



Legislative Assembly for the ACT

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

Scrutiny Report

10 August 2009

Report 10

TERMS OF REFERENCE

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

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2009-89 being the Public Sector Management Amendment Standards 2009 (No. 5) made under section 251 of the *Public Sector Management Act 1994* omits section 495 of the Management Standards.

Disallowable Instrument DI2009-90 being the Public Sector Management Amendment Standards 2009 (No. 4) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2009-91 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2009 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* revokes DI2008-2 and DI2008-205 and declares a specified organisation to be a parking authority for the areas of block 3, section 45, Turner and block 3, section 34, Dickson.

Disallowable Instruments—Comment

The Committee has examined the following item of subordinate legislation and offers the following comments on it:

Is this instrument valid?

Disallowable Instrument DI2009-93 being the Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2) made under section 254 of the *Utilities Act 2000* revokes DI2009-30 and determines fees payable for the grant of a licence.

This instrument determines the fee payable for a licence under *Utilities Act 2000*. Section 56 of the *Legislation Act 2001* sets out requirements in relation to fees determinations. Subsection 56(5) provides:

- (5) The 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.

Paragraph 56(5)(b) above provides that a fees determination must provide “to whom the fee is to be paid”. This determination does not. On its face, the determination would appear to be invalid. The Committee draws the Legislative Assembly’s attention to this instrument, on the basis that it does not appear to be in accord with the general objects of the Act under which it is made, in breach of principle (a)(i) of the Committee’s terms of reference.

Subordinate Laws—No comment

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

Subordinate Law SL2009-23 being the Evidence (Miscellaneous Provisions) Regulation 2009 made under subsection 101(1) of the *Evidence (Miscellaneous Provisions) Act 1991* provides a definition of "prescribed person" for the purposes of subsection 40E(1) of the Act and prescribes a position for the purposes of a "responsible person" under section 40G of the Act.

Subordinate Law SL2009-24 being the Magistrates Court Regulation 2009 made under the *Magistrates Court Act 1930* determines the manner in which costs may be awarded in criminal matters.

Subordinate Law SL2009-28 being the Road Transport (Third-Party Insurance) Amendment Regulation 2009 (No. 1) made under the *Road Transport (Third-Party Insurance) Act 2008* aligns the vehicle classification structure of goods vehicles for compulsory third party insurance premiums with the definitions of heavy vehicles and light vehicles defined in the *Road Transport (Vehicle Registration) Act 1999*.

Subordinate Laws—Comment

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

“Henry VIII” clause

Subordinate Law SL2009-22 being the Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1) made under the *Gungahlin Drive Extension Authorisation Act 2004* extends the expiry date of the Act to 31 December 2012.

Section 14 of the *Gungahlin Drive Extension Authorisation Act 2004* provides:

14 Expiry of Act

- (1) This Act expires—
 - (a) 5 years after the day it commences; or
 - (b) if another date is prescribed under the regulations—on the date prescribed.
- (2) This Act is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

This subordinate law prescribes another date – 30 December 2012 – as the date that the GDE Authorisation Act expires. As a result, the provision that authorises the making of this subordinate law (ie paragraph 14(1)(b) of the GDE Authorisation Act) has the same effect as a “Henry VIII” clause, as it allows the primary legislation to be amended by subordinate

legislation. The Committee notes, however, that the Legislative Assembly has explicitly authorised this particular exercise of legislative power. As a result, the Committee makes no further comment on this subordinate law.

“Henry VIII” clause

Subordinate Law SL2009-25 being the Criminal Code Amendment Regulation 2009 (No. 1) made under the Criminal Code 2002 extends the application date in the Code to 1 July 2013, the first year of the Eighth Legislative Assembly for the Australian Capital Territory.

Subsection 10(1) of the *Criminal Code Act 2002* contains the following definition:

default application date means 1 July 2009 or, if another date is prescribed by regulation for this definition, that date.

The definition is relevant for section 5 of the Criminal Code Act, which provides:

5 Codification

- (1) The only offences against territory laws are the offences created under this Act or any other Act.

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

- (2) This section does not apply until the default application date.
- (3) Subsection (2) and this subsection expire on the default application date.

This subordinate law sets a new “default application date”. The Explanatory Statement for the subordinate law states:

For an offence to operate effectively under the Criminal Code 2002, the offence must be structured in a way that conforms to the general principles of criminal responsibility set out in Chapter 2. Chapter 2 applies to all new offences created or remade after 1 January 2003, it will also apply to remaining offences on the Code ‘default application date’. The default application date is 1 July 2009.

The Parliamentary Counsel’s Office has indicated that a great number of offences on the ACT statute book have been harmonised since that time, either through dedicated harmonisation work or in the normal course of review and creation of new offences.

Further, a number of pre-1 January 2003 Acts and regulations have been identified by the relevant agencies for policy review and revision soon. This means that a considerable number of remaining offences will also be harmonised over the next few years.

The Government believes that it is prudent to defer the application of Chapter 2 to pre-January 2003 offences to allow Parliamentary Counsel’s Office to continue their process of reviewing legislation and agencies reviewing their policies and legislation of their own accord.

This regulation extends the application date in the Criminal Code 2002 to 1 July 2013, which is the first year of the Eighth Legislative Assembly for the Australian Capital Territory (2012 to 2016).

It is considered that four years is adequate for the majority of offences to be reformed as the normal processes of reviewing and modernising laws occurs.

The Committee notes that the provision that authorises the making of this subordinate law (ie the definition of *default application date* in subsection 10(1) of the Criminal Code Act) is effectively a “Henry VIII” clause, as it allows the primary legislation to be amended by subordinate legislation. The Committee also notes, however, that the Legislative Assembly has explicitly authorised this particular exercise of legislative power. As a result, the Committee makes no further comment on this subordinate law.

Strict liability offence

Subordinate Law SL2009-26 being the Dangerous Substances (Explosives) Amendment Regulation 2009 (No. 1) made under the *Dangerous Substances Act 2004* simplifies the definition of “firework” to assist in the prosecution of fireworks-related offences.

This subordinate law amends the *Dangerous Substances (Explosives) Regulation 2004*. Among the amendments, section 10 inserts into the Dangerous Substances (Explosives) Regulation a new offence of supplying to a consumer a greater weight of fireworks than the consumer can lawfully store (ie 25 kg). The offence is expressed to be a strict liability offence.

The Committee has consistently paid close attention to strict liability offences. The Committee’s approach can be traced back to the Committee’s *Scrutiny Report No 38* of the *Fifth Assembly*, where the Committee suggested that where a provision of a Bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Scrutiny Report No 38* of the *Fifth Assembly*, the Committee went on to say:

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged.

There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that the Explanatory Statement accompanying this subordinate law contains no discussion of even the fact that the subordinate law contains a strict liability offence. As a result, the Committee draws the Legislative Assembly’s attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a)(ii) of the Committee’s terms of reference.

The Committee also recommends that the Minister address the issues identified above.

“Henry VIII” clause

Subordinate Law SL2009-27 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2009 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* changes the definition of an anabolic steroid and corrects references to the Administrative Appeals Tribunal in the *Medicines, Poisons and Therapeutic Goods Regulation 2008* to the ACT Civil and Administrative Tribunal.

Section 501 of the *Medicines, Poisons and Therapeutic Goods Act 2008* provides:

501 Transitional regulations

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this chapter.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

Section 5 of this subordinate law inserts into the *Medicines, Poisons and Therapeutic Goods Regulation 2008* a new Chapter 31. That new Chapter provides:

Chapter 31 Modification of Act

1100 Modification of Act, ch 14—501 (2)

The Act, chapter 14 applies as if the following section were inserted:

‘552 Modification—Crimes Act 1900

- (1) The *Crimes Act 1900* is modified as set out in the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, schedule 10.
- (2) This section expires on the day the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, part 31 expires.’

1110 Expiry—ch 31

This chapter and schedule 10 expire on the day the *Medicines, Poisons and Therapeutic Goods Act 2008*, chapter 14 expires.

This means that this subordinate law amends the Medicines, Poisons and Therapeutic Goods Regulation, which amends the Medicines, Poisons and Therapeutic Goods Act which, in turn, modifies the Crimes Act. The Committee notes that the empowering provision on which this subordinate law relies (ie section 501 of the Medicines, Poisons and Therapeutic Goods Act) is, in effect, a “Henry VIII” clause, in that it allows the amendment of primary legislation by subordinate legislation. The Committee also notes, however, that the Legislative Assembly has explicitly authorised this particular exercise of legislative power. As a result, the Committee makes no further comment on this subordinate law.

BILLS

Bills—No comment

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

AUDITOR-GENERAL AMENDMENT BILL 2009
--

This is a Bill for an Act to amend the *Auditor-General Act 1996* to provide that the annual budget for the ACT Auditor-General shall be determined by the ACT Legislative Assembly.

WATER AND SEWERAGE (ENERGY EFFICIENT HOT-WATER SYSTEMS) LEGISLATION AMENDMENT BILL 2009
--

This is a Bill for an Act to amend the *Water and Sewerage Act 2000* and the *Water and Sewerage Regulation 2001* to regulate the kinds of hot-water systems, and water saving showerheads, that may be installed in new and existing homes and townhouses, with a view to reducing the environmental impacts and financial costs of hot water systems.

WORKERS COMPENSATION (DEFAULT INSURANCE FUND) AMENDMENT BILL 2009
--

This is a Bill for an Act to amend the *Workers Compensation Act 1951* to permit the manager of the default insurer fund to make decisions regarding the conduct of matters and settlement of claims without the employer's consent.

Bills—Comment

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

CRIMES LEGISLATION AMENDMENT BILL 2009

This is a Bill for an Act to amend a number of Territory laws administered by the Department of Justice and Community Safety. In particular, proposed amendments to the *Evidence (Miscellaneous Provisions) Act 1991* are necessary to ensure that the amendments made to the Act by the *Sexual and Violent Offences Legislation Amendment Act 2008* will operate as intended.

The amendment to the *Evidence (Miscellaneous Provisions) Act 1991*

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

The right of an accused to defend himself or herself personally and to cross-examine prosecution witnesses

The *Sexual and Violent Offences Legislation Amendment Act 2008* commenced to operate on 30 May 2009. This Act inserted section 38D into the *Evidence (Miscellaneous Provisions) Act 1991*. The thrust of this provision is, in the words of the Explanatory Statement to this Bill, to “prohibit(s) a self-represented accused person from personally cross-examining certain categories of vulnerable witnesses in sexual and violent offence proceedings”. Its purpose “is to limit the distress that can be caused to witnesses when confronted by their accuser asking questions directly of them”.

This Bill, by the provisions on Part 1.8 of Schedule 1, would amend section 38D to maintain the allowance currently made to an accused to have the witness examined by the accused’s legal representative, and to provide in addition that “if the accused person does not have a legal representative - a person appointed by the court” (proposed paragraph 38D(3)(b)). Other proposed amendments elaborate this scheme.

Is the prohibition on the ability of a self-represented accused to cross-examine certain classes of witness a justifiable restriction on the HRA rights stated in paragraphs 22(2)(d) and (g)?

This right arises out of a combination of the rights stated in HRA paragraphs 22(2)(d) and (g):

- 22 (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
- (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
 - ...
 - (g) to examine prosecution witnesses, or have them examined; ...

The rule in proposed subsection 38D(3) of the *Evidence (Miscellaneous Provisions) Act* – that “[t]he witness must not be examined personally by the accused person ...” – appears to negate this right in relation to a witness for the prosecution who is, in a sexual or violent offence proceeding, the complainant, a child, a similar act witness, or a witness with a disability. That is, proposed subsection 38D(3) prohibits any form of cross-examination by the accused personally, (in contrast to limiting the exercise of the cross-examination).

Thus, on its face, proposed subsection 38D(3) appears to engage HRA paragraphs 22(2)(d) and (g).¹ HRA section 28 provides that human rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society, and the critical issue here is whether subsection 38D(3) can be justified under section 28.

¹ The Committee notes that the Explanatory Statement to the Sexual and Violent Offences Legislation Amendment Bill 2008 argued that there was no infringement of these rights: “Section 22(2)(d) of the *Human Rights Act 2004* provides that an accused has the right to defend himself or herself personally, or through legal assistance chosen by him or her. This right is based on Article 14 of the International Covenant on Civil and Political Rights. Article 14 has been interpreted by the European Court of Human Rights to provide that the right of self-representation contained within it is not absolute. A state law which obliges a court to appoint, where the interests of justice so require, legal counsel to defend an accused person (even where such representation is against the person’s wishes) does not offend this right”. There was however no citation to any case decided by the European Court. (This Court is not called upon to interpret Article 14 of the ICCPR, and the reference should be to art 6(3)(e) of the *European Convention on Human Rights*.)

On some judicial views, which may or may not be adopted by a court having jurisdiction to review compliance with the HRA, the *negation* of a right cannot be justified under HRA section 28. If this approach is regarded as too strict, justification under section 28 nevertheless requires a showing by the proponent of the law that the limitation or restriction on the right pursues a legitimate objective, and that there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

This Committee report will not canvass this issue. Instead, Members are referred to the extensive and fair discussion in the Explanatory Statement to the Sexual and Violent Offences Legislation Amendment Bill 2008.

The Explanatory Statement to this Bill does not advert to HRA issues, but does refer to provisions in other laws of jurisdictions in Australia that have adopted the option of providing for the court to appoint a person to communicate an accused's questions to a witness.

The Committee draws this matter to the attention of the Assembly, and recommends that the explanatory statement make reference to the Explanatory Statement to the Sexual and Violent Offences Legislation Amendment Bill 2008.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2009 (NO 2)
--

This Bill would amend a number of laws administered by the Department of Justice and Community Safety.

Amendments proposed to the <i>Door-to-Door Trading Act 1991</i>
--

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

Is there an inappropriate delegation of legislative power in that the Executive may, by way of an unconfined power, make a regulation concerning a significant aspect of the scheme of the Act?

Section 4 of the *Door-to-Door Trading Act 1991* makes provision for the kinds of contracts to which it applies, being certain kinds of contract for the supply of goods or services to a consumer. Subsection 4(4) then states exceptions to the general provisions in this regard.

Clause 14 of the Bill would add another category of exception to subsection 4(4), being

- (b) a contract, or part of a contract, exempted (with or without conditions) from the operation of this Act by regulation.

A long standing concern of the Committee is that a bill does not inappropriately delegate to a Minister or the Executive a power to modify the operation of a statutory provision. The concern is greater where the power might be exercised to make a substantial change in the scheme of the Act and/or where the power is not conditioned in any way by reference to criteria for its use. Both of these concerns arise here.

In *Report 47* of the *Fifth Assembly*, concerning the Health Professionals Bill 2003, the Committee said:

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

The Explanatory Statement addresses the issue by stating: “The amendment gives flexibility to determine the scope and nature of the Act’s application to particular kinds of contracts”.

The Committee notes that the Assembly may disallow the regulation, but disallowance only takes effect from the date of the resolution of disallowance, and will not affect the legal situation between the date of the regulation and the date of the resolution.

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

Amendments proposed to the <i>Legal Aid Act 1977</i>

Is an authorised exercise of legislative power insufficiently subject to parliamentary scrutiny? - para (c)(v)?

Should a determination by the Legal Aid Commission under proposed subsection 31E(5) be disallowable (rather than simply notifiable)?
--

Proposed subsection 31E(1) of the Act would permit the Legal Aid Commission to “establish panels of private legal practitioners to provide legal assistance”. By paragraph 31E(4)(a), the commission may appoint a practitioner to a panel “in accordance with the criteria determined under subsection (5)”. By subsection 31E(5), the commission “may determine criteria”. There is no provision stating the considerations relevant or not relevant to the exercise of this power. A determination by the commission is a notifiable instrument (subsection 31E(8)).

It might be argued that a determination should be disallowable by the Assembly. An exercise of this power might be quite significant, in that it will bear on how private legal practitioners can participate in the legal aid scheme. Moreover, there is no provision stating the considerations relevant or not relevant to its exercise.

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

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

Natural justice

The Committee commends the inclusion of a statement of the obligation of the commission to accord natural justice to a legal practitioner in respect of contemplated action in relation to the suspension, removal or exclusion of that practitioner from a panel.

While a court would no doubt imply that these powers are subject to an obligation to accord natural justice, the express statement in the law provides better guidance to persons whose interests are at stake.

The secrecy clause in proposed sections 35D and 35E

As the Explanatory Statement notes, proposed Part 5A of the Act, containing proposed sections 35A, 35B, 35C, 35D, 35E, and 35F, is designed to allow the Commission to provide dispute resolution services (“approved negotiation”) where either all parties are receiving, or at least one party to a matter or proceeding is receiving, legal assistance from the Commission. (The “matter or proceeding” could be any kind of legal dispute. It is necessary only that one party to the matter be in receipt of legal assistance from the Commission.)

Proposed section 35D is a secrecy clause and is described in the Explanatory Statement in these words:

New section 35D requires that convenors [of negotiation sessions] keep information received in the course of a negotiation confidential from nonparticipants in the negotiation, but provides exceptions to allow for convenors to refer the parties for further dispute resolution services, to allow the Commission to obtain information in order to provide legal assistance, to prevent or minimise damage to a person or property, and where a law of the Commonwealth or Territory compels disclosure. Also, the convenor may disclose information to nonparticipants with the consent of the person who provided the information.

It may be accepted that while this provision engages the right stated in HRA subsection 16(2), the protection of the confidentiality of a matter disclosed in a negotiation is on the face of it reasonably justifiable under HRA section 28. The parties to the negotiation would have a reasonable expectation of confidentiality, (which might be described as a privacy interest in terms of HRA paragraph 12(a)), and there is a public interest in the parties being able to avoid resort to court. The prohibition on disclosure will also in many cases protect the interests of persons who are not parties to the negotiation. Apart from their intrinsic value, a further reason to protect these interests is that this will encourage persons to provide accurate and fulsome information to the relevant person exercising a function under the Act. It does not appear necessary in this case to include a “harm element” in the scope of the prohibition.

In *Scrutiny of Secrecy Clauses* paragraph 12.1ff, the Legal Adviser has noted that the Australian Law Reform Commission (ALRC) has attached significance to the desirability of including a “harm element” in any secrecy clause.

Some exceptions are designed to facilitate the provision of legal assistance and the range of persons to whom the information might be provided is very limited. Other exceptions are designed to facilitate further dispute resolution and require consent of the parties. A non-participant who provided information to the convenor may consent to its disclosure.

Are the exceptions in **proposed paragraphs 35D(d) and (e)**, to the prohibition on disclosure of information in the opening words of section 35D, justifiable limitations on the prohibition? This assessment requires that attention be paid to the reasons for the prohibition and the reasons for the exceptions.

There is a question about the appropriateness of two other exceptions. By **proposed paragraph 35D(d)**, a convenor may disclose information if “the disclosure of the information is reasonably necessary to prevent or minimise injury to a person or damage to property”. In this instance the prevention of harm to others will outweigh the privacy and other interests other persons, and can be said to enhance the HRA rights to life (section 9) and security of the person (subsection 18(1)). These interests must be “balanced” against the reasons for the prohibition as stated above.

The exception in **proposed paragraph 35D(e)** is much more problematic. By it, a convenor may disclose information if “the convenor is required to disclose the information under a law of the Territory or Commonwealth”. This provision might be said to suffer from a number of defects:

- a person or a party to a negotiation is given no guidance as to when information they provide might be disclosed, or to whom, a problem compounded by the fact that the law requiring disclosure might be one made after this law takes effect;
- which in turn might have a chilling effect on the willingness of persons to provide information, and/or of parties to engage in negotiation; and
- there is no harm element in the prohibition nor any indication of what interests the exception is designed to protect.

The Explanatory Statement does not address any of these issues.

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

Should the secrecy clause in **proposed subsection 35E(1)** be amended by the insertion of the words “relating to the dispute” after the words “court or tribunal” in subsection 35E(1)?

Proposed subsection 35E(1) would read:

35E Admissibility of evidence

- (1) Evidence of anything said or done at a negotiation session, including a document prepared at or for the session, is not admissible in evidence in any proceeding in a court or tribunal unless the parties in attendance at the session consent to the admission of the evidence.

Proposed section 35D would not apply to disclosure to a court because the courts read the word “person” in these contexts as not including a court. Hence the need for a discrete exception in proposed subsection 35E(1).

Given the right to a fair trial stated in HRA subsection 21(1), a restriction on the production of evidence to a court that is relevant to the resolution of the dispute before the court should be scrutinised closely to determine if it is demonstrated to be justifiable under HRA section 28.

The rationale for limiting proposed subsection 35E(1) so that it applied only to evidence “relating to the dispute” the subject of the negotiation would be that the need for confidentiality in respect of a negotiation session extends only to information that is provided in relation to the particular dispute. If it happens that some other information is provided that is relevant to some other legal matter – whether it be a prosecution or a civil matter – this information should receive no greater protection than it would under other laws. (A limitation of this kind was stated in the closely comparable secrecy clause in subsection 702(3) of the *Workplace Relations Act 1996* (Commonwealth).)

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

Amendments proposed to the <i>Machinery Act 1949</i>

Are rights, liberties and/or obligations rendered unduly dependent upon insufficiently defined administrative power? - para (c)(ii)?

Should the power of the chief executive to appoint a person to be an inspector be circumscribed in some way? Might it be limited to the appointment of a public servant, or of a person holding specified qualifications or experience?

This question arises in relation to proposed subsection 4(1) of the Act, which would read “The chief executive may appoint a person to be an inspector for this Act”.

The Committee has consistently criticised appointment provisions in this form and Territory practice is limit them in one or other of the ways suggested above.

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

Amendments proposed to the <i>Magistrates Court Act 1930</i>

As noted in the Explanatory Statement, amendments to Division 3.4.2 of the Act modernise the provisions dealing with warrants for the arrest of witnesses who have not attended Court as required, and witnesses who are unlikely to attend as required. The new requirements are intended to update the former sections 63 and 64 to be compliant with the *Human Rights Act 2004*, whilst providing a clear and orderly process for issuing and executing warrants for witnesses who fail to attend Court.

The Committee commends these provisions, having noted earlier the manner in which the HRA bears on this issue.

LONG SERVICE LEAVE (PORTABLE SCHEMES) BILL 2009

This Bill would repeal the *Long Service Leave (Building and Construction Industry) Act 1981* and the *Long Service Leave (Contract Cleaning) Act 1999* and establish a single integrated ACT Portable Long Service Leave Authority, incorporating the Boards and functions of the ACT Construction Long Service Leave Authority and the ACT Cleaning Industry Long Service Leave Authority. It would however quarantine the assets of each industry's long service leave fund.

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

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

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

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

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

Strict liability offences

The Committee commends the fact that this issue is addressed appropriately in the Explanatory Statement. It does not consider that any provision might be incompatible with the Human Rights Act.

Enforcement powers

Part 8 of the Bill contains provisions that confer powers of enforcement. The Committee has reviewed the provisions and concludes that they are in the form usually found in comparable Territory laws. It does not see any significant rights issue arising out of them.

Drafting queries

- Should the reference in paragraph 43(3)(b) to “section 42” be instead a reference to “section 45”?

² This is the effect of section 79 of the *Legislation Act 2001*. See section 28 concerning the day of notification.

- Should there be provision for a civil penalty to be imposed in respect of a failure by a registered contractor to give the appropriate return as required by clause 54? Compare to clauses 49 and 52.

WORK SAFETY LEGISLATION AMENDMENT BILL 2009

This Bill would amend the *Work Safety Act 2008* (the Act) and other Territory legislation, primarily to enact routine provisions needed as a consequence of the Act, facilitate the transition of legislation and government regulatory arrangements, and further refine existing provisions.

Are rights, liberties and/or obligations rendered unduly dependent upon insufficiently defined administrative power? - para (c)(ii)?

Clarity and certainty in the expression of concepts that impose duties

The Committee commends the proposed amendment to the definition of “dangerous occurrence” in section 37 of the Act so that, in the words of the Explanatory Statement, “subparagraph (b) is limited in scope to only those occurrences specifically listed, rather than the listed occurrences being only some instances of a relevant occurrence for the purposes of the section. This provides clarity and certainty for persons required to comply with the Act without unduly limiting the meaning of a dangerous occurrence”.

Is there an undue trespass on personal rights and liberties? – para (c)(i)

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

Strict liability offences

What is the justification for a maximum penalty of 100 penalty points for breach of the strict liability offence in proposed section 55A of the Act?

Provision for a strict liability offence engages the right to liberty and security (HRA subsection 18(1)) and/or the presumption of innocence (HRA subsection 22(1)). Derogation of these rights might be justifiable under HRA section 28.

Proposed section 55A of the Act (see clause 1.9 of Schedule 1) would create a strict liability offence in respect of which the maximum penalty would be 100 penalty points. The general position taken by the Committee is that the maximum penalty for breach of a strict liability offence should be no more than 50 penalty points, and the vast majority of such provisions in Territory law do not exceed this maximum.

The Explanatory Statement does not address this issue.

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

Reasons for administrative decisions

The Committee commends the inclusion in proposed subsection 147(4) of a statement of the obligation of the chief executive to provide reasons for a specified decision.

The secrecy clause in proposed section 211 of the Act

Proposed section 211 would apply in respect of “protected information” obtained by a person “exercising, or purporting to exercise, any function under [the] Act”. This person would commit an offence if they made a record of the information, or directly or indirectly divulged the protected information to a person (subsection 211(2)).

The object of the provision may be gathered from the definition of “protected information”:

protected information means -

- (a) information relating to the personal affairs of a person; or
- (b) information the disclosure of which would, or could reasonably be expected to—
 - (i) disclose a trade secret; or
 - (ii) adversely affect a person in relation to the lawful business affairs of that person.

Is the secrecy clause justified?

A secrecy clause engages HRA subsection 16(2), and the first issue is whether the prohibition is justified. So far as paragraph (a) of the definition is concerned, the apparent object is to protect the privacy of a person, and the secrecy clause thus promotes the right to privacy stated in HRA paragraph 12(a). This is evident and it is probably not a point of concern that no harm element is stated.

So far as paragraph (b) of the definition is concerned, no harm element is stated in subparagraph (i), but again it is evident that disclosure of trade secrets would be harmful the relevant person. In relation to subparagraph (ii), a harm test is stated. Commercial interests may not be encompassed within the notion of “privacy” in HRA paragraph 12(a), but they are a recognised category of interests protected by secrecy clauses.

Apart from their intrinsic value, a further reason to protect these interests is that this will encourage persons to provide accurate and fulsome information to the relevant person exercising a function under the Act.

Are the exceptions justifiable?

Proposed section 211 is as follows:

211 Use of protected information

- (1) This section applies if—
 - (a) a person is exercising, or purporting to exercise, any function under this Act; and
 - (b) the person obtains protected information about another person.

- (2) A person to whom this section applies commits an offence if the person—
- (a) makes a record of the protected information; or
 - (b) directly or indirectly divulges the protected information to a person.
- Maximum penalty: 50 penalty units, imprisonment for 6 months or both.
- (3) Subsection (2) does not apply if the record is made, or the protected information is divulged—
- (a) under this or another territory law; or
 - (b) in relation to the exercise of a function of the person to whom this section applies under this or another territory law; or
 - (c) to a relevant authority, by the person to whom this section applies, if the person reasonably believes that recording or divulging the information is in the interests of work safety; or
 - (d) to a person administering or enforcing a corresponding law; or
 - (e) to a law enforcement authority; or
 - (f) to a court under a summons or subpoena.
- (4) Subsection (2) does not prevent a person from making a record of, or divulging protected information about another person with the other person's consent.

(The concepts of “protected information” and “*corresponding law*” are noted below.)

This extensive prohibition is then qualified by a number of exceptions. In some respects, there is an issue as to whether they are so wide that they undermine the reasons for the prohibition. The particular issues are as follows.

Should the exception in proposed 211(3)(a) extend to the divulging of protected information under any “territory law”?

Proposed 211(3)(a) extends to the divulging of protected information “under this or another territory law”.

There can be little objection to the divulging of protected information for the purpose of the administration of the Act. It is another question whether the information might be divulged for the purposes of any other Territory law, (noting too that laws made subsequent to this provision would be encompassed). Such a wide exception gives no guidance as when information provided might be disclosed, or to whom, which in turn might have a chilling effect on the willingness of persons to provide information. In these ways, the objectives of the secrecy clause are greatly undermined.

Should the exception in proposed 211(3)(d) be included, or, if included, modified? Perhaps at a minimum, the words “whether or not the law corresponds, or substantially corresponds, to this Act” in paragraph (b) of the definition of “corresponding law” in proposed subsection 211(5) might be removed.

Proposed 211(3)(d) extends to the divulging of protected information “to a person administering or enforcing a corresponding law”. On the face of it, this exception might be seen as promoting the enhancement of work safety, inasmuch as a “corresponding law” might be thought to be directed towards this objective. This is an objective spelt out in the Explanatory Statement:

Key changes have been made to existing secrecy provisions to enable the sharing of protected information within the Office of Regulatory Services and between the Territory and other jurisdictions where that exchange is in the interests of work or public safety. This includes information gathered in connection with the Act and allows information to be shared within different inspectorates of the Office of Regulatory Services, with other relevant government agencies in the Territory and interstate agencies.

In practice, this will mean that work safety regulators will not be hamstrung by bureaucratic red-tape and impractical restrictions which do not meaningfully protect rights to privacy but do hinder the ability to protect work and public safety. It is essential that safety regulators are able to communicate information which may assist in the protection of all workers and members of the public from risks to their safety. However, these changes are carefully framed to ensure that proper safeguards exist to prevent inappropriate use of information.

Having regard, however, to the definition of “corresponding law”, it might be asked whether proper safeguards do exist. This definition (proposed subsection 211(5)) reads:

corresponding law means—

- (a) a law of a State corresponding, or substantially corresponding, to this Act; or
- (b) a law of the Commonwealth or a State, that is declared by regulation to be a corresponding law, ***whether or not the law corresponds, or substantially corresponds, to this Act.*** (Emphasis added).

Two issues arise.

In respect of both limbs of this definition, the result may be to permit data-matching by some other government agency.

The Committee draws attention to the issues identified by the Committee as arising where an exception to a secrecy clause might permit data-matching – see *Secrecy Clauses Review* – paras 20.2, 21.1, 22.1, 23.1, 24.1 and 25.1.

In respect of the second limb of this definition, the result of the words emphasised in the definition of “corresponding law” is that a regulation might specify a law of another jurisdiction whether or not that law has any connection with the enhancement of protection work and public safety.

Should the Executive be empowered by exercise of a power to make a regulation to define the concept of a “corresponding law” in a way that would extend an exception to the secrecy clause to disclosure under a law of the Commonwealth or of a State which law may have no bearing on work safety?

In *Secrecy Clauses Review* the Committee said:

20.3 Given the significance of data-matching, it is arguable that displacement of a secrecy clause should be authorised by the Legislative Assembly, rather than by an exercise of subordinate law-making. In other words, this is a circumstance where delegation of legislative power would be “inappropriate” in terms of Committee Term of Reference (c)(iv).

20.4 Where circumstances are such that a delegation of power is desirable, it may be argued that any subordinate law should be disallowable. A stronger check would require that the subordinate law not take effect until expressly approved by the Assembly.

In respect of all of these exceptions, should the person whose personal or business affairs are proposed to be disclosed be accorded an opportunity to object to the disclosure?

In respect of all of these exceptions, the question arises as to whether the person whose personal or business affairs are proposed to be disclosed should be accorded an opportunity to object to the disclosure. *Refer to Scrutiny of Secrecy Clauses para 23.1.*

Is the provision in proposed 211(3)(f) for the disclosure of information to a court or tribunal too narrowly expressed? Should it provide simply for an exception to govern the divulging of protected information “to a court”?

Proposed 211(3)(f) extends to the divulging of protected information “to a court under a summons or subpoena”. This exception enhances the right to a fair trial in HRA subsection 21(1). It is not apparent why it is necessary to limit the clause to a situation where the information is provided under a “under a summons or subpoena”. Once a witness voluntarily appears to give evidence to a court, he or she is obliged, under penalty for contempt of court, to answer all questions and produce all relevant documents.

(If it is accepted that the divulging of protected information “to a court” should be permitted, then there is probably no need for any express exception, inasmuch as a prohibition on the divulging of information to “a person” does not encompass a court. *Refer to Scrutiny of Secrecy Clauses para 10.8.*)

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

Based on ALRC, *Review of Secrecy Laws* Discussion Paper 74 June 2009, the experience of the Committee, and on other research, the Committee’s Legal Adviser has prepared an analysis and discussion of secrecy clauses from a rights perspective. The Committee has not adopted this report as a definitive statement of its view, although some particular parts of it have been referred to in the discussion of two of the bills reported on in this report. The Committee includes this analysis and discussion as a framework for assessment of scrutiny clauses, and is a way of engaging in dialogue with the Executive.

SCRUTINY OF SECRECY CLAUSES

The rights context

Secrecy clauses versus open government

Open government and HRA subsection 16(2)

1.1 Secrecy clauses impose obligations not to disclose information, usually in specified circumstances, on designated public officials in possession of information. As such they contradict the notion of open government and engage HRA subsection 16(2):³

- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

1.2 The tension between open government and secrecy clauses was noted recently by the Australian Law Reform Commission (ALRC):

[There is a] conflict between open government—as a philosophy of government—and secrecy as an obligation of working practice for individual public servants.⁴ ... There is an apparent discrepancy between the objects of the FOI Act—with its presumption of general access to information—and the application of criminal and administrative penalties for informal disclosure in accordance with the intention of the FOI Act.⁵

1.3 The value of freedom of information is encapsulated in the objects clause proposed in the Commonwealth Exposure Draft Freedom of Information Amendment (Reform) Bill 2009. In the words of the ALRC, this indicates that

the objects of the FOI Act should be to promote Australia’s representative democracy by increasing public participation in Government processes; by increasing scrutiny, discussion, comment and review of the Government’s activities; and to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.⁶

Should open government yield to the need for secrecy?

1.4 Subsection 16(2) is based very closely on article 19(2) of the *International Covenant on Civil and Political Rights* (ICCPR). In a 1983 report, the then Commonwealth Human Rights Commission found that section 70 of the Commonwealth *Crimes Act 1914*, which imposes a generally applicable obligation of confidentiality on all Commonwealth officers, “could operate in a manner inconsistent with art 19”,⁷ and it recommended that section 70 be amended to limit its operation to the kinds of information in respect of which restrictions may be imposed under article 19(3).

³ A secrecy clause may also be said to engage HRA para 17(a): “Every citizen has the right, and is to have the opportunity, to— (a) take part in the conduct of public affairs, directly or through freely chosen representatives: ...”

⁴ ALRC, *Review of Secrecy Laws* Discussion Paper 74 June 2009, para 2.37.

⁵ Ibid para 4.77.

⁶ Ibid para 7.2.

⁷ Ibid para 1.3.

Article 19(3) provides that the rights in article 19(2) may be subject to

certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights and reputations of others;
- (b) for the protection of national security or of public order, or of public health or morals.

1.5 HRA section 16 does not incorporate article 19(3), but of course the rights in section 16 may be abrogated by a law that meets the requirements of HRA section 28. In the application of section 28 to a particular law, article 19(3) might be taken as a guide to whether the law was a “reasonable limit” that was “demonstrably justified in a free and democratic society”. It is to be noted that article 19(3) makes no mention of the interests of government in the sense of the working of the public service or the political organs, nor of the interests of commercial enterprises, yet these interests are commonly sought to be protected by a secrecy clause. It is perhaps unlikely that section 28 would, so far as subsection 16(2) is concerned, be read down by reference to article 19(3). Nevertheless, the limitations stated in article 19(3) point to the desirability of there being close scrutiny not only of laws designed to serve the interests stated in paragraphs (a) and (b), but more particularly of laws is designed to serve some other interest.

1.6 Several submissions from agencies of the Commonwealth government to the ALRC suggested what these other interests might be. The Australian Securities and Investments Commission (ASIC) argued that

A high proportion of that information is received and developed in confidence and could, if disclosed without authorisation, have a material prejudicial effect on both public and private interests. Public interests that may be affected include, at a broader level, the effective functioning of the Australian economy. At a narrower level they include the effective functioning of ASIC. For example, certain disclosures may prejudice the conduct of investigations by ASIC. Other disclosures could inhibit the frankness of communications with government on issues of policy development and law reform that are required to address gaps in regulation. They could also prejudice the receipt of information from foreign regulators. The disclosure of information could also have a materially adverse effect on a wide variety of private rights and interests.⁸

Because of “the sensitivity of the information that it receives, persons may be ‘less forthcoming’ in providing the information if it were not protected from disclosure”.⁹

1.7 The ALRC noted that the Department of Human Services drew attention to the broad role that secrecy provisions fulfil:

⁸ Ibid para 2.45.

⁹ Ibid 2.46.

Secrecy laws ... serve a number of functions not fully realised in reliance on other laws ... They ensure individuals who handle sensitive information have a clear sense of personal responsibility for the protection of that information, not just Australian Public Service employees; they support public confidence in the appropriate management of private information; they provide practical acknowledgement that some information in the possession of the government is more inherently sensitive, and therefore worthy of greater protection, than other information; and they provide a legitimate basis for agencies to refuse to disclose information in appropriate circumstances, and to recover sensitive information inappropriately disclosed. While other legal mechanisms achieve these outcomes to a greater or lesser extent, they are generally not as targeted and direct as secrecy laws can be.¹⁰

1.8 The ALRC also noted that

Some stakeholders cited other reasons for needing secrecy provisions, such as the ability to ensure that commercially sensitive information is protected. For example, the Department of Climate Change submitted that:

In particular circumstances, it is both necessary and desirable to impose a statutory obligation on Commonwealth officers not to disclose information. In the case of the [*National Greenhouse and Energy Reporting Act 2007* (Cth) Act], this is necessary to ensure that commercially sensitive information reported under the Act by corporations is protected, and to ensure confidence in the integrity of the reporting system.¹¹

Open government versus privacy protection – HRA section 12

2.1 ICCPR article 19(3) acknowledges explicitly that a secrecy clause may be designed to protect the “rights and reputations of others”, (that is, of persons other than the person exercising the rights in article 19(2)). These rights are stated in HRA section 12:

12 Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

If a person provides, either voluntarily or by compulsion, information to a government body which if disclosed could interfere with that persons rights under section 12, then on the face of it such disclosure breaches that right. But then, of course, the disclosure might be justifiable under HRA section 28.

Should a secrecy clause be supported by criminalising its breach? – HRA subsection 18(1)

The limits of criminalisation

3.1 HRA subsection 18(1) provides that:

¹⁰ Ibid 2.53.

¹¹ Ibid 2.57.

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

3.2 As the Committee noted in *Scrutiny Report No 2* of the 7th Assembly, concerning the Crimes (Murder) Amendment Bill 2008, this right is potentially breached by a law that states a basis for a criminal conviction where the penalty may result in a loss of liberty. This is true of every law that provides for imprisonment as a possible punishment upon conviction of a crime, and if this is right, every serious criminal offence is on its face incompatible with HRA subsection 18(1).¹² But that incompatibility might of course be justifiable under HRA subsection 28.

3.3 If subsection 18(1) is not applicable, there remains the broader rights consideration that there should be a close correlation between moral culpability and any degree of criminal responsibility. A serious moral stigma that attaches to a conviction for any offence, and conviction results in various legal disabilities and risks. Specifically in relation to secrecy clauses, these points are amply illustrated in the ALRC report *Review of Secrecy Laws*.¹³

3.4 The ALRC accepted that

there is a role for the criminal law in certain circumstances. Commonwealth information includes a range of highly sensitive information such as national security information, information relating to defence, valuable commercial information and sensitive personal information. Unauthorised disclosure of this kind of information has the capacity to cause real harm to important public interests, and to the effective functioning of government.

6.62 The role of the criminal law in publicly punishing, deterring, and denouncing offending behaviour is appropriate when applied to behaviour that harms, is reasonably likely to harm or intended to harm important public interests. Given the adverse consequences of a criminal conviction, however, it is the ALRC's view that *it is inappropriate to apply such penalties to disclosures that were not intended and are unlikely to cause such harm* (emphasis added).¹⁴

3.5 The ALRC also recommended that the level of penalty where harm was intended or likely should vary according to the degree of harm or, in some cases, the nature of the interest harmed.¹⁵ (The interests deserving of particular protection were those relating to national security and the like, the prevention of criminal offences and the like, the life and physical safety of a person, and public health and safety.)

¹² Another way to understand the rights issue is to argue that since a person may be arrested and/or detained for suspected breach of an offence, every offence provision should be scrutinised to determine if its is "arbitrary". Some ACT judges may take this view; see *Temoannui v Ford* [2009] ACTSC 69 at para 39.

¹³ Ibid paras 6.38-6.53.

¹⁴ Ibid para 6.61-6.62.

¹⁵ Ibid para 6.64 and see 7.126.

Alternatives to criminalisation

4.1 Civil penalties. The ALRC noted that there were alternatives to criminalising a breach of a secrecy clause. The law might provide for a civil penalty, and although recognising that this was a less draconic way of penalising breach,¹⁶ and citing some instances in Commonwealth law, it did not make any recommendation for extension of this technique.

4.2 Injunctions. The ALRC did recommend that

the courts be given an express power to issue injunctions to restrain a breach of the proposed general secrecy offence or the on-disclosure of information in breach of the proposed subsequent disclosure offence. This proposal recognises that preventing the disclosure of sensitive Commonwealth information is preferable to imposing sanctions once disclosure has occurred.¹⁷

4.3 Administrative penalties. There is an argument that breach of many secrecy clauses should be penalised by the imposition of an administrative penalty. In relation to Commonwealth employees, the ALRC noted that

where an APS employee breaches the Code of Conduct in the Public Service Act, an agency head may impose one of the following penalties: termination of employment; reduction in classification; re-assignment of duties; reduction in salary; deductions from salary (which are not to exceed 2% of the APS employee's annual salary); or a reprimand. While some of these penalties, such as termination of employment, are quite severe, they are considered disciplinary rather than criminal in nature. (Footnotes omitted).¹⁸

Its view is that

such provisions have an important role to play, particularly where a disclosure is inadvertent, there is no intention to cause harm, or where any potential harm caused by the disclosure is likely to be minor. Administrative penalties provide a range of responses to different levels of misconduct. They allow misconduct of a lower order to be addressed in the employment context, without imposing the very serious consequences of a criminal charge and conviction ...¹⁹

The desirability of certainty in the language of a criminal offence

5.1 The Committee has often commented on the need for certainty in the expression of the scope of a criminal offence.²⁰ In the context of secrecy clauses, the ALRC argues that

¹⁶ Ibid paras 6.17-6.36.

¹⁷ Ibid para 6.29, 6.37, and paras 9.185ff for detail.

¹⁸ Ibid para 6.11.

¹⁹ Ibid 6.15. It also noted that administrative penalties “do not apply to former employees or persons in the private sector who may have access to Commonwealth information” (para 6.13).

²⁰ In *Temoannui v Ford* [2009] ACTSC 69, Higgins CJ states that “[t]o subject a person to [an] unspecified obligation exposes a person to arbitrary arrest and detention contrary to s 18(1) of the HR Act” (para 39).

[g]iven the serious consequences of a criminal conviction, it is important that the parameters of conduct that will attract criminal penalties are certain. As a general principle, a person should not be subject to criminal penalties where the scope of the offence is ambiguous.²¹

The mental element of an offence of non-compliance with a secrecy clause

6.1 A secrecy clause offence may modify the default position that the commission of any physical element of an offence must be accompanied by an intent (in the case of a physical element that consists only of conduct), or by recklessness (in the case of a physical element that consists of a circumstance or a result)²². The clause may modify these rules by providing that the offence is one of strict liability or of absolute liability.

6.2 In either case, such a clause engages the right to liberty and security (HRA subsection 18(1)) and/or the presumption of innocence (HRA subsection 22(1)). Derogation of these rights might be justifiable under HRA section 28.

Penalties for breach of a secrecy clause

7.1 Any penalty needs to be assessed for compatibility with HRA section 10 (Protection from torture and cruel, inhuman or degrading treatment etc) which, as the Committee has often pointed out, may be seen to incorporate a principle that punishment should not be disproportionate to the offence.

The right to a fair trial

8.1 HRA 21(1) states:

21 Fair trial

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

8.2 The ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent, is an element of a fair trial. This is reflected in the common law rule that the starting point for the admission of evidence is that any relevant evidence is admissible.²³

That is, a piece of evidence (information) submitted to an adjudicator (such as a court) is admissible if that evidence – assuming that the adjudicator accepts that it has some value – would tend to establish the existence, or non-existence, of a fact in issue which must be resolved as a step towards adjudication. The rights dimension of this principle was made clear by Spigelman CJ in *R v Young* [1999] NSWCCA 166:

²¹ ALRC DP 74, at 6.53.

²² *Criminal Code* 2002, section 22.

²³ See the discussion in *Scrutiny Report No 26* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006.

75 The starting point is that the search for the truth requires all oral and documentary information, which is directly or indirectly relevant or material, to be available. As Rich J has put it: “The paramount principle of public policy is that truth should always be accessible to the established courts of the country.” *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 87).

8.3 This topic is mentioned here because while the common law is restated in sections 55 and 56 the *Evidence Act 1995* (Commonwealth), which applies in Territory judicial proceedings, these provisions do not apply in the face of an inconsistent Territory law. It is not uncommon for a secrecy clause to provide in effect that information may not be provided to a court (with or without exceptions).²⁴

8.4 While such provisions in secrecy clauses derogate from the right to a fair trial, it might that the derogation can be demonstrated to be justifiable under HRA section 28.²⁵

General

9 It can be seen quite easily that assessment of the justifiability of a secrecy clause in the light of the HRA is a task that appears to involve the balancing of incommensurable values. At the end of the day, an assessment of whether a secrecy clause is incompatible with the HRA turns on a largely impressionistic judgement.

Constitutional limits to the legislative power to enact secrecy clauses

The freedom to discuss government and political matters

10.1 The freedom of political communication – that is, to publish material discussing government and political matters - guaranteed in the *Australian Constitution* (and which applies to ACT laws) may limit the power of the Legislative Assembly to enact secrecy clauses. The argument is that “because secrecy laws specifically target the communication of information about government, such laws may require particularly close scrutiny in order to be consistent with the implied freedom of political communication”.²⁶ There are two single judge decisions that have accepted this theory,²⁷ and they suggest that the freedom of political communication will operate only to restrain secrecy clauses cast in very wide language.²⁸

²⁴ Ibid; *Scrutiny Report No 21* of the *Sixth Assembly*, concerning the Children and Young People Amendment Bill 2005 (No 2); and *Scrutiny Report No 7* of the *Sixth Assembly*, concerning the Road Transport (Mass, Dimensions and Loading) Bill 2009.

²⁵ The kinds of argument that might be put in justification are reviewed in *Scrutiny Report No 26* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006.

²⁶ R Jolly, ‘The Implied Freedom of Political Communication and Disclosure of Government Information’ (2000) 28 *Federal Law Review* 42 at 47, quoted at ALRC, DP 74, para 2.76.

²⁷ *Bennett v President of HREOC* (2003) 134 FCR 334, and *R v Goreng Goreng* [2008] ACTSC 74.

²⁸ See analysis in ALRC, DP 74, paras 2.67 to 2.83.

The separation of powers

10.2 Of more practical significance to the power of the Legislative Assembly to enact secrecy clauses may be a limit derived from separation of powers theory. In short, it is argued that a secrecy clause cannot inhibit a court in the exercise of judicial power, and, in particular, that it cannot interfere with the ability of a court to receive such information as it requires to discharge that function.

10.3 In *Grollo v Palmer* [1995] HCA 26, Gummow J observed that “[t]he chief and, as is apparent from this passage, necessary utility of the exercise of the federal judicial power is the quelling of justiciable controversies by *ascertainment of the facts*, by application of the law and by exercise, where appropriate, of judicial discretion” (emphasis added).

The issue his Honour addressed in that case arose out of the following scenario. In the exercise of a non-judicial power, a federal judge acquired information that was relevant to the issue of whether that judge, in some subsequent judicial proceeding, should disqualify her or himself from conducting or taking part in that proceeding on the basis that a member of the public might apprehend that the judge was biased. It was argued that secrecy provisions in Commonwealth Acts precluded the federal judge from providing this information to the parties to the matter (para 47). Gummow J said that “to deny to the [judge] what would otherwise be the step of disclosing the relevant facts, as recalled by the judge, to the parties and their representatives, would be seriously to impede the discharge by the judge of the judge's duties in the exercise of the judicial power of the Commonwealth” (para 45).

Assuming that the effect of the secrecy clauses, (or of general law obligations arising out of a duty not to breach confidence), was to impose a duty on the judge not to disclose the information, Gummow J held that “whether the source of the duty be in a statute ... or the general law, the ambit of the duty stops short of impeding discharge of the higher duty flowing from Ch III of the Constitution by the [judge]” (para 54).

10.4 Perhaps more extensive than Gummow J's holding is the view expressed by Ellicott J in *Haj-Ismael v Minister of Immigration and Ethnic Affairs* [1981] FCA 124 that

[t]he powers of the courts in exercising federal jurisdiction to determine what documents shall be available for inspection and admission in evidence before them is, in my opinion, part of the judicial power of the Commonwealth vested in these Courts. It is not open to Parliament to limit this power. It may regulate its exercise provided such regulation does not impair the power. It cannot usurp the power.

10.5 The extent to which principles of law drawn from separation of powers theory that apply to the Commonwealth polity apply to the ACT is not yet settled, although the prevailing view appears to be that these principles do not apply to the same extent. Nevertheless, it is of course open to a member of the Assembly to take the view that these principles are an appropriate yardstick to apply in the process of scrutinising a Territory bill.²⁹

²⁹ In *Grollo*, Gummow J noted that Montesquieu “was animated by a desire to avoid danger to political liberty which he perceived as posed by undue concentration of power in any one branch of government”, citing Ch 6 of Book II of *The Spirit of Laws* (1748).

10.6 Moreover, the reasoning of judges such as Gummow J and Ellicott J may apply in the Territory as a result of the application of the right to a fair trial stated in HRA subsection 21(1).

10.7 It must also be borne in mind that the courts will tend to construe secrecy provisions in such a way as to enhance their ability to receive relevant information.

10.8 A prohibition against divulging or communicating information to "another person" does not apply in respect of the disclosure of such information in the course of giving evidence before a court. The High Court has held that, as a matter of ordinary language, the words "divulge or communicate to another person" are inappropriate to refer to the giving of evidence before a court "which would hardly be called" another person.³⁰

10.9 Where there is an exception to the secrecy clause that permits an officer to divulge the information "in the performance of any duty of the officer", those words will be taken to providing information to a court where the proceeding relates to the functions of the government agency.³¹

10.10 A provision that an officer "An officer shall not be required to produce in court" (certain documents) "or to divulge or communicate to any court any matter or thing ..." "only protects an officer from being required to do those things, it does not forbid his doing them. The difference between compellability and competency to give evidence is well known and the sub-section is concerned only with compellability and not with competency".³²

Secrecy laws and parliamentary privilege³³

11.1 The notion of 'parliamentary privilege' refers to the privileges or immunities of the Legislative Assembly to protect the integrity of its processes. Paragraph 24(2)(a) of the *Australian Capital Territory (Self-Government) Act 1988* gives the Legislative Assembly power to declare "the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives or of its members or committees". In the absence of any declaration by it, "the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees" (subsection 24(3)).

11.2 One aspect of privilege is the Assembly's power to conduct inquiries, including the ability to compel witnesses to give evidence or produce documents. The ALRC notes that "[i]t is generally accepted that a general secrecy provision will not prevent the disclosure of information to the Parliament or a parliamentary committee".³⁴ It also noted that "[the Assembly] may choose to abrogate parliamentary privilege and prevent the disclosure of information to the Parliament or its committees", so long as an intention to abrogate was stated in express statutory words.³⁵

³⁰ *Hilton v Wells* [1985] HCA 16 at para 21 per Gibbs, Wilson and Dawson JJ, citing other cases.

³¹ *Canadian Pacific Tobacco Co Ltd v Stapleton* [1952] HCA 32 at para 21, per Dixon CJ.

³² *Ibid* para 2, per Williams J.

³³ This part also draws heavily on ALRC, DP 74, paras 2.100ff.

³⁴ ALRC DP 74, para 2.102, citing H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008) at 51.

³⁵ *Ibid* para 2.103, citing references.

11.3 The comment made by the ALRC applies equally to ACT laws:

when drafting secrecy provisions, the Australian Government should give attention to the interaction between the provision and other laws and practices, including parliamentary privilege. Where it is intended to abrogate parliamentary privilege so as to prevent the disclosure of information to the Parliament, this intention should be clearly stated in the provision and supporting documents, as for example in the Tax Laws Exposure Draft Bill.³⁶

How should a secrecy clause be expressed?³⁷

12.1 Ultimately a secrecy clause must be a ‘proportionate’ means of achieving the objective sought by restricting the disclosure of the particular information concerned. Without being exhaustive, a number of particular matters might be noted.

12.2 Does the secrecy clause “include an express “harm element”, such as a requirement that a disclosure of information is reasonably likely to cause harm to a specified public interest, or that a person, in disclosing the information, intended to cause harm”?³⁸

12.3 Where harm is an element of the offence, the test may be cast objectively, as in the *Pooled Development Funds Act 1992* (Cth), which protects information “the disclosure of which may reasonably be expected to affect a person adversely in respect of the lawful business, commercial or financial affairs of the person”. Or the test may be subjectively expressed, as in one of the “official secrets” offences in the *Crimes Act 1914*, which requires that a communication be “with the intention of prejudicing the security or defence of the Commonwealth or a part of the Queen’s dominions”.³⁹ A subjective test affords greater protection to an inadvertent disclosure.

12.4 Alternatively, proof of lack of intent to cause some harm may be a defence to an apparent breach. The *Defence Force Discipline Act 1982* (Cth) provides a defence to the offence of unauthorised disclosure of information where “the person proves that he or she neither knew, nor could reasonably be expected to have known, that the disclosure of the information was likely to be prejudicial to the security or defence of Australia”.⁴⁰

12.5 The ALRC attaches particular significance to the desirability of including a “harm element” in any generally applicable secrecy clause offence.

In the absence of any actual, likely or intended harm to those public interests, the ALRC has formed the preliminary view that unauthorised disclosure of Commonwealth information is more appropriately dealt with by the imposition of administrative penalties or the pursuit of contractual or general law remedies.⁴¹

³⁶ Ibid para 2.111.

³⁷ The various kinds of Commonwealth information that secrecy clauses aim to protect are usefully identified Ibid 5.39-5.73.

³⁸ Ibid para 5.36. Chapter 10 of the ALRC DP reviews a number of Commonwealth “harm element” offences.

³⁹ Ibid para 10.7.

⁴⁰ Ibid para 5.123.

⁴¹ Ibid para 10.12.

12.6 Agency submissions to the ALRC tended to argue for omission of any harm test. The view of the Commonwealth Attorney-General's Department is more willing to accept the statement of a harm requirement.

The Australian Government Attorney-General's Department (AGD) distinguished between secrecy offences dealing with different kinds of information. The AGD submitted that 'while harm to the public interest should be a key consideration and policy rationale for any secrecy provision, it may not be necessary to expressly include this as an element in all secrecy laws'. The AGD stated:

Some information may, by its very nature, be likely to cause harm, so it may not add much to include this as an element of the offence. Some examples may include intelligence information, defence information, information with a national security classification and Cabinet documents ... in these situations it should not be necessary for the prosecution to have to establish proof of harm⁴²

10.29 The AGD considered that, for information that is not 'by its very nature' likely to cause harm, it may be appropriate to 'link the offence to the public interest it is intended to serve in order to avoid the provision being unnecessarily broad'. The AGD concluded that a 'reasonably likely to cause harm' formulation would be a useful model for some secrecy offences. (Footnote omitted).⁴²

12.7 The ALRC agreed with the AGD's conclusion, adding that

[w]here no such harm is likely, it is appropriate that the matter be subject only to administrative sanctions or contractual remedies, at least where the individual concerned is a Commonwealth officer.⁴³

12.8 The ALRC illustrated its policy by reference to secrecy offences aimed primarily at protecting confidential commercial information held by government agencies from unauthorised disclosure. It noted that in many of them, there is no express requirement that an unauthorised disclosure be reasonably likely to harm commercial interests. The ALRC view is that

[i]t would be possible to incorporate in such offences a requirement that disclosure is reasonably likely to 'have a substantial adverse effect on a person in respect of his or her lawful business or professional affairs or on the business, commercial or financial affairs of an organisation' ...⁴⁴

12.9 Perhaps it may be said that as a starting point, a secrecy clause offence that does not include a "harm element" will be more difficult to justify as a derogation of the right in HRA subsection 16(2) than one that does contain such an element.

13.1 Where the secrecy clause is aimed at protecting information relating to personal or commercial affairs, is it possible to permit the disclosure of information that does not identify the person or entity that is the subject of the information?

⁴² Ibid paras 10.28-10.29.

⁴³ Ibid 10.31.

⁴⁴ Ibid 10.32. In the end, however, the ALRC suggested a case-by-case approach to the issue; ibid para 10.39.

13.2 The ALRC provided illustrative provisions in Commonwealth laws.⁴⁵ On a proportionality analysis, the less restriction of a right the more likely it is that restriction is justifiable.

14.1 Is a secrecy clause aimed at protecting against the disclosure of confidential information expressed in the least restrictive way?

14.2 Such a clause may be expressed in various ways.

Some provisions prohibit the disclosure of ‘confidential’ information, which may or may not be defined in the Act. Others prohibit the disclosure of information that was supplied in confidence, or information the disclosure of which would constitute a breach of confidence.⁴⁶

14.3 This last mentioned is probably the narrowest mode of restriction (although probably more difficult to apply in practice). On the other hand, a very wide provision would be one in which it was the prohibition attached to information “communicated in confidence within the government; or ... received in confidence by the government from a person or persons outside the government; whether or not the disclosure would found an action for breach of confidence”.⁴⁷

15.1 Is a secrecy clause aimed at protecting against the disclosure of commercial information expressed in the least restrictive way?

15.2 Again, such a clause may be expressed in various ways.

Some of these provisions specify the type of confidential commercial information protected, while others prohibit the disclosure of information obtained under an Act on the basis that its disclosure would be detrimental to the commercial interests of a person or body. For example, s 74 of the *Wheat Export Marketing Act 2008* (Cth) prohibits the disclosure of ‘protected confidential information’, which is defined as information provided under certain provisions of the Act, the disclosure of which could cause financial loss or detriment to a person or benefit a competitor of the person.⁴⁸

15.3 Other expressions are possible of course, and many are found in legislation.

16.1 What are the fault elements of the offence? In particular, does strict liability apply to the conduct that constitutes the disclosure of the information? Does it apply to harm flowing from disclosure (where harm is an element)?

16.2 The Committee’s general policy concerning offences that contain strict and/or absolute liability applies as much to secrecy clause offences, but a couple of particular matters may be noted.

⁴⁵ Ibid para 5.117.

⁴⁶ Ibid para 5.70.

⁴⁷ Ibid.

⁴⁸ Ibid para 5.71.

16.3 In Commonwealth law, it is apparently rare for strict liability to apply to the conduct that constitutes the disclosure of the information. The ALRC cited only subsection 63(2) of the *Superannuation (Resolution of Complaints) Act 1993* (Cth), which provides that certain persons must not disclose any information acquired in connection with a complaint made to the Superannuation Complaints Tribunal and the offence is stated to be an offence of strict liability.⁴⁹

16.4 The ALRC was much more sympathetic to strict liability applying to harm flowing from disclosure.

17.1 What provision is there for exceptions to the reach of the offence – that is, any provision that “that limits the scope of conduct prohibited by a secrecy offence”, and/or for defence to the commission of the elements of the offence – that is, “a provision that may be relied on by a person whose conduct is prohibited by a secrecy offence”?⁵⁰

17.2 This distinction may be more a matter of form than substance, although it is argued that from a defendant’s point of view, provision of an exception is more beneficial.⁵¹ The essential question is what is said in the offence provision about when it will not apply. Without being exhaustive, it might, depending on context, be desirable to provide for one or more of the following exceptions or defences.

17.3 (a) Where disclosure of the particular information is in the “public interest”. This is attractive, but will be productive of uncertainty about the scope of the secrecy clause.⁵²

17.4 (b) Where disclosure is consented to by a person whose interests are sought to be protected by the secrecy clause. This again is attractive, but some Commonwealth agencies raised the question as to how an agency can determine if consent is truly voluntary.⁵³

17.5 (c) Where the information disclosed is already in the public domain (or perhaps where it has lawfully been made available to the public).⁵⁴

Data matching

18.1 This topic is of such significance that separate treatment is justified.

18.2 Data matching is “the large scale comparison of records or files ... collected or held for different purposes, with a view to identifying matters of interest”.⁵⁵ It is evident from the ALRC report that there is currently a ‘push’ towards facilitating greater scope for data-matching from Commonwealth agencies to other agencies of government.⁵⁶

⁴⁹ Ibid 10.100. The ALRC added that if the offence incorporates a reasonable likelihood of harm test in the proposed general secrecy offence, recklessness as to disclosure should be sufficient (para 10.105).

⁵⁰ Ibid para 11.6.

⁵¹ Ibid pars 11.8-11.10.

⁵² See Ibid paras 11.44-11.45.

⁵³ Ibid 11.62.

⁵⁴ Ibid 11.63ff.

⁵⁵ Office of the Federal Privacy Commissioner, *The Use of Data-Matching in Commonwealth Administration—Guidelines* (1998).

⁵⁶ ALRC DP 74, paras 3.54-3.57.

Why data-matching might be desirable

18.3 The ALRC said that the sharing of information through data matching may need to take place:

- where there is a crisis or national emergency;
- to better examine information held by government, by analysing and integrating information held across a number of different portfolios;
- to integrate service delivery, for example, between the ATO and Centrelink, or between Centrelink and a private employment service provider; and
- to manage areas of joint activity by encouraging the sharing of information with the Australian Government, across jurisdictions and with the private sector.⁵⁷

Why data-matching is problematic

18.4 Drawing on comments of the Office of the Federal Privacy Commissioner, the ALRC recognised that “[t]here are obvious privacy risks associated with data matching”, such as the

- use of personal information for purposes other than for the reasons it was collected, and these purposes may not be within the reasonable expectations of the individuals about whom the personal information relates;
- examination of personal information about individuals about whom there are no grounds for suspicion, sometimes without the knowledge of those individuals; and
- retention of matched information by agencies for potential future use.⁵⁸

18.5 In addition, “data-matching is not always reliable. Matched information may fail to distinguish between individuals with similar details; input data may not be accurate; technical errors may occur; and fields may not be standardised”.⁵⁹

Privacy Act restraints

18.6 The ALRC noted that “[u]nder the *Privacy Act 1988* (Cth), agencies and organisations are subject to additional forms of regulation in respect of their data-matching activities through privacy principles in relation to information handling”.⁶⁰ It cited section 14 of that Act, and Information Privacy Principles 10 and 11. However, these IPPS do not apply where the use of the information for some purpose other than that for which it was collected “is required or authorised by or under law” (IPP 10.1(c), and see IPP 11.1(d)). Thus, if a law authorises data-matching, these IPPs are irrelevant.⁶¹

⁵⁷ ALRC DP 74, para 3.44, drawing from Australian Government Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia’s Priority Challenges* (2004 at60.

⁵⁸ Office of the Federal Privacy Commissioner, *The Use of Data-Matching in Commonwealth Administration—Guidelines* (1998) at 2. See also P Durbin, “ATO lashed over privacy breaches”, *Australian Financial Review*, 23 April 2009 at 1.

⁵⁹ Ibid.

⁶⁰ ALRC DP 74, para 3.48.

⁶¹ This is subject to the need in some cases to resolve whether the purported authorising provision is one that fits in to the IPP category of exception; see ALRC DP 74, para 4.184.

18.7 Of potentiality more significance, the ALRC notes that

[the] Federal Privacy Commissioner has issued guidelines that address general data-matching activities of agencies and a number of agencies have agreed to comply with them.⁶² The guidelines apply to agencies that match data from two or more databases, if at least two of the databases contain information about more than 5,000 individuals.

The ALRC noted that:

In summary, the guidelines require agencies to give public notice of any proposed data-matching program; prepare and publish a ‘program protocol’ outlining the nature and scope of a data-matching program; provide individuals with an opportunity to comment on matched information if the agency proposes to take administrative action on the basis of it; and destroy personal information that does not lead to a match. Further, the guidelines generally prohibit agencies from creating new, separate databases from information about individuals whose records have been matched.⁶³

18.8 It also noted that:

the Federal Privacy Commissioner can examine (with or without a request from a minister) any proposal for data matching or data linkage that may involve an interference with privacy or that may have any adverse effects on the privacy of individuals. The Federal Privacy Commissioner may report to the minister responsible for administering the *Privacy Act* about the results of any research into developments in data-matching or proposals for data matching.⁶⁴

The common law of natural justice and data-matching

19.1 In *Johns v ASC* [1993] HCA 56, (1993) 178 CLR 408 the High Court held that there was a common law obligation to provide natural justice (or procedural fairness) to persons whose interests may be adversely affected by decisions made under section 127 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). This provision sets out secrecy obligations for ASIC, and the circumstances where disclosure is authorised.

Brennan J said that “[t]he purposes for which information may legitimately be used or disclosed are one thing; the means by which information is used or disclosed are another” (para 16). He noted that ASIC and its officers were “obliged by s. 127(1) to keep the [relevant material] confidential except to the extent to which disclosure was authorized” (para 25), and that in this instance “[t]he decisions to allow the use of the transcripts in public

⁶² Office of the Federal Privacy Commissioner, *The Use of Data-Matching in Commonwealth Administration—Guidelines* (1998). In 2007–2008, the Federal Privacy Commissioner was provided with agency protocols for 13 data-matching programs: Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2007–30 June 2008* (2008) at 64–71.

⁶³ Office of the Federal Privacy Commissioner, *The Use of Data-Matching in Commonwealth Administration—Guidelines* (1998), [33]–[41], [42]–[47], [63], [69]. In Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), the ALRC suggested that the Office of the Privacy Commissioner could exercise its research and monitoring function to review the data-matching guidelines. The ALRC also recommended that the Office of the Privacy Commissioner develop and publish guidance for organisations that conduct data-matching activities: Rec 10–4.

⁶⁴ Citing *Privacy Act 1988* (Cth) subsections 27(1)(c), 32(1). The text is found at footnote 60 attaching to ALRC DP 74, para 3.49.

hearings were prejudicial to Mr Johns' interests" (para 26). It followed that since "exercise of the authority conferred by s.127(4)(b) is apt to affect adversely the interests of an examinee who is prima facie entitled to have the confidentiality of the transcript of the examination observed. Accordingly there is an obligation on a person proposing to exercise that authority to observe the rules of natural justice" (para 27). Since Mr Johns was not given an opportunity to be heard in opposition to the disclosure of the documents, the decision to do so was invalid (para 28). His Honour did note that "there would be some situations in which natural justice would not require notice to be given to an examinee of an intention to make transcripts of the examination available to a State agency: for example, where an investigation by a State law enforcement agency might be frustrated" (ibid).

19.2 The reasoning in *Johns* is potentially applicable to every power vested in a public official to disclose confidential information⁶⁵ where the disclosure could affect adversely the interests of a person. It is also probably the case that the reasoning will apply unless a statute expressly provides otherwise.

19.3 The ALRC accepted the reasoning in *Johns*. It argued that "there is (also) a general understanding that individuals who provide information to government agencies do so for a specific purpose and are entitled to a level of protection of that information. Where information is to be shared, people should know about it".⁶⁶

Matters relevant to the scrutiny of a secrecy clause

20.1 Without attempting to be exhaustive, the Committee suggest that a scrutiny of a secrecy clause might involve a number of queries.

20.2 Who decides whether displacement of a secrecy clause to permit data-matching should be permissible in any circumstance?

20.3 Given the significance of data-matching, it is arguable that displacement of a secrecy clause should be authorised by the Legislative Assembly, rather than by an exercise of subordinate law-making. In other words, this is a circumstance where delegation of legislative power would be "inappropriate" in terms of Committee Term of Reference (c)(iv).

20.4 Where circumstances are such that a delegation of power is desirable, it may be argued that any subordinate law should be disallowable. A stronger check would require that the subordinate law not take effect until expressly approved by the Assembly.

21.1 Who decides whether displacement of a secrecy clause is permissible in a particular context?

⁶⁵ There might in some cases be a question whether the information is "confidential". *Johns* is also significant in that it held that information acquired by an exercise of powers was necessarily confidential.

⁶⁶ ALRC DP 74, para 3.88.

21.2 The ALRC accepted⁶⁷ the argument put to it by the Commonwealth Attorney-General's Department (AGD) that to achieve the best balance of "the need to share information between agencies, while also ensuring accountability for the protection of the information", "a general secrecy provision [should] allow the agency head or a senior officer to authorise disclosure". AGD argued:

Including a provision to enable the agency head or other senior officers to authorise disclosure may provide greater flexibility as it may enable disclosure in new or unforeseen circumstances. It also provides a level of accountability by requiring a senior officer to consider whether disclosure would be consistent with policy considerations in a particular case. Memorandums of understanding (MOU) or internal guidelines may also be used to set out circumstances when information can be disclosed from one agency to another. This may provide a more flexible approach, as the detail of information sharing arrangements can be left to documents more easily amended.⁶⁸

22.1 Should inter-agency agreements for data-matching be subject to Assembly review?

22.2 Perhaps instruments whereby inter-agency arrangements for data-matching are describes should be subject to review by the Assembly by way of making them disallowable. A lesser step would be to make them notifiable.

23.1 Should the principle that a person who might be affected adversely by data-matching must be accorded natural justice be expressly stated in the law?

23.2 While express statement is not strictly required, it may serve the purpose of reminding both government agencies and individuals that reasoning in *Johns*. The ALRC noted that

[s]ome secrecy provisions permit disclosure of information after notice and an opportunity to object to disclosure has been provided to certain persons. For example, the *Food Standards Australia New Zealand Act 1991* (Cth) provides that confidential commercial information given by a person may not be disclosed unless the Chief Executive Officer of Food Standards Australia New Zealand has advised the person of this in writing and 'given the person a reasonable opportunity to communicate the person's views about the proposed disclosure of that information'.⁶⁹

24.1 Are the circumstances such that an agency providing information for data-matching purposes should be required to adhere to the Federal Privacy Commissioner's guidelines concerning data-matching? (Refer to para 18.7 above)

25.1 Should there be a note appended to the relevant statutory provision to alert the reader to the fact that the Federal Privacy Commissioner can examine any proposal for data matching or data linkage that may involve an interference with privacy or that may have any adverse effects on the privacy of individuals? (Refer to para 18.8 above)

⁶⁷ Ibid 3.90.

⁶⁸ Ibid 3.83.

⁶⁹ Ibid 5.116.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 21 April 2009, in relation to comments made in Scrutiny Report 2 concerning Disallowable Instrument DI2008-213, being the Health Professionals (Medical Radiation Scientists Board) Appointment 2008 (No. 2).
- The Acting Minister for Health in relation to comments made in Scrutiny Report 8 concerning Disallowable Instrument DI2009-56, being the Health (Fees) Determination 2009 (No. 1).
- The Attorney-General, dated 22 June 2009, in relation to comments made in Scrutiny Report 6 concerning Disallowable Instrument DI2009-29, being the Civil Law (Wrongs) Professional Standards Council Appointment 2009 (No. 1).
- The Minister for Planning, dated 23 June 2009, in relation to comments made in Scrutiny Report 5 concerning Subordinate Law SL2009-3, being the Planning and Development Amendment Regulation 2009 (No. 1).
- The Minister for Planning, dated 25 June 2009, in relation to comments made in Scrutiny Report 7 concerning Subordinate Laws:
 - SL2009-14, being the Planning and Development Amendment Regulation 2009 (No. 4); and
 - SL2009-15, being the Planning and Development Amendment Regulation 2009 (No. 5).
- The Minister for Children and Young People, dated 30 June 2009, in relation to comments made in Scrutiny Report 8 concerning Disallowable Instrument DI2009-64, being the Children and Young People (Official Visitor) Appointment 2009 (No. 1).
- The Minister for Education and Training, dated 1 July 2009, in relation to comments made in Scrutiny Report 7 concerning Disallowable Instrument DI2009-45, being the Education (Government Schools Education Council) Appointment 2009 (No. 4).
- The Minister for Planning, dated 13 July 2009, in relation to comments made in Scrutiny Report 8 concerning Subordinate Law SL12009-18, being the Planning and Development Amendment Regulation 2009 (No. 6).
- The Minister for the Environment, Climate Change and Water, dated 28 July 2009, in relation to comments made in Scrutiny Report 8 concerning Disallowable Instrument DI2009-36, being the Environment Protection (Recognised Environmental Authorisations) Declaration 2009 (No. 1).
- The Minister for the Environment, Climate Change and Water, dated 28 July 2009, in relation to comments made in Scrutiny Report 7 concerning Disallowable Instruments:
 - DI2009-37, being the Utilities Exemption 2009 (No. 1); and
 - DI2009-55, being the Utilities Exemption 2009 (No. 2).

The Committee wishes to thank the Minister for Health, the Acting Minister for Health, the Attorney-General, the Minister for Planning, the Minister for Children and Young People, the Minister for Education and Training and the Minister for the Environment, Climate Change and Water for their helpful responses.

PRIVATE MEMBER'S RESPONSE

The Committee has received a response from Ms Le Couteur, dated 22 June 2009, in relation to comments made in Scrutiny Report 6 concerning the building (Energy Efficient Hot Water Systems) Legislation Amendment Bill 2009.

Vicki Dunne, MLA
Chair

August 2009

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

REPORTS—2008-2009

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

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

Report 2, dated 4 February 2009

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

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

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

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

Report 7, dated 9 June 2009

Disallowable Instrument DI2009-35 - Territory Records (Advisory Council)
Appointment 2009 (No. 1)

Disallowable Instrument DI2009-49 - Road Transport (Public Passenger Services)
(Authorised Fixed Fare Hiring) Approval 2009 (No. 1)

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-65 - Fair Trading (Fitness Industry) Code of Practice
2009

Disallowable Instrument DI2009-67 - Pest Plants and Animals (Pest Plants) Declaration
2009 (No. 1)

Disallowable Instrument DI2009-72 - Road Transport (General) (Numberplate Fees)
Determination 2009 (No. 1)

Disallowable Instrument DI2009-73 - Road Transport (General) (Vehicle Registration
and Related Fees) Determination 2009 (No. 1)

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

Bills/Subordinate Legislation

Disallowable Instrument DI2009-84 - Stock (Fees) Determination 2009 (No. 1)
Disallowable Instrument DI2009-85 - Waste Minimisation (Landfill Fees) Determination 2009 (No. 1)
Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009
Subordinate Law SL2009-19 - Fair Trading (Consumer Product Standards) Regulation 2009



Katy Gallagher MLA

DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR HEALTH
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear ~~Mrs Dunne~~ *Vicki*

The Scrutiny of Bills and Subordinate Legislation Committee, in Scrutiny Report No 2 of 2009, commented on DI 2008-213, being the Health Professionals (Medical Radiation Scientists Board) Appointment 2008 (No 2) made under the *Health Professionals Act 2004* and the *Health Professionals Regulation 2004*.

The Committee noted that the Explanatory Statement to the Instrument did not state that the persons being appointed met all the relevant requirements of the Legislation.

Please be advised that the people who were appointed all met the requirements laid down in the legislation. The Explanatory Statement was consistent with those that had been provided with previous appointments to health professions boards. Future Explanatory Statements to Disallowable Instrument appointments will include the statement that appointees meet the legislative requirements for appointment.

I have noted the findings of the Committee for this Disallowable Instrument and am grateful for its advice.

Yours sincerely

K. Gallagher
Katy Gallagher MLA
Minister for Health

21.4.05

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au



Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER

MINISTER FOR POLICE AND EMERGENCY SERVICES

MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2610

Dear Mrs Dunne

I refer to the Scrutiny Report No 8 dated 22 June 2009 in which the Committee raised two minor drafting issues arising from the Disallowable Instrument DI2009-56 being the Health (Fees) Determination 2009 (No. 1) made under section 192 of the *Health Act 1993*. As the Minister for Health is currently on leave, the comments on these issues are addressed below.

Unnecessary Full-Stop

Thank you for pointing out the superfluous full-stop contained in DI2009-56. The full-stop was a typographical error and has been corrected on the subsequent disallowable instrument which is to be effective from 1 July 2009.

Part O Numbering

Part O of the determination of fees relates to Dental Services. The fees charged by ACT Health for dental services, like many other States, are taken from the Australian Schedule of Dental Services and are used by the Australian Dental Council as well as the Department of Veteran's Affairs. The use of the group numbering from Group 0 (zero) through to Group 9 (nine) provides consistency with these bodies. While I concede that the similarity between the letter O and the number 0 may cause confusion, I feel it is beneficial to continue to align the numbering system with National standards.

To alleviate the committee's concerns, ACT Health will arrange to swap the Dental Services letter (O) in the next determination, with that of a different item to partially address the issue raised. Unfortunately, timing did not allow for this change to occur on the determination that becomes effective on 1 July 2009.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

I trust these comments assist the Committee and address its concerns.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Simon Corbell', with a horizontal line drawn across the bottom of the signature.

Simon Corbell MLA
Acting Minister for Health



Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER

MINISTER FOR ENERGY

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 6 of 4 May 2009. I offer the following response in relation to the Committee's comments on Disallowable Instrument DI2009-29 being the Civil Law (Wrongs) Professional Standards Council Appointment 2009 (No. 1).

The ACT Professional Standards Council (the ACT Council) is fully constituted when it is made up of eleven members. One member is from the ACT and the rest are from other jurisdictions in Australia. The same eleven members also constitute the relevant Professional Standards Council for each and every other State and Territory jurisdiction in Australia. Effectively the members form a National Council and when they meet they represent the interests of each jurisdiction.

Individual jurisdictions are responsible for appointing the eleven members to their respective councils. As a result of different timing in appointment processes in each jurisdiction, each council may not have the same number of members at any given time. During the period of 1 January 2009 and 13 March 2009, the nine members referred to in the Scrutiny of Bills Report were not officially members of the ACT Council during this period but were members in other jurisdictions. Therefore, while the National Council sat once during this period, it made no decisions in respect of the ACT Council.

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

Yours sincerely

Simon Corbell MLA
Attorney General

22 JUN 2009

ACT LEGISLATIVE ASSEMBLY



Andrew Barr MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Thank you for your Scrutiny Report No 5 of 30 March 2009.

The Committee has commented on the Planning and Development Amendment Regulation 2009 (No 1) SL2009-3. This regulation expands the list of matters that are exempt from the need to obtain development approval under the *Planning and Development Act 2007*.

The Committee raised the question of whether the expanded exemptions unduly impact on human rights through the removal of development approval and appeals processes for the newly exempt matters. The Committee also quoted extracts from the relevant Explanatory Statement and noted that:

“... the Explanatory Statement for this subordinate law contains a detailed explanation for why the further exemptions are justified ...

It is a matter for the Legislative Assembly as to whether the explanations provided by the Explanatory Statement are sufficient to justify the limitation of the rights of persons who might otherwise make third party appeals. On their face, however, the Committee considers the impact of the further exemptions to be relatively minor and, therefore, the potential impact on potential third party appeals to be also minor. ”

I consider the impacts of the further exemptions related to human rights to be justified, given the benefits of the Amendment Regulations in terms of reduced costs for builders, owners, efficiency and the relatively minor nature of the exemptions.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

My reasons are set out in detail in the attached analysis. I have been advised that the analysis of this issue had unfortunately not been notified on the Legislation Register due to administrative error, and it is now too late to do so. For the future, such analyses will be set out in the relevant regulatory impact statement as required.

I thank the Committee for its comments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Barr', written in a cursive style.

Andrew Barr MLA
Minister for Planning

23 JUN 2009

Overview

The following is an analysis of the substantive elements of the *Planning and Development Amendment Regulation 2009 (No 1)* (the Amendment Regulation). The law amends the *Planning and Development Regulation 2008* (the Regulation), including amendments to:

1. permit minor changes to Development Approval (DA) exempt development while retaining the DA exempt status of the development; also to allow one or more DA exempt developments to be undertaken concurrently and for the composite development to be DA exempt;
2. permit minor changes to a development authorised by a development approval without requiring amendment to the approval notwithstanding the changes are not consistent with the approval; and
3. provide the Planning and Land Authority with a discretionary power to exempt certain low impact dwelling developments from requiring development approval where there is a minor breach of requirements, by making an “exemption declaration”.

There are a number of other provisions consequential to these substantive elements. I make no comment on these as they are minor in nature.

For convenience, the following headings correspond to the content required for regulatory impact statements under the *Legislation Act 2001*.

(a) The authorising law

The provisions in this Amendment Regulation, except for section 5, are authorised by the following sections of the *Planning and Development Act 2007* (“the Act”):

- section 133 What is an exempt development?;
- section 134 Exempt development-no need for development application or approval; and
- section 426 Regulation-making power.

Section 198C of the Act is the authorising law for section 5.

Section 198C of the Act applies to development that is not DA exempt but which has development approval. The section permits regulations to be made to specify changes to development that can lawfully be made notwithstanding that the changes are not consistent with the relevant development approval. Any such changes are deemed to be consistent with the development approval.

Section 198C, of the Act, was inserted into the Act by a regulation modification (section 20.1 of Schedule 20 to the regulation and as such, will expire on 31 March 2010. Consequently, provisions that will need to be maintained after this date will be brought forward through an amendment bill.

(b) Policy objectives of the Regulation

As the Regulation enacts the policy objectives of the *Planning and Development Act 2007* (the Act) a brief summary of the pertinent policy objectives behind the Act is provided.

Policy objectives behind the Act

One of the key policy objectives of the Government in the development of the Act was to make the planning system simpler, faster and more effective. Pages 2-3 of the Revised Explanatory Statement for the Act states that:

“The Bill is intended to make the Australian Capital Territory’s (ACT’s) planning system simpler, faster and more effective. The Bill will replace the existing *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002*.

The objective of the Bill is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles.

The most significant change under the Bill is simplified development assessment through a track system that matches the level of assessment and process to the impact of the proposed development. As well as being simpler, more consistent, and easier to use, this system is a move towards national leading practice in development assessment ...

The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require development approval. ...

The new system will have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand what does and does not need approval, what is required for a development application and how it will be assessed. ...”

One of the methods for achieving a simpler, faster, more effective planning system was for the law to permit more developments to proceed without having to go through the development approval process. This approach was noted on page 3 of the Revised Explanatory Statement for the Act:

“The proposed reforms are:

- ***More developments that do not need development approval***
[emphasis added]
- Improved procedures for notification of applications and third party appeal processes that reduce uncertainty
- Clearer assessment methods for different types of development

- Simplified land uses as set out in the territory plan
- Consolidated codes that regulate development
- Clearer delineation of leases and territory plan in regulating land use and development
- Enhanced compliance powers. ...”

The objective for a simpler, faster, more effective planning system is relevant to concepts of “orderly development” and “economic aspirations of the people of the ACT” which are embedded in the object of the Act (section 6):

“6 Object of Act

The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—

- (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
- (b) in accordance with sound financial principles.”

Policy objectives specific to the Regulation:

The policy objectives of the Regulation are, in part, to further the policy objective behind the Act, that is, a planning system that is simpler, faster, and more effective. The Act has now been in operation since 31 March 2008 and through monitoring of the operation of the Act and in consultation with industry it is evident that greater efficiencies can be achieved ahead of broader DA exemptions. The Regulation introduces changes that enhance the operation of the existing DA exempt process.

The amendments to the Regulation in sections 4 and 5 of the Amendment Regulation will permit homeowners, builders and developers to make use of DA exemptions at any stage or context in the development process allowing:

- incorporation into the construction of a larger principal development (in many cases, not possible under the existing Regulation); and
- adding to other DA exempt development to create an aggregate DA exempt development (in many cases, not possible under the existing Regulation).

Sections 11 and 12 of the Amendment Regulation are a specific response to construction and building certification industry concerns. Industry expressed frustration that minor breaches of DA exemption rules, relating to building envelopes, resulted in the loss of DA exemption status and consequently required development approval. Such development applications would be assessed in the Merit track and can include public notification which has statutory timeframes and incurs a fee to lodge.

Seeking development approval, for a development proposal that has a minor breach of DA exempt requirements, was seen as causing unnecessary delay in commencement of construction and increasing costs for no or negligible gains in terms of ensuring sustainable and appropriate development. The Amendment Regulation remedies this situation by allowing certain dwellings to remain DA exempt notwithstanding certain minor breaches of DA exemption rules.

The Amendment Regulation also implements Government objectives of improving access to affordable housing at all levels as indicated, for example, in the *Affordable Housing Action Plan 2007*. Government policy also seeks to reduce regulatory intervention where another mechanism can provide acceptable outcomes, particularly where regulations have the potential to impede or discourage timely housing developments.

The Amendment Regulation is also consistent with related objectives as indicated in section 6 of the Act, that is, of a land system that contributes to “the orderly and sustainable development of the ACT consistent with the social, environmental and economic aspirations of the people of the ACT”. This is because the Amendment Regulation does not remove any significant categories of development from the development application and approval system.

Instead, the law extends the circumstances re timing, etc in which current DA exemptions can apply. The Amendment Regulation does permit minor breaches of DA exemption rules without loss of DA exempt status, but the scope of these additional tolerances is tightly circumscribed.

In summary, the reforms are consistent with one of the principal aims behind the authorising law, which was to create a planning and development assessment system that is simpler, faster and more effective. The exempt category offers significant savings in time, effort and costs for thousands of ACT residents each year, who were previously required to obtain development approval under the *Land (Planning and Environment) Act 1991*.

(c) Achieving the policy objectives

The policy objectives are achieved by the Amendment Regulation in the following ways:

- (1) permits an existing DA exempt development to be changed in minor ways without risk to the DA exempt status of the development (refer section 4 of the Amendment Regulation which inserts new sections 20(3), (4), (5), (6)).***

This provision applies to the following scenario. During construction of a principal development (e.g. a house in a new estate area), the lessee might decide to change the principal development by adding a new feature. The construction of the new feature may cause the construction of the principal development to breach a DA exemption rule in the regulation and as a result cease to be DA exempt.

This might be the case even though the same feature could be lawfully added after physical completion of the principal development without development approval, on the basis that the feature is itself DA exempt and the principal development is already built and so it no longer requires a DA.

This element of the Amendment Regulation permits DA exempt development to remain DA exempt development, irrespective of the timing of the development.

The DA exempt development can be done whether it is completed during the construction of another principal development, as an addition to an already built structure, or as a stand alone item. This is not adding an entirely new category of DA exempt development but instead broadening the circumstances in which existing DA exempt development can occur.

Consistent with the above approach, the Amendment Regulation also permits multiple DA exempt actions to be combined into the one single construction activity, i.e. composite development, and for the composite development to be DA exempt.

The Amendment Regulation includes safeguards (refer new section 20(6)), that is, exceptions to this rule to ensure the rule does not permit development to remain DA exempt if it would result in:

- more than one single dwelling on a block
- multiple occupancy dwelling e.g. a dual occupancy dwelling
- more than 2 class 10 buildings (e.g. garden shed or garage).

(2) *allows an existing development, which has development approval, to be changed in minor ways notwithstanding that the development as changed would not be consistent with the approval. (refer section 5 of the Amendment Regulation which inserts new sections 35(2), (3), (4))*

This provision applies to the following scenario. During construction of a principal development that is authorised by a development approval (e.g. a house), the lessee might decide to change the principal development by adding a new feature. The construction of the new feature may cause the construction of the principal development to breach the development approval and so cease to be authorised by the approval. This might be the case even though the same feature could be lawfully added after physical completion of the principal development without a further development approval, on the basis that the feature is itself DA exempt and the principal development is already built and so it no longer requires a DA.

This element of the Amendment Regulation permits DA exempt development to be undertaken and remain DA exempt irrespective of the timing of the development. The DA exempt development can be done whether it is completed during the construction of another principal development that is authorised by a development approval, as an addition to an already built structure, or as a stand alone item. In this, the item is consistent with the Amendment Regulation as described in (1) above. This is not adding an entirely new category of DA exempt development but instead broadening the circumstances in which existing DA exempt development can occur.

The Amendment Regulation includes safeguards, that is, exceptions to this rule to ensure the rule does not permit development to remain DA exempt if it would result in:

- more than one single dwelling on a block
- multiple occupancy dwelling e.g. a dual occupancy dwelling
- more than 2 class 10 buildings (e.g. garden shed or garage)

(3) *permits DA exempt single dwellings, on new residential land, to remain DA exempt notwithstanding a minor breach of DA exemption rules. (refer to Amendment Regulation section:*

- 11 which inserts new section 1.100A into schedule 1;
- 13 which inserts new sections 1A.10(2A), (2B) into schedule 1A; and
- 14 which inserts new sections 1A.11(2A), (2B)) into schedule 1A.

This provision permits a DA exempt single dwelling (i.e. single dwelling on new block in new estate area) to remain DA exempt notwithstanding the actual construction of the dwelling results in a minor breach of the relevant DA exemption rules. This provision only applies to single dwellings on new blocks of land (new estate areas) that would be exempt under section 1.100 of schedule 1 of the Regulation but for the minor breach and then only if the breach of the relevant DA exemption rules (i.e. relevant requirements of Territory Plan codes) relates to setback, building envelope or minimum open space requirements.

The mechanism for achieving this is an “exemption declaration”. The Amendment Regulation permits the planning and land authority to make an exemption declaration. An exemption declaration can declare that specified non-compliance with DA exemption requirements shall not cause the overall development to cease to be DA exempt. The Authority can only make such an exemption declaration on application if the Authority is satisfied that:

- the non-compliance is minor;
- building the dwelling in the non-compliant form will not adversely affect anyone other than the lessee/builder; and
- building the dwelling in the non-compliant form will not result in more than minimal environmental harm.

(d) Consistency of the Amendment Regulation with the authorising law

The authorising law, section 133(c) of the Act (What is an exempt development?), entitles the Regulation to prescribe development that is exempt from requiring development approval.

Under s133 of the Act, section 20 of the Regulation (Exempt developments—Act, s 133, def exempt development, par (c)), specifies development that is DA exempt. In summary, under s20 of the Regulation schedule 1 lists exempt development. Development may also be exempt notwithstanding non-compliance with schedule 1 provided the non-compliance meets criteria in schedule 1A.

Note the development tables of the Territory Plan may also specify development that is DA exempt (refer s133) and development specified in s134 of the Act is also DA exempt. The Amendment Regulation is within the parameters of the authorising law, section 133 of the Act. It is relevant to note that the Amendment Regulation does not create entirely new categories of DA exemptions but instead broadens the circumstances in which current DA exemptions can apply.

The Amendment Regulation does include a new DA exemption that effectively creates a discretion to declare that minor breaches of DA exemption rules shall not cause a development to cease to be DA exempt. As this discretion is tightly circumscribed in the manner noted above, this element is also consistent with the authorising law.

As indicated above, the Amendment Regulation is also consistent with the Government objectives behind the making of the Act and the objects stated in section 6 of the Act.

(e) the Amendment Regulation is not inconsistent with the policy objectives of another territory law.

The Amendment Regulation is not inconsistent with the policy objectives of another territory law.

(f) Reasonable alternatives to the Amendment Regulation

The objective of the Amendment Regulation is to make the planning system simpler, faster and more effective through removal of unnecessary restrictions on the application of existing DA exemptions. There are no alternative means to achieve this except by amendment of the Regulation.

(g) Brief assessment of benefits and costs of the Amendment Regulation

The reforms delivered by the Amendment Regulation are twofold increased flexibility in applying the DA exemption framework and a reduced need for obtaining a DA for development achieving significant benefits to the community through:

1. Construction cost benefits

The reforms delivered by the Amendment Regulation mean that “staged development” is no longer necessary due to planning laws and that the building can be available sooner for use by the home-owner or available for sale, thus increasing the efficient supply of accommodation in the market and delivering cost savings.

Costs savings, through the Amendment Regulations can be achieved through:

- being able to complete the minor structure at the same time as the main construction potentially provides a saving of around 10% of the construction costs of the minor structure;
- reduced holding costs; and
- if alternative accommodation is being used, those costs.

Historically, minor buildings did not require a DA provided they did not form part of a DA development. Sometimes, this resulted in **staged development** to “work around” the DA system’s impediments. For example, a DA obtained for a dwelling alone is constructed without additional minor structures. Once that development is complete, DA exempt minor structures are added.

It would have been unlawful to construct both the dwelling and the minor structures simultaneously as they produced a development beyond the DA parameters.

Staged development is far less cost effective than undertaking a single combined development. For example, constructing a garage at the same time as constructing the associated dwelling could cost \$20,000. But if the dwelling is completed first, without the garage, all the tradespeople decamp only to return later and re-establish themselves and their equipment on the site. They must also protect the finished dwelling from damage as they separately construct the garage. If the garage is attached to the house, new brickwork may have to be cut into the existing brickwork of the house to join the old and new. The re-establishment and extra protection required could typically add over \$2,000 to construction costs for the garage.

Furthermore, if the home-owner, builder or developer could not use the site until the garage is completed, staging the garage construction adds additional time to the overall construction time. Consequently, additional costs including holding costs and possibly alternative accommodation costs of the home-owner are incurred.

The Amendment Regulation facilitates a reduction in construction costs for DA exempt minor buildings and structures such as garages, carports, pergolas, decks etc.

2. Reduction in DA application fees and timeframes

Home-owners, builders and developers can save application fees that would be incurred if they had to lodge a development application for development approval. Further, by not requiring a development approval, the Amendment Regulation allows development to commence sooner thus reducing the overall timeframe for the development.

Examples of current DA application fees, affected by the Amendment Regulation are:

- \$185 for a garage costing \$20,000; and
- \$720 for a dwelling costing \$200,000.

These fees would no longer be payable under the Amendment Regulation. Further savings would be achieved through the exemption declaration process through negating the need for a DA, saving that fee, and application of a fee that is set only to recover costs which could be as low as \$220 (thus saving \$500).

However, these cost savings, to the home-owner, builder or developer, may be reduced if there is an increase in fees charged by building certifiers to determine if the building/s are DA exempt when the certifier is assessing the development for building approval (BA) under the *Building Act 2004*.

Development approvals have statutory timeframes, may require public notification, referral to other agencies and formal amendment if there is an existing DA. The Amendment Regulation reduces timeframes by removing the need for a DA and reduces associated costs, other than the application fee. For example:

- for a DA that requires public notification, fees are levied to cover the public notification process. Public notification fees range from \$215 for *minor* notification to \$830 for *major* notification. The Amendment Regulation removes the need for these fees for development proposals that will no longer require development approval.
- to amend an existing Merit track DA attracts a fee of \$550 for the first five amendments then \$70 per amendment in addition to public notification costs (see above point).

Further, through the exemption declaration process, it is estimated that assessment time would be considerably shorter than the normal DA process as only those elements of the development that the exemption declaration applies to need to be assessed by the Authority. This is a significant benefit as a full DA process can add considerable time to a development proposal.

3. Other general benefits

The Amendment Regulation broadens the circumstances in which DA exempt development can occur and ensures consistency in the application of the exempt development framework. This means that if a development is an exempt development, it is always an exempt development irrespective of whether it is done as part of other development or separately. The consistency provided by the Amendment Regulation will greatly assist home-owners, builders and developers to understand when a DA is required therefore delivering a core objective of the reform package, that is, greater certainty.

Further, the Amendment Regulation, by ensuring greater certainty provides an opportunity for the Authority to direct limited resources to the assessment of more complex development proposals. This has a flow-on benefit of delivering great efficiencies to those home-owners, builders and developers who require development approval thus allowing building to commence sooner and costs to be kept to a minimum.

The Amendment Regulation also represents a further implementation of the underlying principles of the planning reform as agreed upon by the community and Government¹, and is an acknowledgment and timely response to industry concerns about delays in processing development applications under the Act.

(h) Brief assessment of the consistency of the Amendment Regulation with Scrutiny of Bills Committee principles

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

¹ For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008*.

The Amendment Regulation refines the Regulation, made under the Act, without making substantive changes, except for the matters discussed below. The discussion below, of those substantive matters, demonstrates that they are consistent with the Committee's principles. The matters that need to be addressed by this analysis in terms of consistency with the Committee's principles are as follows.

1. Rights to comment on DA exempt development and merit review in ACAT

Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). Public notification can be either *minor* or *major*, depending on the particular development proposal.

The Amendment Regulation by broadening the circumstances in which development may occur without development approval will impact on the ability to comment on such development. Minor breaches of DA exemption rules that have been addressed by an exemption declaration will mean that such development is not open to comment. Development that is DA exempt does not involve ACTPLA in the decision making process and as such there is no right of merit review to the ACT Civil and Administrative Tribunal (ACAT).

This outcome is justified because the extension of DA exemptions under the Amendment Regulation is relatively minor. Before the Amendment Regulation, a new DA exempt development that is conducted after finishing an initial main development does not require a DA and does not require public notification. The Amendment Regulation permits such new DA exempt development to be made earlier during the construction of the initial main development instead of only after completion of the main development. Therefore in this respect, the Amendment Regulation affects the timing of DA exempt development only - it does not directly impact on final built outcomes. This minimal impact is justified by the gains in efficiency and clarity noted above.

The DA exemption declaration process will allow for small discrepancies (minor non-compliance with relevant Territory Plan codes) to be approved without having to go through the DA process. This process is only available for single dwelling housing. The Amendment Regulation includes rules to ensure that such matters are minor only and do not affect third parties and do not have significant environmental impacts. Due to the constraints provided by the Amendment Regulation the changes that can be made under an exemption declaration are of such a nature that they will not detrimentally affect a third party. This minimal impact is justified by the gains in efficiency and clarity noted above.

The right of third parties to seek a review the legality of decisions on DA exemption matters in the Supreme Court under the Administrative Decisions (Judicial Review) Act 1989 remains available. The right of the public to comment on the development and variation of relevant Territory Plan codes remains available.

2. Discretionary power to give an exemption declaration

The provisions relating to the discretionary power of the planning and land authority to give an exemption declaration are also consistent with the Scrutiny of Bills Committee principles.

The discretionary power for the planning and land authority to decide to give, or refuse to give, an exemption declaration prescribes the considerations that the authority must consider in making the decision (see new section 100A (5)).

A formal right to apply for merit review of an exemption declaration decision by the ACT Civil and Administrative Tribunal (ACAT) is not included in the Amendment Regulation. This is because:

- the decision relates to minor matters only as noted above;
- a decision to refuse to make an exemption declaration does not mean that construction of the development cannot proceed. It only means that an application for development approval may be required. A proponent faced with a refusal, will be able to progress the matter quickly and at little cost through a development application, more readily, it is suggested, than through a court process;
- if a development approval is required, a decision to refuse the approval or impose conditions (if the approval is in the merit or impact tracks) is open, on application, to an internal reconsideration process. Also, major merit track approvals and all impact track approvals are subject to merit review before ACAT (Chapter 13 and schedule 1 of the Act). (Decisions to refuse approvals in the code track are not subject to merit review but decisions to impose conditions on a code track approval are).

Conclusion

In view of the costs and benefits noted above, the DA exemptions and modifications of exemption rules in the Regulation are justified.



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR PLANNING

MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

Scrutiny Report No. 7—Subordinate Law SL2009-14, being the *Planning and Development Amendment Regulation 2009 (No 4)* and Subordinate Law SL2009-15, being the *Planning and Development Amendment Regulation 2009 (No 5)*; and Disallowable Instrument DI 2009-38

I refer to Scrutiny Report No. 7 of 9 June 2009 and the Committee's comments regarding Subordinate Law SL2009-14, being the *Planning and Development Amendment Regulation 2009 (No 4)* and Subordinate Law SL2009-15, being the *Planning and Development Amendment Regulation 2009 (No 5)* and their accompanying regulatory impact statements.

I would like to thank the Committee for its consideration of these items of subordinate legislation and advise that your comments have been noted, and will be taken into account in preparing future regulations and instruments.

Subordinate Law SL2009-14 being the *Planning and Development Amendment Regulation 2009 (No 4)*

The Committee noted that this subordinate law has the effect of excluding third party appeals for certain developments, namely, the construction of new buildings and upgrading of existing buildings in the ACT schools under the *Commonwealth Nation Building and Jobs Plan*. The Committee reproduced that part of the accompanying explanatory statement that addressed the human rights issue in relation to the limitation of third party appeals and expressed the view that it was a matter for the Assembly to decide if the limitation of third party appeal rights was justified in this case.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Subordinate Law SL2009-15 being the *Planning and Development Amendment Regulation 2009 (No 5)*


The Committee noted that this subordinate law expands the development application (DA) exemption that currently applies for single dwellings in new residential areas to any residential area in the ACT (providing certain other criteria were met).

The Committee commented that the law might be considered to trespass unduly on rights previously established by law because it removed from the general public a right to comment on development proposals included in the further exemptions. The Committee reproduced that part of the accompanying regulatory impact statement that addressed this issue and expressed the view that it was a matter for the Assembly to decide whether the extension of the exemptions from the DA requirements can be justified in this case.

I thank you for your comment that the regulatory impact statements for Subordinate Laws SL 2009-14 and SL2009-15 met the requirements of section 35 of the *Legislation Act 2001*. Your other comment that the material in the regulatory impact statement for SL2009-15 relating to the justification of the limitation of the opportunity for public comment might have also been included in the relevant explanatory statement has been noted.

And finally, I would like to thank you for your consideration of Disallowable Instrument DI 2009-38 being the Planning and Development (Amount payable for, and period of, further rural lease) Determination 2009 (No.1) about which you had no comment.

Yours sincerely


Andrew Barr MLA
Minister for Planning

25 JUN 2009



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE

MINISTER FOR PLANNING

MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

Mrs Vicki Dunne
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
PO Box 1020
Canberra ACT 2601

Dear Mrs Dunne

I am writing with regard to Scrutiny Report No. 8, dated 22 June 2009.

I thank the Committee for its comments concerning Disallowable Instrument DI2009-64 which is the Children and Young People (Official Visitor) Appointment 2009 (No. 1), made under the *Children and Young People Act 2008*. I agree that the Explanatory Statement makes the assumption that by undertaking all relevant steps to comply with the Act, I have demonstrated that the appointee is a suitable entity.

I can advise the committee that Mrs Hargreaves is a suitable entity in accordance with section 38 of the *Children and Young People Act 2008*. The Department has noted the Committee's concern and will ensure that in future, similar issues are addressed in the Explanatory Statement.

Thank you for the opportunity to respond to this matter.

Yours sincerely

Andrew Barr MLA
Minister for Children and Young People

30 June 2009



Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

C/- Scrutiny of Bills and Subordinate Legislation Committee

ACT Legislative Assembly

CANBERRA ACT 2601

Dear Mrs Dunne

I refer to Scrutiny Report No 7 dated 9 June 2009 in which the Committee raised concerns about the Explanatory Statement for Disallowable Instrument DI2009-45. The Disallowable Instrument re-appointed Mr Tiemin Wu as a community member to the Government Schools Education Council.

I wish to clarify for the Committee that Mr Wu is not currently an ACT public servant and was not an ACT public servant when he was previously appointed to the Government Schools Education Council in 2005. The instrument (DI2005-226) appointed Mr Wu to the Council for a period of three years. I have attached a copy of the Instrument which is held on the ACT Legislation Register for the Committee's information.

I note the Committee's request that Explanatory Statements for Disallowable Instruments should indicate whether or not the member being appointed is a public servant. I will ensure this information is provided for future appointments.

I thank the Committee for providing me with this advice.

Yours sincerely

Andrew Barr MLA

Minister for Education and Training

- 1 JUL 2009

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au

Education (Government Schools Education Council) Appointment 2005 (No 3)

Disallowable Instrument DI 2005 - 226

made under the

Education Act 2004, Section 57 (1) Appointed members of council (government)

1 Name of instrument

This instrument is the Education (Government Schools Education Council) Appointment 2005 (No 3)

2 Commencement

This instrument commences on the day after notification.

3 Appointment

I appoint Dr Tiemin Wu and Ms Carolyn Harkness as community members of the Government Schools Education Council for three years from the day after notification of this appointment.

Katy Gallagher MLA
Minister for Education and Training

5/10/2005

Education (Government Schools Education Council) Appointment 2005 (No 3)

Disallowable Instrument DI 2005 – 226

Education Act 2004, Section 57 (1) Members of Council (government)

EXPLANATORY STATEMENT

The *Education Act 2004* governs the establishment, functions and membership of the Government Schools Education Council.

Section 57 (1) of the Act deals with appointments of members and requires such appointments to be made by the Minister.

This instrument appoints Dr Tiemin Wu and Ms Carolyn Harkness as community members, for three years from the day after notification of the appointment. The appointees are not public servants and this instrument makes appointments to which the *Legislation Act 2001*, Division 19.3.3 applies. Accordingly under the *Legislation Act 2001*, s 229 the instrument is a disallowable instrument.

The Minister for Education and Training has approved these appointments. The Standing Committee on Education, Training and Young People was consulted in accordance with section 228 of the *Legislation Act 2001*.



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR PLANNING

MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne


Scrutiny Report No. 8 —Subordinate Law SL2009-18 being the *Planning and Development Amendment Regulation 2009 (No 6)*

I refer to Scrutiny Report No. 8 of 22 June 2009 and the Committee's comments regarding Subordinate Law SL2009-18, being the *Planning and Development Amendment Regulation 2009 (No 6)*.

The Committee noted that this subordinate law has the effect of modifying the *Planning and Development Act 2007* relying upon what is regarded as a "Henry VIII" clause which has been specifically provided for in legislation passed by the Legislative Assembly.

I would like to thank the Committee for its consideration of this subordinate legislation and advise that your comments have been noted, and will be taken into account in preparing future regulations.

Yours sincerely


Andrew Barr MLA
Minister for Planning
13 JUL 2009

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0011 Fax (02) 6205 0157 Email barr@act.gov.au



Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mrs Dunne

In *Scrutiny Report No. 8*, the Committee made comment on DI2009-36 Environment Protection (Recognised Environmental Authorisations) Declaration 2009 (No. 1), which related to the ordering of clauses in the principal act.

The Committee noted that the ordering of clauses 67 and 67A were not in standard order. I have brought this to the attention of the Parliamentary Counsel's Office which has assured me that the standard order will be reinstated either through the next republication of the Act or via a Statute Law Amendment Bill.

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

Yours sincerely

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

28 JUL 2009

cc Deputy Clerk, ACT Legislative Assembly

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au



Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER

MINISTER FOR POLICE AND EMERGENCY SERVICES

MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

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

Vicki
Dear Mrs Dunne

In *Scrutiny Report No. 7*, the Committee made comment on Disallowable Instruments DI2009-37 and DI2009-55 Utilities Exemption 2009 (No. 1), questioning why the instrument was re-issued.

As the Committee surmised, the Instrument was re-issued to correct an omission of commencement provisions. As noted by the Committee, the Explanatory Statement of DI2009-55 did not explain the reason for re-issuing the Disallowable Instrument. I regret the inconvenience this omission may have caused the Committee.

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

Yours sincerely

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

28 JUL 2009

cc Deputy Clerk, ACT Legislative Assembly

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au



Caroline Le Couteur MLA
ACT Greens
Member for Molonglo

www.act.greens.org.au

M GPO Box 1020 Canberra 2601
T 02 6205 0051
F 02 6205 3000
E LeCouteur@parliament.act.gov.au

22 June 2009

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

Dear Mrs Dunne,

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee Report No 6 of 2009 and the comments on the Building (Energy Efficient Hot Water Systems) Legislation Amendment Bill 2009.

The Committee considered that the proposed section 136 gives rise to a rights issue by displacing subsection 47(6) of the *Legislation Act 2001*. Subsection 47(6) of the *Legislation Act 2001* is intended to ensure the public can properly ascertain the content of the law, by accessing documents that are incorporated into acts.

I thank the Committee for raising this issue. I have reviewed the Bill and its interaction with the *Building Act 2004*. The Bill revises subsection 136(1) of the *Building Act 2004* to change the definition of "Building Code". This new definition incorporates a new subsection 136(1A), which refers to the proposed hot water system standard. These sections mean that the hot water standard would be a part of the Building Code, and would therefore be available for inspection at the construction occupations registrar under subsection 138 of the *Building Act 2004*.

Yours sincerely

Caroline Le Couteur MLA
ACT Greens MLA for Molonglo
ACT Greens Spokesperson for Planning, Territory and Municipal Services, Business and Economic Development, Indigenous Affairs, Arts and Heritage
Phone: 6205 0051
GPO Box 1020 Canberra ACT 2601

