



Legislative Assembly for the ACT

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

Scrutiny Report

18 AUGUST 2008

Report 58

TERMS OF REFERENCE

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS

Bill—No comment

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

DUTIES AMENDMENT BILL 2008 (NO 2)

This Bill would amend the *Duties Act 1999* to provide that a determination for section 208 of the Act that is made under section 139 of the *Taxation Administration Act 1999* may apply, adopt or incorporate an instrument as in force from time to time.

SUPERANNUATION (LEGISLATIVE ASSEMBLY MEMBERS) AMENDMENT BILL 2008

This is a Bill to provide for the superannuation scheme arrangements for existing members of the Legislative Assembly and new members of the Legislative Assembly who commence on or after the October 2008 elections.

UNIT TITLES AMENDMENT BILL 2008

This Bill would amend the *Unit Titles Act 2001* in relation to matters such as the resolution of disputes, the management of communications within a unit complex, protection for buyers of units, definition of the role and responsibilities of the executive committee, executive committee members and owners corporation managers, and a sinking fund 10-year plan and the review of such a plan.

Bill—Comment

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

ACT CIVIL AND ADMINISTRATIVE TRIBUNAL LEGISLATION AMENDMENT BILL 2008 (NO 2)

This Bill would amend the *ACT Civil and Administrative Tribunal Act 2008* and other legislation in relation to tribunals and other bodies, the functions of which are to be conferred on the ACT Civil and Administrative Tribunal.

Report under section 38 of the *Human Rights Act 2004* (HRA)

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

The amendments proposed to the ACT Civil and Administrative Tribunal Act (“the Act”)

The right to a fair trial & the costs of litigation – HRA subsection 21(1)¹

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

Are the provisions of the Bill concerning the costs of a matter such as to ensure that access to the ACAT is inexpensive?

Part 1.1 of Schedule 1 would insert provisions that are generally considered necessary to the operation of a tribunal. In *Scrutiny Report No. 55* of the *Sixth Assembly*, concerning the ACT Civil and Administrative Tribunal Bill 2008, the Committee drew attention to the critical issue of the legal costs that might be incurred by a party to a tribunal proceeding. The Committee drew attention to a number of risks, including in particular that a party who resorted to the tribunal might find that they are required to participate in an expensive Supreme Court proceeding notwithstanding that there had not to that point been an adjudication by the tribunal of the merits of the case. The Committee also called for an explanation of why the usual rule in civil matters that “the loser pays” does not apply in the civil disputes jurisdiction of the tribunal.

The Minister has not yet responded to the Committee’s report, but it is noted that the question of costs is one of the matters that has been addressed by these amendments – see proposed section 22S of the Act (Part 1.1). The policy of this provision is that provision of financial support to a litigant is a matter lying within the discretion of the Minister. Proposed section 22S would provide:

22S Legal and financial assistance for certain people

- (1) This section applies to a person who, in relation to a matter **arising under this part** —
 - (a) makes, or proposes to make, an application to the tribunal; or
 - (b) is a party to an application before the tribunal made by another person; or
 - (c) proposes to begin a proceeding for review of a decision, or is a party to a proceeding, before a court.
- (2) The person may apply to the Minister for assistance in relation to the application or proceeding.
- (3) The Minister may authorise the provision by the Territory of legal or financial assistance determined by the Minister in relation to the application or proceeding if satisfied that —
 - (a) it **would involve hardship to the person** to refuse the application; and
 - (b) in all the circumstances, it is reasonable that the application be granted.
- (4) The Minister may impose conditions on the authorisation to provide assistance. (Emphasis added.)

The Committee notes in particular that the words “arising under this part” in subsection 22S(1) have the effect that this scheme could operate only in relation to a matter in the administrative review jurisdiction of the ACAT. There appears to be no provision in relation to the civil jurisdiction.

It is also noted that the scheme cannot benefit a person unless the Minister can be satisfied that a refusal of aid “would involve hardship to the person”.

The Committee reiterates its view that the question of costs is significant and refers to its earlier in *Scrutiny Report No. 55* of the *Sixth Assembly*.

The Committee draws this to the attention of the Assembly, noting the fair trial requirement in HRA subsection 21(1) - see below for the text.

The amendments proposed to the *Occupational Health and Safety Act 1989* (“the Act”)

Having regard to the rule of law, and/or to HRA subsection 8(2), is it appropriate that the Minister, upon an application by a relevant person, may grant to that person (or persons) an exemption from complying with any or all provisions of the Act?

Proposed section 9 of the Act (see Part 1.77 of Schedule 1 of this Bill) would confer on the Minister a power to grant to a person (or persons) an exemption from complying with any or all provisions of the Act. The persons or entities who might apply for an exemption are employers, employees and workplaces.

The Committee appreciates that this proposal substantially restates the existing position under section 9 of the Act, and that the point of the new provision is to permit an unsuccessful applicant to seek review of the decision by the ACAT instead of, as at present, the AAT. Nevertheless, given that proposed section 9 would be a new law, the role of the Committee extends to a full review of its provisions. The fact that a proposal would re-enact an existing provision does not immunise it from review. The Committee has often commented that the enactment of the *Human Rights Act 2004* might well require a fresh look at an existing provision that is proposed to be restated.

The Committee notes that the power of the Minister is one to dispense with the operation of the law in favour of particular individuals. Thus, on its face, it engages HRA subsection 8(3) - “Everyone is equal before the law and is entitled to the equal protection of the law without discrimination”. For example, were an employer to be granted an exemption, her or his employees would not have the benefit of the relevant provisions of the Act.

This derogation from the right to equality before the law might be justifiable under HRA section 28.

The power to dispense also violates the basic constitutional principle that “[t]he Executive branch of government cannot dispense its officers from the binding effect of the laws prescribed by the Parliament”.² Given that non-government officials are less amenable than officials to being called to account by the Assembly, this principle applies with more force where the dispensation is in favour of persons who are not officials.

The Explanatory Statement makes no reference to this issue, and the Committee draws this to the attention of the Assembly.

Where the ACAT reverses a refusal of the Minister to grant an exemption, is the tribunal decision “an exemption” so that it is a disallowable instrument?

In that by proposed subsection 9(2) the exemption is a disallowable instrument, the Assembly may check on the exercise of the power of the Minister. The instrument must be notified and presented to the Assembly, which may disallow the instrument, with the result that it would cease to have legal effect.

² *Ridgeway v The Queen* [1995] HCA 66, Brennan J judgment at [17], citing *Clough v Leahy* [1904] HCA 38; (1904) 2 CLR 139 at 155-156; *A v Hayden (No 2)* [1984] HCA 67; (1984) 156 CLR 532 at 540, 562, 580-582, 588-589, 592.

What, however, is the situation where the ACAT reverses a refusal of the Minister to grant an exemption? Is the tribunal decision “an exemption” so that it is a disallowable instrument?

In principle, the ACAT decision should be so treated, for otherwise the Assembly has no control over the power to dispense with the operation of the laws it has enacted. It is not easy to see how an ACAT decision can be notified and presented to the Assembly.

The Committee recommends that the proponent of the Bill provide an explanation of this matter.

Comment on the Explanatory Statement

The amendments proposed to the ACT Civil and Administrative Tribunal Act (“the Act”)

There is very little in the way of explanation of these provisions. This legislation will however be of very great significance to the practice of law in the Territory, and both lawyers and members of the public would be greatly assisted by an Explanatory Statement in the usual form. The provisions are not in any sense merely consequential or minor amendments to the scheme and are no less significant than the provisions of the ACT Civil and Administrative Tribunal Bill 2008. These latter provisions were fully explained.

In particular, the Committee notes a problem in the way proposed section 22S (see above) is explained. The Explanatory Statement merely says that it “preserves the operation of a legal aid scheme”. The Presentation Speech provides more explanation when it says that “[o]ne of the amendments preserves the opportunity for a person who has made, or proposes to make an application in the administrative review jurisdiction, to apply to the Attorney-General for provision of financial or legal assistance in relation to the proceeding”. This is not accurate, in that the range of persons covered by proposed subsection 22S(1) is clearly much wider than “a person who has made, or proposes to make an application in the administrative review jurisdiction”.

The Committee suggests that a full explanation of proposed section 22S be included in the Explanatory Statement.

The practice of explaining “consequential” changes to recently enacted legislation with short descriptions that do not explain the provisions in the usual detail

Schedule 1 of the Bill would amend 110 pieces of legislation, and text of the Bill in this respect runs to 340 pages. The Explanatory Statement runs to 14 pages.

The Committee’s comments are not based on this comparison. It accepts that most of the proposed amendments are designed merely to replace provisions of an existing law providing for review by the AAT with provisions providing for ACAT review. In these cases, a reader looking at a particular part of Schedule 1 and at the Explanatory Statement could well see what that part of Schedule 1 was designed to do.

In some instances however, the proposed amendments go further, largely, it appears, to “frame the administrative decision and the review right in modern language” (see below).

For example, in Part 1.22 of Schedule 1, the *Common Boundaries Act 1981* is substantially amended, yet the Explanatory Statement states only:

This part provides that an application may be made for a review of administrative decisions in the Act (previously brought before the Administrative Appeals Tribunal)³ to the ACAT. Many of the provisions in the Act have required amendment, in order to frame the administrative decision and the review right in modern language.

While as a matter of their substance, the new provisions restate the existing law, this law is of great significance to lawyers and members of the public, and the Committee considers that they should have been explained in the usual way. If the provisions of Part 1.22 had been presented in a discrete Bill, this is what would have been done, and the fact that they are contained in an omnibus Bill should not make any difference.

In some cases, the amendments proposed may indeed go further than a merely consequential change or a modernisation of language. In Part 1.103, the *Utilities Act 2000* is substantially amended, yet the Explanatory Statement states only:

This part makes consequential amendments to the Act and provides that an application may be made for a review of administrative decisions in the Act (previously brought before the Administrative Appeals Tribunal) to the ACAT.

Proposed Parts 11 and 12 of the Utilities Act are very different to the comparable existing provisions of the Act, largely because the particular regime for review of decisions contained in the Act as it stands is to be replaced by provisions that provide for review by the ACAT and these provisions must be read together with the ACAT Act. At least this much should have been explained.

In proposed Part 12 there may be an instance where the provisions in Part 1.103 introduce matter not found in the existing Act or in the ACAT Act. Proposed section 184 of the Utilities Act would make provision for the protection of confidential information by ACAT. It may have missed something, but the Committee cannot see any parallel provision in the Utilities Act or in the ACAT Act.

Does the provision in proposed section 184 of the Utilities Act, which would make provision for the protection of confidential information by ACAT, engage the right to a fair trial (HRA subsection 21(2)), and if so, is any incompatibility justifiable?

The need for an explanation of proposed section 184 is underlined by the fact that there are some points of uncertainty about its scope. In subsection 184(1), it is provided that “ACAT must preserve the confidentiality” of certain kinds of information disclosed to or obtained by it. This is:

- (a) personal information; and
- (b) information that—
 - (i) could affect the competitive position of a utility or someone else; or
 - (ii) is commercially sensitive for another reason (subsection 184(1)).

³ This may not be correct. The Committee understands that fencing disputes were resolved by the Small Claims Tribunal.

What however is involved in the preservation of confidentiality? For example, does it mean that information of a relevant kind should not be disclosed to a party to the matter before the ACAT? If so, then subsection 21(1) (the right to a fair trial) of the *Human Rights Act 2004* is engaged, and thus should have been addressed in the Explanatory Statement.

The Explanatory Statement makes no reference to this issue, and the Committee draws this to the attention of the Assembly.

LEGISLATIVE ASSEMBLY (MEMBERS' STAFF) AMENDMENT BILL 2008

This is a Bill to amend the *Legislative Assembly (Members' Staff) Act 1989* to give effect to the clause in the Assembly Members' Code of Conduct which requires that members not employ family members.

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

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

The Committee draws attention to subsection 8(3) of the *Human Rights Act 2004*:

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

Without expressing an opinion as to whether the Bill is incompatible with HRA subsection 8(3), the Committee considers that the Assembly should take this right into account in its debate on the Bill.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2008-131 being the Health (Fees) Determination 2008 (No. 1) made under section 192 of the *Health Act 1993* revokes DI2007-321 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-132 being the Taxation Administration (Rates—Rebate Cap) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2007-133 and determines a new rebate cap under the *Rates Act 2004*.

Disallowable Instrument DI2008-134 being the Taxation Administration (Rates—Fire and Emergency Services Levy) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2007-134 and determines new amounts for the calculation of the fire and emergency services levy under the *Rates Act 2004*.

Disallowable Instrument DI2008-135 being the Public Place Names (Acton) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of one road in the Division of Acton.

Disallowable Instrument DI2008-136 being the Taxation Administration (Rates) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2007-132 and determines the variable rating factors for the purposes of the calculation of rates payable under the *Rates Act 2004*.

Disallowable Instrument DI2008-137 being the Taxation Administration (Interest Payable—Land Rent) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* determines the interest rate on unpaid land rent payable under a land rent lease under the *Land Rent Act 2008*.

Disallowable Instrument DI2008-138 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2008 (No. 1) made under section 139 of the *Taxation Administration Act 1999* determines the standard percentage, the discount percentage, the relevant percentage and the income threshold amount for the purposes of the provisions of the *Land Rent Act 2008*.

Disallowable Instrument DI2008-139 being the Land Rent (Certificate Fees) Determination 2008 (No. 1) made under section 32 of the *Land Rent Act 2008* determines the fee payable for an application to the Commissioner for a certificate of land rent and other charges.

Disallowable Instrument DI2008-140 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2008 (No. 2) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2008-141 being the Road Transport (General) (Pay Parking Area Fees) Determination 2008 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2005-201 and DI2005-262 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-142 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2008 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2007-307 and determines the maximum fares payable on regular route services provided by ACTION.

Disallowable Instrument DI2008-143 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 3) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares a specified organisation to be a parking authority within the area of Block 12, Section 45, in the suburb of Belconnen.

Disallowable Instrument DI2008-144 being the Animal Diseases (Fees) Determination 2008 (No. 1) made under section 88 of the *Animal Diseases Act 2005* revokes DI2007-137 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-146 being the Animal Welfare (Fees) Determination 2008 (No. 1) made under section 110 of the *Animal Welfare Act 1992* revokes DI2007-138 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-147 being the Clinical Waste (Fees) Determination 2008 (No. 1) made under section 40 of the *Clinical Waste Act 1990* revokes DI2007-139 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-148 being the Environment Protection (Fees) Determination 2008 (No. 1) made under section 165 of the *Environment Protection Act 1997* revokes DI2007-164 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-149 being the Fisheries (Fees) Determination 2008 (No. 1) made under section 114 of the *Fisheries Act 2000* revokes DI2007-140 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-150 being the Heritage (Register Fees) Determination 2008 (No. 1) made under section 120 of the *Heritage Act 2004* revokes DI2007-141 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-151 being the Nature Conservation (Fees) Determination 2008 (No. 1) made under section 139 of the *Nature Conservation Act 1980* revokes DI2007-142 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-152 being the Stock (Fees) Determination 2008 (No. 1) made under section 68 of the *Stock Act 2005* revokes DI2007-143 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-153 being the Water Resources (Fees) Determination 2008 (No. 1) made under section 107 of the *Water and Sewerage Act 2000* revokes DI2007-192 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-154 being the Electoral (Fees) Determination 2008 made under section 8 of the *Electoral Act 1992* revokes DI2007-124 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-155 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2008 (No. 1) made under section 49 of the *Cemeteries and Crematoria Act 2003* revokes DI2007-160 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-156 being the Domestic Animals (Fees) Determination 2008 (No. 2) made under section 144 of the *Domestic Animals Act 2000* revokes DI2007-66 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-157 being the Hawkers (Fees) Determination 2008 (No. 1) made under section 45 of the *Hawkers Act 2003* revokes DI2007-158 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-158 being the Roads and Public Places (Fees) Determination 2008 (No. 1) made under section 9A of the *Roads and Public Places Act 1937* revokes DI2007-290 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-160 being the Building (Fees) Determination 2008 (No. 1) made under section 150 of the *Building Act 2004* revokes DI2007-146 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-161 being the Community Title (Fees) Determination 2008 (No. 1) made under section 96 of the *Community Title Act 2001* revokes DI2007-148 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-162 being the Construction Occupations Licensing (Fees) Determination 2008 (No. 1) made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2007-147 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-163 being the Electricity Safety (Fees) Determination 2008 (No. 1) made under section 64 of the *Electricity Safety Act 1971* revokes DI2007-149 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-164 being the Gas Safety (Fees) Determination 2008 (No. 1) made under section 67 of the *Gas Safety Act 2000* revokes DI2007-150 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-165 being the Planning and Development (Fees) Determination 2008 (No. 4) made under section 424 of the *Planning and Development Act 2007* revokes DI2008-43 and DI2008-57 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-166 being the Surveyors (Fees) Determination 2008 (No. 2) made under section 80 of the *Surveyors Act 2007* revokes DI2008-75 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-167 being the Unit Titles (Fees) Determination 2008 (No. 1) made under section 179 of the *Unit Titles Act 2001* revokes DI2007-153 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-169 being the Public Baths and Public Bathing (Active Leisure Centre) (Fees) Determination 2008 (No. 1) made under section 37 of the *Public Baths and Public Bathing Act 1956* revokes DI2007-163 and determines the fees payable on pool admission, classes and swim school provided by the Active Leisure Centre.

Disallowable Instrument DI2008-170 being the Nature Conservation (Criteria and Guidelines for Declaring Threatened Species and Communities) Determination 2008 made under section 35 of the *Nature Conservation Act 1980* revokes DI1995-99 and specifies the criteria and guidelines to enable the Flora and Fauna Committee to determine the conservation status of a species or community, or the ecological significance of a threatening process.

Disallowable Instrument DI2008-171 being the Public Sector Management Amendment Standards 2008 (No. 2) made under section 251 of the *Public Sector Management Act 1994* amends the Standards to increase the base monthly lease rate for executive vehicles.

Disallowable Instrument DI2008-172 being the Utilities (Essential Services Consumer Council) Appointment 2008 (No. 1) made under paragraph 174(1)(a) of the *Utilities Act 2000* appoints a specified person as chairperson of the Essential Services Consumer Council.

Disallowable Instrument DI2008-173 being the Utilities (Essential Services Consumer Council) Appointment 2008 (No. 2) made under paragraph 174(1)(b) of the *Utilities Act 2000* appoints a specified person as deputy chairperson of the Essential Services Consumer Council.

Disallowable Instrument DI2008-174 being the Utilities (Essential Services Consumer Council) Appointment 2008 (No. 3) made under paragraph 174(1)(c) of the *Utilities Act 2000* appoints specified persons as members of the Essential Services Consumer Council.

Disallowable Instrument DI2008-175 being the Legal Profession (Disciplinary Tribunal) Appointment 2008 (No. 2) made under subsection 566(1) of the *Legal Profession Act 2006* appoints specified persons as chair and deputy chair of the Legal Practitioners Disciplinary Tribunal.

Disallowable Instrument DI2008-178 being the Residential Tenancies Tribunal Selection 2008 (No. 2) made under subsection 112(5) of the *Residential Tenancies Act 1997* selects a specified person as a member of the Residential Tenancies Tribunal.

Disallowable Instrument DI2008-179 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2008 (No. 4) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares a specified organisation to be a parking authority within the area of Block 19, Section 86, in the suburb of Belconnen.

Disallowable Instrument DI2008-180 being the Housing Assistance Housing Asset Assistance Program 2008 (No. 1) made under subsection 19(1) of the *Housing Assistance Act 2007* makes public housing assets available to eligible organisations for the provision of services within the social housing and human services system.

Disallowable Instrument DI2008-181 being the Health Professionals (Fees) Determination 2008 (No. 4) made under section 132 of the *Health Professionals Act 2004* revokes DI2007-19 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2008-182 being the Public Place Names (Forde) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of new roads in the Division of Forde.

Disallowable Instrument DI2008-183 being the Training and Tertiary Education (Fees) Determination 2008 made under section 111 of the *Training and Tertiary Education Act 2003* revokes DI2007-162 and determines the maximum fees payable for specified services provided by the ACT Accreditation and Registration Council.

Disallowable Instrument DI2008-184 being the Children and Young People Childrens Services Council Appointment 2008 (No. 1) made under section 36 of the *Children and Young People Act 1999* appoints specified persons as chair and members of the Childrens Services Council.

Disallowable Instruments—Comment

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

Minor typographical error

Disallowable Instrument DI2008-129 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2008 (No. 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2007-257 and determines the maximum fares relating to the hiring or use of a taxi.

The Committee notes that there is a minor typographical error in section 2 of this instrument (ie the reference to the “ACT Government Legislation Register”).

Determination of fees

Disallowable Instrument DI2008-130 being the Health Professionals (Fees) Determination 2008 (No. 3) made under section 132 of the *Health Professionals Act 2004* revokes DI2005-165 and determines fees payable for the purposes of the Act.

This instrument determines fees in relation to matters administered by the Medical Board. There is no indication in either the instrument or the Explanatory Statement to the instrument as to how the fees imposed by the instrument compare to the existing fees. Nor is there any explanation for any increases in fees. The Committee notes that it has previously (and consistently) pointed out that it is important that the Legislative Assembly, which has a supervisory role in relation to the setting of fees, be advised of the magnitude of fees increases and also the justification for increasing fees. In this context, the Committee commends to the Medical Board the approach adopted (for example) in Disallowable Instrument DI2008-129.

Minor drafting issue

Disallowable Instrument DI2008-133 being the Public Place Names (Bonner) Determination 2008 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of new roads in the Division of Bonner.

The Committee notes that the Explanatory Statement for this instrument states that it commemorates “three women and 13 men”. The Committee notes that, in fact, the instrument appears to commemorate **four** women and 13 men.

Is this instrument valid?

Disallowable Instrument DI2008-145 being the Attorney General (Fees) Determination 2008 made under the Agents Act 2003; Associations Incorporation Act 1991; Births, Deaths and Marriages Registration Act 1997; Business Names Act 1963; Civil Law (Wrongs) Act 2002; Civil Partnerships Act 2008; Classification (Publications, Films and Computer Games) (Enforcement) Act 1995; Consumer Credit (Administration) Act 1996; Cooperatives Act 2002; Court Procedures Act 2004; Dangerous Substances Act 2004; Emergencies Act 2004; Guardianship and Management of Property Act 1991; Instruments Act 1933; Land Titles Act 1925; Liquor Act 1975; Machinery Act 1949; Occupational Health and Safety Act 1989; Partnership Act 1963; Pawnbrokers Act 1902; Prostitution Act 1992; Public Trustee Act 1985; Registration of Deeds Act 1957; Sale of Motor Vehicles Act 1977; Scaffolding and Lifts Act 1912; Second-hand Dealers Act 1906; Security Industry Act 2003; Trade Measurement (Administration) Act 1991; Workers Compensation Act 1951 revokes DI2007-131 and determines fees payable for the purposes of the Acts.

This instrument determines fees under 29 Acts. Among other things, it revokes DI2007-131, which the Committee commented on in *Scrutiny Report No 44* of the *Sixth Assembly*. The Committee refers to those earlier comments below.

The determination of fees is provided for by section 56 of the *Legislation Act 2001*. Subsection 56 (5) provides that a fees determination:

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

The Committee notes that this instrument does not indicate by whom the relevant fees are payable, as required by paragraph 56 (5) (a) of the *Legislation Act*. In that regard, the Committee notes that this instrument contains no equivalent of subsections 4 (1) and 5 (1) of DI2007-131. Quite apart from the fact that it is mandatory that an instrument determining fees provide for the persons by whom a fee is payable, the Committee notes that persons relying on the instrument must make assumptions as to the person who is to pay relevant fees. While this may be obvious in some cases, by reference to the narrative in Schedule 2 of the instrument, it is clearly less-than-helpful for users of the instrument (and arguably unlawful) that this instrument does not address the paragraph 56 (5) (a) criterion.

These comments aside, the Committee notes with approval that, in accordance with the comments made in *Scrutiny Report No 44* of the *Sixth Assembly*, various presentational issues in DI2007-131 have been addressed in this instrument.

Minor typographical error / Minor drafting issue

Disallowable Instrument DI2008-159 being the Architects (Fees) Determination 2008 (No. 1) made under section 91 of the Architects Act 2004 revokes DI2007-145 and determines fees payable for the purposes of the Act.

The Committee notes that section 5 of this instrument should (presumably) refer to the Legislation Register.

Minor typographical error

Disallowable Instrument DI2008-168 being the Water and Sewerage (Fees) Determination 2008 (No. 2) made under section 45 of the Water and Sewerage Act 2000 revokes DI2008-51 and determines fees payable for the purposes of the Act.

The Committee notes that there is a minor typographical error (an unnecessarily-italicised “the”) in the second line of section 5 of this instrument.

Are these appointments valid?

Disallowable Instrument DI2008-176 being the Residential Tenancies Tribunal Appointment 2008 (No. 1) made under subsection 112(1) of the Residential Tenancies Act 1997 appoints a specified person as president of the Residential Tenancies Tribunal.

Disallowable Instrument DI2008-177 being the Residential Tenancies Tribunal Appointment 2008 (No. 2) made under subsection 113(1) of the Residential Tenancies Act 1997 appoints a specified person as acting president of the Residential Tenancies Tribunal.

These instruments appoint two named persons as, respectively, the President and Acting President of the Residential Tenancies Tribunal. Sections 112 and 113 of the *Residential Tenancies Act 1997* provide that only a magistrate can be appointed as President or as Acting President. While it may be regarded as common knowledge that the two named persons are, in fact, magistrates, the Committee suggests that it would be helpful (and not especially onerous) if the Explanatory Statements to the instruments stated that the persons in question are magistrates.

General comment – Inconsistency of explanation of fees increases

On the basis of the instruments examined for the purposes of this Report, the Committee has generally been pleased with the improvement in the standard of Explanatory Statements for fees determinations. In particular, the Committee has been pleased to observe that, by and large, Explanatory Statements both explain the reason for any fees increases and indicate the magnitude of any fee increases (ie by reference to the previously-applicable fee). The Committee has, however, noted one minor discrepancy.

The Explanatory Statements for some of the instruments referred to above – DI2008-129, DI2008-131, DI2008-161, DI2008-162, DI2008-163, DI2008-164, DI2008-165, DI2008-166, DI2008-167 and DI2008-168 – indicate that the fees increases are based on an annualised increase in the Consumer Price Index of 4.2%. The Explanatory Statements for other instruments – DI2008-144, DI2008-146, DI2008-147, DI2008-148, DI2008-149, DI2008-150, DI2008-151, DI2008-152, DI2008-153, DI2008-154, DI2008-156, DI2008-157 and DI2008-158 – indicate that the fees increases are based on a Wage Price Index estimate of 4.25%. The Explanatory Statement for another instrument – DI2008-131 – indicates that some of the fees increases are based on the CPI and some are based on the WPE.

The Committee would appreciate the Treasurer’s advice as to the reason for this difference in approach to fees increases.

In making this comment, the Committee notes that DI2008-155 increases fees applicable to the operation of cemeteries and crematoria by **6.25%**. The Committee also notes, however, that the Explanatory Statement accompanying that instrument states that the increase is “in line with the movement of costs incurred by the broader cemetery industry and to ensure the cemeteries authority can meet its long term Perpetual Care Trust obligations under the Act.”

Subordinate Laws—No comment

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

Subordinate Law SL2008-25 being the Court Procedures Amendment Rules 2008 (No. 1) made under section 7 of the *Court Procedures Act 2004* amends the *Court Procedures Rules 2006*.

Subordinate Law SL2008-26 being the Training and Tertiary Education Amendment Regulation 2008 (No. 1) made under the *Training and Tertiary Education Act 2003* amends the *Training and Tertiary Education Regulation 2004* to provide for the Ministerial Council for Vocational and Technical Education to delegate the exercise of its functions under the Act to the ministerial company, Technical and Vocational Education and Training Australia.

Subordinate Law SL2008-27 being the Planning and Development Amendment Regulation 2008 (No. 2) made under the *Planning and Development Act 2007* clarifies and regulates the transitional position for development applications for approval of an estate development plan.

Subordinate Law SL2008-28 being the Land Rent Regulation 2008 made under the *Land Rent Act 2008* prescribes requirements in relation to an application to pay land rent.

Subordinate Law SL2008-33 being the Planning and Development Amendment Regulation 2008 (No. 3) made under the *Planning and Development Act 2007* overcomes delays caused by minor contraventions of development approvals and will permit minor development application amendments to be assessed and processed quickly.

Subordinate Laws—Comment

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

Setting fees by reference to the Consumer Price Index

Subordinate Law SL2008-29 being the Juries Fees Amendment Regulation 2008 (No. 1) made under the *Juries Act 1967* prescribes the scale of payments to jurors.

This subordinate law increases the fees payable to persons who attend the ACT Supreme Court for jury service. The Explanatory Statement to this subordinate law states:

The revised payments are based on the 2007-08 jury fees for New South Wales, and have been indexed and rounded for 2008-09 in accordance with the Consumer Price Index at 2.75%, as forecast in the 2007-08 ACT Budget Overview.

As the Committee has already noted in its discussion of the various pieces of subordinate legislation that determine fees, there is an inconsistency in the explanations that have been given for the determination of increases in fees. This explanation (and the figure of 2.75%) demonstrates a further inconsistency.

The Committee would be grateful for the Treasurer's advice as to the reason for the differences in approach demonstrated by the various instruments.

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 4 August 2008, in relation to comments made in Scrutiny Report 57 concerning Disallowable Instruments:
 - DI2008-101, being the Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2008 (No. 1); and
 - DI2008-102, being the Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2008 (No. 1).
- The Minister for the Environment, Water and Climate Change, dated 4 August 2008, in relation to comments made in:
 - Scrutiny Report 54 concerning the Water Resources (Validation of Fees) Bill 2008; and
 - Scrutiny Report 56 concerning Disallowable Instrument DI2008-80, being the Heritage (Council Deputy Chairperson) Appointment 2008 (No. 1).
- The Minister for Territory and Municipal Services, dated 4 August 2008, in relation to comments made in:
 - Scrutiny Report 44 concerning Disallowable Instruments:
 - DI2007-175, being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2007 (No. 1);
 - DI2007-176, being the Road Transport (General) (Driver Licence and Related Fees) Determination 2007 (No. 1);
 - DI2007-177, being the Road Transport (General) (Numberplate Fees) Determination 2007 (No. 1);
 - DI2007-178, being the Road Transport (General) (Parking Permit Fees) Determination 2007 (No. 1); and
 - DI2007-179, being the Road Transport (General) (Refund Fee and Dishonoured Cheque Fee) Determination 2007 (No. 1);
 - Scrutiny Report 45 concerning Subordinate Law SL2007-20, being Road Transport (Safety and Traffic Management) Amendment Regulation 2007 (No. 1);
 - Scrutiny Report 51 concerning Disallowable Instrument DI2007-307, being the Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No. 1); and
 - Scrutiny Report 53 concerning Disallowable Instrument DI2008-20 being the Territory Records (Advisory Council) Appointment 2008 (No. 1).
- The Minister for Planning, dated 4 August 2008, in relation to comments made in Scrutiny Report 54 concerning Subordinate Law SL2008-8, being the Planning and Development Amendment Regulation 2008 (No. 1).

- The Minister for Industrial Relations, dated 5 August 2008, in relation to comments made in Scrutiny Report 57 concerning the Workers Compensation Amendment Bill 2008.

The Committee wishes to thank the Chief Minister, the Minister for the Environment, Water and Climate Change, the Minister for Territory and Municipal Services, the Minister for Planning and the Minister for Industrial Relations for their helpful responses.

Bill Stefaniak, MLA
Chair

August 2008

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

REPORTS—2004-2005–2006–2007–2008

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

Report 4, dated 7 March 2005

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

Report 6, dated 4 April 2005

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

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen)

Determination 2005 (No 2)

Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)

Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)

Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)

Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)

Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)

Hotel School (Repeal) Bill 2005

Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 (PMB)

Report 19, dated 21 November 2005

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

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 (PMB)

Terrorism (Preventative Detention) Bill 2006 (PMB)

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

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

Bills/Subordinate Legislation

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

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

Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006

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

Report 36, dated 11 December 2006

Crimes Amendment Bill 2006 (PMB)

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

Report 37, dated 12 February 2007

Civil Partnerships Bill 2006

Report 43, dated 13 August 2007

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

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

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

Report 44, dated 27 August 2007

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

Report 45, dated 24 September 2007

Crimes (Street Offences) Amendment Bill 2007 (PMB)

Legal Profession Amendment Bill 2007

Report 47, dated 12 November 2007

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

Report 49, dated 3 December 2007

Government Transparency Legislation Amendment Bill 2007 (PMB)

Sentencing Legislation Amendment Bill 2007 (PMB)

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

Victims of Crime Amendment Bill 2007

Report 50, dated 4 February 2008

Children and Young People Amendment Bill 2007 (PMB)

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

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

Bills/Subordinate Legislation

Report 51, dated 3 March 2008

Crimes Amendment Bill 2008

Disallowable Instrument DI2007-298 - Land (Planning and Environment) (Plan of Management for Urban Open Space and Public Access Sportsgrounds in the Gungahlin Region) Approval 2007

Subordinate Law SL2007-36 - Occupational Health and Safety (General) Regulation 2007, including a Regulatory Impact Statement

Report 53, dated 7 April 2008

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2008

Disallowable Instrument DI2008-23 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 3)

Disallowable Instrument DI2008-24 - Long Service Leave (Building and Construction Industry) Governing Board Appointment 2008 (No. 4)

Disallowable Instrument DI2008-25 - Emergencies (Bushfire Council Members) Appointment 2008

Report 54, dated 5 May 2008

Crimes (Forensic Procedures) Amendment Bill 2008

Protection of Public Participation Bill 2008 (PMB)

Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2008 (PMB)

Subordinate Law SL2008-10 - Magistrates Court (Building Infringement Notices) Regulation 2008

Report 55, dated 10 June 2008

ACT Civil and Administrative Tribunal Bill 2008

Disallowable Instrument DI2008-54 - Legal Profession (Bar Council Fees) Determination 2008 (No. 1)

Disallowable Instrument DI2008-58 - Major Events Security Declaration 2008 (No. 1)

Disallowable Instrument DI2008-59 - Major Events Security Declaration 2008 (No. 2)

Projects of Territory Importance Bill 2008

Waste Minimisation (Container Recovery) Amendment Bill 2008 (PMB)

Report 56, dated 23 June 2008

Disallowable Instrument DI2008-104 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2008 (No. 1)

Subordinate Law SL2008-18 - Domestic Animals Amendment Regulation 2008 (No. 1)

Subordinate Law SL2008-21 - Dangerous Substances (Explosives) Amendment Regulation 2008 (No. 1), including a regulatory impact statement

Report 57, dated 28 July 2008

ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008

Civil Partnerships Amendment Bill 2008 (PMB)

Bills/Subordinate Legislation

Crimes (Controlled Operations) Bill 2008

Disallowable Instrument DI2008-120 - Nature Conservation (Flora and Fauna Committee) Appointment 2008 (No. 1)

Disallowable Instrument DI2008-99 - Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2008 (No. 1)

Justice and Community Safety Legislation Amendment Bill 2008 (No. 2)

Sexual and Violent Offences Legislation Amendment Bill 2008



- 4 AUG 2008

Jon Stanhope MLA

CHIEF MINISTER

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
(Performing the functions of the Scrutiny of Bills and Subordinate Legislation Committee)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to Scrutiny Report No. 57 of the Standing Committee on Legal Affairs with respect to two disallowable instruments, DI2008-101 made under subsection 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989*, and DI2008-102 made under subsection 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989*.

The Committee noted a minor drafting issue in relation to references in these instruments to the Clerk of the Legislative Assembly.

I am advised that, as a general rule, a capital is used when referring to a particular position. However, to use "the clerk" of the Assembly in section 8 of DI2008-101 instead of "the Clerk" of the Assembly does not negate or invalidate the instrument.

Thank you for bringing this matter to my attention. Your comments have been noted and will be taken into consideration in future drafting.

Yours sincerely

Jon Stanhope MLA
Chief Minister
4 AUG 2008

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Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Stefaniak 

I refer to the Scrutiny of Bills Report No.54 dated 5 May 2008 regarding the *Water Resources (Validation of Fees) Bill 2008* and Report No.56 dated 23 June 2008 regarding *Disallowable Instrument DI2008-70*.

Water Resources (Validation of Fees) Bill 2008

The Committee raised the issue of whether it is justifiable to provide for the retrospective operation of a law and concluded that there is no undue trespass on rights on the basis that:

- those who paid the fee probably did so in the belief that they were legally obliged to do so; and
- the fees charged are in substance amounts that are properly related to the services that were provided.

The Committee's comments have been noted.

DI2008-70 – Heritage (Council Deputy Chairperson) Appointment 2008 (No 1)

The Committee notes that, while this instrument appoints only one named person, the Explanatory Statement states “the appointees are not ACT Public Servants”. This is an administrative error and will be amended in future Instruments.

Yours sincerely



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

- 4 AUG 2008

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- 6 AUG 2008

John Hargreaves MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES

MINISTER FOR HOUSING

MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

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

Dear Mr ^{Bill} Stefaniak

I refer to Scrutiny of Bills Report No. 44 dated 28 August 2007 regarding *Disallowable Instruments DI2007-175, DI2007-176, DI2007-177, DI 2007-178, DI2007-179*, Scrutiny Report No. 45 dated 24 September 2007 regarding *Subordinate Law SL2007-20*, Scrutiny Report No. 51 dated 3 March 2008 regarding *Disallowable Instrument DI2007-307* and Scrutiny Report No. 53 dated 7 April 2008 regarding *Disallowable Instrument DI2008-20*.

Scrutiny Report No. 44: Disallowable Instruments DI2007-175, DI2007-176, DI2007-177, DI 2007-178, DI2007-179

The Committee made minor comment on the drafting of these instruments noting that there was inconsistency with the rounding of fees.

Treasury is currently reviewing its Fees and Charges Guidance policy and TaMS is also reviewing its framework for fees and charges with the aim of providing a consistent approach.

Scrutiny Report No. 45: Subordinate Law SL2007-20

The Committee has suggested that the Regulation incorporate by reference, Australian Standard AS 2898.1-2. In normal circumstances, it states, documents included by reference are published on the Legislation Register in accordance with section 47 (5) of the Legislation Act. However, in this Regulation section 47 (5) has been not applied. The committee therefore sought advice as to why this is so.

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The Dangerous Substances Regulation provides a scheme of access to the Australian Standard because it is important that the external workplaces and businesses that deal with dangerous substances, and which have strong compliance obligations under the Dangerous Substances legislation, can access those standards as and when the need arises. For the purposes of effective dangerous substances regulation and compliance activities, the costs of setting up an access regime for the relevant Standards is justified by the public safety interested in ensuring that the affected businesses/workplaces can readily monitor their compliance with the Standards.

By contrast, in relation to speed cameras, the obligation to comply with the Australian Standard in relation to speed cameras is imposed on the Territory (and the people it pays to service the cameras). There is, therefore no need for public access to the Standard that would necessitate the costs of establishing a system for providing access to it.

Scrutiny Report No. 51: DI2007-307 Road Transport (Public Passenger Services) Maximum Fares Determination 2007 (No 1)

The committee is correct in noting that this instrument does not in fact correct the earlier instrument that it revokes (DI2006-106), as an error in the old instrument's ES has been carried over into this instrument. A new instrument is being prepared to correct and replace DI2007-307.

The committee also notes that the instrument is expressed to operate retrospectively. The retrospectivity of this instrument relates to the initiative of free travel for all holders of an ACT Seniors Card to travel on ACTION buses for half the adult fare, including peak periods. Although this should not have occurred, no person's rights have been prejudicially affected, nor any liabilities imposed on any person.

The committee also some minor typographical errors. These have been noted and will be corrected in future instruments.

Scrutiny Report No 53: Disallowable Instrument DI2008-20 Territory Records (Advisory Council) Appointment 2008 (No 1)

The Committee commented that it was not clear if the council had a member representing the agencies.

The Territory Records Advisory Council decided, to ensure continuity, that after the expiry of the first Council there would be staggered appointments.

There was no Revocation Statement on Territory Records (Advisory Council) Appointment 2008 (No 1) Disallowable instrument DI2008-20. This was so that those appointments that had not expired from Territory Records (Advisory Council) Appointment 2005 (No 1) Disallowable instrument DI2005-206 would continue.

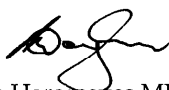
It was understood that ACT Public Servants serving on Government Advisory Boards and Committees were not required to be appointed through the Disallowable Instrument process although they were recommended to Government. Clarification of this detail will be included on future appointments to Council.

The person representing ACT Government agencies is Mr Phillip Tardif, Executive Director, Business Improvement Services, Department of Education and Training. Mr Tardif is representing Government Agencies on the Council until 22 September 2008.

The committee also notes that the Explanatory Statement does not expressly indicate that the requirement in subsection 44(2) (ie that the person appointed under paragraph 44 (1) (d) be an Aboriginal or Torres Strait Islander) has been met.

The person appointed to Council to represent Aboriginal or Torres Strait Islanders as required by the legislation is Ms Rebecca Stubbs. Again, clarification of this detail will be included on future appointments to Council.

Yours sincerely



John Hargreaves MLA
Minister for Territory and Municipal Services

A August 2008



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

Dear Mr ~~Stefaniak~~ ^{Bill}

I am writing in response to the comments made by the Standing Committee on Legal Affairs in Scrutiny Report 54 of 5 May 2008 on the *Planning and Development Amendment Regulation 2008* (the regulation). I have considered the Report and provide the following comments.

The Committee raised a number of issues and I shall respond against each comment in the order that they arise in the Committee's report.

Planning and Development Amendment Regulation 2008 (No.1)

The Committee correctly pointed out that the Explanatory Statement referred to an incorrect section in the regulation. I thank the Committee for their attention to detail and as the Committee points out, the correct reference should have been to section 19 of the regulation rather than section 17. A Revised Explanatory Statement correcting this error will be tabled as soon as possible.

The Committee also commented that the Explanatory Statement did not address certain issues in relation to the strict liability offence created by section 19 of the regulation. Under section 19(3), a person commits an offence if:
(a) the person interferes with a seized thing, or anything containing a seized thing, to which access has been restricted under subsection (2); and
(b) the person does not have an inspector's approval to interfere with the thing. Under section 19(4) it is a strict liability offence with a maximum penalty of 10 penalty units. A penalty unit is defined in the *Legislation Act 2001* and is currently \$100.

In the Committee's view, the Explanatory Statement addressed the issue of why a fault element was not required for the offence but failed to address the issue of whether a defendant could rely on some defences other than the defence of reasonable mistake of fact allowed by the *Criminal Code 2002*.

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It is agreed that the Explanatory Statement failed to address the issue raised by the Committee and a Revised Explanatory Statement in which this issue is discussed will be tabled as soon as possible.

The following passage will be inserted into the Revised Explanatory Statement to address the omission:

“A strict liability offence under section 23 of the *Criminal Code 2002* means that there are no fault elements for any of the physical elements of the offence. That means that conduct alone is sufficient to make the defendant culpable. However, the mistake of fact defence expressly applies to strict liability as does the other defences in Part 2.3 of the *Criminal Code*. Section 23(3) of the *Criminal Code* provides that other defences may still be available for use in strict liability offences. Defences such as intervening conduct or event (see section 39 of the *Criminal Code*) are available.

Strict liability offences do not have a fault element, termed ‘mens rea’. However, strict liability does not oust a range of defences to criminal responsibility in Territory law. For example, a person may raise a defence that they were mentally ill at the time of committing a strict liability offence. Strict liability offences do not lead to a reversal in the onus of proof. Such offences require the prosecution to prove the elements of the offence beyond reasonable doubt. It is then open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt. As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies.”

I thank the Committee for drawing attention to the error and omission in the Explanatory Statement with the result that a Revised Explanatory Statement will now be tabled.

Planning and Development Regulation 2008 - Regulatory Impact Statement

I thank the Committee for pointing out (p21) that the Explanatory Statement referred to the strict liability offence as being in section 17 but the regulatory impact statement referred to the same section as section 19. The Committee states that neither appears to be the correct section number. However, as stated above, the correct section number is section 19 as stated in the regulatory impact statement and there is no error in this regard in the regulatory impact statement.

The Committee also criticised the regulatory impact statement because the Government contends in it that the proposed provision for the strict liability offence is consistent with the scrutiny of bills and subordinate legislation committee principles. The Committee stated that it is perplexed as to the basis upon which the regulatory statement can assert this when the Explanatory Statement failed to address the 2 issues that the Committee has consistently required to be addressed when a subordinate law contains a strict liability offence.


As indicated above, the Committee criticised the Explanatory Statement for not addressing 1 of the issues (possible defences), not both. As it is proposed to amend

the Explanatory Statement to include a discussion of the issue of possible defences to the strict liability offence, this criticism seems no longer applicable.

I trust that the information provided above adequately addresses the issues raised by the Committee.

Thank you for raising these matters.

Yours sincerely


Andrew Barr MLA
Minister for Planning

- 4 AUG 2008



Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Bill Stefaniak, MLA
Chair, Scrutiny of Bills Committee
C/- Scrutiny Committee Secretary
Chamber Support Office
Legislative Assembly for the Australian Capital Territory
CANBERRA CITY ACT 2601

Dear Mr ~~Stefaniak~~^{Bill}

Re: Workers Compensation Amendment Bill 2008

I refer to Report 57 of the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) and in particular to comments on the Workers Compensation Amendment Bill 2008 at pp19-21.

I would like to thank the Committee for its comments and can inform you that an amended Explanatory Statement reflecting those comments has been prepared by my department which I will introduce into the Assembly prior to the Bill being debated on Wednesday 6 August 2008.

Thank you once again for your input to this Bill.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

- 5 AUG 2008

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