



**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

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

**SCRUTINY REPORT NO. 27**

**11 MARCH 2003**

## TERMS OF REFERENCE

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

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

## **MEMBERS OF THE COMMITTEE**

**MR BILL STEFANIAK, MLA (CHAIR)**  
**MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)**  
**MS KERRIE TUCKER, MLA**

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**LEGAL ADVISER: MR PETER BAYNE**  
**SECRETARY: MR TOM DUNCAN**  
**(SCRUTINY OF BILLS AND SUBORDINATE**  
**LEGISLATION COMMITTEE)**  
**ASSISTANT SECRETARY: MS CELIA HARSDORF**  
**(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.

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

**RESPONSES**

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
<b><u>REPORTS – 2001-2003</u></b>	
<b><u>Report No. 1, dated 12 December 2001</u></b>	
Nil	
<b><u>Report No. 2, dated 19 February 2002</u></b>	
Crimes Amendment Bill 2001 (No. 2) <b>(PMB)</b>	
<i>Act citation: Crimes Amendment Act 2002 (Passed 5.3.02).....</i>	<b>No. 5</b>
Crimes (Abolition of Offence of Abortion) Bill 2001 <b>(PMB)</b> .....	
Health Regulation (Maternal Health Information) Repeal Bill 2001 <b>(PMB)</b> .....	
Land (Planning and Environment) Legislation Amendment Bill 2001 <b>(PMB)</b> .....	
Supreme Court Amendment Bill 2001 (No. 2) <b>(PMB)</b> .....	
Subordinate Law No 40 –Building Regulations Amendment.....	<b>No. 8</b>
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001.....	
Subordinate Law No 42 – Crimes Regulations 2001.....	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment.....	<b>No. 8</b>
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002.....	<b>No. 8</b>
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Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001.....	<b>No. 10</b>
Health Professions Board (Procedures) Act – Determination No 221 of 2001.....	<b>No. 10</b>
Health Professions Board (Procedures) Act – Determination Nos. 216-220, 222, 225 to 237 of 2001.....	<b>No. 10</b>
Independent Pricing and Regulatory Commission Act - Determination No. 291 of 2001.....	<b>No. 8</b>
Legislative Assembly (Members’ Staff) Act - Determination No. 292 of 2001.....	<b>No. 23</b>
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001..	
Rehabilitation of Offenders (Interim) Act 2001 - Determination No. 305 of 2001.....	

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
Commissioner for the Environment Act - Determination No. 315 of 2001.....	<b>No. 8</b>
Psychologists Act - Determination No. 318 of 2001.....	<b>No. 10</b>
Auditor-General Act – Determination No. 323 of 2001.....	
Drugs of Dependence Act – Determination No. 328 of 2001.....	<b>No. 10</b>
National Exhibition Centre Trust Act - Determination Nos. 330 and 331 of 2001.....	<b>No. 8</b>
Appointment to the Racing Tribunal.....	<b>No. 8</b>
<b><u>Report No. 3, dated 21 February 2002</u></b>	
Rehabilitation of Offenders (Interim) Amendment Bill 2002 (Passed 21.2.02).....	
<b><u>Report No. 4, dated 5 March 2002</u></b>	
Inquiries Amendment Bill 2002 (PMB).....	
Gene Technology Bill 2002.....	<b>No. 12</b>
Legislation Amendment Bill 2002 (Passed 15.4.02).....	<b>No. 9</b>
Subordinate Law No 49 – Road Transport (Offences) Regulations 2001.....	<b>No. 8</b>
Road Transport (Safety and Traffic Management) Regulations 2000 – Disallowable Instrument No 4.....	<b>No. 8</b>
Road Transport (Driver Licensing) Regulations 2000 – Disallowable Instrument No 7.....	<b>No. 8</b>
Health and Community Care Services Act – Determinations Nos 5 and 15.....	
<b><u>Report No. 5, dated 5 March 2002</u></b>	
Nil	
<b><u>Report No. 6, dated 7 March 2002</u></b>	
Nil	
<b><u>Report No. 7, dated 27 March 2002</u></b>	
Drugs of Dependence Amendment Bill 2002 (Passed 14.5.02).....	<b>No. 10</b>
Duties Amendment Bill 2002 (Passed 11.4.02).....	<b>No. 8</b>
Fair Trading Amendment Bill 2002 (PMB) (Passed 29.08.02).....	
Subordinate Law 2002 No 1 – Radiation Regulations 2002.....	<b>No. 10</b>
<b><u>Report No. 8, dated 1 May 2002</u></b>	
Discrimination Amendment Bill 2002 (PMB) (Passed 5.6.02).....	
Gaming Machine (Women’s Sports) Amendment Bill 2002 (Passed 4.6.02).....	<b>No. 10</b>

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002.....	<b>No. 15</b>
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Road Transport (General) Act – Disallowable Instrument No. 20.....	<b>No. 15</b>
Public Place Names Act – Disallowable Instrument No. 24.....	
<b><u>Report No. 9, dated 7 May 2002</u></b>	
Nil	
<b><u>Report No. 10, dated 14 May 2002</u></b>	
Building Amendment Bill 2002 ( <b>Passed 16.5.02</b> ).....	<b>No. 16</b>
<b><u>Report No. 11, dated 14 May 2002</u></b>	
Nil	
<b><u>Report No. 12, dated 16 May 2002</u></b>	
Justices of the Peace Act – Disallowable Instrument No. 25.....	
Residential Tenancies Act – Disallowable Instrument No. 26.....	
<b><u>Report No. 13, dated 29 May 2002</u></b>	
Cemeteries and Crematoria Bill 2002.....	<b>No. 15</b>
Duties (Insurance Exemptions) Amendment Bill 2002.....	<b>No. 15</b>
Road Transport Legislation Amendment Bill 2002.....	<b>No. 16</b>
<b><u>Report No. 14, dated 4 June 2002</u></b>	
Statute Law Amendment Bill 2002 ( <b>Passed 29.08.02</b> ).....	<b>No. 15</b>
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Workers Compensation (Acts of Terrorism) Amendment Bill 2002....	<b>No. 17</b>
Remuneration Tribunal Act – Disallowable Instrument No. 34.....	<b>No. 23</b>
Hotel School Act – Disallowable Instrument No. 35.....	<b>No. 18</b>
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<b><u>Report No. 16, dated 25 June 2002</u></b>	
Maternal Health Legislation Amendment Bill 2002 ( <b>PMB</b> ).....	
Medical Practitioners (Maternal Health) Amendment Bill 2002 ( <b>Passed 21.08.02</b> ) ( <b>PMB</b> ).....	

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
Health and Community Care Services Act – Disallowable Instrument No. 41.....	<b>No. 19</b>
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<b><u>Report No. 17, dated 9August 2002</u></b>	
Justice and Community Safety Legislation Amendment Bill 2002 ( <b>Passed 22.08.02</b> ).....	
Magistrates Court (Refund of Fees) Amendment Bill 2002 ( <b>Passed 25.09.02</b> ).....	
Planning and Land Bill 2002 ( <b>Passed 12.12.02</b> ).....	<b>No. 20</b>
Plant Diseases Bill 2002 ( <b>Passed 12.11.02</b> ).....	<b>No. 18</b>
Revenue Legislation Amendment Bill 2002 ( <b>Passed 22.08.02</b> ) .....	<b>No. 18</b>
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002.. Land (Planning and Environment) ACT Heritage	
Council Appointments 2002 (No 1) - DI 2002—56.....	<b>No. 20</b>
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Stock (Fees) Revocation and Determination 2002 (No 1) – DI2002-77	<b>No. 19</b>
Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	<b>No. 19</b>
Pounds (Fees) Revocation and Determination 2002 – DI2002-79.....	<b>No. 19</b>
Nature Conservation (Fees) Revocation and Determination 2002 – DI2002-80.....	<b>No. 19</b>
Lakes (Fees) Revocation and Determination 2002 – DI2002-81.....	<b>No. 19</b>
Environment Protection (Fees) Revocation and Determination 2002 – DI2002-82.....	<b>No. 19</b>
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<b><u>Report No. 18, dated 27 August 2002</u></b>	
Cooperatives Bill 2002...(Passed 19.11.02).....	<b>No 22</b>
<b><u>Report No. 19, dated 20 September 2002</u></b>	
Adventure Activities (Liability) Bill 2002 (PMB) .....	<b>No. 20</b>
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Injuries Compensation Framework Bill 2002 (PMB) .....	<b>No. 20</b>
Prostitution Amendment Bill 2002 (Passed 24.09.02) .....	<b>No. 20</b>
Disallowable Instrument DI 2002—99 being the Machinery	
(Fees) Revocation and Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—102 being the Architects	
(Fees) Revocation and Determination 2002 .....	<b>No. 22</b>
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(Fees) Revocation 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—104 being the Building	
(Fees) Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—105 being the Community	
Title (Fees) Determination and Revocation 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—106 being the Construction	
Practitioners Registration (Fees) Determination and	
Revocation 2002 .....	<b>No. 22</b>
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Sewerage (Fees) Revocation 2002 .....	<b>No. 22</b>
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and Sewerage (Fees) Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—111 being the Land	
(Planning and Environment) (Fees) Revocation 2002 .....	<b>No. 22</b>
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(Planning and Environment) (Fees) Determination 2002 .....	<b>No. 22</b>
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(Fees) Revocation 2002 .....	<b>No. 22</b>
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(Fees) Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—120 being the Plumbers,	
Drainers and Gasfitters Board (Fees) Revocation and	
Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—128 being the Scaffolding	
and Lifts (Fees) Revocation and Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI 2002—129 being the Occupational	
Health and Safety (Fees) Revocation and Determination 2002 .....	<b>No. 22</b>



<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
Disallowable Instrument DI 2002—130 being the Workers’ Compensation (Fees) Revocation and Determination 2002 .....	
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002 .....	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002 .....	<b>No. 22</b>
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002 .....	<b>No. 22</b>
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002 .....	
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1) .....	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2) .....	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1) .....	<b>No. 22</b>
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002 .....	
<b><u>Report No 20, dated 11 November 2002</u></b>	
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Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1) .....	<b>No. 24</b>
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1) .....	<b>No. 24</b>
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)....	<b>No. 24</b>
<b><u>Report No 21, dated 19 November 2002</u></b>	
Administrative Appeals Tribunal Amendment Bill 2002.....	<b>No. 23</b>
Building (Water Efficiency) Amendment Bill 2002 ( <b>PMB</b> ).....	
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1) .....	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2).....	
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1).....	
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1).....	

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
Disallowable Instrument DI2002-183 being the Justices of the Peace Appointment of Justices of the Peace 2002 .....	
<b><u>Report No 22, dated 21 November 2002</u></b>	
Civil Law (Wrongs) Amendment Bill 2002 (No 2) <b>(PMB)</b> .....	
Crimes Amendment Bill 2002 <b>(PMB)</b> .....	
Revenue Legislation Amendment Bill 2002 (No 2) <b>(Passed 10.12.02)</b>	<b>No. 23</b>
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1) .....	<b>No. 24</b>
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1) .....	<b>No. 24</b>
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) Veterinary Surgeons Board Appointments 2002 (No 1) .....	<b>No. 24</b>
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002.....	<b>No. 24</b>
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2) .....	<b>No. 24</b>
<b><u>Report No 23, dated 6 December 2002</u></b>	
Discrimination Amendment Bill 2002 (No 2) .....	
Health and Community Care Services (Repeal and Consequential Amendments) Bill 2002 <b>(Passed 10.12.02)</b> .....	
Litter Amendment Bill 2002 <b>(PMB)</b> .....	
<b><u>Report No 24, dated 28 January 2003</u></b>	
ACTION Authority Amendment Bill 2002 <b>(Passed 18.2.03)</b> .....	
Taxation (Government Business Enterprises) Bill 2002 .....	
Community Based Sentences (Transfer) Bill 2002 <b>(Passed 20.2.03)</b> ..	
Cemeteries and Crematoria Bill 2002 (No 2) .....	
Hawkers Bill 2002 .....	
Security Industry Bill 2002 <b>(Passed 20.2.03)</b> .....	
<b><u>Report No 25, dated February 2003</u></b>	
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Disallowable Instrument DI2002-193 being the Supervised Drug Injection Trial Advisory Committee Appointments 2002 (No 1)...	
Disallowable Instrument DI2002-194 being the Residential Tenancies - Tribunal Selections 2002 .....	

<b>Bills/Subordinate Legislation</b>	<b>Responses received – Scrutiny Report No.</b>
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Disallowable Instrument DI2002-195 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2002 (No 7) .....

Disallowable Instrument DI2002-197 being the Domestic Violence Prevention Council Appointments 2002-2004.....

**Report No 26, dated 27 February 2003**

Consumer and Trader Tribunal Bill 2003 .....

Land (Planning and Environment) (Compliance) Amendment Bill 2003.....

Subordinate Law SL2003-1 being the Urban Services (Application of Criminal Code) Amendment Regulations 2002 .....

Disallowable Instrument DI2002-207 being the Gambling and Racing Commission – Appointments 2002 (No 1).....

Disallowable Instrument DI2002-212 being the National Exhibition Centre Trust Appointment 2002 (No 2).....

Subordinate Law SL2002-37 being the Trade Measurement (Miscellaneous) Amendment Regulations 2002 .....

Disallowable Instrument DI2002-219 being the Health Professions Boards (Procedures) – Nurses Board of the ACT Appointments 2002 (No 2) .....

Disallowable Instrument DI2002-220 being the Water Restriction Scheme Approval 2002 (No 2) .....

Disallowable Instrument DI2002-223 being the Occupational Health and Safety Council – Appointment 2002 (No 3) .....

Disallowable Instrument DI2002-224 being the Occupational Health and Safety Council – Appointment 2002 (No 2) .....

Disallowable Instrument DI2002-225 being the Occupational Health and Safety Council – Appointment 2002 (No 2) .....

Disallowable Instrument DI2002-232 being the Road Transport (General) Revocation of Declaration for Traffic Marshals 2002 ...

Disallowable Instrument DI2003-3 being the Hotel School Appointment 2003 (No 1).....

Disallowable Instrument DI2003-5 being the Tree Protection (Interim Scheme) Determination of Criteria 2002.....

## **BILLS**

### Bills - Comment

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

### **Bushfire Inquiry (Protection of Statements) Bill 2003**

This is a Bill for an Act to protect people making statements to the McLeod inquiry into the operational response to the January 2003 bushfires in the ACT, by providing that a person who makes a statement, or gives information to the inquiry, has, in relation to that action, the same protection as a witness in proceedings in the Supreme Court.

*Para 2(c)(i) – undue trespass on rights and liberties*

#### Free speech and privacy (reputation) interests

From a rights perspective, the immediate effect of the Bill would be to enhance the freedom of speech of those who make statements, or give information to the inquiry. The law of defamation is a restriction on free speech, and where the proposed law applied, it would displace that body of law. The effect of the Bill would be to grant absolute privilege to a 'witness' to the inquiry.

It might be said that a witness to the inquiry would have some protection from successful suit in defamation arising from general defences available in defamation matters, as well as, perhaps, those defences available where a statement is made on an occasion of qualified privilege. These opportunities are, however, available only to those who can afford to run the very great financial cost of defending a defamation action. This risk is of course enhanced by the great difficulty lawyers have in predicting the outcome of a defamation suit. Of course, the risk of costs must be assessed by those who sue. A prospective witness would, however, have to balance their interest in providing information to the McLeod inquiry against the risk that a person with access to funds would sue in defamation.

One might see the issue as being whether the interest of the public in encouraging those with information and opinions that might assist the McLeod inquiry, which is the kind of interest that justifies witnesses in trials before courts being afforded absolute privilege, is, in the context of the McLeod inquiry, sufficiently strong as to justify equating evidence given to a trial with evidence given to the McLeod inquiry.

In making this calculation, regard might also be had to the reputation interest of those who might be defamed in statements, or information given to the inquiry. In this respect, the conduct of trials is different in that there are various ways in which, to some extent but not completely, the risk of damage to a third party is controlled and confined. The trial is directed towards an inquiry into facts that is in general more focussed than will be that of the McLeod inquiry. The observance of the professional responsibilities of lawyers who might be involved acts, to some extent, as a dampener on the possibility that a witness will make gratuitous defamatory attacks on others.

The trial judge or tribunal member might be alert to this occurring. One remedy is the making of a non-publication order by the trial judge or tribunal member.

On the other hand, witnesses before Royal Commissions and the like are often entitled to a measure of protection against actions in defamation, and those inquiries are not unlike the McLeod inquiry.

### **Bushfire Reconstruction Authority Bill 2003**

This is a Bill to establish a Bushfire Reconstruction Authority and for related purposes. The Authority would have, in fire-affected areas, functions in relation to land planning, and to development. It would pay particular regard to bushfire protection, and would be obliged to engage in community consultation. In key areas, it would be subject to Ministerial control or approval.

*Para 2(c)(i) – undue trespass on rights and liberties*

#### Strict liability offences

A number of proposed offences are stated to be ones of strict liability. There is no Explanatory Memorandum to the Bill and thus no explanation of why this is desirable, or whether consideration was given to providing for a reasonable excuse defence.

*Para 2(c)(iv)- inappropriate delegation of legislative power*

Under para 21(1)(a), regulations may empower the Authority to enter land. The Assembly may consider whether a power so invasive of rights should be stated in the Act, rather than be capable of being conferred by a regulation.

Where such a power is conferred by regulation, it is not altogether clear that the Authority would be required to pay compensation under subclause 21(3), given that it refers to "powers under this section".

*Comment on the Explanatory Memorandum*

There is no Explanatory Memorandum.

### **Charitable Collections Bill 2003**

This is a Bill for an Act to promote proper management and administration of collections; ensure proper record keeping and auditing of accounts; and ensure that the public has access to information about collections. In effect, the Bill would create a licensing scheme backed by criminal offences in respect of unlicensed activities.

*Para 2(c)(i) – undue trespass on rights and liberties*

Strict liability offences

A number of proposed offences are stated to be ones of strict liability. There is no explanation in the Explanatory Memorandum of why this is desirable, or whether consideration was given to providing for a reasonable excuse defence.

Lack of clarity in clause 23 concerning the power to refuse a licence

Subclause 23(2) states that the chief executive "must refuse" a licence in certain circumstances, whereas in the circumstances described under subclauses 23(2) and (3), the chief executive "may refuse" a licence. It is not clear why there should be different treatment.

The Committee does not query subclause 23(5).

Lack of clarity in clause 44 concerning burden of proof

Provisions of Bills that place any kind of burden of proof on a defendant must be assessed in terms of whether this amounts to an undue trespass on the presumption of innocence. It is thus important that the Assembly be able to ascertain that any such shifting of onus is the result of a particular provision. In addition, any lack of clarity in the criminal law is a matter of concern from a rights perspective.

In earlier Reports, the Committee argued that drafters might adopt techniques that resolved these issues. The Committee offers another analysis of this issue in the light of the impact of the *Criminal Code 2002*. Although it greatly assists, it has not removed all of the pre-Code areas of doubt surrounding burdens of proof in relation to statutory offences. (The effect of the Commonwealth Code in this respect is noted in *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General's Department, March 2002), at 345-346, although the Territory Code, by the use of Examples, may go further in resolving some doubts)

The issue can be posited in terms of clause 44 of this Bill.

44 (1) A licensee commits an offence if the licensee fails to ensure that the proceeds of a collection conducted by the licensee are applied only for the purposes of the collection.

(3) This section does not apply to the deduction of lawful and proper expenses in accordance with the conditions (if any) of the licensee's licence or the regulations.

Under subclause 44(3) the question arises: Which party (or parties) would bear a burden of proof in proof or disproof of whether the deductions were in accordance with the conditions of the licence?

Given that clause 44 does not expressly impose an evidential or a legal burden on the defendant, the only burden that could be carried by the defendant would be an evidential burden of establishing that that matter exists; Code subsection 58(1). This

is the burden to adduce or point to evidence that suggests a reasonable possibility that that matter exists: *Code* subsection 58(7).

Whether the defendant does carry such an evidential burden will turn on whether the issue of whether the deductions were in accordance with the conditions of the licence would be classified as one or other of an "exception, exemption, excuse, qualification or justification"; *Code* subsection 58(3).

Leaving aside for the moment the statement of Examples appended to subsection 58(3), the *Code* provides no guidance as to how to determine this issue. In *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General's Department, March 2002), at 344-345, it is noted:

The references to "excuse" or "justification" can be taken to apply to established defences found in particular chapters of the *Code*. For example, the defendant is required to bear the evidential burden when relying on "reasonable excuse", a defence frequently employed in federal legislation. In general, excuses and justifications are readily recognisable. That cannot be said of exceptions, exemptions or qualifications. Though the distinction drawn in the *Code* between "elements" and matters of defence or exception parallels a familiar common law distinction, the criteria which govern its application are not apparent in Chapter 2 itself. In practice, a measure of certainty has been achieved by adopting standardised drafting techniques in framing offences, which distinguish between elements and matters of defence or exception.

The *Guide* then went on to illustrate how what may appear to be an exception may be characterised as an element of the offence, such that the prosecution would bear both an evidential and legal burden. The *Guide* also illustrated the use in some Commonwealth laws of certain drafting techniques that make clearer whether some matter is in substance a matter of exception, etc such as to require the defendant to discharge an evidential burden of proof. One technique is to make use of interpretative notes to the relevant provision (see *Guide* 347). Another is to make an express statement in the provision as to whether the defendant bears any kind of burden of proof.

In this respect, the Committee notes the Examples appended to subsection 58(3) of the *Code*. In each, a statement of the elements of an offence in one subsection of a section of an Act is then qualified in a separate subsection by a statement that commences "This section does not apply if ---". The text to the examples then asserts that the qualification is an exception, and that a defendant would carry an evidential burden in respect of the matter stated after the occurrence of the word "if". (If the defendant did discharge that burden, the prosecution would then need to disprove the matter beyond reasonable doubt.)

These examples are part of the *Code*. While the examples are part of the Act, it is not perhaps entirely clear what will be their effect. Each of the examples might be taken simply as a guide as to how *that particular kind of offence provision* should be understood. On the other hand, a court might more broadly take it that the use of the words "This section does not apply if ---" will *in all circumstances* mean that the

matter that follows must be proved by the defendant (although only to the evidential burden standard).

In relation to its task, the Committee makes these comments.

First, it invites comment as to what is the correct understanding of what was meant to be achieved by the insertion of the Examples to subsection 58(3) of the *Code*.

Secondly, it suggests that greater clarity might be achieved if there was appended to subsection 44(3) a cross-reference to section 58(3) of the *Code*.

In relation to this second point, the Committee acknowledges that the state of 'the statute book' of the Territory has been improved in many ways by the enactment of legislation such as the *Code* and the *Legislation Act 2001*. Greater clarity has been achieved, but it is the case that a reader of a particular statute will only benefit from this to the extent that he or she is familiar with these provisions of these two Acts that are designed to run alongside provisions of other Acts. The Committee's general point is that the reader will be assisted by greater use of Notes that cross-reference to the *Code* and the *Legislation Act*.

#### Privileges against disclosure

The point just made arises in connection with clause 53, which empowers the chief executive to require information or documents about collections. The privileges against selfincrimination and exposure to civil penalty, and client legal privilege, may well continue to operate; see sections 170 and 171 of the *Legislation Act 2001*.

A cross-reference would assist the reader.

#### Lack of compensation for injury arising out of government action

Under clause 62, the Minister may make various kinds of public statements and warnings about various matters, such as "collection practices or activities generally or the collection practices or activities of an entity" (para 62(2)(a)). If false, such statements could unjustifiably cause great damage to a person's business and reputation. Subclause 62(4) affords protection to the Territory:

(4) A civil proceeding does not lie against the Territory in relation to loss, damage or injury of any kind to anyone because of the honest making of a statement or warning under this section.

Presumably the Minister would in some way be similarly protected.

Given, however, that this power would be exercised in the "public interest", (subsection 62(1)), there appears to be a case for considering whether the person damaged should have some form of entitlement to compensation.

The Committee draws this to the attention of the Assembly.



*Comment on the Explanatory Memorandum*

The Explanatory Memorandum makes very little attempt to explain the content of the provisions of the Bill. It also contains an error that renders its very short statements of less utility. Part 3 of the Bill contains clauses 14 to 20, and not, as the Explanatory Memorandum states, clauses 14 to 21. What the Explanatory Memorandum describes as clause 15 is not found in Part 3.

Subordinate Legislation - No Comment

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

**Subordinate Law SL2003-4 being the Land (Planning and Environment) (Bushfire Emergency) Regulations 2003 made under the *Land (Planning and Environment) Act 1991* works in conjunction with the Building (Bushfire Emergency) Regulations 2003 to provide for the identification of the land where buildings and structures were destroyed by bushfires, identify the period of the bushfires and exempt demolition and clearance on that land from approval as development under the Land (Planning and Environment) Act, under certain conditions. One of these conditions is that a specific plan of works is drawn up for the demolition and the work complies with an agreement between the owner and the person carrying out the demolition approved in general terms or specifically by the building controller. Another condition is that the plan of works must be endorsed by a construction practitioner registered under the *Construction Practitioners Registration Act 1998*. In this respect the plan of works supersedes requirements of the Building Regulations 1972.**

**Subordinate Law SL2003-5 being the Building (Bushfire Emergency) Regulations 2003 made under the *Building Act 1972* works in conjunction with the Land (Planning and Environment) (Bushfire Emergency) Regulations 2003 to provide for the identification of the land where buildings and structures were destroyed by bushfires, identify the period of the bushfires and exempt demolition and clearance on that land from approval as development under the Land (Planning and Environment) Act, under certain conditions. One of these conditions is that a plan of works is drawn up for the demolition and the development complies with an agreement between the owner and the person carrying out the demolition that has been approved by the building controller. Another condition is that the plan of works must be endorsed by a construction practitioner registered under the *Construction Practitioners Registration Act 1998*.**

**Subordinate Law SL2003-6 being the Supreme Court Amendment Rules 2003 (No 1) made under the *Supreme Court Act 1933* are consequential on the *Civil Law (Wrongs) Act 2002* and give effect to the procedures provided for in that Act by amending Order 2 rule 6, Order 26 and Order 61 rule 3, as well as providing appropriate forms.**

**Subordinate Law SL2003-7 being the Land (Planning and Environment) (Bushfire Emergency) Amendment Regulations 2003 (No 1) made under the *Land (Planning and Environment) Act 1991* amends the Principal Regulations to simplify requirements for the rebuilding of buildings and structures destroyed**

or damaged by the bushfires and provides for the identification of buildings to which exemptions may apply.

**Disallowable Instrument DI2003-7** being the **Public Sector Management Amendment Standards 2003 (No 1)** made under section 251 of the *Public Sector Management Act 1994* makes amendments to the Standards as specified in Schedule A.

**Disallowable Instrument DI2003-8** being the **Food Act 2001 – Fees – Determination 2003 (No 1)** made under section 150 of the *Food Act 2001* revokes **Disallowable Instrument DI2002-37** (made 9 May 2002) and determines the fees payable under the Act are as set out in the Schedules.

**Disallowable Instrument DI2003-9** being the **Smoke-free Areas (Enclosed Public Places) Act 1994 – Fees – Determination 2003 (No 1)** made under section 22 of the *Smoke-free Areas (Enclosed Public Places) Act 1994* revokes all previous determinations of fees under the Act and determines the fees payable are as set out in the Schedule.

**Disallowable Instrument DI2003-10** being the **Tobacco Act (Fees) – Determination 2003 (No 1)** made under section 70 of the *Tobacco Act 1972* revokes all previous determinations of fees under the Act and determines fees payable in relation to wholesale tobacco merchants' licences and retail tobacconists' licences are as set out in the Schedule.

**Disallowable Instrument DI2003-11** being the **Poisons Act 1933 – Fees – Determination 2003 (No 1)** made under section 20 of the *Poisons Act 1933* revokes all previous determinations of fees under the Act and determines the fees payable in relation to licences to sell poisons, poisonous substances, biological preparations or restricted substances are as set out in the Schedule.

**Disallowable Instrument DI2003-12** being the **Poisons and Drugs Act 1978 – Fees – Determination 2003 (No 1)** made under section 47 of the *Poisons and Drugs Act 1978* revokes all previous determinations of fees under the Act and determines the fees payable are as set out in the Schedule.

**Disallowable Instrument DI2003-13** being the **Public Place Names 2003, No 5** made under section 3 of the *Public Place Names Act 1989* revokes Determination published in the Commonwealth of Australia Gazette S24, dated 8 February 1978, of the following names of public places that are Territory land in the division of Belconnen: Morell Street and Sutherland Crescent.

**Disallowable Instrument DI2003-14** being the **Environment Protection Declaration of non-application of section 48 2003 (No 1)** made under section 48 (6) of the *Environment Protection Act 1997* exempts the Environment Protection Authority from publicly notifying an application for an authorisation for the operation of a commercial landfill.

**Disallowable Instrument DI2003-15** being the **Utilities (Repeal of Disallowable Instrument) 2003 (No 1)** made under section 62 of the *Utilities Act 2000* repeals **Disallowable Instrument DI2002-216** which notifies approval of the Electricity Customer Transfer Code by the ICRC.

**Disallowable Instrument DI2003-16** being the **Water and Sewerage (Fees) (Bushfire Emergency) Determination 2003** made under section 45 of the *Water*

*and Sewerage Act 2000* determines that the fees determined in DI2002-110 (LR, 24 June 2002) do not apply to lessees affected by the January 2003 bushfire. This exemption applies only to plumbing and draining work associated with buildings or structures completely or partially damaged during the bushfires in January and to people who were the lessees at the time.

Disallowable Instrument DI2003-17 being the Building (Fees) (Bushfire Emergency) Determination 2003 made under section 108 of the *Building Act 1972* determines that the fees determined in DI2002-104 (made on 26 June 2002) do not apply to lessees affected by the January 2003 bushfire. This exemption applies only to buildings or structures completely or partially damaged during the bushfires in January and to people who were the lessees at the time.

Disallowable Instrument DI2003-18 being the Land (Planning and Environment) (Fees) (Bushfire Emergency) Determination 2003 made under section 287 of the *Land (Planning and Environment) Act 1991* determines that the fees determined in DI2002-112 (LR, 27 June 2002) do not apply to lessees affected by the January 2003 bushfire. This exemption applies only to buildings or structures completely or partially damaged during the bushfires in January and to people who were the lessees at the time.

Disallowable Instrument DI2003-19 being the Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2003 (No 1) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* amends the Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2002 (No 3) (LR, 19 December 2002) by substituting “1 March 2003” wherever it appears with a new date of “1 July 2003”.

Disallowable Instrument DI2003-20 being the Utilities (Non-franchise electricity customers) Declaration 2003 (No 1) made under section 18 of the *Utilities Act 2000* revokes Disallowable Instrument No 93 of 2001 (Gazette No 19, dated 10 May 2001) and declares the persons stated in the schedule to this Declaration to be non-franchise customers for the purposes of the Act in relation to the supply of electricity.

Disallowable Instrument DI2003-22 being the Race and Sports Bookmaking – Determination – Security Guarantee Minimum Amount 2003 (No 1) made under section 90 (1) of the *Race and Sports Bookmaking Act 2001* sets the minimum amount of security guarantees for sports bookmaking licences at \$250,000.

Disallowable Instrument DI2003-24 being the Public Place Names 2003, No 1 (Street Nomenclature – Dunlop) made under section 3 of the *Public Place Names Act 1989* determines the names, origins and significance of new street names in the Division of Dunlop.

Disallowable Instrument DI2003-25 being the Public Place Names 2003, No 3 (Street Nomenclature – Gungahlin) made under section 3 of the *Public Place Names Act 1989* determines the name, origin and significance of a new street name in the Division of Gungahlin.

Subordinate Legislation - Comment

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

**Disallowable Instrument DI2003-21 being the Plumbers, Drainers and Gasfitters Board Appointments 2003 (No 1) made under section 5 of the *Plumbers, Drainers and Gasfitters Board Act 1982* appoint specified persons as members of the Plumbers, Drainers and Gasfitters Board of the ACT for a period of three years from 25 February 2003 and appoints a specified person as a deputy member of the Board for three years from 25 February 2003.**

*Is this instrument disallowable?*

The Committee again notes that the explanatory statement gives no indication as to whether or not the persons appointed to the Plumbers, Drainers and Gasfitters Board of the ACT are public servants. An instrument appointing a public servant is not a disallowable instrument under section 227 (2) (a) of the *Legislation Act 2001*.

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**Disallowable Instrument DI2003-23 being the Occupational Health and Safety (Fees) Revocation and Determination 2003 made under section 96A of the *Occupational Health and Safety Act 1989* revokes DI2002-129 (LR, 1 July 2002) and determines that the fees for the purposes of the Act shall be in accordance with the Schedule.**

*Retrospectivity*

The Committee notes that instrument was signed on 18 February 2003, was notified on the Legislation Register on 27 February 2003 and states that it commences on 18 January 2003.

*What is the effect of the period from the instrument taking effect until notification?*

The effect of the period between this instrument taking effect and its notification in the Legislation Register needs to be considered.

There is no mention in the explanatory statement of the possible effect of section 76 of the *Legislation Act 2001* on any occurrences decided during the relevant period of retrospectivity.

The possible effect of section 76 of the *Legislation Act 2001* appears to be of particular relevance to this instrument. It provides as follows:

**“76 Non-prejudicial provision may commence retrospectively  
(SLA s 7)**

- (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
- (2) This section applies to a non-prejudicial provision of a statutory instrument only if the instrument clearly indicates that the provision is to commence retrospectively.

**Example**

the instrument provides that a non-prejudicial provision is ‘taken to have commenced’ at an earlier date or time

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

- (3) This section is a determinative provision.

*Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

- (4) In this section:

***non-prejudicial provision*** means a provision that does not operate to the disadvantage of a person (other than the Territory or a Territory authority or instrumentality) by—

- (a) adversely affecting the person’s rights; or
- (b) imposing liabilities on the person.”.

Confirmation is sought that no person’s rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

## **INTERSTATE AGREEMENTS**

There is no matter for comment in this report.

## **REGULATORY IMPACT STATEMENTS**

There is no matter for comment in this report.

## **GOVERNMENT RESPONSES**

The Committee has received a response in relation to comments from:

- The Treasurer, dated 28 February 2003, in relation to comments in Scrutiny Report No. 24 regarding the Taxation (Government Business Enterprises) Bill 2002.

A copy of the response is attached.

The Committee thanks the Treasurer for his helpful response.

### Further response

The Committee makes these brief comments on the response of the Attorney-General to the comments in Scrutiny report No. 25 concerning the Confiscation of Criminal Assets Bill 2002.

The Committee focussed on the debate - which is at the forefront of the ALRC's report - as to whether a non-conviction based scheme is to be classified as either punitive in character, or, as remedial in the sense of depriving persons of assets unjustly obtained by them. It saw this - as did the ALRC - as the critical rights issue presented by the Bill.

The Attorney is critical of the Committee for failing to note the increase in 'white-collar' crime as revealed in debates in other legislatures, and for failing to refer to matter in the ALRC report concerning the failure of the conviction-based schemes for confiscation of criminal assets. The Committee notes that the Explanatory Memorandum did not make any mention of this material.

In relation to the issue of how the Bill should be characterised - as either punitive or as remedial - the Committee attempted to present opposing viewpoints. Its report did not commit itself to a preference for the punitive model.

In relation to this issue, the Committee adds only that how one characterises a law cannot be settled by some declaration in the law that it is or is not punitive. It is a matter of looking at the substance of the law, to be gathered by considering all of its provisions. Resolution of this issue in respect of the Confiscation of Criminal Assets Bill 2002 is not easy. The Committee notes that while the Explanatory Memorandum states that "punishment of offenders is not included among the purposes" of the Bill, at one point the Attorney's letter says that "the Government's Bill would take away from offenders only those assets that have been unlawfully obtained or have been used to commit crime".

John Hargreaves MLA  
Deputy Chair

11 March 2003



## Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM

MINISTER FOR SPORT, RACING AND GAMING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee Report No. 24 of 2003.

I offer the following response in relation to the matters raised by your Committee on the *Taxation (Government Business Enterprises) Bill 2002*.

### Retrospectivity of the proposed law

I note the comments made by the Committee and its acknowledgement of the explanation for the retrospective application of the proposed law. I would like to point out that the legislation applies only to ACT Government business entities, and is a continuation and consolidation of the tax equivalents regimes which have been in place for several years. The ACT Government is a signatory to an agreement which established the National Tax Equivalents Regime which replaced State/Territory income tax equivalent regimes. With respect to tax law and administration, it is common practice for a tax measure to apply from announcement rather than formal legislative implementation to prevent avoidance.

All ACT Government business entities were informed of these developments in mid 2002, and have, in place, accounting and reporting measures to comply. Indeed, this Bill puts in a legislative form, a practice that has been in operation for most GBEs for some time. This retrospectivity does not impose any disadvantages to the affected GBEs, and achieves administrative transparency and efficiency.

### Access to law

With respect to the comments dealing with clause 6 and the Explanatory Memorandum of the Bill, clause 6 was drafted to avoid setting out on the face of the

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statute book a substantial set of rules and procedures relating to the administration of the tax equivalent scheme.

The National Tax Equivalent Regime formally came into existence through a Memorandum of Understanding (MOU) which was signed in 2001 by all State/Territory and the Commonwealth Under Treasurers. The MOU established a scheme to ensure that the nominated government businesses of the Commonwealth, States and Territories are subject to the same income tax arrangements as the private sector entities. The MOU put into effect the decision of the Intergovernmental Agreement (IGA) on the reform of Commonwealth-State financial relations (1999) which covers various aspects of taxation including the intention to set up a national tax equivalent regime. That agreement is a schedule to the *Financial Relations Agreement Act 2000* (ACT).

The IGA was mentioned at length in the Assembly in March 2000 when the then Treasurer tabled the *Financial Relations Agreement Bill 2000*. I have enclosed a copy of the MOU and have written to all Assembly Members also enclosing a copy.

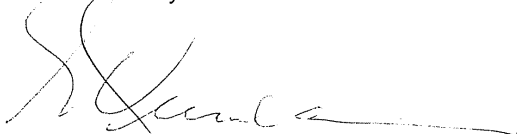
The Australian Taxation Office administers the NTER scheme. The Manual which is mentioned in clause 6 was developed to lay down the procedures for the administration of the scheme including the procedures for changing the list of nominated government businesses subject to the regime. The Manual is a working document for State and Territory Treasuries. It is subject to change over time to improve the administration of the scheme and is revised to take into account changes to the schedules. A copy of the current manual is also attached.

As the proposed legislation applies only to the internal tax arrangements for ACT Government enterprises, it is considered that it is not necessary to incorporate quite complex and substantial procedures into the legislation, especially as the practices contained in the manual may change over time.

I intend to table copies of the MOU and the manual prior to the debate on the Bill.

I trust the above adequately addresses the issues raised by the Committee.

Yours sincerely



Ted Quinlan MLA  
February 2003