



Legislative Assembly for the ACT

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

Scrutiny Report

14 NOVEMBER 2005

Report 18

TERMS OF REFERENCE

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:**Bills—No Comment**

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2005 (NO 3)
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This Bill would amend a number of Acts and regulations administered by the ACT Department of Justice and Community Safety. The amendments are of a minor or technical nature.

STATUTE LAW AMENDMENT BILL 2005 (NO 2)

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

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

Bills—Comment

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

ADMINISTRATION (INTERSTATE AGREEMENTS) REPEAL BILL 2005
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This Bill would amend and repeal the *Administration (Interstate Agreements) Act 1997*.

Comment

The object of this Act is to oblige Ministers to inform relevant Assembly committees of the state of proposals for legislation resulting from the participation of the Territory in the various forums in which are forged agreements between the governments of the Commonwealth, the States and the Territories of the Commonwealth.

This Committee is (or should be) informed in order that it might comment on proposals for legislation against its terms of reference. It may assist the Assembly to say that, in practice, this has occurred very rarely. While the Committee has received general information that some agreement is under discussion, there has only been one occasion on which the Committee has had the opportunity to evaluate a proposal for legislation in the way it evaluates proposed Territory laws against its terms of reference.

This comment does not suggest that any Territory Minister has withheld a proposal for legislation which implements an “interstate agreement”.

GUARDIANSHIP AND MANAGEMENT OF PROPERTY AMENDMENT BILL 2005
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This Bill would amend the *Guardianship and Management of Property Act 1991*, largely to permit the Guardianship and Management of Property Tribunal to appoint a person to manage the property of a missing person.

Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?

The right to protection of property

Is the conferment on a manager of a power to make decisions concerning the property of a missing person compatible with the latter's right to property?

(a) The notion of a right to property in Territory law

The *Human Rights Act 2004* does not state a right to property. Nevertheless, this right is recognised in Article 17 of the foundation document of the international human rights framework – the *Universal Declaration of Human Rights*:

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

In addition, our legal and constitutional tradition attaches great significance to the right to property. In one case, a judge observed that:

there is a wealth of authority establishing that there is a common law right recognised in this country protecting citizens from invasions of their private rights to property and possessions. Indeed, the whole history of the law is fundamentally based on the law of trespass and the protection of citizens from interference by unlawful seizure or removal of that citizen's property by force or without the consent [of] the citizen: (see *Police v Carbone* (Supreme Court of South Australia, 26 March 1997)).

Some aspects of a right to property have a higher status in the law of the Territory. Under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* "the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; ...". This right is, however, narrower than the broader right to property stated in Article 17 of the Universal Declaration of Human Rights.

(b) Does the Bill unduly trespass on the right to property?

Turning now to the Bill, in substance it would permit the Guardianship and Management of Property Tribunal to appoint a manager to manage the property of a missing person where:

- the application for appointment is made by a person of a kind specified in the Act – to the general effect that the applicant must have an interest in the appointment);
- the tribunal is satisfied that the person is missing; and
- the tribunal is satisfied that “there is, or is likely to be, a need for a decision in relation to the person’s financial matters or property”.

The “decision-making principles” stated in section 6 of the Act (which are designed to protect the interests of the person “with impaired decision-making ability”) would apply. The Act states that a person has “impaired decision-making ability” “if the person’s decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness”.

The principle underlying the Act reflected in section 6 is generally accepted and the rights issue comes down to assessing whether that principle applies where the person is “missing”. The issue for the Assembly is whether the circumstance that a person is missing warrants the appointment of a manager.

The Committee draws attention to a possible problem in the way proposed paragraph 8AA(2)(a) is drafted. It provides:

- (2) The tribunal may be satisfied that a person is a missing person only if satisfied that –
- (a) it is not known whether the person is alive;

The question arises – not known by whom? If taken to mean – “not known by any person” – it would be very difficult to prove that there was nobody in the whole world who had knowledge that the relevant person was “missing”.

The Committee draws these matters to the attention of the Assembly.

HEALTH RECORDS (PRIVACY AND ACCESS) AMENDMENT BILL 2005 (NO 2)

This Bill would amend the *Health Records (Privacy and Access) Act 1997* to address concerns about the practical operation of the Act and to maintain consistency with the National Health Privacy Code. Some provisions concern access by a member of the family of a person to the latter’s health records.

Report under section 38 of the *Human Rights Act 2004* *Has there been a trespass on personal rights and liberties?*

The objects of the Act are stated in section 3:

The objects of this Act are—

- (a) to provide for privacy rights in relation to personal health information; and
- (b) to provide for the integrity of records containing personal health information; and

- (c) to provide for access to personal health information contained in health records; and
- (d) to provide for a consumer to receive an explanation of the consumer's personal health information; and
- (e) to encourage agreement, concerning the exercise of a right or performance of an obligation under this Act, between the persons concerned.

The provisions of the Act operate on “personal health information” contained in a “health record”.

It may thus be seen that the Act promotes the protection of privacy, a right stated in the *Human Rights Act 2004*, section 12:

12 Privacy and reputation

Everyone has the right—

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

Of course, a law may derogate from this right in circumstances stated in *HRA* section 28:

28 Human rights may be limited

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The principal vehicle for carrying out the objects of the Act is the statement – currently found in section 5 – of a number of “Privacy Principles”. (By clause 5 of the Bill, this statement would be moved to Schedule 1.) Thus, the Committee suggests that careful attention should be given to any proposed amendment to these “Privacy Principles” with a view to assessing whether it derogates from the privacy interest of a person whose “personal health information” is the subject of a “health record”.

Proposed amendment to Principle 4 (see clause 5)

Principle 4 governs the topic of “Storage and security of personal health information”. By clause 5 of the Bill, the current statement would be repealed and replaced by a more elaborate and extensive statement contained in three separate provisions – being Principles 4.1, 4.2, and 4.3. What is now contained in Principle 4 is replicated in 4.1 sections 1 and 2.

Proposed Principle 4.1 sections 2 and 3 provide that a record must not be destroyed unless (a) that is “required or allowed under a law of the Territory”, or, (b) destruction is not prohibited under law but in this circumstance only after the passage of at least 7 years.

Proposed Principle 4.2 requires that a “record keeper must keep a register of records that have been destroyed or transferred to another entity”.

Proposed Principle 4.3 section 1 makes it clear that information may be kept “if it is needed for the purpose for which it was collected, or another purpose allowed under a law of the Territory, even if its destruction is allowed under principle 4.1”. Proposed Principle 4.3 section 2 states:

An entity other than a health service provider must take reasonable steps to destroy, or permanently deidentify, health information if it is no longer needed for the purpose for which it was collected or for any other purpose allowed under a law of the Territory.

<p>The issue is whether these additions to Principle 4 enhance or detract from the protection of the privacy of the person whose affairs are the subject of the relevant health information. Given that the Act does not prohibit destruction of records, the creation of a regime to govern destruction would appear to <i>enhance</i> privacy protection.</p>

Proposed amendment to Principle 6 (see clause 6)

Principle 6 governs the topic of “Access to health records by persons other than the consumer”. Clause 6 would substitute Principle 6 with a new statement of the Principle.

Proposed Principle 6, sections 1 and 2 restate the current content of Principle 6 and call for no comment. They permit access to the personal health information of a person by others who need that information to provide, or to manage the provision of a health service to the person. Proposed Principle 6, section 4 restates the current content of Principle 6, section 3.

What is new is what is proposed as Principle 6, section 3. As stated in the Explanatory Statement, its effect would be “to allow a treating health service provider to disclose personal health information about a consumer if the disclosure is made for compassionate reasons and the disclosure would be reasonably expected by the consumer and is not contrary to any wishes previously expressed by the consumer. These changes will not impinge upon the consumers right to confidential treatment of health information as provided for in subsection 17(3) of the Act.”

It needs to be noted that subsection 17(1) of the Act states:

- (1) A record keeper shall not give access to a health record or part of a health record if, under this section, the health record or part of the record is subject to confidentiality.

Subsection 17(3) then provides a means for the consumer to ensure that a particular health record is “subject to confidentiality”.

The issue is whether proposed Principle 6, section 3 enhances or detracts from the protection of the privacy of the “consumer” – being a person whose affairs are the subject of the relevant health information. Given that disclosure is permitted only where it would be reasonably expected by the consumer, is not contrary to any wishes previously expressed by the consumer, and that subsection 17 continues to apply, the proposed change would not appear to detract from privacy protection to any degree that would amount to an incompatibility with *HRA* section 12, whether or not it would be necessary to invoke *HRA* section 28.

Proposed amendment to Principle 10 (see clause 7)

Principle 10 governs the topic of “Limits on disclosure of personal health information”. Section 1 of Principle 10 states a governing principle against disclosure in these terms: “a record keeper who has possession or control of a health record shall not disclose the information to a person or agency (other than the consumer)”, and then allows for a number of exceptions. Those exceptions stated in section 1 (and the principle against disclosure) are restated in proposed Principle 10, sections 1 (which states the governing principle) and 2 (which states the exceptions).

Proposed Principle 10, sections 3 and 8 are new. Their effect is stated in the Explanatory Statement: “[to allow] for identifiable data to be disclosed for research purposes under controlled circumstances”. The notion of “identifiable data” refers to personal health information which identifies the relevant person.

It should be noted that disclosure

- may, “for the purpose of research or the compilation or analysis of statistics”, be made to *any* entity (noting that such an entity need not have any particular status); and
- may be disclosed where “it is impracticable to seek the consumer’s consent before disclosure”.

Offsetting the width of the circumstances in which disclosure is permitted are safeguards on the disclosure and use of the information by the entity that obtains the information. In general, the information should be protected in the same way as a record keeper under the Act must protect information, and the entity “must not use or disclose the information for a purpose other than the purpose for which the information was given to the entity” (see Proposed Principle 10, section 8).

The issue is whether Principle 10, sections 3 and 8 detract from the protection of the privacy of the subject of the relevant health information in a way that is incompatible with *HRA* section 12, having regard to *HRA* section 28. Disclosure is hedged with protections to the person, but the **Committee draws attention to** the facts that **disclosure may be made to *any* entity** – that is, it need not be to a body that has any demonstrable capacity for the research of the kind contemplated; that **it need be demonstrated only that obtaining the consumer’s consent is only “impracticable”** (compare to Principle 10, section 4 – below); and that **there need be no demonstration that the entity has internal procedures** – such as an ethics committee – which might be a means **for oversight of the use of the information**.

Proposed Principle 10, sections 4 (concerning a record keeper) and 10 (concerning a treating health service provider) are new. Their effect is stated in the Explanatory Statement: “[to allow] disclosure to a carer where access is necessary for them to carry out their functions as carers safely and effectively”. The circumstances where this may occur are:

- (a) the consumer cannot give or withhold consent to the disclosure, whether or not because the consumer is a young person or legally incompetent person; and
- (b) in the record keeper’s opinion, the disclosure is necessary to enable the carer to safely and effectively provide appropriate services to, or care for, the consumer.

In addition, Proposed Principle 10, section 8 (see above) applies.

The issue is whether Principle 10, sections 4 and 10 detract from the protection of the privacy of the subject of the relevant health information in a way that is incompatible with *HRA* section 12, having regard to *HRA* section 28. The Committee notes that disclosure can occur only where “consumer cannot give or withhold consent”, and the record-keeper must focus on the personal circumstances of the person. In these circumstances, it is easier to come to the view that the proposed change would not appear to detract from privacy protection to any degree that would amount to an incompatibility with *HRA* section 12, whether or not it would be necessary to invoke *HRA* section 28.

Proposed Principle 10, section 7 stipulates how a consumer must give consent to disclosure for the purposes of Principle 10, section 2(c) – which consent will displace the governing principle against disclosure in Principle 10, section 1.

Proposed Principle 10, section 7 enhances privacy protection and is clearly not objectionable in terms of *HRA* section 12.

Proposed Principle 10, section 11 is new. Its effect is stated in the Explanatory Statement: “to allow an immediate family member access for compassionate reasons to personal health information of a consumer in situations where such disclosure would have been expected by the consumer and are not contrary to any wishes expressed by the consumer”.

The issue is whether Principle 10, section 11 detracts from the protection of the privacy of the subject of the relevant health information in a way that is incompatible with *HRA* section 12, having regard to *HRA* section 28. The Committee notes that disclosure can occur only where “consumer cannot give or withhold consent”. Furthermore, the record-keeper must assess whether the consumer would have expected that the information be disclosed, and disclosure is only justified where there are compassionate reasons to make the disclosure. In these circumstances, it is easier to come to the view that the proposed change would not appear to detract from privacy protection to any degree that would amount to an incompatibility with *HRA* section 12, whether or not it would be necessary to invoke *HRA* section 28.

Comment on the Explanatory Statement

Clause 12 of the Bill does much more than substitute a new version of section 13. It would also add sections 13A to 13D. The Committee appreciates that these provisions break up existing section 13 and restate its effect in a number of sections which, in the end, will probably make it easier to understand and administer the Act. The Committee recommends that consideration be given to amending the Explanatory Statement to draw attention to sections 13A to 13D and their general effect.

A similar point may be made concerning the substitution of section 16 with proposed sections 16, and 16A to 16D.

SUBORDINATE LEGISLATION:Disallowable Instruments—No Comment

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

Disallowable Instrument DI2005-202 being the Radiation (Council) Appointment 2005 (No 2) made under section 8(2) of the *Radiation Act 1983* appoints a specified person as a member of the Radiation Council of the ACT.

Disallowable Instrument DI2005-203 being the Public Sector Management Amendment Standard 2005 (No. 8) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2005-204 being the Public Place Names (Bruce) Determination 2005 (No. 2) made under section 3 of the *Public Place Names Act 2989* determines the names of new streets in the Division of Bruce.

Disallowable Instrument DI2005-205 being the Financial Management (Public Liability Insurance) Guidelines 2005 made under section 67 of the *Financial Management Act 1996* standardises levels of public liability insurance cover to be levied on community groups and other third parties utilising or occupying ACT Government property and public spaces.

Disallowable Instrument DI2005-207 being the Roads and Public Places (Removable Signs) Code of Practice 2005 made under section 12A of the *Roads and Public Places Act 1937* revokes DI2001-300 and approves the Code of Practice for the placement of movable signs in specified public places.

Disallowable Instrument DI2005-208 being the Radiation (Fees) Determination 2005 (No. 2) made under section 77 of the *Radiation Act 1983* revokes DI2005-61 and determines fees for the purposes of the Act.

Disallowable Instrument DI2005-210 being the Nature Conservation (Threatened Ecological Communities and Species) Action Plan 2005 (No. 3) made under section 42 of the *Nature Conservation Act 1980* specifies the Action Plan No. 30 for the Spotted-tailed Quoll (*Dasyurus maculatus*).

Disallowable Instrument DI2005-211 being the Commissioner for the Environment (Reporting Period and Reporting Day) Determination 2005 (No. 1) made under subsection 19(5) of the *Commissioner for the Environment Act 1993* specifies the reporting period for the next ACT State of the Environment Report.

Disallowable Instrument DI2005-213 being the Public Place Names (Griffith) Determination 2005 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of a park in the Division of Griffith.

Disallowable Instrument DI2005-214 being the Public Place Names (City) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new street in the Division of City.

Disallowable Instrument DI2005-215 being the Australian Capital Tourism Corporation Appointment 2005 (No. 1) made under section 9 of the *Australian Capital Tourism Corporation Act 1997* appoints a specified person as a member of the Australian Capital Tourism Corporation.

Disallowable Instrument DI2005-216 being the Australian Capital Tourism Corporation Appointment 2005 (No. 2) made under section 9 of the *Australian Capital Tourism Corporation Act 1997* appoints a specified person as a member of the Australian Capital Tourism Corporation.

Disallowable Instrument DI2005-217 being the Domestic Violence (Prevention Council) Appointment 2005 (No. 2) made under section 6 of the *Domestic Violence Agencies Act 1986* appoints specified persons as members of the Domestic Violence Prevention Council.

Disallowable Instrument DI2005-220 being the Public Health Notifiable Conditions Determination 2005 made under section 100 of the *Public Health Act 1997* revokes DI1999-240 and determines specified diseases as notifiable conditions.

Disallowable Instrument DI2005-221 being the Public Sector Management Amendment Standard 2005 (No. 9) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2005-226 being the Education (Government Schools Education Council) Appointment 2005 (No. 3) made under subsection 57(1) of the *Education Act 2004* appoints specified persons as community members of the Government Schools Education Council.

Disallowable Instrument DI2005-227 being the Stock (Fees) Determination 2005 (No. 2) made under section 68 of the *Stock Act 2005* revokes DI2005-179 and determines the fees payable for the purposes of the Act.

Disallowable Instrument DI2005-228 being the Public Place Names (Kingston) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new park in the Division of Kingston.

Disallowable Instrument DI2005-229 being the Road Transport (General) Nominal Defendant Appointment 2005 (No. 1) made under section 215 of the *Road Transport (General) Act 1999* revokes DI2004-222 and appoints a specified person as the Nominal Defendant.

Disallowable Instrument DI2005-230 being the National Exhibition Centre Trust Appointment 2005 (No. 2) made under section 8 of the *National Exhibition Centre Trust Act 1976* appoints a specified person as a member of the National Exhibition Centre Trust.

Disallowable Instruments—Comment

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

Is this a disallowable instrument?

Disallowable Instrument DI2005-206 being the Territory Records (Advisory Council) Appointment 2005 (No. 1) made under section 44 of the *Territory Records Act 2002* revokes DI2003-59 and appoints specified persons as member of the Territory Records Advisory Council.

Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument. This requirement generally does not apply, however, to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that, while the Explanatory Statement to this instrument indicates that two appointments made at this time are public servant appointments and, as a result, are not included in the instrument, there is no statement to indicate that the remaining appointments are not public servant appointments. While this may be inferred, the Committee would prefer to see this issue dealt with explicitly in the Explanatory Statement.

The Committee notes that there is a typographical error in the second-last line of the Explanatory Statement.

Minor drafting issue

Disallowable Instrument DI2005-209 being the Health (Fees) Determination 2005 (No. 3) made under section 36 of the *Health Act 1993* revokes DI2005-131 and determines fees for the purposes of the Act.

The Schedule to this instrument sets out the fees that are determined by the instrument. The Committee notes that column 1 of item B(b) of the Schedule refers to the "*Commonwealth National Health Act 1953*". The Committee suggests that it would be more appropriate to refer to the "*National Health Act 1953 (Cth)*".

Is this a disallowable instrument?

Disallowable Instrument DI2005-212 being the Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1) made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as an official visitor.

The Committee notes that Division 19.3.3 of the *Legislation Act 2001* generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. While the Committee notes that the Explanatory Statement to this instrument contains no such statement, the Committee also notes that paragraph 121(3)(a) of the *Mental Health (Treatment and Care) Act 1994* provides that the Minister must not appoint a public servant as an official visitor. This being so, this instrument must be a disallowable instrument (unless the person appointed is, in fact, a public servant, in which case the appointment is arguably invalid).

Minor drafting issue

Disallowable Instrument DI2005-218 being the Independent Competition and Regulatory Commission (Reference for Investigation) Determination 2005 (No. 1) made under section 15 of the *Independent Competition and Regulatory Commission Act 1997* directs the Commission to conduct an investigation into the determination of retail prices for regulated services in electricity.

The Committee notes that this instrument refers a matter to the Independent Competition and Regulatory Commission (**Commission**), under section 15 of the *Independent Competition and Regulatory Commission Act 1997* (**Act**) and also determines the terms of reference for the referral, under section 16 of the Act. The Committee notes that while, under subsection 16(3) of the Act, the written determination of the latter is a disallowable instrument, a determination in relation to the former is only a notifiable instrument (and is not even explicitly required to be in writing). The mixing of a notifiable and a disallowable instrument does not affect the validity of this instrument, however.

Is this a disallowable instrument?

Disallowable Instrument DI2005-219 being the Children and Young People Official Visitor Appointment 2005 (No. 3) made under subsection 41(2) of the *Children and Young People Act 1999* appoints specified persons as Official Visitors.

The Committee notes that Division 19.3.3 of the *Legislation Act 2001* generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no such statement.

No Explanatory Statements

Disallowable Instrument DI2005-223 being the Building (Fees) Determination 2005 (No. 2) made under section 150 of the *Building Act 2004* revokes DI2005-112 and determines fees for the purposes of the Act.

Disallowable Instrument DI2005-224 being the Construction Occupations Licensing (Fees) Determination 2005 (No. 3) made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2005-115 and determines fees for the purposes of the Act.

Disallowable Instrument DI2005-225 being the Water and Sewerage (Fees) Determination 2005 (No. 2) made under section 45 of the *Water and Sewerage Act 2000* revokes DI2005-120 and determines fees for the purposes of the Act.

The Committee notes that none of these instruments is accompanied by an Explanatory Statement, nor do they give any indication of the size of any change in the fees that are determined. While the latter is not a formal requirement, the Committee notes that it (and the Legislative Assembly) are better informed about the effect of an instrument determining fees if it contains information as to the size and the reasons for any increases in fees, or the reasons for the imposition of any new fees.

Subordinate Law—No comment

The Committee has examined the following subordinate law and offer no comment on it:

Subordinate Law SL2005-19 being the Land (Planning and Environment) Amendment Regulation 2005 (No. 1) made under the *Land (Planning and Environment) Act 1991* amends the definition of "reticulated services" in the dictionary to include mobile telecommunications services.

Subordinate Law SL2005-20 being the Heritage Amendment Regulation 2005 (No. 1) made under the *Heritage Act 2004* provides for the protection of 1066 Aboriginal places by entry to the heritage register.

Subordinate Law SL2005-21 being the Smoking (Prohibition in Enclosed Public Places) Regulation 2005 made under the *Smoking (Prohibition in Enclosed Public Places) Act 2003* defines the meaning of "enclosed" in relation to an "enclosed public place".

Subordinate Law SL2005-22 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2005 (No. 2) made under the *Road Transport (General) Act 1999* and the *Road Transport (Safety and Traffic Management) Act 1999* permits the use of loading zones by taxis and allows for pre-paid and all day parking tickets to be used in multi-stay ticket parking areas.

Subordinate Law SL2005-23 being the Fair Trading (Consumer Product standards) Amendment Regulation 2005 (No. 1) made under the *Fair Trading (Consumer Affairs) Act 1973* prescribes a consumer product safety standard for baby bath aids.

Subordinate Law SL2005-24 being the Magistrates Court (Dangerous Substances Infringement Notices) Amendment Regulation 2005 (No. 1) made under the *Magistrates Court Act 1930* enables infringement notices to be issued for certain offences under the Dangerous Substances (Explosives) Regulation and the Dangerous Substances (General) Regulation.

Subordinate Law SL2005-25 being the Water and Sewerage Amendment Regulation 2005 (No. 2) made under the *Water and Sewerage Act 2000* amends the Water and Sewerage Regulation 2001.

Subordinate Law SL2005-26 being the Supreme Court Amendment Rules 2005 (No. 1) made under the *Court Procedures Act 2004* detail the reasons for an application relating to the dismissal of an appeal by a single judge of the Court of Appeal and extend the jurisdiction and power of the Court which may be exercised by a single judge.

Subordinate Law—Comment

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

Inadequate Explanatory Statement?

Subordinate Law SL2005-27 being the Fair Trading Amendment Regulation 2005 (No. 1) made under the *Fair Trading Act 1992* enables the Fitness Industry Code of Practice to be enforced in the ACT by the Commissioner for Fair Trading.

This subordinate law makes two amendments to the *Fair Trading Regulation 1995* (the Regulations). The first amendment omits from subsection 4(1) of the Regulations a reference to the "Fitness Industry Code of Practice" and replaces it with a reference to the "Fitness Industry Code of Practice – June 2005". The second amendment omits section 5 of the Regulations, which relates to amendment of the Fitness Industry Code of Practice (ie the previous Code of Practice).

The Explanatory Statement to this subordinate law states:

Section 33 of the *Fair Trading Act 1992* (the Act) provides that a draft Code of Practice for fair dealing may be submitted by the Commissioner for Fair Trading to the Minister for approval. Section 34 provides that the *Fair Trading Regulation 1995* may prescribe a Code of Practice approved by the Minister. Section 35 provides that amendments to a Code of Practice must follow the same process as a new Code of Practice. On 28 May 2005 the Minister approved amendments contained in a consolidated republication of the Fitness Industry Code of Practice – June 2005 (the Code).

The purpose of the Fair Trading Amendment Regulation 2005 (the Regulation) is to prescribe the Fitness Industry Code of Practice – June 2005. The Regulation gives effect to the Ministers decision to approve the amended Code.

This amendment to the Regulation will enable the new Code to be enforced in the ACT by the Commissioner for Fair Trading.

The effect of the first of the amendments made by this subordinate law is not to amend the previous Code of Practice but to prescribe a Code of Practice. As a result, the Committee is curious as to why it is necessary to refer to section 35 of the *Fair Trading Act 1992* (the Act) in the Explanatory Statement. Of more concern, however, is the fact that the Explanatory Statement does not indicate whether or not the requirements of subsections 33(4) and (5) of the Act have been met. Those subsections provide:

- (4) For the purpose of preparing a draft code of practice, the commissioner shall arrange for consultation with, and invite submissions from, the persons and organisations that, in the opinion of the commissioner, would have an interest in the terms of the proposed draft code of practice.
- (5) If the commissioner is satisfied that associated persons in a field of trade or commerce have, in consultation with organizations representing consumers and other interested persons, agreed to abide by a particular code of practice in their dealings with or in relation to consumers, the commissioner may submit the code to the Minister for consideration together with any recommendations by the commissioner in relation to amendments to the code.

While the Committee accepts that the failure of the Explanatory Statement to indicate that these requirements have been met does not (of itself) affect the validity of this subordinate law, the Committee considers that it would have been more useful if such a reference was included in the Explanatory Statement, rather than the (arguably confusing) reference to section 35 of the Act.

The Committee also notes that the page of the ACT Legislation Register relating to the Act lists the Regulations under the heading "Registrable instruments". The Committee assumes that this is incorrect and the heading should be "Subordinate laws".

INTERSTATE AGREEMENTS:

The Committee did not consider any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS:

The Committee has examined the regulatory impact statements relating to the following instruments and makes no comment on them:

Subordinate Law SL2005-21 being the Smoking (Prohibition in Enclosed Public Places) Regulation 2005 made under the *Smoking (Prohibition in Enclosed Public Places) Act 2003*.

Disallowable Instrument DI2005-220 being the Public Health Notifiable Conditions Determination 2005 made under section 100 of the *Public Health Act 1997*.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Industrial Relations, dated 18 October 2005, in relation to comments made in Scrutiny Report 17 concerning the Dangerous Substances (Asbestos) Amendment Bill 2005 (No. 2).
- The Minister for Planning, dated 19 October 2005, in relation to comments made in Scrutiny Report 16 concerning DI2005-175 being the Public Places Names (Fyshwick) Determination 2005 (No. 1).
- The Chief Minister, dated 20 October 2005, in relation to comments made in Scrutiny Report 16 concerning DI2005-172 being the Public Sector Management Amendment Standard 2005 (No. 7).
- The Attorney-General, dated 20 October 2005, in relation to comments made in Scrutiny Report 15 concerning DI2005-128 being the Attorney General (Fees) Determination 2005.

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Industrial Relations and the Minister for Planning for their helpful responses.

Bill Stefaniak, MLA
Chair

November 2005

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

REPORTS—2004-2005

RESPONSES

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 1, dated 9 December 2004</u>	
Disallowable Instrument DI2004-180 - Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1)	No. 2
Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004	No. 2
Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1) ...	No. 6
Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2) ...	No. 6
Disallowable Instrument DI2004-220 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1)	No. 4
Disallowable Instrument DI2004-221 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2)	No. 4
Disallowable Instrument DI2004-230 - Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No. 1)	
Disallowable Instrument DI2004-231 - Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No. 1)	
Disallowable Instrument DI2004-232 - University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2).....	No. 14
Disallowable Instrument DI2004-246 - Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1).....	No. 10
Disallowable Instrument DI2004-258 - Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1)	No. 3
Subordinate Law SL2004-41 - Health Professionals Regulations 2004	No. 2
Subordinate Law SL2004-48 - Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1)	No. 2
<u>Report 2, dated 14 February 2005</u>	
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004. <i>Act citation: Classification (Publications, Films and Computer Games) (Enforcement) Amendment Act 2005 (Passed 8.03.05)</i>	No. 5
Fair Work Contracts Bill 2004.....	No. 6

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
Government Procurement Amendment Bill 2004. <i>Act citation: Government Procurement Amendment Act 2005 (Passed 15.02.05)</i>	No. 3
Justice and Community Safety Legislation Amendment Bill 2004 (No. 2). <i>Act citation: Justice and Community Safety Legislation Amendment Act 2005 (Passed 17.02.05)</i>	No. 11
Water Efficiency Labelling and Standards Bill 2004. <i>Act citation: Water Efficiency Labelling and Standards Act 2005 (Passed 10.03.05)</i>	No. 5
<u>Report 3, dated 17 February 2005</u>	
Dangerous Substances (Asbestos) Amendment Bill 2005. (Passed 17.02.05)	No. 6
Health Records (Privacy and Access) Amendment Bill 2005. (Passed 17.02.05)	
<u>Report 4, dated 7 March 2005</u>	
Disallowable Instrument DI2004-260 - Health (Interest Charge) Determination 2004 (No. 1)	
Disallowable Instrument DI2004-261 - Liquor Licensing Standards Manual Amendment 2004 (No. 1)	No. 11
Disallowable Instrument DI2004-262 - Taxation Administration (Amounts payable-Home Buyer Concession Scheme) Determination 2004 (No. 5)	No. 6
Disallowable Instrument DI2004-266 - Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 15)	No. 6
Disallowable Instrument DI2004-267 - Public Sector Management Amendment Standard 2004 (No. 8)	No. 6
Disallowable Instrument DI2004-269 - Public Place Names (Gungahlin) Determination 2004 (No. 4).....	
Disallowable Instrument DI2004-270 - Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1)	
Disallowable Instrument DI2005-1 - Emergencies (Strategic Bushfire Management Plan) 2005	
Disallowable Instrument DI2005-2 - Public Sector Management Amendment Standard 2005 (No. 1)	
Disallowable Instrument DI2005-3 - Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 1)	No. 6
Domestic Violence and Protection Orders Amendment Bill 2005 (Passed 17.03.05).....	No. 6
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (PMB)	
Residential Tenancies Amendment Bill 2005 (Passed 18.08.05) ...	No. 6

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
Subordinate Law SL2004-52 - Health Professionals Amendment Regulation 2004 (No. 1).....	
Subordinate Law SL2004-53 - Supreme Court Amendment Rules 2004 (No. 4)	No. 12
Subordinate Law SL2004-56 - Dangerous Substances (General) Regulation 2004	No. 6
Subordinate Law SL2004-61 - Utilities (Electricity Restrictions) Regulations 2004.....	
Subordinate Law SL2004-64 - Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2).....	No. 10
Utilities Amendment Bill 2005 (Passed 17.03.05).....	No. 6
<u>Report 5, dated 14 March 2005</u>	
Disallowable Instrument DI2005-11 - Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2005 (No. 1).....	No. 10
Disallowable Instrument DI2005-12 - Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1).....	
Disallowable Instrument DI2005-18 - Emergencies (Fees) Determination 2005.....	No. 10
Disallowable Instrument DI2005-8 - Community and Health Services Complaints Appointment 2005 (No. 1).....	
<u>Report 6, dated 4 April 2005</u>	
Animal Diseases Bill 2005 (Passed 7.04.05)	No. 10
Disallowable Instrument DI2005-20 - Public Place Names (Dunlop) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-22 - Public Place Names (Watson) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-23 - Public Place Names (Bruce) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-28 - Road Transport (Public Passenger Services) Exemption 2005 (No. 1).....	No. 10
Long Service Leave Amendment Bill 2005 (Passed 6.05.05)	
Pest Plants and Animals Bill 2005 (Passed 5.05.05).....	No. 10
Stock Bill 2005 <i>Act citation:</i> (Passed 7.04.05)	No. 10
Subordinate Law SL2005-4 - Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1).....	No. 11
Tree Protection Bill 2005	No. 10
<u>Report 7, dated 6 April 2005</u>	
Workers Compensation Amendment Bill 2005 (Passed 7.04.05)...	No. 10

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 10, dated 2 May 2005</u>	
Crimes (Child Sex Offenders) Bill 2005 (Passed 23.06.05)	No. 11
Crimes (Sentencing) Bill 2005	No. 11
Crimes Amendment Bill 2005 (PMB)	
Disallowable Instrument DI2005-21 - Waste Minimisation (Fees) Amendment Determination 2005 (No. 1)	No. 11
Disallowable Instrument DI2005-32 - Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 1)	No. 11
Disallowable Instrument DI2005-34 - Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)	
Human Rights Commission Bill 2005 (Passed 23.08.05)	No. 11
<u>Report 11, dated 20 June 2005</u>	
Disallowable Instrument DI2005-33 - Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-41 - Domestic Violence (Prevention Council) Appointment 2005	No. 13
Disallowable Instrument DI2005-53 - Legal Aid Commission Appointment 2005	No. 13
Disallowable Instrument DI2005-54 - Liquor Licensing Board Appointment Amendment 2005	No. 13
Disallowable Instrument DI2005-55 - Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 2)	
Subordinate Law SL2005-7 - Road Transport (Safety and Traffic Management) Amendment Regulation 2005 (No. 1)	No. 13
Subordinate Law SL2005-8 - Utilities (Gas Restrictions) Regulation 2005	No. 13
Water Resources Amendment Bill 2005 (Passed 18.08.05)	No. 13
<u>Report 12, dated 27 June 2005</u>	
Children and Young People Amendment Bill 2005 (Passed 1.07.05)	No. 14
Disallowable Instrument DI2005-58 - Water Resources (Fees) Determination 2005 (No. 1)	No. 17
Disallowable Instrument DI2005-61 - Radiation (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-62 - Heritage (Council Members) Appointment 2005 (No. 1)	No. 17
Disallowable Instrument DI2005-66 - Vocational Education and Training Authority Appointment 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-71 - Public Sector Management Amendment Standard 2005 (No. 5)	
Disallowable Instrument DI2005-73 - Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)	

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
Disallowable Instrument DI2005-77 - Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-78 - Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 2)	No. 16
<u>Report 13, dated 9 August 2005</u>	
Disallowable Instrument DI2005-104 - Education (Government Schools Education Council) Appointment 2005 (No. 2)	No. 16
Disallowable Instrument DI2005-111 - Architects (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-112 - Building (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-114 - Community Title (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-115 - Construction Occupations Licensing (Fees) Determination 2005 (No. 2)	No. 16
Disallowable Instrument DI2005-116 - Electricity Safety (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-117 - Land (Planning and Environment) (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-118 - Surveyors (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-119 - Unit Titles (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-120 - Water and Sewerage (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-83 - Public Sector Management Amendment Standard 2005 (No. 6)	No. 16
Disallowable Instrument DI2005-88 - Education (Government Schools Education Council) Appointment 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-89 - Children and Young People Official Visitor Appointment 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-90 - Roads and Public Places (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-93 - Road Transport (General) (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-95 - Tertiary Accreditation and Registration Council Appointment 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-97 - Hawkers (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-98 - Roads and Public Places (Fees) Determination 2005 (No. 2)	
Disallowable Instrument DI2005-99 - Domestic Animals (Fees) Determination 2005 (No. 1)	

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 14, dated 15 August 2005</u>	
Crimes (Sentence Administration) Bill 2005.....	No. 17
Criminal Code (Administration of Justice Offences) Amendment Bill 2005.....	No. 17
Criminal Code Harmonisation Bill 2005	No. 17
Domestic Animals (Cat Containment) Amendment Bill 2005.....	No. 16
Human Rights Commission (Children and Young People Commissioner) Amendment Bill 2005 (Passed 25.08.05)	No. 15
Litter Amendment Bill 2005	No. 16
Mental Health (Treatment and Care) Amendment Bill 2005 (Passed 26.08.05)	No. 16
Public Advocate Bill 2005 (Passed 25.08.05).....	No. 15
Sentencing and Corrections Reform Amendment Bill 2005 (PMB)	
<u>Report 15, dated 22 August 2005</u>	
Disallowable Instrument DI2005-109 - Roads and Public Places (Fees) Determination 2005 (No. 3)	No. 16
Disallowable Instrument DI2005-110 - Waste Minimisation (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-113 - Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2005 (No. 2).....	No. 16
Disallowable Instrument DI2005-124 - Public Place Names (Belconnen) Determination 2005 (No. 2)	
Disallowable Instrument DI2005-127 - Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1).....	
Disallowable Instrument DI2005-128 - Attorney General (Fees) Determination 2005.....	No. 18
Disallowable Instrument DI2005-132 - Utilities (Variation of Industry Code) Determination 2005 (No. 2)	No. 17
Disallowable Instrument DI2005-133 - Emergencies (Bushfire Council Members) Appointment 2005 (No. 2).....	
Disallowable Instrument DI2005-136 - Community and Health Services Complaints (Appointment) 2005 (No. 2)	No. 16
Disallowable Instrument DI2005-137 - Road Transport (General) (Hire Car) Exemption 2005 (No. 1).....	No. 16
Disallowable Instrument DI2005-138 - Planning and Land Council Appointment 2005 (No. 1)	
Disallowable Instrument DI2005-139 - Planning and Land Council Appointments 2005 (No. 2).....	
Disallowable Instrument DI2005-140 - Planning and Land Council Appointments 2005 (No. 3).....	
Disallowable Instrument DI2005-141 - Pharmacy (Fees) Determination 2005 (No. 1)	No. 16

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
Disallowable Instrument DI2005-142 - Dangerous Substances (Fees) Determination 2005 (No. 2)	No. 16
Disallowable Instrument DI2005-143 - Machinery (Fees) Determination 2005.....	No. 16
Disallowable Instrument DI2005-144 - Occupational Health and Safety (Fees) Determination 2005.....	No. 16
Disallowable Instrument DI2005-145 - Scaffolding and Lifts (Fees) Determination 2005.....	No. 16
Disallowable Instrument DI2005-149 - Electoral (Fees) Determination 2005.....	No. 16
Disallowable Instrument DI2005-152 - Veterinary Surgeons (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-153 - Health Professionals (Medical Board) Appointment 2005 (No. 1).....	No. 16
Disallowable Instrument DI2005-154 - Health Professionals (Medical Board) Appointment 2005 (No. 2).....	No. 16
Disallowable Instrument DI2005-155 - Health Professionals (Medical Board) Appointment 2005 (No. 3).....	No. 16
Disallowable Instrument DI2005-156 - Electoral (Chairperson and Member) Appointment 2005 (No. 1)	No. 17
Disallowable Instrument DI2005-159 - Tree Protection (Interim Scheme) Appointment 2005.....	No. 17
Disallowable Instrument DI2005-160 - Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 1).....	
Disallowable Instrument DI2005-161 - Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 2).....	
Disallowable Instrument DI2005-162 - Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 3).....	
Disallowable Instrument DI2005-163 - Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 4).....	
Disallowable Instrument DI2005-165 - Health Professionals (Fees) Determination 2005 (No. 1)	No. 16
Disallowable Instrument DI2005-167 - Children and Young People (Places of Detention) Standing Order 2005 (No. 1).....	No. 16
Disallowable Instrument DI2005-170 - Public Places Names (Watson) Determination 2005 (No. 2)	
Disallowable Instrument DI2005-171 - Public Places Names (Mitchell) Determination 2005 (No. 1)	
Hotel School (Repeal) Bill 2005 (Passed 25.08.05).....	
Public Sector Management Amendment Bill 2005 (No. 3) <i>Act citation: Public Sector Management Amendment Bill 2005 (No. 2) (Passed 25.08.05)</i>	No. 16
Subordinate Law SL2005-15 - Periodic Detention Amendment Regulation 2005 (No. 1).....	

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 16, dated 19 September</u>	
Civil Law (Wrongs) Amendment Bill 2005 (PMB)	
Court Procedures (Protection of Public Participation) Amendment Bill 2005 (PMB)	
Disallowable Instrument DI2005-172 - Public Sector Management Amendment Standard 2005 (No. 7)	No. 18
Disallowable Instrument DI2005-175 - Public Place Names (Fyshwick) Determination 2005 (No. 1)	No. 18
<u>Report 17, dated 17 October 2005</u>	
Dangerous Substances (Asbestos) Amendment Bill 2005 (No. 2) <i>Act citation: (Passed 20.10.05)</i>	No. 18
Disallowable Instrument DI2005-188 - Animal Welfare (Australian Model Code of Practice for the Care and Use of Animals for Scientific Purposes) Approval 2005.....	
Disallowable Instrument DI2005-191 - Independent Competition and Regulatory Commission (Disclosure Guidelines) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-192 - University of Canberra (Academic Progress) Amendment Statute 2005 (No. 1).....	
Disallowable Instrument DI2005-198 - Domestic Animals (Dog Control Areas) Declaration 2005 (No. 1).....	
Subordinate Law SL2005-18 - Construction Occupations (Licensing) Amendment Regulation 2005 (No. 1).....	
Subordinate Law SL2005-15 - Periodic Detention Amendment Regulation 2005 (No. 1).....	



KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2601



Dear ^{Bill} Mr Stefaniak

Re: Dangerous Substances (Asbestos) Amendment Bill 2005 (No. 2)

I refer to Report No.17 of the Standing Committee on Legal Affairs (Performing the Duties of a Scrutiny of Bills and Subordinate Legislation Committee) and particularly to comments on the Dangerous Substances (Asbestos) Amendment Bill 2005 (No. 2).

I would like to thank the Committee for its comments contained in the Report on the Bill and would like to offer the following comments in reply.

The Government believes that this measure will not affect a person's right to a healthy environment free of asbestos. A more effective means of informing and educating building owners and tradespersons as to the probable existence of materials containing asbestos in the built environment is being developed by the Government in response to the findings of the Asbestos Task Force set out in its Report, *Asbestos Management in the ACT*. The Task Force raised serious concerns about the effectiveness and impact of sections 47K and 47L. Implementation of the new framework requires the repeal of these provisions before they commence.

As I announced in the Assembly when tabling the Task Force Report and the Government's response to the recommendations, a generic asbestos advice to be made available at key transaction points for homes built prior to 1985. These intended key transaction points are:

- building approval;
- tenancy agreements (owner to provide to potential or actual tenant); and
- sale of property (owner to provide to potential or actual purchaser).

ACT LEGISLATIVE ASSEMBLY

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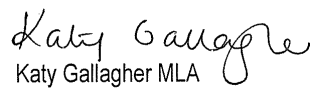


This is to be accompanied by the development of a regulatory regime for the management and control of asbestos in non-residential premises based on the 2005 National Occupational Health and Safety Commission's code of practice and recently introduced asbestos management laws in the United Kingdom.

The Government also notes the Committee's comments in relation to the Explanatory Statement for the Bill. A revised Explanatory Statement has now been prepared to address in part the Committee's comment and will be tabled in the Assembly as soon as possible.

Thank you again for your comments.

Yours sincerely


Katy Gallagher MLA
Minister for Industrial Relations
18/10/05

BILLS:

Bills—No Comment

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

CIVIC DEVELOPMENT AUTHORITY BILL 2005

This is a Bill to provide for the establishment of a civic development authority, a primary function of which would be to develop a master plan for an area to be designated by the Minister as the civic development area.

LEGISLATION AMENDMENT BILL 2005

This Bill would amend the *Legislation Act 2001* to define the concept of an explanatory statement in relation to a bill presented to the Legislative Assembly, and, in particular, to provide that an Explanatory Statement include a report on any consultation that has been conducted in developing the Bill.

LIMITATION AMENDMENT BILL 2005

This Bill would amend the *Limitation Act 1985* to extend the limitation period in relation to a cause of action arising from the January 2003 bushfires from 3 years to 6 years.

Bills—Comment

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

DANGEROUS SUBSTANCES (ASBESTOS) AMENDMENT BILL 2005 (NO 2)

This is a Bill to amend the *Dangerous Substances (Asbestos) Amendment Act 2004* and the *Dangerous Substances (Asbestos) Amendment Act 2005*.

**Report under section 38 of the *Human Rights Act 2004*
*Has there been a trespass on personal rights and liberties?***

Would the repeal of sections 47K and 47L of the *Dangerous Substances Act 2004* be incompatible with the “right to life” stated in HRA subsection 9(1), or in some way be a derogation of the right of a person to a healthy environment?

The effect of the Bill is to repeal sections 47K and 47L of the *Dangerous Substances Act 2004* prior to their scheduled commencement on 16 January 2006. These provisions impose on the owners and occupiers of premises obligations in respect of notification to others of the presence and treatment of asbestos on the premises. Given that repeal of the provisions will reduce the extent of these obligations, the Assembly may wish to consider whether the rights of those who enter on the premises are affected adversely.

Just how such a right might be expressed and justified is debatable. In terms of the *Human Rights Act 2004*, it may be an aspect of the "right to life" stated in HRA subsection 9(1) (see N Jayawickrama, *The Judicial Application of Human Rights Law* (2002) 270), and Hanna Jaireth, "Review of the Operations of the Human Rights Act 2004 concerning environment-related rights" (Human Rights Office, ACT)).

There may be more encompassing rights recognised by international law. The Committee notes only that a 1998 paper from an authoritative source recorded that

The so-called "right to environment," or its variations such as a right to a "healthy environment," has been widely discussed during the past two decades, and particularly in the period immediately preceding the UNCED in 1992. Hohmann has stated that "...whether a fundamental right of all human beings to an environment adequate for their health and well-being has to be acknowledged in international law, is disputed. It is at least a human right de lege ferenda." [Note - the Latin term "de lege ferenda" means 'what the law ought to be' (as opposed to what the law is).]

Although neither of the international human rights covenants (the ICESCR and the ICCPR) includes a "right to environment," the term has been incorporated in one regional human rights covenant, in several environmental agreements and in a variety of draft international legal principles and instruments: G Maggio and O J Lynch, "Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society" (Spring 1998) (The Center for International Environmental Law).

The Committee notes that paragraph 43(2)(b) of the *Human Rights Act 2004* refers – although without elaboration – to "environment-related human rights".

Assuming for present purposes that a person on premises may be said to have a right to have a healthy environment, and that it extends to a right to be on premises free of asbestos such as would create a health hazard, it is for the Assembly to assess whether the repeal of sections 47K and 47L of the *Dangerous Substances Act 2004* are incompatible with this right. Insofar as the right depends on HRA subsection 9(1), regard must be had to HRA section 28:

28 Human rights may be limited

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The Committee draws this matter to the attention of the Assembly, and, furthermore, the explanation for the repeal of sections 47K and 47L in the Presentation Speech of the Minister.

Comment on the Explanatory Statement

The Committee suggests that the Explanatory Statement would be clearer were the statement “The 2004 Amendment Act also contains amendments to the Dangerous Substances Act that ...” (see page 2), was replaced by the words: “Two significant amendments made by the 2004 Amendment Act ...”.

While the explanatory statement, as it stands, states that “The 2004 Amendment Act also contains amendments...”, the fact is that reference has already been made to these amendments in the last two dot points stated prior to this point on page 2 of the explanatory statement. Thus the use of the word “also”, in the passage which the Committee suggests should be deleted, creates some confusion.

SUBORDINATE LEGISLATION:**Disallowable Instruments—No Comment**

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

Disallowable Instrument DI2005-189 being the Tertiary Accreditation and Registration Council Appointment 2005 (No. 2) made under section 12(3) of the *Tertiary Accreditation and Registration Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.

Disallowable Instrument DI2005-190 being the Tertiary Accreditation and Registration Council Appointment 2005 (No. 3) made under section 12(3) of the *Tertiary Accreditation and Registration Act 2003* appoints a specified person to the ACT Accreditation and Registration Council.

Disallowable Instrument DI2005-193 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 9) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles competing in the ACT timed special (competitive) stages of the Brindabella Motor Sport Club Friday Night Special 2—Endomax Rally.

Disallowable Instrument DI2005-194 being the Vocational Education and Training Authority Appointment 2005 (No. 3) made under section 12(2) of the *Vocational Education and Training Act 2003* appoints a specified person as a member, representing the interests of employees, of the Vocational Education and Training Authority.

Disallowable Instrument DI2005-196 being the Vocational Education and Training Authority Appointment 2005 (No. 4) made under sub-section 12(2) of the *Vocational Education and Training Act 2003* appoints a specified person as a member, representing the interests of the ACT Council of Parents and Citizens Associations Incorporated, of the Vocational Education and Training Authority.



Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO



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

Dear Mr Stefaniak

Thank you for Scrutiny Report No 16 of 19 September 2005 in which the Committee commented on a disallowable instrument prepared by the ACT Planning and Land Authority.

In relation to Disallowable Instrument DI2005-175 – Public Place Names (Fyshwick), the Committee's comment has been noted. I have asked that the preparation of Explanatory Statements be monitored more carefully and that templates and proformas for the preparation of the Statements be reviewed for accuracy.

I appreciate the Committee's advice on this matter.

Yours sincerely

Simon Corbell MLA
Minister for Planning

19-10-05

ACT LEGISLATIVE ASSEMBLY

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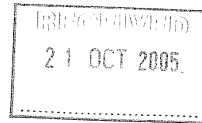


Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA



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

Dear Mr Stefaniak

Thank you for providing me with Report No 16 of the Scrutiny of Bills and Subordinate Legislation Committee of 19 September 2005. I refer to comments on page 9 relating to Disallowable Instrument DI2005-172 Public Sector Management Standard 2005 (No 7).

The Committee has requested further detail in explanatory statements in light of the difficulties accessing previous versions of the Management Standards (the Standards). The Committee has noted that previous versions of the Standards should be available on the Legislation Register in March 2006, and that copies of previous Standards are available on request to my office.

My department advises that while the explanatory statement does factually explain the amendments, my department will endeavour to provide further context to the amendments to assist the Committee in fulfilling its role. To assist with this, my department will also attach in future amendments, relevant provisions in force before the relevant amendments as a schedule to the explanatory statement.

I trust this response addresses the concerns of the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

20 OCT 2005

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MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
GPO Box 1020
CANBERRA ACT 2601

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Dear Mr Stefaniak

Thank you for your Scrutiny Report No 15 of 22 August 2005. I write in reply to the committee's comments in relation to there being no Explanatory Statement for the *Attorney General (Fees) Determination 2005*, Disallowable instrument DI 2005-128.

As you note in your report, the face of the instrument expressly states that explanatory notes are included in the text of the instrument, in italics and that "General Explanatory Notes" are set out on the final page of the instrument.

The instrument itself is made under a number of different legislation and the determination of fees in relation to these. Due to the large number of different legislation involved, it would be too cumbersome to provide an Explanatory Statement that would effectively express the terms of the instrument beyond that provided.

Schedule 2 to the instrument fully details each piece of legislation the instrument is made under, and the effect of each item. All 253 items included in Schedule 2 have an Explanatory Note so as to mitigate the need to provide an all-encompassing Explanatory Statement. At page 27 to Schedule 2 of the instrument, there are provided *General Explanatory Notes* that provide any other information that would have been required in an Explanatory Statement.

I thank the Committee for its comments in relation to this instrument and note that at this stage there is no legislative requirement for an Explanatory Statement to be provided for Disallowable Instruments.

Yours sincerely

Jon Stanhope MLA
Attorney General

20 OCT 2005

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