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

9 June 2009

Report 7

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.

BILLS

Bills—No comment

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

APPROPRIATION BILL 2009-2010

This is a Bill for the appropriation of monies for the 2009-2010 financial year.

DUTIES AMENDMENT BILL 2009

This Bill would amend the *Duties Act 1999* to move the duty exemption for residential leases from Chapter 5 of Act to Chapter 2 (given that Chapter 5 is scheduled to expire on 30 June 2009); to clarify that a declaration of trust cannot be used as a vehicle to circumvent liability to landholder duty; and to introduce a duty exemption for "top-hatting" arrangements that give effect to a rollover scheme under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth).

STATUTE LAW AMENDMENT BILL 2009

This Bill would amend a number of Territory laws as part of the technical amendments program for ACT legislation. Under guidelines for the technical amendments program approved by the government, the essential criteria for the inclusion of amendments in the bill are that the amendments are minor or technical and non-controversial.

Bills—Comment

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

ROAD TRANSPORT (MASS, DIMENSIONS AND LOADING) BILL 2009

This is a Bill for an Act to provide for the implementation of certain laws that form part of the system of nationally consistent road transport laws for the regulation of mass, dimensions and load restraint in relation to heavy vehicles, and for other purposes. It would repeal the *Road Transport (Dimensions and Mass) Act 1990* and make consequential amendments to other Acts.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)

Is it justifiable in the circumstances to permit the Minister to fix by written notice the date for the commencement of the Act?

Clause 2 provides that the proposed Act is to commence on a day to be fixed by written notice by the Minister. This is in effect a delegation to the executive of a power to choose a time for commencement which is within the 6 months following the notification day.[1]

[1] This is the effect of section 79 of the *Legislation Act 2001*. See section 28 concerning the day of notification.

There may well be good reason to delegate this power. The Committee notes however that the Explanatory Statement does not address this issue, and the Committee refers to the Assembly the question of whether in this instance there is inappropriate delegation of legislative power.

Is there an inappropriate delegation of legislative power in that the Executive may, by way of a regulation in effect modify or dispense with the Act?

A long standing concern of the Committee is that a bill does not inappropriately delegate legislative powers. Two particular concerns are that a clause does not:

- permit subordinate legislation to amend statute law (the Henry VIII clause); or
- confer a power on a Minister or the Executive to dispense with the operation of a statutory provision.

Both issues arise in respect of this Bill, and three provisions are in issue:

(1) By subclause 120(1), a regulation "may prescribe a different lower limit, or a different method of calculating a lower limit, for a substantial risk breach, or severe risk breach, of a mass, dimension or loading requirement to which a provision of subdivision 2.2.2.2 (Lower limits for breaches) applies". However, this power is circumscribed by subclause 120(2), in that "the regulation must not prescribe a limit that is lower than the limit provided by the relevant provision of subdivision 2.2.2.2.".

Comment. The limited nature of this power may remove much concern that there is here an inappropriate delegation of legislative power.

(2) By subclause 171(7), "[a] regulation may prescribe when subsection (1), (2) or (3) does not apply".

(3) By subclause 508(1), "[a] regulation may exempt a person or vehicle, or provide for the granting of exemptions of people or vehicles, from the regulations".

Comment. The provisions offend the long-standing constitutional principle that the Executive should not have power to dispense with the operation of a statute. In *Report 47* of the *Fifth Assembly*, concerning the Health Professionals Bill 2003, the Committee said:

> It is fundamental that the law apply equally to all citizens. Any dispensation should be justified. Dispensing clauses are also objectionable on the ground of their being an inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined. As a general principle, a law should state a principle according to which persons might apply for an exemption, rather than simply empower a Minister or an executive officer to grant a dispensation.

The Committee notes that the power to dispense in clause 508 applies only to regulations. A further countervailing consideration is that the Assembly may disallow the regulation, but disallowance only takes effect from the date of the resolution of disallowance, and will not affect the legal situation between the date of the regulation and the date of the resolution.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister address the issues identified above.

Is there an undue trespass on personal rights and liberties? – para (c)(i)
Report under section 38 of the *Human Rights Act 2004*

General comment

The Committee notes that the Explanatory Statement observes that:

> The Bill is modelled on the national Road Transport Reform (Compliance and Enforcement) Bill, (Model Bill) which was developed by the National Road Transport Commission.
>
> It was recognised when developing the Model Bill that jurisdictions, when implementing the national scheme, may need to modify provisions to satisfy their wider legal and policy requirements. The provisions in this Bill have been fine-tuned to reflect ACT criminal law and human rights policy.

The major modifications to the Model Bill are noted in the discussion below. At the outset, the Committee commends the effort made to accommodate the national scheme to human rights principles.

Administrative discretions

Several provisions of the Bill would confer discretionary power on officials, and the Committee notes that the exercise of them is often conditioned on the holder having "reasonable grounds" to believe in a specified state of affairs; (for example, see subclause 124(1)(a)). It also notes that the scope of choice is often structured in the sense that it is specified that regard must be had to certain matters (for example, see clause 106), although in some cases the list of relevant factors specified is non-exhaustive (for example, see 124(5)).

The Committee commends these techniques. Of particular note is clause 164, the purpose of which "is to bring to the attention of courts the general implications and consequences of breaches of mass, dimension or loading requirements when deciding the kinds and levels of sanctions to be imposed".

There are however instances of unconfined discretionary power, and the Committee suggests that consideration be given to confining the range of choice:

- In relation to subclause 137(2) and subclause 137(3) (see discussion below), it may be that the factors that the Explanatory Statement suggests would be relevant to the exercise of the discretion in subclause 137(3) could be stated in the text of clause 137.

- In relation to clause 198, it may be that discretion to cancel could be stated to be exercisable according to whether or not the matters stated in clause 194 continue to exist or not.
- In relation to subclause 200(3), it may be that the holding of the belief be conditioned on there being "reasonable grounds" for the belief.

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

Strict liability offences

Some 32 provisions of the Bill would create strict liability offences. These provisions engage the right to liberty and security (HRA subsection 18(1)) and/or the presumption of innocence (HRA subsection 22(1)). Derogation of these rights might be justifiable under HRA section 28.

At no point does the Explanatory Statement offer a justification for these provisions, even in the most general terms. It would not have been difficult to point to the regulatory nature of the proposed offences, the low level of the penalty that would attach to conviction, and to the fact that in most instances, the Bill provides for defences in addition to the defences available under the Criminal Code. All these matters provide justification for the provisions, and **subject to a point concerning subclause 196(4), the Committee does not consider that any provision might be incompatible with the Human Rights Act.**

The Committee must however point out that it is critical to the proper working of a system of scrutiny of bills (and of subordinate laws) that the Explanatory Statement identify any provision that would create a strict liability offence, and provide a justification for its enactment.

The Committee commends the fact that the Bill provides for defences in addition to the defences available under the Criminal Code. In particular, clause 185 provides for a "reasonable steps exception" that is then picked up by many of the strict liability offence provisions and made applicable to those provisions. Subclause 185(2) provides:

> (2) The offence does not apply to the defendant if—
>
> (a) the defendant did not know, and could not reasonably be expected to have known, about the failure to comply with the heavy vehicle road law; and
>
> (b) either—
>
> (i) the defendant had taken reasonable steps to comply; or
>
> (ii) there were no steps that the defendant could reasonably be expected to have taken to comply.
>
> *Note* The defendant has an evidential burden in relation to the matters mentioned in s (2) (see Criminal Code, s 58).

Subclause 185(3) then states non-exhaustively a wide range of matters that a court may have regard to when assessing whether something done, or omitted to be done, by the defendant constitutes reasonable steps.

A defendant will need to discharge an evidential burden in relation to the matters mentioned in subclause 185(2) (which if established will provide a defence to the relevant offence provision). That is, the defendant must present or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. If the defendant does so, then the prosecution must prove beyond reasonable doubt that the matter does or does not exist (as the case may be depending on the wording of the particular matter of exception in issue).

The Explanatory Statement observes that

> [t]he Bill departs from the Model Bill in that instead of providing a 'reasonable steps' defence, a 'reasonable step' exception is provided. The model provision placed a legal burden on the accused, and by reversing the onus of proof engaged Section 22(1) of the *Human Rights Act 2004* (right to be presumed innocent). Replacing the defence with an exception changes the burden of proof on the defendant from a legal burden to an evidential one.

Additional defences are also provided in clauses 188 and 189, and in respect of both the defendant bears only an evidential burden.

Should the defendant carry a legal burden of proof to establish the defence provided for in subclause 196(4)?

With respect to the particular additional defence stated in subclause 196(4), which applies only to the strict liability offence in subclause 196(1), the defendant must discharge a legal burden of proof to establish the defence. That is, to prove on the balance of probabilities that the matters that constitute the defence exist (or not exist, as the case may be).

There is no reference to this issue in the Explanatory Statement, although, as indicated by the quote from the Explanatory Statement immediately above, the Explanatory Statement does recognise that the placing of a legal burden on a defendant engages HRA subsection 22(1).

The Committee draws this matter to the attention of the Assembly and recommends that the Minister address the issues identified above.

For the record, and to assist any Assembly member who may wish to pursue the matter, the Committee will note the strict liability offences in three categories: (1) those in respect of which the Bill makes no provision for an additional defence; (2) those in respect of which the "reasonable steps exception" applies; and (3) those in respect of which some other particular defence is allowed. In relation to each provision, the maximum penalty is indicated. The abbreviation "pp" refers to "penalty points":

(1) Clauses 128 - 50pp, 132 - 50pp, 136 - 50pp, 138 - 50pp, 221 - 50pp, 310 - 50pp, 316 - 50pp, 347 - 50pp, 503 - 50pp, and 510 - 20pp.

(2) Clauses 141 – 20 or 40 pp, 143 – 50 pp, 144 – 15 or 30 pp, 146 – 20 or 40 pp, 148 – 50 pp, 149 – 15 or 30 pp, 151 – 20 or 40 pp, 153 – 15 or 30 pp, 155 – 20 or 40 pp, 157 – 15 or 30 pp, 159 – 20 or 40 pp, 161 – 15 or 30, 170 – 50 pp, 171 – 50 pp, 172 – 50 pp, 179 – 50 pp, and 196 – 50 pp.

(3) Clauses 312 – 50 pp, 313 – 50 pp, 314 – 50 pp, 322 – 50 pp, and 338 – 50 pp.

Investigatory powers

Division 3.1 of the Bill contains provisions conferring on a police officer or authorised person powers of investigation.

(1) By division 3.1.2, powers are conferred on a police officer or authorised person to give directions in relation to the stopping and moving of vehicles, and as to which persons must leave or not enter a vehicle. The powers may be exercised in order that the officer, etc "exercise a function under an Australian heavy vehicle road law" (for example, clause 309), or where the officer has reasonable grounds to believe that a certain state of affairs exists (for example, clause 313).

Comment. The Explanatory Statement argument that one of these powers (clause 309) "is fundamental to monitor compliance, to ensure timely enforcement and also to ensure a suspected danger to the public is ended immediately" (page 15) applies to all the powers. The Committee does not see any significant rights issue arising out of these provisions.

(2) By division 3.1.3, powers are conferred on a police officer or authorised person to enter and move an unattended vehicle or combination for the purpose of exercising other functions under a heavy vehicle road law, or where the vehicle is causing serious harm, or creating an imminent risk of serious harm to public safety, the environment or road infrastructure, or is causing or likely to cause an obstruction to traffic.

Comment. The Explanatory Statement in relation to the provisions of division 3.1.2 appear to apply with respect to these provisions. The Committee does not see any significant rights issue arising out of these provisions.

(3) By division 3.1.4, powers are conferred on a police officer or authorised person to direct any person with responsibilities associated with heavy vehicles or combinations, or their operation, to provide to the officer any *information, documents, records, devices or things in their possession or control* relating to the use, performance or condition of the vehicles or combinations and other specific matters *that may assist in checking compliance* with the heavy vehicle road transport laws (clause 321).

A person who fails to comply with a direction commits an offence of strict liability, but may raise a defence of having a reasonable excuse for non-compliance (clause 322).

Comment. There are some rights issues arising out of these provisions.

First, it would appear that a person subject to a direction could argue that non-compliance is justified on the ground that he or she could claim client legal privilege (also known as legal professional privilege) in respect of the information, etc. This would constitute a reasonable excuse. (More fundamentally, the effect of section 171 of the Legislation Act may be that a direction simply does not apply to any such information. If the Minister accepts this view, then the Committee suggests that an appropriate reference to section 171 be inserted in clause 321).

Secondly, while normally the effect of section 170 of the Legislation Act would be that a direction would not apply to any information in respect of which a person could claim the privilege against self-incrimination, (or, alternatively, could raise this privilege as a "reasonable excuse"), these arguments are not possible in the light of clause 331:

> **331 Protection from incrimination**
>
> (1) A person is not excused from a requirement to comply with a direction under this chapter on the ground that complying with the requirement might incriminate the person or make the person liable to a penalty.
>
> (2) However, the following is not admissible in evidence against the person in a criminal proceeding (except a proceeding for an offence against this chapter):
>
> (a) a statement made or any information or answer given or provided by an individual in compliance with a direction under this chapter;
>
> (b) information directly or indirectly derived from a statement, information or answer mentioned in paragraph (a).
>
> (3) Any document produced by a person in compliance with a direction under this chapter is not inadmissible in evidence against the person in a criminal proceeding on the ground that the document might incriminate the person.
>
> *Note* The Legislation Act, s 170 deals with the application of the privilege against selfincrimination.

(The addition of this note might mislead, given that it appears clause 331 displaces section 170 in relation to clauses in chapter 3 of the Bill.)

With apparent reference to clause 331, the Explanatory Statement states that the Bill "provides appropriate protection against self-incrimination, providing a full derivative use immunity as opposed to the use immunity in the Model Bill" (page 2). There are however qualifications to be made.

First, it must be noted that clause 331 may not engage paragraph 22(2)(i) of the *Human Rights Act 2004*, which provides that

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

There is however a broader common law privilege against self-incrimination which applies to any form of pre-trial proceeding. It applies "not just to answers to *oral* interrogation, but also to requests for production of documentation, (including pre-existing documents), and any other incriminating evidence".[2] This common law right is just as significant as the more limited right stated in the Human Rights Act, in that there is little point to a post-charge right if the person charged had been forced to incriminate at an earlier stage.

[2] A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) 23.16.2, footnotes omitted.

Clause 331 does then engage a very significant human right.

Secondly, while subclause 331(2) provides for a derivative use immunity in respect of oral matter provided by a person, this safeguard is limited by the exception that the matter may be used in a "proceeding for an offence against [chapter 3 of the Bill]". This exception is more extensive that the usual form of exception in that it is not limited to offences arising out of any false statement made under compulsion by the person, or out of a refusal to answer questions or produce documents. The offences in chapter 3 cover much more extensive ground. (This point was made by the Committee in relation to the Work Safety Bill 2008; see *Scrutiny Report No 59* of the *6th Assembly*. The Minister accepted this point and the Bill was amended so that the exception to the immunity applied only to offences for failing to answer questions or produce documents.)

Furthermore, the limited immunity protection in subclause 331(2) has no application to a document produced by a person in compliance with a direction.

There is a serious question as to whether clause 331 amounts to an undue trespass on a significant personal right, and the Committee draws this matter to the attention of the Assembly. The Committee also recommends that the Minister address the issues identified above.

It must be noted that clause 331 applies to any power in chapter 3 to give a direction. For example, subclause 337(1) empowers a police officer or authorised person to "direct a responsible person for a heavy vehicle or heavy combination to give assistance to the officer or person to allow the officer or person effectively to exercise a power under this part". Such assistance "may include helping the police officer or authorised person to … (b) to find and gain access to electronically stored information; …". The information that might thereby be discovered might well have attracted the operation of the privilege against self-incrimination.

Enforcement powers

Division 3.2 of the Bill contains provisions that confer powers of enforcement:

(1) Clause 333 (as elaborated by clauses 334 and 335) confers on police or authorised officers power to enter premises, vehicles, and combinations. The Explanatory Statement (page 18) provides a short account of these provisions that suffers from lack of reference to specific provisions. In one respect, it may not accurately state their effect. The Explanatory Statement states that "[t]he power to inspect premises under clause 333 does not apply to premises that are used for predominantly residential purposes". This may be too narrow, in that subclause 333(3) says: "Also, subsection (1)(a) to (h) does not authorise entry into a part of premises that is being used for residential purposes".

Comment. There is no limitation that the premises must be "used for predominantly residential purposes". Subclause 333(3) is much broader and in circumstances could well apply to prevent the operation of several of the particular provisions in paragraphs 333(1)(a) to (h). For example, "a part of premises that is being used for residential purposes" could well be co-extensive with premises "that are occupied by a responsible person for a heavy vehicle or heavy combination for the business" (paragraph 333(1)(b)(ii)).

The Minister may wish to consider the scope of subclause 333(3). The Committee does not encourage a widening of the Bill to embrace premises that are used for residential purposes, but perhaps some wider rule than that currently stated in subclause 333(3) would accommodate privacy concerns to a practicable application of clause 333.

(2) The powers conferred by clauses 336 to 344 are summarised in three paragraphs of the Explanatory Statement at pages 18 to 19. Again, this short account suffers from lack of reference to specific provisions, and several significant powers are barely addressed. Given the liberty, privacy and property rights that are engaged by these provisions, this is not satisfactory.

Comment. The Committee has reviewed the provisions and concludes that they are in the form usually found in comparable Territory laws. It does not see any significant rights issue arising out of them (subject to what has been noted above concerning the relationship between clause 331 and provisions that empower the giving of directions).

(3) Clause 349 deals with the power of a magistrate to issue a search warrant. The Explanatory Statement states that "[a]uthorised officers may apply to a magistrate for a warrant to enter premises, a vehicle or combination if there are reasonable grounds for suspecting that a thing or activity is or may be connected with an offence against an Australian heavy vehicle road law". This appears to be a misleading description of subclause 349(4), which states that a magistrate may issue a warrant "only if satisfied there are reasonable grounds for suspecting" three particular matters, the first of which is as stated in the Explanatory Statement. No reference is made to the other two matters. The power to issue a warrant appears to be much more limited than as described.

Again, the Explanatory Statement pays no attention to the detail of what warrants authorise and how they may be executed.

Comment. Subject to one point, the Committee has reviewed the provisions and concludes that they are in the form usually found in comparable Territory laws, and it does not see any significant rights issue arising out of them.

The Committee considers that there should be a reference in subclause 349(6) to sections 170 and 171 of the Legislation Act, as there is in subclause 336(1).

(4) As the Explanatory Statement notes, division 3.2.5 (clauses 354-360) "sets out provisions for receipting things seized, moving things seized to another place for examination, providing access for the person who is entitled to possession of the thing, and the return of, or forfeiture of, seized things.

Comment. The Committee has reviewed the provisions and concludes that they are in the form usually found in comparable Territory laws, and it does not see any significant rights issue arising out of them.

Burden of proof

Provisions in criminal laws that impose a legal burden of proof on a defendant to establish the existence of a fact as a condition of establishing a defence engage the presumption of innocence (HRA subsection 22(1)).

(1) The Committee has commented above on subclause 196(4).

(2) The Bill contains in Part 4.3 several clauses that are designed to relieve a party of the need in its case to adduce evidence of particular facts. For example, paragraph 413(a) of the Bill provides:

> In a proceeding for an offence, any of the following statements or allegations in a complaint or charge made by the prosecutor is evidence of the matter:
>
> (a) at a stated time or during a stated period a stated vehicle or combination was a heavy vehicle or heavy combination; … .

Where such provisions are used by the prosecution in a criminal matter, they have the potential to reverse the onus of proof by casting on the defendant an obligation to adduce evidence that the particular fact does not exist.

In all the provisions of the Bill, the averment, or statement, is to be treated only as evidence of a fact, and not as conclusive proof of the fact. The former provision is much less objectionable than the latter.

An Explanatory Statement should provide a justification for such provisions. One consideration relevant to assessing justifiability is whether the matter of fact in issue is or is not contentious. If the latter, the provision is more easily justifiable.

This Explanatory Statement does not offer any justification for these provisions.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister address the issues identified above.

The right to a fair trial – HRA subsection 21(1)

Subclause 501(5) raises a rights issue which has been addressed in several previous reports. It would provide:

> (5) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another territory law.

(By clause 500, "***protected information*** means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else".)

Does subclause 501(5) conflict with the principle that on a trial all relevant evidence is admissible – which principle may be seen as a component of the right to a fair trial stated in HRA subsection 21(1) - and, if it does so conflict, is subclause 50(5) nevertheless justifiable under HRA section 28, at least in part on the basis that it enhances the right to privacy stated in HRA section 12?

HRA section 12 states:

> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily … .

Subsection 21(1) states:

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

The issue arises this way. The ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent, is an element of a fair trial. This is reflected in the common law rule that the starting point for the admission of evidence is that any relevant evidence is admissible.[3] The rule is restated in sections 55 and 56 of the *Evidence Act 1995* (Commonwealth), which applies in Territory judicial proceedings. The rule may be argued to be a component of a "fair" hearing within subsection 21(1).

The provisions of the *Evidence Act 1995* do not however apply where there is an inconsistent Territory law, and subclause 501(5) appears to be inconsistent. This is because this Act does not fall within the words "unless it is necessary to do so for this Act or another territory law" in subclause 501(5). The concept of "territory law" embraces an Act of the Legislative Assembly, but not an Act of the Commonwealth Parliament; (see section 7 of the Legislation Act, and the definition of "law, of the Territory" in Schedule 1).

Thus, if in a judicial proceeding a party sought to adduce evidence of "protected information", and supposing this information was relevant to proof or disproof of issues arising in the particular litigation, and the production of that information could not be said to be necessary for the Road Transport (Mass, Dimensions and Loading) Act, or another territory law, the information could not be adduced by reason of the prohibition in subclause 501(5).

It is strongly arguable that this result engages the right to a fair trial in HRA subsection 21(1) and is indeed inconsistent with it.

[3] See the discussion in *Scrutiny Report No 26* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006.

That is not the end of the matter, for it might be argued that this restriction on subsection 21(1) was justifiable under HRA section 28.[4]

There is no reference to these issues in the Explanatory Statement.

The Committee should add that the rights issue could be avoided were the exception in subclause 501(1) to read "unless it is necessary to do so for this Act, another territory law or another law applying in the territory". For an example of where this approach is taken in an analogous context, see subsection 129(5) of the *Health Professionals Act 2004*.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister address the issues identified above.

Comment on the Explanatory Statement

At many points, the Explanatory Statement does not meet the standards expected. Some particular issues have been identified above.

The explanations provided are largely in the form of a global explanation of the contents of particular subdivisions and subdivisions of the Bill. It is left to the reader to work out the link between the explanation and particular clauses. In many instances, there is no reference to the content of particular clauses.[5] At points, the explanation takes the form of a comment on how a clause will operate, or what its effect will be. At some points, the Explanatory Statement does not state accurately what provisions are contained in a particular subdivision. All this makes it hard to follow the explanation.

This general comment may be illustrated by noting deficiencies in the explanation of subdivision 2.2.3.5 of the Bill.

The clauses in this subdivision are 137 to 140 (not 136 to 140 as stated in the Explanatory Statement).

The explanatory paragraphs are not linked to the particular clauses and subclauses being explained. This makes it hard to follow the explanation.

The first paragraph at page 7 is in the nature of a comment on how it is thought subclauses 137(1) and (2) will operate, rather than an explanation of them. A comment is fine, so long as it is based on an accurate and full explanation. In this case, there appear to be some deficiencies.

Subclause 137(1) states the circumstances in which subclause 137(2) will operate, but there is no reference in the explanation to the factor in paragraph 137(1)(a)(ii).

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[4] The kinds of argument that might be put in justification are reviewed in *Scrutiny Report No 26 of the 6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006.

[5] For example, in the explanation of division 2.2.6, there is no reference to three strict liability offence provisions in clauses 170, 171 and 172.

Subclause 137(2) provides that a police officer or authorised person "may give to the driver … an authorisation to continue the journey". Having regard to the principle of interpretation stated in subsection 146(2) of the Legislation Act, the effect is that the officer has discretion whether to give or not give an authorisation.[6] The first paragraph at page 7 states this result in a roundabout way and suggests that an authorisation will generally be given. There is nothing on the face of subclause 137(2) to warrant this view. Nor is there any indication of what matters might warrant a refusal of an authorisation; perhaps the matters referred to in relation to subclause 137(3) – see below – would be relevant. From a rights perspective, it would be better to redraft subsection 137(2) (and subclause 137(3)) to spell out – if only non-exhaustively – the matters relevant to an exercise of these powers.

Subclause 137(3) is explained in the third paragraph on page 7. It would be better placed as the second paragraph. This provision in effect confers an open-ended discretion on the relevant police officer or authorised person. The explanation is useful in that it indicates how the power might be exercised. It states:

> The officer may attach such conditions to the authorisation as are necessary, in the officer's opinion and within administrative guidelines, to avoid risk to public safety, public assets (roads, road furniture and road infrastructure), the environment or public amenity

It is not however apparent why these factors could not be stated in subclause 137(3).

It is stated correctly that clause 138 would create a strict liability offence, but no justification for derogating from the principle that an offence will contain a fault element is offered.

These problems with the explanation of division 2.2.3.5 are illustrative of problems that arise with many of the explanations. The Committee must state again that it is important for a number of purposes – including of course providing information to the public about the content and purpose of a bill (and then of the Act in so far as the provisions of the Bill are enacted) –that an Explanatory Statement provide a full explanation of the provisions of the Bill, and, if practicable, of why the provisions are proposed and of how they will work.

In these respects, the Committee commends the Explanatory Statement to the Duties Amendment Bill 2009.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

[6] See subsection 146(2) of the Legislation Act. Section 146 is a "determinative provision", and thus its effect where the expression "may" is found in another law may be displaced only expressly or by "manifest contrary intention" in that other law. It appears that neither is the case in relation to subclause 137(2) of the Bill.

Disallowable Instrument DI2009-33 being the Public Place Names (Casey) Determination 2009 (No. 3) made under section 3 of the *Public Places Names Act 1989* **determines the names of 10 new roads in the Division of Casey.**

Disallowable Instrument DI2009-34 being the Children and Young People (Research) Standards 2009 (No. 1) made under section 887 of the *Children and Young People Act 2008* **declares that the Research Standards for the ACT apply to the research provisions at section 808 of the Act.**

Disallowable Instrument DI2009-38 being the Planning and Development (Amount payable for, and period of, further rural lease) Determination 2009 (No. 1) made under sections 280 and 281 of the *Planning and Development Act 2007* **determines the amount payable for a further rural lease and the period of a further rural lease.**

Disallowable Instrument DI2009-39 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 1) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **reappoints a specified person as a member of the ACT Accreditation and Registration Council, representing the higher education expertise position.**

Disallowable Instrument DI2009-40 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 2) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **reappoints a specified person as a member of the ACT Accreditation and Registration Council, representing the interests of employers.**

Disallowable Instrument DI2009-41 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 3) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **appoints a specified person as a member of the ACT Accreditation and Registration Council, representing the interests of providers of industry training advisory services.**

Disallowable Instrument DI2009-42 being the Education (Government Schools Education Council) Appointment 2009 (No. 1) made under section 57 of the *Education Act 2004* **appoints a specified person as a member of the Government Schools Education Council, representing school boards.**

Disallowable Instrument DI2009-43 being the Education (Government Schools Education Council) Appointment 2009 (No. 2) made under section 57 of the *Education Act 2004* **appoints a specified person as a member of the Government Schools Education Council, representing preschool parents.**

Disallowable Instrument DI2009-44 being the Education (Government Schools Education Council) Appointment 2009 (No. 3) made under section 57 of the *Education Act 2004* **appoints a specified person as a community member of the Government Schools Education Council.**

Disallowable Instrument DI2009-46 being the Public Sector Management Amendment Standards 2009 made under section 251 of the *Public Sector Management Act 1994* **amends the *Public Sector Management Standards 2006* to give effect to the Indigenous Traineeship Program.**

Disallowable Instrument DI2009-47 being the Legislative Assembly (Members' Staff) Continuation of Employment Direction 2009 made under subsection 13(5) of the *Legislative Assembly (Members' Staff) Act 1989* **determines the employment of a specific class of persons to have been continuous during the break period between the polling day for the 2001 general election and the date of commence of a new employment agreement on 12 or 13 November 2001, for the purpose of calculating the termination entitlement.**

Disallowable Instrument DI2009-48 being the Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment Of Members' Staff 2009 made under subsection 13(5) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2005-291 and extends of the period of deemed continued employment of a specific class of employees from the present two weeks to four weeks after polling day.**

Disallowable Instrument DI2009-50 being the Education (Non-Government Schools Education Council) Appointment 2009 (No. 1) made under section 109 of the *Education Act 2004* **appoints a specified person as a community member of the Non-Government Schools Education Council.**

Disallowable Instrument DI2009-51 being the Education (Non-Government Schools Education Council) Appointment 2009 (No. 2) made under section 109 of the *Education Act 2004* **appoints a specified person as a community member of the Non-Government Schools Education Council.**

Disallowable Instrument DI2009-52 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 1) made under section 31 of the *Canberra Institute of Technology Act 2087* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the student body.**

Disallowable Instrument DI2009-53 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 2) made under section 31 of the *Canberra Institute of Technology Act 2087* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2009-54 being the Public Sector Management Amendment Standards 2009 (No. 2) made under section 251 of the *Public Sector Management Act 1994* **amends the *Public Sector Management Standards 2006* by updating rates for motor vehicle allowances and the overtime duty meal allowance.**

Disallowable Instruments—Comment

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

Is this instrument of appointment valid?

Disallowable Instrument DI2009-35 being the Territory Records (Advisory Council) Appointment 2009 (No. 1) made under section 44 of the *Territory Records Act 2002* **appoints specified persons as members of the Territory Records Advisory Council, representing Territory agencies and community associations interested in historical or heritage issues.**

This instrument appoints 3 specified persons as members of the Territory Records Advisory Council. The Explanatory Statement for the instrument states:

Mr Andrew Kefford has been nominated to represent Territory agencies. Mr Kefford is a public servant and appointed in accordance with Section 227 2(a) of the *Legislation Act 1991*. Mr Kefford is appointed for a three year term. Although it is not a legislative requirement to appoint Mr Kefford by disallowable instrument, this has been done to provide a complete list of Council members on the ACT Legislation Register.

The Committee notes that Division 19.3.3 of the *Legislation Act 2001* deals with the making of statutory appointments. Section 229 of the Legislation Act provides that an instrument making (or evidencing) an appointment to which Division 19.3.3 applies is a disallowable instrument. That provision gives the Committee the jurisdiction to scrutinise and report on instruments of appointment. It is important to note, however, that the Committee's jurisdiction is limited by section 227 of the Legislation Act, which defines the application of Division 19.3.3. It provides:

227 Application of div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

(c) a person to a statutory position if the only function of the position is to advise the Minister.

This means that Division 19.3.3 (including the requirement that appointments be by disallowable instrument) does not apply to the appointment of public servants to statutory positions. It is for this reason that the Committee generally prefers that the Explanatory Statement to an instrument of appointment indicate clearly that the persons appointed are not public servants.

In this case, the Explanatory Statement contains no indication (other than by implication) as to whether or not 2 of the specified persons are public servants. In relation to the remaining person, the Explanatory Statement indicates that the person is a public servant, which means that there is no requirement that the person be appointed by disallowable instrument.

While the Committee appreciates the argument given for including the public servant appointment in the instrument (ie to provide a complete list of Council members on the ACT Legislation Register), the Committee suggests that this practice may cause more confusion than it avoids, in the sense that it complicates the situation faced by the Legislative Assembly should there be any possibility of the Assembly seeking to disallow the instrument of appointment. The Committee would be interested in the Minister's views on the practical issues arising from including a non-disallowable appointment in an instrument of appointment.

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

Why has this instrument been re-made?

Disallowable Instrument DI2009-37 being the Utilities Exemption 2009 (No. 1) made under section 22 of the *Utilities Act 2000* **exempts a specified water services provider from the requirement for a licence in relation to a water utility service.**

Disallowable Instrument DI2009-55 being the Utilities Exemption 2009 (No. 2) made under section 22 of the *Utilities Act 2000* **revokes DI2009-37 and exempts a specified water services provider from the requirement for a licence in relation to a water utility service.**

The first of the instruments mentioned above was made on 24 March 2009. It exempts Outward Bound Australia, a water services provider, from the requirement that a water utility service have a licence. The second of the instruments mentioned above was made 3 weeks later, on 14 April 2009. It revokes the first instrument and, in effect, re-makes it.

There is nothing in the Explanatory Statement for the second instrument to indicate why it has been necessary to revoke and re-make the first instrument so soon after it was made. The Committee can identify differences between the first and second instruments. The most obvious is that, unlike the second instrument, the first instrument contains no commencement provision.

The Committee considers that Explanatory Statements are an important means by which the makers of instruments explain to the Legislative Assembly what an instrument does and why the instrument is required. In situations where an instrument is revoked and re-made soon after having been made, the Committee expects that the Explanatory Statement for the later instrument would explain why the revocation and re-making was required. In the absence of that explanation, the Committee will generally be required to seek that explanation from the Minister.

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

Is this a disallowable instrument?

Disallowable Instrument DI2009-45 being the Education (Government Schools Education Council) Appointment 2009 (No. 4) made under section 57 of the *Education Act 2004* **appoints a specified person as a community member of the Government Schools Education Council.**

This instrument appoints a specified person as a "community" member of the Government Schools Education Council. The Explanatory Statement for the instrument states:

> This instrument appoints Dr Tiemin Wu for three years from the day after notification to the position of Community member. This is a reappointment and the determination is a disallowable instrument for the purpose of division 19.3.3 of the *Legislation Act 2001*.

The Committee notes that Division 19.3.3 of the *Legislation Act 2001* deals with the making of statutory appointments. Section 229 of the Legislation Act provides that an instrument making (or evidencing) an appointment to which Division 19.3.3 applies is a disallowable instrument. That provision gives the Committee the jurisdiction to scrutinise and report on instruments of appointment. It is important to note, however, that the Committee's jurisdiction is limited by section 227 of the Legislation Act, which excludes public servant appointments from the operation of Division 19.3.3 (including the requirement that appointments be made by disallowable instrument). As a result of this exemption, the Committee generally prefers that the Explanatory Statement to an instrument of appointment expressly indicate that the person appointed is not a public servant.

In the present case, there is no indication as to whether or not the person appointed is a public servant. The fact that the person is being *re-appointed* may lead to an assumption that the person is not a public servant, on the basis that the person would not have been appointed (by disallowable instrument) in the first place if they were a public servant. This assumption is not able to be made with any great confidence, however. There is nothing in either the instrument or the Explanatory Statement to indicate the person was originally appointed by legislative instrument (and the Committee's examination of the ACT Legislation Register has not identified such an earlier instrument). In any event, there is no basis for assuming that the person's status has not changed since the original appointment. As a result, the Committee considers that, even for re-appointments, it is appropriate that the Explanatory Statement for an instrument of appointment expressly address the issue of whether or not the person appointed is a public servant.

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

Drafting issue – Explanatory Statement

Disallowable Instrument DI2009-49 being the Road Transport (Public Passenger Services) (Authorised Fixed Fare Hiring) Approval 2009 (No. 1) made under section 142A of the *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2008-39 and approves hirings by Nightlink taxis between midnight Fridays and 6.00 am Saturdays, or between midnight Saturdays and 6.00 am Sundays to be authorised fixed fare hirings and revises the fixed fare structure.**

The Committee notes that the Explanatory Statement for this instrument contains the following Note:

> ***Note:***
>
> The reference to the Act in the title 'section 142A (Exemption from operation of taxi meter and metered fares for certain hirings – Act s85 (1)) is incorrect.
>
> Amendments made to the *Road Transport (Public Passenger Services) Act 2001*, in 2006, to include provisions for Demand Responsive Services, resulted in renumbering of some provisions including s85(1) which has been renumbered as s128 (1).

The Committee is perplexed by this Note. First, the Committee assumes that the quotation marks that are opened at 'section 142A' should be closed at 'Act s85(1))'. Second, the Committee assumes that the Note is intended to indicate that the heading to section 142A of the *Road Transport (Public Passenger Services) Regulation 2002*, under which the instrument is made, incorrectly refers to subsection 85 (1) of the *Road Transport (Public Passenger Services) Act 2001* as the power to make regulations exempting persons or vehicles from provisions of the Act.

If the second assumption is correct, the Committee is perplexed that the (now) error in the heading to section 142A of the Regulations need necessarily be repeated in the formal part of this instrument (thereby requiring the insertion in the Explanatory Statement of the Note). The Committee seeks the Minister's advice as to why the formal part of this instrument could not correct the (now) incorrect reference to subsection 85 (1) of the Act.

Subordinate Laws—No comment

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

Subordinate Law SL2009-10 being the Domestic Violence and Protection Orders Regulation 2009 made under the *Domestic Violence and Protection Orders Act 2008* **determines procedures for the administration of protection order applications by ACT Magistrates, the ACT Magistrates Court Registrar and Deputy Registrars.**

Subordinate Law SL2009-11 being the Court Procedures Amendment Rules 2009 (No. 1) made under section 7 of the *Court Procedures Act 2004* **empowers the registrar to make consent orders under part 5 of the *Domestic Violence and Protection Orders Act 2008*.**

Subordinate Laws—Comment

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

Limitation of third party appeals

Subordinate Law SL2009-14 being the Planning and Development Amendment Regulation 2009 (No. 4), including a regulatory impact statement made under the *Planning and Development Act 2007* **specifies that the Chief Minister may declare a program administered by the Territory or Commonwealth to be a declared funding program.**

Section 5 of this subordinate law adds 2 new items to Schedule 2 of the *Planning and Development Regulation 2008*. As noted in the Explanatory Statement for the subordinate law, the effect of including these new items - which refer to the construction of new buildings and the upgrading of existing buildings in ACT schools, under the Commonwealth *Nation Building and Jobs Plan* - is to exclude third party appeals in relation to those developments. This being so, the amendments might be considered to unduly trespass on rights previously established by law and/or to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions, contrary to principles (b) (ii) and (iii), respectively, of the Committee's terms of reference.

The Committee notes that the Explanatory Statement for the subordinate law addresses this limitation of third party appeal rights. It does so by reference to the *Human Rights Act 2004* (**HRA**), stating (in part):

> To the extent that schedule 2 of the regulation limits any rights afforded by the HRA, these limitations must meet the proportionality test of section 28 of that legislation. The schedule serves to improve the development assessment process within the Territory by ensuring that only matters which have the potential to significantly impact on residential areas are open to third party appeals. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. Rights of judicial review under the *Administrative Decisions (Judicial Review) Act 1989* remain.

> On balance, the social and economic benefits that will flow to the ACT community from securing the substantial funding available under the Commonwealth Plan for school building projects outweigh the limited foregoing of third party appeal rights on development assessment decisions. This is especially the case given that the restrictions are limited to projects on existing school campuses; time limited to 31 March 2013; and restricted to projects that are funded by declared funding programs (i.e. Commonwealth or Territory economic stimulus programs).
>
> Schedule 2 achieves an appropriate balance between the general benefit to the ACT community of facilitating development and the protection of the interests of residents and others likely to be affected by such development. In all these circumstances, the proportionality test of section 28 is met.

The Explanatory Statement also notes that there are already a range of matters specified in Schedule 2 in relation to which third part appeals are excluded.

It is a matter for the Legislative Assembly as to whether or not the limitation of third party appeal rights is justified in this case.

Extension of exemption from development approval requirements

Subordinate Law SL2009-15 being the Planning and Development Amendment Regulation 2009 (No. 5), including a regulatory impact statement made under the *Planning and Development Act 2007* **expands the current exemption applying to development proposals for single dwellings in new residential estates to development proposals for single dwellings in any residential zone.**

Section 7 of this subordinate law amends Schedule 1 of the *Planning and Development Regulation 2008*, adding to the list of "straightforward" developments that are exempt from the requirement that a development approval (**DA**) be obtained in relation to each development. This, in turn, limits the capacity for public consultation and comment on proposed developments.

The subordinate law expands the exemption that currently applies to development proposals for single dwellings in new residential estates (set out in Schedule 1, section 1.100 of the Planning and Development Regulation) to development proposals for single dwellings in <u>any</u> residential zone, provided that the dwelling complies with the relevant Code and also that there would only be one dwelling on the block. The Explanatory Statement to the subordinate law states:

> The amending regulation therefore extends the same rights currently enjoyed by people building a single dwelling on new residential land to other members of the community who live in established residential zones.

This subordinate law might be considered to unduly trespass on rights previously established by law, contrary to principle (b) (ii) of the Committee's terms of reference, in the sense that it would remove from the general public a right to be comment on the development proposals included in the further exemption. That said, it might also be considered to confer a benefit (and, indeed, a benefit currently enjoyed by other property owners) on property owners who must currently obtain a DA in relation to their development proposal, by removing what is presumably a relatively onerous requirement.

The Committee notes that the regulatory impact statement for the subordinate law states that

> [the] general principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to. Similarly, the regulation being amended by the proposed law has been reviewed by the Human Rights section of the ACT Department of Justice and Community Safety and no issues were identified.
>
> The matter[s] that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles are:
>
> ***A reduction in ability to comment on proposed development***
>
> Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). Public notification can be either *minor* or *major*, depending on the particular development proposal.
>
> The proposed law, by broadening the circumstances in which development may occur without development approval, will impact on the ability to comment on such development. Minor breaches of DA exemption rules that have been addressed by an exemption declaration will mean that such development is not open to comment.
>
> Further, there is no public notification process for DA exempt development as it does not require development approval.
>
> Exempt development does not have a public notification requirement because during the development of the Act and the relevant Territory Plan Codes extensive public consultation was conducted. Therefore, the resultant rules around exempt development are designed to deliver acceptable community outcomes i.e. they do not create any material detriment.
>
> There may be discontent that more exempt development is being allowed and this could be perceived as an erosion of community opportunity to comment on development proposals. However, it is important to note that Code compliant single dwelling development applications are currently in the Code track and as such, not subject to public notification or third-party appeals.
>
> The impacts of the proposed law are minimal and justified for the following reasons:
>
> (1) the exemption has been operating since 31 March 2008 for single residential dwellings in new estates. The range of things prescribed in Schedule 1 has now been successfully used within the community since 31 March 2008. During this time, the authority has been monitoring the performance of the exempt development process, in particular, exemptions for single dwellings in new residential estates, and no significant compliance issues have been identified. The Land Regulation and Audit Unit of the authority audited 57 of 803 exempt single residential dwellings that were registered for building approval and found no significant issues of concern in relation to compliance with the Territory Plan code.
>
> (2) the proposed law will encourage enhancement of existing housing stock thus reducing demand for new housing in new areas.
>
> (3) the DA exemption declaration process will allow for small discrepancies to be approved without having to go through the DA process. The regulation includes rules to ensure that such matters are minor only and do not affect third parties and do not have significant environmental impacts. This minimal impact is justified by the gains in efficiency and clarity noted above.

It is a matter for the Legislative Assembly as to whether or not the extension of the exemptions from the DA requirements can be justified, on the basis of the above.

REGULATORY IMPACT STATEMENTS

The Committee has examined regulatory impact statements in relation to the following subordinate laws and offers the following comments on them:

Subordinate Law SL2009-14 being the Planning and Development Amendment Regulation 2009 (No. 4), including a regulatory impact statement made under the *Planning and Development Act 2007* **specifies that the Chief Minister may declare a program administered by the Territory or Commonwealth to be a declared funding program.**

Subordinate Law SL2009-15 being the Planning and Development Amendment Regulation 2009 (No. 5), including a regulatory impact statement made under the *Planning and Development Act 2007* **expands the current exemption applying to development proposals for single dwellings in new residential estates to development proposals for single dwellings in any residential zone.**

These subordinate laws are both accompanied by regulatory impact statements. Principle (b) of the Committee's terms of reference requires it to examine regulatory impact statements, to determine whether or not they meet the technical or stylistic standards expected by the Committee.

Section 35 of the *Legislation Act 2001* sets out 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.

The Committee considers that the Explanatory Statements accompanying the subordinate laws listed above meets both the requirements of section 35 of the Legislation Act and also the technical and stylistic standards expected by the Committee. Further, the Committee considers that the regulatory impact statement for the second of the subordinate laws (ie Subordinate Law SL2009-15) contains material that might have been included in the Explanatory Statement, as justification of the limitation of the opportunity for public comment that the subordinate law enacts.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Territory and Municipal Services, dated 4 May 2009, in relation to comments made in Scrutiny Report 5 concerning the Animal Diseases Amendment Bill 2009.
- The Treasurer, dated 7 May 2009, in relation to comments made in Scrutiny Report 4 concerning Subordinate Law SL2008-94 being the Territory-owned Corporations Regulation 2008 (No. 2).
- The Minister for Planning, dated 7 May 2009, in relation to comments made in Scrutiny Report 4 concerning Disallowable Instrument DI2009-06 being the Public Place Names (Bonner) Determination 2009 (No. 1).
- The Minister for Transport, dated 11 May 2009, in relation to comments made in Scrutiny Report 5 concerning Disallowable Instrument DI2009-24 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2009 (No. 1).
- The Chief Minister, dated 29 May 2009, in relation to comments made in Scrutiny Report 6 concerning Disallowable Instruments:
  - DI2009-27, being the Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009; and
  - DI2009-28, being the Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 1).

- The Minister for Planning, dated 2 June 2009, in relation to comments made in Scrutiny Report 6 concerning Disallowable Instrument DI2009-26 being the Building (ACT Appendix to the Building Code—2008 and 2009 editions) Determination 2009.

The Committee wishes to thank the Chief Minister, the Minister for Territory and Municipal Services, the Treasurer, the Minister for Planning and the Minister for Transport for their helpful responses.

COMMENT ON GOVERNMENT RESPONSE

In a letter dated 29 May 2009, the Chief Minister responded to comments made by the Committee in its *Scrutiny Report No 6* of 2009, in relation to 2 disallowable instruments (DI2009-27 and DI200928) made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990*. The Chief Minister's response appears to indicate that the comments made by the Committee have been accepted and that, as a result, the instruments in question have been re-made. When the Committee last checked the ACT Legislation Register, however, there was no sign of any re-made instruments. The Committee would appreciate the Chief Minister's confirmation that, in fact, the instruments in question have been re-made.

Vicki Dunne, MLA
Chair

June 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 DI2008-213 - Health Professionals (Medical Radiation Scientists Board) Appointment 2008 (No. 2)
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 5, dated 30 March 2009
Subordinate Law SL2009-3 - Planning and Development Amendment Regulation 2009 (No. 1)

Report 6, dated 4 May 2009
Building (Energy Efficient Hot Water Systems) Legislation Amendment Bill 2009 (PMB)
Disallowable Instrument DI2009-29 - Civil Law (Wrongs) Professional Standards Council Appointment 2009 (No. 1)
Road Transport (Third-Party Insurance) Amendment Bill 2009

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

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

Dear Mrs Dunne

I refer to your Committee's comments in relation to the *Animal Diseases Amendment Bill 2009* (the Bill) contained its Scrutiny Report No 5 of 30 March 2009.

I note with approval the comments of your Committee with respect to clause 19 of the Bill. Your Committee correctly observes that the clause is intended to clarify what constitutes a reasonable time at which a vehicle, in use on a public road, can be entered. As the Committee observed, this could be better dealt with in the Bill's Explanatory Statement.

Thank you for also drawing to my attention the spelling error in the last line of the explanation of clause 5 in the Bill's Explanatory Statement.

I also note the Committee's comments in relation to the explanation of clause 13 contained in the Bill's Explanatory Statement.

Given the Committee's comments I have arranged for a Revised Explanatory Statement to be prepared for the Bill.

I thank the committee for their comments.

Yours sincerely

Jon Stanhope MLA
Minister for Territory and Municipal Services

- 4 MAY 2009

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Katy Gallagher MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR HEALTH
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR WOMEN

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

I am writing in response to comments in the Scrutiny of Bills Report No 4 of 23 March 2009 regarding *Subordinate Law SL 2008-49* being the Territory-owned Corporations Regulation 2008(No.2) made under the *Territory-owned Corporations Act 1990.* This regulation provides for the removal of Rhodium Asset Solutions Limited (Rhodium) from Schedule 1 of the Act on a date to be prescribed by regulation.

I note that the Committee considered the Explanatory Statement warranted a more detailed explanation of the need for a further postponement of the commencement date for Rhodium to be removed from Schedule 1 of the *Territory-owned Corporations Act 1990.*

At the time of preparation of the Explanatory Statement it was considered that the unforeseen and unusual circumstances that had beset the sale of Rhodium were generally well known. However, I accept the Committee's point that the Explanatory Statement should have provided more detail about the reasons for again delaying the commencement date for the relevant provisions.

I would like to take this opportunity to provide the following information by way of background to the Committee.

The *Territory-owned Corporations Amendment Act 2007* was enacted to enable Rhodium Asset Solutions Limited to be removed from Schedule 1 of the *Territory-owned Corporations Act 1990* at a date to be fixed by the Treasurer according to when the company would be sold.

Although the Amendment Act was prepared in anticipation that Rhodium would be sold during 2007, negotiations with the proposed buyer were still underway and it was realised that there was a possibility the sale could be delayed for an indefinite period. It was important therefore that the legislative amendment provided a mechanism that would avoid the prospect of Rhodium inadvertently being excluded from the provisions of the *Territory-owned Corporations Act 1990* unless it was about to be sold or wound up.

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As it turned out, there evolved a unique set of circumstances that served to impede the proposed sale, not least of which was the international credit squeeze, which we now know was a precursor to the onset of the global financial crisis. The sudden decision by the Commonwealth Government in October 2007 to ban Rhodium's main customer base from using reverse novated leases also had an adverse impact on the proposed sale. As did the decision, in the same month, by the major car manufacturers to withdraw Government pricing discounts for vehicles financed through reverse novated leases.

Despite these setbacks, assurances were given that the proposed buyer remained committed to the sale.

Regrettably, it became apparent by June 2008 that the sale would not proceed because the proposed buyer was unable to complete the transaction in a manner acceptable to the Territory.

Although efforts to sell the company outright were unsuccessful, the Government is intent on selling each of Rhodium's main undertakings before the company is wound up. However, the actual timing remains difficult to predict and will depend on the outcome of the various procurement processes that have recently been initiated.

I expect that before the end of the year the Government will be in a position to consider whether it is necessary to again vary the commencement date for removing Rhodium from Schedule 1 of the *Territory-owned Corporations Act 1990.*

I trust that this information has provided the Committee with a better insight into the reasons for the delays in the commencement of the relevant provisions.

I appreciate the comments that have been provided by the Committee and undertake to have more care taken in drafting future Explanatory Statements.

Yours sincerely

Katy Gallagher MLA
Treasurer
- 7 MAY 2009

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mrs V Dunne MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs Dunne

Scrutiny Report No. 4— Disallowable Instruments under the Public Place Names Act 1989

Thank you for the Scrutiny Report No 4 of 23 March 2009 concerning Disallowable Instrument DI2009-06 being the Public Place Names (Bonner) Determination 2009 (No. 1)

I appreciate the Committee's positive comments on this matter.

Yours sincerely

Andrew Barr MLA
Minister for Planning

07 MAY 2009

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Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

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

I refer to the Scrutiny of Bills Report No 5 dated 30 March 2009 regarding *Disallowable Instrument DI2009-24.*

DI2009-24 – Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2009 (No 1).

The Committee commended the inclusion of a statement in the Explanatory Statement advising that the retrospective commencement is not in conflict with section 76 of the *Legislation Act 2001.*

I thank the committee for their comment.

Yours sincerely

Jon Stanhope MLA
Minister for Transport

11 MAY 2009

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Jon Stanhope MLA

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MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT

MEMBER FOR GINNINDERRA

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

Dear Mrs Dunne

I refer to the Scrutiny Report No 6 of 2009 in which the Committee asked for advice about how (if at all) section 47 of the *Legislation Act 2001*, which deals with the incorporation of material by reference, applies in relation to 2 disallowable instruments made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990*. The instruments, DI2009-27 and DI2009-28, exempt certain heavy vehicles and drivers from compliance with particular dimension and mass requirements.

Section 47 of the *Legislation Act 2001* is applicable because the *Road Transport (Dimensions and Mass) Act 1990* authorises the making of the instruments (see s 47 (1)).

The first instrument creates the exemption by reference to Australian Design Rule 80/01 or a later version of the rule. Consequently, both that version of the design rule and any later versions are notifiable instruments (see the Legislation Act, section 47 (6)). Both instruments apply certain United Nations Economic Commission for Europe Regulations (the regulations). Because the regulations are not applied as in force from time to time, the regulations are applied as in force when the instruments were made (see section 47 (4) (b)). As such, the text of the regulations, as in force when the determinations were made, are notifiable instruments (see section 47 (5)). However, neither the design rule nor the regulations have been notified on the Legislation Register.

The Australian Design Rules are available on the Federal Register of Legislative Instruments and the regulations are available on the United Nations Economic Commission for Europe's website.

Section 47 (7) of the *Legislation Act 2001* allows a disallowable instrument to provide that section 47 (5) or (6) does not apply to the instrument. The instruments have been remade incorporating a provision displacing the operation of the relevant provisions of section 47. Both instruments now apply the regulations as in force from time to time. Consequently, both instruments displace the operation of section 47 (6) of the Legislation Act. The second instrument now applies the 7th edition of the *Australian Code for the Transport Of Dangerous Goods by Road and Rail* (see the definition of ***dangerous goods***)

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as in force when the instrument is made. Consequently, that instrument also displaces the operation of section 47 (5) of the Legislation Act. The remade instruments also incorporate (as appropriate) new definitions of ***ADR*** and ***UN ECE*** and notes indicating where the design rules and regulations may be accessed and the effect of section 47 of the *Legislation Act 2001*.

I thank the Committee for drawing this matter to my attention.

Yours sincerely

Jon Stanhope MLA
Chief Minister

29 MAY 2009

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Legal Affairs
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CANBERRA ACT 2601

Dear Mrs Dunne

Scrutiny Report No. 6— Disallowable Instrument under the Building Act 2004

I refer to Scrutiny Report No. 6 and the Committee's comments concerning Disallowable Instrument DI2009-26 being the Building Act (ACT Appendix to the Building Code - 2008 and 2009 editions).

The Committee's comments in relation to accessibility of legislation and the minor typographical error in subsection 4(1) of the instrument are noted.

I would like to thank the Committee for its consideration of this item of subordinate legislation.

Yours sincerely

Andrew Barr MLA
Minister for Planning

02 JUN 2009

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