



Legislative Assembly for the ACT

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

Scrutiny Report

3 MARCH 2008

Report 51

TERMS OF REFERENCE

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

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

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

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

ROLE OF THE COMMITTEE

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

BILLSBills—No comment

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

AGENTS AMENDMENT BILL 2007

This Bill would amend the *Agents Act 2003*.

COURTS (JUDICIAL APPOINTMENTS) AMENDMENT BILL 2008

This Bill would amend the *Magistrates Court Act 1930 and the Supreme Court Act 1933* to provide for consultation between the Executive and the appropriate Legislative Assembly committee with respect to the appointment of magistrates and judges.

STANDARD TIME AND SUMMER TIME AMENDMENT BILL 2008
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This Bill would amend the *Standard Time and Summer Time act 1972* to the effect that daylight saving would start in each year on the first Sunday in October (rather than the last Sunday in October) and end on the first Sunday in April (rather than the last Sunday in March) in the following year.

Bills—Comment

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

CRIMES AMENDMENT BILL 2008

This Bill would amend provisions creating street offences in a number of statutes to make those offences appropriate for the infringement notice scheme, including making them strict liability offences. This Bill is accompanied by the Magistrates Court (Crimes Infringement Notices) Regulation 2008 and the Magistrates Court (Liquor Infringement Notices) Regulation 2008.

Report under section 38 of the Human Rights Act 2004

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

The rights of a child to protection – HRA subsection 11(2)

<p>Does the proposed amendment to section 77 of the <i>Children and Young People Act 1999</i> accord sufficient recognition to the right of a child stated in <i>Human Rights Act 2004</i> (HRA) subsection 11(2)? The issue is whether the notion of the protection needed by a child by reason of being a child is compatible with a proposal to remove existing protections considered appropriate where the child is questioned by the police.</p>
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Clause 4 proposes an amendment to the *Children and Young People Act 1999* that raises a significant rights issue. The issue is explained in the Explanatory Statement:

Clause 4 amends section 77 of the *Children and Young People Act 1999* to make an exception to [the existing provision defining the concept of] when a child or young person is taken to be “under restraint” within the meaning of that section. [By the amendment, a] person aged between 16 and 18 and years will not be taken to be under restraint where police are questioning them with a view to issuing them with an infringement notice for the offences listed in the section.¹

The concept of being “under restraint” engages certain procedural safeguards in Division 6.2.2 of the *Children and Young People Act*. These safeguards are intended to assist in ensuring that any admissions or statements made by a child or young person during the course of an investigation are made voluntarily and are reliable, and to ensure the integrity of other evidence obtained from the child or young person in the course of an investigation.

However, given that the issuing of infringement notices can only be issued for relatively minor offences, [that] they can’t be issued to children or young people aged under 16, and [that] the issuing of an infringement notice does not involve the arrest or custody of a young person, it is not considered that circumstances involving police talking to a young person with a view to issuing an infringement notice warrant the procedural safeguards that being “under restraint” affords. This [reasoning] is in line with other exceptions contained in section 77(3) of the Act.

The clause makes it clear that if, whilst talking to the young person, police form the view that proceeding by way of infringement notice is not appropriate, or police form the view that they may need to question the person in relation to another offence, then the young person will be taken to be under restraint within the meaning of section 77 of the Act.

This explanation does not however refer to a relevant right stated in HRA subsection 11(2). This provides:

11 Protection of the family and children

...

- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The issue for the Assembly is whether the proposed amendments to section 77 of the *Children and Young People Act 1999* amount to a limitation of this right and, if so, whether that limitation of justifiable under HRA section 28.

The issue is whether the notion of the protection needed by a child by reason of being a child is compatible with a proposal to remove existing protections considered appropriate where the child is questioned by the police. The Explanatory Statement provides a good framework for this debate.

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

¹ These are the offences of defacing property, urinating in a public place, failure to comply with a noise abatement direction and consumption of liquor in a prescribed public place.

Freedom of expression – HRA subsection 16(2)

Is the proposal to repeal the existing section 119 of the *Crimes Act 1900* and replace it with a new provision compatible with the statement in HRA subsection 16(2) that “everyone has the right to freedom of expression”, and, if not, is any limitation of that right justifiable under HRA section 28?

Clause 7 would repeal the existing section 119 of the *Crimes Act 1900* and replace it with a new provision. The Committee accepts the Explanatory Statement comment that this redrafting may “simply modernise the offence” and not alter its nature. This does not however affect the need to consider the human rights issues thrown up by the clause, in particular in the light of the HRA.

A person commits an offence where he or she “affixes a placard or paper, or makes a mark with chalk, paint or any other material”:

- on *private premises*, without (as the case may be) the consent of the occupier, or owner or person in charge of the premises – proposed subsection 119(1); and
- on *public property*, if the relevant act (of affixing, etc) is done “unlawfully” proposed subsection 119(2).

The offence is punishable by 50 penalty units, imprisonment for 6 months or both.

This provision engages significant human rights. The Explanatory Statement does not however address these human rights issues, and does not articulate any objective of the proposed law. The Committee can do no more than sketch out the issues relevant to a human rights assessment of the proposed amendments.

HRA subsection 16(2) provides that “everyone has the right to freedom of expression”. It is arguable² that at least some of the acts that may constitute the physical elements of the offence (of affixing, etc) are each an exercise of the right to freedom of expression. That is, some such acts will amount to an attempt to convey or attempt to convey a meaning.³

The question then is whether the limitation of this right is in the circumstances justifiable under HRA section 28. In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

It may be accepted that the limitations in the right to free expression pursue a legitimate objective. So far as concerns subsection 119(1), it is clearly legitimate to restrict free expression to protect private property. In relation to subsection 119(2), the protection of public property is also legitimate, and one might point to matters such as the avoidance of litter, aesthetic blight and associated hazards.⁴

² It might however be argued that these acts should not be regarded as within the ambit of freedom of expression where they occur on private premises; compare the analysis in *Ramsden v. Peterborough (City)* 1993 CanLII 60 (Supreme Court of Canada) - <http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/sc/doc/1993/1993canlii60/1993canlii60.html>

³ This comment adopts a test used by the Supreme Court of Canada; see *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 at 968-969.

⁴ See *Ramsden* at page 13.

Assessment of the “proportionality” of the limitation is an open-ended inquiry,⁵ although some broad questions are suggested by relevant case-law.

Proposed section 119 “is aimed at the consequences of the particular conduct in question, and is not tied to content. On its face the by-law is content-neutral and prohibits all messages from being conveyed in a certain manner and at certain places”.⁶ That is, its purpose is not to restrict expression. This factor would tend to support the proportionality of the limitation. On the other hand, the proposed law will apply to some forms of expression that have a high value – that is, those directed to conveying a political message. This factor makes it more difficult to support a finding of proportionality.

To take the analysis further, it is useful to distinguish between subsections 119(1) and (2).

Subsection 119(1) – the absolute ban on affixing etc on private premises

In relation to proposed subsection 119(1), it is necessary to take into account the competing human right to the ownership and enjoyment of the owner or occupier of the private premises. The protection of this right is clearly a legitimate objective, and one deserving of significant weight. The defacing of property clearly interferes with its enjoyment. The right to property is not however absolute, and must accommodate public interests and the interests of other individuals. The issue however is whether an *absolute* prohibition on the commission of the physical elements of the offence (of affixing, etc) without the relevant consents is a “proportionate” means of pursuing this objective. More particularly, should there be some qualification of the scope of the prohibition to allow for the commission of a physical element of the offence that is designed to serve some public interest, or the protection of some other private interest? For example, one might envisage a case where some mark made on private premises amounted to a warning to the public to take care to avoid some danger. If such cases are recognised as not warranting a conviction of an offence, then it might be argued that proposed subsection 119(1) is not justifiable under HRA section 28 because an absolute ban on affixing etc of marks and other forms of expression on private property does not, given the objective of the law, impair the right to expression as little as is reasonably possible.

The Committee notes that the government has proposed to amend HRA section 28 to provide that in the assessment of whether a limitation of an HRA right is reasonable, a particular factor to be considered is whether “any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve”.⁷ This sets a high standard, and it will be for the proponent of a limitation to demonstrate that there is no “less restrictive means reasonably available”.⁸

⁵ The Committee notes that in *Ministry of Transport v Noort* [1992] NZLR 260 at 283, Richardson J said that the tests involved in the application of the NZ equivalent to section 28 “necessarily involve public policy analysis and value judgements on the part of the Courts”, and that “in principle [the inquiry] will properly involve consideration of all economic, administrative and social implications”.

⁶ *Ramsden* above, at page 12.

⁷ See Human Rights Amendment Bill 2007, clause 4, proposing a new paragraph 28(2)(e).

⁸ See A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) para 6.7.1 and the references cited.

Accepting this as the standard, the question is whether some alternative to an absolute ban is not reasonably possible. In relation to subsection 119(1), it could be argued that the legitimate purpose of the limitation on free expression would not be significantly compromised were there to be a qualification to the ban in terms that it did not apply where the affixing etc of marks was designed to serve a significant public or private interest.⁹ This is a question that the Minister should address.

There is then a question as to whether proposed subsection 119(1) is a proportionate restriction of freedom of expression.

Subsection 119(2) – the qualified ban on affixing etc on public property

In relation to proposed subsection 119(2), the limitation of freedom of expression cannot be set against the protection of any personal interest of another person. It can however be accepted that the public has an interest in the protection of public property.

The prohibition stated in proposed subsection 119(2) is not absolute, for it applies only where the relevant act is committed “unlawfully”. It might be argued however that this limitation is disproportionate because it is so vague as to provide no guidance to a person who wishes to know what he or she might do without breaching the law.¹⁰ The Committee has often pointed out that vagueness in the expression of criminal offences is itself a basis for an HRA based objection to the law. That is, the vagueness of the concept of “unlawfully” may mean that this qualification on the limitation is not compatible with one or both of HRA subsections 18(2) or 25(1).¹¹

If the “unlawfully” qualification is set aside, proposed subsection 119(2) is analogous to the law found to be inconsistent with freedom of expression by the Supreme Court of Canada in the *Ramsden* case. The Court held that there were less restrictive alternatives than a complete ban on the form of expression in issue in that case. (This form was the fixing of posters, signs, advertisements and the like to public property.) The Court adopted a view stated by some Justices of the Supreme Court of the USA. Adapted to the ACT situation, these Justices said:

[The Legislative Assembly] might actively create a particular type of environment; it might be especially vigilant in keeping the area clean; it might regulate the size and location of permanent signs; or it might reserve particular locations, such as kiosks, for the posting of temporary signs. Similarly, [the Assembly] might be able to attack its visual clutter problem in more areas of [its jurisdiction] by reducing the stringency of the ban, perhaps by regulating the density of temporary signs, and coupling that approach with additional measures designed to reduce other forms of visual clutter.¹²

Of course, it is a matter of debate as to whether this kind of analysis, which was made in respect of a municipal or local government law, applies, and if so, how far, to a statute made by the Legislative Assembly. What it does suggest is that it is by no means clear that proposed subsection 119(2) would pass muster as a proportionate restriction of freedom of expression.

⁹ The Committee notes that by subsection 41 of the Criminal Code 2002 “[a] person is not criminally responsible for an offence if the person carries out the conduct required for the offence in response to circumstances of sudden or extraordinary emergency”. This defence might not however cover all examples where the affixing etc of marks was in the public interest.

¹⁰ That there might be a body of ‘common law’ to provide guidance is not of much assistance to the layperson seeking guidance.

¹¹ See *Scrutiny Report No 49 of the Sixth Assembly*, concerning the Road Transport (Third Party Insurance) Bill 2007, and *Scrutiny Report No 45 of the Sixth Assembly*, concerning the Crimes (Street Offences) Amendment Bill 2007.

¹² See *Ramsden* at page 14.

It is appropriate that the Minister address the issue of the proportionality of these restrictions on freedom of expression.

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

Strict liability offences

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

The strict liability offences proposed would be those in subsections 120(1) and (2) (defacing private premises or public property – maximum penalty 10 penalty points); section 393A (urinating in a public place – maximum penalty 10 penalty points); and subsection 394(2) (failure to comply with a noise abatement direction – maximum penalty 10 penalty points).

The Explanatory Statement does not refer to the HRA issues raised by the provision for a strict liability offence, but it does provide justification for the imposition of strict liability. In relation to subsections 120(1) and (2), it states:

Section 120 creates a new offence of ‘Defacing Premises — strict liability’. The new offence is a subset of the existing offence of ‘Defacing premises’ in section 119. The offence is limited to the marking with chalk, paint or any other material on private premises or public property. The new offence is aimed at less serious incidents deemed by police officers to warrant the prosecution of the summary offence. The new offence is cast in straightforward and objective criteria so that a police officer can make a reliable assessment of whether the offending behaviour has occurred. As the offence is only concerned with the conduct described, and not any degree of moral blameworthiness, consequently subsection (3) provides that the offence is a strict liability offence.

The Committee finds this confusing. It is true that under subsections 120(1) and (2), the prosecution would need to prove only that the defendant had committed the physical elements of the offence, and need not prove that the defendant intended to commit those acts. In this sense, it is correct to say that “the offence is only concerned with the conduct described, and not any degree of moral blameworthiness”. This follows from the provision in subsection 120(3) that the offences in subsections 120(1) and (2) are ones of strict liability.

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

The penalties attaching to breach of these proposed offences is no more than 10 penalty points, and thus well within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

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

PLANNING AND DEVELOPMENT LEGISLATION AMENDMENT BILL 2008

This Bill would amend the *Planning and Development Act 2007*, in particular in relation to the topics of the powers of inspectors and authorised persons; affordable housing strategies; variations to territory plan without public consultation; and alternative public consultation methods for specified merit track development applications.

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

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

Entry and search powers

The Bill would confer on officials a number of entry and search powers. The Committee considers that these provisions do not give rise to an issue of HRA compatibility. The Committee refers the Assembly to the discussion in the Explanatory Statement.

Strict liability offences

If enacted, the Bill would create a strict liability offence by insertion of a new section 392B and there thus arises under the *Human Rights Act 2004* (HRA) an issue as to whether the provision is in terms of HRA section 28 a justifiable derogation of the right to liberty and security (HRA subsection 18(1)) and/or presumption of innocence (HRA subsection 22(1)).

By proposed subsection 392B(1) (see clause 42), an inspector who enters premises under a search warrant or monitoring warrant may require the occupier, or anyone at the premises, to give the inspector reasonable help to exercise a power under this chapter. By subsection 392B(2), a person commits an offence if they fail to take all reasonable steps to comply with such a requirement, and by subsection 392B(3), this is a strict liability offence.

The Explanatory Statement makes no mention of the HRA issues raised by the provision for a strict liability offence, nor does it provide any justification for the imposition of strict liability. The Committee reiterates its call for an Explanatory Statement to address the rights issues thrown up by the provision of a strict liability offence.

On the face of it, it is not easy to see how this offence might be classified as “regulatory” inasmuch as the persons affected are not in any industry of profession that would make them aware of their obligations under subsection 392B(1). Nor would the imposition of strict liability offences operate as an encouragement to such persons to be aware. On the other hand, the prosecution would need to prove beyond reasonable doubt that the person had failed to take all reasonable steps to comply with a relevant requirement.

What needs to be justified is why the prosecution need not be concerned to establish that a defendant did not intend to fail to take all reasonable steps to comply with a requirement of an inspector. This is the question that the explanatory statement should have addressed.

The penalty attaching to breach of the provisions is no more than 50 penalty points. This is within the range accepted by the Committee as a generally appropriate penalty for breach of a strict liability offence.

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

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

Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?

Discretionary powers

Should the exercise of discretions, or the making of judgements involving the exercise of choice, be qualified by an obligation to exercise the discretion, or to make the judgement, on “reasonable grounds”?

As a matter of controlling administrative (or judicial) discretion, the Committee considers that where possible, its scope should be limited by means of the law spelling out the considerations relevant to the exercise of the power, or, at least by the insertion of a limit in terms that the repository of the power should have “reasonable grounds” for the exercise of the power.

In this Bill, many of the discretionary powers, or statutory judgements that will permit an area of choice, are conditioned on their being exercised or made on “reasonable grounds”. Some, however, are not – see proposed section 239 (clause 21), which confers on the planning and land authority what appears to be a significant open-ended discretion (“may restrict”) to restrict the people eligible for the grant of a lease under section 238; and proposed subsection 272D(2) (clause 31), which confers on the planning and land authority an open-ended discretion (“may decide”) to decide to vary a lease to reduce the rent payable to nominal rent under section 272B despite the ending of the time for deciding the application.

The Committee finds it odd that while proposed subsection 272D(2) is in this form, a similar power to extend time vested in the authority is cast in the form of it being required to have reasonable grounds to extend – see clause 33, and proposed subsection 298B(3).

The Committee suggests that if section 239 is to be retained in its present form, the Minister might be empowered to issue policy guidelines, as has been done in relation to another power vested in the authority - see clause 31, and proposed section 272C.

The Committee offers three comments on the common practice of qualifying only some powers by a requirement that they be exercised on reasonable grounds.

First, it is usually not evident why this difference of treatment is found in a Bill.

Second, the different treatment may lead a court to find that a power not conditioned by an obligation that it be exercised on “reasonable grounds” need not be so exercised.

Third, a power that is not conditioned by an obligation that it be exercised on “reasonable grounds” may not be HRA compatible.

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

Error in the Bill?

There appear to be some words omitted from proposed paragraph 391B(1)(c).

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2007-292 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2007 (No. 1) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2007-293 being the Independent Competition and Regulatory Commission (Regulated Water and Sewerage Services) Terms of Reference Amendment Determination 2007 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* amends DI2007-65 to extend the deadline for completion of the inquiry into water and waste water prices.

Disallowable Instrument DI2007-294 being the Victims of Crime (Coordinator Appointment) 2007 (No. 1) made under section 15 of the *Victims of Crime Act 1994* appoints a specified person as the Victims of Crime Coordinator.

Disallowable Instrument DI2007-295 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 6) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers competing in the timed special (competitive) stages of the Rally des Femmes (Brindabella Motor Sport Club).

Disallowable Instrument DI2007-296 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2007 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares a specified organisation to be a Parking Authority within the area of Block 19, Section 162 (Easty Street carpark) in the suburb of Phillip.

Disallowable Instrument DI2007-299 being the Health Professionals (Fees) Determination 2007 (No. 11) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-16 and determines fees payable for the purposes of the Act in relation to the optometrist profession.

Disallowable Instrument DI2007-300 being the Health Professionals (Fees) Determination 2007 (No. 12) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-20 and determines fees payable for the purposes of the Act in relation to the veterinary surgeon profession.

Disallowable Instrument DI2007-301 being the Health Professionals (Fees) Determination 2007 (No. 13) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-13 and determines fees payable for the purposes of the Act in relation to the dental profession.

Disallowable Instrument DI2007-302 being the Health Professionals (Fees) Determination 2007 (No. 14) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-15 and determines fees payable for the purposes of the Act in relation to the dental profession.

Disallowable Instrument DI2007-303 being the Health Professionals (Fees) Determination 2007 (No. 15) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-12 and determines fees payable for the purposes of the Act in relation to the pharmacist profession.

Disallowable Instrument DI2007-304 being the Health Professionals (Fees) Determination 2007 (No. 16) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-14 and determines fees payable for the purposes of the Act in relation to the chiropractor and osteopath professions.

Disallowable Instrument DI2007-305 being the Health Professionals (Fees) Determination 2007 (No. 17) made under section 132 of the *Health Professionals Act 2004* revokes DI2006-32 and DI2007-41 and determines fees payable for the purposes of the Act in relation to the nursing and midwifery professions.

Disallowable Instrument DI2007-306 being the Health Professionals (Fees) Determination 2007 (No. 18) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-17 and determines fees payable for the purposes of the Act in relation to the physiotherapist profession.

Disallowable Instrument DI2007-307 being the Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services Act 2001)* revokes DI2006-106 and determines the maximum fares payable on regular route services provided by ACTION.

Disallowable Instrument DI2007-308 being the Public Place Names (Macgregor) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of new roads in the Division of Macgregor.

Disallowable Instrument DI2008-1 being the Legal Profession (Disciplinary Tribunal) Appointment 2008 (No. 1) made under subsection 566(1) of the *Legal Profession Act 2006* appoints specified persons as chair and deputy chair of the Legal Practitioners Disciplinary Tribunal.

Disallowable Instrument DI2008-2 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares a specified organisation to be a Parking Authority within the area of Block 3, Section 34 in the suburb of Dickson.

Disallowable Instrument DI2008-3 being the Health Professionals (Fees) Determination 2008 (No. 1) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-18 and determines fees payable for the purposes of the Act in relation to the podiatrist profession.

Disallowable Instrument DI2008-4 being the Health Professionals (Pharmacy Board) Appointment 2008 (No. 1) made under the *Health Professionals Act 2004* and section 10 of the *Health Professionals Regulation 2004* appoints a specified person as a member of the ACT Pharmacy Board.

Disallowable Instrument DI2008-5 being the Public Place Names (Franklin) Determination 2008 (No. 1) made under section 3 of the *Public Places Names Act 1989* determines the names of new roads in the Division of Franklin.

Disallowable Instrument DI2008-6 being the Victims of Crime (Victims Assistance Board) Appointment 2008 (No. 1) made under paragraph 8(1)(e) of the *Victims of Crime Regulation 2000* appoints a specified person as the Health Professions member of the Victims Assistance Board of the Australian Capital Territory.

Disallowable Instrument DI2008-7 being the Civil Law (Wrongs) Approved Institute of Chartered Accountants in Australia (ACT) Scheme 2008 (No. 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* approves the Institute of Chartered Accountants in Australia (ACT) Scheme.

Disallowable Instrument DI2008-8 being the **Civil Law (Wrongs) Approved CPA Australia Ltd (ACT) Scheme 2008 (No. 1)** made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* approves the CPA Australia Ltd (Australian Capital Territory) Scheme.

Disallowable Instrument DI2008-9 being the **Road Transport (General) (Application of Road Transport Legislation) Declaration 2008 (No. 1)** made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers competing in the timed special (competitive) stages of the 2008 Blue Range Rally (Light Car Club of Canberra).

Disallowable Instrument DI2008-10 being the **Utility (Electricity Retail) Licence Conditions Direction 2008 (No. 1)** made under the *Utilities Act 2000* provides for the mandatory availability and first offering to new customers of an accredited green electricity product.

Disallowable Instrument DI2008-11 being the **Health Professionals (ACT Nursing and Midwifery Board) Appointment 2008 (No. 1)** made under section 5, clause 3.9 of Schedule 3 and clause 4.7 of Schedule 4 of the *Health Professionals Regulation 2004* appoints a specified person as president of the ACT Nursing and Midwifery Board.

Disallowable Instruments—Comment

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

No explanatory statement

Disallowable Instrument DI2007-297 being the **Gene Technology Advisory Council Appointment 2007 (No. 1)** made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints specified persons as members of the ACT Gene Technology Advisory Council.

This instrument makes appointments to the ACT Gene Technology Advisory Council, under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004*. That section contains detailed requirements in relation to the appointment of the Council and provides (in part):

11 Advisory council

- (1) The ACT Advisory Council on Gene Technology is established.
- (2) The advisory council consists of 8 members appointed by the Minister.

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

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

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

- (3) The Minister must try to ensure that the following people are appointed as members:
 - (a) a person nominated by the chief executive who is to be the chairperson of the advisory council;
 - (b) a person nominated by the Commonwealth Scientific and Industrial Research Organisation;

- (c) a person nominated by a university based in the ACT who has professional skills or experience in research in a field relevant to gene technology;
 - (d) a person nominated by the ACT Rural Lessees' Association;
 - (e) a person nominated by the ACT Sustainable Lands Group;
 - (f) a person nominated by the Canberra Region Branch Biotechnology Group of AusBiotech;
 - (g) a person who has professional skills or experience in the marketing of food crops;
 - (h) a person to represent the community generally.
- (4) If an entity mentioned in subsection (3) (d) to (f) ceases to exist or does not nominate a member for appointment to the advisory council, the Minister must appoint a person nominated by another entity the Minister considers has similar objectives to the entity.

The Committee notes that there is no Explanatory Statement for this instrument. As a result, there is no statement indicating to the Legislative Assembly that the various requirements governing the appointment of members of the Council have been met. More importantly, however, there is nothing that addresses the issue of whether, in fact, this appointment needs to be made by disallowable instrument. The particular issue that the Committee usually prefers to see addressed in appointment instruments is whether or not the appointee is a public servant because, under section 227 of the *Legislation Act 2001*, this determines whether or not the relevant Legislative Assembly Committee must be consulted in relation to the appointment.

The Committee draws the Legislative Assembly's attention to this instrument, as it may be considered to be contrary to principle (a) (i) of the Committee's terms of reference, in that it may not be in accord with the general objects of the Act under which it is made.

Possible incorrect legislation reference

Disallowable Instrument DI2007-298 being the Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007 made under section 204 of the *Land (Planning and Environment) Act 1991* approves the Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region.

This instrument states that it is made under section 204 of the *Land (Planning and Environment) Act 1991*. That section provides:

204 Minister's powers

- (1) On receipt of a draft plan of management submitted under section 202 or section 205 for approval, the Minister must consider any recommendation relating to the draft by a committee of the Legislative Assembly that considers the draft under section 203 and—
 - (a) in writing, approve a plan of management in the form in which the draft is submitted; or
 - (b) refer the draft to the conservator together with any of the following written directions:
 - (i) to conduct further specified consultation;
 - (ii) to consider any revision suggested by the Minister;
 - (iii) to revise the draft in a specified way;

- (iv) to defer, in writing, until a specified date or the happening of a specified event, the resubmission of the draft to the Minister;
 - (v) to withdraw the draft in writing.
- (2) The following are notifiable instruments:
- (a) a deferral directed under subsection (1) (b) (iv);
 - (b) a withdrawal directed under subsection (1) (b) (v).

Note A notifiable instrument must be notified under the Legislation Act.

The Committee notes that nothing in section 204 indicates why this is a disallowable instrument. The Committee also notes, however, that section 207 of the Land (Planning and Environment) Act provides:

207 Notification, presentation, disallowance and date of effect

- (1) A plan of management, as approved by the Minister under section 204, is a disallowable instrument.

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

- (2) The Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a plan of management as if each reference in that chapter to 6 sitting days were a reference to 5 sitting days.
- (3) Subject to any disallowance under the Legislation Act, chapter 7, the plan of management commences—
- (a) on the day after the 5th sitting day after the day it is presented to the Legislative Assembly under that chapter; or
 - (b) if the plan provides for a later date or time of commencement—on that date or at that time.

Subsection 207 (1) of the Land (Planning and Environment) Act makes this a disallowable instrument and, as a result, brings it within the Committee's jurisdiction. This being the case, the Committee considers that it may have been appropriate for the instrument to refer to section 207 of Land (Planning and Environment) Act. The Committee notes, however, that the Explanatory Statement accompanying the instrument *does* make reference to section 207.

Retrospectivity / Minor typographical errors / Inadequate Explanatory Statement

Disallowable Instrument DI2007-307 being the Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1) made under section 23 of the Road Transport (Public Passenger Services Act 2001 revokes DI2006-106 and determines the maximum fares payable on regular route services provided by ACTION.

This instrument determines maximum fares payable on regular route services provided by ACTION. It appears from the Explanatory Statement that the instrument adds to the category of persons who are exempt from the requirement to pay fares and also to the category of persons who are entitled to concessional fares. It also appears that no maximum fares are increased by the instrument.

The instrument revokes DI2006-106. The Explanatory Statement states:

The instrument is also updated to comply with the *Legislation Act 2001* requirement that determinations must stipulate to whom, and by whom, fees must be paid.

This requirement referred to is set out in subsection 56 (5) of the Legislation Act, which provides (in part) that a fees determination:

- (a) must provide by whom the fee is payable; and
- (b) must provide to whom the fee is to be paid; and
- (c) may make provision about the circumstances in which the fee is payable; and
- (d) may make provision about exempting a person from payment of the fee; and
- (e) may make provision about when the fee is payable and how it is to be paid (for example, as a lump sum or by instalments); and
- (f) may mention the service for which the fee is payable; and
- (g) may make provision about waiving, postponing or refunding the fee (completely or partly); and
- (h) may make provision about anything else relating to the fee.

The Committee assumes that the 2 compulsory requirements of subsection 56 (5) (ie those set out in paragraphs (a) and (b)) are met by section 5 of the instrument, which provides:

5 Payment of Fee

A fee to which this determination applies is payable by a customer for use of ACTION bus services and is payable to ACTION or an authorised agent of ACTION.

The Committee has compared this provision to the equivalent in DI2006-106 (which it revokes and replaces), assuming that the new provision corrects an error in the earlier provision. This assumption proved to be incorrect. The provisions are identical. That being so, the Committee is perplexed as to what it is that this instrument does to update the instrument in light of the requirements of the Legislation Act. The Committee would appreciate the Minister's advice as to what updating has been necessary.

The Committee notes that the instrument is expressed to operate retrospectively. While it is dated 10 December 2007, section 6 of the instrument provides that it commences on 29 October 2007. The Committee also notes, however, that both section 4 of the instrument and the Explanatory Statement state that “[n]o persons’ rights have been prejudicially affected, nor any liabilities imposed on any person”. This addresses the issues that arise as a result of section 76 of the Legislation Act. While the Committee is satisfied that there is no problem in relation to section 76, the Committee considers that it would assist the Committee (and the Legislative Assembly) if the Explanatory Statement contained some indication of why the retrospective operation was required. The Committee seeks the Minister's advice as to the reason for this instrument having retrospective operation and, in particular, seeks the Minister's advice as to whether the retrospective operation is in any way connected to the updating in relation to the requirements of the Legislation Act that is referred to in the Explanatory Statement.

The Committee notes that the new instrument contains some minor typographical errors. First, the header to Schedule 1 of the instrument indicates that it is Schedule 1 of the determination made on the “twenty-**nineth** day of October 2007”. Second, the proposition that it is “made” on 29 October 2007 is not strictly correct. As already noted, the instrument is dated 10 December 2007. It is expressed to *commence* on 29 October 2007. Finally, the Committee notes that paragraph “(iii)” appears twice in the part of Schedule 1 that deals with “Exempt Persons”.

Subordinate Laws—No comment

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

Subordinate Law SL2007-37 being the Court Procedures Amendment Rules 2007 (No. 2) made under section 7 of the *Court Procedures Act 2004* introduces new rules to provide for new definitions of "usual undertaking as to damages" and "usual order as to interest in relation to interest" after judgement.

Subordinate Law SL2007-38 being the Dangerous Substances (General) Amendment Regulation 2007 (No. 2) made under section 216 of the *Dangerous Substances Act 2004* gives effect to agreed national uniform provisions in relation to dangerous substances and implements elements of the National Model Regulations for the Control of Workplace Hazardous Substances [NOHSC:1005(1994)].

Subordinate Law SL2007-39 being the Environment Protection Amendment Regulation 2007 (No. 3) made under the *Environment Protection Act 1997* defines regulated waste.

Subordinate Law SL2007-40 being the Victims of Crime Amendment Regulation 2007 (No. 1) made under the *Victims of Crime Act 1994* amends the *Victims of Crime Regulation 2000* to include specified offences as prescribed offences.

Subordinate Law SL2007-41 being the Road Transport (Offences) Amendment Regulation 2007 (No. 1) made under section 233 of the *Road Transport (General) Act 1999* increases the infringement penalty amount for road transport law offences for which an infringement penalty amount is applicable.

Subordinate Law SL2007-43 being the Health Professionals Amendment Regulation 2007 (No. 4) made under section 134 of the *Health Professionals Act 2004* provides for the establishment of the registration requirements of medical radiation scientists.

Subordinate Laws—Comment

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

Strict liability offences

Subordinate Law SL2007-36 being the Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement made under section 229 of the *Occupational Health and Safety Act 1989* provides for risk control, training for health and safety representatives, reporting of and record keeping in relation to dangerous occurrences at the workplace and for particular duties and safety measures relating to the management at workplaces.

The Committee notes that this subordinate law contains numerous strict liability offences. Offences against the following sections are identified as being strict liability offences:

Sections 21 (failure to provide drinking water for employees), 27 (failure to provide safe and quick exit from premises in case of emergency), 28 (failure to identify places where personal protective and safety equipment must be used), 31 (offences in relation to provision of "air supplied respiratory equipment"), 36 (offence in relation to loads placed on "working platforms"), 50 (offences in relation to electrical installations in a workplace), 59 (allowing person to enter workplace without "suitable personal protective and safety equipment including air supplied respiratory protective equipment"), 60 (offence in relation to the completion of work in a confined space), 62 (offence relating to the appointment of inadequately trained "standby person"), 65 (failure to make written record of training

provided in relation to working in confined spaces), 66 (failure to provide inspector with access to records), 70 (failure to provide information in relation to unsafe noise levels), 71 (failure to take action in relation to unsafe noise levels), 73 (failure to provide safety measures in relation to isolated employees), 75 (failure to install fire extinguishers), 79 (failure to pay fees and reimburse reasonable expenses for training of health and safety representatives), 85 (offences in relation to the protection of the site of an “occurrence” or “event”), 86 (failure to keep records in relation to “occurrences” and events”), 87 (failure to keep proper records) and 89 (failure to keep proper records).

The Committee notes that, in each case, the maximum penalty for the relevant offence is 10 penalty units. The Committee also notes that section 133 of the *Legislation Act 2001* provides that the value of a penalty unit is \$100 for individuals and \$500 for corporations.

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

In particular, the Committee noted that, in its *Scrutiny Report No 38* of the *Fifth Assembly*, it had proposed that where a provision of a bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

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

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

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

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

The Committee notes that the Explanatory Statement accompanying this subordinate law contains the following statement:

Offences

Strict liability offences are usually employed in cases where it is necessary to ensure the integrity of a regulatory scheme, particularly those relating to public health and safety, the environment, and the protection of the revenue. Such offences are primarily aimed at the less serious side of the criminal spectrum with penalties generally at the lower end of the scale.

The Regulation requires compliance with provisions that are intended to ensure the safety of workplaces and health and safety of employees. Accordingly, the Government considers strict liability appropriate, particularly given the low level of penalty attached to them, for certain offences in the Regulation.

Offences that are infringement notice offences are provided for. As a consequence the *Magistrates Court (Occupational Health and Safety Infringement Notices) Regulation 2004* is to be amended by the *Magistrates Court (Occupational Health and Safety Infringement Notices) Amendment Regulation 2007*.

The Committee notes that this statement addresses the first of the issues that the Committee requires to be addressed in relation to strict liability offences but not the second. It does not indicate whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

The only information in this regard is set out in section 5 of the subordinate law, which provides:

5 Offences against regulation—application of Criminal Code etc

Other legislation applies in relation to offences against this regulation.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this regulation (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

The Committee notes that, while this provision directs those who are affected by the subordinate law to the relevant part of the Criminal Code, there is no explanation of the nature that the Committee prefers to see. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a) (ii) of the Committee's terms of reference.

In making this statement, the Committee notes that this subordinate law contains a regulatory impact statement, prepared under section 35 of the *Legislation Act 2001*. Appendix 3 of the regulatory impact statement refers to the Committee's role in scrutinising legislation and to the principles against which the Committee scrutinises legislation. The Committee notes that Appendix 3 contains the following assertion:

- (ii) the Regulation does not trespass on rights previously established by law.

The Committee seeks the Minister's advice as to the basis on which this statement is made.

Strict liability offence

Subordinate Law SL2007-42 being the Public Health Amendment Regulation 2007 (No. 1) made under the Public Health Act 1997 removes the size and distance requirements in relation to the keeping of poultry.

The Committee notes that this subordinate law provides for a strict liability offence. New subsection 66 (5) makes the failure to comply with a direction in relation to the keeping of birds in an insanitary condition a strict liability offence. As the Committee has noted above, in relation to Subordinate Law SL2007-36, the Committee considers that the Explanatory Statement that accompanies legislation that contains a strict liability offence should address the issues of:

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

The Committee notes that the Explanatory Statement for this subordinate law contains the following statement:

Failure to comply with the written direction is a strict liability offence. Strict liability is appropriate as it is a regulatory offence and the person given the direction is aware of the direction. The person will be advised that failure to comply with the direction is an offence.

The Committee notes that this statement addresses the first of the Committee's issues in relation to strict liability offences (albeit only briefly). It does not, however, address the second issue, in relation to the defences that are nevertheless available. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a) (ii) of the Committee's terms of reference.

REGULATORY IMPACT STATEMENT

The Committee has examined the following regulatory impact statement and makes the following comments on it:

Subordinate Law SL2007-36 being the Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement made under section 229 of the Occupational Health and Safety Act 1989 provides for risk control, training for health and safety representatives, reporting of and record keeping in relation to dangerous occurrences at the workplace and for particular duties and safety measures relating to the management at workplaces.

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

35 Content of regulatory impact statements

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

.....

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

As the Committee has already noted, Appendix 3 of the regulatory statement contains an assessment of the consistency of the subordinate law in relation to the Committee's terms of reference. That assessment includes the following assertion:

- (ii) the Regulation does not trespass on rights previously established by law.

The Committee has already noted that the subordinate law contains numerous strict liability offences. By definition, the creation of a strict liability offence takes away rights previously established by law, in the sense that they eliminate the need to prove fault on the part of a person charged with an offence. The requirement to prove the fault element is regarded as one of the most fundamental protections of the criminal law. Division 2.2.3 of the *Criminal Code 2002* deals with fault elements of offences. Subsection 17 (1) of the Criminal Code provides that fault elements may be “intention, knowledge, recklessness or negligence”.

In the light of the above, the Committee is perplexed by the assertion, in the regulatory impact statement for this subordinate law, that it does not trespass on rights previously established by law. As indicated above, the Committee would appreciate the Minister’s advice as to the basis on which this assertion is made.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 11 February 2008, in relation to comments made in Scrutiny Report 50 concerning the Human Rights Amendment Bill 2007.
- The Attorney-General, dated 12 February 2008, in relation to comments made in Scrutiny Report 50 concerning the Justice and Community Safety Legislation Amendment Bill 2007 (No. 2).
- The Minister for Children and Young People, dated 12 February 2008, in relation to comments made in Scrutiny Report 49, concerning Disallowable Instruments:
 - DI2007-258, being the Children and Young People (Places of Detention) Admission and Classification Standing Order 2007 (No. 2);
 - DI2007-259, being the Children and Young People (Places of Detention) Search Standing Order 2007 (No. 1);
 - DI2007-260, being the Children and Young People (Places of Detention) Provision of Information, Review of Decisions and Complaints Standing Order 2007 (No. 2);
 - DI2007-262, being the Children and Young People (Places of Detention) Visits, Phone Calls and Correspondence Standing Order 2007 (No. 2); and
 - DI2007-263, being the Children and Young People (Places of Detention) Safety and Security Standing Order 2007 (No. 2).
- The Minister for Planning, dated 14 February 2008, in relation to comments made in Scrutiny Report 49 concerning Disallowable Instruments:
 - DI2007-265, being the Land (Planning and Environment) Criteria for Direct Grant of a Lease to Dytin Pty Ltd Determination 2007; and
 - DI2007-288, being the Land (Planning and Environment) Criteria for Direct Grant of a Lease (Single Residence Leases) Determination 2007 (No. 1).
- The Minister for the Environment, Water and Climate Change, dated 27 February 2008, in relation to comments made in Scrutiny Report 47 concerning Disallowable Instrument DI2007-227, being the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No. 3)

The Committee wishes to thank the Attorney-General, the Minister for Children and Young People, the Minister for Planning and the Minister for the Environment, Water and Climate Change for their helpful responses.

Further Comment on the Attorney-General's Response to the Committee Report on the Justice And Community Safety Legislation Amendment Bill 2007 (No 2) (The JACS Bill)

The Committee adds two comments on issues of general significance that arise from the Attorney-General's response to the Committee report on the Justice and Community Safety Legislation Amendment Bill 2007 (No 2).

The first is to reiterate the Committee's view that it must exercise its function to the full extent even if a provision of a Bill merely restates the existing law. In its report, the Committee noted that if clause 1.23 of Schedule 1 of the Bill were enacted, its effect would be to create a strict liability offence. The Committee noted that by clause 1.23, the existing section 10 would be repealed, and a new section 10 substituted. As a matter of law, it seems clear to the Committee that the effect of this repeal and substitution is the creation of a strict liability offence, albeit that this occurs at the same time as the old section 10 ceases to have any legal effect.

The Attorney-General takes the view that the Committee's approach is not correct, apparently on the basis that the new section 10 would in substance be the same as the existing section 10.

The Committee appreciates the point being made, and there have been instances where its review of an existing provision is limited to the extent of an amendment of that provision. In these cases however, the amendment did not involve the repeal and replacement of the existing provision, but rather an amendment of only particular parts of the provision. But where the former is the case, the Committee thinks the better view is that it should review the whole of the new provision. In terms of the Committee's work, and of course the work of those who prepare Explanatory Statements, this may give a more expansive view as to the effect of the HRA than the Attorney-General's view. Given however that the HRA is beneficial legislation, the Committee sees advantage in taking this view. This view is one that accords significance to the desirability of pre-enactment human rights discourse. It is always of course for the legislative Assembly to take notice or not of the Committee's report.

The need to accord significance to the desirability of pre-enactment human rights discourse underlies the Committee's second general point. The Attorney-General agreed with the Committee that the Explanatory Statement to the JACS Bill did not canvass the human rights issues involved in the proposed amendments to the *Juries Act 1967*. The Attorney-General assured the Committee that human rights issues were addressed by officers within the department, and agreed that including this information in an Explanatory Statement would provide "additional assurance" that rights issues were addressed.

The Committee respectfully agrees, and wishes to add only that inclusion of this material in an Explanatory Statement is critical to promoting pre-enactment human rights discourse. This is a matter of interest to the Committee, but of at least equal interest to other members of the Assembly and to the general public. The Human Rights Act is promoted as embodying a dialogue model.

Bill Stefaniak, MLA
Chair

March 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)
Members' Hiring Arrangements Approval 2004 (No 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-
holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)
Determination 2004 (No 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)
Approval 2004 (No 1)
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (**PMB**)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination
2005 (No 1)
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination
2005 (No 1)
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination
2005 (No 1)
Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval
2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 (**PMB**)

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
 Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
 Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
 Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
 Hotel School (Repeal) Bill 2005
 Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 (PMB)

Report 19, dated 21 November 2005

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 (PMB)
 Terrorism (Preventative Detention) Bill 2006 (PMB)

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)

Education (School Closures Moratorium) Amendment Bill 2006 (PMB)

Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006

Crimes Amendment Bill 2006 (PMB)

Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007

Civil Partnerships Bill 2006

Report 38, dated 26 February 2007

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)

Report 43, dated 13 August 2007

Disallowable Instrument DI2007-105 - Public Place Names (Forde) Determination 2007 (No. 1)

Disallowable Instrument DI2007-107 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1)

Subordinate Law SL2007-10 - Legal Profession Amendment Regulation 2007 (No. 2)

Subordinate Law SL2007-11 - Powers of Attorney Regulation 2007 (No. 2)

Report 44, dated 27 August 2007

Disallowable Instrument DI2007-175 - Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-176 - Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-177 - Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-178 - Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-179 - Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1)

Subordinate Law SL2007-12 - Powers of Attorney Amendment Regulation 2007 (No. 1)

Report 45, dated 24 September 2007

Crimes (Street Offences) Amendment Bill 2007 (PMB)

Legal Profession Amendment Bill 2007

Bills/Subordinate Legislation

Subordinate Law SL2007-20 - Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1)

Report 47, dated 12 November 2007

Disallowable Instrument DI2007-228 - Pest Plants and Animals (Pest Plants) Declaration 2007 (No. 1)

Report 48, dated 19 November 2007

Disallowable Instrument DI2007-229 - Residential Tenancies Tribunal Appointment 2007 (No. 1)

Disallowable Instrument DI2007-230 - Residential Tenancies Tribunal Appointment 2007 (No. 2)

Disallowable Instrument DI2007-231 - Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 3)

Subordinate Law SL2007-33 - Poisons Amendment Regulation 2007 (No. 1)

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)

Sentencing Legislation Amendment Bill 2007 (PMB)

Subordinate Law SL2007-34 - Crimes (Sentence Administration) Amendment Regulation 2007 (No. 2)

Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)

Disallowable Instrument DI2007-271 - Occupational Health and Safety Council (Deputy Chair) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-276 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 1)

Disallowable Instrument DI2007-277 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-278 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-279 - Occupational Health and Safety Council (Acting Employee Representative) Appointment 2007 (No. 4)

Disallowable Instrument DI2007-283 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 2)

Disallowable Instrument DI2007-284 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 3)

Disallowable Instrument DI2007-285 - Occupational Health and Safety Council (Acting Employer Representative) Appointment 2007 (No. 4)

Gene Technology Amendment Bill 2007

Government Transparency Legislation Amendment Bill 2007 [No. 2] (PMB)

Human Cloning and Embryo Research Amendment Bill 2007

Long Service Leave (Private Sector) Bill 2007 (PMB)

Medicines, Poisons and Therapeutic Goods Bill 2007



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for the Australian Capital Territory
London Circuit
Canberra ACT 2601


Dear Mr Seselja

I refer to the Scrutiny of Bills Committee Report No. 50 – 4 February 2008 where the Committee provided comments on the Human Rights Amendment Bill 2007. I offer the following responses to the committee's comments.

The amendment to section 28 to set out an inclusive list of factors to be considered in determining whether a limit on a right is reasonable

The purpose of the amendment is to clarify the operation of the proportionality test, which is a well-established principle in international human rights law.

I do not believe that this amendment will exclude important nuances and changes in case law. The reasonable limits provision in section 28 must be read in conjunction with section 31, which provides that 'international law and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right'. The purpose of section 31 is to promote a consistent interpretation of universal standards that derive from the ICCPR. This is also consistent with the principle that expressions used in international agreements should be interpreted in a manner consistent with decisions of relevant international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427).

In line with this principle the inclusive list of factors proposed in the Bill for determining whether a limit on a right is reasonable is drawn directly from international case law and the case law of comparable human rights jurisdictions. I consider this is consistent with the views expressed in my response to the committee's report in relation to the Corrections Management Bill 2006.

Legal proceedings in relation to the actions of public authorities

I note with appreciation the committee's comments in relation to the clarifying nature of these provisions. The purpose of these provisions is to make the right of action under the

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HRA clearer and easier to use, consistent with the building of a human rights culture in the ACT.

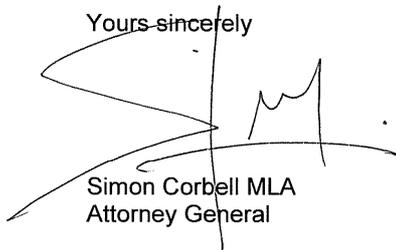
I note the committee's comment that there are quite divergent views on the issue of whether the Supreme Court should or should not be permitted to award damages for a breach of the duty to comply with human rights. I believe that it is not appropriate, given this divergence of views, for the Court to be permitted to award damages for a breach of the duty to comply with human rights. The amendments do not, however, affect any existing right to damages.

Comment on the explanatory statement

I thank the Committee for its commendation of the Explanatory Statement for the Human Rights Amendment Bill 2007.

I trust that this information addresses the Committee's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Simon Corbell', written over a horizontal line. The signature is stylized and somewhat cursive.

Simon Corbell MLA
Attorney General

11 FEB 2008



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly Committee Office
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No. 50 of 4 February 2008. I offer the following response in relation to the Justice and Community Safety Legislation Amendment Bill 2007 (No. 2) (the JACS Bill). The JACS Bill is the seventeenth bill in a series of bills dealing with legislation within the Justice and Community Safety portfolio

Strict liability offences

I note the Committee's comments in relation to clause 1.23 of the JACS Bill which proposes to amend section 10 of the *Civil Law (Sale of Residential Property) Act 2003*. The amendment to section 10, however, does not involve the creation of a strict liability offence as is suggested in the Committee's comments. The strict liability offence in section 10 has existed in the *Civil Law (Sale of Residential Property) Act 2003* since it commenced on 1 July 2004. The JACS Bill only proposes to amend section 10 by including a defence which adds to the range of defences that may normally be raised in relation to a strict liability offence.

The justification for the offence in section 10 as one of strict liability has been previously raised by the Committee and addressed by the former Attorney General, Mr Jon Stanhope MLA. To reiterate, the offence in section 10 regulates the behaviour of sellers to protect potential buyers, by ensuring that they are provided with sufficient information about the condition of property before deciding whether to buy the property and negotiate a fair price. The information is of the type that cannot be learnt from the usual physical inspection undertaken by potential buyers. For many people, buying a home is the largest financial investment they will ever make, therefore there is a large public interest in ensuring that the regulatory scheme is observed, and this requires the sanction of criminal penalties. This reasoning provides sufficient justification for the imposition of a strict liability offence in section 10.

As has previously been commented on by the Committee in relation to other strict liability offences, the proposed amendment by the JACS Bill to include an additional defence only further enhances the *Human Rights Act 2004* compatibility of the strict liability offence in section 10.

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Blind or deaf jurors

I note the Committee's comments in relation to clause 1.56 of the JACS Bill which proposes to remove subsection 10(d) of the *Juries Act 1967* (Juries Act). I will address each of the Committee's comments in turn.

- **Addressing human rights' issues**

The Committee commented that the explanatory statement makes no reference to the human rights' issues involved in the removal of subsection 10(d) and, in particular, does not explain the current state of ACT law in relation to discharging a jury member during trial and the consequential effect on a person's right to a fair trial.

I can assure the Committee that the human rights' issues involved in the removal of subsection 10(d) were carefully considered by officers within the Department of Justice and Community Safety. Section 8 addresses the particular concern of the Committee by providing the judge with the power to excuse a juror from further attendance during a trial where because of illness or other sufficient cause the juror should not continue to act as a juror. Provided the number of remaining jurors is not reduced to below ten, the trial will continue and the verdict of the remaining jurors will be sufficient. I am confident that sections 8 and 16 of the Juries Act provide sufficient protection to ensure that the right to a fair trial will not be compromised by the removal of subsection 10(d).

I agree with the Committee that including information about the human rights' issues considered, and the protections existing in the Juries Act, would provide additional assurance that the amendment does not unduly trespass on personal rights and liberties. This extra information will be included in a revised explanatory statement which I will table in the Legislative Assembly when the Bill is debated on 12 February 2008.

- **Consideration of issue of secrecy of jury deliberations**

The Committee commented that the explanatory statement does not indicate whether consideration was given to questions concerning the admission to the jury room of sign-language interpreters. I can assure the Committee that consideration was given to this issue in addition to other practical issues which may arise in ensuring that reasonable adjustments are provided to aid deaf or blind jurors during the trial. It is more appropriate for the rule-making committee to address these procedural issues through the Court Procedures Rules, rather than to address them through amendments to the Juries Act. I have sent a copy of this letter to the rule-making committee for its consideration.

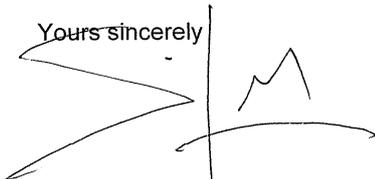
- **The proper use of omnibus legislation**

The Committee's view is that the proposed amendments to the Juries Act are of a substantive nature and therefore should have been put to the Assembly in a standalone bill. With respect, I disagree with this view.

I acknowledge that the proposed amendments are substantive to the extent that the ACT will no longer exclude people from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability, and without any enquiry as to the actual ability of a person to effectively perform as a juror. However, the proposed amendments are minor and will not compromise the right to a fair trial. To pursue such minor amendments through a standalone bill is not efficient and results in ACT legislation which is unresponsive to the changing social needs of the community.

I thank the Committee for its comments and trust that this information addresses the concerns raised by the Committee.

Yours sincerely

A handwritten signature in black ink, consisting of a large, sweeping initial 'S' followed by a series of smaller, connected loops and a final horizontal stroke.

Simon Corbell MLA
Attorney General

12.2.08



Katy Gallagher MLA

DEPUTY CHIEF MINISTER

MINISTER FOR HEALTH

MINISTER FOR CHILDREN AND YOUNG PEOPLE

MINISTER FOR DISABILITY AND COMMUNITY SERVICES

MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

BILL

Mr Zed Seselja, MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA, ACT 2601

12 FEB 2008

Dear Mr Seselja *Zed*

I am writing with regard to the Scrutiny Report No. 49, dated 3 December 2007.

I thank the Committee for its comments in relation to five of the seven Disallowable Instruments made under section 403 of the *Children and Young People Act 1999*, (the Act) and notified on 8 November 2007. These Disallowable Instruments provide Standing Orders (SOs) for a place of detention under the Act.

The Committee had two comments about some of the Disallowable Instruments, and I will deal with each question in turn.

Firstly, the Committee has asked under what power the Disallowable Instruments relating to Admission and Classification (DI2007-258), and Provision of Information, Review of Decisions and Complaints (DI2007-260), have been made. The answer to this question is that both these Disallowable Instruments have been made under section 403 of the Act. My Department has prepared a detailed response in relation to this question, this information is provided at [Attachment 1](#).

The second question the Committee has raised is in relation to five Disallowable Instruments, (DI2007-258, DI2007-259, DI2007-260, DI2007-262 and DI2007-263). The Explanatory Statement for each of these Disallowable Instruments contains a statement, that section 10 (Protection from Torture and Cruel, Inhuman or Degrading Treatment) of the *Human Rights Act 2004* is an absolute right, and not subject to any limitation, and that all the Standing Orders reflect this.

The Committee enquires about the basis on which this statement has been made, in light of section 28 of the *Human Rights Act 2004*, which states:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

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The short answer to the Committee's question regarding this issue, is that the provisions of section 28 of the *Human Rights Act 2004* need to be read in conjunction with Part 4 of that Act. In addition, it has long been established in international human rights law that there are absolutely no circumstances where torture and other cruel, inhuman or degrading treatment or punishment can be justified, so it follows that there can be no limitation of the prohibition against torture that could be considered reasonable and justifiable under section 28. My Department, in consultation with the Department of Justice and Community Safety has prepared a more detailed response to this question, and this information is provided at [Attachment 2](#).

I hope the above satisfactorily responds to the Committee's questions. Thank you for raising these issues.

Yours sincerely



Katy Gallagher MLA
Minister for Children and Young People

Information in relation to the Committee's question, under what power are instruments DI2007-258 and DI2007-260 made?

In relation to the Committee's comments about DI2007-258, it is agreed that the title of this SO, "Admission and Classification" does not bear a one to one relationship with the matters listed in section 403(2) of the Act. However, the matters covered under this SO do fall within the areas covered by section 403(2). A summary of matters covered under each section of this SO in terms of the powers provided at section 403(2) is provided below.

Section 1 - Before Admitting a Child or Young Person - deals with matters relating to:

- safety, management and good order;
- welfare, health and safety; and
- medical care and examinations.

Section 2 - Admission and Induction - deals with matters relating to:

- safety, management and good order;
- welfare, health and safety;
- powers of search;
- personal property; and
- medical care and examinations.

Section 3 – Information Provided to parents or Persons with Parental Responsibility at Reception – deals with matters relating to:

- safety, management and good order;
- welfare, health and safety;
- visits; and
- mail and phone calls.

Section 4 – Involvement of Parents and/or People with parental Responsibility and Aboriginal and Torres Strait Islander Services Unit in Case Management – deals with matters primarily relating to:

- safety, management and good order; and
- welfare, health and safety.

Section 5 – Observation, Placement, Special Management Requirements and Classification – deals with matters primarily relating to:

- safety, management and good order; and
- welfare, health and safety.

Section 6 – Aboriginal and Torres Strait Islander residents – deals with matters relating to:

- safety, management and good order; and
- welfare, health and safety.

Section 7 – Female residents - deals with matters relating to:

- safety, management and good order; and
- welfare, health and safety.

Section 8 – Records and Reporting - deals with matters relating to:

- safety, management and good order;
- any other matters to which the provision relates within the SO.

Section 9 – Provision of Information, Review of Decisions and Complaints – deals with matters relating to:

- safety, management and good order;
- any other matters to which the provision relates within the SO.

The decision to bring together as one Standing Order, instructions relating to the processes and considerations involved in the admission of a young person into a place of detention and the classification of a young person at a place of detention, rather than separate them out into separate Standing Orders was a drafting decision, based on the perceived utility for staff of having this information co-located, and the frequency with which admissions (in particular) and classification occur.

In relation to the Committee's comments about DI2007-260, it is again agreed that the title of this SO, "Provision of Information, Review of Decisions and Complaints" does not bear a one to one relationship with any of the matters listed in section 403(2) of the Act. This SO describes processes that apply to actions taken under other standing orders and forms part of the instructions provided by the SOs regarding those actions. The power for this SO is provided by the power for the subject matter to which it relates (in any given case) and also by the power to make standing orders in relation to safety, management and good order.

The decision to provide instructions regarding provision of information, review of decisions and complaints in a separate SO was made to remove unnecessary duplication of information that otherwise would be repeated in each other Standing Order, and to give prominence to the procedural requirements covered by this SO. (Similar reasoning underpins DI2007-2 – Records and Reporting Standing Order.)

The relationship between the content of DI2007-260 and the other SOs is discussed in two separate ways in the SOs. Paragraphs two and five of the Introduction to each SO discuss how each SO must be applied in the context of all other SOs. For example, paragraph 5 commences thus:

This Standing Order needs to be read and applied in the context of all Standing Orders. Standing Orders -- Provision of Information, Review of Decisions and Complaints, Records and Reporting and Aboriginal and Torres Strait Islander Residents, in particular, have application and need to be considered across all the other Standing Orders.....

Further emphasising and expanding on the above point, the SOs (where relevant) have two sections towards their end (just in front of the glossary), that contain standard paragraphs, one relating to Records and Reporting and the other relating to Provision of Information, Review of Decisions and Complaints. These standard paragraphs provide a summary of the requirements of the SO that deals specifically with these issues, refers the reader to the relevant SO and states that all actions taken under the SO in question must comply with the requirements of the other SO.

Are some human rights subject to no limitations?

The Explanatory Statement for the Human Rights Bill, which may be relied upon to assist in interpreting the *Human Rights Act*, in relation to clause 28, states:

The purpose of clause 28 is to recognise that few rights are absolute and limits may be placed on rights and freedoms. It provides one standard against which to measure justifications for limits on human rights. However, it is not intended that clause 28 will operate in a uniform way in relation to all the rights expressed in Part 3. Some rights are absolute and distinguishable from non-absolute rights. The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (clause 10(1)) is an example of a right that is not subject to any limitation.

The object of the HRA is to give recognition to fundamental human rights and freedoms. The rights in Part 3 of the HRA are drawn from the International Covenant on Civil and Political Rights (ICCPR). The reasonable limits provision in section 28 needs to be read in conjunction with Part 4 of the HRA, which deals with the application of human rights to Territory laws. Section 30 provides that in working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred. Section 31 provides that 'international law and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right'. The purpose of section 31 is to promote a consistent interpretation of universal standards that derive from the ICCPR. This is also consistent with the principle that expressions used in international agreements should be interpreted in a manner consistent with relevant international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427).

It has long been established in international human rights law that there are absolutely no circumstances where torture and other cruel, inhuman or degrading treatment or punishment can be justified, including in times of public emergency. The absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The right is also recognised to be of particular importance to people held in detention centres, prison and mental health facilities (see for eg, General Comment No 20 by the UN Human Rights Committee). It therefore follows that there can be no limitation of the prohibition against torture that could be considered reasonable and justifiable under section 28 of the HRA.



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

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

Dear Mr ~~Stefaniak~~^{Stefaniak}

Scrutiny Report No. 49 — Disallowable Instruments under the Land (Planning and Environment) Act 1991

Thank you for the Scrutiny Report No 49 of 3 December 2007 that contains comments concerning DI2007-265 (Land (Planning and Environment) Criteria for Direct Grant of a Lease to Dytin Pty Ltd Determination 2007) and DI2007-288 (Land (Planning and Environment) Criteria for Direct Grant of a Lease (Single Residence Leases) Determination 2007 (No. 1)).

The Committee notes that both of these instruments are direct grants of leases with the first instrument stating that it is made under subsection 161 (7) of the Land (Planning and Environment) Act 1991 and the second instrument stating that it is made under section 161.

The ACT Planning and Land Authority has confirmed both instruments are granted under subsection 161(7).

Yours sincerely

Andrew Barr MLA
Minister for Planning

14 FEB 2008

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Jon Stanhope MLA

CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ENVIRONMENT, WATER AND CLIMATE CHANGE
MINISTER FOR THE ARTS
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
Civic Square
Canberra ACT 2601

Dear Mr Stefaniak 

Scrutiny Report in relation to the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No.3)

I refer to your committee's scrutiny report No 47 dated 12 November 2007, in respect of the Animal Diseases (Exotic Disease Quarantine Area) Declaration 2007 (No.3). This instrument is the third instrument dealing with quarantine arrangements to manage the current outbreak of equine influenza.

I note the committee's comments in relation to the making of this instrument. However, it is not correct to assert that this quarantine declaration was made to correct the alleged deficiencies in the first and second declarations. Rather, the primary purpose of the declaration, as indicated in the instrument's explanatory statement, was to reflect changes in the management of the equine influenza outbreak and to relax the former quarantine arrangements. No retrospective action dealing with the earlier instruments was considered necessary.

As the impact of the disease diminishes and the risk of further outbreak is reduced, I anticipate that further declarations may be required to further relax quarantine arrangements, until such time as no restrictions are required.

Thank you for also drawing my attention to the minor typographical error in the instrument's explanatory statement.

Yours sincerely



Jon Stanhope MLA
Minister for the Environment, Water and Climate Change

27 FEB 2008

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