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

12 OCTOBER 2009

Report 13

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 AM, 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.

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BILLS

Bills—No comment

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

EMERGENCIES (BUSHFIRE REPORTING) AMENDMENT BILL 2009

This Bill would amend the *Emergencies Act 2004* to make provision in relation to a reporting regime that must be followed in the lead up to a bushfire season.

LONG SERVICE LEAVE (COMMUNITY SECTOR) AMENDMENT BILL 2009

This Bill would amend the *Long Service Leave (Portable Schemes) Act 2009* by the insertion of a new schedule 2A to establish a mandatory portable long service leave scheme for workers and employer organisations in the community sector industry.

WORKERS COMPENSATION (DEFAULT INSURANCE FUND) AMENDMENT BILL 2009 (NO 2)

This Bill would amend the *Workers Compensation Act 1951* to remedy problems that have emerged in consequence of the reforms in 2006 that created a Default Insurance Fund so as to restore the Uninsured Employer arm of the Fund to its intended role, and to implement a revised funding model through which the Fund raises capital.

Bills—Comment

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

EDUCATION AMENDMENT BILL 2009

This Bill would amend the *Education Act 2004* to clarify existing provisions of the Act and, in addition, to permit the suspension of students for up to 10 days.

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

In terms of subsection 11(2) of the Human Rights Act, does the proposal to permit the Chief Executive of the Department of Education and Training, and the Director of the Catholic Education Office, to delegate their authority to schools principals to suspend students for up to 10 days, in contrast to the existing power to suspend for up to five days, accord sufficient weight to the right of a child to the protection needed by the child because of being a child?

The presentation speech contains a justification in detail for this recommended increase in the time for which a child may be suspended. It links the increase to a claim that schools will thereby be safer learning environments, and points out that principals in ACT public schools may currently suspend for a time period (five days) that is shorter than the case in any other State or Territory.

This proposal does, however, raise the issue of whether sufficient recognition has been given "to the right of a child to the protection needed by the child because of being a child" (subsection 11(2)). It is arguable that a right to education is a component of the HRA right. The right of a child to education is also more explicitly recognised in international treaties such as the *International Covenant on Economic Social and Cultural Rights* and the *Convention on the Rights of the Child*.[1] In making this assessment, a Member of the Assembly may wish to take into account the interests of other children who attend the relevant school.

A further consideration is that this amendment to the *Education Act 2004* will have the effect of reducing the period in which there will be a review of the need for a suspension and for arrangements to be made in consequence of the suspension.

Dealing more precisely with proposed subsection 36A(1), the Committee suggests that consideration be given to inserting a requirement that the opinion of the Chief Executive be based on "reasonable grounds".

FURTHER COMMENT ON THE COMPATIBILITY WITH THE *HUMAN RIGHTS ACT 2004* OF STATUTORY PROVISIONS THAT LIMIT THE RIGHT TO CLAIM THE BENEFIT OF THE PRIVILEGE AGAINST SELFINCRIMINATION

In recent reports, and over several years, the Committee has drawn attention to the rights issue posed by a statutory provision that limit the right to claim the benefit of the privilege against selfincrimination. Recent examples are found in *Scrutiny Report No 12* of the *Seventh Assembly* concerning the Dangerous Goods (Road Transport) Bill 2009, and in *Scrutiny Report No 7* of the *Seventh Assembly* concerning the Road Transport (Mass, Dimensions and Loading) Bill 2009. The Committee acknowledges that in relation to both bills the Minister responded[2] to the Committee's concern that relevant provisions in these bills amounted to an undue trespass on personal rights and liberties, and/or might be incompatible with the Human Rights Act.

The Committee's concerns are now given greater point by a decision of the Supreme Court of Victoria. This is a significant decision that, if followed by courts in the Territory, will call for an evaluation of existing provisions in Territory law, and for closer examination of relevant provisions in bills, that do not deal with the privilege against selfincrimination in the way held by Warren CJ to be necessary to comply with provisions of the Victorian Charter that are mirrored in the Territory Human Rights Act.

A detailed outline of the reasoning in this case will be found below. Adapted to reflect the provisions of the HRA, the major elements of the reasoning are:

(1) The rights in HRA section 21(1) and paragraph 22(2)(i) embrace the right of a person to claim the privilege against selfincrimination.

[1] See the discussion is *Scrutiny Report No 26* of the *Sixth Assembly*, concerning the Education Amendment Bill 2006.

[2] The responses will be found in *Scrutiny Report No 8* of the *Seventh Assembly,* and in this report.

(2) The right operates in any circumstance in which a person is compelled by law to answer questions, or produce documents, or things, if to do so might tend to incriminate that person.

(3) A statute may abrogate the right without amounting to a limitation of the right if the use that may be made on the evidence that is obtained by the person acting under compulsion is restricted by provision of **both** a direct and a derivative immunity in respect of the use of that evidence.

(4) Where the statute does however limit the right, the limitation may nevertheless be justifiable under HRA section 28.

(5) The onus of establishing justifiability lies on the party seeking to uphold the limitation, and the evidence required to prove the elements contained in section 28 should be cogent and persuasive and make clear the consequences of imposing or not imposing the limit.

(6) Where a court concludes that, taken on its meaning ascertained in accord with the principles of statutory interpretation, a statutory provision derogating from the right cannot be justified under HRA section 28, the court may, relying on HRA section 30, be able to interpret the provision so that will not be incompatible with the HRA.

Concerning the role of the Committee, the following points are made:

(1) Where a provision in a bill limits the privilege against selfincrimination, the Legislative Assembly will be assisted by a detailed statement in the Explanatory Statement (or other relevant document) of the justification for the limitation that address all the elements of the test of justifiability in HRA section 28. In general terms, this justification has three components:

- Is there a rational connection between the limitation of the right and the objective of the bill?
- Are there, in comparison to the means proposed in the bill, "any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve"?
- Is there is a proportionality between the effects of the measure that limits the right and the law's objective? "This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"

(2) The Committee does not consider that the issue of compatibility of a provision limiting the privilege can be avoided by the expression of a hope that a Territory court will interpret the provision in a way that avoids incompatibility. If there is a doubt as to compatibility, the doubt should be removed by amendment in the Assembly. A person should not be put to the expense of resort to a court to learn the extent of their entitlement to claim a right stated in the HRA.

Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (7 September 2009) (Warren CJ)

Warren CJ addressed the impact on the common law privilege against selfincrimination of subsection 24(1) and paragraph 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) ('the Charter'). A number of the significant propositions of law that appear in her judgment are noted below. First, it must be noted that subsection 24(1) is in substance identical to section 21(1) of the *Human Rights Act 2004* (HRA), and for convenience the latter is set out here:

> 21 (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Paragraph 25(2)(k) of the Charter is in substance identical to paragraph 22(2)(i) of the HRA, and for convenience the latter is set out here:

> 25 (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
>
> …
>
> (i) not to be compelled to testify against himself or herself or to confess guilt.

Propositions of law in the judgment

1. "[40]… citizens in Victoria must have the right to a fair hearing pursuant to s 24(1) of the Charter, there being a fundamental component of that right in the form of a guarantee in s 25(2)(k) not to be compelled to testify against oneself or to confess guilt.".

2. "[42] The privilege, as a deep-seated fundamental common law right, hardly needs emphasising. It defines the relationship between the individual and the state and protects people against aggressive behaviour of those in authority.[footnote omitted] The fundamental rationale of the privilege is that those who allege the commission of a crime should prove it themselves and not be able to compel the accused to prove it for them. As explained by Mason, Wilson and Dawson JJ in *Sorby*,[[1983] HCA 10; (1983) 152 CLR 281, 310.] the privilege operates by protecting a witness from being compelled to answer questions, or produce documents, or things, if to do so might tend to incriminate that person. Their Honours held that the privilege

> protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure that might lead to incrimination, or to the discovery of real evidence of an incriminating character.[ibid]

…

[44] The authorities make it plain that the privilege is a free-standing human right existing as part of the common law of human rights that may be abrogated by statute either by express intention or necessary implication. Once the privilege has been abrogated, an individual's right to claim privilege on the grounds of self-incrimination falls away unless immunities are provided by the legislature."

3. "[26] Where legislation abrogates the privilege, having the effect that a person will not be entitled to claim the privilege as a reason not to answer questions or provide information even if this tends to prove their own guilt, the legislation may sometimes account for this by restricting the use that may be made of the information by providing an immunity. **A 'direct use' immunity** serves to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. A further step or protection is **a 'derivative use immunity**'. This immunity operates to insulate the individual from having the compelled incriminating testimony used to obtain other evidence against that person." (Emphasis added)

4. "[162] The application of the Charter should not be limited simply to persons who have already been charged. Its concern should also include, more generally, the compulsion of persons to give evidence on oath and then to have that evidence subsequently used against them in a [direct or] derivative way.[3] I acknowledge that the right may only have application once a person has been charged, but that seems a mere process of logic. A person cannot be compelled to reveal his or her own criminality unless charged, because such criminality may only ever be determined by proper judicial process. In this respect, I note that the principle upheld in *Saunders* is persuasive:

> the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.[(1997) 23 EHRR 313, 340.]"

5. At para [57]ff, her Honour rejected two lines of argument directed to the proposition that "the fair hearing right is best protected by the court at the hearing stage". The first "was based on the statements of the High Court in *Hammond*[[1982] HCA 42] concerning the court's inherent power to prevent interferences with the course of justice". The second related "to the trial judge's inherent discretion to exclude prejudicial or unfair evidence in the interests of securing the fairness of a trial".

6. The rejection of these arguments opened the way for her Honour to consider the compatibility with the Charter of a statutory provision – being section 39 of the *Major Crime (Investigative Powers) Act 2004* (Victoria) - that compelled a person to answer questions, etc in an examination before a non-judicial officer, and conferred only an immunity from a direct (and thus not a derivative) use of the answers, etc in a subsequent criminal proceeding or a proceeding for the imposition of a penalty (other than certain stated exceptional cases).[4]

"[79] The question, then, is whether the abrogation, which is within legislative power, is consistent with the Charter. The applicant would have the court cease its analysis at this stage, but the fundamental question is whether the law as it stands is sufficient or whether, in addition, a derivative use immunity is required in order for the legislative regime to be compatible with the Charter."

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[3] The words "direct or" have been inserted to reflect the full significance of this passage. Her Honour omitted them because the statutory provision she addressed conferred on the person compelled to answer questions, etc an immunity from a direct use of the answers, etc.

[4] Her Honour adopted the statement in another case that "[t]o the extent that the evidence, information or documents produced in an examination can be used to gather evidence to use against the person summoned, the privilege is effectively removed": at para [54], quoting *C v Chief Commissioner* (2008) 20 VR 174, 178.

7. "[96] Despite the difficulty of the problem, it is not clear from the terms of the Charter … as to what form of immunity must be provided when the privilege against self incrimination is abrogated so as to comply with the right against self-incrimination. …

[97] The approach to the right to a fair hearing and the right against self-incrimination in other jurisdictions is not uniform. Some jurisdictions require a derivative use immunity for consistency with rights (Canada[*Re Application* 2004 SCC 42] and the United States[*Kastigar v United States* [1972] USSC 160; 406 US 441 (1972)]); others do not (South Africa[*Ferreira v Levin* [1995] ZACC 13] and Hong Kong[*Lee Ming Tee* [2001] HKCFA 32]). Others are yet to adopt a clear position (International Covenant on Civil and Political Rights and Europe[See *Saunders v United Kingdom* [1996] ECHR 65; (1997) 23 EHRR 313 ('Saunders') where the European Court of Human Rights commented that the right not to incriminate oneself did not extend to preclude obtaining compulsory evidence such as documents, breath samples, fingerprints, blood and urine samples and tissue samples. But it did not express any opinion on the issue of derivative use immunity in relation to compulsory questioning.])".

8. Her Honour adopted the Canadian approach to the answer to the question she posed at para [79] (see 6 above).

"[129] Canadian law recognises a form of derivative use immunity in the event of statutory abrogation of the privilege. This immunity is required in some form to uphold the rights in ss 7 and 11(d) of the Canadian Charter. …

[133] … The Canadian Supreme Court decision of *S(RJ)* is a helpful starting point to determine comparable principle. Iacobucci J, delivering the majority judgment,[[1995] 1 SCR 451[5]] articulated four meanings for derivative evidence as follows:

> (1) evidence that could have been discovered only as a result of the testimony; (2) evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony; (3) evidence that would, or would probably, have been discovered even without the testimony; and (4) evidence that was discovered after the testimony was given, but independently of the testimony.[ibid at 546]

…

[135] In assessing the four categories of derivative evidence, Iacobucci J held that, in Canada, the accused must be protected from derivative evidence of the nature of category (1):

[5] Her Honour noted at footnote 124 that "La Forest, Cory, Iacobucci and Major JJ (at 472), together with Lamer CJ writing separately (at 469-470), constituted the majority in relation to derivative use immunity. The court concluded that a form of derivative use immunity is required by s 7 of the Charter when the right not to incriminate oneself is abrogated. Sopinka and McLachlin JJ concluded that the witness was not compellable and therefore did not decide on the question of derivative use immunity. L'Heureux-Dube and Gonthier JJ dissented, concluding that the Charter did not require the provision of derivative use immunity when the right not to incriminate oneself was abrogated".

> [D]erivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the Charter in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet.[ibid 561]

9. Warren CJ concluded that section 39 of the Major Crime (Investigative Powers) Act limited the right to a fair hearing:

"[143] Section 39(1) of the Act limits the right to a fair hearing and the right not to testify against oneself because it requires people to testify against themselves and then fails to protect them from derivative use of their testimony."

In other words, section 39(1) was inconsistent with subsection 24(1) and paragraph 25(2)(k) of the Victorian Charter, and by parity of reasoning such a provision would derogate from subsection 21(1) and paragraph 22(2)(i) of the Human Rights Act.[6]

10. Her Honour then turned to what in the Territory is the "section 28 question". Section 7 of the Victorian Charter is substantially identical to section 28 of the Human Rights Act.

"[144] Section 7 of the Charter demonstrates that the rights guaranteed by it are not absolute. The Charter acknowledges that, in some instances, it is necessary to limit rights in circumstances where the exercise of the right would interfere with the operation of a free and democratic society. Section 7 provides the criteria by which a limitation on rights might be justified. Hence, limitations on rights are permissible only when limited in accordance with s 7. The question then becomes, is the limitation on the right against self-incrimination as guaranteed by ss 24(1) and 25(2)(k) of the Charter 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'?"

11. Warren CJ held that the limitation did not meet the tests stated in section 7 of the Charter. As a first step, she identified some general propositions concerning the application of a provision such as section 28 of the Human Rights Act.

"[145] A free and democratic society is the fundamental hallmark of our system of governance and way of life. Notions of the 'public interest' stem from notions of what is best for a free and democratic society. …

[146] To this effect, the right to a fair hearing and the privilege against self-incrimination are rights which define the relationship between the individual and the state and protect people against aggressive behaviour of those in authority. They reflect the philosophy that the state must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated.

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[6] Warren CJ considered whether the statutory provision *limited* a Charter right. She also referred to a case wherein Sir Anthony Mason addressed the question as one of whether a statutory provision *derogated* from the relevant human rights charter (see at [53]). These approaches contrast with the approach which asks whether the provision *engages* a relevant right.

[147] The onus of 'demonstrably justifying' the limitation in accordance with s 7 resides with the party seeking to uphold the limitation.[*Kracke* [2009] VCAT 646, [108].] In light of what must be justified, the standard of proof is high. It requires a 'degree of probability which is commensurate with the occasion'.[*Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).] King J observed in *Williams*[[2007] VSC 2; (2007) 16 VR 168,] that the issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be 'cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.'[*Oakes* [1986] 1 SCR 103, 42]."

12. Warren CJ then turned to the precise terms of section 7, and only brief excerpts from her reasoning are noted here.

"[153] I find that the limitation is rationally and purposefully connected to its purpose; a purpose important enough to lead to such limitation. Investigative authorities are no doubt greatly assisted by the power to compel suspected participants to answer questions, and to use the information obtained from those answers derivatively to prosecute a person for serious offences. It is apparent that the limitation increases the ability of the state to investigate organised crime offences.

[154] But does the limitation, even if rationally connected to the objective, achieve its purpose in the least restrictive way possible? Is there proportionality between the effects of the measures which are responsible for limiting the right, and the objective which has been identified as of sufficient importance?

[155] I find that the relationship between the limitation and its purpose is more drastic than is justified. …

[156] In my view, the purpose of the limitation may still be achieved whilst retaining a form of derivative use immunity. …

[160] In Canada, it has been possible to effectively investigate offences as serious as terrorism while respecting derivative use immunity.[See generally *Re Application* 2004 SCC 42] The applicant has shown no real reason why this should not be the case in Victoria. This is a less restrictive means of achieving the purpose of the original limitation, but which also gives effect to a reasonable limitation on the right against self-incrimination. It deals squarely with the first category of derivative evidence presented by Iacobucci J in *S(RJ)*. Therefore, the form of derivative use immunity reasonably appropriate is an immunity in relation to evidence that could not have been obtained, or its significance appreciated, but for the compelled testimony of the accused.

…

[164] To recapitulate, the applicant has not justified why any further limitation is appropriate. ... Furthermore, I note that derivative use immunity is not uncommon in Australian statutory law."

13. Having reached a point where her Honour held that the statutory provision that constituted a limitation on the rights in subsection 24(1) and paragraph 25(2)(k) of the Victorian Charter was not justifiable under section 7, she turned to determine whether the provision could be interpreted in a way that was compatible with those rights.[7] She held that it could:

"[177] In interpreting s 39 of the *Major Crime (Investigative Powers) Act 2004*, derivative use immunity must be extended to a witness interrogated pursuant to the terms of the Act where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness."

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2009-192 being the Nature Conservation (Flora and Fauna Committee) Appointment 2009 (No. 1) made under section 18 of the *Nature Conservation Act 1980* **revokes DI2008-121 and appoints specified persons as chair and deputy chair of the Flora and Fauna Committee.**

Disallowable Instrument DI2009-195 being the Canberra Institute of Technology (Fees) Determination 2009 made under subsection 53(1) of the *Canberra Institute of Technology Act 1987* **revokes DI2007-205 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-196 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2009 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers the provision of a price direction for the supply of electricity to franchise customers to the Independent Competition and Regulatory Commission.**

Disallowable Instrument DI2009-197 being the Gas Safety (Fees) Determination 2009 (No. 3) made under section 67 of the *Gas Safety Act 2000* **revokes DI2009-179 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-198 being the Cultural Facilities Corporation (Governing Board) Appointment 2009 (No. 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and paragraph 78(5)(b) and subsection 79(1) of the** *Financial Management Act 1996* **appoints specified persons as deputy chair and members of the Cultural Facilities Corporation.**

Disallowable Instrument DI2009-199 being the Public Place Names (Dunlop) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of two new roads in the Division of Dunlop.**

[7] Subsection 32(1) of the Victorian Charter provides: "(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". Section 30 of the Human Rights Act similarly provides: "So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights".

Disallowable Instruments—Comment

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

Inadequate Explanatory Statement

Disallowable Instrument DI2009-193 being the Nature Conservation (Flora and Fauna Committee) Appointment 2009 (No. 2) made under section 18 of the *Nature Conservation Act 1980* **revokes DI2008-120 and appoints specified persons as members of the Flora and Fauna Committee.**

This instrument is made under section 17 of the *Nature Conservation Act 1980*, which provides for the appointment of members of the Flora and Fauna Committee. Subsection 17(2) of the Nature Conservation Act provides:

> (2) The Minister shall not appoint a person as a member unless the Minister is satisfied that the person has appropriate expertise in biodiversity or ecology.

The Committee notes that the Explanatory Statement for the instrument states:

> The members must have appropriate expertise in biodiversity or ecology, and will hold office as a part-time member for a period not exceeding three years.

The Committee also notes, however, that there is no indication that the persons appointed have the relevant expertise.

The Committee accepts that the appointment of these persons may be taken as an indication that the persons in question, in fact, meet the relevant requirements for appointment. This may also be assumed from the fact that the appointments are, in fact, re-appointments. Nevertheless, it would be preferable if the Explanatory Statement contained an express statement that the persons in question meet the requirements of subsection 17(2). The Committee considers that this is not an onerous expectation.

The Committee notes that the Explanatory Statement states:

> These appointments are disallowable instruments.

This is not entirely correct. As the Explanatory Statement also notes, one of the persons appointed is a public servant. The Committee notes that section 227 of the *Legislation Act 2001* provides that Division 19.3.3 of the Legislation Act, which includes the provision that makes instruments of appointment to statutory positions disallowable instruments (ie section 229) does not apply to the appointment of public servants.

The Committee also notes that Division 19.3.3 of the Legislation Act also includes section 228, which requires that "the appropriate Legislative Assembly committee" be consulted about appointments. Unlike other Explanatory Statements, the Explanatory Statement for this instrument contains no indication that the relevant committee has been consulted in this instance. The Committee notes that this is also in contrast to the Explanatory Statement for DI2009-192, which states that the Standing Committee on Climate Change, Environment and Water was consulted about the appointment of 2 of the specified persons in this instrument, who are (in DI2009-192) appointed as Chairperson and Deputy Chairperson of the Flora and Fauna Committee.

The Committee draws the Legislative Assembly's attention to this instrument, under principle (b) of the Committee's terms of reference, on the basis that the Explanatory Statement for the instruments does not meet the technical or stylistic standards expected by the Committee.

Positive comment / Are there any transitional issues?

Disallowable Instrument DI2009-194 being the Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 2) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2009-100 and determines the Rules of Betting.**

The Committee notes that this instrument revokes and re-makes DI2009-100, which the Committee commented on in *Scrutiny Report No 10* of the *Seventh Assembly*. In that Report, the Committee noted that the previous instrument appeared to include some drafting errors. Though it is not explicitly mentioned in the Explanatory Statement for this instrument, the Committee assumes that the instrument has been revoked and re-made as a result of the Committee identifying the drafting errors in the earlier instrument.

In making this observation, the Committee notes that the "new" instrument operates from the day after it was notified, meaning that it operates from 28 August 2009. The Committee would appreciate the Minister's advice as to whether there are any transitional issues arising from the drafting errors in the earlier instrument and the fact that the new instrument has not corrected those errors with retrospective effect.

Minor drafting issue

Disallowable Instrument DI2009-200 being the Surveyors (Chief Surveyor) Practice Directions 2009 (No. 1) made under section 55 of the *Surveyors Act 2007* **revokes DI2008-192 and determines the Chief Surveyor Practice Directions.**

The Committee notes that the formal part of this instrument indicates that it is made under "section no 55" of the *Surveyors Act 2007*. The Committee suggests that the "no" is superfluous.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Treasurer, dated 14 September 2009, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instrument DI2009-102, being the Taxation Administration (Rates) Determination 2009 (No. 1).
- The Treasurer, dated 16 September 2009, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instrument DI2009-100, being the Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 1).
- The Chief Minister, dated 17 September 2009, in relation to comments made in Scrutiny Report 12 concerning the Dangerous Goods (Road Transport) Bill 2009.

- The Minister for Education and Training, dated 17 September 2009, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instruments:
  - DI2009-126, being the Education (Government Schools Education Council) Appointment 2009 (No. 5);
  - DI2009-127, being the Education (Government Schools Education Council) Appointment 2009 (No. 6);
  - DI2009-128, being the Education (Non-government Schools Education Council) Appointment 2009 (No. 3);
  - DI2009-130, being the Board of Senior Secondary Studies Appointment 2009 (No. 1); and
  - DI2009-131, being the Board of Senior Secondary Studies Appointment 2009 (No. 2).
- The Minister for Industrial Relations, dated 17 September 2009, in relation to comments made in Scrutiny Report 10 concerning Subordinate Law SL2009-26, being the Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 1)
- The Minister for Health, dated 24 September 2009, in relation to comments made in Scrutiny Report 10 concerning Subordinate Law SL2009-27, being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2009 (No. 1).
- The Minister for Health, dated 24 September 2009, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instrument DI2009-107, being the Health (Fees) Determination 2009 (No. 2).
- The Minister for the Environment, Climate Change and Water, dated 28 September 2009, in relation to comments made in Scrutiny Report 11 concerning:
  - Disallowable Instrument DI2009-153, being the Nature Conservation (Fees) Determination 2009 (No. 2); and
  - Subordinate Law SL2009-29, being the Environment Protection Amendment Regulation 2009 (No. 1).

The Committee wishes to thank the Chief Minister, the Treasurer, the Minister for Education and Training, the Minister for Industrial Relations, the Minister for Health and the Minister for the Environment, Climate Change and Water for their helpful responses.

Vicki Dunne, MLA
Chair

October 2009

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

REPORTS—2008-2009

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

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

Report 2, dated 4 February 2009

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

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

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

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

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-65 - Fair Trading (Fitness Industry) Code of Practice 2009

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009

Subordinate Law SL2009-19 - Fair Trading (Consumer Product Standards) Regulation 2009

Report 10, dated 10 August 2009

Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Subordinate Law SL2009-22 - Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1)

Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

Bills/Subordinate Legislation

Report 11, dated 24 August 2009

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)
Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009
Disallowable Instrument DI2009-132 - Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-133 - Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2)
Disallowable Instrument DI2009-137 - Planning and Development (Reduction of Change of Use Charge) Policy Direction 2009 (No. 1)
Disallowable Instrument DI2009-140 - Planning and Development (Change of Use Charge on Disused Service Station Sites) Policy Direction 2009 (No. 1)
Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009
Disallowable Instrument DI2009-153 - Nature Conservation (Fees) Determination 2009 (No. 2)
Subordinate Law SL2009-31 - Planning and Development Amendment Regulation 2009 (No. 7), including a regulatory impact statement
Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009

Adoption Amendment Bill 2009
Civil Partnerships Amendment Bill 2009 (PMB) Act citation: .
Crimes (Assumed Identities) Bill 2009
Disallowable Instrument DI2009-169 - Mental Health (Treatment and Care) (Official Visitors) Appointment 2009 (No. 1)
Disallowable Instrument DI2009-171 - Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 6)
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
Disallowable Instrument DI2009-186 - Adoption (Fees) Determination 2009 (No. 1)
Disallowable Instrument DI2009-188 - Education (School Boards of Schools in Special Circumstances) Telopea Park School Determination 2009
Disallowable Instrument DI2009-189 - Education (School Boards of School-Related Institutions) Murrumbidgee Education and Training Centre Determination 2009
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)
Subordinate Law SL2009-37 - Children and Young People Regulation 2009
Subordinate Law SL2009-38 - Planning and Development Amendment Regulation 2009 (No. 9)
Subordinate Law SL2009-39 - Planning and Development Amendment Regulation 2009 (No. 10), including a regulatory impact statement
Subordinate Law SL2009-40 - Planning and Development Amendment Regulation 2009 (No. 11), including a regulatory impact statement

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

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

Dear Ms Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 11 of 24 August 2009 in relation to Disallowable Instrument DI2009-101 being the Taxation Administration (Rates) Determination 2009 (No. 1).

The Committee noted the incorrect reference in the Explanatory Statement to the *Revenue Legislation Amendment Bill 2007* which should have been the *Revenue Legislation Amendment Act 2007.*

Care will be taken to ensure that this error is not repeated in future instruments.

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

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Treasurer
14.9.09

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Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
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Dear Ms ~~Dunne~~ Vicki

I am writing in response to comments in the Scrutiny of Bills Report No 11 of 24 August 2009 in relation to Disallowable Instrument DI2009-100 Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No 1) made under subsection 53(1) of the *Betting (ACTTAB Limited) Act 1964.*

As the Committee noted, Schedule 2 of the instrument contained cross referencing errors. I understand that ACTTAB had been made aware of the errors and a new instrument was prepared. The new Disallowable Instrument, DI2009-101 Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No 2), addresses the issues raised by the Committee and revokes the previous disallowable instrument which contained the errors. The instrument was notified on 27 August 2009.

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

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Treasurer

16.9.09

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Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Ms Vicki Dunne, MLA
Chair
Scrutiny of Bills and
Subordinate Legislation Committee
Legislative Assembly for the ACT
London Circuit
CANBERRA ACT 2600

Dear Ms Dunne

I refer to the Committee's comments on the *Dangerous Goods (Road Transport) Bill 2009* in Scrutiny Report No 12 of 14 September 2009.

I accept the Committee's recommendation in relation to clause 151 of the bill, which is about exemptions by competent authorities from the requirements of a regulation, and propose to move an Assembly amendment to include a reference to 'on reasonable grounds' in relation to the matters about which a competent authority must be satisfied before giving an exemption.

I also propose to move an amendment to clause 28 (4) so that an offence against clause 28 (1) is not a strict liability offence. The designation of the offence as a strict liability offence was an oversight and I thank the Committee for drawing it to my notice.

The Committee raised the issue of whether the offences listed at the top of page 12 of the report should have defences that are additional to the defences available under the Criminal Code. I assume that the inclusion of clause 58 (1) is an oversight given the defences available under subclauses (3) and (4). As regards the other offences listed, I don't believe that anything in addition to the Criminal Code defences, which include, for example, mistake of fact and intervening conduct or event (see sections 36 and 39), is warranted. The offences are in relation to people who are in the dangerous goods transport industry and who should know their obligations under the legislation.

The Committee has raised 2 matters in relation to the issue of selfincrimination. The first is the scope of clause 59 (1) (c) (which allows an authorised person to require someone else to produce a record etc relating to or indicating an offence against the Act) and clause 61 (which allows an authorised person to direct a person involved in the transport of dangerous goods to give information about a vehicle or any load or equipment carried, or intended to be carried, by a vehicle). I accept the Committee's view that clause 59 (1) (c) is objectionable and I propose to move an amendment

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omitting it from the bill. I note that a record etc to which the paragraph relates could be obtained under a warrant under division 3.5.5 of the bill. As regards clause 61, as the Committee notes, it is directed at an administrative investigation (rather than a criminal investigation as is the case of clause 59 (1) (c)) and the common law privilege against selfincrimination applies in relation to the exercise of a power under the clause. Given this situation and that a power under the clause may only be exercised for compliance purposes (see clause 9 of the bill), I believe that the clause strikes an appropriate balance between the purpose of the bill, which is to regulate the transport of dangerous goods to promote public safety and protect property and the environment (see clause 6), and individual rights.

As regards the question of whether clause 67 amounts to an undue trespass on rights, I would like to reiterate the substance of what I said to the Committee in the context of clause 331 of the *Road Transport (Mass, Dimensions and Loading) Bill 2009*, although I note the Committee's comment in relation to the Canadian case of *Fitzpatrick v The Queen*. Accordingly, and having regard to the proposed omission of clause 59 (1) (c), I believe that the extent to which a requirement arising under division 3.2.2 (Directions in relation to pt 3.2 vehicles) or part 3.3 (Directions to give name, records and other things) of the bill might engage the privilege against selfincrimination, the limitation in clause 67 is proportionate and justifiable.

The Committee indicated in an aside that the note under clause 67, which indicates that the Legislation Act, section 170 deals with the application of the privilege against selfincrimination, might be misleading given that the clause displaces the clause in relation to the relevant clauses of the bill. The note is a standard note that is intended to point a reader to the relevant legislative provision about the privilege against selfincrimination rather than describe the operation of the privilege. As such, I think that the note is appropriate.

Clause 192 is a good Samaritan provision. In essence, it protects a person who assists, or attempts to assist, in a situation in which an emergency or accident involving dangerous goods happens or is likely to happen. The provision applies not only to helpers who might render first aid but also to other forms of assistance such as rescue, traffic control and fire suppression. The purpose of good Samaritan provisions is to reduce a bystander's hesitation to give assistance. Given the range of circumstances in which an incident relating to dangerous goods might occur and the consequences of such an incident, I don't believe that it is practical to limit the operation of the section to particular kinds of qualified helpers or to attempt to deal with the issue of informed consent. This approach is consistent with the *Emergencies Act 2004*, section 63 (3) (d) (Offence to provide emergency services without approval) and the *Civil Law (Wrongs) Act 2002*, section 5 (Protection of good samaritans from liability). (However, unlike clause 192 of the bill, the latter provision is limited to situations in which a person is apparently injured or at risk of being injured or in need of emergency medical assistance.)

The clause operates if an emergency or accident involving dangerous goods happens or is likely to happen. The Committee asks why this choice was made. While I haven't been able to ascertain the reason why the drafter's of the uniform legislation chose this threshold, it seems apparent that the concepts of 'emergency' and 'accident' are the situations in which an ordinary member of the public might render assistance. The bill

has the concept of 'dangerous situation' which is used in the context of the powers of authorised people who would be expected to know the situations in which those powers can be used. I don't think that this is an appropriate threshold for a clause which is directed at protecting ordinary members of the public.

The final matter raised by the Committee in relation to clause 192 is whether a person injured by the negligence of a helper should be entitled to compensation from the Territory. A helper is a volunteer who is not exercising functions under the Act and who has no relationship with the Territory. As such, I don't believe that it is appropriate for a person injured by a helper to be entitled to compensation from the Territory.

Yours sincerely

Jon Stanhope MLA
Chief Minister

17 SEP 2009

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to Scrutiny Report No 11 dated 24 August 2009 in which the Committee raised concerns about the Explanatory Statements for *Disallowable Instruments: DI2009-126, DI2009-127, DI2009-128, DI2009-130* and *DI2009-131*.

Disallowable Instruments DI2009-126 and DI2009-127 Education (Government Schools Education Council) Appointment 2009 made under section 57 of the *Education Act 2004* appoints a specified person as an education member of the Government Schools Education Council (GSEC), representing students.

The Committee notes that student representative appointments to GSEC are to be chosen from nominations of the peak organisation representing students. The Committee also notes that there is nothing in the Instrument or Explanatory Statement for the instrument that indicates that the specified persons were chosen from nominations of the peak organisation representing students. Further, there is no indication of which peak organisation nominated the persons concerned.

Nominations for the two student representatives were sought from the ACT Colleges Representative Council. Care will be taken to ensure future instruments include this advice.

Disallowable Instrument DI2009-128 Education (Non-government Schools Education Council) Appointment 2009 (No. 3) made under section 109 of the *Education Act 2004* appoints a specified person as an education member of the Non-government Schools Education Council, representing the non-government school union.

The Committee notes that appointments representing the non-government school union to the Non-government Schools Education Council are to be chosen from nominations of the non-government school union. There is no indication either in the instrument or in the Explanatory Statement for the instrument that the person appointed was chosen in this way. In addition there is no indication of which peak organisation nominated the person concerned.

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I can advise nominations for this appointment were sought from the NSW/ACT Independent Education Union. Care will be taken to ensure future instruments include this advice.

Disallowable Instrument DI2009-130 being the Board of Senior Secondary Studies Appointment 2009 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies, representing the Association of Parents and Friends of the ACT Schools Inc.

Disallowable Instrument DI2009-131 being the Board of Senior Secondary Studies Appointment 2009 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies, representing the Association of Independent Schools Inc.

The Committee notes the Explanatory Statement for the first instrument states the person is appointed 'to represent the Association of Parents and Friends of the ACT Schools Inc.' The Committee further notes the appointment relates to the requirement that the persons appointed to the Board include '1 person appointed after consultation with the Association of Parents and Friends of the ACT Schools Inc.' The Committee observes that the requirement is for the person to be appointed after consultation with the relevant Association, not that they be appointed to represent the Association.

A similar issue arises in relation to the second instrument. The Explanatory Statement for the instrument states the person is appointed 'to represent the Association of Independent Schools Inc.' This appointment relates to the requirement that the persons appointed to the Board include '1 person appointed after consultation with the body known as the Association of Independent Schools'. Again, the statutory requirement is to appoint a person after consultation with the relevant Association, not to represent that Association.

I note the Committee's view that it is preferable for either the instrument of appointment or the Explanatory Statement for the instrument to explicitly address any pre-requisites for appointment, and for the basis of an appointment to be expressed in the same terms as the criteria for appointment. This will be noted when preparing future instruments.

I thank the Committee for their considered comments.

Yours sincerely

Andrew Barr

Andrew Barr MLA
Minister for Education and Training

17 SEP 2009

John Hargreaves MLA

MINISTER FOR DISABILITY AND HOUSING
MINISTER FOR AGEING
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR INDUSTRIAL RELATIONS
MINISTER FOR CORRECTIONS

Member for Brindabella

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly Committee Office
GPO Box 1020
Canberra ACT 2601

Dear Mrs Dunne, Vicki

Thank you for the Scrutiny of Bills Report No. 10 of 10 August 2009 and in particular the Committee's comments on Section 10 of the Dangerous Substances (Explosives) Amendment Regulation 2009 (SL2009-26).

As you and the Committee are now aware, this amendment to Section 10 of the Dangerous Substances (Explosives) Amendment Regulation 2009 has been repealed by the Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 2)(SL2009-43). This has had the effect of repealing the section of the Dangerous Substances (Explosives) Regulation 2004 that you and the Committee were concerned about.

The Scrutiny Committee expressed concern that in the explanatory statement there was no justification put forward for including a strict liability offence and therefore, in the absence of an explanation, whether the offence may be considered to trespass unduly on rights previously established by law. I would like to offer the following explanation.

Section 10 inserted Section 277A into Part 3.3 of the Dangerous Substances (Explosives) Regulation 2004. This made it a strict liability offence for a person to supply to a consumer more than 25kg of fireworks at premises in a single day.

Part 3.3 regulated the advertising, display, storage, sale, purchase and use of consumer fireworks over the Queen's Birthday weekend. It contained 17 strict liability offences. Under section 123, table 123 item 9, consumers could not store more than 25 kg of fireworks for personal use. In 2008, Office of Regulatory Services inspectors reported that retailers were selling to consumers greater quantities of fireworks than the consumers could lawfully store at that time. Section 227A was introduced to stop retailers from encouraging consumers to break the law. Retailers were advised of the provision before the 2009 Queen's birthday weekend.

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When fireworks were sold to a consumer, the retailer was required to provide the consumer with a consumer fireworks authorised receipt. It was the authority for the consumer to possess the fireworks. It was a form prescribed by the legislation and books of the forms were provided to the retailer. Included on that form was the consumer's name, address, date of birth, details of the photographic ID supplied by the consumer e.g. driver's licence number, the date of sale, consumer's signature and details of the fireworks purchased. The receipt advised the consumer that not more than 25kg of consumer fireworks could be purchased and stored. The retailer was required to keep copies of the receipts.

It was a strict liability offence under section 278 for a retailer to fail to provide a consumer fireworks authorised receipt containing all required details. It attracted a maximum penalty of 30 penalty units. It was also a 30 penalty units strict liability offence under section 277 for a retailer to supply fireworks to persons who were under 18 or who lived outside the ACT. The insertion of Section 277A, a strict liability offence with similar penalties, was consistent with that licensing and regulatory scheme.

Firework retailers, because of their professional involvement and the information provided to them by the Office of Regulatory Services, can reasonably be expected to have known the requirements of the law. The mental elements of the offence can justifiably be excluded.

Since that time, Section 277A was repealed by the Dangerous Substances (Explosives) Amendment Regulation (No.2) 2009.

I trust the above comments address the Committee's concerns over the repealed sections of the Dangerous Substances (Explosives) Regulation 2004. I thank the Committee for its comments. These have been noted and will be taken into account in preparing future explanatory statements.

Yours sincerely

John Hargreaves MLA
Minister for Industrial Relations

17 September 2009

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
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Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No. 10 of 10 August 2009 (the Report) and the comments in the Report concerning the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2009 (No. 1) (the Regulation).

In the Report the Committee correctly describes the Regulation as amending the Medicines, Poisons and Therapeutic Goods Regulation, which amends the Medicines, Poisons and Therapeutic Goods Act which, in turn, modifies the Crimes Act. The Committee's characterisation of the amendment as, in effect, a "Henry VIII" clause is also fair.

I note that the Committee had no adverse comment on the Regulation, noting that as the "Legislative Assembly has explicitly authorised this particular exercise of legislative power".

I am of the view that the comments on the Regulation by the Committee in the Report do not require from me any additional explanation or commentary, other than to note the comments are fair and accurate.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
24/9/09

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
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Vicki
Dear Mrs Dunne

I refer to the Scrutiny Report No 11 dated 24 August 2009 in which the Committee raised a minor issue arising from the Explanatory Statement for the Disallowable Instrument DI2009-107 being the Health (Fees) Determination 2009 (No. 2) made under section 192 of the *Health Act 1993*. My comments on these issues are addressed below.

Attachment A items increased by Wage Price Index of 3.5%
The fees charged referred to in Attachment A of the Explanatory Statement are fees that are determined by ACT Health and therefore, the fees are increased by the Wage Price Index, in accordance with ACT Government Policy.

Attachment B items increased by National Consumer Price Index of 2.5%
The fees referred to in Attachment B, Item A of the Explanatory Statement are fees that are determined through advice from the Commonwealth, which is based on the minimum health insurance benefit. Increasing the fees in this way also ensures that the ACT is in line with many other States and Territories.

The fees in Attachment B, Item B of the Explanatory Statement, while set by the ACT, are directly related to the fees at Item A and therefore, we index at the same rate.

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

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
24.9.09

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Simon Corbell MLA

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MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
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Dear Mrs Dunne Vicki

In *Scrutiny Report No. 11*, the Committee made comment on Disallowable Instrument DI2009-159 Nature Conservation (Fees) Determination 2009 (No. 2) and Subordinate Law 2009-29 Environment Protection Amendment Regulation 2009 (No. 1).

I thank the Committee for its comments. I have noted the observation regarding the accessibility on the Legislation Register of external material incorporated by reference.

Yours sincerely

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

28 SEP 2009

cc Deputy Clerk, ACT Legislative Assembly

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