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

27 APRIL 2010

Report 22

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)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

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

ROLE OF THE COMMITTEE

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

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BILLS

Bills—No comment

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

EMERGENCIES (BUSHFIRE WARNINGS) AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Emergencies Act 2004* to insert provisions concerning the preparation and promulgation of emergency warnings for bushfires.

STATUTE LAW AMENDMENT BILL 2010

This a Bill for an Act to amend a number of Acts and regulations for statute law revision purposes only.

WATER RESOURCES AMENDMENT BILL 2010

This a Bill for an Act to amend the *Water Resources Act 2007* to facilitate the transfer of surface water and groundwater on Commonwealth land in the ACT from Commonwealth management to regulation through the Act.

Bills—Comment

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

CRIMES (SENTENCE ADMINISTRATION) AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Crimes (Sentence Administration) Act 2005* to provide for a system for the enforcement of court-imposed fines that would encompass the following options to assist in their recovery: instalment plans; income assessment through written notice or under warrant; the seizure and subsequent sale of personal property; negative reporting to a credit provider; financial institution deduction orders; garnishee orders; voluntary community work orders; and imprisonment. In addition, an entity that has had a reparation order made in their favour may enter into an agreement with the chief executive to have that order enforced through this scheme.

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

Given the large number of penalties in the form of a fine imposed by the courts, and the frequency of non-payment of those fines, this scheme would have a significant impact on the administration of criminal justice. Although neither the Explanatory Statement nor the Presentation Speech makes any reference to the *Human Rights Act 2004*, or to other rights, the Committee has identified a number of provisions of the Bill that appear to engage these rights.

The Compatibility Statement merely asserts the opinion of the Attorney-General that upon his examination of the Bill, as presented to the Legislative Assembly, it is consistent with the Human Rights Act.

This report will, by drawing extensively on the Explanatory Statement, summarise key provisions of the Bill and insert discussion of rights issues raised by some of these provisions.

Penalty notices, default notices and payment arrangements

1.1 Proposed section 116C. Where a convicted offender before the Supreme Court is given a fine, that court's registrar must give the registrar of the Magistrates Court a copy of the conviction or order. When the latter receives such a copy, he or she must then issue the offender with a penalty notice for the fine. Where an offender is given a fine as part of a conviction in the Magistrates Court, the notice of conviction or order must contain a penalty notice.

(Henceforth, a reference to the "registrar" is to the registrar of the Magistrates Court.)

1.2 Proposed section 116D. An offender on whom a fine is imposed must give the registrar details of his or her home address and postal address within 7 days of the fine being imposed, and notify any change of address.

This provision engages the right to privacy in HRA paragraph 12(a), but in the circumstances the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.3 Proposed section 116E. The registrar may write to a relevant person to obtain information held by the person about an address of an offender who is liable to pay a fine. The relevant person must comply with the request as far as practicable. A "relevant person" is the chief police officer; the housing commissioner; the chief executive of an administrative unit and ACTEW Corporation Limited or a territory entity prescribed by regulation.

1.3.1 The committee raises for consideration the question whether "relevant person" should embrace the housing commissioner; the chief executive of an administrative unit and ACTEW Corporation Limited. In particular, the Committee is concerned that information held by the housing commissioner relates only to certain classes of public housing tenants.

This provision engages the right to privacy in HRA paragraph 12(a), but in the circumstances the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.4 Proposed section 116G. If after the due date for the payment of a fine there is any amount outstanding, the offender must pay an administrative fee determined under the *Court Procedures Act 2004*, in addition to the outstanding amount of the fine.

1.5 Proposed section 116H. If a person defaults on a fine (or any relevant administrative fee) the chief executive must send that person (the fine defaulter) a default notice (although not before 28 days after the due date for payment of the fine or fee).

1.6 Proposed section 116I. Amongst other matters, a default notice must explain that a payment arrangement may, on application to the chief executive, be approved in accordance with proposed section 116K, and list the enforcement measures that may or must be imposed against the defaulter. A default notice "may" also specify details regarding a fine defaulter's property or financial circumstances that are required if a fine defaulter wants to make an application for a payment arrangement under proposed section 116K.

The Committee recommends that the Explanatory Statement explain why the chief executive should have discretion to specify details regarding a fine defaulter's property or financial circumstances in the default notice.

1.7 Proposed section 116J. If after 14 days of being sent a default notice a person has not paid the outstanding fine or entered into a payment arrangement with the chief executive, the chief executive must send the person a reminder notice to the person's last known address.

1.8 Proposed section 116K. The chief executive may approve an application for a payment arrangement for either further time to pay an outstanding amount of a fine or administrative fee (including an instalment of such an amount);[1] or payment of an outstanding amount of a fine or administrative fee by instalment. If a payment arrangement in relation to a fine for which a penalty notice or default notice has been issued is approved, the chief executive must update the penalty notice or default notice to reflect any relevant terms of the agreement.

1.8.1 If the chief executive approves a payment arrangement for further time to pay a fine or instalment and that arrangement is inconsistent with an order about the payment of the fine made by the court that imposed the fine, the court order has no effect (proposed subsection 116K(3)).

1.8.2 The Explanatory Statement argues that "[t]his reflects the change of responsibility for the administration of the fine from the originating court to the chief executive". There is however a question whether action taken by the chief executive that is inconsistent with the terms of a court order is only a matter of "administration of the fine", or, on the other hand, is a substantive alteration of the court order. On the face of it, the latter is the appropriate description. Normally, if the government wishes to change the substance of a court order it must do so through the system for appeals to and/or review of court decisions. This normal practice illustrates an aspect of the doctrine of the separation of powers between the judiciary and the other arms of government. In these circumstances, the issue might appear to be of minor significance, but any apparent derogation from the role of the courts should be explained and justified.

The Committee draws this separation of powers issue to the attention of the Assembly and recommends that the Minister respond.

[1] An arrangement for further time to pay can also be made for an overdue amount under a previous arrangement.

Fine enforcement action – proposed Part 6A.3

Reporting fine defaulters

1.9 Proposed section 116L. Proposed Part 6A.3 applies to person who has been sent a default notice and reminder notice and has not paid a fine after 28 days of the default notice being sent or entered into a payment arrangement, and also to a person who has entered into a payment arrangement but has not complied with the arrangement.

1.10 Proposed section 116M. The chief executive must give written notice to the road transport authority if a fine defaulter does not pay an outstanding amount 28 days after being sent a default notice.

1.10.1 The Explanatory Statement states:

> After receiving notice from the chief executive, the road transport [authority] will suspend the fine defaulter's drivers licence or prevent a person from holding a drivers licence if they do not currently hold one. If a person is a responsible person of a motor vehicle, the road transport authority may also suspend the vehicle registration.

The Explanatory Statement does not explain the legal basis for the road transport authority to take these steps.

The Committee recommends that the Explanatory Statement explain the legal basis for the road transport authority to suspend a driver's licence or a vehicle registration.

1.10.2 An explanation of why proposed section 116M is included in the Bill is found in the Presentation Speech. The Minister states that suspension of the defaulter's driver's licence, and the suspension of the registration of a vehicle in the name of the defaulter, is "preliminary action … to encourage payment of the fine". He adds that "if a fine remains unpaid after a person has had their licence and registration suspended and their details given to a credit provider, the next phases of the fine enforcement scheme will be initiated".

1.10.3 There is a question whether proposed section 116M (presumably read with some other law) engages HRA paragraph 10(1)(b), which reads:

> (1) No-one may be—
>
> (b) treated or punished in a cruel, inhuman or degrading way.

It must be noted that the notion of "treatment" is independent of the notion of "punishment", and in accordance with general principle, will be interpreted generously. Just how far it will extend is problematic, but it may be argued that taking HRA section 10 as a whole, "treatment" embraces a criminal-law related interference with a person's interests, including property interests[2] and reputation.

[2] A Butler and P Butler, *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, 2005) paragraph 10.9.6.

1.10.4 On this basis, the application of proposed section 116M results in the "treatment" of a fine defaulter. Is, however, the specific nature of this treatment – that is, the suspension of the defaulter's driver's licence, and the suspension of the registration of a vehicle in the name of the defaulter – "cruel, inhuman or degrading"?

1.10.5 On the face of it, a positive answer to this question seems far-fetched. However, just as courts in Europe, Canada and the United States of America have read a right such as HRA paragraph 10(1)(b) to embrace a disproportionately severe sentence,[3] it may also be read to embrace disproportionately severe treatment.

1.10.6 Relevant to a judgement whether this is the case with proposed section 116M is that it *must* be brought into operation by the chief executive once person who has been sent a default notice and reminder notice and has not paid a fine after 28 days, etc (see above 1.9). The chief executive cannot consider the personal circumstances of the fine defaulter. There might of course be cases where the impact of the operation of proposed section 116M could be quite severe and produce hardship.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.10.7 The chief executive must give further notice to the road transport authority upon the occurrence of one or more events that would (in terms of the object of this scheme) no longer justify suspension of the licence to drive a vehicle, or the registration of a vehicle, whereupon that suspension must be lifted.

1.11 Proposed section 116N. The chief executive must give written notice to a credit reporting agency if a fine defaulter does not pay an outstanding amount 28 days after being sent a default notice, whereupon the agency must include the information received about a fine defaulter in the records used as part of the agency's credit reporting business.

1.11.1 The Explanatory Statement states:

> The purpose of this provision is to negatively affect a fine defaulter's credit rating so as to provide an incentive to pay an outstanding amount.

This action might also affect the reputation of the defaulter and might have severe economic effects. The rights issue is of the same nature as that raised with respect to proposed section 116M (see above 1.10 – 1.10.7).

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.11.2 The chief executive must give further notice to the relevant agency upon the occurrence of one or more events that would (in terms of the object of this scheme) no longer justify inclusion of the information about a fine defaulter in the records of the agency.

[3] Ibid at paragraph 10.12.1, and B Emmerson, A Ashworth and A McDonald, *Human Rights and Criminal Justic*e (2nd ed, 2007) 663ff.

Examining fine defaulter's financial circumstances

1.12 As the Minister noted in the Presentation Speech, "if a fine remains unpaid after a person has had their licence and registration suspended and their details given to a credit provider, the next phases of the fine enforcement scheme will be initiated". The first step in this process is an examination of the fine defaulter's financial circumstances. Under proposed section 116O, the chief executive "may" conduct an examination of a fine defaulter to determine "(a) the financial position of the defaulter; and (b) what fine enforcement action (if any) should be taken against the defaulter". The Explanatory Statement notes that "[if] the chief executive does not need further information to determine a defaulter's financial circumstance or what fine enforcement action should be taken, it is not a requirement for the chief executive to examine the defaulter".

1.13 Proposed section 116P. The chief executive may serve a notice (an examination notice) on a fine defaulter if this officer considers that information in documents sought under the notice would assist to make a determination under proposed section 116O, and the notice may require the fine defaulter to produce any document stated in the notice. Any such document must be submitted within 14 days, or, with the approval of the chief executive, the fine defaulter may provide oral information about one or more documents.

1.13.1 By proposed subsection 116P(1), a notice may be served "if the chief executive considers that information in documents sought under the notice would assist, etc". An administrative power is more easily compliant with the Human Rights Act to the extent that its exercise is conditional upon the repository of the power having "reasonable grounds" to exercise the power. The Committee notes that other powers are so conditioned: see in proposed subsections 116R(1), 116S(4), paragraph 116ZH(1)(a), subsection 116ZO(1), and paragraph 116ZO(2)(b). The reason for difference in treatment is not apparent.

The Committee recommends that the Minister advise the Assembly why the exercise of the discretion in proposed subsection 116P(1) could not be conditioned upon the holder of the power acting upon "reasonable grounds".

1.13.2 There is no mention of whether the person may claim the benefit of the privileges against self-incrimination and of client legal privilege.

The Committee recommends that a note to proposed subsection 116P(2) refer to sections 170 and 171 of the Legislation Act.

1.13.3 Fine defaulters might not be aware of sections 170 and 171 of the Legislation Act, and might not think to read proposed section 116P even if it includes a reference to these provisions. The question arises then whether the examination notice should refer to these provisions and state their effect.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.14 Proposed section 116Q. The information in documents that may be required to be produced by an examination notice includes matters such as information about the defaulter's bank accounts, income, cash reserves, property interests, and debts owing to the defaulter; the amount of money the defaulter reasonably needs for living expenses; whether the defaulter has any dependants and, if so, the amount of money the defaulter needs to provide for them; the hardship (if any) that would be caused to the defaulter as a result of paying the fine; and the hardship (if any) that would be caused to anyone else as a result of paying the fine.

This provision engages the right to privacy in HRA paragraph 12(a), but in the circumstances the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.15 Proposed section 116R. Where the chief executive reasonably believes that a defaulter has not complied with an examination notice, the chief executive may apply to the registrar for a warrant (an examination warrant) for the arrest of the defaulter. This warrant authorises an enforcement officer to arrest the fine defaulter named in the warrant and bring the defaulter before the registrar.

This provision engages the right to liberty and security of the person in HRA subsection 18(1), but in the circumstances, (and noting in particular the comment at 1.16.2 below), the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.16 Proposed section 116S. An examination warrant must require an enforcement officer to arrest the defaulter named in the warrant and bring that defaulter before the registrar to be examined at an examination hearing.

1.16.1 An enforcement officer may enter any premises using necessary assistance and force to arrest the defaulter, and may use force to arrest the defaulter. A police officer may be asked to help.

These provisions engage the right to liberty and security of the person in HRA subsection 18(1), the right to privacy in HRA paragraph 12(a), and the right to property, but in the circumstances the interferences are probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.16.2 An enforcement officer must release a defaulter if the defaulter cannot be brought before the registrar immediately. The Committee considers that this supports a judgement that the interferences with these rights are not arbitrary.

1.17 Proposed section 116T. Where an examination warrant for a fine defaulter has been issued and the defaulter is either brought before the registrar on the warrant or otherwise attends before the registrar, the latter must set a date for an examination hearing and issue an examination hearing subpoena. The subpoena will contain the date of the hearing and require the defaulter to answer questions, give information and provide produce documents or other things as required.

1.17.1 There is no mention of whether the person may claim the benefit of the privileges against self-incrimination and of client legal privilege.

The Committee recommends that a note to proposed subsection 116T(2) refer to the sections 170 and 171 of the Legislation Act.

1.17.2 Fine defaulters might not be aware of sections 170 and 171 of the Legislation Act, and may also not think to read proposed section 116T even if it includes a reference to these provisions. The question arises then whether the examination notice should refer to these provisions and state their effect.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.17.3 Once an examination hearing subpoena has been issued, the registrar must conduct the hearing to determine the financial position of the fine defaulter. The registrar may adjourn an examination hearing and may require the defaulter to which the hearing applies to attend an adjourned hearing.

1.17.4 At an examination hearing the registrar may orally examine or require the production of documents about: the assets, liabilities, expenses and income of the defaulter; any other means the defaulter has to satisfy the outstanding fine; and the defaulter's financial circumstances generally (proposed subsection 116T(6)). There is no mention of whether the person may claim the benefit of the privileges against self-incrimination and of client legal privilege.

The Committee recommends that a note to proposed subsection 116T(6) refer to the sections 170 and 171 of the Legislation Act.

1.17.5 At this point in the process HRA subsection 21(1) is engaged. It provides:

> 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.

Apart from the matter next raised, the application of subsection 21(1) will be relevant to the manner in which a particular examination is conducted.

1.17.6 By proposed subsection 116T(7), an examination hearing must be conducted by the registrar, and "may be conducted in open court or in the absence of the public as the registrar directs" (paragraph 116T(7)(b)).

1.17.7 Such a broadly worded power to exclude the public appears to directly contradict HRA subsection 21(1). By HRA subsection 21(2), "the press and public may be excluded from all or part of a trial" in defined circumstances, and the words "a trial" suggest that a decision to exclude must be assessed on a case-by-case basis. A statute may derogate from an HRA right if its relevant provisions are justifiable under HRA section 28. The Explanatory Statement does not raise this issue.

1.17.8 A person affected by an exercise of the power to conduct a hearing will be better informed about the effect of the HRA subsection 21(2) were a note to propose section 116T(7) draw attention to this HRA provision.

The Committee recommends that a note to proposed subsection 116T(7) refer to the effect of HRA subsection 21(2).

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.18 Proposed section 116U. If a fine defaulter is required to attend an examination hearing (including an adjourned examination hearing) and fails to attend, and the registrar is satisfied that the defaulter was aware that he or she was required to attend an examination hearing and does not have a reasonable excuse for failing to do so, the registrar may issue a warrant (an examination hearing warrant) requiring a police officer to apprehend the defaulter and bring the defaulter before the registrar for examination.

This provision engages the right to liberty and security of the person in HRA subsection 18(1), but in the circumstances, the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.19 Proposed section 116V. An examination hearing warrant must require an enforcement officer to arrest the defaulter named in the warrant and bring that defaulter immediately before the registrar to be examined at an examination hearing.

1.19.1 An enforcement officer may enter any premises using necessary assistance and force to arrest the defaulter, and may use force to arrest the defaulter. A police officer may be asked to help.

These provisions engage the right to liberty and security of the person in HRA subsection 18(1), the right to privacy in HRA paragraph 12(a), and the right to property, but in the circumstances the interferences are probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

Fine enforcement orders

Generally applicable provisions

1.20 Proposed section 116W. The chief executive may apply to the Magistrates Court for an order (a fine enforcement order) to be made against a fine defaulter.

1.20.1 If the defaulter provided any oral information or documents to the chief executive under an examination notice, the information or documents must be provided to the court as part of an application, and if the defaulter appeared at an examination hearing, any documents provided to the registrar or a transcript of oral evidence must also be provided as part of an application (see proposed subsection 116W(2)).

1.20.2 The Magistrates Court is bound to observe HRA subsection 21(1), and any law governing its procedure in these matters must also comply with this right (unless a derogation is justifiable under HRA section 28). Proposed subsection 116W(2) is problematic in that the Bill does not state a rule as to the status in any proceeding for a fine enforcement order of the material that is included in an application by the chief executive to the court. If it is intended – as it may be the case – that the court can have regard to this material, then proposed subsection 116W(2) sanctions the displacement of the law of evidence that would normally apply to a proceeding in the court, and thereby displaces all the protections that that body of law provides by way of ensuring the reliability and value of evidence, and the protections it offers to a party. Given that the Bill makes no provision in substitution for the law of evidence, there is a question whether subsection 116W(2) is, on the face of it, in conflict with HRA subsection 21(1).

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.20.3 It may also be the case that at the point that the Magistrates Court entertains an application for a fine enforcement order, the fine defaulter is "charged with a criminal offence", and must be afforded the guarantees set out in HRA subsection 22(2).[4] If so, the Magistrates Court is bound to observe HRA subsection 22(2), and any law governing its procedure in these matters must also comply with this right (unless a derogation is justifiable under HRA section 28).

1.20.4 A person affected by an exercise of the power to conduct a hearing will be better informed about the effect of the HRA subsection 22(2) were a note to propose section 116W draw attention to this HRA provision.

The Committee recommends that a note to proposed subsection 116T(7) refer to the effect of HRA subsection 21(2).

1.21 Proposed section 116X. The Magistrates Court may make a fine enforcement order against a fine defaulter if "it is in the interests of justice" to do so. The court "must have regard to information it has about the following" (proposed subsection 116X(3)):

- the defaulter's income, assets or equitable interest in property;
- any debts payable to the defaulter;
- any other means by which the defaulter might pay the fine;
- the defaulter's reasonable living expenses including the reasonable living expenses of any dependants;
- the hardship a fine enforcement order would cause to the defaulter or a third party affected by the order;
- the need to give effect to the factor of deterrence that formed part of the decision of the sentencing court to imposed a fine on the fine defaulter;
- whether the fine defaulter has the capacity to pay the fine and is unlikely to have the means to pay the fine in a reasonable time;

[4] See *Benham v United Kingdom* (1996) European Court of Human Rights, paragraphs 20, and 53-56. http://www.worldlii.org/eu/cases/ECHR/1996/22.html

- whether the fine defaulter has knowingly attempted to misrepresent his or her financial affairs to avoid payment of the fine; or
- any other relevant matter.

1.21.1 In the Presentation Speech, the Minister states that "all orders have safeguards built into them. The most important safeguard is that the court must not make an order if such an order would be unfair or cause undue hardship". The Committee cannot follow this. All that proposed subsection 116X(3) requires is that the court "have regard to" information it has about "(g) the hardship a fine enforcement order would cause to the defaulter or any other person affected by the order". There is no reference in proposed subsection 116X(3) to "unfairness" to the defaulter, although this might be taken into account as "(j) any other relevant matter".

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.21.2 A fine enforcement order may contain (and only contain) one or more of an earnings redirection order, a financial institution deduction order, and a seizure and sale order.

1.21.3 A fine enforcement order may be made in the absence of and without notice to the fine defaulter (proposed subsection 116X(4)).

1.21.4 Proposed subsection 116X(4) appears to directly contradict HRA subsection 21(1) and subsection 22(2), and it is difficult to see how such a broad power to proceed in the absence of the defaulter could be justified.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Earnings redirection orders

1.22 Proposed section 116Y. The notion of "earnings" is defined broadly, and includes a pension, benefit or similar payment (which could include social security benefits), an annuity, an amount payable instead of leave or a retirement benefit. The notion of "employer" is also defined broadly.

1.22.1 In the Presentation Speech, the Minister states that "an order must adhere to any income protection legislation. This is particularly relevant where social security or other such benefits are involved. If a person receives child maintenance for example, that income could not be subject to a redirection order". The Committee cannot follow how this result comes about, given that proposed section 116Y appears to contain no such restriction.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.22.2 The court may make an order requiring an employer of a fine defaulter to deduct an amount from the defaulter's earnings and pay that amount in accordance with the order. A deduction can be in the form of a lump sum or instalments.

1.22.3 An employer is permitted to deduct an extra amount to cover any administrative costs associated with making a deduction from the defaulter's earnings.

1.22.4 This provision may engage HRA, subsection 26(2):

> No-one may be made to perform forced or compulsory labour.

A Convention of the International Labour Office defines "forced or compulsory labour" as "all work or service which is extracted from any person under menace of any penalty and for the said person has not offered himself voluntarily".[5] The Human Rights Committee has stated that:

> the term "forced or compulsory labour" covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed.[6]

In this case, the "menace of penalty"[7] lies in the liability of an employer to be in contempt of court if a court earnings redirection order is not obeyed.

1.22.5 By HRA subsection 26(3), the concept of "forced or compulsory labour does not include … (c) work or service that forms part of normal civil obligations". The Human Rights Committee has stated that:

> to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the [International Covenant on Civil and Political Rights Covenant].[8]

This is clearly a very loose test, and it is hard to state a view one way or the other on this issue as it concerns proposed subsection 116Y(2). It may be relevant in this regard to take into account proposed subsection 116Y(5) (see below 1.22.6).

1.22.5.1 The Committee notes that this is nevertheless a quite important issue in that various laws already provide for garnishee of wages and salaries.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

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[5] ILO *Convention Concerning Forced or Compulsory Labour* 1930, 39 UNTS 55, art 2(1), quoted in S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) paragraph 10.03. See too *Van der Mussele v Belgium* (1984) 6 EHHR 63 [32], where the Court noted that while this definition was starting point, "sight should not be lost of that Convention's special features or of the fact that it is a living instrument to be read 'in the light of the notions currently prevailing in democratic States'".

[6] Human Rights Committee, Communication No. 1036/2001 : Australia. 23/11/2005. CCPR/C/85/D/1036/2001. (Jurisprudence)
http://www.unhchr.ch/tbs/doc.nsf/0/37467fda1332920ac12570c8005438d1?Opendocument

[7] See also *Van der Mussele v Belgium* (1984) 6 EHHR 63 [34].

[8] Ibid.

1.22.6 It is an offence for an employer to dismiss a defaulter, change a defaulter's position in a way that disadvantages the defaulter, or discriminate against a defaulter because he or she has an earnings redirection order made against them (proposed subsection 116Y(5)).

1.22.7 This provision may have a bearing on the issue just raised. An employer who carries out the terms of a court earnings redirection order will still be required to continue to employ the employee (to simplify matters). If the employer then alters the terms or conditions of the employee's work, the former may be faced with an accusation that they have committed an offence against proposed subsection 116Y(5). The elements of the offence are stated very broadly, and in effect much will be left to the choice of the police whether or not to prosecute. Even if acquitted, the employer/defendant will face loss of income and possibly of reputation.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Financial institution deduction orders

1.23 Proposed section 116Z. Where a fine defaulter has an account with a financial institution that has or is likely to have sufficient funds to satisfy all or part of the defaulter's outstanding fine, the court may make a financial institution deduction order. The order can direct a financial institution to deduct a stated amount, in either a lump sum or instalments, from an account held by the defaulter and pay the amount in accordance with the order. For each deduction made from a defaulter's account, an institution may make an extra deduction to cover the administrative costs associated with making a deduction.

1.23.1 This provision raises some of the issues raised with respect to proposed subsection 116Y.

Property seizure orders

1.24 Proposed section 116ZA. A court may make an order (a property seizure order) for the seizure of personal property belonging to a fine defaulter.

1.24.1 The making of such an order engages the right to property, but the deprivation involved may be seen as a justifiable limit to the right. For example, under article 1 of the (European) Protocol to the Convention for the Protection of Human Rights, the protection of property is qualified by the provision that it "shall not … in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes or other contributions or penalties".

This provision, and proposed section 116ZB, engage the right to property, but in the circumstances the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.25 Proposed section 116ZB. In defined circumstances, the order authorises the chief executive to enter premises, to seize any property (other than clothing, bedding or other necessities of life) that apparently wholly or partly belongs to the fine defaulter, and to seize any documents that may prove the defaulter's title to personal property.

1.25.1 Where possible, the chief executive must seize property that may be sold promptly and without necessary expense and that if sold, would not cause undue hardship to the defaulter or other people.

1.25.2 The chief executive must prepare an inventory of the property seized, and must attach to the premises a notice that property has been seized in accordance with the property seizure order, a copy of the inventory and "a notice setting out the person's rights" to recover the seized goods (proposed paragraph 116ZB(4)(b)(iii)). The Committee considers that it is important that a person be informed of their right to seek recovery in order to deal with situations where the property seized may have particular value to the owner. The recovery of seized goods is dealt with in proposed section 116ZD, and note should be taken of the matters the chief executive may take into account in deciding whether to agree to a restoration of the property (see also 1.27.3 below).

1.25.3 There are provisions concerning the use of force and assistance by the police.

This provision engages the right to liberty and security of the person in HRA subsection 18(1), but in the circumstances, the interference is probably not arbitrary. The Committee raises this issue but does not call for a response from the Minister.

1.25.4 The Committee notes that damage may be caused to property in the process of its seizure, its restoration to the owner or its sale. It also notes, however, that the Bill does not state any obligation on the chief executive to prevent damage occurring, nor does it provide for any compensation to the person affected by any damage.

The Committee draws this to the attention of the Assembly and recommends that the Minister respond.

1.26 Proposed section 116ZC. Within limits, the chief executive must sell property seized under a property seizure order and pay the proceeds of the sale to the registrar. Where possible, property must be sold in an order that is likely to satisfy an outstanding fine promptly without incurring unnecessary expense and minimises undue hardship to the defaulter or other people. Where possible, the property must also be sold at the best price reasonably obtainable at the time of sale.

1.27 Proposed section 116ZD. Where the chief executive has seized property in accordance with a property seizure order, a person may apply to have that property returned. An application may be made by the fine defaulter to whom the property seizure order relates or by another person. If the applicant is the fine defaulter, the application must state why a refusal to return the property would result in undue hardship or unfairness to the applicant.

1.27.1 If the applicant is not the fine defaulter, the application must state why a refusal to return the disputed property would result in undue hardship or unfairness to the applicant, and whether the applicant claims a legal or equitable interest in the disputed property (proposed paragraph 116DZ(2)(d)).

1.27.2 The chief executive must consider an application and notify the applicant of the her or his decision (proposed subsection 116DZ(3)).

1.27.3 In effect, proposed subsection 116DZ(4) states a non-exhaustive list of matters that "may" be taken into account by the chief executive in an assessment of whether hardship or unfairness would occur if the application was refused.

The Committee notes that the chief executive appears to have a discretion to consider or not the non-exhaustive list of matters. This may be compared to proposed subsection 116X(3), which imposes a duty on a Magistrates Court to have regard to certain matters before making a fine enforcement order. It is not apparent why the chief executive should be treated differently.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.27.4 If the chief executive refuses the application, the applicant may, within 28 days after the decision, apply to the Magistrates Court for an order for the return of the property (proposed subsection 116DZ(5)), and that court "may" take into account the matters mentioned in proposed subsection 116DZ(4).

Concerning the use of the word "may", see the comment above at 1.27.3.

1.27.5 The Explanatory Statement makes no mention of proposed subsections 116DZ(3), (4) and (5).

The Committee recommends that the Explanatory Statement be amended to state the substance of proposed subsections 116DZ(3), (4) and (5).

Voluntary community work orders

1.28 Proposed section 116ZE. The chief executive may apply to the Magistrates Court for a voluntary community work order. This order requires a fine defaulter to undertake community work to discharge an outstanding fine.

1.28.1 By proposed subsection 116ZE(2), the court may make such an order where certain conditions exist, being: (1) that the fine defaulter agrees to the order being made; (2) that if the outstanding amount for which the defaulter is liable for is compensation under a reparation order, the entity in whose favour the reparation order is made agrees; (3) the court is of the opinion that no other fine enforcement order is appropriate and that the defaulter is likely to comply with a voluntary community work order; and (4) the originating offence for which the fine defaulter received a fine was not a personal violence offence.

1.28.2 An issue arises from point (4). On the face of it, a rule that a person who was convicted of a personal violence offence cannot be eligible to obtain the benefit of a voluntary community work order engages HRA subsection 8(3):

> Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

That is, such an offender is treated differently to other kinds of offenders. A derogation may be justifiable under HRA section 28. This issue is not identified in the Explanatory Statement.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.28.3 Proposed subsection 116ZE(3) provides that "The court may inform itself in any way it considers appropriate about a matter mentioned in subsection (2)."

This provision appears to sanction the displacement of the law of evidence that would normally apply to a proceeding in the court, and thereby displaces all the protections that that body of law provides by way of ensuring the reliability and value of evidence, and the protections it offers to a party. Given that the Bill makes no provision in substitution for the law of evidence, there is a question as to question as to the provision is in conflict with HRA subsection 21(1).

The provision also appears to sanction any kind of method of obtaining information, which also raises a question as to question as to the provision is in conflict with HRA subsection 21(1).

To underline the significance of these points, the Committee notes that the court might, on the basis of information obtained, find that a fine defaulter had been convicted of a personal violence offence. Should this be wrong, the person would suffer damage to reputation.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.29 Proposed section 116ZG. A fine defaulter performing work under a voluntary community work order discharges the defaulter's outstanding fine at the rate of $37.50 for each hour of work performed under the order.

1.30 Proposed section 116ZH. If the entity administering a voluntary community work order believes on reasonable grounds that a person has not complied with the order and the person has not requested an amendment to the conditions of the order, the administering entity must report the noncompliance to the court. If the court is satisfied that a fine defaulter has failed to comply with an order, the court may take no further action, warn the defaulter about the need to comply with the order, amend the order or cancel the order. If the court amends or cancels the order, the fine defaulter must be provided with written notice of the amendment or cancellation.

The Explanatory Statement states that:

> [i]f the court cancels the order, the fine defaulter could be subject to another fine enforcement order, remission of the fine or imprisonment.

1.31 The Explanatory Statement does not explain why the court might decide to "take no further action" even if it is "satisfied that the fine defaulter failed to comply with the order" (see proposed subsection 116ZH(3)).

The Committee recommends that the Explanatory Statement be amended to explain why a court might decide to take no further action even if it is satisfied that the fine defaulter failed to comply with the order.

Imprisonment

1.32 Proposed section 116ZK. The chief executive may apply to the Magistrates Court for an imprisonment order.

1.32.1 By proposed subsection 116ZE(2), the court may make such an order where certain conditions exist, being: (1) that all appropriate fine enforcement action has been taken against the fine defaulter and there is no real likelihood of the fine being recovered; (2) the fine has not been remitted by the chief executive as is authorised by section 116ZO of the Act; and (3) if a reparation order is being enforced, the entity in whose favour the reparation order is made consents to the amount owed being discharged by way of imprisonment.

1.32.2 There is an issue as to whether it is ever appropriate that a person be imprisoned for non-payment of a fine. It is open to a member of the Legislative Assembly to take that view. The Committee points out that cases decided by the European Court of Human Rights have accepted that imprisonment for non-payment is a remedy of last resort.[9] It should also be noted that the Minister points out in the Presentation Speech that where it is not appropriate to seek imprisonment, the chief executive may remit a fine under proposed section 116ZO.[10]

These provisions engage the right to liberty and security of the person in HRA subsection 18(1). The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.32.3 The length of time a person is to be imprisoned under this section is the lesser of 1 day of imprisonment for each $300, or part of $300, of the outstanding fine or 6 months. This means that if a person has an outstanding fine of $1500, the person will be imprisoned for 5 days.

1.32.4 If a person was a young offender at the time the offence was committed, the length of imprisonment is to be the lesser of 1 day for each $500, or part of $500, of the outstanding fine or 7 days. This means that if a person has an outstanding fine of $1500, the person will be imprisoned for 3 days.

1.32.5 This provision engages HRA subsection 11(2):

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

The issue is whether a fine defaulter who is child should ever be imprisoned for non-payment of a fine.[11] An alternative is that taken in proposed subsection 116ZL(5) concerning a periodic detention order made in respect of a young offender (see 1.33.2 below); that is, that the prison term be served when the child becomes an adult.

[9] See *Lloyd v United Kingdom* [2005] 41 EHRR.

[10] An exercise of this power is a means to accommodate the point made by Bernhardt J in the *Benham* case: "…if it is undisputed that the detained person has no means to pay the charge, a prison sentence is in my view hardly compatible with the proper role of criminal sanctions in present-day societies".

[11] Article 37(b) of the UN *Convention of the Rights of the Child* provides that the imprisonment of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time".

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

1.33 Proposed section 116L. In defined circumstances, the court may, in an imprisonment order made under proposed section 116ZK, set all or part of the imprisonment period to be served by periodic detention. As summarised in the Explanatory Statement, periodic detention can only be used if it is suitable and appropriate for the fine defaulter; there are appropriate facilities available at a correctional centre; and the offender signs an undertaking to comply with the periodic detention obligations contained in section 42 of the *Crimes (Sentence Administration) Act 2005*.

1.33.1 In assessing suitability, the court may consider any (relevant) matter (proposed subsection 116ZL(4)), but must consider a report prepared by the chief executive that addresses the matters in section 79 of the *Crimes (Sentencing) Act 2005*, any evidence given by the person who prepared the report and any medical report about the fine defaulter.

1.33.2 A court cannot set a period of periodic detention for a young fine defaulter unless that defaulter will be an adult when serving the period of periodic detention (proposed subsection 116ZL(5)).

1.34 Proposed section 116ZM. This section provides the rate an outstanding fine is discharged through imprisonment.

1.35 Proposed section 116ZN. Where a person is imprisoned under this chapter, if an amount is paid to the Territory, or someone acting on behalf of the Territory, that completely discharges the outstanding amount, the person must be released from custody unless they may be lawfully detained on another matter.

EMERGENCIES AMENDMENT BILL 2010

This Bill would amend the *Emergencies Act 2004* to strengthen the governance arrangements for planning for, and responding to, emergencies in the ACT.

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

The powers of the proposed office of emergency controller

One objective of the Bill is to:

> decouple the activation of the powers of the Emergency Controller from the need to formally declare a State of Emergency. This will allow the greater coordination capacity of that position to be utilized in advance of an emergency occurring – e.g. on a day of "catastrophic" bushfire danger rating – but where a formal declaration of a State of Emergency would be inappropriate (Explanatory Statement).

In a situation where a state of emergency has not been declared, this officer would have very extensive powers in relation to matters such as the movement of people, animals or vehicles; the control or disposal of property belonging to others; the taking of possession of "premises, animal substance or thing(s)"; and the performance of works on land (see proposed subsection 150C(2) – clause 24 of the Bill).

The exercise of these powers would have an adverse impact on various human rights, such as the right to movement (HRA section 13), the right to privacy (HRA paragraph 12(a)), and the right to property.

While the public interest in the restriction of these rights might appear obvious, the Explanatory Statement does not recognise that there are any rights issues to be addressed. The Compatibility Statement merely asserts the opinion of the Attorney-General that upon his examination of the Bill, as presented to the Legislative Assembly, it is consistent with the Human Rights Act.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

The power of the Legislative Assembly to entrench a law to the extent that its effect cannot be affected by any other law, and the relationship between such a law and the Human Rights Act 2004

Proposed subsection 150C(3) (clause 24) provides:

> Subsection (1) operates despite any other territory law.

Proposed subsection 150C(1) provides:

> This section applies if an emergency controller is appointed under section 150A for an emergency.

It appears then that proposed subsection 150C(2) – see above – is entrenched against the operation of any other Territory law. Two issues arise from these provisions.

First, as it has noted before, the Committee understands that a provision such as proposed subsection 150C(3) is inconsistent with the provision in subsection 22(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cwth) that "Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory". That is, a Territory law that purports to restrain the power of the Legislative Assembly to make laws is inconsistent with a grant of power by the Act to the Assembly that is plenary except so far as modified by the Act, and of course, subject to the Commonwealth Constitution.

Secondly, there is the particular issue of the operation of the Human Rights Act in respect of any entrenched provision of a law (assuming entrenchment is possible).

The Committee recommends that the Minister advise the Assembly of the basis of a view that a law of the Territory can restrain the power of the Assembly to enact laws.

INFRASTRUCTURE CANBERRA BILL 2010

This is a Bill for an Act to establish the Canberra Infrastructure Plan, and for related purposes including the creation of the Canberra Infrastructure Commission, the office of Canberra Infrastructure Commissioner, and the Canberra Infrastructure Board.

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

Right to privacy

By subclause 35(1) and subclause 36(1), the commissioner must report to the appropriate Legislative Assembly committee for certain periods and in respect of particular matters. By subclause 38(1), the commissioner must not include information in a report if he or she is of the opinion that the disclosure of the information would be contrary to the public interest because the disclosure could have one or more specified results, such as that disclosure could:

(a) be an unreasonable disclosure of personal information about a person; or
(b) disclose a trade secret; or
(c) disclose information (other than a trade secret) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
(d) be an unreasonable disclosure of information about the business, commercial or financial interests or affairs of an entity; or
(e) prejudice the investigation of a contravention of a law; or
(f) prejudice the fair trial of a person; … .

But this extensive protection of the right to privacy and the right to property is then qualified by subclause 38(2):

> However, the commissioner may include in the report information mentioned in subsection (1) if the commissioner is satisfied that the substance of the information is public knowledge.

It should also be noted that if, for example, the commissioner disclosed a trade secret that in fact was not in substance public knowledge, the commissioner would not be civilly liable for the disclosure (which might otherwise in some circumstances warrant a substantial award of damages) where the disclosure was "done honestly and without recklessness" (clause 40).

The rights of privacy and the right to property would be better protected if the commissioner was, having identified the relevant information and formed a view that its "substance" was "public knowledge", obliged to inform the relevant person of these judgements and invite a response within a stated time frame.

The Committee draws this matter to the attention of the Assembly and recommends that the Member respond.

RADIATION PROTECTION (TANNING UNITS) AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Radiation Protection Act 2006* to regulate tanning units used in solaria businesses.

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

The Bill would achieve its objective by prohibiting the conduct of a solaria business unless the operator has a tanning unit licence.

Regulation of a previously unregulated area of business activity and the right to property

The Bill would achieve its objective by prohibiting the conduct of a solaria business unless the operator has a tanning unit licence (see below), and by the creation of arrange of offences in relation to the mode of carrying on the business. It should be noted that proposed section 87A of the Act (see clause 4 of the Bill) defines "**solaria business" to mean:**

> a business carried on by a person for fee or reward that uses 1 or more tanning units to provide a service of tanning human skin for cosmetic purposes (proposed section 87A).

By proposed section 87B, "[a] person must not carry on a solaria business unless the person has a tanning unit licence".

A right to property is not included in the Human Rights Act, but is recognised in international conventions such as the *Universal Declaration of Human Rights* 1948, article 17(2) of which provides that "No one shall be arbitrarily deprived of his property". The imposition of a licensing scheme on a previously unregulated activity would probably be regarded as a deprivation of property, (just as the alteration of a licence is a deprivation where the person had a reasonable expectation of the lasting nature of the licence[12]).

However, a deprivation will not be "arbitrary" where it serves a compelling public interest. The Committee notes that there is no Explanatory Statement accompanying this Bill.

The Committee draws this matter to the attention of the Assembly and recommends that the Member respond

[12] See the Statement of Compatibility concerning the Liquor Control reform Amendment (Anzac Day) Bill 2010 of Victoria.
http://tex.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.one&db=hansard91&dodraft=0&pageno=253&house=ASSEMBLY&speech=9280&date1=4&date2=February&date3=2010&title=LIQUOR+CONTROL+REFORM+AMENDMENT+(ANZAC+DAY)+BILL&tmpfile=/tmp/rand4911707126&query=true+and+(+activity+contains+\'Statement+of+Compatibility\'+)+and+(+hdate.hdate_3+=+2010+)+and+(+hdate.hdate_2+contains+\'February\'+)+and+(+house+contains+\'ASSEMBLY\'+)

SUBORDINATE LEGISLATION

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

Disallowable Instruments—No comment

Disallowable Instrument DI2010-22 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2010 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares a specified company to be a parking authority for the area of Block 21, Section 17 in the suburb of Greenway.**

Disallowable Instrument DI2010-23 being the Road Transport (General) (Restricted Access Vehicle Route Access Permit Fees) Determination 2010 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **determines fees payable for applications involving vehicles and combinations with a loaded mass exceeding 125 tonnes and carrying an indivisible load.**

Disallowable Instrument DI2010-24 being the Public Place Names (Hume) Determination 2010 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new road in the Division of Hume.**

Disallowable Instrument DI2010-25 being the Public Place Names (Casey) Determination 2010 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Casey.**

Disallowable Instrument DI2010-26 being the Education (Government Schools Education Council) Appointment 2010 (No. 1) made under section 57 of the *Education Act 2004* **reappoints a specified person as chairperson of the Government Schools Education Council.**

Disallowable Instrument DI2010-27 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2010 (No. 1 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2009-73 and determines fees payable for transactions relating to vehicle registration.**

Disallowable Instrument DI2010-28 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2010 (No. 1) 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 Brindabella Motor Sports Club Sponsor Day.**

Disallowable Instrument DI2010-29 being the Unlawful Gambling (Exempt Game) Declaration 2010 (No. 1) made under section 48 of the *Unlawful Gambling Act 2009* **declares that specified games are exempt games under subsection (9)(2) of the Act.**

Disallowable Instrument DI2010-30 being the Unlawful Gambling (Unlawful Game) Declaration 2010 (No. 1) made under section 48 of the *Unlawful Gambling Act 2009* **declares that specified games are unlawful under subsection 7(2) of the Act.**

Disallowable Instrument DI2010-31 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2010 (No. 1) made under section 48 of the *Unlawful Gambling Act 2009* **determines the fee payable for a charitable organisation to apply to the ACT Gambling and Racing Commission for approval to conduct a game.**

Disallowable Instrument DI2010-33 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2010 (No. 2) made under subsection 13(1) of the *Road Transport (General) Act 1999* **allows conditionally registered motor vehicles to be driven to a specified funeral.**

Disallowable Instrument DI2010-34 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2010 (No. 3) made under section 13 of the *Road Transport (General) Act 1999* **allows accredited hire car operators to provide hire car services, using vehicles that are not hire cars and drivers who are not licensed to drive hire cars, to provide ground transportation logistics during the visit by President Obama.**

Disallowable Instrument DI2010-35 being the Electoral Commissioner Appointment 2010 made under section 22 of the *Electoral Act 1992* **appoints a specified person as the Electoral Commissioner.**

Disallowable Instruments—Comment

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

Disapplication of subsection 47(6) of the Legislation Act 2001
Disallowable Instrument DI2010-32 being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2010 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-219 and determines the amounts of duty payable on the application to register a motor vehicle.**

The Committee notes that section 5 of this instrument provides that subsection 47(6) of the *Legislation Act 2001* does not apply to the Green Vehicle Guide. The Green Vehicle Guide is defined in section 3 of the instrument, which provides (in part):

> ***Green Vehicle Guide*** means the Green Vehicle Guide published by the Commonwealth as in force from time to time.
> *Note* The Green Vehicle Guide is available at http://www.greenvehicleguide.gov.au

Subsection 47(6) of the Legislation Act provides:

> **(6)** If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
>
> (a) the law or instrument as in force at the time the relevant instrument is made;
> (b) each subsequent amendment of the law or instrument;
> (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
> (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

Subsection 47(3) of the Legislation Act provides:

> **(3)** The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.
> *Note* For information on the operation of s (3), see the examples to s (9).

The first issue is whether or not this instrument displaces subsection 47 (3) of the Legislation Act. Section 6 of the Legislation Act provides (in part):

> **(2)** A determinative provision may be displaced expressly or by a manifest contrary intention.
> **(3)** A non-determinative provision may be displaced expressly or by a contrary intention.
> *Note* For the distinction between a 'manifest contrary intention' (see s (2)) and 'contrary intention' (see s (3)), see the examples in this section.

Subsection 47(9) provides that section 47 is a determinative provision. This means that it may be displaced either expressly or by "manifest contrary intention". Subsection 47(3) provides that the instrument of another jurisdiction can be applied only as in force at a particular time. The definition of "Green Vehicle Guide" in this instrument applies the instrument of that name, published by the Commonwealth, "as in force from time to time". The Committee notes that the examples of "manifest contrary intention" given in section 6 of the Legislation Act include the situation provided for here – ie a provision that "clearly contradicts subsection 47(3).

This means that subsection 47(3) has been displaced. What section 5 of the instrument then does is displace subsection 47(6) of the Legislation Act, the effect of which is to remove the requirement that any amendments to the Green Vehicle Guide be notified on the ACT Legislation Register as "notifiable" instruments.

The Committee notes that, by way of explanation, the Explanatory Statement for this instrument states:

> 10. This instrument specifies that section 47(6) of the *Legislation Act 2001* does not apply to the Green Vehicle Guide. That section would require the text of the Green Vehicle Guide to be remade as a new Notifiable Instrument every time the Green Vehicle Guide is amended. The displacement of that section will ensure that the Green Vehicle Guide can be applied automatically for the purposes of this instrument when it is amended by the Commonwealth without the requirement to continually remake it as a Notifiable Instrument.

The Committee notes that the paragraph above provides a good explanation of the effect of displacing subsection 47(6) but provides no explanation as to why the displacement is necessary. In making this comment, the Committee notes that one of the objects of subsection 47(6) is to ensure that those affected by ACT laws are notified of any changes to the law of another jurisdiction that are applied by an ACT law. In making this comment, the Committee notes that the instrument, helpfully, provides the internet address of the Commonwealth instrument. This does not, however, provide the kind of notification mechanism that is contemplated by subsection 47(6) of the Legislation Act. Rather (and in the absence of any other explanation), those affected by the instrument would be required to monitor the Commonwealth instrument for any changes to it.

The Committee would appreciate the Minister's advice as to (a) why it is necessary to displace subsection 47(6) of the Legislation Act in this instance and (b) what (if any) mechanisms exist to advise those affected by this instrument of any changes to the (Commonwealth) Green Vehicle Guide.

Inadequate Explanatory Statement? – "schools in special circumstances"

Disallowable Instrument DI2010-36 being the Education (School Boards of Schools in Special Circumstances) Woden School Determination 2010 made under section 43 of the *Education Act 2004* **determines the composition of the School Board of the Woden School.**

Disallowable Instrument DI2010-37 being the Education (School Boards of Schools in Special Circumstances) Black Mountain School Determination 2010 made under section 43 of the *Education Act 2004* **determines the composition of the School Board of the Black Mount School.**

The Committee notes that these instruments exercise a power in section 43 of the *Education Act 2004* that allows the chief executive of the ACT Department of Education and Training to determine the composition of the board of certain schools. Section 43 provides (in part):

> **43 Composition of school boards of school-related institutions and other schools in special circumstances**
>
> (1) This section applies to a school that is—
>
> (a) a school-related institution; or
> (b) declared, in writing, by the chief executive to be a school to which special circumstances apply.

The Committee notes that a prerequisite for the application of the power is a declaration, by the chief executive, that the school in question is "a school to which special circumstances apply". The Education Act provides no guidance as to what are "special circumstances", nor as to the sorts of situations in which the chief executive might exercise the power. While the Committee notes that there is no statutory requirement to do so, the Committee considers that (in the absence of a good reason not to do so) it would be appropriate if the Explanatory Statement for an instrument such as this provided an explanation as to the reasons for the instrument being made.

Subordinate Laws—No comment

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

Subordinate Law SL2010-5 being the Road Transport Legislation Amendment Regulation 2010 (No. 1) made under the *Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2001, Road Transport (Safety and Traffic Management) Act 1999* **adopts the revised version of the Australian Road Rules published in February 2008 and gives effect to the 5th, 6th and 7th packages of amendments to the Rules.**

Subordinate Law SL2010-6 being the Unlawful Gambling Regulation 2010 made under the *Unlawful Gambling Act 2009* **requires charitable organisations approved to conduct games to keep certain records and use only "play money" for the games.**

Subordinate Law SL2010-8 being the Planning and Development Amendment Regulation 2010 (No. 1), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008* to create a new exemption for public art and determines the period for deemed refusal of an application for controlled activity order, if the development application is refused.**

Subordinate Laws—Comment

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

Positive comment – Strict liability offences
Subordinate Law SL2010-4 being the Road Transport (Mass, Dimensions and Loading) Regulation 2010 made under the *Road Transport (Mass, Dimensions and Loading) Act 2009* **determines the conditions under which heavy vehicles and heavy combinations may travel safely and efficiently on the ACT road network.**

The Committee notes with approval that the Explanatory Statement for this subordinate law provides a thorough explanation as to (a) why it is appropriate that various offences set out in the subordinate law are strict liability offences and (b) the defences that are nevertheless available in relation to the offences (including an explanation as to how those defences operate). The Explanatory Statement states:

> **Strict liability offences**
>
> Strict liability offences engage the presumption of innocence under the *Human Rights Act 2004*. All strict liability offences are assessed by the Human Rights and Criminal Law Units in the Department of Justice and Community Safety.
>
> When assessing whether an offence is suitable to be a strict liability offence, the Department has regard to a number of criteria, including:
>
> - whether the defendant was "put on notice" of a requirement to do an act, and that a failure to do so will result in the commission of an offence;

- whether the defendant can be reasonably expected, because of his or her admission to a particular profession or because the requirements of a regulatory regime to which he or she is subject to, to know of their legal obligations under that regime;
- whether the commission of the conduct constituting the offence is technical in nature, or whether the commission of the conduct is "morally blameworthy" or "repugnant": see *Wholesale Travel Group Inc v R* [1991] 3 S.C.R. 154; whether the burden on the defendant to raise a mistake of fact defence is an evidential or legal one; whether requiring the prosecution to prove a subjective mental fault element or higher level of fault would impose a difficult or impossible burden on it, thereby undermining the legitimate regulatory objectives of the state; and
- the severity of the penalty for the offence. A penalty of imprisonment is very serious, and requires exceptional justification.

In *Travel Group Inc* a majority Court drew a distinction between 'true crimes' and regulatory offences. The Court observed the earlier distinction it had drawn in *R v City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. In that case Dickson J (as he then was), writing on behalf of a unanimous Court, recognised:

> public welfare offences as a distinct class. … such offences, although enforced as penal laws through the machinery of the criminal law, 'are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.'

Cory J, writing for the majority in *Travel Group Inc*, observed that:

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

The Court recognised that strict liability offences would be more readily justified when applied to regulatory offences which do not imply the same degree of moral blameworthiness as 'true crimes'.

Having regard to the matters considered above, it is considered that the strict liability offences in this Regulation impose reasonable and proportionate limitations on the presumption of innocence in section 22 (1) of the Human Rights Act. The offences are essentially of a regulatory nature. The defence of mistake of fact is available to a defendant charged with a strict liability offence. The defence only imposes an evidential burden, as opposed to a legal or 'persuasive' burden, on the defendant: the defendant need only present or point to evidence which suggests that there is a 'reasonable possibility' that he or she acted under a mistake of fact (see the Criminal Code, section 58 (4) and (7)). If the defendant discharges this onus, the burden is then put back on the prosecution to disprove beyond reasonable doubt that the defendant did not act under a mistake of fact (see the Criminal Code, section 56(2)).

The Committee commends this comprehensive approach to other agencies.

Inadequate Explanatory Statement?

Subordinate Law SL2010-8 being the Planning and Development Amendment Regulation 2010 (No. 1), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008* to create a new exemption for public art and determines the period for deemed refusal of an application for controlled activity order, if the development application is refused.**

The Committee makes comments below about the regulatory impact statement for this instrument. Those comments address the requirement in paragraph 35(h) of the *Legislation Act 2001* that a regulatory impact statement for a proposed law include a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency. As the Committee indicates below, the regulatory impact statement for this subordinate law contains a through explanation as to the reasoning behind the widening of exemptions from the development approval process (ie to include public art) and also an explanation as to why that widening should be accepted by the Legislative Assembly (eg the limited public complaints about the existing exemptions).

The Committee notes that it would have been appropriate for similar explanations to have been provided in the Explanatory Statement for the subordinate law.

Positive comment – Strict liability offences

Subordinate Law SL2010-9 being the Animal Welfare Amendment Regulation 2010 (No. 1) made under the *Animal Welfare Act 1992* **amends the *Animal Welfare Regulation 2001* by inserting additional provisions dealing with the welfare of poultry used in commercial egg production.**

The Committee notes that this subordinate law contains numerous strict liability offences that are created in relation to a new regulatory regime that is to apply in relation to the welfare of poultry used in commercial egg production. The Committee notes with approval that the Explanatory Statement for the subordinate law contains the following statement in relation to the use of strict liability offences in the subordinate law:

> *Overview of new part 6*
>
> The new part creates obligations on commercial egg producers, with the failure to carry out the obligations giving rise to a series of offences. The offences are strict liability with penalties that do not exceed 10 penalty units (the maximum that may be imposed under the regulation-making power – see section 112(3) of the Act).
>
> Strict liability offences are appropriate in this context as the offences only apply to commercial egg producers. Commercial egg producers are or ought to be aware of the content of the *Code of Practice for the Welfare of Animals: Domestic Poultry, 4th Edition* (the poultry code) as the poultry code has been an approved code of practice[.] The poultry code has formed the basis for the drafting of the offences in the Regulation. Consequently, the strict liability offences meet one of the tests that strict liability offences be proposed where a defendant can reasonably be expected, usually because of his or her business involvement, to be aware of the requirements of the law.

REGULATORY IMPACT STATEMENT

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

Subordinate Law SL2010-8 being the Planning and Development Amendment Regulation 2010 (No. 1), including a regulatory impact statement made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008* to create a new exemption for public art and determines the period for deemed refusal of an application for controlled activity order, if the development application is refused.**

Section 35 of the *Legislation Act 2001* provides that, if a proposed subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement to be prepared for the proposed law.

Section 35 of the Legislation Act sets out various requirements for the content of a regulatory impact statement. They include a requirement that a regulatory impact assessment include:

> (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 notes that the regulatory impact statement for this instrument contains the following 2 passages dealing with the requirement in paragraph 35(h):

> **(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles**
>
> The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.
> The proposed law refines the regulation, made under the Act, without making substantive changes, except for the matter discussed below. The discussion below demonstrates that the matter is consistent with the Committee's principles.
> Furthermore, 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 that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is the reduction in the 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. 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. The proposed law seeks to maintain these core rules (established during the Act's development) and consultation with peak industry groups (HIA and MBA) ensure that the DA exempt framework continues to achieve a core objective, that is, provide 'black and white' criteria easily understood by the community and industry and of a nature so as to not invoke adverse community comment.

There may be discontent that more exempt development is being allowed and this could be perceived as an erosion of community opportunity to comment. However, there has been limited public complaint about DA exemptions and the types of things which are exempt, and industry (that works daily with exempt developments) has acknowledged the benefits that DA exempt development offers.

The impacts of the proposed law are minimal and justified because 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 and no significant compliance issues have been identified. For instance, 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. Further the authority, in proposing these changes, is acknowledging operational experience, responding to industry feedback, and ensuring that the DA exemption framework is consistent in its approach and application.

…….

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

The proposed law refines the regulation, made under the Act, without making substantive changes and is therefore consistent with the Scrutiny of Bills Committee principles.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.

The Committee commends the discussion above in relation to the exemption process and the lack of public discontent with it. As indicated above, however, the Committee considers that it would have been appropriate for similar discussion to have also been included in the Explanatory Statement for the subordinate law.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Gaming and Racing, dated 23 March 2010, in relation to comments made in Scrutiny Report 19 concerning Disallowable Instrument DI2009-250, being the Gambling and Racing Control (Governing Board) Appointment 2009 (No. 2).

- The Attorney-General, dated 24 March 2010, in relation to comments made in Scrutiny Report 21 concerning the proposed Government amendments to the Fair Trading (Motor Vehicle Repair Industry) Bill 2009.
- The Attorney-General, dated 24 March 2010, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instruments:
  - DI2010-18, being the Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 1); and
  - DI2010-19, being the Victims of Crime (Victims Assistance Board) Appointment 2010 (No. 2).
- The Treasurer, dated 30 March 2010, in relation to comments made in Scrutiny Report 20 concerning Subordinate Law SL2009-53, being the Territory-owned Corporations Amendment Regulation 2009 (No. 1).
- The Attorney-General, dated 30 March 2010, in relation to comments made in Scrutiny Report 4 concerning Disallowable Instrument DI2009-15, being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1).
- The Attorney-General, dated 31 March 2010, in relation to comments made in Scrutiny Report 21 concerning Crimes (Serious Organised Crime) Amendment Bill 2010.
- The Attorney-General, dated 13 April 2010, in relation to comments made in Scrutiny Report 21 concerning Crimes (Surveillance Devices) Bill 2010.
- The Minister for Health, dated 16 April 2010, in relation to comments made in Scrutiny Report 20 concerning Subordinate Law SL2010-2, being the Medicines, Poisons and Therapeutic Goods Amendment Regulations 2010 (No. 2).
- The Minister for the Environment, Climate Change and Water, dated 20 April 2010, in relation to comments made in Scrutiny Report 20 concerning:
  - Disallowable Instrument DI2010-21, being the Nature Conservation (Flora and Fauna Committee) Appointment 2010; and
  - Subordinate Law SL2009-55, being the Environment Protection Amendment Regulation 2009 (No. 3).

The Committee wishes to thank the Minister for Gaming and Racing, the Attorney-General, the Treasurer, the Minister for the Environment, Climate Change and Water and the Minister for Health for their helpful responses.

Vicki Dunne, MLA
Chair

April 2010

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

REPORTS—2008-2009-2010

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 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 SL2009-25 - 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

Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009

Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Bills/Subordinate Legislation

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 14, dated 9 November 2009

Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)
Education (Participation) Amendment Bill 2009

Report 15, dated 16 November 2009

Disallowable Instrument DI2009-210 - Attorney General (Fees) Amendment Determination 2009 (No. 3)
Disallowable Instrument DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)

Report 16, dated 7 December 2009

Fair Trading (Motor Vehicle Repair Industry) Bill 2009

Report 17, dated 9 December 2009

Civil Partnerships Amendment Bill 2009 (No. 2)

Report 18, dated 1 February 2010

Health Practitioner Regulation National Law (ACT) Bill 2009
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)
Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010

Disallowable Instrument DI2009-235 - Attorney General (Fees) Amendment Determination 2009 (No. 5)
Disallowable Instrument DI2009-253 - Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 5)
Disallowable Instrument DI2009-256 - Long Service Leave (Portable Schemes) Employers Levy Determination 2009
Disallowable Instrument DI2009-266 - Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2009 (No. 1)

Bills/Subordinate Legislation

Education (Suspensions) Amendment Bill 2010 (PMB)
Justice and Community Safety Legislation Amendment Bill 2010
Personal Property Securities Bill 2010

Report 20, dated 15 March 2010
Disallowable Instrument DI2010-10 - Exhibition Park Corporation (Governing Board) Appointment 2010 (No. 1)
Subordinate Law SL2009-56 - Court Procedures Amendment Rules 2009 (No. 3)

Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 19 of 22 February 2010 in relation to Disallowable Instrument DI2009-250 being the Gambling and Racing Control (Governing Board) Appointment 2009 (No.2). The Committee noted that the Disallowable Instrument should have made reference to section 79 of the *Financial Management Act 1996* which appoints a specified person as a member and chair of a Territory authority made under regulation.

I am advised that this appointment is not invalid by operation of section 212 of the *Legislation Act 2001* which states that an appointment is not invalid because of a defect or irregularity in or in relation to the appointment.

I note the Committee's comments and assure you that future Disallowable Instruments appointing a chair to the Gambling and Racing Commission will refer to section 79 of the *Financial Management Act 1996*.

I thank the Committee for bringing these matters to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Gaming and Racing
23 MAR 2010

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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. 21 of 22 March 2010. I offer the following response in relation to the Committee's comments on the proposed Government amendments to the Fair Trading (Motor Vehicle Repair Industry) Bill 2009 (the Bill).

The Committee raised concern over the appropriateness of delegating power to the Minister to issue directions about the equipment, materials and skills necessary to perform repairs (new clause 22 of the Bill proposed by Government amendment 1).

Clause 22 is another example of an appropriate delegation of power to the Minister which ensures that regulatory schemes can operate effectively. Enabling the Minister to issue directions which deal efficiently with issues that arise during, and that affect, the day-to-day operation of a regulatory scheme can prevent timely and costly disruptions to the regulation of that industry, and to all parties participating in that industry. The power will be exercised by the Minister following advice that will be given by the Commissioner for Fair Trading or the advisory committee, proposed to be established by Government amendment 3. A direction issued under clause 22 is a disallowable instrument. The disallowable nature of a direction acts as an effective safeguard on the appropriate exercise of the power.

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

Yours sincerely

Simon Corbell MLA
Attorney General

24.5.10

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne
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. 20 of 15 March 2010. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on the *Victims of Crime (Victims Assistance Board) Appointment 2010 (No 1)* (DI2010-18) and *Victims of Crime (Victims Assistance Board) Appointment 2010 (No 2)* (DI2010-19).

In the report, the Committee noted that the instruments of appointment stated that they are made under the *Victims of Crime Regulations 2000*, incorrectly adding an 's' to the word 'Regulation'. I appreciate the Committee's comments and will seek to ensure that future instruments of appointments correctly refer to the *Victims of Crime Regulation 2000*.

The Committee further commented that the Explanatory Statement for the Disallowable Instrument 2010-18 contains no indication that the specified person met the pre-requisites for the appointment. I can assure you that the health professions member is not a doctor or dentist, and the appointee has the necessary prerequisites for appointment. I will seek to ensure future instruments of appointments, or their Explanatory Statements, expressly indicate that any required pre-requisites have been met.

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

Yours sincerely

Simon Corbell MLA
Attorney General
24.3.10

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Katy Gallagher MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR HEALTH
MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

I refer to Scrutiny Report No. 20 prepared by the Standing Committee (the Committee) on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), dated 15 March 2010.

The Subordinate Law SL2009-53 being the Territory-owned Corporations Amendment Regulation 2009 (No. 1) made under the *Territory-owned Corporations Act 1990* defers the commencement date for the removal of Rhodium Asset Solutions Limited from Schedule 1 of the Act until 12 December 2010.

I note that the Committee makes positive comment about the completeness of the Explanatory Statement. Please convey my appreciation to the Committee for its comments.

Yours sincerely

K. Gallagher

Katy Gallagher MLA
Treasurer
30.3.10

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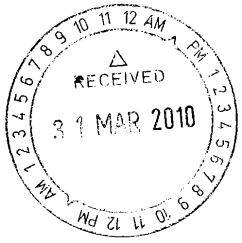

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No. 4, dated 23 March 2009. This report referred to *Disallowable Instrument DI 2009-15*, which appointed the Chair of the Sentence Administration Board.

The Committee noted that there is no indication, either in the instrument or in the Explanatory Statement that the specified person meets the requirements set out in subsection 174 (2) of the *Crimes (Sentence Administration) Act*.

The Committee further noted that it is preferable that the Explanatory Statements for instruments of this type expressly address any requirements for the appointment. As the Committee has previously stated, this is not an onerous requirement and would assist the Committee (and the Assembly) in ensuring that the formal requirements for appointments have been met.

In response to the Committee's comments I wish to advise that *Disallowable Instrument DI 2009-15* has been repealed and is no longer in force. However, your comments have been noted and will be taken into consideration in future drafting.

Thank you for bringing this matter to my attention.

Yours sincerely

Simon Corbell MLA
Attorney General

28-3-10

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has issued further comments on the Crimes (Serious Organised Crime) Amendment Bill 2010 (SOC Bill) in Scrutiny Report Number 21.

I note that in this Report the Committee adopted its preliminary comments on the SOC Bill from Scrutiny Report Number 20, and has taken the opportunity to restate its concerns about the lack of certainty about the definition of 'material benefit', the use of the mental element of 'ought to have known' and whether section 652 as it is drafted represents a proportionate limitation on human rights.

While I note that the Committee believes these issues were not addressed in my letter dated 16 March 2010. I believe that I have already addressed these concerns in my letter of 16 March 2010.

Yours sincerely

Simon Corbell MLA
Attorney General
31.3.10

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Mrs Vicki Dunne MLA
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Legislative Assembly
London Circuit
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Dear Mrs Dunne

I note the Standing Committee on Justice and Community Safety (the Committee) has issued further comments on the Crimes (Surveillance Devices) Bill 2010 (SD Bill) in Scrutiny Report Number 21.

In this Report, the Committee reiterated its comments about emergency authorisations considered in the SD Bill at Part 3, and whether these provisions are justifiable under section 28 of the *Human Rights Act 2004* (HR Act).

You also asked that I provide the Assembly with a justification for my view that, although these provisions engage the right to privacy, the provisions are none the less proportionate. In doing so, the Committee asked that I pay particular attention to section 28 (2) of the HR Act.

In the ACT , the principle of proportionality is found in section 28 of the HR Act, which states that the rights listed in the HR Act may be subject only to reasonable limits set by territory laws that can be demonstrably justified in a free and democratic society.

The test of proportionality sits at the centre of human rights protection. Proportionality governs the legality of an interference with the democratic and participatory rights. The principle of proportionality requires that there is a reasonable relationship between the means employed and the aims sought. The test of proportionality will decide whether an interference, which is aimed at promoting a legitimate public policy, is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals.

Under section 28(2) of the HR Act, all relevant factors must be considered in deciding whether a limit is reasonable, including the following:

- The nature of the right affected;
- The importance of the purpose of the limitation;

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- The nature and extent of the limitation;
- The relationship between the limitation and its purpose;
- Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The nature of the right affected
The use of surveillance devices engages the right to privacy contained in section 12 of the HR Act, which states that "Everyone has the right not to have his or her privacy . . . interfered with unlawfully or arbitrarily".

The European Court of Human Rights (ECHR) has defined the right to privacy contained in Article 8 of the European Convention of Human Rights very broadly to include aspects such as gender identification, name, sexual orientation, and sexual life, as well as communication.

The right to privacy is not an absolute right. It is a qualified right, which means that while the right can first be asserted, permissible restrictions to that right can be applied where it can be shown that it is necessary in a democratic society to do so and if there is a legal basis for such an interference. Indeed, there are many instances where the needs of a democratic society naturally affect the right to privacy.

As I indicated in my response to the interim comments on the SD Bill in Scrutiny Report (Number 20), the ECHR has determined that covert surveillance by law enforcement agencies for criminal investigation is an acceptable interference with the right to privacy, provided that legal safeguards are in place.

The objective of the Bill is to create a scheme that will authorise the use of data surveillance devices, listening devices, optical surveillance devices, and tracking devices by law enforcement officers in the ACT that can also be used in other jurisdictions with corresponding law. The scheme is intended to provide ACT Policing with modern tools to detect and dismantle organised crime where it occurs in the Territory.

In the context of using the surveillance devices contemplated by the Bill, the right to privacy relates primarily to forms of communication and interaction with other people, which can be either verbal, written, electronic, etc. The right to privacy may only be limited in a manner prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The importance and purpose of the limitation
In the context of emergency authorisations and non-judicial officers authorising the initial use of surveillance devices, the limitation on the right to privacy will only occur in very rare instances. However, in drafting the model laws, the Joint Working Group stated that 'there are limited circumstances when it may be impracticable for law enforcement agencies to apply for a warrant, even by telephone'[1].

[1] *Cross-border investigative powers for law enforcement Report* - November 2003, Members of the Joint Working Group as an initiative of the Leaders Summit on Terrorism and Multijurisdictional Crime; p 435.

As the Explanatory Statement says, the type of situations where these powers are likely to be used include a siege situation, a terrorist incident, an act of deprivation of liberty in which a victim's life may be in danger, or an act of extortion involving a threat of imminent injury. These are serious harms that engage other rights, such as the right to life to the right to liberty.

The purpose of the limitation is to ensure that a serious offence does not occur, or to limit the possible impact of the aforementioned situations. The Bill defines a 'relevant offence' as an offence against an ACT law that is punishable by imprisonment of 3 years or more, or an offence against an ACT law that is prescribed under regulation. In such instances, I am satisfied that the rights which may be engaged require the law's protection, and that the purpose of limiting the right to privacy is demonstrably justified.

In order for police to investigate crime, they must be given effective powers. Setting out cross border investigative powers in legislation provides law enforcement agencies with clear parameters and promotes transparency and certainty about the extent of those powers.

Nature and extent of the limitation, relationship between the limitation and its purpose
The ECHR has accepted that the power to use surveillance techniques is an indispensable tool in the investigation and prevention of serious crime.

In the 1984 case of *Malone v United Kingdom*,[2] the ECHR found that a breach of the right of privacy had occurred because the covert surveillance procedures that the law enforcement agency used to investigate a crime were not clearly incorporated into the legal rules of the state.[3]

The Court also said that the existence of laws granting powers of interception of communications, to aid the police in their function of investigating and detecting crime, may be necessary in a democratic society for the prevention of crime in the context of the right to privacy.

In its decision in *Malone*, the ECHR stated the caveat that the exercise of such powers, because of their inherent secrecy, carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole, since a system of secret surveillance designed to protect national security and public order entails the risk of undermining or even destroying democracy on the ground of defending it.

In other cases, the ECHR has ruled that the interference can only be regarded as 'necessary in a democratic society' if the particular system of secret surveillance adopted contains adequate guarantees against abuse. Furthermore, police surveillance should be restricted to that which is strictly necessary to achieve the required objective. In the case of *Klass v Germany*, the Court found that *powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under ECHR only in so far as strictly necessary for safeguarding the democratic institution.*[4]

Protecting society against crime is an important public interest, and the use of surveillance techniques and instruments are critical.

2 (1985) 7 EHRR 14.

3 (1985) 7 EHRR 14 at para 79.

4 (1978) 2 EHRR214

In the Australian context, these sentiments were echoed in the Final Report of the Wood Royal Commission,[5] which considered that the use of electronic surveillance was the single most important factor in achieving a breakthrough in its investigations.
The use of electronic surveillance can be seen to have a number of advantages, which include:

- Obtaining evidence that provided a compelling, incontrovertible and contemporaneous record of criminal activity;
- The removal of the incentive to engage in process corruption;
- The opportunity to effect an arrest while a crime is in the planning stage, thereby lessening the risks to lives and property; and
- Overall efficiencies in the investigation of corruption offences and other forms of criminality that are covert, sophisticated and difficult to detect by conventional methods, particularly were those involved are aware of policing methods, are conscious of visual surveillance and employ counter surveillance techniques.

Emergency authorisations will only be available in very limited circumstances, and must then be confirmed by judicial authorisation. Clause 25 provides for the very rare circumstances in which a law enforcement officer may apply to the Chief Police Officer for an emergency authorisation for the use of a surveillance device. The threshold issue is again twofold. Firstly, the officer must suspect or believe on reasonable grounds the things referred to in clause 25(1) (a) – (d). These include a imminent threat of serious violence to a person or substantial damage to property exists, that the use of the surveillance device is immediately necessary for the purpose of dealing with that threat; that the circumstances are so serious and the matter is of such urgency that the use of the device is warranted and that it is not practicable in the circumstances to apply for a surveillance device warrant.

In the context of emergency authorisations, even though the initial authorisation occurs by a non-judicial officer, the Bill requires that the law enforcement agency seeks judicial approval of the warrant within 2 working days.

Clause 29 sets out the different thresholds under which a judge may approve an application consequent to an emergency authorisation, depending on the circumstances relating to the granting of that emergency authorisation.

It is intended that if the judge approves the emergency use of powers he or she may issue a surveillance device warrant for the continued use of the surveillance devices as if it were a warrant application under Division 2. In this way, the duration of the warrant is no more than 90 days and the judge is empowered to impose conditions or restrictions on the warrant in the usual way.

Under the scheme contemplated by the Bill, if the judge does not approve an authorisation he or she may order that the use of the surveillance device cease. In any case (regardless of whether the judge approves or does not approve an authorisation) Clause 29(5) empowers a judge to order that any information obtained from or relating to the exercise of powers under the emergency authorisation or any record of that information be dealt with in the way specified in the order. This would empower the judge to order the destruction of the material if that were appropriate. The power to order the destruction of material protects the right to a fair trail and the presumption of innocence.

5 New South Wales, Royal Commission into the New South Wales Police Service, Final Report (1997).

The SD Bill has further checks and balances incorporated into it which include:

- Placing obligations on law enforcement agencies to record details relating to the execution of warrants; and to provide annual reports to the Attorney General on the use and effectiveness of surveillance devices;
- Requiring the Attorney General to provide the Legislative Assembly with a copy of this report every financial year; and
- Prescribing the Ombudsman with independent oversight of the scheme with full access to relevant records.

In his book, *Human Rights in Criminal Proceedings*, Stefan Trechsel when considering the issue of surveillance and the interception in communication in the context of the European Convention on Human Rights stated

> *Unfortunately there will always be persons who do not adhere to the values which form the basis of human rights. Those people believe in some absolute truth, for example, of a religious or political nature, which they value higher than the life of individual human beings or entire groups of human beings, let alone the classical liberties such as freedom of expression, of opinion, of religion, etc. as they have adopted deviant value systems, it is necessary to suspend certain fundamental rights for the purpose of maintaining a social order in which rights can find protection. ...On the other hand, this is not to say that the individual remains unprotected. As the Court demonstrated in Klass the legislation at issue must provide for an elaborate system of checks and balances which serve to reduce to a minimum the dangers of misuse.*[6]

Any less restrictive means reasonably available to achieve the purpose

Before seeking to use of a surveillance device under Part 3 of the SD Bill, in making an application to the Chief Police Officer, a law enforcement officer must give consideration to whether:

- the investigation in relation to which the surveillance device is authorised in the ACT is likely to extend to a participating jurisdiction; and
- the use of the surveillance device in a participating jurisdiction is immediately necessary to prevent the loss of any evidence; and
- the circumstances are so serious and the matter is of such urgency that the use of the surveillance device in the participating jurisdiction is warranted; and
- it is not practicable in the circumstances to apply for a surveillance device warrant.

Clause 28 of the Bill requires the Chief Police Officer to be mindful of the intrusive nature of using a surveillance device in considering whether to approve an emergency authorisation.

Jurisprudence from the ECHR indicates that approval of surveillance devices by non-judicial bodies is not incompatible. In *Klass v Germany*, the involvement of a parliamentary board and an independent commission was deemed a sufficient check and balance, etc. In this case, the Court stated that:

> *it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. This will usually mean that*

[6], Trechsel, Stefan; *Human Rights in Criminal Proceedings*; Oxford University Press; 2006, page 552.

there should be some form of judicial control, even if only in the last resort.[7]

While the Bill authorises the non-judicial approval for emergency authroisations, the ECHR has concluded in cases such as *Klass* that non-judicial approval of the use of surveillance devices is not inconsistent.

Proportionality always requires that a balance is struck between the burden placed upon the individual whose rights are being limited and the interests of the general public in achieving the aim that is being protected.

The requirement for the use of surveillance device warrants issued under Part 3 to be approved by a judicial officer, combined with further information safeguards and accountability measures that include the independent oversight of the scheme by the Ombudsman satisfies the decision in *Klass*.

It is for these reasons that I believe that while emergency authorisations contained in Part 3 of the *Crimes (Surveillance Devices) Bill 2010* engages the right to privacy, it does so in a manner that is proportionate, specific and justified in a free and democratic society.

The Committee's Report also supported the proposal by Civil Liberties Australia that the Bill be amended to use on-call duty magistrates rather than the Chief Police Officer for emergency authorisations. I have received a letter from Shane Rattenbury MLA referring to CLA's suggestions. As I said to Mr Rattenbury, the use of on-call judicial officers is precisely what the Bill anticipates if an after hours judicial officer is available (bearing in mind that most warrants can only be issued by Supreme Court judges, including in the case of the ACT Federal Court judges who hold dual commission), then a remote (e.g. telephone) application should be made to that judicial officer. It is only envisaged that the "not practicable" grounds will be made out only if there is no judicial officer available by telephone to grant the warrant. As the court arranges for a judge to be 'rostered on' for after hours work of this type at all times, these circumstances are likely to be very rare.

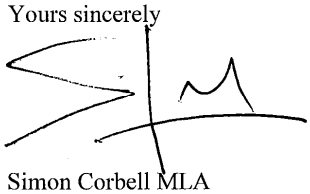
In any event, even if an emergency authorisation is granted, the Bill provides for judicial review and oversight through the requirements of clause 28 for a judicial officer to approve the emergency authorisation. That approval application must take place within 2 working days after the emergency authorisation was granted. Further, regardless of whether the judicial officer gives approval for the emergency authorisation, he or she is empowered under clause 29(5) to order that any information obtained from or relating to the exercise of powers under the emergency authorisation or any record of that information be dealt with in the way specified in the order. This would empower the judge to order the destruction of the material if that were appropriate.

Finally, I consider it is appropriate for the Territory to be reluctant to deviate from the model bill in the manner proposed. As you are no doubt aware, for a cross-border scheme to effectively operate, the legislation of other jurisdictions must correspond. To deviate from the model bill in the fashion proposed would leave the Territory in the position of having to justify that our provisions continue to correspond. The very limited circumstances in which the emergency

[7] (1978) 2 EHRR214

authorisation provisions operate, together with the safeguards requiring ratification by a judicial officer are, in my view, more than sufficient.

Yours sincerely



Simon Corbell MLA
Attorney General

13.4.10

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chairperson
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Dear Mrs Dunne

In *Scrutiny Report No. 20*, the Committee made comment on Disallowable Instrument DI2010-21 and Subordinate Law SL2009-55.

As the Committee noted, DI2010-21 in which Dr Richard Schodde is appointed as a member of the Flora and Fauna Committee, does not specify that Dr Schodde is not a public servant. Dr Schodde is not a public servant and it is therefore appropriate that he be appointed through the mechanism of a disallowable instrument. I regret the inconvenience this omission may have caused the Committee.

The Committee described SL2009-55, which amends schedule 1 of the *Environment Protection Act 1997* by inserting a threshold of 100 m^3 to the activity of extraction of material (other than water) from a waterway, as an exercise in law-making by "Henry VIII" clause. However, subsection 166(8) of the Act permits the amendment of schedule 1 by "adding activities to, or deleting activities from, that schedule". My Department has advised that SL2009-55 is consistent with the purpose of subsection 166(8). In effect, it deletes the previous activity "the extraction of material (other than water) from a waterway" from Schedule 1, and adds the activity "the extraction of more than 100m^3 of material (other than water) from a waterway".

I thank the Committee for bringing these matters to my attention.

Yours sincerely

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

20.4.10

cc Deputy Clerk, ACT Legislative Assembly

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Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
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Dear Mrs Dunne

I refer to the Scrutiny Report No 20 dated 15 March 2010 and the Committee's comment on the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2010 (No 2) regarding the matter of a minor typographical error and the use of abbreviations in the Explanatory Statement for this subordinate law.

I have noted the Committee's comments and while the errors do not impact on the legality of the subordinate law I note that the Explanatory Statement has not met the technical and stylistic standards expected by the Committee.

I have brought the Committee's comments to the attention of the relevant area and thank the Committee for bringing this matter to my attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

16 April 2010

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