

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

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

SCRUTINY REPORT NO. 22

21 NOVEMBER 2002

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.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)
ASSISTANT SECRETARY: MS CELIA HARSdorf
(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.

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

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>REPORTS – 2001-2002</u>	
<u>Report No. 1, dated 12 December 2001</u>	
Nil	
<u>Report No. 2, dated 19 February 2002</u>	
Crimes Amendment Bill 2001 (No. 2) (PMB)	
<i>Act citation: Crimes Amendment Act 2002 (Passed 5.3.02).....</i>	No. 5 of 2002
Crimes (Abolition of Offence of Abortion) Bill 2001 (PMB).....	
Health Regulation (Maternal Health Information) Repeal Bill 2001 (PMB).....	
Land (Planning and Environment) Legislation Amendment Bill 2001 (PMB).....	
Supreme Court Amendment Bill 2001 (No. 2) (PMB).....	
Subordinate Law No 40 – Building Regulations Amendment.....	No. 8 of 2002
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001.....	
Subordinate Law No 42 – Crimes Regulations 2001.....	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment.....	No. 8 of 2002
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002.....	No. 8 of 2002
Subordinate Law No 46 – Road Transport Amendment Regulations 2001.....	
Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001.....	No. 10 of 2002
Health Professions Board (Procedures) Act – Determination No 221 of 2001.....	No. 10 of 2002
Health Professions Board (Procedures) Act – Determination Nos. 216-220, 222, 225 to 237 of 2001.....	No. 10 of 2002
Independent Pricing and Regulatory Commission Act - Determination No. 291 of 2001.....	No. 8 of 2002
Legislative Assembly (Members' Staff) Act - Determination No. 292 of 2001.....	
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001...	

Rehabilitation of Offenders (Interim) Act 2001 - Determination No. 305 of 2001.....	
Commissioner for the Environment Act - Determination No. 315 of 2001.....	No. 8 of 2002
Psychologists Act - Determination No. 318 of 2001.....	No. 10 of 2002
Auditor-General Act – Determination No. 323 of 2001.....	
Drugs of Dependence Act – Determination No. 328 of 2001.....	No. 10 of 2002
National Exhibition Centre Trust Act - Determination Nos. 330 and 331 of 2001.....	No. 8 of 2002
Appointment to the Racing Tribunal.....	No. 8 of 2002

Report No. 3, dated 21 February 2002

Rehabilitation of Offenders (Interim) Amendment Bill 2002
(Passed 21.2.02).....

Report No. 4, dated 5 March 2002

Inquiries Amendment Bill 2002 (PMB).....	
Gene Technology Bill 2002.....	No. 12 of 2002
Legislation Amendment Bill 2002 (Passed 15.4.02).....	No. 9 of 2002
Subordinate Law No 49 – Road Transport (Offences) Regulations 2001.....	No. 8 of 2002
Road Transport (Safety and Traffic Management) Regulations 2000 – Disallowable Instrument No 4.....	No. 8 of 2002
Road Transport (Driver Licensing) Regulations 2000 – Disallowable Instrument No 7.....	No. 8 of 2002
Health and Community Care Services Act – Determinations Nos 5 and 15.....	

Report No. 5, dated 5 March 2002

Nil

Report No. 6, dated 7 March 2002

Nil

Report No. 7, dated 27 March 2002

Drugs of Dependence Amendment Bill 2002 (Passed 14.5.02).....	No. 10 of 2002
Duties Amendment Bill 2002 (Passed 11.4.02).....	No. 8 of 2002
Fair Trading Amendment Bill 2002 (PMB) (Passed 29.08.02).....	
Subordinate Law 2002 No 1 – Radiation Regulations 2002.....	No. 10 of 2002

Report No. 8, dated 1 May 2002

Discrimination Amendment Bill 2002 (PMB) (Passed 5.6.02).....	
Gaming Machine (Women's Sports) Amendment Bill 2002 (Passed 4.6.02).....	No. 10 of 2002

Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002.....	No. 15 of 2002
Subordinate Law No. 4 – Community Title Regulations 2002.....	No. 15 of 2002
Road Transport (Public Passenger Services) Regulations 2002 – Disallowable Instruments Nos 12 and 18.....	No. 15 of 2002
Road Transport (General) Act – Disallowable Instrument No. 20.....	No. 15 of 2002
Public Place Names Act – Disallowable Instrument No. 24.....	
<u>Report No. 9, dated 7 May 2002</u>	
Nil	
<u>Report No. 10, dated 14 May 2002</u>	
Building Amendment Bill 2002 (Passed 16.5.02).....	No. 16 of 2002
<u>Report No. 11, dated 14 May 2002</u>	
Nil	
<u>Report No. 12, dated 16 May 2002</u>	
Justices of the Peace Act – Disallowable Instrument No. 25.....	
Residential Tenancies Act – Disallowable Instrument No. 26.....	
<u>Report No. 13, dated 29 May 2002</u>	
Cemeteries and Crematoria Bill 2002.....	No. 15 of 2002
Duties (Insurance Exemptions) Amendment Bill 2002.....	No. 15 of 2002
Road Transport Legislation Amendment Bill 2002.....	No. 16 of 2002
<u>Report No. 14, dated 4 June 2002</u>	
Statute Law Amendment Bill 2002 (Passed 29.08.02).....	No. 15 of 2002
<u>Report No. 15, dated 20 June 2002</u>	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002....	No. 17 of 2002
Remuneration Tribunal Act – Disallowable Instrument No. 34.....	
Hotel School Act – Disallowable Instrument No. 35.....	No. 18 of 2002
Road Transport Act – Disallowable Instrument No. 39.....	No. 17 of 2002
Commissioner for the Environment Act No. 38.....	No. 17 of 2002
<u>Report No. 16, dated 25 June 2002</u>	
Maternal Health Legislation Amendment Bill 2002 (PMB).....	
Medical Practitioners (Maternal Health) Amendment Bill 2002 (Passed 21.08.02) (PMB).....	
Health and Community Care Services Act – Disallowable Instrument No. 41.....	No. 19 of 2002

Public Place Names Act –	
Disallowable Instrument No. 43.....	No. 17 of 2002
Disallowable Instrument No. 44.....	No. 17 of 2002
Building Act – Disallowable Instrument No. 50.....	No. 17 of 2002

Report No. 17, dated 9 August 2002

Justice and Community Safety Legislation Amendment Bill 2002 (Passed 22.08.02).....	
Magistrates Court (Refund of Fees) Amendment Bill 2002.....	
Planning and Land Bill 2002	No. 20 of 2002
Plant Diseases Bill 2002.....	No. 18 of 2002
Revenue Legislation Amendment Bill 2002 (Passed 22.08.02)	No. 18 of 2002
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002..	
Land (Planning and Environment) ACT Heritage Council Appointments 2002 (No 1) - DI 2002—56.....	No. 20 of 2002
Roads and Public Places (Fees) Revocation and Determination 2002 (No 1) - DI 2002—71.....	No. 19 of 2002
Roads and Public Places (Fees) Revocation and Determination 2002 (No 2) - DI 2002—72.....	No. 19 of 2002
Roads Transport (General) (Fees) Revocation and Determination 2002 – DI2002—73.....	No. 19 of 2002
Hawker (Fees) Revocation and Determination 2002 – DI2002—74....	No. 19 of 2002
Roads and Public Places (Fees) Revocation and Determination 2002 (No 3) – DI2002-75.....	No. 19 of 2002
Water Resources (Fees) Revocation and Determination 2002 – DI2002-76.....	No. 19 of 2002
Stock (Fees) Revocation and Determination 2002 (No 1) – DI2002-77	No. 19 of 2002
Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	No. 19 of 2002
Pounds (Fees) Revocation and Determination 2002 – DI2002-79.....	No. 19 of 2002
Nature Conservation (Fees) Revocation and Determination 2002 – DI2002-80.....	No. 19 of 2002
Lakes (Fees) Revocation and Determination 2002 – DI2002-81.....	No. 19 of 2002
Environment Protection (Fees) Revocation and Determination 2002 – DI2002-82.....	No. 19 of 2002
Domestic Animals (Fees) Revocation and Determination 2002 – DI2002-83.....	No. 19 of 2002
Animal Welfare (Fees) Revocation and Determination 2002 – DI2002-84.....	No. 19 of 2002
Animal Diseases (Fees) Revocation and Determination 2002 – DI2002-85.....	No. 19 of 2002
Road Transport (General) (Parking Permit Fees) Revocation and Determination 2002 – DI2002-86.....	No. 19 of 2002
Road Transport (General) (Vehicle Impounding and Seizure/Speed Tests) Revocation and Determination 2002 – DI2002-89.....	No. 19 of 2002

Report No. 18, dated 27 August 2002

Cooperatives Bill 2002.....	No. 22 of 2002
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Report No. 19, dated 20 September 2002

Adventure Activities (Liability) Bill 2002 (PMB)	
Civil Law (Wrongs) Bill 2002	No. 20 of 2002
Injuries Compensation Framework Bill 2002 (PMB)	
Prostitution Amendment Bill 2002	
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—103 being the Building (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—104 being the Building (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—105 being the Community Title (Fees) Determination and Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—106 being the Construction Practitioners Registration (Fees) Determination and Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—109 being the Water and Sewerage (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—110 being the Water and Sewerage (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—111 being the Land (Planning and Environment) (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—112 being the Land (Planning and Environment) (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—114 being the Surveyors (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—115 being the Unit Titles (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI 2002—116 being the Unit Titles (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI 2002—120 being the Plumbers, Drainers and Gasfitters Board (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—130 being the Workers' Compensation (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	

Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	No. 22 of 2002
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	No. 22 of 2002
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002	
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2)	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1)	No. 22 of 2002
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002	

Report No 20, dated 11 November 2002

Civil Law (Wrongs) Amendment Bill 2002	
Criminal Code 2002.....	No. 22 of 2002
Planning and Land Bill 2002 (Further response).....	No. 22 of 2002
Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1)	
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)	

Report No 21, dated 19 November 2002

Administrative Appeals Tribunal Amendment Bill 2002.....	
Building (Water Efficiency) Amendment Bill 2002 (PMB)	

BILLS

Bills - Comment

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

Civil Law (Wrongs) Amendment Bill 2002 (No 2)

This Bill would amend the *Civil Law (Wrongs) Act 2002* to the effect of enabling a person who was in "a domestic relationship" with another to (a) participate in an award of damages where that other dies as a result of some tortious action by another, and (b) where the person in the domestic relationship suffers nervous shock as a result of a wrong to the person with whom they are in that relationship.

The Committee respectfully notes that the effect of the Bill is correctly stated in the presentation speech of Ms Roslyn Dundas. The speech says that the bill "recognises people within domestic relationships as family for the purpose of legal action following the death of a loved one and legal action in regards to nervous shock arising out of the injury or death of a loved one". It is stated that the purpose is to "allow access to the courts of all family members be they straight, lesbian, gay, bisexual, transgender or intersex members of our community".

The Committee notes that persons in these categories will be within "a domestic relationship" only if they satisfy the criteria of the definition of that term (see below). On the other hand, any person who is in a domestic relationship will fall within the definition. This may, depending on the facts, include persons who share houses.

Para 2(c)(i) – undue trespass on rights and liberties

The amendments to section 20 would apply where a person (the deceased) dies as a result of some tortious action by another (the defendant). Section 20 provides that persons defined as members of the family of the deceased may, by order of the court, take shares in the damages that would, if the deceased had not died, been awarded to the deceased. Under section 20 as it stands now, a "member, of a dead person's family" includes a spouse, child, parent, sibling, and a person who was "living in a de facto marriage relationship" with the deceased.

The amendments to section 20 by clauses 4 and 5 of the Bill would enable a person who was in "a domestic relationship" with the deceased to take a share in the damages.

This concept is very broad, encompassing a "personal relationship ... between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other". There is no limitation in respect of matters such as the level of that support when it is compared to other sources of support. The definition proposed is taken from the *Domestic Relationships Act 1994*, where it has a different function.

The amendments to section 20 would impinge on the interests of those persons who currently fall within the definition of members of the family of the deceased. The most obvious effect is that the pool of damages available to those persons would be potentially decreased. Another effect might well be the increased costs of litigation should there be dispute between the persons currently entitled (such as a spouse) and a person in “a domestic relationship” with the deceased, as to the relative shares of each.

The amendments to section 29 by clause 7 would enable a person (person X), in a “a domestic relationship” with another (person Y), to sue to recover damages for nervous shock suffered by X by reason of person Y having been killed, injured or put in danger by a by a wrongful act or omission of another person.

One effect of this amendment would be to create a liability in damages where none exists now. This would impinge on the interests of those made liable, and might have an upward effect in the level of insurance premiums. Another effect would be on the amount of damages that may be recovered by other members of the family of person Y, (given that the court may set a limit to the total amount recoverable under this nervous shock heading by all of the family members). Again, the cost of litigation by a family member may increase if there is dispute between them, and the potential for dispute is increased as the number of potential family members is increased.

Crimes Amendment Bill 2002

This Bill would amend the Crimes Act 1900 to insert proposed new s 42A, which would prescribe certain new offences "relating to unborn children".

Para 2(c)(i) – undue trespass on rights and liberties

In so far as the proposed new s 42A raises the issue of whether abortion should be unlawful, the Committee refers to its earlier Report No 15 of 2002.

In this Report, the Committee raises only the issue of the state of the law on this topic were this Bill to be passed. The question the Assembly needs to address is whether the law will be left in a state that is reasonably intelligible to those persons who wish to know what it is. The ability to ascertain the law, and in particular the criminal law, is a dimension of a person's rights.

In the first place the Committee notes the reference to “a lawful abortion” in paragraph 42A (1) (a). The Committee understands that this is intended to refer to a situation where an abortion is performed in accordance with those laws that regulate the conduct of any medical procedure, and, in particular any such law that regulates medical procedures applicable to abortions.

This Committee’s report will form part of the legislative history, but it would assist were this matter to be specifically addressed in the debate on the Bill. Mr Pratt has indicated that he intends to consult in relation to the Bill, and the point made about the uncertainty surrounding paragraph 42A (1) (a) might be further pursued.

In the second place the Committee has addressed the question of what proposed new section 42A would add to existing sections 42 and 43 of the Act. It is to be noted that section 42 refers to any act or omission that occurs “in relation to a childbirth”. In lay terms this should be understood to refer to the period of time occupied by the birthing process. If section 42 is understood in this way, it will operate in only a relatively very short period between gestation and birth. In this way it is apparent that section 42A will have a field of operation different to sections 42 and 43.

Current provisions of the *Crimes Act 1900*.

42 Child destruction

A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive—

- (a) prevents the child from being born alive; or
- (b) contributes to the child’s death;

is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

43 Childbirth—grievous bodily harm

A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive, inflicts grievous bodily harm on the child, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

44 Abortion—abolition of common law offence

- (1) Any rule of common law that creates an offence in relation to procuring a woman’s miscarriage is abrogated.
- (2) This section expires 3 months after it commences.
- (3) This section is a law to which the Legislation Act 2001, section 88 applies.

Proposed new section 42A

42A Offences relating to unborn children

- (1) This section does not apply to—
 - (a) a lawful abortion; or
 - (b) anything done by a pregnant woman in relation to her own unborn child; or
 - (c) anything done to save the life of a woman who is pregnant or her unborn child; or
 - (d) anything done otherwise within the usual and customary standards of medical practice.

(2) A person commits an offence if the person intentionally destroys the life of an unborn child.

Maximum penalty: imprisonment for life.

- (3) A person commits an offence if—
 - (a) the person intentionally or recklessly assaults a pregnant woman; and
 - (b) the person knows or ought reasonably to know that the woman is pregnant; and

(c) in committing the assault, the person (directly or indirectly) destroys the life of, does grievous bodily harm to, or transmits a serious disease to, the woman's unborn child.

Maximum penalty: imprisonment for 20 years.

(4) A person commits an offence if—

(a) the person commits an offence against another provision of this part; and

(b) in committing the other offence, the person (directly or indirectly) destroys the life of, does grievous bodily harm to, or transmits a serious disease to, an unborn child.

Maximum penalty: imprisonment for 15 years.

(5) In this section:

serious disease means a disease that would, if left untreated—

(a) endanger or be likely to endanger life; or

(b) cause or be likely to cause permanent injury to health, loss of a distinct part or organ of the body or serious disfigurement; whether or not treatment is or could have been available.

unborn child means a fetus at any stage of its development.

Revenue Legislation Amendment Bill 2002 (No 2)

This Bill would amend each of the *First Home Owner Grant Act 2000*; the *Payroll Tax Act 1987*; and the *Rates and Land Tax Act 1926*.

Para 2(c)(i) – undue trespass on rights and liberties

The Committee notes that the Explanatory Memorandum notes that in relation to the amendments to the *First Home Owner Grant Act 2000*, the Bill “corrects an omission to the First Home Owner Grant Act to preclude a person from receiving a grant, if, after 1 July 2000, they have purchased and lived in a property prior to a subsequent acquisition of property for which they seek to apply for a grant. This amendment will bring the ACT’s administration of the Commonwealth’s First Home Owners’ Scheme into line with other jurisdictions”.

The Committee raises no issue with this policy objective. It is not clear, however, whether this amendment would have any retrospective effect, in particular in relation to any applications for a grant that are on foot at the commencement of these amendments.

The Committee considers that this should be clarified, and that if a retrospective effect is intended, a justification should be offered.

Subordinate Legislation - No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them.

Subordinate Law SL2002-24 being the Supreme Court Amendment Rules 2002 (No 2) made under the *Supreme Court Act 1933* amends orders 39 and 40 and introduces new forms: prescribing a form of affidavit, a form of annexure clause and a certificate identifying an exhibit.

Subordinate Law SL2002-25 being the Construction Practitioners Registration Amendment Regulations 2002 (No 1) made under the *Construction Practitioners Registration Act 1998* amends the Principal Regulations by omitting from Regulation 5 the provisions that define the run-off cover (5(3) (e), 5(5) and 5 (6), a provision that limits the excess (5(4) and one that requires approval of the insurer (5(4)).

Subordinate Law SL2002-26 being the Electricity Safety Amendment Regulations 2002 (No 1) made under the *Electricity Safety Act 1971* amends the Principal Regulations by inserting new regulations 7 and 8 to make the relevant efficiency standards and labelling requirements in the Victorian law applicable in the ACT as far as they are consistent with the ACT law and exempts section 47(6) of the *Legislation Act 2001*.

Disallowable Instrument DI2002-173 being the Sports Bookmaking Events Determination 2002 (No 1) made under section 20 (1) of the *Race and Sports Bookmaking Act 2001* amends Determination No. 261 of 2001 (notified in S68, dated 7 September 2001). In particular, it clarifies which international thoroughbred race meetings are sanctioned by the Commission as determined sports bookmaking events.

Disallowable Instrument DI2002-177 being the Public Place Names 2002, No. 13 (Street Nomenclature – Macgregor) made under section 3 of the *Public Place Names Act 1989* determines the name, origin and significance of a new street name in the Division of Macgregor.

Disallowable Instrument DI2002-178 being the Public Place Names 2002, No. 9 (Street Nomenclature – Banks) made under section 3 of the *Public Place Names Act 1989* determines the names, origins and significance of new street names and revokes certain street names in the Division of Banks.

Disallowable Instrument DI2002-179 being the Health and Community Care Services – Determination of Fees 2002-03 (No 2) made under section 32 of the *Health and Community Care Services Act 1996* revokes Disallowable Instrument DI2002-97 (notified in the Legislation Register on 27 June 2002) and determines the fees and charges for or in connection with the provision of health and community care services.

Disallowable Instrument DI2002-180 being the Mediation Act 1997 Declaration of approved agency 2002 (No 1) made under section 4 (2) of the *Mediation Act 1997* declares the Australian Disputes Centre Limited as an approved agency.

Disallowable Instrument DI2002-181 being the Public Sector Management Amendment Standards 2002 (No 4) made under section 251(7) of the *Public Sector Management Act 1994* makes amendments to the Standards as specified in Schedule A.

Disallowable Instrument DI2002-182 being the Mediation – Declaration of approved agency 2002 (No 2) made under section 4 (2) of the *Mediation Act 1997* declares Jennifer Rivers as an approved agency.

Disallowable Instrument DI2002-184 being the Tree Protection (Interim Scheme) Instrument of Appointment 2002 made under section 21 (1) of the *Tree Protection (Interim Scheme) Act 2001* appoints a specified person to advise the Conservator of Flora and Fauna from 24 October 2002 for one year about the exercise of functions under part 3 of the Act.

Disallowable Instrument DI2002-185 being the Independent Competition and Regulatory Commission (Reference for Investigation) 2002 (No 2) made under section 16 of the *Independent Competition and Regulatory Commission Act 1997* refers a matter to the Independent Competition and Regulatory Commission for an investigation into public bus passenger service fares.

Disallowable Instrument DI2002-186 being the Gas Safety (Fees) Determination 2002 made under section 67 of the *Gas Safety Act 2000* determines that the fees payable for the purposes of the Act, in relation to issue of a certificate of accreditation for a new gas appliance worker accreditation scheme, shall be in accordance with the Schedule.

Disallowable Instrument DI2002-189 being the Physiotherapists (Fees) Determination 2002 (No 2) made under section 54 of the *Physiotherapists Act 1977* revokes DI2002-160 (notified in Legislation Register on 26 August 2002) and determines the fees set out in the schedule to be the fees for the Act.

Disallowable Instrument DI2002-190 being the Agents Board Appointments 2002 (No 3) made under section 9 (2) of the *Agents Act 1968* appoints specified persons as members of the Agents Board of the ACT from 1 November 2002 till 31 October 2005 inclusive.

Disallowable Instrument DI2002-191 being the Agents Board Appointments 2002 (No 4) made under section 9 (2) of the *Agents Act 1968* appoints a specified person as Chair of the Agents Board of the ACT from 1 November 2002 till 31 October 2005 inclusive.

Subordinate Legislation - Comment

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

Incorrect Act citation

Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1) made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Medical Practitioners Act 1931* appoints a specified person to be a member of the Medical Board of the ACT from 26 September 2002 for a period of 3 years.

The Committee notes that the explanatory statement for the above instrument states that the Medical Board of the ACT is established under section 7 of the *Medical Practitioners Act 1931*. Perhaps the correct citation of this Act should be the *Medical Practitioners Act 1930*.

Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2) made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Medical Practitioners Act 1931* appoints a specified person to be a member of the Medical Board of the ACT from 31 October 2002 for a period of three years.

Incorrect Act citation

The Committee notes that the explanatory statement for the above instrument states that the Medical Board of the ACT is established under section 7 of the *Medical Practitioners Act 1931*. Perhaps the correct citation of this Act should be the *Medical Practitioners Act 1930*.

No confirmation by relevant Committee of agreement to appointment

The Committee also notes no indication has been given in the explanatory statement as to whether the required consultation in relation to this appointment has taken place with the relevant Committee.

Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1) made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and section 6 of the *Optometrist Act 1956* appoints 2 specified persons to be members of the Optometrist Board for a period of 3 years commencing 4 October 2002.

Again another incorrect Act citation and incorrect Board name. The explanatory statement for the above instrument states that the Optometrist Board is established under section 6 of the *Optometrist Act 1956*. The correct citation of this Act is the *Optometrists Act 1956* and the correct name of the Board is the Optometrists Board.

Only part of this instrument disallowable

Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1) made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and section 6 of the *Veterinary Surgeons Act 1965* appoints specified persons to be Chairman and members of the Veterinary Surgeons Board for three years commencing 4 October 2002 and an acting member from 4 October 2002 until 25 March 2003.

The Committee notes that the explanatory statement for the above instrument states that a person appointed as a member and a person appointed for less than six months as an acting member of the Veterinary Surgeons Board are public servants. The explanatory statement also states that division 19.3.3 of the *Legislation Act 2001* applies in relation to the appointments. However, section 227 (2) (a) and (b) of the Act provides:

- (2) However, this division does not apply to an appointment of—
- (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
 - (b) a person to act in a statutory position for not longer than 6 months, unless the appointment is of the person to act in the position for a 2nd or subsequent consecutive period; or

Division 19.3.3 only applies to the persons appointed in this instrument who are not public servants and who are appointed for longer than six months. The Committee therefore notes that this instrument is only part disallowable and could lead to confusion in the event of a disallowance motion being moved in the Assembly.

Is this instrument disallowable

Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002 made under section 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons to be Justices of the Peace.

The Committee notes that the explanatory statement gives no indication as to whether or not the persons appointed as Justices of the Peace are public servants. An instrument appointing a public servant is not a disallowable instrument under section 227 (2) (a) of the *Legislation Act 2001*.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments from:

- The Attorney-General, dated 19 November 2002, in relation to comments in Scrutiny Report No. 18 of 2002 regarding the Cooperatives Bill 2002.
- The Attorney-General, dated 19 November 2002, in relation to comments in Scrutiny Report No. 20 of 2002 regarding the Criminal Code 2002.
- The Minister for Planning, dated 12 November 2002, in relation to comments in Scrutiny Report No. 19 of 2002 regarding Disallowable Instrument DI2002-142 – Appointments of members to the Gungahlin Development Authority.
- The Minister for Planning, dated 13 November 2002, in relation to comments in Scrutiny Report No. 19 of 2002 regarding Disallowable Instruments DI 2002-102, 103, 104, 105, 106, 109, 110, 111, 112, 113, 114, 115 and 116 – Fees and Determinations and Disallowable Instruments DI 2002-107 and 108 – Electricity Safety Act.
- The Minister for Planning, dated 20 November 2002, in relation to further comments in Scrutiny Report No. 20 of 2002 regarding the Planning and Land Bill 2002.

Copies of the responses are attached.

The Committee thanks the Attorney-General and the Minister for Planning for their helpful responses.

The Committee notes the general comments of the Attorney-General in his response, dated 19 November 2002, in relation to comments in Scrutiny Report No. 20 of 2002 regarding the Criminal Code 2002.

At this point, the Committee adds only the following in relation to the response so far as it concerns the particular clauses of the Bill that were the subject of comment by the Committee.

Clause 26 and the capacity of children to commit crime

The primary aim of the Committee's comments was to draw attention to the fact that there is room for debate as to whether clause 26 should be enacted. It is not a provision that is mandated by any international human rights instrument, and while there is acceptance within Australian jurisdictions that such a clause is appropriate, the reforms to English law in very recent years indicate a different view point.

The Committee considered it appropriate to draw this to the attention of the Assembly. The Attorney's detailed response will, it is respectfully suggested, assist any debate.

In one respect, the Committee acknowledges that its comments did not adequately address one particular issue that it raised.

Victims of crime compensation. The Committee's comments in Report No 20 suggest that proof that a crime was committed may be more difficult where the alleged the perpetrator is aged between 10 and 14 years. This is the case, but the Committee also

took the view that this would create problems for those seeking criminal injuries compensation. The Attorney's response is that this is misconceived, and overlooks s 8 of the *Victims of Crime (Financial Assistance) Act 1983* (the Act).

The Committee is, with respect, prepared to accept that the Attorney is correct. The position might not, however, be so clear.

Para 4(1)(a) of the Act defines a "criminal injury" as "an injury (a) by virtue of which the person who has sustained the injury is a primary victim". Para 9(1)(a) defines a "primary victim" as a person who is injured as a direct result of "a violent crime committed against him or her".

This suggests that no crime can have been committed if the perpetrator could not have been convicted of any crime in respect of what was done to the victim. Proof that a crime was committed may be more difficult where the alleged perpetrator is aged between 10 and 14 years. That is, a child aged between 10 and 14 years would, under proposed subclause 26(1) of the Bill for the Criminal Code, only be criminally responsible for an offence if the child knows that her or his conduct is wrong. Under subclause 26(3), the burden of proving that the child knows that her or his conduct is wrong is on the prosecution.

The Attorney suggests that this is in error, and points to s 8 of the Act, which provides:

Legal incapacity—criminal intent

8. For this Act, a person is deemed to have intended an act or omission that, if done or made with intent, would have constituted criminal conduct notwithstanding that he or she was legally incapable of forming that intent (whether because of age, mental condition, intoxication or otherwise).

The Committee notes that s 8 does not make it plain, as some analogous provisions do, (see *Victims of Crime Assistance Act 1996* (Vic), s 3 definition of "criminal act"), that an act may constitute an offence notwithstanding that the perpetrator lacked criminal responsibility because of age. It is also noted that at the foot of page 3, the Attorney's letter draws a distinction between the concepts of criminal capacity and of intention as an element of an offence.

Clause 28 and the insanity defence

It is respectfully suggested Attorney's detailed response will assist any debate concerning this clause.

Clause 31 and the intoxication defence

The Committee considers that it understood that subclause 31(1) of the Bill modified the common law. The Attorney's explanation is appreciated, and it is respectfully suggested that it will assist any debate concerning this clause.

Clause 42 and self defence

The Committee drew attention to the limitations in the clause in so far as a householder engages in self-defence against a criminal trespasser. When this issue is raised in community wide debate, there is always a considerable level of interest in it.

In this area, as in all other areas addressed above, rights are in conflict. Again, the Attorney's explanation is appreciated, and it is respectfully suggested that it will assist any debate.

The Committee adds only that while it accepts that the law does in some contexts stop short of authorising the use of lethal force in defence of property, the issue is whether it should do so in this particular context.

Bill Stefaniak MLA
Chair

21 November 2002