



Legislative Assembly for the ACT

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

## Scrutiny Report

13 AUGUST 2007

**Report 43**

## **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 Zed Seselja, MLA (Chair)**  
**Ms Karin MacDonald, MLA (Deputy Chair)**  
**Dr Deb Foskey, MLA**

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**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 comments on them:

<b>APPROPRIATION BILL 2007-2008</b>
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This is a Bill for an Act to appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2007, and for other purposes.

<b>CANBERRA INSTITUTE OF TECHNOLOGY AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend the *Canberra Institute of Technology Act 1987* to revise the membership of the CIT Advisory Council.

<b>LAND TAX (INTEREST AND PENALTY) AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend the *Land Tax Act 2004* to regulate the levying of interest and penalty tax where an owner fails to notify the commissioner that their property is rented.

<b>REVENUE LEGISLATION (HOUSING AFFORDABILITY INITIATIVES) AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend the *Taxation Administration Act 1999*, the *Duties Act 1999*, the *Rates Act 2004* and the *Land Tax Act 2004* to introduce the taxation framework to support three initiatives that form part of the ACT Government's Housing Affordability Action Plan.

Bills—Comment

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

<b>BUILDING LEGISLATION AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend legislation consequent on the enactment of the *Planning and Development Act 2007* to implement planning system reform, and for other purposes. The Bill would make several substantive new reform amendments as well as to make consequential amendments to the *Building Act 2004*. The Bill also makes minor amendments to the *Construction Occupations (Licensing) Act 2004*, and the *Planning and Development Act 2007* to better facilitate the Building Act's interaction with those laws. A central focus of the Bill is to facilitate making private sector building certifiers a one-stop-shop for all of the plan approvals and associated certifications necessary to erect buildings that are exempted from requiring development approval.

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

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

#### *Strict liability offences*

The proposed amendments would create a number of strict liability offences, and thus there arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, and in terms of HRA section 28, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or the presumption of innocence (HRA subsection 22(1)).

The Committee suggests that the comprehensive nature of the justification offered in this Explanatory Statement provides an opportunity for the Assembly to discuss just what are acceptable lines of justification for a derogation of these rights. The Committee offers its own analysis to assist debate.

At page 9, the Explanatory Statement lists the offences that would be created by the Bill, and indicates which of them would be strict liability offences. The Committee appreciates this guidance.

On the face of it, the proposed amendments derogate from the statement of rights in the *Human Rights Act 2004*; in particular from “the right to liberty and security of person” stated in subsection 18(1), and/or the presumption of innocence stated in subsection 22(1). (The reason the Committee cites subsection 18(1) is explained in *Scrutiny Committee Report No 41*, concerning the Water Resources Bill 2007.) There is thus raised the question of whether the derogation is justifiable under HRA section 28.

Section 28 provides:

#### **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.

While it may require refinement, the Explanatory Statement explanation (page 12) of the effect of section 28 is an acceptable guide:

In effect, section 28 requires that any limitation or restriction of human rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

In summary, the Committee considers that there is sufficient justification for the imposition of strict liability in the ways proposed. This is explained below. In addition, in no case does the penalty exceed 60 penalty points. The Committee also notes that some of these offences are qualified by provision for a defendant to raise a defence that will add to the range of defences that may normally be raised in relation to a strict liability offence (see as indicated at pages 10-11 of the Explanatory Statement). The additional defences are designed to permit a defendant argue that he or she took “reasonable precautions and exercised appropriate diligence to avoid the contravention” (page 12). In such cases, there is an additional reason to think that the strict liability offence is HRA compatible.

Taking these matters into account, the Committee does not consider that there is an issue of HRA compatibility. Nevertheless, the Committee suggests that the comprehensive nature of the justification offered in this Explanatory Statement provides an opportunity for the Assembly to discuss just what are acceptable lines of justification for a derogation of these rights. The Committee offers its own analysis to assist debate.

The Committee notes in appreciation that the Explanatory Statement does provide a comprehensive justification for the imposition of strict liability. The primary line of justification offered appears on its face to be a sufficient basis for concluding that the provision of strict liability offences in the Bill is HRA compatible if regard is also had to the relatively minor penalties that may be imposed. On the other hand, the other lines of justification offered appear to have little if any weight.

In the end, of course, it is for each member of the Legislative Assembly to arrive at her or his own assessment of the matter.

#### The primary line of justification for the creation of strict liability offences in the Bill

The Explanatory Statement states (page 10):

The rationale for their inclusion as strict liability offences is to protect the health and safety of the public, and the fiscal and functional value of buildings. That is because failures by certifiers to exercise due skill care and diligence in exercising their relevant responsibilities in verifying that the minutia of technical design information shown in building plans, and building work as executed, have proven to result in -

- unsafe or unhealthy buildings; or
- buildings unable to be used for their intended purpose; or
- buildings that when complete have to be demolished or altered to make them comply with laws including urban planning control instruments or the Building Code of Australia.

This is a generally accepted line of justification for the imposition of strict liability in relation to a regulatory offence. As is the case with many other professionals and tradespeople, certifiers have a positive duty to take care. This is particularly so where the Government has entrusted to them the primary responsibility for ensuring compliance with the law that regulates matters such as health, safety and environmental protection. The imposition of strict liability offences will create an added incentive to certifiers to ensure that they do exercise due skill care and diligence in exercising their relevant responsibilities. This point is implicit in the statement at page 11 that:

Strict liability offences reduce risks to the community. An *adequately deterrent scheme* to ensure building work is done only as approved under the Building Act reduces the risk of the community being affected by bad, inappropriate, inefficient, unsound, unsafe or unhealthy buildings or buildings that have inappropriate access or facilities fro [sic] people with disabilities.

There is further elaboration of this point at pages 13, where the Explanatory Statement offers an argument in support of the point that while a strict liability offence is a derogation of the presumption of innocence stated in section 22(1) of the *Human Rights Act 2004*, this is justifiable under section 28 of the Act. It is said:

Of necessity the application of the HRA in circumstances such as those mentioned above does require some value judgments to be made. A judgment must be made about the value to society of the presumption of innocence as opposed to the protection of the community from development with unacceptable impacts on neighbours and the general community, the protection of the environment, and the protection of human health and safety. In assessing whether rights have been trespassed upon within permissible limits it is necessary to consider the objective of the offence and whether the trespass is proportionate to the objective served by the offence provision.

There then follows statements about the place of the building code in combating environmental degradation, followed by the argument that

[t]he ACT Construction Occupations Registrar must be provided with an *adequately deterrent scheme* to ensure the protection of the community and the environment from unlawful building construction or demolition. It is also crucial that the registrar have the ability to act quickly and decisively, particularly in circumstances where delay may result in irreparable damage.

#### *Other lines of justification*

There are other justifications offered that might appear to carry less weight. The Explanatory Statement states (page 11):

Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions.

The Committee considers that considerations of cost and efficiency do not of themselves warrant derogation of fundamental principles of criminal justice stated in the Human Rights Act. This point also applies to the argument that “[t]he necessity to prove intent affects the level of resources needed to investigate and prosecute” (page 11). It is hard to see how this carries any weight, given that this presumably applies to all kinds of prosecutions.

This last comment also applies to the argument (page 11) that strict liability offences “are appropriate where the prosecutor is in a position to readily assess the truth of a matter and that an offence has been committed”.

It is also said (page 11) that strict liability offences

can be dealt with by infringement notice, which is a cheaper and less time consuming alternative to a court prosecution, where laws provide for infringement notices covering the offence.

It is hard to see how this advances a justification for derogating from the Human Rights Act.

Another commonly advanced justification is made at page 11:

A widely publicised instance of that Registrar’s inability to prosecute could seriously erode public confidence in the integrity of the construction occupations licensing scheme embodied in the *Construction (Occupations) Licensing Act 2004* and its operational Acts such as the Building Act. Evidence of intention or recklessness is often difficult to obtain in the absence of admissions or independent evidence. This in turn can reduce the effectiveness of using the prospect of prosecutions as a deterrent to impugned behaviour.

The weakness of this argument is that it applies as much to any offence where there is a fault element – including of course the very serious offences found in the statute book. It amounts to an argument that the task of the prosecution should be made easier by removal of fault elements, and this, standing alone, is not a good argument to derogate from the Human Rights Act.

Finally, it is argued (page 11) that

The provision for strict liability offences is consistent with recently enacted ACT legislation. The pre-existing provisions in the Building Act and the *Construction (Occupations) Licensing Act 2004* provide for strict liability offences. Strict liability offences are also used in other jurisdictions including the Commonwealth.

While the first point here is correct, and deserving of weight as a line of justification, the other two points carry no weight. The Committee has often pointed out that Territory laws that pre-date the operation of the Human Rights Act were passed in a different era of rights awareness and application. Similarly, whatever is the practice in another Australian jurisdiction has little bearing on how the Human Rights Act affects legislative practice in the Territory.

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

#### *Issues for clarification*

First, the Committee notes that no offence is qualified by a “reasonable excuse” defence, and accepts the point in the Explanatory Statement that “there is a high level of uncertainty in the application of [such a] defence” (page 12)<sup>1</sup>. It cannot however follow the further point made that

an explicit ‘reasonable excuse’ defence is unnecessary because the Criminal Code, Part 2.3, (Circumstances where there is no criminal responsibility), now provides defences covering ‘reasonable excuse’ matters. For that reason the Bill does not provide explicit ‘reasonable excuse’ defences.

The Committee understands that the Criminal Code, Part 2.3 does not allow of a “due diligence” line of defence, which in ordinary language might be considered an example of a reasonable excuse. The Committee considers that the Minister might provide further explanation of the point made in the Explanatory Statement.

The second matter concerns the effect of sections 58 and 59 of the *Criminal Code 2002*. While subsection 58(1) states that “a burden of proof that a law imposes on a defendant is an evidential burden only”, this rule is expressly subject to section 59. The latter states:

A burden of proof that a law imposes on the defendant is a legal burden only if the law expressly—

...

(b) requires the defendant to prove the matter; ... .

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<sup>1</sup> The Committee notes however that provision for a defence in these terms is still found in Territory Bills; see for example clause 53 of the Surveyors Bill 2007.



The Committee raises this issue in the light of the statement at page 13 of the Explanatory Statement that:

To facilitate consistency with the HRA, strict liability offences -

impose on the defendant an evidential burden only. An evidential burden means that a defendant need only point to evidence that suggests a reasonable possibility that the matter in question exists. It is lower than a legal burden and is less of a limitation on the presumption of innocence. The prosecution must then disprove the existence of any defence beyond reasonable doubt; . . . .

The provision in a law that an offence is one of strict liability offence only imposes on the defendant an evidential burden if regard is had to the defences in the Criminal Code, Part 2.3, and then to subsection 58(2) of the Code. (This provides: “(2) A defendant who wishes to deny criminal responsibility by relying on a provision of part 2.3 (Circumstances where there is no criminal responsibility) has an evidential burden in relation to the matter”).

In relation to defences to an offence of strict liability that are additional to those in Criminal Code, Part 2.3, the position may be – depending on the wording of the defence – that the defendant carries a legal burden of proof of the matters required to establish the defence. In such cases, the prosecution does not need to disprove any matter beyond reasonable doubt.

In the light of Code subsection 59(b) (see above), some defences – giving their wording - provided for by the provisions of the Bill do appear to impose on a defendant a legal burden of proof of the matters required to establish the defence - see proposed subsections 50B(3) and (4) (clause 1.42) and proposed subsections 64(4) and (5) (clause 1.53).

The Committee considers that the Explanatory Statement should point out this matter in its explanation of these proposed subsections, lest a reader be confused by the general statement concerning strict liability offences recorded above.

#### *Typographical error in the Bill*

Paragraph 50(3)(b) should not be followed by a full stop. Perhaps a semi-colon followed by the word “and” is appropriate.

#### *Explanatory Statement spelling and other errors*

Page 3, second last paragraph – “processes” should be “process”.

Page 5, first dot point – “compliments” should be “complements”.

Page 10 – word omitted

Page 14, third paragraph – “weather” should be “whether”.

Page 39 – the reference mid-page to “50(3)” should be “50B(3)”

<b>DOMESTIC ANIMALS AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend the *Domestic Animals Act 2000* to provide for the lifetime registration of dogs; compulsory microchipping of dogs at point of sale; the introduction of microchipping of all dogs over a three year period; improved regulation and revised penalties for dangerous dogs; tightening of dog seizure and return provisions; cat desexing before age of first breeding but exempting sellers; guidelines for determining animal nuisance; codes of practice for keeping animals; licensing the keeping of multiple cats; and the declaration of dog prohibited areas by disallowable instrument.

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

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

*Strict liability offences*

The proposed amendments would create a number of strict liability offences, and thus there arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

Strict liability offences would be created by proposed subsection 15(6) (clause 9), 74A(3), and 74A(2) (clause 23). The penalties attaching to breach of these provisions are no more than 50 penalty points. In addition to the defences available under the Criminal Code, Part 2.3, additional defences are provided for in relation to subsection 15(6) and 74A(3), although in relation to the latter the defendant will carry a legal burden of proof (see subsection 74A(5)).

The Explanatory Statement makes no mention of the Human Rights Act issues raised by the provision for strict liability offences, nor does it provide any justification for the imposition of strict liability.

On the face of it, these offences might be classified as “regulatory”, and justified on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007.

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

*Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?*

The Committee refers to this term of reference merely to commend the provision for the Minister to issue guidelines to the registrar; see clause 27 of the Bill.

The desirability of there being guidelines is addressed in *Scrutiny Report No 6* of the *6th 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)***  
**Report under section 38 of the *Human Rights Act 2004***

Is it justifiable in the circumstances to permit a code of practice made under proposed subsection 143(1) (clause 34) to apply, adopt or incorporate another document?

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 *Legislation Act 2001*?

The Bill proposes that there be an alternative to the generally applicable provision in section 47 of the *Legislation Act 2001* so far as concerns the public accessibility of applied, adopted or incorporated documents. The scheme of the Bill is explained in the Explanatory Statement, as follows (with some additional comment).

Clause 34 - New Sections 143, 143A and 143B.

This clause inserts the following new provisions allowing for codes of practice to be prepared and for inspection and notification of incorporated documents.

Section 143 – Codes of Practice.

These provisions allow for the Minister to prepare codes of practice relating to the duties of owners, carers and keepers of particular domestic animals if they are kept on land in relation to which a residential lease has been granted. The note gives examples of the kinds of animals for which codes of practice may be prepared. A code of practice is a disallowable instrument which is prepared in consultation with stakeholders before tabling in the Assembly for final approval.

[To this must be added a reference to proposed subsection 143(2), which provides that a code of practice “may apply, adopt or incorporate an instrument, as in force from time to time”.]

Section 143A – Inspection of incorporated documents.

This subsection allows for the inspection free of charge of any incorporated documents in a code of practice at the office of the business unit of the chief executive. The office is currently located at the Department of the Territory and Municipal Services, Macarthur House, 12 Wattle Street, Lyneham 2602 or at the Domestic Animals Shelter, Mugga Lane, Symonston 2609.

Section 143B - Notification of certain incorporated documents.

This subsection deals with the requirement the Chief Executive to prepare a written incorporation document notice that includes certain information in relation to what will be recognise[d] as incorporated documents in a code of practice. Such a notice is a notifiable instrument.

[To this must be added a reference to proposed subsection 143B(5), which provides that “[t]he Legislation Act, section 47 (7) does not apply in relation to incorporated documents”.]

Two kinds of issues arise where a law (here subsection 143(2)) 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 (Committee 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.

The second issue noted above addressed in section 47 of Legislation Act (and see the sanction for non-compliance in section 62). So far as concerns proposed subsection 143(2) of the Act, subsection 47(6) of Legislation Act would, *unless it was displaced*, require that the text of the incorporated document, as it is from time to time, to 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.

But by proposed subsection 143B(5), subsection 47(6) would be displaced, and there thus arises a rights issue. Where this is proposed by a Bill the Committee looks for a justification in the Explanatory Statement.

Proposed section 143A and 143B of the Act provide for a scheme of notification that must in effect be used as an alternative to that in subsection 47(6) of the Legislation Act. Its major elements are described above in the extracts from the Explanatory Statement. In essence, the alternative 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.

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

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

Is restriction (if any) of the privacy interests of person who wishes to keep more than 3 cats on a residential premise justifiable in terms of HRA paragraph 12(a) itself, and/or HRA section 28?

Proposed Division 4.1 of the Act would regulate the keeping of 4 or more cats. The central provision would be proposed section 84A, described in the Explanatory Statement as follows:

Section 84A - Multiple cat licences – requirement to be licensed.

This section creates an offence where a person keeping 4 or more cats on 1 residential premises does so without having a multiple cat licence. This offence is subject to certain exemptions (2)(a) to (e) including an exemption (d) for assistance animals and (e) for a cat kept on land under a lease that allows for an animal care facility. The maximum penalty that may apply is 50 penalty units or 6 months imprisonment. This level and type of penalty is the same as for dogs, see section 18 of the Act.

Paragraph 12(a) of the Human Rights Act provides that

Everyone has the right -

(a) not to have his or her privacy, ... interfered with unlawfully or arbitrarily; ... .

(The issue of whether an interference is “arbitrary” probably overlaps completely with the issue of whether an interference is justifiable under HRA section 28.)

It is arguable that this right embraces a lifestyle choice to keep cats – that is, that the ability to own a cat and make decisions about how it lives is an aspect of a person’s privacy.

If this is accepted, then the issue that arises is whether the degree of regulation proposed by the Bill is an arbitrary interference with that right to privacy, or assuming it is, whether that interference is justifiable under HRA section 28.

The Explanatory Statement does not address this issue, but the Presentation Speech does. It states:

This new provision requiring cat owners who wish to keep more than three cats to apply for a multiple cat licence has been introduced in response to repeated requests to do so from members of the public for several years. It is strongly supported by the written submissions received on the Exposure Draft Bill with 47% in favour, and 11% against.

This licensing requirement does not limit the total number of cats which can be kept, it simply requires a cat owner to apply for a licence to keep more than three cats. This brings the cat keeping laws in alignment with a similar provision that already applies to dogs, so that dog and cat owners are being treated fairly and equitably.

Requiring multiple cat owners to be licensed will help ensure cats are kept under hygienic conditions which do not compromise the animals’ welfare and which minimises the number of nuisance complaints from neighbours.

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

<b>JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2007</b>
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This is a Bill for an Act to amend a number of laws administered by the ACT Department of Justice and Community Safety.

*Explanatory Statement spelling and other errors*

Page 3 - in the 5<sup>th</sup> paragraph, the explanation of proposed subsection 97(3) does not pick up the first limb of the way the presumption can be rebutted.

Page 6 – in the 5<sup>th</sup> paragraph, the word is “principal” (correctly used once) and not “principle” (incorrectly used twice).

**PLANNING AND DEVELOPMENT (CONSEQUENTIAL AMENDMENTS) BILL 2007**

This is a Bill for an Act to amend various Acts and Regulations consequent on the *Planning and Development Act 2006*, and for other purposes.

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

Is provision for the planning and land authority to require the commissioner for revenue to supply to it either a person’s name, or a person’s home address or other contact address, justifiable in terms of HRA paragraph 12(a) itself, and/or HRA section 28?

Paragraph 12(a) and section 28 are set out above.

Proposed section 388A of the *Planning and Development Act 2006* has a number of elements:

- if the planning and land authority may or must notify, or intends to take action under this Act in relation to, an uncontactable person or a person the authority reasonably believes is an uncontactable person;
- the authority may, in writing, ask the commissioner for revenue for either of the following: (a) the person’s name; or (b) the person’s home address or other contact address; in which case
- the commissioner must disclose the information required in a request.

A person is an *uncontactable person* if the authority does not have, or only has incomplete or outdated information about, either the person’s name, or a contact address for the person.

The Explanatory Statement (at page 3) identifies this issue and advances a justification for this scheme.

This section contains constraints on the nature of the information collected and the purposes for which it may be used. Only a person’s name and address may be disclosed; no financial or other personal information can be given. The information can only be used for the purposes of exercising a function under the *Planning and Development Act 2007*. The benefits to the territory community through the effective operation and enforcement of *Planning and Development Act 2007* outweigh any minimal and reasonable trespass on an individual’s privacy and is therefore justifiable under section 28 of the HRA.

The Planning and Land Authority is also bound by the Information Privacy Principles (IPP) contained in the *Privacy Act 1998* (Cwth). The IPP regulate the collection, use and disclosure of personal information. New section 388A is drafted to ensure compliance with these requirements.

There is further explanation at page 14:

A request can only be made if the Authority does not have the person's name or address, or is uncertain that its records about the person are current or accurate. This information would be requested in order to fulfil a statutory function under the *Planning and Development Act 2007*. This may include notifying lessees and/or occupiers of neighbouring blocks of a development application in the merit track, or in the course of taking compliance action under chapter 11 (Controlled activities) or chapter 12 (Enforcement) of the *Planning and Development Act 2007*, such as the issuing of controlled activity orders or rectification notices. This provision is necessary as the information held by the Commissioner may be more accurate and current than the information available to the Authority.

This power for the Commissioner to disclose this information is found in the *Taxation Administration Act 1999*, section 97(c), which allows disclosure 'in accordance with a requirement imposed under an Act'. New section 388A allows disclosure of the information consistent with the IPP (see especially IPP 11(1)(d)). The human rights implications of this amendment are discussed above.

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

### SURVEYORS BILL 2007

This is a Bill for an Act to regulate the practice of land surveying. It would repeal the *Surveyors Act 2001*, and replace its scheme of regulation with one that regulates surveying activities only insofar as they are related to the making or reestablishment of land boundaries; establishes the position of chief surveyor; confers on the chief surveyor powers to investigate complaints and take disciplinary action against surveyors; and creates a new Survey Advisory Committee to advise the chief surveyor on surveying standards and practices.

***Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?***

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

In relation to clause 8, the critical rights issue may be posed in 2 alternative ways:

Is there an insufficient definition of the power of chief surveyor under clause 8 of the Bill to register, or not register, a person as a surveyor?

Is amendment of clause 8 in a way that would spell out the considerations relevant to the exercise of this discretionary power necessary to achieve compliance with the *Human Rights Act 2004*?

Subclauses 8(1) and 8(2) of the Bill provide

- (1) On application by a person for registration as a surveyor, the chief surveyor must—
  - (a) register the person; or
  - (b) refuse to register the person.
- (2) However, the chief surveyor must refuse to register the person if the person is not eligible for registration.

Subclause 7(1) provides

- (1) A person is eligible to be registered as a surveyor if—
  - (a) the person has previously been registered in the ACT; and
  - (b) the chief surveyor is satisfied that the person has a working knowledge of current surveying practices and any practice directions; and
  - (c) the person’s registration was not cancelled other than in accordance with a request by the surveyor.

(Subclause 7(1)(c) is qualified by subclause 7(2)).

The Committee has long adopted the standpoint that administrative power should be confined in its scope so far as practicable. Paragraph 2(c)(ii) of the Committee’s terms of reference require it to report on whether a clause of a bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative power. The Committee’s report on the Legal Profession Bill 2006 in *Scrutiny Report No 26* of the *6th Assembly* is illustrative. In *Scrutiny Report No 32* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).

The executive has at times accepted that discretionary powers should be limited to the greatest extent possible, as is implicit in the amendments to the *Public Health Act 1997* in the Health Legislation Amendment Bill 2006 (No 2) – see *Scrutiny Report No 34* of the *6th Assembly*.

A discretionary power expressed in very wide terms - such as clause 8 – is on its face “insufficiently defined”. A court would no doubt read down such a power so that its lawful exercise would require that the decision-maker have regard only to those matters the court, by reference to its view of the object of the Act, thinks were intended by the Act to be relevant to the exercise of the power. In this case, the court might well read in the eligibility criteria in clause 7 as perhaps the only considerations relevant to the exercise of the power. This is far from certain, and in any event the Committee’s term of reference reflect a policy that a law should provide a sufficient definition of relevant (and/or irrelevant) matters.

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

Should the power of the chief surveyor in subclause 59(1) to exempt a surveyor from a stated requirement of a practice direction if satisfied in all the circumstances that it is not reasonably practicable for the surveyor to comply with the direction be further qualified by a requirement that the chief surveyor have “reasonable grounds” for her or his state of satisfaction?

The amendments to the *Public Health Act 1997* in the Health Legislation Amendment Bill 2006 (No 2) referred to above were apparently based on legal advice to the relevant Minister that unless a power vested in a Minister was qualified by provision that the Minister have “reasonable grounds” for taking action the law would not be HRA compatible.



This same line of argument might apply in relation to a provision such as subclause 59(1), which would empower the chief surveyor to exempt a surveyor from a stated requirement of a practice direction if satisfied in all the circumstances that it is not reasonably practicable for the surveyor to comply with the direction. This power could be further limited by a requirement that the chief surveyor have “reasonable grounds” for her or his state of satisfaction.

The Committee notes that another kind of power vested in the chief surveyor is limited in this way – see subclause 39(3).

This point might of course apply to several other kinds of administrative power that would be created by the Bill. The Committee has not attempted to identify them.

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

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

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

#### ***Strict liability offences***

The proposed amendments would create a number of strict liability offences, and thus there arises under the *Human Rights Act 2004* (HRA) an issue as to whether, in each case, the provision is a justifiable derogation of the right to liberty and security (HRA subsection 18(1) and/or presumption of innocence (HRA subsection 22(1)).

Strict liability offences would be created by subclauses 15(3), 43(4), 50(2) and 54(3). The penalties attaching to breach of these provisions are no more than 50 penalty points. In addition to the defences available under the Criminal Code, Part 2.3, an additional defences is provided for in relation to subclause 54(3), although the defendant will carry a legal burden of proof to establish this defence (see subclause 54(4)).

The Explanatory Statement makes no mention of the Human Rights Act issues raised by the provision for strict liability offences, nor does it provide any justification for the imposition of strict liability.

On the face of it, these offences might be classified as “regulatory”, and justified on the same general basis the Committee identified as persuasive in relation to the Building Legislation Amendment Bill 2007.

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

### **SUBORDINATE LEGISLATION**

#### **Disallowable Instruments—No comment**

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

**Disallowable Instrument DI2007-106 being the Public Place Names (Franklin) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of new streets in the Division of Franklin.**

**Disallowable Instrument DI2007-108 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2007 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles or drivers participating in a special stage of specified rallies.**

**Disallowable Instrument DI2007-109 being the Public Place Names (Kingston) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends Commonwealth of Australia Gazette No. S266 by revoking the name of a specified place in the Division of Kingston.**

**Disallowable Instrument DI2007-110 being the Public Place Names (Lyons) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* revokes DI2003-304 which determined the names of three roads in the Division of Lyons.**

#### Disallowable Instruments—Comment

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

##### *Minor drafting issue*

**Disallowable Instrument DI2007-105 being the Public Place Names (Forde) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of new streets in the Division of Forde.**

The Committee notes that, as is customary with Explanatory Statements in relation to instruments that determine place names, the Explanatory Statement for this instrument states:

The number of women and men after whom divisions or public places have been named in the last 10 years, and whether the names of women are well-represented, have been considered as required by the *Public Place Names Act 1989*.

The Explanatory Statement goes on to state:

This instrument commemorates nine women.

The Committee notes that, in fact, the instrument commemorates nine women and one man.

##### *Is there a power to waive?*

**Disallowable Instrument DI2007-107 being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2007 (No. 1) made under subsection 84(1) of the *Legal Profession Act 2006* determines fees payable for the purposes of the Act.**

The Committee notes that this instrument determines fees, under section 84 of the *Legal Profession Act 2006*, in relation to the grant or renewal of practising certificates for barristers and solicitors. The Explanatory Memorandum states:

Section 84(1)(a) empowers the law society council to determine fees in relation to applications for the grant or renewal of barrister practising certificates.

While this statement is not strictly incorrect, it would be more correct to state that paragraph 84(1)(a) also empowers the law society to determine fees for the grant and renewal of practising certificates for solicitors and for government and in-house lawyers (especially given that the instrument, in fact, determines fees in relation to practising certificates for those categories of persons).

After referring to the setting of various fees, the Explanatory Statement goes on to state:

The Law Society may, on application by the person applying for a practising certificate, waive all or part of a fee determined by clause 3 of this instrument.

This proposition is reflected in a Note to clause 8 of the instrument itself, which states:

*Note: The Law Society of the Australian Capital Territory may, on application by a person, waive all or part of fee for an application for the grant or renewal of a practicing certificate, for a category of legal practitioners decided in writing by the Law Society Council.*

The Committee is curious as to the authority for the proposition reflected in the Note. The Committee can identify no provision of the Legal Profession Act that gives the Law Society an express power to waive an application fee.

In making this observation, the Committee does not consider that subsection 576(8) of the Legal Profession Act assists. It provides:

- (8) A person who holds a practising certificate is entitled, on application to the law society, to be admitted to membership of the society without paying a fee for admission.

Subsection 576(8) does not appear to apply to the waiver of fees in relation to practising certificates, only fees for membership of the Law Society.

In this context, the Committee also notes that section 56 of the *Legislation Act 2001* contains some over-arching provisions in relation to the determination of fees by disallowable instrument. It provides (in part):

**56 Determination of fees by disallowable instrument**

- (1) This section applies if an Act (the *authorising law*) authorises fees to be determined for an Act or statutory instrument (the *relevant law*).
- (2) The authorising law authorises a fee to be determined in relation to any matter under or related to the relevant law.
- (3) To remove any doubt, a fee may be determined for a provision of the relevant law even though the provision does not mention a fee.  
.....
- (4) A fee may be determined—
  - (a) by stating the fee; or
  - (b) by setting a rate, or providing a formula or other method, by which the fee is to be worked out; or
  - (c) by a combination of a stated fee and a rate, formula or other method.  
.....
- (5) The determination—
  - (a) must provide by whom the fee is payable; and
  - (b) must provide to whom the fee is to be paid; and
  - (c) may make provision about the circumstances in which the fee is payable; and
  - (d) may make provision about exempting a person from payment of the fee; and

- (e) may make provision about when the fee is payable and how it is to be paid (for example, as a lump sum or by instalments); and
- (f) may mention the service for which the fee is payable; and
- (g) may make provision about waiving, postponing or refunding the fee (completely or partly); and
- (h) may make provision about anything else relating to the fee.

.....

- (6) This section is a determinative provision.

*Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

The Committee can identify no basis for the displacement of section 56 of the Legislation Act. That being so, the Committee notes that there is a power in paragraph 56(5)(d) of the Legislation Act to “make provision about exempting a person from payment of [a] fee”. This instrument does not “make provision” for the exempting of persons from a fee. Rather, it states that there is the power to do so. It makes that statement in a Note. Helpfully, the instrument contains the following explanation of the effect of a Note:

Explanatory notes are included in italic text. Explanatory notes in italic text do not form part of the determination. (For example, the following nine words would not form part of the determination: [*Explanatory note: general explanatory notes are in italic text*]).

The Committee would appreciate the Minister’s clarification as to the source of the power to waive fees for practising certificates.

*Is this appointment valid?*

**Disallowable Instrument DI2007-111 being the Adoption Review Committee Appointment 2007 (No. 1) made under Part 3, subsection 17(1) of the *Adoption Act 1993* appoints specified persons as members of the Adoption Review Committee.**

This instrument appoints two specified persons as members of the Adoption Review Committee. That Committee is established under section 17 of the *Adoption Act 1993*, which provides:

**17 Review of chief executive’s decision**

- (1) Where—
  - (a) the chief executive refuses to include the names of applicants on the register; and
  - (b) the applicants have, in writing, requested that he or she reconsider that decision;

the Minister shall convene a committee, consisting of not more than 3 persons appointed by him or her, to review the decision.
- (2) A person is not eligible to be appointed as a member of a review committee unless the Minister is satisfied that—
  - (a) the person is not an officer of the administrative unit responsible for providing services for children and young people under the *Children and Young People Act 1999*; and
  - (b) the person has appropriate qualifications or experience.

- (3) Having reviewed a decision, a committee may recommend to the chief executive that he or she confirm or vary the decision.
- (4) On receiving a recommendation from a committee, the chief executive shall reconsider the decision and may confirm or vary it.
- (5) Where the chief executive confirms or varies a decision he or she shall cause notice in writing of the decision to be given to the applicants.

The Committee notes that, while it is otherwise thorough and informative, the Explanatory Statement to this instrument contains no indication that the requirements of subsection 17(2) above have been met. While this might be assumed, given that the Minister has appointed the persons in question and the appointments have been considered by the Standing Committee on Education, Training and Young People, the Committee considers that it would assist all those interested in ensuring that appointments are properly made if the Explanatory Statement to an instrument of appointment contained a statement to the effect that any mandatory conditions for an appointment have been met.

### Subordinate Laws—Comment

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

*“Henry VIII” clause - Delayed commencement*

**Subordinate Law SL2007-10 being the Legal Profession Amendment Regulation 2007 (No. 2) made under the *Legal Profession Act 2006* changes the date of commencement of Parts 3.1 and 3.2 to allow the ACT legal profession adequate opportunity to implement the new trust account management and costs disclosure requirements.**

The Committee notes that the Explanatory Statement to this subordinate law states:

The Legal Profession Regulation 2006 commenced on 1 July 2006. Numerous provisions of the model Legal Profession Regulations were not implemented at that time, either because certain policy matters had not been settled or because the commencement of certain relevant parts of the Act was postponed to a later date.

The provisions relating to that postponement are found in Chapter 10 of the Act. Within that Chapter, section 605 deals with the operation of Part 3.1 of the Act, which relates to trust money and controlled money. Sections 606 to 608 deal with the operation of Part 3.2 of the Act, which relates to costs and, in particular, to costs disclosure.

This amending regulation changes the date of commencement of Parts 3.1 and 3.2 the Act from 1 July 2007 to 1 October 2007, to allow the ACT legal profession adequate opportunity to effectively implement the new trust account management and costs disclosure requirements in the Act.

The changes to commencement dates effectively postpone the obligation on legal practitioners to meet more stringent requirements in relation to the provision of advice about costing of legal matters and the maintenance of solicitors’ trust accounts. Because the delay will allow the legal profession adequate time to make practitioners aware of the processes required to meet that obligation, it is in the interests of those practitioners’ clients that the amendment is made.

The amending regulation also makes the following changes:

- Sections 4 and 5 correct an error in section 10 of the Legal Profession Regulation.
- Section 6 ensures that the Australian Government Solicitor is a government

- agency for the purposes of the Act.
- Section 7 includes provisions to ensure that ‘old’ complaints about barristers may be dealt with under the repealed barrister rules, and to ensure that legal practice by government lawyers may be recognised as supervised legal practice, for the purposes of meeting the prescribed criteria for the grant of an unrestricted practising certificate.

The Committee notes that this subordinate law has a similar effect to the *Legal Profession Amendment Regulation 2006* and the *Legal Profession Amendment Regulation 2007 (No 1)*, which the Committee commented on in its *Scrutiny Report No 37* and *Scrutiny Report No 40* of the *Sixth Assembly*, respectively. As with the earlier subordinate laws, this subordinate law relies on a "Henry VIII" clause, in that the effect of the subordinate law is to amend a primary law, ie the Legal Profession Act. The clause in question is section 618 of the Legal Profession Act, which provides:

**618 Transitional regulations**

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

As in the earlier cases, the Committee notes that, while law-making by "Henry VIII" clauses is generally to be disapproved of, this particular exercise has been expressly authorised by the Legislative Assembly.

As in the earlier cases, however, a further issue is the fact that the effect of this subordinate law is to delay the commencement of various provisions, in circumstances where the provisions' commencement has previously been explicitly provided for in the primary legislation.

The Committee notes, however, that the commencement of Parts 3.1 and 3.2 of the Legal Profession Act have already been delayed once, by the *Legal Profession Amendment Regulation 2007 (No 1)*. The same reason is given for the delay in this case as was given in relation to the delay in the earlier case - ie to allow the ACT legal profession adequate opportunity to implement the new requirements.

The Committee previously indicated that it hoped that no further delays will be required. Despite this, a further delay has been required. The Committee would appreciate the Minister's further advice as to the reasons for this further delay and, in particular, advice as to why the initial delay in commencement was not sufficient.

*“Henry VIII” clause*

**Subordinate Law SL2007-11 being the Powers of Attorney Regulation 2007 (No. 2) made under the Powers of Attorney Act 2006 determines that a power of attorney made on or after the commencement day and before 1 December 2007 is not taken to be invalid if it complied with the previous Act when made.**

The Committee notes that this subordinate law (which was notified on 24 May 2007) is made under subsection 156(2) of the *Powers of Attorney Act 2006*, which provides:

## 156 Transitional regulations

- .....
- (2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.

The Explanatory Statement to the subordinate law states:

The *Powers of Attorney Act 2006* (the Act) is to commence operation on 30 May 2007. The forms of general and enduring powers of attorney under the Act (new forms) are to be approved by the Minister for use from 30 May 2007. It is considered that people would continue to use the forms under the *Powers of Attorney Act 1956* (Previous Act) even after 30 May 2007 to make powers of attorney, inadvertently or because they are not aware of the availability of the new forms. This is the case, in particular, where the current forms will still be available to the general public from, for example, news agencies.

The *Powers of Attorney Regulation 2007 (No 2)* (the Regulation) provides that a power of attorney made on or after 30 May 2007 and before 1 December 2007 using a form under the Previous Act to be not invalid only because it does not comply with the requirements under the Act about the making of powers of attorney. It also provides that such a power of attorney operates only to the extent that it is not otherwise inconsistent with the Act.

The Committee notes that, on the basis of the explanation set out above, this subordinate law appears to be an appropriate exercise of the power provided by subsection 156(2) of the Powers of Attorney Act. The Committee also notes, however, that the power was recently exercised in relation to the *Powers of Attorney Regulation 2007* (SL2007-8 notified on 3 May 2007). In addition, however, the Committee notes that the power has subsequently been exercised in relation to the *Powers of Attorney Amendment Regulation 2007 (No. 1)* (SL2007-12 – notified on 29 May 2007). The latter subordinate law (which will be dealt with in the Committee's next Report) actually *amends* this subordinate law (ie SL2007-11).

The Committee would appreciate the Minister's advice as to why it has been necessary to exercise the power given by subsection 156(2) of the Powers of Attorney Act three times in just under four weeks.

## REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for the Environment, Water and Climate Change, dated 4 June 2007, in relation to comments made in Scrutiny Report 41 concerning the Water Resources Bill 2007.
- The Minister for Health, dated 6 June 2007, in relation to comments made in Scrutiny Report 40 concerning Disallowable Instrument DI2007-62, being the Public Health (Drinking Water) Code of Practice 2007 (No. 1).

- The Minister for Industrial Relations, dated 7 June 2007, in relation to comments made in Scrutiny Report 42 concerning the Long Service Leave (Building and Construction and Contract Cleaning Industries) Legislation Amendment Bill 2007.
- The Attorney General, dated 25 June 2007, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2007-68, being the Electoral Commission (Chairperson and Member) Appointment 2007 (No. 1).
- The Attorney General, dated 25 June 2007, in relation to comments made in Scrutiny Report 42 concerning Disallowable Instrument DI2007-99, being the Liquor Licensing Board Appointment 2007.
- The Attorney General, dated 25 June 2007, in relation to comments made in Scrutiny Report 42 concerning Subordinate Law SL2007-7, being the Criminal Code Amendment Regulation 2007 (No. 1).
- The Minister for Planning, dated 2 July 2007, in relation to comments made in Scrutiny Report 38 concerning:
  - the Land (Planning and Environment) Legislation Amendment Bill 2007;
  - Disallowable Instrument DI2007-27, being the Land (Planning and Environment) Criteria for the Direct Grant of a Crown Lease for the National Zoo and Aquarium Determination 2007;
  - Disallowable Instrument DI2007-28, being the Public Place Names (Belconnen) Determination 2007 (No. 1); and
  - Subordinate Law SL2006-53, being the Gas Safety Amendment Regulation 2006 (No. 1).
- The Attorney General, dated 16 July 2007, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instruments:
  - DI2007-93, being the University of Canberra (Student Conduct) Amendment Statute 2007;
  - DI2007-94, being the University of Canberra Election of Staff Members of Council Statute 2007; and
  - DI2007-95, being the University of Canberra (Courses and Awards) Amendment Statute 2007.

The Committee wishes to thank the Minister for the Environment, Water and Climate Change, the Minister for Health, the Minister for Industrial Relations, the Attorney-General and the Minister for Planning for their helpful responses.

Zed Seselja, MLA  
Chair

August 2007



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

**REPORTS—2004-2005–2006–2007**

**OUTSTANDING RESPONSES**

**Bills/Subordinate Legislation**

**Report 1, dated 9 December 2004**

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

**Report 4, dated 7 March 2005**

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

**Report 6, dated 4 April 2005**

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

**Report 10, dated 2 May 2005**

Crimes Amendment Bill 2005 (**PMB**)

**Report 12, dated 27 June 2005**

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

**Report 14, dated 15 August 2005**

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

## **Bills/Subordinate Legislation**

### **Report 15, dated 22 August 2005**

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)  
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)  
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)  
 Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)  
 Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)  
 Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)  
 Hotel School (Repeal) Bill 2005  
 Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

### **Report 16, dated 19 September**

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

### **Report 18, dated 14 November 2005**

Guardianship and Management of Property Amendment Bill 2005 (PMB)

### **Report 19, dated 21 November 2005**

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

### **Report 25, dated 8 May 2006**

Registration of Relationships Bill 2006 (PMB)  
 Terrorism (Preventative Detention) Bill 2006 (PMB)

### **Report 28, dated 7 August 2006**

Public Interest Disclosure Bill 2006

### **Report 30, dated 21 August 2006**

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

## **Bills/Subordinate Legislation**

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)  
 Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination  
 2006 (No. 1)  
 Education (School Closures Moratorium) Amendment Bill 2006 (**PMB**)  
 Education Amendment Bill 2006 (No. 3)

### **Report 34, dated 13 November 2006**

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

### **Report 36, dated 11 December 2006**

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

### **Report 37, dated 12 February 2007**

Civil Partnerships Bill 2006

### **Report 38, dated 26 February 2007**

Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006  
 (No. 1)

### **Report 39, dated 12 March 2006**

Disallowable Instrument DI2007-41 - Health Professionals (Fees) Determination 2007  
 (No. 10)

### **Report 41, dated 28 May 2007**

Disallowable Instrument DI2007-80 - Tobacco (Compliance Testing Procedures)  
 Approval 2007 (No. 1)  
 Disallowable Instrument DI2007-81 - Road Transport (Driver Licensing) Driving  
 Instruction Code of Practice 2007 (No. 1)  
 Disallowable Instrument DI2007-83 - Housing Assistance (Public Rental Housing  
 Assistance Program) Review Committee Appointment 2007 (No. 1)  
 Disallowable Instrument DI2007-85 - Nature Conservation (Threatened Ecological  
 Communities and Species) Action Plan 2007 (No. 2)  
 Disallowable Instrument DI2007-90 - Cultural Facilities Corporation Appointment  
 2007 (No. 1)

### **Report 42, dated 4 June 2007**

Disallowable Instrument DI2007-103 - Health Professionals (Medical Board)  
 Appointment 2007 (No. 1)



**Jon Stanhope** MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No. 41 dated 28 May 2007 regarding  
*Water Resources Bill 2007*.

The committees report relates to four main points. These are:

1. A deficient explanatory statement on the application of strict liability to offences;
2. A deficient explanatory statement in relation to clause 105 – self-incrimination etc;
3. Concerns relating to wide ranging powers of the Environment Protection Authority (EPA) in relation to clause 60(d); and
4. Concerns relating to the provision for the EPA to enter land in relation to the contravention of a notice or direction originally issued by the EPA.

To incorporate the Committee's recommendation, a supplementary explanatory statement has been prepared and Government amendments are proposed in relation to clause 60(d) and Part 9 of the Bill and scheduled for debate in the Legislative Assembly on Tuesday, 5 June 2007.

Yours sincerely

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

4 JUN 2007

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## Katy Gallagher MLA

DEPUTY CHIEF MINISTER

MINISTER FOR HEALTH    MINISTER FOR CHILDREN AND YOUTH  
MINISTER FOR DISABILITY AND COMMUNITY SERVICES    MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
Legislative Assembly for the Australian Capital Territory  
GPO Box 1020  
CANBERRA ACT 2601

Dear Mr <sup>Zed</sup>Seselja

I thank the committee for its comment on the Public Health (Drinking Water) Code of Practice 2007 (No. 1) in Report No. 40 of 30 April 2007. The Committee commented on a minor typographical error in the explanatory statement to the disallowable instrument about the inadequate reference to the Public Health Act 1997.

The error is regretted, though as the Committee notes it is minor.

I have asked ACT Health to endeavour to avoid future typographical errors in explanatory statements.

Yours sincerely

*Katy Gallagher*

Katy Gallagher MLA  
Minister for Health

6/6/07

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**Andrew Barr** MLA

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

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MEMBER FOR MOLONGLO

Mr Zed Seselja  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mr <sup>Zed</sup>Seselja,

The Standing Committee on Legal Affairs in Scrutiny Report 42 of 4 June 2007 commented on the strict liability offences contained in the Long Service Leave (Building and Construction and Contract Cleaning Industries) Legislation Amendment Bill 2007.

Specifically, the Report examined whether the proposed amendments concerning the strict liability offences derogate from the statement of rights in subsections 18(1) and 22(1) of the *Human Rights Act 2004* (HRA) and, subsequently, whether the derogation is justifiable under section 28 of the HRA.

I have also observed that the Report states “the Committee notes in appreciation that the Explanatory Statement does provide a justification for the imposition of strict liability.”

I thank the Committee for its deliberations and support of this legislation.

Yours sincerely

Andrew Barr MLA  
Minister for Industrial Relations  
7 June 2007

ACT LEGISLATIVE ASSEMBLY

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**Simon Corbell** MLA

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

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MEMBER FOR MOLONGLO

Mr Zed Seselja MLA  
Chairperson  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
CANBERRA ACT 2601

Dear Mr Seselja

I am writing in response to Report Number 41 of the Standing Committee on Legal Affairs, tabled in the Legislative Assembly on 28 May 2007.

I have noted the Committee's comments on *Disallowable Instrument DI2007-68: Electoral Commission (Chairperson and Member) Appointment 2007 (No. 1)*, at page 13 of the Report. I can assure the members that the appointments are valid, and that proper checks in relation to eligibility under section 12A and 12B of the *Electoral Act 1992* had been undertaken by my Department.

I also wish to assure the Committee that, in future, care will be taken when preparing such instruments to ensure that an explanatory statement, which includes relevant information relating to appointment eligibility requirements, is provided.

Yours sincerely

Simon Corbell MLA  
Attorney General

25.5.07

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Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
GPO Box 1020  
CANBERRA ACT 2601

Dear Mr Seselja

Thank you for your Scrutiny Report No.42 of 4 June 2007. I offer the following response in relation to the matter raised by your Committee in regard to disallowable instrument DI2007-99 being the Liquor Licensing Board Appointment 2007.

In regard to the Committee's comment on this instrument I can advise that the instrument is disallowable, as the appointee is not a public servant.

I trust this information addresses the Committee's concern about this instrument.

Yours sincerely

Simon Corbell MLA  
Attorney General

25-6-07

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Standing Committee on Legal Affairs  
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Dear Mr Seselja

I refer to the Committee's report No. 42 of 4 June 2007 in relation to subordinate law SL2007-7, amendment to the Criminal Code Regulation 2005 to change the default application date for the Criminal Code.

I thank the Committee for their comments.

Yours sincerely

Simon Corbell MLA  
Attorney General

25.6.07

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## Andrew Barr MLA

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

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MEMBER FOR MOLONGLO

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mr ~~Seselja~~ *Zed*

Thank you for Scrutiny Report No 38 that contains comments on the Land (Planning and Environment) Legislation Amendment Bill, and subordinate legislation made under the *Public Place Names Act 1989* (DI2007-28) and the *Land (Planning and Environment) Act 1991* (DI2007-27). I will respond to each of the Committee's comments separately:

*Land (Planning and Environment) Legislation Amendment Bill 2007*

The report raises a number of matters in relation to the Land (Planning and Environment) Legislation Amendment Bill.

***Is there a right not to be affected adversely by a retrospective law, and does this Bill unduly trespass on this right?***

As noted in the Scrutiny of Bills Committee report, the relevant principle is that in interpreting legislation a court starts with the presumption that the legislature does not intend to interfere with rights that have accrued at the time the legislation is enacted. This is a principle of statutory interpretation. As such it does not mean that the legislature cannot make such laws, only that if it wants to do so it should do so explicitly. In this case, the intention to achieve retrospective operation is explicit and clear.

The Government accepts that retrospective laws of this nature should only be made where there are compelling reasons for doing so. This matter is such a case. Firstly, the laws are not retrospective in any arbitrary or capricious sense, they simply restore the legal position that was intended by the Government and understood to be the case until the relevant Supreme Court decision. Secondly, this restoration is essential to achieve the objectives behind the original introduction of the regulations and to restore continuity in the regulatory environment. This continuity is necessary for investor confidence in the Territory.

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It is clear that the legislature has powers to retrospectively interfere with accrued rights and that the courts recognise this power. There is no automatic conclusion that a person has a right not to be adversely affected by a retrospective law. No such right exists. The Bill does not unduly trespass on the general principle that a legislature should be taken not to intend to interfere with accrued rights. The intention to do so however arises because of a court decision that has an effect that was wholly unintended by the making of regulation 10A by the *Land (Planning and Environment) Amendment Regulation 2006 (No 2)*.

The making of that regulation, which was not opposed in the Assembly by the Opposition, was intended to remove the right to appeal against decisions approving development in the Civic centre area, town centre areas and industrial areas. The regulation was made before there was any development approval or any appeal that resulted in the court decision. As the court decision showed, the amendment did not achieve its intended effect and this amendment seeks only to maintain that position. This intended effect is relevant to each of the other issues mentioned below.

***Are the amendments inconsistent with paragraph 25(4)(c) of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) (PALM Act)?***

This paragraph of the Commonwealth PALM Act was taken into consideration in drafting both the original Act and the amending Bill. Both are not inconsistent with the Commonwealth PALM Act.

***If the Bill passes, would the Act amount to an exercise of legislative power that is an interference with or infringement of judicial power?***

This amendment is to rectify the current legislation to reflect the Government's policy in relation to third party appeals against decisions to approve developments in the Civic Centre area, town centre areas and industrial areas. It is not directed towards a specific person or persons.

The amendment has been undertaken at the first opportunity that was available after the deficiency of the current legislation became clear as a result of a court decision. Quite to the contrary, the amendments were undertaken in response to a judicial decision so that the law could be put right as it was originally intended.

***Does the scheme of the Bill amount to an "acquisition of property otherwise than on just terms" contrary to paragraph 23(1)(a) of the Australian Capital Territory (Self-Government) Act 1988 (SG Act)?***

This section of the SG Act was taken into consideration and the Bill is not contrary to section 23(1)(a) of that Act.

***Does the scheme of the Bill derogate from the right stated in HRA subsection 21(1), and, if so, is the derogation justifiable under HRA section 28?***

It is noted that the Scrutiny of Bills Committee report agrees with the comment in the Explanatory Statement that "opportunities for input into planning and development applications and the existence of a right to judicial review ... satisfy the requirement of the right to a fair trial". It is also noted that the Committee accepts the Explanatory Statement comment that that case law on human rights legislation suggests that "any adverse impacts of a development authorised through a planning decision must be

quite severe to constitute unlawful and arbitrary interference with a person's right to privacy."

The Scrutiny of Bills Committee report concludes that there is no derogation from the rights under subsection 21(1) HRA.

Disallowable Instrument – DI2007-27

The reference to Block 1496 Belconnen relates the Crown lease over the existing Zoo and Aquarium complex.

The reference to Block 1496 was included to ensure that the grant of the second Crown lease as defined in Disallowable Instrument (DI2007-27) can only be made to the lessee of Block 1496 Belconnen. This takes into account the possibility of the current lessee transferring the Crown lease/s to another entity before the grant of the second Crown lease over the remainder of Block 1502 Belconnen.

Disallowable Instrument – DI2007-28

The typographical error is noted. The correct spelling is *Ibbott*, which is the street name. The incorrect spelling in the 'Significance' column does not affect the validity of the Disallowable Instrument.


Subordinate Law – SL2006-53

The Committee's question, which relates specifically to section 18B(d) of the Regulation, is noted. For the purposes of section 20(1) of the Act, section 18B(d) recognises an approved appliance as being a type A appliance that is listed in the SAI Global On-Line Certification Register as currently certified as an approved appliance.

In its report the Committee questions whether the on-line Register will clearly indicate that a particular version of the Register is the applicable one for the purposes of paragraph (d), in the same way that the ACT Legislation Register (for example) indicates the date and effect of particular versions of laws. I can advise the Register does not display versions of the Register that were in effect at a given point in time however, information about the dates that an individual certification commenced and expired are available on the Register. It is therefore possible to ascertain whether a product was certified at a given point in time.

I would like to thank members of the Committee for their thorough review of the legislation and for raising these matters with me.

Yours sincerely

  
Andrew Barr MLA  
Minister for Planning  
02 JUL 2007




## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA  
Chair  
Standing Committee on Legal Affairs  
(performing the duties of a Scrutiny of Bills  
and Subordinate Legislation Committee)  
ACT Legislative Assembly  
GPO Box 1020  
CANBERRA ACT 2601

Dear Mr  Seselja

Thank you for the comments raised by the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) in its Report No 41 of 28 May 2007, about entries on the ACT legislation register (the legislation register) in relation to three disallowable instruments made under the *University of Canberra Act 1989*. I offer the following response.

Disallowable Instrument DI2007-93, the University of Canberra (Student Conduct) Amendment Statute 2007, amends the *Student Conduct Statute 1992* (the principal statute). The committee has noted that the principal statute appears on the legislation register as the *University of Canberra Student Conduct Statute 1992* and asks if this title is correct.

I am advised that the prefix 'University of Canberra' is given to all University of Canberra statutes on the legislation register. This is to ensure that University of Canberra statutes can be found readily as disallowable instruments under their 'parent' Act. Under the *Legislation Act 2001*, section 19 (5) the parliamentary counsel may enter additional material in the register in any way the parliamentary counsel considers is likely to be helpful to register users. The prefix is added to the register only to make it easier for users to find the statutes and therefore improve access to the law. The statutes themselves retain the names given by their citation provisions.

In relation to Disallowable Instrument DI2007-94, the University of Canberra Election of Staff Members of Council Amendment Statute 2007, the committee noted that brackets were included around the words 'Election of Staff Members of Council' in the legislation register entry for this instrument. However, brackets were not used in the citation in section 1 of the instrument. This was an oversight and the brackets have been removed from the title on the legislation register.

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In relation to Disallowable Instrument DI2007-95, the University of Canberra (Courses and Awards) Amendment Statute 2007, the committee noted that the *Courses and Awards Statute 1995* that is amended by the instrument does not appear on the legislation register. The committee also pointed out that there was no link on the legislation register to the University of Canberra Secretariat Website where the *Courses and Awards Statute 1995* can be found. Further, it was also noted that both the statute and the instrument did not appear in the list of disallowable instruments made under the *University of Canberra Act 1989* on the legislation register.

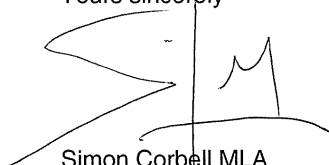
I am advised that the *University of Canberra Courses and Awards Statute 1995* as amended had not been included on the legislation register because an authoritative version of the statute is not available. However, an unauthorised version of the statute has now been included on the legislation register for information with links to all available amending statutes.

There has been a link to the University of Canberra Secretariat Website on the main page for each non-amending University of Canberra statute on the legislation register. However, for further ease of access, a link will also be added on the disallowable instruments page for the *University of Canberra Act 1989*.

Disallowable Instrument DI2007-95 was in fact included on the legislation register under the list of disallowable instruments made under the *University of Canberra Act 1989* but as a repealed instrument. Because the instrument was an amending instrument it was automatically repealed under the *Legislation Act 2001*, section 89 (1) once its provisions commenced. The instrument therefore does not appear in the listing of current statutes.

I trust that this information addresses the committee's concerns. I am keen that the legislation register be as user-friendly as possible, and the committee's comments will help to make the University of Canberra statutes more accessible.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Simon Corbell', written over a vertical line that serves as a separator between the signature and the typed name below.

Simon Corbell MLA  
Attorney General

16.7.07