



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

16 NOVEMBER 2009

Report 15

TERMS OF REFERENCE

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

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

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SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2009-154 being the Victims of Crime (Victims Assistance Board) Appointment 2009 (No. 1) made under section 8 of the *Victims of Crime Regulation 2000* appoints a specified person as the migrant member of the Victims Assistance Board.

Disallowable Instrument DI2009-202 being the Health Professionals (Fees) Determination 2009 (No. 6) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-303 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2009-203 being the Public Place Names (Crace) Determination 2009 (No. 3) made under section 3 of the *Public Place Names Act 1989* determines the names of two roads in the Division of Crace.

Disallowable Instrument DI2009-204 being the Public Place Names (Forde) Determination 2009 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the names of seven roads in the Division of Forde.

Disallowable Instrument DI2009-206 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2009 (No. 4) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2009 Corsa de Mille Pini Rally.

Disallowable Instrument DI2009-207 being the Waste Minimisation (West Belconnen Borrow Pit Remediation Fees) Determination 2009 (No. 1) made under section 45 of the *Waste Minimisation Act 2001* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2009-208 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2009 (No. 1) made under section 49 of the *Cemeteries and Crematoria Act 2003* revokes DI2008-155 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2009-209 being the Environment Protection (Fees) Determination 2009 (No. 2) made under section 165 of the *Environment Protection Act 1997* revokes DI2009-110 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2009-212 being the Public Place Names (Ainslie) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a park in the Division of Ainslie.

Disallowable Instrument DI2009-213 being the Public Place Names (Phillip) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of three new roads in the Division of Phillip.

Disallowable Instrument DI2009-219 being the Work Safety Council (Acting Employer Representative) Appointment 2009 (No. 1) made under paragraph 186(b) of the *Work Safety Act 2008* revokes DI2007-283 and appoints a specified person as an acting member of the Work Safety Council, representing employers.

Disallowable Instrument DI2009-220 being the Work Safety Council (Employer Representative) Appointment 2009 (No. 1) made under paragraph 186(b) of the *Work Safety Act 2008* revokes DI2007-280 and appoints a specified person as a member of the Work Safety Council, representing employers.

Disallowable Instrument DI2009-222 being the Public Sector Management Amendment Standards 2009 (No. 8) made under section 251 of the *Public Sector Management Act 1994* amends the Standards to introduce the power for the Commissioner for Public Administration to waive the requirement for an independent job evaluation of a chief executive office, in certain circumstances.

Disallowable Instruments—Comment

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

Minor drafting issue

Disallowable Instrument DI2009-205 being the Surveyors (Chief Surveyor) Practice Directions 2009 (No. 2) made under section 55 of the *Surveyors Act 2007* revokes DI2009-200 and establishes the Chief Surveyor Practice Directions.

The Committee notes that this instrument (dated 21 September 2009) revokes and re-makes DI2009-200, which was dated 24 August 2009. The Explanatory Statement for this instrument (ie DI2009-205) states:

The new instrument amends several minor errors in the previous document and amends forms required for administrative purposes. It does not change the survey requirements or instructions.

There is no indication as to what the “minor errors” were.

The Committee commented on DI2009-200 in its *Scrutiny Report No 13 of the Seventh Assembly* (dated 12 October 2009). In that Report, the Committee stated:

[T]he formal part of this instrument indicates that it is made under “section no 55” of the *Surveyors Act 2007*. The Committee suggests that the “no” is superfluous.

The Committee notes that the superfluous “no” also appears in DI2009-205.

Minor drafting issue

Disallowable Instrument DI2009-210 being the Attorney General (Fees) Amendment Determination 2009 (No. 3) made under section 228 of the *Work Safety Act 2008* amends DI2009-116 and determines fees payable for the purposes of the Act.

The Committee notes that section 3 of this instrument sets out the substantive amendments that are to be made, by the instrument, to the *Attorney-General (Fees) Determination 2009*. Section 3 provides (in part):

This instrument amends the Attorney General (Fees) Determination 2009 (DI2009-116) by:

.....

- (g) The Parliamentary Counsel is authorised to reprint DI2009-116 together with this amendment.

The Committee notes that this provision is an instruction to the Parliamentary Counsel, rather than an amendment of the principal instrument, and would ordinarily be included in an instrument as a separate section (as it is, for example in DI2009-218, which is discussed below).

No Explanatory Statement / Has this instrument been validly made? / Minor drafting issue

Disallowable Instrument DI2009-211 being the Emergencies (Strategic Bushfire Management Plan for the ACT) 2009 made under section 72 of the Emergencies Act 2004 amends the Strategic Bushfire Management Plan for the ACT.

The Committee notes that this instrument is made under section 72 of the *Emergencies Act 2004*, which provides (in part):

72 Strategic bushfire management plan

- (1) The commissioner must prepare, and give the Minister, a draft strategic bushfire management plan for the ACT.
- (2) In preparing the draft plan, the commissioner must—
 - (a) consult with the bushfire council; and
 - (b) consider the impact of the plan on any land management agreements and land managers.
- (3) After considering the draft plan, the Minister must, in writing, make a strategic bushfire management plan for the ACT (the *strategic bushfire management plan*).
- (4) The plan is a disallowable instrument.

.....

No Explanatory Statement is provided for this instrument. The Committee has consistently commented that, while there is no formal requirement that instruments be accompanied by an Explanatory Statement (and while the absence of an Explanatory Statement does not affect the validity of an instrument), the absence of an Explanatory Statement denies the Legislative Assembly the opportunity to be advised of various “background” issues relating to an instrument. In the case of this particular instrument, an Explanatory Statement might, for example, have included details about whether (and how) the requirements of subsection 72(2) of the *Emergencies Act* (ie the requirements to consult with the bushfire council, etc) have been met.

The Committee also notes that the instrument contains various typographical errors (most of which can be identified by the use of spell-check). The most obvious typographical error appears on page 1 of the instrument, where section 4 provides:

4 Explanatory material

The following maps and content are included with the plan for explanatory purposes only and do not form part of the plan:

- The Ministers Forward; and
- Figures 1 and 2.
- Chapter 5 - Figures 7(a), 7(b), 7(c) (in Supporting Information Part 1 – Factors Contributing to Bushfire Risk); and
-
- Chapter 6 – Figures 2, 3, 4, 5, and 6 (in Supporting Information Part 1 – Factors Contributing to Bushfire Risk).

The Committee notes that the reference to “Ministers Forward” is, clearly, an incorrect reference to the Minister’s “Foreword”, which starts at page iii of the instrument.

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

Positive comment

Disallowable Instrument DI2009-218 being the Attorney General (Fees) Amendment Determination 2009 (No. 4) made under the Agents Act 2003, Associations Incorporation Act 1991, Births, Deaths and Marriages Registration Act 1997, Business Names Act 1963, Civil Law (Wrongs) Act 2002, Civil Partnerships Act 2008, Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, Consumer Credit (Administration) Act 1996, Cooperatives Act 2002, Court Procedures Act 2004, Dangerous Substances Act 2004, Emergencies Act 2004, Guardianship and Management of Property Act 1991, Hawkers Act 2003, Instruments Act 1933, Land Titles Act 1925, Liquor Act 1975, Machinery Act 1949, Partnership Act 1963, Pawnbrokers Act 1902, Prostitution Act 1992, Public Trustee Act 1985, Registration of Deeds Act 1957, Sale of Motor Vehicles Act 1977, Scaffolding and Lifts Act 1912, Second-hand Dealers Act 1906, Security Industry Act 2003, Trade Measurement (Administration) Act 1991, Workers Compensation Act 1951, Work Safety Act 2008 revokes DI2008-157 and amends DI2009-116, being the Attorney General (Fees) Determination 2009.

The Committee notes, with approval, that the amendments made by this instrument address concerns about the drafting of the *Attorney-General (Fees) Determination 2009* (and, before that, the *Attorney-General (Fees) Determination 2008*) in *Scrutiny Report No 11* of the *Seventh Assembly*.

Issue requiring clarification

Disallowable Instrument DI2009-221 being the Planning and Development (Circumstance for, and Amount of, Change of Use Charge Remission-Prohibition of Smoking) Policy Direction 2009 (No. 1) made under section 177 of the Planning and Development Regulation 2008 provides for the circumstances where the Planning and Land Authority must remit a change of use charge and sets out the amount of remission of the charge.

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

This disallowable instrument is being re-made as a result of its repeal under subsection 428(2) of the *Planning and Development Act 2007* (the Act).

Section 2 of the instrument gives the instrument retrospective effect, to 31 March 2008. In relation to the retrospectivity, the Explanatory Statement states:

Section 76 of the *Legislation Act 2001* provides that a statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively. A non-prejudicial provision is a provision that does not adversely affect a person's rights or impose liabilities on the person. The instrument does not contain provisions that adversely affect a person's rights or impose liabilities on the person. The instrument therefore commences on 31 March 2008 which is the day of commencement of the *Planning and Development Act 2007*.

While it is a relatively minor matter, the Committee has been unable to identify the repealed instrument on the ACT Legislation Register. The Committee would appreciate the Minister's assistance in locating that instrument.

The Committee would also appreciate the Minister's assistance in explaining the relationship between the repealed instrument and the re-made instrument.

Subordinate Laws—No comment

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

Subordinate Law SL2009-46 being the Territory Records Regulation 2009 made under the *Territory Records Act 2002* determines the Principal Officer responsible for records management for the various agencies within the Department of Justice and Community Safety.

Subordinate Law SL2009-47 being the Magistrates Court (Work Safety Infringement Notices) Regulation 2009 made under the *Magistrates Court Act 1930* allows for infringement notices under the Act for certain offences against the *Work Safety Act 2008* and the *Work Safety Regulation 2009*.

Subordinate Law SL2009-49 being the Door-to-Door Trading Regulation 2009 made under the *Door-to-Door Trading Act 1991* exempts certain contracts from provisions of the Act.

Subordinate Law SL2009-50 being the Electoral Amendment Regulation 2009 (No. 1) made under the *Electoral Act 1992* prescribes that fees received by an associated entity, totalling less than \$50 in a financial year for membership of the entity, are excluded from the requirements for reporting to the Electoral Commissioner in their annual return of receipts, payments, capital and outstanding debts.

Subordinate Laws—Comment

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

Strict liability offences - Positive comment / Minor typographical errors

Subordinate Law SL2009-45 being the Work Safety Regulation 2009, including a regulatory impact statement made under the *Work Safety Act 2008* brings together the regulations under the previous *Occupational Health and Safety Act 1989*.

The Committee notes that this subordinate law contains numerous strict liability offences. The Explanatory Statement for the subordinate law states:

Strict Liability Offences

The Regulation has strict liability offences in clauses 8, 11, 12, 13,14,15,17, 18, 19, 20, 21, 22, 24, 27, 42, 43, 48, 49, 50, 56, 60, 68(3), 68(4), 69, 72, 75, 76(2), 77(1), 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 115, 116, 117, 118, 120, 121, 125, 131, 132, 133, 141, 143, 144, 151,152,156, 159, 163, 164, 165, 167, 168, 169, 174,175, 183 and 184. The offences incorporating strict liability elements have been carefully considered during the Regulation's development. The strict liability offences arise in a regulatory context

where for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people who owe work safety duties such as employers, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offences is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

The Committee notes that, in fact, the maximum penalty that applies in relation to a strict liability offence in this subordinate law is 30 penalty units.

The Committee commends the form of explanation for strict liability offences set out above to other agencies that are responsible for subordinate legislation that introduces new strict liability offences.

Finally, the Committee notes that the Explanatory Statement for this subordinate law contains some minor typographical errors. In particular, the Committee notes that a misspelling of "surrendered" (ie as "surrended") in that part of the Explanatory Statement relating to clause 132 is repeated in those parts of the Explanatory Statement relating to clauses 133, 141 and 143.

Undue interference with rights to privacy?

Subordinate Law SL2009-48 being the Crimes (Sentencing) Amendment Regulation 2009 (No. 1) made under the *Crimes (Sentencing) Act 2005* prescribes the Canberra Rape Crisis Centre and the Domestic Violence Crisis Service Incorporated as criminal justice entities under the Act.

The Committee notes that this subordinate law prescribes both the Canberra Rape Crisis Centre and the Domestic Violence Crisis Centre as a "criminal justice entity", for the purposes of the *Crimes (Sentencing) Act 2005*. The prescribing of these entities is relevant for section 136 of the Act, which provides:

136 Information exchanges between criminal justice entities

- (1) This section applies to any information in relation to an offence (including an alleged offence) in a record of a criminal justice entity, including information about—
 - (a) a person charged with the offence; and
 - (b) a victim of the offence; and
 - (c) a person convicted or found guilty of the offence.
- (2) The criminal justice entity may give the information to another criminal justice entity for the purposes of the other entity.
- (3) This section is additional to any other Act that provides for information to be given by, or to, a criminal justice entity.

Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including any regulation (see Legislation Act, s 104).

(4) In this section:

criminal justice entity means any of the following:

- (a) the Supreme Court;
- (b) the Magistrates Court;
- (c) the chief executive responsible for this Act;
- (d) the chief executive (CYP);
- (e) the sentence administration board;
- (f) the director of public prosecutions;
- (g) the chief police officer;
- (h) the victims of crime coordinator under the *Victims of Crime Act 1994*;
- (i) any other entity prescribed by regulation.

victim, of an offence—see section 47.

The effect of the organisations being prescribed as a “criminal justice entity” is to allow these entities to provide information to other such entities and also to receive information from such entities. That being so, the subordinate law may be regarded as interfering with the privacy rights of the persons to whom the information relates.

The Explanatory Statement for the subordinate law states:

Section 136 [of the Crimes (Sentencing) Act] was enacted to overcome past problems with the concerns of agencies to share information with each other on the basis that they might be in breach of their obligations under the National Privacy Principles contained in the *Privacy Act 1988* (Cwlth), and that sharing information might otherwise prejudice the effective operation of their agency. Section 136 puts beyond doubt the ability of criminal justice agencies to share information, and conveys to agencies the strong intention of the ACT Legislature that they cooperate with each other in the exchange of information relating to the criminal justice system.

National Privacy Principle 2.1(h) (i) allows for the exchange of information by criminal justice agencies for the purposes of preventing, detecting, investigating, prosecuting or punishing criminal offences.

This regulation will prescribe both the Canberra Rape Crisis Centre and the Domestic Violence Crisis Service Incorporated as criminal justice entities pursuant to section 136(4) (h) of the *Crimes (Sentencing) Act 2005*.

The Canberra Rape Crisis Centre is an incorporated association under the *Associations Incorporation Act 1991*. Its certificate of incorporation number is A02865.

The Canberra Rape Crisis Centre is a non-government organisation that provides crisis support, counselling, information, and advocacy services to victims of sexual assault, as well as a 24 hour crisis phone support and crisis call out in Canberra and the surrounding region.

The Domestic Violence Crisis Service Incorporated is an incorporated association under the *Associations Incorporation Act 1991*. Its certificate of incorporation number is A01467.

The Domestic Violence Crisis Service Incorporated is a non-government organisation with key objectives of addressing violence and abuse in personal relationships and promoting respect and fairness in personal relationships in the Canberra region. Domestic Violence Crisis Service Incorporated does this by providing 24 hour crisis intervention, advocacy, referral, information, support and practical assistance for people subjected to, or using, violence and abuse in relationships, giving priority to those subjected to violence.

The Government has decided to prescribe both the Domestic Violence Crisis Service Incorporated and the Canberra Rape Crisis Centre as these organisations play a vital role in the ACT criminal justice system as they support victims considering whether to give evidence against their alleged attackers, and supporting and assisting victims through the criminal justice system.

By prescribing both the Domestic Violence Crisis Service Incorporated and the Canberra Rape Crisis Centre, the Government intends to strengthen the criminal justice system in the Territory through improved relationships and exchange of relevant information between all criminal justice entities.

In the light of the above explanation, the Committee makes no further comment on this subordinate law, as it appears to the Committee that, to the extent that this subordinate law interferes with any existing rights to privacy, it does not do so unduly.

Retrospective operation? / Interference with right to privacy

Subordinate Law SL2009-51 being the ACT Civil and Administrative Tribunal (Transitional Provisions) Amendment Regulation 2009 (No. 1) made under the ACT Civil and Administrative Tribunal Act 2008 addresses additional transitional matters arising from the initial operation of the ACT Civil and Administrative Tribunal.

Section 4 of this subordinate law amends the *ACT Civil and Administrative Tribunal (Transitional Provisions) Regulation 2009*, inserting a new section 52A, which deals with references to the (no longer existing) Small Claims Court in documents. The Explanatory Statement provides the following explanation of the new section:

This regulation inserts a new section 52A to provide that where a document written before commencement day included a reference to the Small Claims Court, that reference shall not only be taken as a reference to the ACAT but will also be taken as a reference to the Magistrates Court in relation to enforcement proceedings.

This regulation preserves the intent of persons executing instruments (such as a power of attorney) which might have been premised on enforcement proceedings being undertaken in the Small Claims Court. It complements existing provisions in Part 13 of the ACAT (TP) Regulation which recognise such references as applying to the ACAT in appropriate circumstances.

New subsection 52A(2) makes it clear that the new provision applies to relevant references in documents “on and after the commencement day”. “Commencement day” is defined in the Dictionary for the ACT Civil and Administrative Tribunal (Transitional Provisions) Regulation as “the day the *ACT Civil and Administrative Tribunal Act 2008*, section 6 commences”. According to Endnote 3 to the ACT Civil and Administrative Tribunal Act, section 6 of that Act commenced on 2 February 2009. This would appear to mean that the amendment has a retrospective operation.

Section 76 of the *Legislation Act 2001* allows only non-prejudicial provisions to commence retrospectively. It provides:

76 Non-prejudicial provision may commence retrospectively

- (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
- (2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.

Example

The *Locust Damage Compensation Determination 2003* (a hypothetical disallowable instrument) sets out (among other things) the people who are eligible for compensation under a compensation fund. Previously, there was no restriction on who was eligible. The determination provides that it is taken to have commenced on 1 July 2003, but it is not notified until 15 August 2003. There is nothing in the Act under which the determination is made (or any other Act) that authorises the retrospective commencement.

The provision of the determination that limits who can apply for compensation is a prejudicial provision (ie it adversely affects some people’s right to receive compensation) and cannot commence retrospectively. Instead, it would commence on the day after the determination’s notification day (see s 73 (3)).

- (3) This section is a determinative provision.

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

- (4) In this section:

non-prejudicial provision means a provision that is not a prejudicial provision.

prejudicial provision means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

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

The Committee notes that there is nothing in the Explanatory Statement for this instrument that addresses the issue of the retrospective operation of this amendment. The Committee would be grateful if the Attorney-General could confirm that the amendment in question has no retrospective operation.

Section 7 of this subordinate law inserts into the ACT Civil and Administrative Tribunal (Transitional Provisions) Regulation a new Schedule 3, which modifies the *Legal Profession Act 2006*. Item 3.1 of Schedule 3 has the effect of inserting into the Legal Profession Act a new section 423A, which provides:

423A Restriction on publication of certain identifying material from application

- (1) A person must not publish an account or report of an application under this part if the account or report—
 - (a) discloses the identity of the person who is the subject of the complaint to which the application relates (the *person concerned*); or
 - (b) allows the identity of the person concerned to be worked out.
- (2) However, the identity of the person concerned may be disclosed in an account or report of the application if—
 - (a) a final decision has been made that the person concerned is guilty of the conduct complained of; and
 - (b) either—
 - (i) the appeal period has ended and no appeal has been made; or
 - (ii) any appeal has been decided against the person concerned.
- (3) In this section:

appeal means an appeal under the *ACT Civil and Administrative Tribunal Act 2008*, section 79 against a decision by the tribunal.

The Explanatory Statement offers the following explanation for this provision:

Regulation 7 New schedule 3

This regulation inserts a new schedule 3 into the ACAT (TP) Regulation, modifying the *Legal Profession Act 2006* by inserting new section 432A dealing with the naming of legal professionals prior to the expiry of the appeal process for an occupational discipline matter. A similar provision (former section 426A) was included in an earlier republication of the *Legal Profession Act 2006*, but was omitted by the *ACT Civil and Administrative Tribunal Amendment Act 2008*, which replaced Part 4.7 of the *Legal Profession Act 2006*.

Leaving aside the issue of the omission of the earlier provision (the effect and implications of which are not explained), the Committee notes that “new” section 432A of the Legal Profession Act has the effect of providing a conditional right to privacy for lawyers who are the subject of an “occupational discipline matter”. The condition is that the lawyer must not be found guilty of the conduct complained of.

While the Committee can anticipate the likely reasons for this approach (ie the need to protect lawyers against unfounded complaints and the desirability – for deterrent effect – of publicising findings of guilt), the Committee considers that, given the effect of this sort of publicity on a lawyer found guilty, some sort of explanation should have been provided in the Explanatory Statement for this subordinate law. Such an explanation would assist the Committee (and the Legislative Assembly) in determining whether the provisions in question unduly trespass on rights previously established by law, contrary to principle (a)(ii) of the Committee’s terms of reference. The absence of such an explanation also means that the Explanatory Statement does not meet the technical or stylistic standards expected by the Committee, contrary to principle (b) of the Committee’s terms of reference.

GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, dated 12 November 2009, in relation to comments made in Scrutiny Report 14 concerning the Justice and Community Safety Legislation Amendment Bill 2009 (No. 3).

REGULATORY IMPACT STATEMENT

The Committee has examined a regulatory impact statement relating to the following subordinate law and offers the following comments on it:

Subordinate Law SL2009-45 being the Work Safety Regulation 2009, including a regulatory impact statement made under the Work Safety Act 2008 brings together the regulations under the previous *Occupational Health and Safety Act 1989*.

The Committee notes that section 35 of the *Legislation Act 2001* sets out the requirements for the content of regulatory impact statements. It provides:

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:

- (a) the authorising law;
- (b) a brief statement of the policy objectives of the proposed law and the reasons for them;
- (c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
- (d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
- (e) if the proposed law is inconsistent with the policy objectives of another territory law—
 - (i) a brief explanation of the relationship with the other law; and
 - (ii) a brief explanation for the inconsistency;
- (f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
- (g) a brief assessment of the benefits and costs of implementing the proposed law that—
 - (i) if practicable and appropriate, quantifies the benefits and costs; and
 - (ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

- (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.

“Scrutiny committee principles” is defined in section 31 of the Legislation Act:

scrutiny committee principles means the terms of reference of the Legislative Assembly’s Standing Committee on Legal Affairs that apply to subordinate laws and disallowable instruments.

The section 35 requirements are summarised on page 5 of the regulatory impact statement for this subordinate law.

The Committee notes that, despite acknowledging the requirements in relation to the “scrutiny committee principles”, the regulatory impact statement for this subordinate law contains no assessment of the consistency of the subordinate law with the scrutiny committee principles. The Committee draws attention to the regulatory impact statement for this subordinate law, under principle (b) of the Committee’s terms of reference, which requires the Committee to examine regulatory impact statements, to determine whether or not they meet the technical or stylistic standards expected by the Committee.

Vicki Dunne, MLA
Chair

November 2009

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

REPORTS—2008-2009

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

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

Report 2, dated 4 February 2009

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

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

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

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

Report 8, dated 22 June 2009

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

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

Report 10, dated 10 August 2009

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

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

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

Report 11, dated 24 August 2009

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009

Bills/Subordinate Legislation

Disallowable Instrument DI2009-132 - Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2)
 Disallowable Instrument DI2009-133 - Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2)
 Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009
 Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)
 Crimes (Assumed Identities) Bill 2009
 Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
 Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Report 13, dated 12 October 2009

Disallowable Instrument DI2009-193 - Nature Conservation (Flora and Fauna Committee) Appointment 2009 (No. 2)
 Disallowable Instrument DI2009-194 - Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 2)
 Education Amendment Bill 2009

Report 14, dated 9 November 2009

Building and Construction Industry (Security of Payment) Bill 2009
 Disallowable Instrument DI2009-214 - Housing Assistance (Affordable and Community Housing Providers) Registration Determination 2009 (No. 1)
 Disallowable Instrument DI2009-215 - Housing Assistance (Community Housing Providers) Standards 2009 (No. 1)
 Disallowable Instrument DI2009-216 - Housing Assistance (Affordable and Community Housing Providers) Monitoring Guidelines 2009 (No. 1)
 Disallowable Instrument DI2009-217 - Housing Assistance (Affordable and Community Housing Providers) Intervention Guidelines 2009 (No. 1)
 Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)
 Education (Participation) Amendment Bill 2009
 Smoking (Prohibition in Enclosed Public Places) Amendment Bill 2009
 Subordinate Law SL2009-44 - Taxation Administration Amendment Regulation 2009 (No. 1)
 Unlawful Gambling Bill 2009



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
MINISTER FOR ENERGY
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 14 of 9 November 2009. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on the Justice and Community Safety Legislation Amendment Bill 2009 (No 3).

The amendment to the *Court Procedures Act 2004* will ensure that the existing law on security screening is not confused by the language of section 45. Section 45 was never intended as a limitation on the power of the courts to conduct screening. Understood in context, this law already permits screening of every entrant to court premises so long it is reasonably prudent for maintaining court security.

The courts already have inherent and statutory powers to conduct general security screening. It is currently the policy of the courts to require such screening as a condition of entry to court premises. This amendment redrafts the statute to avoid the confusion that may result from an incomplete review of the history and context of existing section 45.

The Committee should note that a statement of compliance with the *Human Rights Act 2004* was tabled alongside the Bill. The power of courts to require basic security screening upon entry to their premises is well settled. It is essential to ensuring a fair trial in a civilised society that courts operate and are seen to operate in atmosphere of security and calm. This amendment will do no more than introduce language that prevents misinterpretations that would invent unreasonable limitations on the security of the courts where there are presently none.

I trust that the above response answers the Committee's concerns and I thank the Committee for its review.

Yours sincerely

Simon Corbell MLA
Attorney General

12-11-09 .

ACT LEGISLATIVE ASSEMBLY

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