and democratic society” (HRA subsection 28(1)).⁶ The Committee comments on this issue below.

³ This formulation is drawn from the judgment of a majority of the High Court in the *Wilson* case; see 4.5.

⁴ Also, “if an accused intended to kill A by shooting him in a busy shopping centre, but instead missed and killed B, the accused would be guilty of the wilful murder of B”: Law Reform Commission of Western Australia, *A review of the law of homicide* (Report No 97) (2007) at 41 (henceforth LRC WA).

⁵ It is difficult to see how the second part of this provision might apply, given that the point of the law is not to authorise the arrest or detention of anyone. It might be noted that a person charged with murder need not necessarily be later arrested or detained before trial.

⁶ HRA subsection 28(1) states in full: “Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society”.

Common law and the current ACT definition of murder

2.1 The most obviously acceptable definition of murder encompasses the case where a person (the accused) caused the death of the victim and intended to cause the death of the victim or of another person.

2.2 By the modern period, the common law statement extended this definition to encompass the cases where the accused (1) intended to kill, or was reckless about whether death would result, or (2) intended to inflict grievous bodily harm, or was reckless about whether such harm would result.

2.3 Currently, the crime of murder is defined in section 12 of the *Crimes Act 1900*:

12 Murder

- (1) A person commits murder if he or she causes the death of another person—
 - (a) intending to cause the death of any person; or
 - (b) with reckless indifference to the probability of causing the death of any person.
- (2) A person who commits murder is guilty of an offence punishable, on conviction, by imprisonment for life.

2.4 Given that it does not include cases where only grievous bodily harm was intended or foreseen, section 12 is narrower than the common law definition. It is very close to the definition recommended in the MCCOC DP. The Scrutiny Committee lacked time to explore the history of section 12. Rather, it is proposed to address the reasons why the MCCOC cast the definition in this form, prior to addressing the reform proposed by the Crimes (Murder) Amendment Bill 2008.

2.5 The MCCOC began by noting that:

it is the defendant's state of mind at the time he or she causes the death that determines the culpability of the defendant. A guilty state of mind is the fundamental criterion of fault that the community understands and accepts⁷ as requiring the intervention of the criminal justice system. In short a requirement for a guilty mind avoids 'the public scandal of convicting on a serious charge persons who are in no way blameworthy'.

Logically, the need for a guilty mind escalates with the gravity of the crime. Fatal offences are amongst the most serious of crimes. The Committee places a strong emphasis upon subjective intent and notes this to be consistent with liberal democratic values such as free-will. Accordingly, subjective intention is used as the cornerstone by which a principled approach to the law of homicide is achieved.

The MCCOC noted that the common law (see above 2.2) extended the primary notion that a person was guilty of murder if they caused and intended to cause the death of a person, and said that:

⁷ This assertion was not justified in any way.

[the] key evaluative factor in deciding whether these extensions to murder are warranted is to consider whether they equate with the necessary degree of moral culpability sufficient to attract the murder label. That is clearly a mutable determination upon which reasonable minds can and do differ (page 43).

(This comment is of course applicable to consideration of any statutory extension to the primary notion of what constitutes murder, such as is proposed by this Bill.)

2.6 The Committee then turned to evaluate the common law position and to make recommendations for its reform. It began by saying that “[a] controversy arises in considering whether a conviction for murder should be extended to situations where there is only an intention to do grievous bodily harm” (page 49). It noted that in Australian law, a jury may be told that this concept equates to “really serious injury”,⁸ and that it gave rise to a problem:

This affords the jury a considerable degree of autonomy. Consequently, this area of the law has been plagued with varying results which are difficult to reconcile.

2.7 The MCCOC noted that “in the Model Criminal Code, grievous bodily harm will be replaced with the term ‘serious harm’”. The definition of “serious harm” proposed by the MCCOC has been adopted in the Dictionary to the ACT *Criminal Code 2002*:

serious harm means any harm (including the cumulative effect of more than 1 harm) that—

- (a) endangers, or is likely to endanger, human life; or
- (b) is, or is likely to be, significant and longstanding.

In its discussion, the MCCOC equated “grievous bodily harm” with “serious harm” as defined.

2.8 The Committee began its evaluation of the “serious harm” limb of the common law definition of murder with a question:

Determining moral culpability is central to deciding whether this category of murder should be retained. The question should be asked: Is the person who kills while merely intending to do serious harm just as culpable as the person who intends to kill and does so? Are such persons moral equivalents?

2.9 It noted that there was argument to answer this question “yes”.

Those who argue that such persons are moral equivalents emphasise the fact that the defendant has intentionally acted in such a way so as to endanger the life of another. They further point to the fine evidential line distinguishing persons who intend to kill from those merely intending to cause serious harm. It is not difficult to envisage situations where it is virtually impossible to draw this distinction. If forced to make this distinction, the jury in these cases may resort to guessing. Moreover, the fine distinction between the two would potentially enable defendants who intended to kill to avoid a murder conviction by arguing that they merely intended to cause serious harm.

⁸ See page 51, footnote 77. This is the law in the ACT; see *R v Cameron* [2001] ACTSC 57 at [6], per Crispin J citing *DPP v Smith* [1961] AC 290 at 334, and *R v Perks* (1986) 41 SASR 335 at 337. English law is different, in that there is no appealable error where jury is told that grievous bodily harm equates to “serious harm”. In the ACT (and probably Australia wide) there would be an error.

2.10 The MCCOC took a contrary view.

Despite these arguments several bodies have recommended the abolition of the serious harm category of murder.⁹ They argue that the doctrine is outdated. At the time of its development, it was far more common for persons who suffered serious harm to die. The practical distinction, therefore, between a person intending to kill and doing so and one who merely intended to do serious harm was in the past not very significant. Progress in medical science has caused the distinction to become more relevant. Further, the notion of reckless killing has since been developed. This is said to be capable of subsuming the serious harm category of murder.¹⁰ Critics also argue that the notion of serious harm is too vague, leading to inconsistent verdicts and unacceptably uncertain results.

The Committee is aware of the need for a principled approach to the law of homicide and has predominantly used the defendant's mental state in doing a particular act to achieve such consistency. **The serious harm category of murder diminishes this intent-based approach by allowing something less than an intention to kill to constitute murder. The Committee's view is that murder should in some way be linked to death as the contemplated harm rather than merely serious harm** (emphasis added).

The Committee is concerned that any offence of murder require the prosecution to prove intention or recklessness as to death. If the prosecution can only prove intention or recklessness as to causing serious harm, then manslaughter will be the appropriate offence (pages 52-53, some footnotes omitted)

This last point was stated in another way in the comment that “an intention to do serious harm *without being aware of the substantial risk of death* should only establish manslaughter, not murder” (page 59).

2.11 Thus, the MCCOC recommended that “[the] crime of murder should not extend to cases in which the accused intended serious harm, rather than death, unless the accused was reckless as to the risk of death” (page 53).

2.12 This recommendation is reflected in section 12 of the Crimes Act as it now stands. The proposal to extend in section 12 by providing (as proposed by the Bill) that a person is guilty of murder where they intend to cause serious harm to any person was explicitly rejected by the MCCOC.

2.13 This does not mean of course that the Assembly should reject the Bill, for there is at least one line of argument (as noted at 2.9) that could support the Bill's proposal. The Committee will refer below to the justifications offered by the Attorney-General.

⁹ These include the Mitchell Committee (1977), the Victorian Law Reform Commission (1974, 1984), the English Law Commission (1966, 1989), the English Criminal Law Revision Committee (1980) two English Royal Commissions (one on Capital Punishment (1949-1953) and the other on Murder and Life Imprisonment (1989)), and the Law Reform Committee of Canada (1984).

¹⁰ See Leader-Elliott, “Recklessness in Murder” (1981) 5 *Criminal Law Journal* 84. A person who foresees the risk of death or serious harm but decides to act (recklessly) in any event and thereby causes death is not very different from the person who intends to cause serious harm.

Extensions of the primary notion of murder that are narrower than the proposal in the Bill

3.1 At this point, it is necessary to note that some law reform bodies have proposed extensions to the primary notion of what should constitute murder which would involve an extension of the current definition in section 12 of the Crimes Act, yet be narrower than the wide extension proposed in this Bill.¹¹

3.2 The Law Reform Commission (LRC) of Western Australia (WA) recommended a reform that stands between the narrow approach to what should constitute the crime of murder recommended by the MCCOC, and the wide approach taken in the Bill before the Assembly. The WA definition of the crime of murder that was under review by the LRC defined the kind of harm¹² that it would be sufficient for the accused to have intended to bring about to satisfy the fault element of murder in way that is close to the definition of “serious harm” in the ACT Criminal Code. The Criminal Code of WA described that harm as “grievous bodily harm” and defined it to mean “any bodily injury of such a nature as to [1] endanger, or be likely to endanger life, or [2] to cause, or be likely to cause, permanent injury to health”.¹³

3.3 The LRC recommended that only the first half of this definition should be retained. It accepted that “the mental element of an offence should correspond with the harm caused”, and reasoned that

[an] intention to cause a permanent injury to health does not correspond with harm caused. On the other hand, an intention to cause an injury likely to endanger life corresponds closely with the resulting harm of death.¹⁴

It argued that “there is a significant difference in moral culpability between an intention to cause an injury likely to endanger life and an intention to cause a permanent injury to health”.¹⁵

3.4 It illustrated the width of the second part of the definition:

The second limb covers injuries that cause or are likely to cause permanent injury to health. For example, a permanent injury to health may include having a toe or finger cut off or being punched in the eye leading to permanent double vision. In these examples a person would be permanently injured; however, such injuries would not be likely to endanger life (footnotes omitted).¹⁶

¹¹ An evaluation of whether a law that derogates from a right in the HRA is justifiable under HRA section 28 requires, among other matters, that regard be had to whether the object of the law could be achieved by means less restrictive of the right than those means proposed by the law; see paragraph 28(2)(e).

¹² That is, harm less than death.

¹³ LRC WA at 43.

¹⁴ LRC WA 46. The Law Commission (England and Wales) takes a similar position; see LRC WA at 47-48. It recommended that a test to replace the “grievous bodily harm” limb of the common law definition of murder should require that it be proved that the accused was aware that there was a serious risk of death involved in the infliction of the harm intended by the accused. This formulation is also close to part (a) of the definition of “serious harm” in the Dictionary of the ACT Criminal Code.

¹⁵ LRC WA 48.

¹⁶ The LRC also noted that it had been decided by the WA Supreme Court that the two limbs of the definition must be viewed “as separate descriptions of injuries that amount to grievous bodily harm”; see at 43.

3.5 It argued that:

While the conduct is clearly reprehensible there is an insufficient connection between the accused's intention and the resulting death. Therefore, the Commission has concluded that only an intention to cause an injury that endangers or is likely to endanger life should constitute the mental element of murder.¹⁷

3.6 If this approach was adopted, then the definition of "serious harm" for the purposes of proposed paragraph 12(c) of the Crimes Act would not adopt the definition of "serious harm" in the Criminal Code in its entirety, but only part (a) of that definition.

3.7 There is another possible amendment to the definition of murder in ACT law that deserves to be debated. This concerns the definition of "serious harm" in the Criminal Code.

Several LRCs of Australia and in the Commonwealth of Nations¹⁸ have recommended that in relation to such a definition the prosecution must prove not only that the accused intended to inflict the harm, but also that he or she knew that that harm would be likely to endanger human life. (As noted later,¹⁹ this is probably not how this limb of the definition of "serious harm" in the ACT Criminal Code would be interpreted.)

However, not all LRCs have accepted that this should be so. It is argued that "severe moral condemnation is merited by a failure to foresee what any decent human being would foresee".²⁰

The philosophical standpoint of the High Court on the issue of the definition of murder and manslaughter at common law

4.1 If the Bill passes into law, and the question of the compatibility of the amendment with the HRA arises, it may be anticipated that a reviewing court will pay attention to what the High Court has had to say about how the crimes of murder and manslaughter should be defined at common law. The leading case is *Wilson v R* [1992] HCA 31. The court addressed the definition of manslaughter, but its analysis is relevant to the definition of murder.

4.2 At common law, there are two categories of involuntary manslaughter: (1) by an unlawful and dangerous act carrying with it an appreciable risk of serious injury; and (2) by criminal negligence. In *Wilson*, the High Court emphasised that for category (1), the injury must be "serious". The case before it was one where the accused had punched the victim. The court considered and rejected a doctrine that held that it was sufficient that the act of the accused that caused the death of the victim simply amounted to an assault.²¹

¹⁷ LRC WA 48, which notes at footnote 62 that the LRC of Ireland took a position in agreement with this approach.

¹⁸ See LRC WA at 49.

¹⁹ See at 5.3.

²⁰ See LRC WA at 49.

²¹ See at [1992] HCA 31 [33].

4.3 Rather, the majority of the court held that the test is whether “a reasonable person [in the accused’s position] would have realised that he or she was exposing another to an appreciable risk of ... serious injury”.²² The majority rejected the argument for a test that would allow that any act of assault would be sufficient, saying:

Cases of death resulting unexpectedly from a comparatively minor assault ... will be covered by the law as to assault A conviction for manslaughter in such a situation does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate.²³

Earlier, their Honours said that “[m]anslaughter by the intentional infliction of [only] some harm ... continues the rigour of the early common law and ought to play no part in contemporary law”.²⁴

4.4 Their Honours did not define “serious injury”, but there is no indication that they had in mind a definition as extensive as that in the Dictionary to the Criminal Code. This definition is so wide that it could encompass a “comparatively minor assault” such as a punch.

4.5 Two points arise from *Wilson*. The first is to note the philosophical standpoint of the High Court on the issue of the definition of an offence where the victim has died – this being that “there should be a close correlation between moral culpability and legal responsibility”. The second point is that the definition of “serious harm” in the Criminal Code is so wide that it could encompass cases (such as a minor assault that nevertheless results in a harm that is “is, or is likely to be, significant and longstanding”) that are of a kind that the High Court did not consider should warrant even a conviction for manslaughter.²⁵

4.6 This analysis underlines the general point that the proposal in the Bill raises a serious issue of its compatibility with the generally accepted principle that “there should be a close correlation between moral culpability and legal responsibility”.

Issues in the interpretation of the proposed amendment to section 12 when read with the definition of “serious harm” in the Criminal Code

5.1 It is clear that, generally speaking, the proposal in the Bill to add an additional paragraph to subsection 12(1) of the Crimes Act would significantly extend the definition of murder. Just how wide depends on how some issues of interpretation would be resolved.

5.2 The definition of “serious harm” requires that it be asked whether the harm that the accused intended to cause (and did cause) had either (or it could be both) of two effects. The first, stated in paragraph (a) of the definition, is whether the harm “endangers, or is likely to endanger, human life”, and the second, in paragraph (b), is whether it “is, or is likely to be, significant and longstanding”.

²² At [47] and see at [48] and [25].

²³ At [50].

²⁴ At [49].

²⁵ This might depend on whether the test for whether a harm would have that effect is subjective – that is, did the accused intend that degree of harm?, or objective – that is, should the accused, acting reasonably, have foreseen that degree of harm? The case-law suggests the latter, in which case the point made in the test is stronger. See 5.3 below.

What is the test for whether a particular harm would have one or other effect? *Is it subjective*, so that the question is whether the accused intended one or other effect? If so, then the scope of the definition is narrower. *Or is the test objective*, so that test is whether the accused, acting reasonably, should have foreseen that one or other effect would result? If the latter is the case, then the scope of the definition is broader.

5.3 This is a matter that calls for clarification from the Attorney-General. The critical issue is the meaning to be given to the word “likely”. On the basis of High Court decisions, it is probable that whether a harm is “likely to endanger(,) human life” or is “likely to be significant or long-standing” would be determined objectively. That is, the prosecution would not need to prove that the particular accused was aware that the injury was likely to have either one of those consequences. Rather, it need prove only that viewed objectively what the accused did (being an act that amounts to a “harm”) was of such a nature that it was likely to have either one of those consequences.²⁶ Moreover, it will not be necessary to prove “that the consequences are more likely than not to occur. Rather, there must be a substantial and real chance that the particular consequences may result”.²⁷

5.4 There will be cases where the harm will be of such a nature that in the absence of medical treatment the harm is likely to endanger life or to be significant or longstanding, but with appropriate medical treatment the person may recover completely from the injury sustained. Australian case-law suggests that the whether the harm falls within either limb “is determined by considering the nature of the injury irrespective of the availability or otherwise of medical treatment”.²⁸ This approach gives a wider meaning to the definition of “serious harm” (and consequently to the definition of murder as proposed by the Bill) and is another issue that should be clarified by the Attorney-General.

Is there justification for any derogation of HRA subsection 18(1), and/or of the principle that there should be a close correlation between moral culpability and legal responsibility?

6.1 For the sake of simplicity, this can be addressed as if the question was whether this proposal to amend section 12 of the Crimes Act is, in terms of HRA subsection 28(1), a reasonable limit “that can be demonstrably justified in a free and democratic society”.

6.2 This is an open-ended test that requires the person making the assessment (such as a reviewing court) to make value judgements.²⁹ As the MCCOC noted, whether a definition of murder “equate(s) with the necessary degree of moral culpability sufficient to attract the murder label ... is clearly a mutable determination upon which reasonable minds can and do differ”.

6.3 In the Territory, the person making the assessment must also take into account (but not as an exhaustive statement of relevant matters) the considerations stated in HRA subsection 28(2):

²⁶ LRC WA 44 discusses the High Court decisions.

²⁷ LTRC 44-45.

²⁸ LRC WA 43.

²⁹ What this assessment involves is explained at length in *Scrutiny Report No 25* of the 6th Assembly, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. The Committee cited the words of Richardson J in *Ministry of Transport v Noort* [1992] NZLR 260 at 283) (adapting them to section 28) that the tests involved in the application of section 28 “necessarily involve public policy analysis and value judgements on the part of the Courts”, and that “in principle [the inquiry] will properly involve consideration of all economic, administrative and social implications”.

- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
- (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

6.4 In terms of this Bill, the matter may boil down to resolving a tension between two conflicting sets considerations.

On the one hand are the interests or values that are derogated from by the Bill. If one looks at it in terms of HRA subsection 18(1), the “right” affected by the limitation is the right to liberty, and this right will in many cases be seriously affected by the lengthy term in prison that usually follows upon a conviction for murder. Whether or not subsection 18(1) is relevant, one may also argue that the Bill departs significantly from the principle that there should be a close correlation between moral culpability and legal responsibility. Also to be considered is the serious moral stigma that attaches to a conviction for murder, to a greater degree than is the case with all other crimes including manslaughter.³⁰

6.5 On the other hand, the purpose of the Bill’s limitation of these interests or values must be taken into account. Its apparent purpose is to widen the definition of murder. The Explanatory Statement says very little about why this is thought necessary:

In all other Australian jurisdictions, the fault element for murder includes an intention to inflict a form of serious bodily harm. The Bill introduces the same concept to the *Crimes Act 1900*, section 12(1) so that murder in the Australian Capital Territory can be established when a person who causes the death of another does so with the intention to inflict serious harm on that person.

The definition of serious harm is taken from the *Criminal Code 2002*, in accordance with the government’s commitment to continue the codification of the criminal laws of the ACT.

The definition of serious harm includes that the harm endangers, or is likely to endanger, human life, or is harm that is, or is likely to be, significant and longstanding. The definition provides certainty about the harm which must be intended in order for the offence to be made out, rather than relying on the common law to define what is ‘grievous bodily harm’. The use of the common law definition of grievous bodily harm as “really serious bodily injury” could leave a level of uncertainty about the level of harm intended.

³⁰ This might be seen to engage HRA section 12 (the right to privacy).

6.6 The first part of this statement concerning the position in other Australian jurisdictions may be somewhat misleading. The reference in the first sentence is to the definition of murder at common law, or in some statutes that encompass the case where a person charged is proved to have intended to inflict grievous bodily harm. As noted above, as a matter of Australian law, this concept can be equated with “a form of serious bodily harm”, but, a number of ACT Supreme Court decisions make it clear that the appropriate gloss on “grievous bodily harm” is “serious bodily harm”. This is recognised in the third paragraph of the extract from the Explanatory Statement reproduced above.

6.7 Secondly, and more critically, so far as the Committee’s researches have been able to discover, it is only in the Northern Territory that the definition of harm for the purposes of the definition of murder corresponds exactly to the definition of “serious harm” as stated in the Dictionary to the Criminal Code. The definitions in some other jurisdictions are similar, in some others they are not.³¹ (The Committee invites the Attorney-General to provide to the Assembly further information should it be maintained that the proposal in the Bill will bring the Act “into line” with other Australia jurisdictions.) The Committee notes again that the MCCOC DP rejected the approach to a definition of murder taken by the later Northern Territory law.³² Moreover, many law reform bodies have recommended the use of a concept of “grievous bodily harm” in the definition of murder should be jettisoned.

6.8 The Presentation Speech says:

There has been strong concern voiced in our community over recent months that our legislation does not adequately cover the circumstances in which the taking of life can be classified as murder. This Bill is a response to those concerns. ... This amendment will bring the ACT into line with all other Australian jurisdictions. It is a further step in ensuring that the laws of the ACT reflect the wishes of the ACT community.

6.9 The speech does not elaborate on how it has been ascertained that the ACT community would wish to have the law of murder defined in such an extensive fashion as that proposed in the Bill. It is worth noting that the LRC of WA recorded that

the Law Commission (England and Wales) considered research conducted in relation to the public’s opinion about murder. This research found that the ‘public assumes that murder involves an intention to kill or its moral equivalent, namely a total disregard for human life’.³³

This does not take the matter very far in relation to opinion in the ACT, but it may be a caution against assuming too much about community opinion.

³¹ See the brief review in LRC WA at 45.

³² As noted by the LRC of WA, “[the] MCCOC recommended that murder should only apply where the accused intends to cause death or is reckless about causing death and accordingly, did not extend murder to include an intention to cause serious harm: see MCCOC, *Fatal Offences Against the Person, Discussion Paper* (1998) 58. The Northern Territory Code adopts the Model Criminal Code definition of serious harm: see MCCOC, *Non-Fatal Offences Against the Person, Report* (1998) 16”.

³³ LRC WA at 74.

6.10 Furthermore, the Committee's understanding of the law of other Australian jurisdiction is that it is only the Northern Territory that has taken exactly the same approach. The approach in WA (and perhaps in one or two other States) may approximate to the Bill's position (and it has been noted above that the LRC of WA considers that approach too wide). In other States the narrower common law definition applies.³⁴

6.11 A final point is a critical one. Assessment of whether a proposed law is justifiable under HRA section 28 must, in terms of paragraph 28(2)(e), consider whether "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve". A question for the Attorney-General is whether the objective of the Bill could be achieved by a redefinition of murder in the terms proposed by the LRC of WA. That is, would it be sufficient to add a paragraph (c) to section 12, as proposed, but to define "serious harm" by adopting only paragraph (a) of that definition (see paragraph 2.8 above)?

The Memorandum of Compatibility

7.1 The Committee commends the Attorney-General for providing a Memorandum of Compatibility written by officers of his Department. This material has assisted the Committee and it may assist the Assembly if the Committee offers some comments.

7.2 It is clear that the limb of the common law definition that allows that a defendant may be convicted of murder if it is established that they had intent to cause "grievous bodily harm" is widely criticised.

7.3 Section 12 of the Crimes Act is a reform to the common law that removes the "grievous bodily harm" limb, and would be widely approved by Australian and English judges and by law reform commissions. The question for the Assembly is not whether to remove the "grievous bodily harm" test and replace it with another similar test. It is whether section 12 should (when read with the definition of "serious harm" in the Criminal Code) be amended to state a quite different test for intention that does not correspond to the harm which results, that is, the causing of death. With respect, the Memorandum gives a false impression of what is in issue.

7.4 In paragraph 5, the Memorandum argues that adoption of a test for "serious harm" as stated in the Criminal Code would "prevent people from being convicted of murder when the injury they intend to cause is not particularly serious". This assumes that the common law "grievous bodily harm" of murder is still the law in the Territory. It clearly is not, and debate about this issue is, with respect, beside the point.³⁵

7.5 The Memorandum does not sufficiently acknowledge that a test for "serious harm" as stated in the Criminal Code would again make the crime of murder in the Act a species of constructive crime. That is, a person may have the requisite intent to commit murder if they intend harm, and that harm "is, or is likely to be, significant and longstanding". Such a person may have no intention of killing a person or doing something that endangers life.

³⁴ See the review at LRC WA at 45.

³⁵ The Committee notes that the Memorandum (paragraph 3) understates the strictness of the test for "grievous bodily harm". Whatever may be the position on English law, it cannot be equated to harm "of as serious character".

7.6 The Memorandum examines the human rights implications from a standpoint different to that taken by the Committee. The Committee commented upon the Bill by reference to recommendations of law reform bodies (and in particular of the MCCOC), and the position taken by the Australian High Court in the *Wilson* case.

7.7 The Committee doubts that the concept of an arbitrary arrest or detention stated in HRA subsection 18(1) has any bearing on the matter; (contrast to paragraphs 9-13 of the Memorandum³⁶). It may be that the right to liberty is engaged (Memorandum paragraphs 14-17), and the Committee has assumed so.

7.8 The decisions of a court of another country concerning the relevant human rights document of that country must be approached with care.

- The text of the document may be different to the comparable provision of the HRA, and this difference may be critical.³⁷
- Even where a provision of the HRA is substantially identical to that of the human rights document of another country, it is axiomatic that the decision of another jurisdiction will reflect the community attitudes and standards of that jurisdiction. The Australian High Court made this point in *Wilson*, when it appears to have endorsed the view of a South Australian judge that for this reason decisions of the Supreme Court of Victoria were more persuasive than those of England.³⁸ Thus, decisions of Australian courts – and in particular of course of the High Court – concerning the common law approach will have significant influence on Australian courts.³⁹
- There is a question whether comments of the Human Rights Committee of the United Nations should have much if any influence on how an Australian court would interpret the HRA. This Committee is not in any sense a court.

7.9 The Canadian law relied upon in the Memorandum appears to support a rejection of the proposed extension to section 12 as much (if not more than) as it supports the proposal.

7.10 The conclusions of the Memorandum start at paragraph 32 by asking whether “a *mens rea* for murder of intent to cause grievous bodily harm breaches the fundamental principles of justice” and opines that it does not. As noted above, this is not the question raised by the proposal to extend the definition of murder in section 12 of the Crimes Act. The focus should be on the definition of “serious harm” in the Criminal Code.

³⁶ The Memorandum refers to a case from Hong Kong (paragraph 17), but it does not note that the text of Article 28 on the Basic Law of Hong Kong provides that “[no] Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment”. In contrast, subsection 18(1) of the HRA refers only to arbitrary arrest or detention. These two concepts more naturally refer to arrest or detention before trial, and not to imprisonment after conviction.

³⁷ See the previous footnote.

³⁸ [1992] HCA 31 at [32].

³⁹ It is worth noting that a legal opinion about how the HRA will apply is an opinion about what an ACT reviewing court will do, and it is axiomatic that such a court will be bound to follow High Court authority or to give it great persuasive weight.

7.11 The Memorandum argues that any unjust application of the extended definition in a particular case could be dealt with by relying upon the sentencing discretion of the Supreme Court to fix a “more lenient sentence”. With respect, this is not a principled approach to a question as grave as the definition of murder. Moreover, it overlooks the severe stigma of a conviction for murder.

7.12 It is asserted (paragraph 34) that “all Australian jurisdictions” define murder to include a *mens rea* of intention to cause “grievous bodily harm”. In substance this may be so, but when addressing the question of the application of section 28 the HRA, the many criticisms of the Australia law reform commissions of this rule must be considered and have some weight.

7.13 Finally, to assert that the issue of the definition of murder should be left to the legislature (that is, to the Legislative Assembly) overlooks the fact that the HRA sets standards that are meant to control legislative activity. The argument in the Memorandum comes close to saying (if it does not mean) that a law engaging an HRA right must be reasonably justifiable in a democratic society because it has been enacted by a democratic legislature. This argument would render the HRA meaningless.

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

<p>DANGEROUS SUBSTANCES AND LITTER (DUMPING) LEGISLATION AMENDMENT BILL 2008</p>

This is a Bill to amend a number of Acts and Regulations to decrease incidents of illegal dumping and to facilitate the recovery of costs involved in removing illegally dumped material.

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

The seizure and impounding of vehicles and the rights to privacy and property

The *Dangerous Substances Act 2004* and the *Litter Act 2004* provide for a range of offences and this Bill would extend that range (see below for comment on some aspects). Part 6 of the Bill would also amend the *Road Transport (Safety and Traffic Management) Act 1999* to enable the police to use their power under Division 2.3 of that Act to impound vehicles used in the commission of some kinds of offences. These are those in part 3.2 of the *Dangerous Substances Act 2004* (failure to comply with safety duties) and in section 9 (aggravated littering), section 9A (dumping litter), and subsection 9C(1) (commercial waste) of the *Litter Act 2004*.

The Committee commented on vehicle impounding schemes in *Scrutiny Report No 28* of the 6th Assembly,⁴⁰ in relation to the Road Transport (Safety and Traffic Management) Amendment Bill 2006. It identified the rights issues raised by such a scheme:

⁴⁰ <http://www.parliament.act.gov.au/downloads/reports/6scrutiny28.pdf>

In terms of the *Human Rights Act 2004*, the issue might be posed as to whether there is derogation from HRA section 10 (Protection from torture and cruel, inhuman or degrading treatment etc) which, as the Committee has often pointed out, may be seen to incorporate a principle that punishment should not be disproportionate to the offence. In this case of course, the seizure of the property occurs before any finding of guilt. The issue might also be seen as raising a breach of the right to privacy in HRA subsection 10(1): “Everyone has the right— (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; ...”. This view requires an extensive interpretation to the concept of “home”.

In other jurisdictions, this kind of issue is seen as one of whether there is a derogation of the right to property, and in that context the courts have focused on the value of the property and the extent of the hardship that is caused by its seizure: see R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) Second Supplement, 18.109B. While the HRA does not include a right to property, this right is stated in international treaties (in particular Article 17 of the Universal Declaration of Human Rights, and see United Nations Commission on Human Rights, "The Right of Everyone to Own Property Alone as well as in Association with Others", UN Doc/E/CN.4/1994/19 (1993) at 90-92). In a modified form, it is a right of full constitutional status so far as concerns the legislative power of the Legislative Assembly; see paragraph 23(1)(a) of the *Australian Capital Territory ((Self-Government) Act 1988*.

In response to this comment, the Minister said that he acknowledged that the vehicle impoundment provisions of the *Road Transport (Safety and Traffic Management) Act 1999* “raised human rights issues and may require further consideration in terms of human rights compatibility” and would be reviewed in the second half of 2006.

The Committee notes that there is no acknowledgement in the Explanatory Statement to this Bill that the extension of the impounding scheme to offences under the *Dangerous Substances Act 1999* and the *Litter Act 2004* raise human rights issues.

Given this background, the Committee recommends that the Minister provide the Assembly with advice addressing the rights issues that do arise.

Strict liability offences

Clause 10 of the Bill would create strict liability offences by the insertion into the Litter Act of a new section 9B. The issue under the *Human Rights Act 2004* (HRA) is whether the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1)) and/or of the presumption of innocence (HRA subsection 22(1)).

The Explanatory Statement makes no reference to the HRA and states only:

Section 9B establishes an alternative strict liability offence of dumping litter, with a lower penalty (50 penalty units) than section 9A. The Government is of the view that a strict liability offence is warranted. The physical element of the offence, the dumping of a quantity of litter, is the critical feature of the offence.

In *Scrutiny Report No 53* of the 6th Assembly,⁴¹ concerning the Children and Young People Bill 2008, it observed of an identical claim:

The Committee does not regard this as satisfactory. This line of justification could apply to those many offences where it is the commission of the physical elements that is the critical element. The criminal law is not often concerned primarily with the mental state of the accused. The argument that providing for a fault element “would diminish the regulating purpose” comes close to saying that it will be easier to establish guilt if there is no fault element. This is true, but not a justification for overriding the right to liberty and security and/or presumption of innocence.

These offences are not regulatory in nature in the way this concept is conventionally used by the Committee and in recent Explanatory Statements.

What is required is an explanation of why no fault element is prescribed. For example, taking proposed subsection 9B(1), why is it that a person who dumps litter (of the requisite weight or volume) at a public place should be guilty of a criminal offence where they did not intend to dump it at such a place?

The Committee recommends that the explanatory statement be amended to address this question.

EDUCATION AMENDMENT BILL 2008

This is a Bill to amend section 20 of the *Education Act 2004* to make new provision concerning the nature of the consultation that must take place before the Minister decides to close or amalgamate a government school, and to insert a time frame for decision making to ensure that a school closure or amalgamation cannot occur less than 6 months after the final decision is made, and longer depending on the end of the school year.

Report under section 38 of the *Human Rights Act 2004* **Has there been a trespass on personal rights and liberties?**

In what ways, if any, do the proposals for amendment of the Education Act enhance the achievement of the international law obligations so far as concerns the adequacy of a system for providing primary and secondary education to children?

In *Scrutiny Report No 30* of the 6th Assembly,⁴² the Committee commented on the Education Amendment Bill 2006 (No. 3) and drew attention to Article 13 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR). This states principles that might be taken to state obligations in international law so far as concerns the adequacy of a system for providing primary and secondary education to children. It also recorded the comments of the Committee on Economic, Social and Cultural Rights (CESCR) on Article 13. It also noted the comments of the Human Rights Committee on the provision of the ICCPR that is adopted by subsection 11(2) of the *Human Rights Act 2004*. Members are referred to this discussion.

⁴¹ <http://www.parliament.act.gov.au/downloads/reports/6scrutiny53.pdf>

⁴² <http://www.parliament.act.gov.au/downloads/reports/6scrutiny30.pdf>

In conclusion the Committee commented that it “[did] not suggest that reference to Article 13 of the ICESCR or to the Comments of the CESCR will necessarily determine any issue as to whether the Bills under review do or do not enhance the achievement of the international law obligations so far as concerns the adequacy of a system for providing primary and secondary education to children in the Territory”.

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

FREEDOM OF INFORMATION AMENDMENT BILL 2008

This Bill would amend the *Freedom of Information Act 1989* to remove the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption from the duty to disclose a document under section 34 (documents affecting relations with Commonwealth and States); section 35 (Executive documents), and section 36 (internal working documents) of that Act; and to make consequential amendments.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

Would removal of the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption under section 34 (documents affecting relations with Commonwealth and States), under section 35 (Executive documents), and under section 36 (internal working documents) of the *Freedom of Information Act 1989*, enhance HRA section 16 (freedom of expression) and/or paragraph 17(a) (right to take part in the conduct of public affairs)?

Freedom of expression and freedom of information

A general account of the FOI Act and the role of a conclusive certificate in support a claim for exemption is in *Scrutiny Report No 36* of the *Sixth Assembly*,⁴³ concerning the Freedom of Information Amendment Bill 2006. Only some key points are repeated here.

Section 10 of the FOI Act states that "every person has a legally enforceable right to obtain access" to documents of ministers, departments and agencies. This right does not however extend to matter in a document that is exempt from disclosure, and a number of provisions state what kinds of documents are exempt. Nor does the right extend to documents that are excluded from access under the Act.

For present purposes, three exemptions must be noted.

Section 34 – the exemption for documents affecting Commonwealth/State relations (a) By subsection 34(1) of FOIA, certain kinds of documents the disclosure of which would affect Commonwealth/State relations are exempt; in particular, those where disclosure “would, or could reasonably be expected to, cause damage to relations between the Territory and the Commonwealth or the Territory and a State” (paragraph 34(1)(a)), and those where disclosure “would divulge information or matter communicated in confidence by or on behalf of the Commonwealth, a State or an authority of the Commonwealth or of a State to the Territory, to a Territory authority or to a person receiving the communication on behalf of the Territory or of a

⁴³ <http://www.parliament.act.gov.au/downloads/reports/6scrutiny36.pdf>

Territory authority” (paragraph 34(1)(b)).⁴⁴ (b) Under subsection 34(3), if a Minister certifies that a document is an exempt document for a reason referred to in subsection 34(1), then that establishes conclusively, subject to part 7 (concerning AAT review), that that is the case. Subsections 34(3) and (6) relate to this power. (c) Under subsection 34(4), a Minister may certify that information as to the existence or non-existence of a document as described in a request would, if contained in a document of an agency, cause the lastmentioned document to be an exempt document under this section because of a reason referred to in subsection 34(1).

Section 35 – the exemption for Executive documents (a) By subsection 35(1) of FOIA, certain kinds of “executive documents” are exempt; in particular, “a document that has been submitted to the Executive for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive”; “an official record of the Executive”; and “a document the disclosure of which would involve the disclosure of any deliberation or decision of the Executive ...”. (b) Under subsection 35(3), if a relevant chief executive signs a certificate certifying that a document is of a kind referred to in subsection 35(1), then that “establishes conclusively, subject to part 7 [concerning AAT review], that it is an exempt document of that kind”.

Section 36 – the exemption for “internal working documents” (a) By subsection 36(1) of FOIA, an “internal working document” (as defined) is exempt if its disclosure “would be contrary to the public interest”. (b) Under subsection 36(3), if the Minister signs a certificate to the effect that the disclosure of an internal working document “would be contrary to the public interest”, then that establishes conclusively, subject to part 7 [concerning AAT review], that that is the case.

A decision-maker may claim exemption under any of subsections 34(1), 35(1) or 36(1) in the absence of a conclusive certificate.

If an exemption is claimed by a decision-maker, the requester may seek review by the Administrative Appeals Tribunal (AAT), a body established by the *Administrative Appeals Tribunal Act 1989* (ACT). The AAT stands in the shoes of the decision-maker, and takes its own view – uninfluenced by the view of the agency decision-maker – as to whether the document falls within a category of exemption.

But the function of the AAT is very different where a conclusive certificate supports a claim that a document is exempt. An applicant can appeal to the AAT to seek review of a claim of exemption that is supported by a conclusive certificate, but the tribunal cannot overrule the claim. Rather, it may decide only whether there exist “reasonable grounds” for the claim. If the AAT determines that there are no reasonable grounds for the certificate, the Minister has a choice whether to maintain or revoke the certificate. If the certificate is maintained, notice must be provided to the applicant and tabled in Parliament.

⁴⁴ It should be noted that by subsection 34(5), section 34 “does not apply to a document in respect of matter in a document the disclosure of which under this Act would, on balance, be in the public interest”. This provision would be unaffected by the amendments proposed in this Bill. This is also true of the amendments in the Freedom of Information Amendment Bill 2008 (No 2).

It would thus enhance the right to information stated in section 10 of FOIA were there removed from FOIA the provisions for conclusive certificates to be issued to support claims exemption under any of subsections 34(1), 35(1) or 36(1). In this way, certain rights stated in the *Human Rights Act 2004* might be enhanced.

It may be argued that removal of the facility for conclusive certificates would better protect the right to freedom of expression stated in HRA section 16; (for more detail, see *Scrutiny Report No 36* of the *Sixth Assembly*). Section 16 provides:

16 Freedom of expression

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

This reform might also enhance the right stated in HRA paragraph 17(a):

17 Taking part in public life

Every citizen has the right, and is to have the opportunity, to—

- (a) take part in the conduct of public affairs, directly or through freely chosen representatives;

There are writers on international human rights law who argue that:

[f]reedom of information has been recognized not only as crucial to participatory democracy, accountability and good governance, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations by a number of international bodies, including the United Nations (UN), the Organization of American States (OAS), the Council of Europe (COE) and the Commonwealth, as well as national developments in countries around the world, amply demonstrate this: T Mendel, “Freedom of Information: An Internationally protected Human Right” (footnote omitted).

The Australian FOI laws have been introduced on the basis that they will enhance democratic accountability.

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

FREEDOM OF INFORMATION AMENDMENT BILL 2008 (No 2)
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This Bill would amend the *Freedom of Information Act 1989* to remove the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption under section 35 (Executive documents) and section 36 (internal working documents) of that Act; and to make consequential amendments. By amendment of section 11 of the Act, the Bill would also provide that a person may not obtain access to certain categories of documents.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

Would removal of the ability of a decision-maker to issue a conclusive certificate to support a claim for exemption under section 35 (Executive documents) and under section 36 (internal working documents) of the *Freedom of Information Act 1989*, enhance HRA section 16 (freedom of expression) and/or paragraph 17(a) (right to take part in the conduct of public affairs)?

This question has been considered above in relation to the Freedom of Information Amendment Bill 2008. The answer is “yes”.

Do the proposed amendments to section 11 of the Act, whereby a person could not obtain access to certain categories of documents, derogate from HRA section 16 (freedom of expression) and/or paragraph 17(a) (right to take part in the conduct of public affairs)? If so, are these limitations justifiable under HRA section 28?

Clause 4 of the Bill proposes that a new subsection be added to section 11, in these terms:

- (1A) A person is **not entitled to obtain access** under this part to **any of the following documents** (emphasis added):
- (a) a document prepared for a Minister newly appointed to a portfolio for the purpose of giving information and advice about the Minister’s portfolio responsibilities;
 - (b) a document prepared by or for a Minister for the purpose of accounting to the Legislative Assembly for the previous and proposed spending of appropriations by agencies within the Minister’s portfolio;
 - (c) a notebook or similar document (the Cabinet notebook) containing notes of any discussion or deliberation taking place in a meeting of the Executive or of a committee of the Executive, made in the course of the discussion or deliberation by, or under the authority of, the Secretary to the Executive;
 - (d) a document prepared by or for a Minister for the purpose of assisting the Minister to answer questions in the Legislative Assembly.

These are in effect new exclusions, although the existing exemption provision in section 35 of the Act concerning Executive documents would in one way or another cover the documents that would be affected by proposed paragraph 11(1A)(c). It is not explained why it is necessary to make this provision.

So far as concerns paragraphs (a), (b) and (d), it is clear that they are inspired by recommendations of a report to the Queensland government (*The Right to Information Reviewing Queensland’s Freedom of Information Act* June 2008⁴⁵). The Presentation Speech draws attention to this report, and its two key justifications for these exclusions should be noted.

⁴⁵ http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf

First, it is argued that the exclusions are necessary to enhance the concept that a Minister is individually responsible for the conduct of administration in the areas of their portfolio responsibilities by ensuring that the Minister knows what is happening (or has recently happened) within the relevant departments. The Report singled out the briefs that a Minister receives on taking office and the brief provided in advance of the annual budget estimates debates in Parliament. (The claim that in “virtually all” Australian jurisdictions these documents are withheld from release under another exemption is apparently not true of the ACT – see below).

Secondly, “[there] would be a real governance problem if the FOI law was to inhibit the free and frank provision of *information* by officials to Ministers”. The report cited a recent study of the working of the New Zealand FOI law to buttress this claim. In essence, it is a claim that unless the kinds of documents covered by proposed subsection 11(1A) are excluded from the FOI Act, Ministers will not be in a position to know what is happening (or has recently happened) within the relevant departments because the advisers and public servants will not include all relevant information in these documents. (At the same time, however, the Report conceded that “[the] question of whether “free and frank” *advice* by officials might be inhibited by FOI is a quite distinct issue, and one that the courts – and senior officials – are becoming less inclined to accept as a real possibility”. It is not explained why officials should be expected to be frank when providing advice but fearful of providing information.)

On the other hand, the Presentation Speech of the Attorney-General frankly acknowledges that the documents covered by proposed subsection 11(1A) have been “traditionally” released. The speech says:

Few jurisdictions in the Westminster system, with good reason, release these types of documents under FOI legislation, finding exemptions and exclusions to deny access. This is not the experience of the Territory where opposition parties, and I include Labor in this, have traditionally requested and received such documents.

(The Attorney may not have intended to include Cabinet note-books.) This acknowledgement suggests that no harm to the Territory system of government will result if the proposal for a new subsection 11(1A) is not enacted. That is, there is no need for a blanket exclusion of all examples of these kinds of document. In those cases where a specific document of one of these types is thought to deserve protection, (such as, a particular Cabinet notebook), an existing exemption provision may be invoked.

The Explanatory Statement offers a very general justification for these exclusions in the following terms.

The Bill engages rights under the *Human Rights Act 2004* specifically section 16, Freedom of expression, which includes the freedom to seek, receive and impart information. There is some uncertainty in international human rights law as to whether a positive right to access to government-held information can be said to derive from the right to freedom of expression (Article 19, ICCPR). Never-the-less, the extent to which such a right can be implied, the right to freedom of expression is not an absolute right and it is accepted that the right may be legitimately subject to reasonable restrictions.

The Committee draws this to the attention of the Assembly.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-209 being the Animal Diseases (Exotic Disease Quarantine Area) Revocation 2008 (No. 1) made under section 19 of the *Animal Diseases Act 2005* revokes DI2008-33.

Disallowable Instrument DI2008-210 being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2008 (No. 2) made under subsection 20(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2008-114 and determines the approved sports bookmaking events relating to national and international racing.

Disallowable Instrument DI2008-211 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2008 (No. 2) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2008-115 and determines the rules for sports bookmaking.

Disallowable Instrument DI2008-212 being the Health (Interest Charge) Determination 2008 (No. 1) made under section 193 of the *Health Act 1993* revokes DI2007-322 and determines the interest charged on the aggregate amount of fees and charges unpaid after the due date.

Disallowable Instrument DI2008-214 being the Road Transport (Offences) Application to Holiday Period Declaration 2008 (No. 1) made under section 21 of the *Road Transport (Offences) Regulation 2005* declares that the Family and Community Day public holiday period is excluded as a holiday period and normal demerit point penalties will apply for driving offences.

Disallowable Instrument DI2008-215 being the Public Sector Management Amendment Standards 2008 (No. 3) made under section 251 of the *Public Sector Management Act 1994* amends the Public Sector Management Standards by inserting a definition of "temporary employee register".

Disallowable Instrument DI2008-216 being the Health Professionals (Fees) Determination 2008 (No. 5) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-304 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-217 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2008 (No. 4) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council, representing the position requiring expertise in vocational education and training.

Disallowable Instrument DI2008-218 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2008 (No. 5) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* appoints a specified person to the ACT Accreditation and Registration Council, representing the interests of employers.

Disallowable Instrument DI2008-219 being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* determines the amount of duty payable on the registration of motor vehicles.

Disallowable Instrument DI2008-220 being the Taxation Administration (Amounts Payable—Duty) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* determines the amount of duty payable under various provisions of the *Duties Act 1999*.

Disallowable Instrument DI2008-223 being the Duties (Stock Exchanges) Declaration 2008 made under section 252A of the *Duties Act 1999* revokes DI2007-61 and recognises specified financial markets as stock exchanges.

Disallowable Instrument DI2008-224 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2008 (No. 1) made under Schedule 3 of the *Workers Compensation Act 1951* revokes DI2006-227 and appoints a specified person as a member of the Default Insurance Fund Advisory Committee, representing insurer interests.

Disallowable Instrument DI2008-225 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2008 (No. 2) made under Schedule 3 of the *Workers Compensation Act 1951* revokes DI2006-228 and appoints a specified person as a member of the Default Insurance Fund Advisory Committee, representing employee interests.

Disallowable Instrument DI2008-226 being the Public Place Names (Forde) Determination 2008 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the names of seven roads in the Division of Forde.

Disallowable Instrument DI2008-227 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2008 (No. 3) made under Schedule 3 of the *Workers Compensation Act 1951* revokes DI2006-229 and appoints a specified person as a member of the Default Insurance Fund Advisory Committee, representing insurer interests.

Disallowable Instrument DI2008-228 being the Road Transport (Public Passenger Services) (Defined Rights Conditions) Determination 2008 (No. 3) made under section 84M of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2008-60 and DI2008-61 and determines the defined rights conditions for a ballot of defined rights for non-transferable leased taxi licences.

Disallowable Instrument DI2008-229 being the Health Professionals (Fees) Determination 2008 (No. 6) made under section 132 of the *Health Professionals Act 2004* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-230 being the Environment Protection (Fees) Determination 2008 (No. 2) made under section 165 of the *Environment Protection Act 1997* revokes DI2008-148 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-232 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 7) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers participating in the Canberra Rally Test Day.

Disallowable Instrument DI2008-233 being the **Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2008 (No. 2)** made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2008-129 and determines the maximum fares relating to the hiring or use of a taxi.**

Disallowable Instrument DI2008-235 being the **Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2008 (No. 2)** made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2008-142 and determines the maximum fares payable on regular route services provided by ACTION.**

Disallowable Instrument DI2008-236 being the **Financial Management (Credit Facility) Approval 2008 (No. 1)** made under subsection 59(9) of the *Financial Management Act 1996* **approves a loan credit facility for the Land Development Agency from the Territory Banking Account.**

Disallowable Instrument DI2008-237 being the **Gambling and Racing Control (Government Board) Appointment 2008 (No. 1)** made under section 11 of the *Gambling and Racing Control Act 1999* **appoints a specified person as an ordinary member and deputy chair of the ACT Gambling and Racing Commission.**

Disallowable Instrument DI2008-238 being the **Gambling and Racing Control (Government Board) Appointment 2008 (No. 2)** made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* **appoints a specified person as a member of the ACT Gambling and Racing Commission with knowledge, experience or qualifications related to providing counselling services to problem gamblers.**

Disallowable Instrument DI2008-239 being the **Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 5)** made under sections 13 and 14 of the *Long Service Leave (Building and Construction Industry) Act 1981* **appoints a specified person as a member of the Long Service Leave (Building and Construction Industry) Governing Board, representing employer organisations.**

Disallowable Instrument DI2008-240 being the **Road Transport (General) (Vehicle Registration) Exemption 2008 (No. 1)** made under section 13 of the *Road Transport (General) Act 1999* **exempts specified wheelchair accessible vehicles from paragraph 32B(2)(b) of the *Road Transport (Vehicle Registration) Regulation 2000.***

Disallowable Instrument DI2008-242 being the **Public Place Names (Braddon and Reid) Determination 2008 (No. 1)** made under section 3 of the *Public Place Names Act 1989* **amends Commonwealth Government Gazette No. 99 by revoking one road name and determines the names of two new roads in the Divisions of Braddon and Reid.**

Disallowable Instrument DI2008-243 being the **Public Place Names (Hume) Determination 2008 (No. 1)** made under section 3 of the *Public Place Names Act 1989* **determines the names of two roads in the Division of Hume.**

Disallowable Instrument DI2008-244 being the **Residential Tenancies Tribunal Selection 2008 (No. 3)** made under subsection 112(5) of the *Residential Tenancies Act 1997* **appoints a specified person as a member of the Residential Tenancies Tribunal.**

Disallowable Instrument DI2008-245 being the **Utilities (Energy and Water Consumer Council) Appointment 2008 (No. 1)** made under paragraph 174(1)(c) of the *Utilities Act 2000* **appoints a specified person as a member of the Energy and Water Consumer Council.**

Disallowable Instrument DI2008-246 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 8) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers participating in the CALTEX Airport StarMART Rally.

Disallowable Instrument DI2008-248 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2008 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2007-97 and approves specified venues to be sports bookmaking venues for the purposes of the Act.

Disallowable Instrument DI2008-249 being the Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2008 (No. 1) made under section 22 of the *Race and Sports Bookmaking Act 2001* revokes DI2005-259 and determines the directions for the operation of sports bookmaking venues.

Disallowable Instrument DI2008-251 being the Public Place Names (Amaroo) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a park at Block 1 Section 92 in the Division of Amaroo.

Disallowable Instrument DI2008-253 being the Corrections Management (Official Visitor) Appointment 2008 (No. 2) made under subsection 57(1) of the *Corrections Management Act 2007* appoints a specified person as an Official Visitor.

Disallowable Instrument DI2008-254 being the Public Place Names (Forde) Determination 2008 (No. 3) made under section 3 of the *Public Place Names Act 1989* revokes DI2008-182 and determines the names of new roads in the division of Forde.

Disallowable Instrument DI2008-255 being the Racing Appeals Tribunal Appointment 2008 (No. 1) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* appoints a specified person as a member and president of the Racing Appeals Tribunal.

Disallowable Instrument DI2008-256 being the Racing Appeals Tribunal Appointment 2008 (No. 2) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* appoints a specified person as a member and deputy president of the Racing Appeals Tribunal.

Disallowable Instrument DI2008-257 being the Racing Appeals Tribunal Appointment 2008 (No. 3) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* appoints a specified person as a member of the Racing Appeals Tribunal.

Disallowable Instrument DI2008-258 being the Racing Appeals Tribunal Appointment 2008 (No. 4) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* appoints a specified person as a member of the Racing Appeals Tribunal.

Disallowable Instrument DI2008-259 being the Racing Appeals Tribunal Appointment 2008 (No. 5) made under section 40 and Schedule 1, section 1.1 of the *Racing Act 1999* appoints a specified person as a member of the Racing Appeals Tribunal.

Disallowable Instrument DI2008-260 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 7) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares a specified organisation to be a Parking Authority for Block 5, Section 24, City.

Disallowable Instrument DI2008-261 being the Health (Fees) Determination 2008 (No. 2) made under section 192 of the *Health Act 1993* revokes DI2008-131 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-262 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2008 (No. 3) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* appoints the Superintendent of the Prosecution and Judicial Support area, ACT Policing and, in that person's absence, the Officer in Charge of the Prosecution and Judicial Support area, ACT Policing, as the non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2008-263 being the ACT Civil and Administrative Tribunal (Commencement) Determination 2008 made under subsection 2(6) of the *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008* determines the date of commencement of Part 1.43 of the Act.

Disallowable Instrument DI2008-264 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 9) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers participating in the media event and the National Capital Rally.

Disallowable Instrument DI2008-265 being the Civil Law (Wrongs) Professional Standards Council Appointment 2008 (No. 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.

Disallowable Instrument DI2008-266 being the University of Canberra Council Appointment 2008 (No. 1) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2008-267 being the University of Canberra Council Appointment 2008 (No. 2) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2008-268 being the University of Canberra Council Appointment 2008 (No. 3) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2008-269 being the University of Canberra Council Appointment 2008 (No. 4) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2008-270 being the University of Canberra Council Appointment 2008 (No. 5) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2008-271 being the University of Canberra Council Appointment 2008 (No. 6) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instruments—Comment

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

Qualification of persons appointed

Disallowable Instrument DI2008-213 being the Health Professionals (Medical Radiation Scientists Board) Appointment 2008 (No. 2) made under sections 5 and 10 and section 15.24 of Schedule 15 of the *Health Professionals Regulation 2004* appoints specified persons as president and members of the Medical Radiation Scientists Board.

This instrument appoints a president and also 3 members of the ACT Medical Radiation Scientists Board. The appointment of the president is made under section 5 of the *Health Professionals Regulation 2004*. That section provides (in part):

5 Board president

- (1) The Minister must appoint a person to be president of a health profession board (the *board president*).

Note 1 The Minister must consult the board, and may consult other people, before appointing the board president (see s 11).

Note 2 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

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

- (2) However, the Minister may appoint a person under subsection (1) only if the person—
- (a) is a registered member of a health profession for which the health profession board was established; and
 - (b) has been registered for a continuous period of at least 3 years immediately before the day of appointment.

The Explanatory Statement for this instrument states that the person appointed as president of the Board is “a diagnostic radiographer in private practice”. That statement would seem to address the requirement in paragraph 5(2)(a) of the Act. There is no indication, however, as to whether or not the person in question has been registered for a period of at least 3 years immediately before the day of appointment, as required by paragraph 5(2)(b).

Paragraph 10(2)(b) of the Regulation contains similar requirements in relation to the appointment of Board members. Again, the Explanatory Statement indicates that the persons in question meet the requirement that they be a registered member of the relevant profession but there is no indication as to whether or not the persons have been registered for the required 3 year continuous period.

The Committee notes that the instrument also refers to section 15.24 of Schedule 15 of the Regulation. That section is a transitional provision. It states:

15.24 Board membership—Act, s 24—transitional

- (1) The Minister may, under section 5 (Board president), appoint a member of the board appointed under subsection (2) to be president of the board.

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

Note 2 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

- (2) The Minister may, under section 10 (Appointment of board members), appoint a person to be a member of the board, other than as the community representative, if satisfied the person—
- (a) has appropriate qualifications and expertise to practise as a medical radiation scientist; and
 - (b) has practised as a medical radiation scientist in the ACT or a local jurisdiction for a continuous period of at least 3 years immediately before the day of the appointment, whether or not the person is or has been registered.
- (3) The Minister may appoint a person, other than a person mentioned in subsection (2), to be the first community representative member if satisfied that the person has interests, skills or qualifications that will help the board in carrying out the main object of the Act.

Note The main object of the Act is set out in the Act, s 13.

- (4) Subsections (1) to (3) have effect despite any of the following:
- (a) section 5 (2) (Board president);
 - (b) section 10 (2) and (4) (Appointment of board members);
 - (c) section 12 (Community representatives);
 - (d) section 15.9 (Board membership—Act, s 24).
- (5) In this section:

continuous period, of practice, includes any period or periods of absence from practice the total of which is not more than 6 months.

While this transitional provision allows the Minister some latitude in relation to the appointment of the Board, it nevertheless requires practice for a continuous period of 3 years.

In making this observation, the Committee notes that section 40 of the *Legislation Act 2001* provides:

40 Presumption of validity

It is presumed, unless the contrary is proved, that all conditions and steps required for the making of a statutory instrument have been satisfied and carried out.

This means that there is a presumption, arising from the fact that the instrument of appointment has been made, that any conditions for the making of the appointments have been met. In addition, the Committee notes that section 212 of the *Legislation Act* provides that an appointment is not invalid “only because of a defect or irregularity in or relation to the appointment”. The effect of these provisions would probably be to “save” any of the appointments in question, even if any of the persons appointed did not meet the 3 year practise requirement.

Despite the existence of these “saving” provisions in the Legislation Act, the Committee considers that, in cases where a statutory appointment is subject to specified requirements, the Explanatory Statement for any instrument of appointment should indicate that the persons appointed meet all the relevant requirements. This assists the Committee (and The Legislative Assembly) in its scrutiny of instruments, in that it allows the Committee (and the Assembly) to be satisfied that statutory requirements for appointments have been met. The Committee considers that this is not an onerous requirement.

Are these disallowable instruments?

Disallowable Instrument DI2008-221 being the Emergencies (Bushfire Council Members) Appointment 2008 (No. 2) made under section 129 of the *Emergencies Act 2004* appoints specified persons as members of the Bushfire Council.

Disallowable Instrument DI2008-222 being the Emergencies (Bushfire Council Members) Appointment 2008 (No. 3) made under section 129 of the *Emergencies Act 2004* revokes DI2005-24 and appoints a specified person as a member of the Bushfire Council.

These instruments appoint 7 named persons as members of the Bushfire Council. The instruments are made under section 129 of the *Emergencies Act 2004*. A Note to that section points out that Part 19.3 of the *Legislation Act 2001* applies to appointments under section 129.

Part 19.3 of the Legislation Act includes paragraph 227(1)(a), which provides that Division 19.3.3 does not apply to the appointment of a public servant to a statutory position. That Division includes section 229, which makes instruments of appointment disallowable.

The Committee considers that the Explanatory Statement to any appointment to which Division 19.3.3 applies should contain a statement that the person appointed is not a public servant. This would make it clear that the instrument is disallowable. The Committee considers that this is not an onerous requirement.

The Explanatory Statement to this instrument contains no such statement. As a result, there is nothing to indicate to the Committee (or the Legislative Assembly) that Division 19.3.3, in fact, applies and that this is, in fact, a disallowable instrument.

Unreviewable decisions?

Disallowable Instrument DI2008-231 being the Children and Young People (Visiting Conditions) Declaration 2008 made under section 228 of the *Children and Young People Act 2008* determines the visiting conditions applying in relation to visits to a detention place.

The Committee notes that this instrument sets out detailed procedures that apply to the visiting of young people while in detention. The most obvious limitation is that only “approved people” may visit a young detainee (section 6.2). The Senior Manager of the detention place is responsible for giving this approval. The Senior Manager may also impose conditions on visits (section 6.8).

There is no indication in the instrument as to the basis on which approval may be denied (or given). Nor is there any indication in the instrument as to the basis on which conditions may be imposed.

There is no indication in the instrument as to any appeal mechanism for such decisions. Nor do the decisions in question appear to be “reviewable decisions” for the purposes of the *Children and Young People Act 2008*.

The Committee notes, however that the *Children and Young People (Provision of Information, Review of Decisions and Complaints) Policy and Procedures 2008 (No. 1)* (Notifiable instrument NI2008–391) sets out information in relation to review processes. This instrument notes that certain decisions (essentially disciplinary charges, under section 296 of the Act) are subject to a detailed review procedure (set out in the Act). The instrument goes on to state:

External review of all other decisions

6.26 A person, including a young detainee, who is adversely affected by an administrative decision made under a Territory law may apply to the Supreme Court for a review of the decision under the *Administrative Decisions (Judicial Review) Act 1989*.

6.27 Staff must provide all reasonable assistance to a young detainee who wishes to apply for an external review of a decision, including assistance in preparing a written application if requested.

The Committee seeks the Minister’s advice as to whether, in fact, the only avenue of review for a person who is denied approval or upon whom a condition is imposed with which they do not agree (or, indeed, of any decision under this instrument) is under the AD (JR) Act. In seeking this advice, the Committee notes that an appeal to the Supreme Court, under the *Administrative Decisions (Judicial Review) Act 1989* is a complex and costly process. If this is the only avenue appeal, the Committee seeks the Minister’s advice as to what “all reasonable assistance” would encompass.

In the light of the above discussion, the Committee draws the Legislative Assembly’s attention to this instrument, on the basis that it may makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions, in breach of principle (a)(iii) of the Committee’s terms of reference.

Positive comment

Disallowable Instrument DI2008-234 being the Animal Welfare (Animal Boarding Establishments) Code of Practice 2008 made under section 22 of the Animal Welfare Act 1992 revokes DI1993-163 and approves the Code of Practice for Animal Boarding Establishments.

Disallowable Instrument DI2008-247 being the Animal Welfare (Animal Boarding Establishments) Code of Practice 2008 (No. 2) made under section 22 of the Animal Welfare Act 1992 revokes DI2008-234 and approves the Code of Practice for Animal Boarding Establishments.

The Committee notes that the first of these instruments was made on 8 September 2008. It was made under section 22 of the *Animal Welfare Act 1992*, which provides:

22 Codes of practice

- (1) The Minister may approve a code of practice relating to animal welfare.

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

- (2) A code of practice is a disallowable instrument.

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

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

The second instrument, which revokes the first instrument, was made on 19 September 2008 – less than 2 weeks after the first instrument. By way of explanation, the Explanatory Statement states:

The instrument revokes DI2008-234 (Animal Welfare (Animal Boarding Establishments) Code of Practice 2008) (the former instrument). Although the Code of Practice was attached to the former instrument, that instrument omitted to include a formal approval clause adopting the Code of Practice. While it is arguable that as the former instrument was expressed to be made under section 22 of the Act the Minister implicitly approved the Code of Practice, in the interests of legal certainty, a new instrument has been made, whereby the Minister has explicitly approved the Code of Practice.

The Committee commends both the prudent approach to legal certainty demonstrated by the revoking and re-making of the instrument and also the express and unambiguous explanation for the re-making of the instrument that has been provided.

No Explanatory Statement / Has this instrument been validly made?

Disallowable Instrument DI2008-241 being the Utilities (Dam Safety Code) Variation Determination 2008 (No. 1) made under sections 61 and 65 of the *Utilities Act 2000* approves the variation to the Dam Safety Code (March 2003).

The Committee notes that there is no Explanatory Statement for this instrument. While the Committee acknowledges that the lack of an Explanatory Statement does not affect the validity of an instrument, the Committee reminds instrument-makers that Explanatory Statements are a valuable source of information for the Committee (and the Legislative Assembly) in carrying out its scrutiny role.

In the case of this particular instrument, the Committee notes that sections 61 and 65 of the *Utilities Act 2000* contain various consultation requirements (and exemptions from consultation requirements) in relation to the making of such instruments. Without an Explanatory Statement, the Committee (and the Assembly) has no way of knowing whether relevant consultation has taken place (or whether relevant exemptions apply). As a result, the Committee draws this instrument to the attention of the Legislative Assembly, under principle (a)(i) of the Committee's terms of reference, on the basis that the Committee cannot be satisfied that the instrument is in accord with the general objects of the Act under which it is made.

Minor drafting issue

Disallowable Instrument DI2008-250 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2008 (No. 3) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2005-269 and determines the rules for sports bookmaking for methods of betting, including telecommunications equipment.

The Committee notes that this instrument amends the rules applying to sports bookmaking by removing a restriction that had previously applied. The amendment is made by revoking the instrument that previously applied and re-making it without the provision that contained the restriction.

The Committee notes that the clause affected is 2.3. Prior to being re-made, it provided:

2.3 The following restrictions apply to Clause 2.1(3):

- (1) sports bookmakers must only accept bets via the sports bookmaker's Internet betting system, which includes the incorporating hardware, operating system and betting software, if the system is approved by the Gambling and Racing Commission; and
- (2) sports bookmakers who offer markets in relation to Australian Racing products must post the following warning on each page of the website where such markets are offered:

“Please note, that in relation to Australian racing events sports bookmakers licensed in the Australian Capital Territory are prohibited from offering odds based upon totalisator dividends.”

As indicated above, the re-made instrument simply omits subclause (2). The “and” at the end of subclause (1) is not omitted, however. The Committee suggests that, if the instrument is again re-made, the opportunity should be taken to tidy up the drafting of clause 2.3.

Minor drafting issues

Disallowable Instrument DI2008-252 being the Heritage (Council Chairperson) Appointment 2008 (No. 1) made under section 17 of the *Heritage Act 2004* appoints a specified person as chairperson of the ACT Heritage Council.

The Committee notes that this instrument appoints a named person as Chairperson of the ACT Heritage Council. The Explanatory Statement to the instrument indicates that the person is currently a member of the Council. That being so, the heading to section 4 of the instrument - “Appointment of Members to ACT Heritage Council”- is misleading. The Committee notes, however, that the text of the provision correctly reflects what the instrument purports to do.

The Committee notes that the Explanatory Statement to the instrument states that “[t]he appointees are not public servants”. As the instrument only appoints only one person, clearly, this is an error.

While the errors noted above are minor, the Committee suggests that this instrument possibly provides a salutary lesson in the potential dangers of using previous instruments as templates for later instruments.

Subordinate Laws—No comment

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

Subordinate Law SL2008-36 being the Road Transport (General) Amendment Regulation 2008 (No. 1) made under the *Road Transport (General) Act 1999* enables the Road Transport Authority to round down a fee, charge or other amount that is payable to the nearest 10 cents.

Subordinate Law SL2008-39 being the Liquor Amendment Regulation 2008 (No. 1) made under the *Liquor Act 1975* declares specified places to be prescribed public places during Summernats 2009.

Subordinate Law SL2008-40 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2008 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* allows drivers of vehicles involved in crashes to discharge their reporting obligation if they provide particulars of the crash using the new crash reporting website.

Subordinate Law SL2008-42 being the Medicines, Poisons and Therapeutic Goods Regulation 2008 made under the *Medicines, Poisons and Therapeutic Goods Act 2008* provides the detail for the regulatory framework established by the ACT and ensures that health professionals will still be able to prescribe, administer and dispense medicines.

Subordinate Law SL2008-43 being the Electoral Amendment Regulation 2008 (No. 1) made under the *Electoral Act 1992* allows the Chief Executive, Department of Treasury, to provide electoral roll data to another person or entity involved in contacting former Totalcare employees about superannuation.

Subordinate Law SL2008-44 being the Court Procedures Amendment Rules 2008 (No. 2) made under section 7 of the *Court Procedures Act 2004* determines new rules in relation to the practice and procedure of ACT courts and their registries.

Subordinate Law SL2008-45 being the Road Transport (Third-Party Insurance) Amendment Regulation 2008 (No. 2) made under the *Road Transport (Third-Party Insurance) Act 2008* amends the Road Transport (Third-Party Insurance) Regulation 2008 by adding consultation categories covering psychiatrists and psychologists.

Subordinate Laws—Comment

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

Strict liability offence

Subordinate Law SL2008-37 being the Road Transport (Third-Party Insurance) Regulation 2008 made under the *Road Transport (Third-Party Insurance) Act 2008* including two regulatory impact statements, provides delegated legislative support to the Act.

Section 13 of this subordinate law makes it an offence for a person who is liable (under section 12 of the subordinate law) to pay an additional CTP premium not to pay that additional premium. Subsection 13(2) provides that an offence against section 13 is a strict liability offence.

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

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

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

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

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

There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that the Explanatory Statement accompanying this subordinate law contains no discussion of even the fact that the subordinate law contains a strict liability offence. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a)(ii) of the Committee's terms of reference.

"Henry VIII" clause / Minor drafting issue

Subordinate Law SL2008-38 being the Duties (Transitional Provisions) Regulation 2008 made under the Duties Act 1999 modifies the definition of "stock exchange" in the Payroll Tax Act 1987.

This subordinate law modifies the definition of *stock exchange* in the Dictionary in the *Payroll Tax Act 1987*. As the effect of the subordinate law is for a primary law to be (in effect) amended by a subordinate law, it is an exercise in law-making by "Henry VIII" clause. The Explanatory Statement for the subordinate law states that the amendment is made under the power contained in section 441 of the *Duties Act 1999* which (according to the Explanatory Statement) allows for regulations to be made in relation to transitional matters. The reference to section 441 appears to be incorrect. The Committee believes that the reference should be to section 442 of the Duties Act, which provides:

442 Transitional regulations—ch 16

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of section 72B by the *Duties Amendment Act 2008*.
- (2) A regulation may modify this chapter (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.
- (4) A regulation under subsection (2) expires 12 months after the day it commences.

The Explanatory Statement to the subordinate law states:

The *Duties (Landholders) Amendment Act 2008* (the Amendment Act) amended the *Duties Act 1999* (the Duties Act) on 1 September 2008. The Amendment Act replaced the term of "stock exchange" with the term "recognised stock exchange", without changing the substance of the definition.

In the Dictionary of the Payroll Tax Act, the term "stock exchange" is defined:

stock exchange-see the *Duties Act 1999*, dictionary.

The reference to "stock exchange" in the Dictionary of the Payroll Tax Act should refer to the new term "recognised stock exchange", which this regulation accomplishes.

That being so, the subordinate law is squarely within the express power given by the Legislative Assembly. As a result, the Committee makes no further comment on the subordinate law.

"Henry VIII" clause

Subordinate Law SL2008-41 being the Planning and Development Amendment Regulation 2008 (No. 4) made under the *Planning and Development Act 2007* modifies the Act to apply merit track provisions to the processing of an application of a development proposal for a lease variation in a designated area.

This subordinate law modifies the *Planning and Development Act 2007*. As the effect of the subordinate law is for a primary law to be (in effect) amended by a subordinate law, it is an exercise in law-making by "Henry VIII" clause. The source of the power is section 429 of the *Planning and Development Act*, which provides:

429 Transitional regulations

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Building Legislation Amendment Act 2007*, the *Planning and Development (Consequential Amendments) Act 2007* or this Act.
- (2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.

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

It appears from the Explanatory Statement to this instrument that the provisions in question are, in fact, transitional in nature. That being so, the subordinate law is squarely within the express power given by the Legislative Assembly. As a result, the Committee makes no further comment on the subordinate law.

REGULATORY IMPACT STATEMENTS

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

Subordinate Law SL2008-37 being the Road Transport (Third-Party Insurance) Regulation 2008 made under the *Road Transport (Third-Party Insurance) Act 2008* including two regulatory impact statements, provides delegated legislative support to the Act.

As the Committee has already noted above, this subordinate law is accompanied by two regulatory impact statements, prepared under section 35 of the *Legislation Act 2001*. The Committee notes that section 35 provides (in part):

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the *proposed law*) must include the following information about the proposed law in clear and precise language:

.....

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

The regulatory impact statements for this instrument contain the following statement, under the heading “Consistency with scrutiny committee principles”, by reference to provisions in Parts 6 and 8 of the subordinate law:

The sections:

- are consistent with the objectives of the *Road Transport (Third-Party Insurance) Act 2008*;
- do not unduly trespass on existing rights established by law;
- do not make rights, liberties and/or obligations unduly dependent on non-reviewable decisions; and
- do not contain matters that should properly be dealt with in an Act.

In addition to these sections of the Regulation, the Regulation as a whole is consistent with the Scrutiny Principles.

As the Committee has already pointed out above, there is an issue with the inclusion in Part 4 of the subordinate law of a strict liability offence, for which no explanation is provided in the Explanatory Statement. That being so, the Committee does not consider that it is correct to state that “the Regulation as a whole is consistent with the Scrutiny Principles”. As a result, the Committee draws the Legislative Assembly’s attention to this regulatory impact statement, under principle (b) of the Committee’s terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

Vicki Dunne, MLA
Chair

February 2009

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

REPORTS—2008-2009

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

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