



Legislative Assembly for the ACT

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

Scrutiny Report

6 MARCH 2006

Report 22

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:

CRIMINAL CODE (MENTAL IMPAIRMENT) AMENDMENT BILL 2006
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This Bill would amend the *Criminal Code 2002* to provide, for criminal justice purposes, a definition of the concept of mental impairment in the *Code* which definition will differ from similar concepts employed in the *Mental Health (Treatment & Care) Act 1994* for therapeutic purposes.

HUMAN RIGHTS COMMISSION LEGISLATION AMENDMENT BILL 2006
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This Bill would amend the *Human Rights Commission Act 2005* to repeal provision that the Act commence on 1 March 2006, and insert instead provision for the Act to commence on a date to be fixed by the Minister by written notice. A number of consequential amendments are also proposed.

RACING (JOCKEYS ACCIDENT INSURANCE) AMENDMENT BILL 2006
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This Bill would amend the *Racing Act 1999* to provide a means by which jockeys, apprentices and approved riders who engage in racing, track work or barrier trials in the Territory may be insured against the consequences of injury in the performance of their profession.

ROAD TRANSPORT (ALCOHOL AND DRUGS) AMENDMENT BILL 2006

This Bill would amend the *Road Transport (Alcohol and Drugs) Act 1977* to make it clear that a doctor or nurse is only required to take a blood sample from a person if they have reasonable grounds to believe that the person was a driver involved in an accident that occurred less than 6 hours before the person arrived at hospital; and to update the procedural requirements for analysing samples taken under the Act.

WORKERS COMPENSATION AMENDMENT BILL 2006

This Bill would amend the *Workers Compensation Act 1951* to ensure all family day care and in-home care carers in the ACT are covered by the Act; address an anomaly relating to pre-incapacity weekly earnings; include rehabilitation treatment as part of the compensation an injured worker is entitled to; and enable access to workers compensation for women up until the age of 65 years.

Bills—Comment

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

CONSTRUCTION OCCUPATIONS LEGISLATION AMENDMENT BILL 2006

This Bill would amend several Acts and pieces of subordinate law relating to the licensing and disciplinary regime for construction occupations to improve the functioning of the laws and to incorporate certain new initiatives.

Has there been an inappropriate delegation of legislative power? – para (c)(iv)
Is there an undue trespass on personal rights and liberties? – para (c)(i)

Is it justifiable in the circumstances to permit instruments which may be made under proposed subsection 11A(4) of the <i>Electricity Act 1971</i> , or subsection 46(1) of the <i>Water and Sewerage Act 2000</i> , to adopt another document?

Incorporation by reference

By proposed subsection 11A(4) of the *Electricity Act 1971*

... the planning and land authority may declare an article of electrical equipment under subsection (1), or state the safety standard that an article of electrical equipment must comply with, by adopting a law of a State, as in force at a particular time or from time to time, under which the article or safety standard is prescribed.

By proposed subsection 46(1) of the *Water and Sewerage Act 2000*

The Minister may declare a document to be the plumbing code for this Act.

The issues thrown up by such provisions are discussed below in relation to the Motor Sport (Public Safety) Bill 2006.

Given that the regime in section 47 of the *Legislation Act 2001* will apply to ensure reasonable access to the law (see explanation of section 47 below), the only issue of substance is whether the use of this technique amounts to an inappropriate delegation of legislative power (Terms of Reference para (c)(iv)). The technique is frequently used, and might generally be thought to be acceptable provided there is adequate provision for a person to find the adopted document.

The Committee draws this matter to the attention of the Assembly.

Comment on the Explanatory Statement

General observations

In a recent Supreme Court decision, the Chief Justice observed of an Explanatory Statement that “consistently with the apparent purpose of such documents”, it “explain[ed] as little as possible” (*SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 [82]). This Committee has (either directly or indirectly) in the past expressed the hope that an Explanatory Statement will not only summarise the effect of a provision of a Bill, but in addition will explain:

- how the new provision would operate in the context of the existing law;
- why the change in the law is necessary; and
- address any human rights issue that arises.

Of course, the need for explanation at the first two steps will vary according to the nature of the Bill.

Explanation assists the Assembly when it determines whether to pass the Bill into law. As the Chief Justice’s comments indicate, such explanation is also of great assistance to the courts (and of course to legal advisers) when they are called upon to interpret the law.

The Explanatory Statement to this Bill

This Explanatory Statement does, to an extent greater than is often the case, explain how a new provision would operate in the context of the existing law, and the Committee commends this approach.

There are, however, some deficiencies.

- There are three clauses in the Bill, not four. It is apparent that what was at some point intended as clause 3 (per the Explanatory Statement) was dropped out.
- There are other indications that this Explanatory Statement relates to an earlier version of the Bill. Clause 1.25 of the Schedule to the Bill refers to the “Minister”, whereas in the clause of the Bill the relevant authority is “the land planning authority”.
- In reference to clause 1.1 of the Schedule to the Bill there is a reference to “new subsection 29(1)(a)”. It appears as if this should be to “existing subsection 29(1)(a)”.
- In reference to clause 1.6 of the Schedule to the Bill there is a reference to “section 61(1)”. It appears as if this should be to “section 56(1)”.
- In reference to clause 1.6 the words “and/or and” should probably be replaced by the words “or ask”.

The explanation of the intended effect of clause 1.17 of the Schedule to the Bill is very hard to follow and does not address the rights issue or whether the change would retrospectively affect adversely, and as a matter of substance, the legal rights and obligations of a licensee or former licensee. In this case, the Committee appreciates that if such persons were liable to discipline under a prior legal regime, they should to the same extent continue to be liable under this new regime. What needs to be explained is whether or not this is the case.

DOMESTIC ANIMALS (VALIDATION OF FEES) BILL 2006

This is a Bill for an Act to give retrospective validity to a number of fee determinations made under the *Domestic Animals Act 2000* in relation to the charging of a fee for the sale of dogs from the pound.

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

Is the retrospective validation of the collection of fees for the sale of dogs from the pound justifiable?

The legal deficiency in the fee determinations was pointed out in *Scrutiny Report No 13* of the *Sixth Assembly*, and the Committee acknowledges that in his Presentation speech the Minister has drawn attention to the Committee's role.

The result of this deficiency was that the government collected approximately \$80,000 from the sale of dogs without lawful authority. The Minister offers this justification for retrospective validation (rather than reimbursement of the fee):

As members of the public who purchased dogs from the pound received a dog in return for the payment of the fee it is considered appropriate to validate the fees, rather than refund them.

A similar issue arose in relation to the Validation of Fees (Cemeteries) Bill 2003. In its report on this Bill in *Scrutiny Report No 41 of the Fifth Assembly*, the Committee accepted that there have been such cases in the past, and that the approach taken has been that where a service has been provided for a fee, there should be later validation of the making of that charge.

The Committee advises the Assembly that there is no undue trespass on rights on the basis that

- those who paid the fee upon their obtaining a dog probably did so in the belief that they were legally obliged to do so, and
- the fees charged are in substance amounts that are properly related to the service that was provided.

MOTOR SPORT (PUBLIC SAFETY) BILL 2006

This is a Bill for an act to create a scheme under which motor sport activities contemplated at dedicated motor sport facilities can be managed. It is designed to ensure the competence of motor sport operations through appropriate risk controls at a standard that protects the public and the interests of sponsors and participants; application of relevant OH&S and environmental standards; and adequate insurance arrangements.

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

<p>Is there an insufficient definition of the power of the Minister under clause 9 to make to issue a motor vehicle racing licence?</p>

By clause 9, the chief executive would be given an open-ended discretion to determine whether to issue a motor vehicle racing licence. Notwithstanding that the chief executive must consider “the public interest”, which of course itself is significantly open-ended, by subclause 9(4) this factor does not operate as a limit to the discretion.

On its face, the power appears to be “insufficiently defined”. The Committee does note that there will be legal limits to just when the Minister could refuse a licence. The power could not lawfully be exercised except in pursuance of the purposes for which the power is vested in the Minister. The Minister – or a court considering a challenge to an exercise of the power – would ascertain those purposes by reference to the whole of the Act, and in terms of other documents such as the Explanatory Statement and the Presentation Speech. (In this case, however, the Explanatory Statement is of no assistance.)

In these circumstances, the Assembly might consider it necessary, at the least, to insert provision in clause 9 for the chief executive to issue guidelines as to how he or she will exercise the discretion. Guidelines might be prescriptive as to the range of matters the decision-maker may consider, or, alternatively, might leave a residual discretion to the decision-maker. This technique is sometimes employed in Territory laws; for example, see section 31 of the *Tree Protection Act 2005*.

The Committee generally draws such administrative powers to the attention of the Assembly; (see *Report No 6 of the Sixth Assembly*).

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

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

<p>Is it justifiable in the circumstances to permit a regulation made under clause 38 to adopt another document?</p>
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<p>Should there be explanation of the need for a scheme of notification of adopted documents which would be alternative to the scheme provided for by section 47 of the <i>Legislation Act 2001</i>.</p>
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Incorporation by reference

Clause 38 makes provision for the making of regulations by the Executive, and by subclause 38(3):

- (3) A regulation may apply, adopt or incorporate any of the following **as in force from time to time**:
- (a) a publication of the National Transport Commission;
 - (b) a publication of a national or international body responsible for a motor vehicle sport prescribed by regulation;
 - (c) any other instrument as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

It should be noted that the *Legislation Act 2001* defines “instrument” to mean “any writing or other document” (subsection 14(1)), and “a reference to an *instrument* includes a reference to a provision of an instrument” section 14(2)).

Two kinds of issues arise where a law would itself incorporate into its terms the text of some other document, or would permit the maker of a statutory instrument to incorporate into its terms the text of some other document.

The first is whether this technique amounts to an inappropriate delegation of legislative power (Terms of Reference para (c)(iv)). The technique is frequently used, and might generally be thought to be acceptable provided there is adequate provision for a person to find the adopted document.

The second is whether the technique affects the capacity of a person to ascertain the content of the law to an extent that it may be said that the person cannot obtain the protection of the law. This second concern may be posed as an issue as to whether the Bill is an undue trespass on personal rights and liberties (Terms of Reference para (c)(i)), or possibly as an issue arising under section 8 of the *Human Rights Act 2004*. The general point is that the protection and enforcement of rights of any kind presupposes that a person can ascertain the content of the law.

Of course, the extent of concern on either of these bases will turn on just what is provided for in a particular Bill, and the considerations that justify those provisions.

Leaving aside the issue of whether there is an inappropriate delegation, these rights issues are addressed in section 47 of Legislation Act (and see the sanction for non-compliance in section 62). So far as concerns subclause 38(3) of the Bill, it is to be noted that **by subsection 47(6) the text of the incorporated document, as it is from time to time, must be published in the legislation register**. The policy objective here is that the public may thus ascertain just what the law of the Territory is as it stands at a particular time. A member of the public need only consult the legislation register. This is an important safeguard of the basic right of a person to ascertain the law.

Displacement of subsection 47(6) thus raises a rights issue, and where it is proposed by a Bill, the Committee looks for a justification in the Explanatory Statement.

Clauses 34 and 35 of the Bill provide for a scheme of notification that may be used as an alternative to that in subsection 47(6) of the Legislation Act. Its major elements are

- a requirement that the Chief Executive make any incorporated documents publicly available free of charge (subclause 34(2)); and
- a requirement that the Chief Executive makes an incorporated document notice in respect of the incorporated document and of any changes to it, which notice is a notifiable instrument (subclause 35(2) and (3)).

Subclause 35(4) then provides:

- (4) An incorporated document as in effect at the commencement of this section, and any amendment or replacement of an incorporated document, has no effect under this Act unless—
 - (a) an incorporated document notice is notified in relation to the document, amendment or replacement; or
 - (b) the document, amendment or replacement is notified under the Legislation Act, section 47 (6).

Thus, the alternative to compliance with section 46 of the *Legislation Act 2001* is the notification (on the Legislation Register) of an incorporated document notice, which notice would inform the public how to gain access to the incorporated document.

The Explanatory Statement does not explain why this alternative is thought desirable. The Committee appreciates that there may be good reasons to provide for displacement, but considers that they should be stated in the Explanatory Statement. (It is also noted that the Statement does not attempt any explanation of the scheme, and thus compares unfavourably to the explanation given about a similar scheme in the Explanatory Statement to the Tree Protection Bill 2005 – see *Scrutiny Report No 6 of the Sixth Assembly*).

The Committee draws this matter to the attention of the Assembly.

Comment on the Explanatory Statement

For general comment, see above in relation to the Construction Occupations Legislation Amendment Bill 2006.

The Explanatory Statement does not meet the standard which is expected. Some specific deficiencies have been noted above.

SUBORDINATE LEGISLATION:Disallowable Instruments—No Comment

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

Disallowable Instrument DI2005-268 being the Road Transport (Offences) Holiday Period Declaration 2005 made under subsection 22(1)(e) of the *Road Transport (Offences) Regulation 2005* declares a specified period to be a holiday period.

Disallowable Instrument DI2005-270 being the Financial Management (Investment and Borrowing) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes the investment and borrowing requirements of the Territory and Territory Authorities.

Disallowable Instrument DI2005-271 being the Financial Management (Budget Financial Statements) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes the financial statements required for budget papers.

Disallowable Instrument DI2005-272 being the Financial Management (Periodic and Annual Financial Statements) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes the financial statements required for periodic and annual financial statement.

Disallowable Instrument DI2005-273 being the Financial Management (Statement of Performance Scrutiny) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes the annual scrutiny requirement for different categories of performance measures included in the Statement of Performance and defines the level of scrutiny by the Auditor-General of annual Statements of Performance.

Disallowable Instrument DI2005-274 being the Financial Management (Treasurer's Advance) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* defines the term "urgent need for expenditure".

Disallowable Instrument DI2005-275 being the Financial Management (Territory Authority Statement Preparation Period) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes the period within which the annual financial statements and statements of authority of Territory authorities must be provided to the Auditor-General for scrutiny.

Disallowable Instrument DI2005-276 being the Financial Management (Departments) Guidelines 2005 made under section 107 of the *Financial Management Act 1996* prescribes specified administrative units as separate departments for the purposes of the Act.

Disallowable Instrument DI2005-278 being the Animal Welfare (Advisory Committee) Establishment and Constitution 2005 made under section 109 of the *Animal Welfare Act 1992* establishes the Animal Welfare Committee and appoints specified persons as members of the Committee.

Disallowable Instrument DI2005-279 being the Public Place Names (Tharwa) Determination 2005 (No. 2) made under section 3 of the *Public Places Names Act 1989* revokes DI2005-252 and determines the name of a new laneway in the Division of Tharwa.

Disallowable Instrument DI2005-280 being the Housing Assistance Rental Bonds Housing Assistance Program 2005 (No. 1) made under subsection 12(1) of the *Housing Assistance Act 1987* amends the eligibility criteria to remove the requirement that an application not be committing more than 40% of their income to the payment of rent and repayment of a bond loan.

Disallowable Instrument DI2005-281 being the Housing Assistance Public Rental Housing Assistance Program 2005 (No. 2) made under subsection 12(1) of the *Housing Assistance Act 1987* allows for the granting of short-term rebates in situations where household income has reduced, but is expect to increase again in a short period of time.

Disallowable Instrument DI2005-283 being the University of Canberra (Courses and Awards) Amendment Statute 2005 (No. 2) made under section 40 of the *University of Canberra Act 1989* determines new awards arising from the accreditation of new courses and the re-accreditation of existing courses.

Disallowable Instrument DI2005-284 being the University of Canberra (Election of Academic Staff Members of Council) Amendment Statute 2005 made under section 40 of the *University of Canberra Act 1989* determines that the order of names on a ballot paper be decided by drawing lots.

Disallowable Instrument DI2005-285 being the University of Canberra (Election of General Staff Member of Council) Amendment Statute 2005 made under section 40 of the *University of Canberra Act 1989* determines that the order of names on a ballot-paper be decided by drawing lots.

Disallowable Instrument DI2005-286 being the University of Canberra (Election of Student Members of Council) Amendment Statute 2005 made under section 40 of the *University of Canberra Act 1989* determines that the order of names on a ballot-paper be decided by drawing lots.

Disallowable Instrument DI2005-287 being the University of Canberra (Election of Council Member by Graduates) Amendment Statute 2005 made under section 40 of the *University of Canberra Act 1989* determines that the Council member elected must be a graduate of the University or its predecessor College and removes the requirement for a ballot paper to be sent to all financial members of the Alumni Society in case of a contested election.

Disallowable Instrument DI2005-288 being the Vocational Education and Training Authority Appointment 2005 (No. 6) made under subsection 12(2) of the *Vocational Education and Training Act 2003* appoints a specified person as chairperson of the ACT Vocational Education and Training Authority.

Disallowable Instrument DI2005-289 being the Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2005 (No. 1) made under subsections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2004-230, DI1997-197 and DI1997-139 and determines the arrangements under which Members may agreed to employ staff or engage consultants and contractors.

Disallowable Instrument DI2005-290 being the Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2005 (No. 1) made under subsections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2004-231, DI1997-195 and DI1997-167 and determines the arrangements under which office-holders may agreed to employ staff or engage consultants and contractors.

Disallowable Instrument DI2005-293 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Office-holders' Staff 2005 made under subsection 6(2) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2001-161, DI2000-82, DI2000-77, DI1999-78, DI1998-75, DI1997-196, DI1997-168 and DI1997-137 and remakes the variable terms of employment pertaining to the existing entitlement of office holder's staff to preserved severance benefits.

Disallowable Instrument DI2005-294 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Members' Staff 2005 made under subsection 11(2) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2000-81, DI2000-80, DI1999-77, DI1998-74, DI1997-198, DI1997-166 and DI1997-138 and remakes the variable terms of employment pertaining to the existing entitlement of member's staff to preserved severance benefits.

Disallowable Instrument DI2005-295 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2005 (No. 4) made under section 139 of the *Taxation Administration Act 1999* revokes DI2005-158 and determines the thresholds to be used to calculate duty payable for the Home buyer Concession Scheme.

Disallowable Instrument DI2005-296 being the Occupational Health and Safety (National Occupational Health and Safety Commission's Asbestos: Code of Practice and Guidance Notes) Revocation 2005 made under section 206 of the *Occupational Health and Safety Act 1989* revokes the approval of the National Occupational Health and Safety Commission's Asbestos: Code of Practice and Guidance Notes as a code of practice.

Disallowable Instrument DI2005-297 being the Dangerous Substances (National Occupational Health and Safety Commission Code of Practice for the Safe Removal of Asbestos 2nd Edition) Approval 2005 made under section 219 of the *Dangerous Substances Act 2004* approves the National Occupational Health and Safety Commission's Code of Practice for the Safe Removal of Asbestos 2nd Edition.

Disallowable Instrument DI2005-299 being the **Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 12)** made under section 13 of the *Road Transport (General) Act 1999* exempts specified vehicles and the owners/users of such vehicles participating in the 19th Summernats Car Festival from the application of compulsory third party insurance.

Disallowable Instrument DI2005-300 being the **Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 13)** made under section 13 of the *Road Transport (General) Act 1999* enables specified vehicles and the registered owners/users of such vehicles to participate in the 19th Summernats Car Festival.

Disallowable Instrument DI2005-301 being the **Public Place Names (Bruce) Determination 2005 (No. 3)** made under section 3 of the *Public Places Names Act 1989* determines the names of new streets in the Division of Bruce.

Disallowable Instrument DI2006-1 being the **Road Transport (General) (Heavy/Oversize Vehicle Route Access Permit Fee) Determination 2006 (No. 1)** made under section 96 of the *Road Transport (General) Act 1999* revokes DI2005-93 and determines the fees payable for the purposes of the Act.

Disallowable Instrument DI2006-2 being the **Independent Competition and Regulatory Commission (Terms of Reference) Determination 2006 (No. 1)** made under section 16 of the *Independent Competition and Regulatory Commission Act 1997* outlines the requirements in relation to the conduct of an investigation by the Independent Competition and Regulatory Commission into prices for public passenger bus services provided by ACTION and the impact of fuel prices on ACTION's costs.

Disallowable Instrument DI2006-3 being the **Public Sector Management Amendment Standard 2006 (No. 1)** made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2006-4 being the **Public Sector Management Amendment Standard 2006 (No. 2)** made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2006-5 being the **Public Health (Reporting of Notifiable Conditions) Code of Practice 2006 (No. 1)** made under section 133 of the *Public Health Act 1997* outlines the process for reporting notifiable conditions.

Disallowable Instrument DI2006-6 being the **Cemeteries and Crematoria (Public Cemeteries Operator) Appointment 2006 (No. 1)** made under section 28A of the *Cemeteries and Crematoria Act 2003* appoints the Australian Capital Territory Public Cemeteries Authority as operator of specified public cemeteries.

Disallowable Instrument DI2006-7 being the **Public Sector Management Amendment Standard 2006 (No. 3)** made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

Disallowable Instrument DI2006-8 being the **Taxation Administration (Levy) Determination 2006 (No. 1)** made under section 139 of the *Taxation Administration Act 1999* revokes DI2005-7 and determines the new relevant amount to be used to calculate the monthly ambulance levy paid by health benefits organisations.

Disallowable Instrument DI2006-10 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 1) 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 Rallye des Femmes.

Disallowable Instrument DI2006-13 being the Water Resources Environmental Flow Guidelines 2006 (No. 1) made under section 9 of the *Water Resources Act 1998* revokes DI1999-98 and determines the flow necessary to maintain aquatic ecosystems.

Disallowable Instruments—Comment

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

Minor drafting issues

Disallowable Instrument DI2005-267 being the Podiatrists (Fees) Determination 2005 (No. 1) made under section 54 of the *Podiatrists Act 1994* revokes all previous determinations of fees and determines new fees payable for the purposes of the Act.

The Committee notes that there are typographical errors in the title of the Schedule to this instrument ("fees") and in the second line of the item in the Schedule headed "Mutual Recognition" ("territory").

The Committee also notes that the Explanatory Statement to this instrument does not refer to the setting of fees in relation to the item in the Schedule headed "Mutual Recognition". The Committee assumes that this is an oversight.

Accessibility of legislation

Disallowable Instrument DI2005-277 being the Public Sector Management Amendment Standard 2005 (No. 10) made under subsections 251(6) and (7) of the *Public Sector Management Act 1994* amends the Management Standards.

The Committee notes that it has previously raised concerns about the accessibility of Management Standards, essentially because, unlike other instruments, the history of amendments to the Management Standards is not available either on the ACT Legislation Register or on the Commissioner for Public Administration's website.

The particular issue identified by the Committee was that, as a result of the lack of ready availability of such history, it was not possible (easily) to identify what was the effect of amendments to the Management Standards. The Committee suggested that, pending the full publication of the Management Standards on the ACT Legislation Register, it might be appropriate for any amendments to the Management Standards to include details of the provisions amended, so as to allow the Committee (and other users) easily to identify the effect of the amendments.

The Committee is pleased to note that, in this instrument, the Commissioner has taken up the Committee's suggestion. Schedule 1 of the Explanatory Statement contains the text of each Rule amended by the instrument, as it existed immediately prior to the amendment. Any new Rules are also identified as such, in the instrument itself.

The Committee commends the Commissioner for this initiative.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-282 being the University of Canberra (Academic Board) Amendment Statute 2005 made under section 40 of the *University of Canberra Act 1989* amends the Principal Statute to modify the provisions of section 19.

The Committee notes that this instrument is accompanied by an "Explanatory memorandum". That document consists of the following 4 paragraphs:

Section 40 of the *University of Canberra Act 1989* gives the University Council the power to make Statutes.

Section 19 of the Act establishes an Academic Board. The *Academic Board Statute 1990* (the Principal Statute) contains additional detail of the Board's members, their terms of office, and the Board's powers and procedures.

The *University of Canberra (Academic Board) Amendment Statute 2005* seeks to amend the Principal Statute to modify those provisions.

Section 42 of the *University of Canberra Act 1989* requires that a Statute, once made by Council, be submitted by the Chancellor to the Executive for approval.

The only explanation that is provided as to the effect of the instrument is that it modifies certain provisions. Apart from the fact that this would appear to be stating the obvious, the Committee considers that an Explanatory Statement should provide the Assembly with an indication of the detail and effect of the amendments made by an amending instrument, presumably by reference to the existing provisions. The Committee considers that this is a matter that is appropriate to raise under paragraph (b) of the Committee's terms of reference, which allows the Committee to:

Consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Committee.

In making this comment, the Committee notes that the "Explanatory memoranda" to instruments DI2005-283, DI2005-284, DI2005-285, DI2005-286 and DI2005-287 (mentioned under "No Comment" above), which also amend University statute and were made on the same date and by the same rule-makers, do contain a level of detail that the Committee considers to be appropriate.

Minor drafting issue

Disallowable Instrument DI2005-291 being the Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment of Members' Staff 2005 made under subsection 13(5) of the *Legislative Assembly (Members' Staff) Act 1989* revokes a direction

made by a previous Chief Minister on 12 January 1995 and substitutes a new updated direction concerning the termination of employment of Members' staff.

The Committee suggests that the reference to "section 13" at the end of section 6 of this instrument is superfluous.

Minor drafting issue

Disallowable Instrument DI2005-292 being the Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment of Office-holders' Staff 2005 made under subsection 8(6) of the *Legislative Assembly (Members' Staff) Act 1989* revokes a direction made by a previous Chief Minister on 7 February 1990 and substitutes a new updated direction concerning the termination of employment of office holders' staff.

The Committee suggests that the reference to "section 8" at the end of section 5 of this instrument is superfluous.

Response to the Committee's comments on previous instrument?/Minor drafting issues

Disallowable Instrument DI2005-298 being the Health (Fees) Determination 2005 (No. 6) made under section 36 of the *Health Act 1993* revokes Disallowable Instrument DI2005-231 and determines fees payable for the purposes of the Act.

The Committee notes that this instrument revokes and replaces instrument DI2005-231, which the Committee commented on in its *Report No 19* of the *Sixth Assembly*. In that report, the Committee queried whether Item M2 of the earlier instrument was within power, because it both set a fixed fee in relation to the production of documents under subpoena and indicated that only "gray scale" copies of documents would be provided under a subpoena. The Committee queried whether this might pre-empt the power of the Supreme Court, which has an express power to order the payment of "reasonable" and "just" fees, charges and expenses in relation to the production of documents under subpoena and which might, in some circumstances, require colour copies of documents.

The Committee notes that this version of the instrument deletes Item M2. In the absence of any explanation to the contrary, the Committee assumes that this was done in response to the Committee's concerns.

The Committee notes that this instrument is made under section 36 of the *Health Act 1993* (**Health Act**). Subsection 36(5) of the Health Act defines various terms for the purposes of section 36. One such definition is:

disallowable instrument, for a Commonwealth Act, means a disallowable instrument under the *Acts Interpretation Act 1901* (Cwlth), section 46A.

The Committee notes that section 46A of the *Acts Interpretation Act 1901* was repealed in the context of the enactment of the *Legislative Instruments Act 2003*.

The Committee notes that there is an inconsistent use in this instrument of the terms "(Cth)" and "(Cwlth)", to denote that legislation referred to is Commonwealth legislation (see, for example, the definitions of ***Medicare Benefits Schedule Book*** and ***Professional service***).

Minor drafting issue

Disallowable Instrument DI2005-302 being the Public Health (Risk Activities) Declaration 2005 (No. 1) made under section 18 of the *Public Health Act 1997* revokes DI2001-184 and determines the operation, management or control of a business, charity, demonstration or service that carries out a skin penetration procedure to be a licensable public health risk activity.

The Committee notes that the definitions set out in section 6 of this instrument are not in alphabetical order.

Minor drafting issue

Disallowable Instrument DI2005-303 being the Public Health (Infection Control) Code of Practice 2005 made under section 133 of the *Public Health Act 1997* determines the document entitled Infection Control Code of Practice 2005 to be a code of practice for office practices and other community based services.

The Committee notes that this instrument determines an Infection Control Code of Practice (**Code**), as authorised by section 133 of the *Public Health Act 1997*. Part Two of the Code sets out standards for infection control. Clearly, it is an important and operative part of the Code. The first few clauses of Part Two provide:

1. Standards for infection control

- 1.1. Any procedure performed by a practitioner or person engaged by the business, is completed in such a way so as to prevent the transmission of blood borne and other infections.
- 1.2. The premises and the layout of all fixtures and fittings installed in the premises in which skin penetration and infection risk procedures are performed are suitable for that purpose and are maintained accordingly.
- 1.3. Standard Precautions, and where appropriate, Additional Precautions, are adhered to by all practitioners engaged by the business.
- 1.4. Effective systems are in place to prevent cross contamination of appliances used by all practitioners engaged by the business.

The subsequent clauses are couched in similar terms. That is, they describe standards that, presumably, are to be met by persons and premises covered by the Code. The Committee suggests, however, that it may be more clear that this is the effect of Part Two if there was a statement, before the standards are listed, to the effect that these are the standards that are to be complied with. In making this comment, the Committee notes that paragraph 2.1 of the Code may be regarded as doing this. The Committee also notes, however, that this paragraph appears after the substantive requirements and appears under a heading "Additional Requirements". As the Committee has already stated, a similar statement, preceding the substantive requirements might enhance the operation of the Code.

Subordinate Laws—No comment

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

Subordinate Law SL2005-40 being the Education Amendment Regulation 2005 (No. 1) made under the *Education Act 2004* prescribes those schools at which two students members are to be elected by students for appointment to the school's board .

Subordinate Law SL2005-41 being the Road Transport (Offences) Amendment Regulation 2005 (No. 1) made under the *Road Transport (General) Act 1999* reinstates the correct penalty amount for meter and ticket parking offences.

Subordinate Law SL2005-43 being the Workers Compensation Amendment Regulation 2005 (No. 1) made under the *Workers Compensation Act 1951* requires an insurer to provide adequate reinsurance or other arrangements to cover the insurer's future liability.

Subordinate Law SL2005-44 being the Crimes (Child Sex Offenders) Regulation 2005 made under the *Crimes (Child Sex Offenders) Act 2005* prescribes various matter for the purposes of the Act.

Subordinate Laws—Comment

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

Strict liability offences

Subordinate Law SL2005-39 being the Road Transport Legislation Amendment Regulation 2005 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999*, *Road Transport (General) Act 1999*, *Road Transport (Public Passenger Services) Act 2001* and *Road Transport (Vehicle Registration) Act 1999* provides for "stand-by hire cars" to operate under permits while hire cars are being repaired and requires taxi networks and public passenger service operators to keep records about drivers.

This subordinate law amends, among other subordinate laws, the *Road Transport (Public Passenger Services) Regulation 2002* (PPS Regulation). The Committee notes that the Explanatory Statement to the subordinate law states that the new subsections 26(1), 27(2), 27A(2), 77(2), 77A(2), 97(1), 99(2), 133(3), 177E(4), 177E(5), 177H(1), 182(1), 182A(2) and 207(3) of the PPS Regulation, which are inserted by this subordinate law, are strict liability offences.

The Committee notes that the maximum penalty for an offence against subsections 26(1), 97(1), 177E(4) and 177E(5) is 20 penalty units (ie \$2,000.00). For an offence against subsections 133(3) and 177H(1), the maximum penalty is 5 penalty units (ie \$500.00). For the remaining provisions, the maximum penalty is 10 penalty units (ie \$1,000.00).

The Explanatory Statement for the subordinate law states (on page 3):

... These are regulatory offences applied in the interests of public and industry safety. A fault element is not considered to be necessary for these offences as a defendant could be reasonably expected, because of his or her professional involvement, to know what the requirements of the law are. Public passenger service operators and drivers are expected to be aware of the requirements placed on them by the regulatory regime for their profession.

As noted in *Report No 2 of the Sixth Assembly*, the use of strict liability offences is a recurring issue for the Committee. In that Report (at pp 5-8), the Committee also set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred to the principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences (at page 9).

In particular, the Committee noted that, in its *Report No 38 of the Fifth Assembly*, it had proposed 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 *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, in this instance, the Explanatory Statement meets the first of the principles set out by the Committee in its *Report No 38 of the Fifth Assembly*. It does not, however, meet the second principle, in that it does not indicate whether a defendant is nevertheless able to rely on a defence.

In making this comment, the Committee notes that section 4A of the PPS Regulation states that Chapter 2 of the *Criminal Code* applies to certain specified offences under the PPS Regulation. The Committee also notes that Note 1 to section 4A states:

[Chapter 2 of the *Criminal Code*] sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg **conduct**, **intention**, **recklessness** and **strict liability**).

The Committee does not consider that the existence of section 4A (including Note 1) meets the first of the criteria set out by the Committee in *Report No 2 of the Sixth Assembly*.

The Committee notes that, in its *Report No 2 of the Sixth Assembly*, it quoted the statement of general approach contained in the Explanatory Statement to the *Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004* as an example of the kind of explanation that the Committee would prefer to see.

Finally, the Committee notes that the various maximum penalties prescribed for the various offences are well within the 60 penalty unit threshold that, in its *Report No 2 of the Sixth*

Assembly, the Committee has previously suggested as a level which such penalties in subordinate legislation should not exceed.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

Amendments by "Henry VIII" clause

Subordinate Law SL2005-42 being the Financial Management Regulation 2005 made under the *Financial Management Act 1996* preserves the current arrangements for Board appointments, elections and joint venture for the maximum period until 27 October 2007 and provides for the chief executive officer of the health promotion authority to be a public servant.

The Committee notes that this subordinate law amends the *Financial Management Act 1996* (FM Act). That is, a subordinate law operates to amend an Act. The authority to do so is section 111 of the FM Act, which provides:

Transitional regulations

- 111** (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Financial Management Legislation Amendment Act 2005*.
- (2) A regulation may modify this part (including its operation in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.
- (4) This section expires 2 years after the day it commences.

Section 111 is a "Henry VIII" clause. The term is derived from the fact that this kind of law-making was favoured by King Henry VIII (see Pearce and Argument, *Delegated Legislation in Australia*, 3rd edition, [1.8] and [1.20]). The Committee notes, however, that what is provided for by this subordinate law is evidently within the scope of what the Legislative Assembly authorised, in enacting section 111 of the FM Act. As a result, the Committee makes no further comment on the subordinate law.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Attorney-General, dated 10 February 2006, in relation to comments made in Scrutiny Report 21 concerning the Civil Law (Wrongs) Amendment Bill 2005.

- The Attorney-General, dated 15 February 2006, in relation to comments made in Scrutiny Report 20 concerning the Crimes (Offences Against Pregnant Women) Amendment Bill 2005.
- The Minister for Urban Services, dated 16 February 2006, in relation to comments made in Scrutiny Report 13 concerning DI2005-99, being the Domestic Animals (Fees) Determination 2005 (No. 1).

Incorporation by reference—Need for amendment of the *Legislation Act 2001*

Arising out of the Attorney-General's response of 10 February 2006 in relation to comments made concerning the Civil Law (Wrongs) Amendment Bill 2005, the Committee draws attention to the need to amend section 47 of the Legislation Act so that the scheme for notification and publication of a document incorporated by reference applies where incorporation is brought about by a provision of an Act. At present, section 47 applies only where incorporation is brought about by a statutory instrument authorised by an Act.

The Committee wishes to thank the Attorney-General and the Minister for Urban Services for their helpful responses.

Bill Stefaniak, MLA
Chair

March 2006

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

REPORTS—2004-2005-2006

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

Report 3, dated 17 February 2005

Health Records (Privacy and Access) Amendment Bill 2005. **(Passed 17.02.05)**

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-260 – Health (Interest Charge) Determination 2004
(No. 1)
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
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**
Subordinate Law SL2004-52 – Health Professionals Amendment Regulation 2004
(No. 1)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 5, dated 14 March 2005

Disallowable Instrument DI2005-12 – Health Professions Boards (Procedures) Pharmacy
Board Appointment 2005 (No. 1)
Disallowable Instrument DI2005-8 – Community and Health Services Complaints
Appointment 2005 (No. 1)

Bills/Subordinate Legislation

Report 6, dated 4 April 2005

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

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**
 Disallowable Instrument DI2005-34 – Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)

Report 11, dated 20 June 2005

Disallowable Instrument DI2005-33 – Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-61 – Radiation (Fees) Determination 2005 (No. 1)
 Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval 2005 (No. 1)

Report 14, dated 15 August 2005

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

Report 15, dated 22 August 2005

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 DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No. 2)
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No. 1)
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No. 2)

Bills/Subordinate Legislation

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

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

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

Hotel School (Repeal) Bill 2005 (**Passed 25.08.05**)

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

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (**PMB**)

Report 18, dated 14 November 2005

Disallowable Instrument DI2005-209 – Health (Fees) Determination 2005 (No. 3)

Disallowable Instrument DI2005-212 – Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1)

Guardianship and Management of Property Amendment Bill 2005 (**PMB**)

Report 19, dated 21 November 2005

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

Report 20, dated 12 December 2005

Disallowable Instrument DI2005-241 - Public Place Names (Phillip) Amendment 2005 (No. 1)

Disallowable Instrument DI2005-242 - Public Place Names (Bonython) Amendment 2005 (No. 1)

Report 21, dated 6 February 2006

Children and Young People Amendment Bill 2005 (No. 2)

Disallowable Instrument DI2005-245 - Nurses (Fees) Determination 2005 (No. 1)

Disallowable Instrument DI2005-255 - Pest Plants and Animals (Pest Animals) Declaration 2005 (No. 1)

Disallowable Instrument DI2005-263 - Gambling and Racing Commission Appointment 2005 (No. 2)

Subordinate Law SL2005-38 - Environment Protection Regulation 2005



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

I refer to Scrutiny of Bills Report No. 21 dated 6 February 2006 concerning the Civil Law (Wrongs) Amendment Bill 2005 and offer the following response in relation to the matters raised by the Committee.

The Committee has drawn a number of matters to the attention of members.

The first matter concerns legislation by reference. The model bill provides that a jurisdiction may identify a specific occasion, document or proceeding, as one that attracts the benefit of a defence – and that defence is then automatically recognised by the legislation in the other jurisdictions. For example, a state may wish to extend a privilege defence to a specific enquiry established by legislation but which is conducted ‘on-the-papers’ rather than by public hearings. The Committee raises the issue of another jurisdiction legislating to add to the content of Territory law. The Committee raises two issues: firstly, is the content of the law made by another jurisdiction accessible to people; and secondly, is the approach reasonable in the circumstances.

Law officers proposed the mechanism in the model law to address the issue of forum shopping (eg, in the example given, before the model law is enacted, a plaintiff may not be able to sue successfully in the jurisdiction in which the enquiry is held, and may attempt to avoid the effect of the privilege by suing in another jurisdiction). Law officers proposed the model after a careful consideration of other possibilities, including the possibility, when a jurisdiction enacts a specific defamation defence, the jurisdiction then requesting each of the other Australian jurisdictions to pass mirror amendments to the defamation law. The need for jurisdictions to pass a continuous stream of minor amendments to reflect such changes seems undesirable – carrying with it the risk of error or delay. Such an objection might have carried far more weight twenty years ago, when knowledge of the law in each jurisdiction was paper bound, often out of date and sometimes missing altogether. Today, up-to-date information about the law in each jurisdiction is available with little special effort.

ACT LEGISLATIVE ASSEMBLY

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The second matter concerns the definition of “public document”. The release of documents by a government is a ubiquitous and an essential means by which a government conducts the functions of government. As indicated in the explanatory statement, it is considered that the law provides a proportionate limitation on the right to reputation, as the publication must be made “honestly for the information of the public or the advancement of education”.

In this context, the Committee raised the question whether the definition of ‘public document’ would be given a wide meaning, or whether it would be limited to publications of a state. The relevant provision must be read as a whole, which, in context, has a more limited meaning. The Committee may wish to note that these provisions are based on existing ACT and NSW provisions to similar effect.

Finally, the Committee raised an issue concerning the capping of the non-economic component of damage awards. I note that the Committee starts, as do the states and territories, from the unexceptional principle that defamation damages should bear a rational relationship to the harm caused. However, the Committee is concerned that the cap on this component of damages represents a significant intrusion into the rights of a plaintiff.

The states and territories have adopted the approach in the legislation for a number of reasons. Firstly, an examination of awards (and in particular NSW, the jurisdiction in which the highest non-economic component were awarded) suggested that the proposed cap would very seldom be exceeded. Secondly, each jurisdiction has slightly different caps for personal injuries, and the failure for jurisdictions to set a common cap may lead to forum shopping, as litigants sought to maximise their tactical position. On this basis, law officers proposed a single approach. If the ACT did not adopt the cap, litigants might forum shop into the ACT to gain a perceived benefit.

I am satisfied, therefore, that it is appropriate and desirable for the Bill to be enacted in its current form.

Yours sincerely

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

Jon Stanhope MLA
Attorney General

10 FEB 2006



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

Bill

I refer to Scrutiny of Bills Report No. 20 dated 12 December 2005 concerning the Crimes (Offences Against Pregnant Women) Amendment Bill 2005 ("the Bill").

I am grateful to the Committee for its thorough and detailed analysis of the issues involved in determining whether the Bill complies with the *Human Rights Act 2004* (HRA). As you are aware my Government takes the matter of human rights very seriously and was, therefore, greatly assisted by your Committee's observations on the Bill and, most particularly, with the concerns it expressed about the absence of a fault element for establishing the aggravating factors of the Bill offences.

I accept the Committee's finding that the absence of the requirement to prove fault for the aggravating factors is a limitation to the right to a presumption of innocence and I share the Committee's concerns that the limitation may not satisfy the reasonable limits test in section 28 of the HRA. Indeed, we are not alone in this. I am informed that the focus of the discussions with Ms Foskey, Mr Pratt and the advisors in your office has been almost exclusively on this issue and you will be aware that this is also the central concern of Civil Liberties Australia (ACT).

The Committee Report makes the point that the additional sentencing criteria in the Bill will ameliorate the lack of a requirement to prove fault with respect to the aggravating factors, however, as Civil Liberties Australia (ACT) properly points out this cannot remedy the problem that a person is fixed with criminal liability in the first place, even though he or she did not know and could not have known that the woman was pregnant

My Government is an inclusive government and my Government takes its consultations seriously because it is convinced that this will ultimately produce the best laws for the community we serve. Accordingly, having regard to the legitimate concerns that have been expressed, I have decided to amend the Bill so that a person would not be convicted for an aggravated offence if he or she did not know and could not have reasonably known about the pregnancy.

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I would like to thank the Committee again for its detailed report on the Bill generally and also for the valuable alterations it suggested for the Explanatory Statement. I will be tabling a Revised Explanatory Statement, incorporating the suggested changes prior to the debate.

Yours sincerely

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

Jon Stanhope MLA
Attorney General

15 FEB 2006



JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES

MINISTER FOR URBAN SERVICES

MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

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

Dear Mr Stefaniak

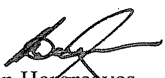
I refer to Scrutiny of Bills Report No.13 in which the Committee drew my attention to the sub delegation of a legislative power in item 25 of **Disallowable Instrument DI2005-99 – Domestic Animals (Fees) Determination 2005 (No 1)**. This item determined the fee for the sale of a dog from the pound to be “as determined by the Registrar”.

Upon reviewing the instrument, I have decided to replace it with a new instrument and explanatory statement, which determines the fee for this item to be \$45. This is amount currently charged by the Registrar. Some editorial changes have also been made to improve the clarity of the instrument. The new determination and explanatory statement have been attached for the Committee’s information, although they will also be tabled in the normal course of events.

On 16 February 2006 I also introduced legislation validating the fees charged under this item of DI 2005-99 and previous instruments in the Legislative Assembly.

I thank the Committee for bringing this to my attention.

Yours sincerely


John Hargreaves
Minister for Urban Services
16 February 2006

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Domestic Animals (Fees) Determination 2006 (No 1)

Disallowable Instrument DI2006-9

made under the

Domestic Animals Act 2000, Section 144 - Determination of Fees

1. Name of instrument

This instrument is the Domestic Animals (Fees) Determination 2006 (No 1).

2. Commencement

This instrument commences the day after notification.

3. Determination of fees

The fee payable in respect of each matter listed in an item in Column 3 of Schedule 1 is the amount for that item in Column 5 of Schedule 1.

4. Payment of Fee

The fee is payable to the Territory by the person requesting the good or service listed.

5. Waiver and refund of fees

The Registrar may waive, completely or partly, the fee payable for the sale of a dog from the pound if the Registrar is satisfied that the sale is made to a person as part of a program the main purpose of which is to rescue animals.

The Registrar may refund a fee paid to the ACT Government for the issue of a permit to keep a dog or cat that is not desexed in accordance with the formula in Schedule 2 where:

- the permit holder/s relocate interstate;
- the animal is desexed within three years of the date of issue of the permit; or
- the animal dies within three years of the date of issue of the permit.

6. GST

Where applicable, GST inclusive fees are marked with a double asterisk (**).

7. Revocation

I revoke disallowable instrument number **DI 2005-99** as notified on the ACT Government Legislation Register.

John Hargreaves
Minister for Urban Services
7 February 2006

SCHEDULE 1

Item Number	Relevant Section of the Act	Description of Matter for which fee is payable	Explanatory Notes (Fee Payable \$ 2004-2005)	Fee Payable \$ 2005-2006
(1)	(2)	(3)	(4)	(5)
1.	s 7	Initial registration of a dog that is between 8 weeks and one year of age.	<i>Nil</i>	Nil
2.	s 7	Initial registration of a dog that is older than 1 year of age.	<i>32.10</i>	32.90
3.	s 10;	Renewal of registration of a dog where dog is a Trained Assistance Animal	<i>Nil</i>	Nil
4.	s 10	Renewal of registration of a dog where dog trained to an approved obedience level	<i>3.15</i>	3.20
5.	s 10;	Renewal of registration of a dog where dog residing on a rural lease	<i>3.15</i>	3.20
6.	s 10	Renewal of registration of a dog where dog is trained to a Confirmation Showing level	<i>3.15</i>	3.20
7.	s 10	Renewal of registration of a dog where keeper is a pension/benefit recipient	<i>3.15</i>	3.20
8.	s 10	Renewal of registration for all other dogs	<i>12.85</i>	13.15
9.	s 11 (4)	Replacement registration certificate	<i>5.30</i>	5.40
10.	s 11 (4)	Replacement dog tag	<i>5.30</i>	5.40
11.	s 19	Application for licence to keep 4 or more dogs	<i>77.10</i>	79.00
12.	s 32	Renewal of licence to keep 4 or more dogs.	<i>21.40</i>	21.90
13.	s 24	Licence application to keep dangerous dog	<i>125.30</i>	128.40
14.	s 32	Renewal of a licence to keep dangerous dog	<i>125.30</i>	128.40
15.	s 76	Issue of permit to keep a cat or a dog that is not desexed where keeper is a recipient of a pension or benefit.	<i>53.55</i>	54.85
16.	s 76	Issue of permit to keep a cat or a dog that is not desexed where keeper is a member of the ACT Canine Association Incorporated, Capital Cats Incorporated or the Canberra Greyhound Racing Club Incorporated.	<i>267.90</i>	274.55
17.	s 76	Issue of permit to keep any other cat or dog that has not been desexed	<i>53.55</i>	54.85
18.	ss 62, 63, 64, 65, 70	Release of seized dog where period impounded does not exceed 24 hours – and dog seized for first offence	<i>107.15</i>	109.80

Minister's Initials _____

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

THIS IS PAGE 2 OF SCHEDULE 1 OF THE DOMESTIC ANIMALS (FEES) DETERMINATION 2006 (NO 1)

Item Number	Relevant Section of the Act	Description of Matter for which fee is payable	Explanatory Notes (Fee Payable \$ 2004-2005)	Fee Payable \$ 2005-2006
(1)	(2)	(3)	(4)	(5)
19.	ss 62, 63, 64, 65, 70	Release of seized dog where period impounded does not exceed 24 hours – and dog seized for second offence	160.70	164.70
20.	ss 62, 63, 64, 65, 70	Release of seized dog where period impounded does not exceed 24 hours – and dog seized third or more offence	214.30	219.65
21.	ss 62, 63, 64, 65, 70	Impounded dog, cost for each additional day after initial 24 hours – first offence	10.70	10.95
22.	ss 62, 63, 64, 65, 70	Impounded dog, cost for each additional day after initial 24 hours – second offence	10.70	10.95
23.	ss 62, 63, 64, 65, 70	Impounded dog, cost for each additional day after initial 24 hours – third or further offence	10.70	10.95
24.	ss 62, 63, 64, 65, 70	Transportation of a dog upon release of from pound	37.40	38.30
25.	s 69	Transportation of a dog upon surrendering of dog ownership	37.40	38.30
26.	s 66	Sale of a dog from the pound **	45.00	45.00

Note: The fees set out in column 3 are for financial year 2004/2005 and are for comparison purposes only.

Minister's Initials _____
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SCHEDULE 2

Description of Matter for which refund is payable	Explanatory Notes (Refund Payable \$ 2004-2005)	Refund Payable \$ 2005-2006
(1)	(2)	(3)
Request for refund of fee paid for permit to keep dog of cat that is not desexed		
(a) Where application for refund is made within 1 year of date of issue of permit:	209.10	214.30
(b) Where application for refund is made within 2 years of date of issue of permit:	104.55	107.15
(c) Where application for refund is made within 3 years of date of issue of permit:	52.25	53.55

Note: The amounts set out in column 2 are for financial year 2004/2005 and are for comparison purposes only.

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Australian Capital Territory

Domestic Animals (Fees) Determination 2006 (No 1)

Disallowable Instrument DI 2006-9

made under the

Domestic Animals Act 2000, Section 144 - Determination of Fees

EXPLANATORY STATEMENT

Section 144 of the *Domestic Animals Act 2000* (the Act) allows for the Minister to determine fees for the Act.

Fees have been payable for the sale of dogs from the pound since commencement of the Act in 2001. However, previous instruments have provided that this fee is to be “as determined by the Registrar”.

This Legal Affairs Committee raised concerns about the legality of determining the fee is this way.

By this instrument the Minister, rather than the Registrar, determines that the fee for the ‘sale of a dog from the pound’ will be \$45.00. It also clarifies that the Registrar may waive the fee payable for the ‘sale of a dog from the pound’. The Registrar currently waives the fee that would otherwise be payable for the sale of a dog from the pound where dogs are released to members of a dog rescue program. Examples of organisations operating such programs include ACT Rescue and Foster Inc., Australian Cattle Dog Rescue, and Siberian Husky Breed Rescue (among others).

All other fees have remained unchanged, although some minor editorial changes have been made to the instrument to improve clarity and consistency.

The new fee determination takes effect on the day after notification on the ACT Government Legislation Register.