Legislative Assembly for the ACT

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

Scrutiny Report

12 FEBRUARY 2007

Report 37

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

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:

EMERGENCIES AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Emergencies Act 2004* to impose on the ACT Emergency Services Commissioner a duty each year to assess and analyse rural areas with respect to the risk of bushfire and the measures necessary to prevent or prepare for bushfires; to add to the matters that must be addressed in a strategic bushfire management plan and in a bushfire operational plan; and to require the commissioner to develop certain kinds of guidelines in relation to an area of land for which a bushfire operational plan is required.

RATES AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Rates Act 2004* to allow for the collection of the City Centre Marketing and Improvements Levy.

UTILITIES (NETWORK FACILITIES TAX) BILL 2006

This is a Bill for an Act to impose a tax on a network facility on land in the ACT.

Bills—Comment

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

ANIMAL WELFARE LEGISLATION AMENDMENT BILL 2006

This Bill would amend the *Animal Welfare Act 1992* and some associated laws, primarily to regulate the carrying out of medical or surgical procedures on animals, and to create new schemes for the licensing (or authorisation or permission) of (i) the breeding of animals for conducting a circus or a travelling zoo, and (iii) trapping.

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

The HRA and administrative power

It is far from easy to say just what content the Supreme Court will give to the statement in HRA subsection 21(1) of the "right to have rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing". The Committee spelt out its standpoint on this issue in *Scrutiny Report No 32* of the *Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No 2). The Committee took the view that:

the terms on which administrative power is conferred by statute may not comply with HRA subsection 21(1) where having regard to matters such as the potential effect of the exercise of the power on persons:

(1) the circumstances in which the power may be exercised (which of course requires attention to the scope of the discretionary elements of the power) are insufficiently defined;

(2) the procedure to be followed in the exercise of the power does not meet the requirements of natural justice (or 'procedural fairness'); and

(3) the scope for judicial review of the legality of an exercise of the power is not sufficient.

Are the schemes for licensing (or authorisation or permission) incompatible with HRA subsection 21(1) in that they permit an open-ended discretion to the relevant authority insofar as concerned the grant of a licence, etc?

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. In Scrutiny Report No 32, 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).

This issue is presented by a number of provisions of the Bill, and the matter will be illustrated by reference to the scheme (see proposed sections 25 to 35) for the licensing of a person to use or breed animals for research or teaching, (or for both purposes).

Upon a person making an application for a licence, the authority is in the first place given an open-ended discretion to choose whether to grant or to refuse to grant the licence; see clause 11 of the Bill, proposing a subsection 27(1) of the *Animal Welfare Act 1992* (henceforth, the Act). Subsection 27(2) would then structure the exercise of that discretion by stating that the authority "must consider" certain matters, but it does not confine the range of choice because subsection 27(3) states that "[s]ubsection (2) does not limit the matters that the authority may consider".

This form is not unusual, and in some circumstances might be justifiable, but other provisions of the Bill indicate that the scope of the choice to grant or not a licence could be confined. One indication is proposed section 28 of the Act, which empowers the authority to put on a licence a condition "that the authority believes on reasonable grounds is reasonable or necessary in the interests of animal welfare". Another is in subclause 34(1), which empowers the authority to amend a licence on the same basis.

Nothing would appear to be lost in terms of the objectives of the scheme were the choice to grant or not a licence was similarly limited. Without wishing to be prescriptive, section 27 might be drafted as follows:

Subsection 27(1) remains as it stands in the Bill.

Subsection 27(2) would read: "The authority must not refuse to grant the licence unless it believes on reasonable grounds that refusal is reasonable or necessary in the interests of animal welfare".

Subsection 27(3) would be in the terms as subsection 27(2) stands in the Bill.

Subsection 27(3) as it stands in the Bill would be deleted.

Subsection 27(4) remains as it stands in the Bill.

There is a further reason to think that confinement of the discretion in subclause 27(1) is necessary. While a licensee's licence may be amended only if the authority "believes on reasonable grounds that the amendment is reasonable or necessary in the interests of animal welfare" (subclause 34(1), *the authority has an open-ended or unconfined discretion to cancel the licence. This appears to be the result* of the proposals to amend the Act contained in clause 16 of the Bill.

By proposed paragraph 73B(1)(e) of the Act, a ground for regulatory action against a licensee arises "if the regulatory body believes on reasonable grounds that it would refuse an application by the person for an approval of the kind held by the person on the grounds mentioned in the relevant section". The notion of "relevant section" is then defined to mean "section 27 (2) (a), (b), (c), (e) or (g) or (3)". The reference to subclause 27(3) means of course that the "regulatory body" (which for a licensee would be the authority that granted the licence) might cancel the licence on any ground it chose (so long as that was compatible with the objects and purposes of the Act), but not (it would appear) limited to "the interests of animal welfare".

From the standpoint of a licensee, this result seems harsh, taking into account that a licence may the foundation for the person's business or livelihood. He or she would receive no guidance at all from the Act concerning what it is that he or she might do or fail to do that could give rise to the authority finding a ground for regulatory action against a licensee. In turn, such a finding could lead to the licence being cancelled – since that is a kind of regulatory action (see paragraph 73C(c)) that may follow if "the regulatory body believes on reasonable grounds that a ground for taking the proposed regulatory action has been established" (see paragraph 73D(3)(b)(i)).

This analysis applies also to the other schemes of authorisation and permission. The provisions that might be amended in the same way as is proposed for section 27 are sections 38, 55 and 64.

Are the schemes for licensing (or authorisation or permission) incompatible with HRA subsection 21(1) in that they fail to provide procedural fairness where an applicant for the licence seeks a licence that would commence on the expiration of an identical licence?

Again, this issue is presented by a number of provisions of the Bill, and again the matter will be illustrated by reference to the scheme (see proposed sections 25 to 35) for the licensing of a person to use or breed animals for research or teaching, (or for both purposes).

A licence granted to a person under paragraph 27(1)(a) remains in force (unless cancelled) for a term of 3 years (see proposed section 30 of the Act). The licensee might apply for another licence to commence immediately upon the expiry of the licence. Paragraph 27(4) and subclause 32(5) speak of this as the renewal of the licence. When this occurs, the "licence remains in force, subject to this Act, until the application is decided under section 27" (subsection 32(2)).

From the licensee's standpoint, there are two problems. The first is that the authority's discretion to renew or not is open-ended (as a result of subsection 27(3) – see above). On the face of it, a decision to refuse to renew might have nothing to do with how the licensee has operated as such. Nor need it be based on "the interests of animal welfare". This problem would be addressed by re-drafting proposed section 27 as proposed above.

The second problem is the absence of an explicit requirement that the authority observe procedural fairness when deciding a renewal application. This seems incongruous given that subclauses 34(3) and (4) make such provision where the authority proposes to amend an existing licence. This problem might be addressed by including in section 32 provisions similar to subclauses 34(3) and (4); except of course that the words in the equivalent to subclause 34(3) would be "refuse to grant an application for renewal", rather than "amend a licence on its own initiative".

It is highly likely, probably certain, that a court would find that consideration of an application for renewal attracted the obligation to afford procedural fairness to an applicant. It would be of a higher content than the obligation that would attach to consideration that of an initial application. But there are advantages to all concerned where content is spelt out in the Act, and given that clause 34 spells out the content in relation to amendment, nothing would be lost in terms of the object of the Act so far as concerns renewal.

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

Strict liability offences and the presumption of innocence

Is, in each case, the provision for offences of strict liability in clauses 9 (provision for section 19A of the *Animal Welfare Act 1992*), in clause 11 (provision for new sections 33 and 42 of that that Act), and clause 13 (provision for new section 52 of that Act), a justifiable derogation under HRA section 28 of the presumption of innocence stated in HRA subsection 22(1)?

The Explanatory Statement adverts to the fact that the Bill would create strict liability offences, but does not name them. The Committee urges that this be done.

The Committee notes that

- the offence in proposed section 19A of the *Animal Welfare Act 1992* concerns what a veterinary surgeon may and may not do by way of surgical procedures on dogs and animals, and attracts a maximum penalty of 50 penalty points;
- the offence in proposed section 33 of the Act concerns the obligation of a licensee to notify a change of address and attracts a maximum penalty of 10 penalty points;

- the offence in proposed section 42 of the Act concerns the obligation of an authorised person to return an identity certificate and attracts a maximum penalty of 1 penalty point; and
- the offence in proposed section 59 of the Act concerns the obligation of a circus or travelling zoo-holder to notify a change of address and attracts a maximum penalty of 10 penalty points.

The Explanatory Statement addresses only with respect to the offence in proposed section 59, when it says "the rationale is that people who are engaged in for example managing or conducting a circus, can be expected to be aware of their duties and obligations". This rationale applies to the other provisions too.

The Committee sees no particular difficulty from a rights perspective with these provisions, and draws them to the attention of the Assembly.

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Children and Young People Act 1999* to introduce a scheme for pre-natal reporting of anticipated abuse or neglect of a child who may be born, and to replace the current search and seizure powers in relation to children and young people who are detained at a shelter or institution.

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

The scheme for pre-natal reporting

The right to privacy of the pregnant woman

The scheme in general

The Explanatory Statement acknowledges that the scheme for pre-natal reporting of anticipated abuse or neglect of a child who may be born may be said to engage the right to privacy stated in HRA paragraph 12(a) to the extent that it provides that "[e]veryone has the right (a) not to have his or her privacy, … interfered with unlawfully or arbitrarily …". The scheme may also engage the protection afforded by HRA subsection 11(1) that "[t]he family is the natural and basic group unit of society and is entitled to be protected by society". The Explanatory Statement acknowledges too that justification for the Bill's provisions might need to be rested on HRA section 28, and in this connection states:

> In considering the reasonableness of the intrusion on these rights, the following factors have been considered:
>
> - Child death reviews across Australia have consistently identified the need for legislative provisions that allow concerns about unborn children to be reported and responded to, in order to provide early support.
> - The objective of these provisions is to reduce the likelihood the child will be in need of care and protection when born. This will be achieved through the Chief Executive providing or arranging the provision of appropriate support services to the pregnant woman with her consent.

- To ensure that intervention by the Chief Executive is proportionate and least restrictive, the Bill does not enable the Chief Executive to take action to compel a pregnant woman to do or not do something.

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

The obligation of the Chief Executive to record reports

The Committee notes that HRA paragraph 12(b) adds another measure of privacy protection by providing that "[e]veryone has the right - … (b) not to have his or her reputation unlawfully attacked".

Under proposed section 157A of the *Children and Young People Act 1999* (the Act) (see clause 6 of the Bill), a person who, during the pregnancy of any woman, suspects or believes that a child who may be born as a result of the pregnancy may be in need of care and protection, may report the suspicion or belief, and the supporting reasons, to the chief executive.

With consent of the pregnant woman, the chief executive may provide for an assessment of whether the child is likely to be in need of care and protection after the child is born: proposed paragraph 157A (3)(a).

Proposed section 162 then requires the chief executive to make and keep a written record of a report made to the chief executive under section 157A, and of any assessment made because of the report.

The privacy issue here is whether it is reasonable (or proportionate) that a report concerning a pregnant woman, which may of course be based only on "suspicion", which report will often contain allegations defamatory of the woman, should be retained in government files. Even if the document is only passed around within the government agency, there is potential for damage to the woman.

The case is no different if the woman consented to the chief executive taking action to obtain an assessment of whether the child is likely to be in need of care and protection after the child is born. It is that document that should be a source for any future action, not the initial report.

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

The scheme for search and seizure in relation to detainees – the right to liberty (HRA subsection 18(1) and the right to humane treatment when deprived of liberty (HRA section 19)

By HRA subsection 18(1), "[e]veryone has the right to liberty and security". In the first place, given that detention in a facility is a deprivation of liberty, this right bears on the rights compatibility of the whole scheme of the Bill. Of course, a deprivation of liberty consequent upon the sentence of a court will be justifiable under HRA section 28, but the conditions of that detention must be assessed against the rights conferred by HRA section 19:

19 Humane treatment when deprived of liberty

(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person must be segregated from convicted people, except in exceptional circumstances.

Note An accused child must also be segregated from accused adults (see subsection 20 (1))

(3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

From the standpoint of the detainee, the Bill states very high standards for ensuring that the obligation in section 19 is observed. The Minister is to be commended for presenting a bill in respect of which there is such a sustained endeavour to ensure that the detainees are treated "with humanity and with respect for the inherent dignity of the human person".

The Committee comments are directed to whether there is at some points a degree of obscurity or vagueness that might be avoidable.

Is there an avoidable degree of obscurity concerning the extent of the obligation of the chief executive to make provision for the medical needs of a detainee?

This issue is raised in respect of proposed section 401AL of the Act. The Committee has discussed the issue in its comments on clause 66 of the Corrections Management Bill 2006 – see below.

The Committee recommends that the Minister clarify how proposed section 401AL is to be applied.

Is there an avoidable degree of obscurity in the provisions concerning the searching of privileged material?

This issue is raised in respect of proposed sections 401AZH and 401AZI of the Act. The Committee has discussed the issue in its comments on clauses 122 and 123 of the Corrections Management Bill 2006 – see below.

The Committee recommends that the Minister clarify how these provisions would work.

The Committee notes that the definition of "privileged material" for the purposes of proposed sections 401AZH and 401AZI (see clause 17 of the Bill, definition of "privileged") is wider that the definition of "legally privileged" for clauses 122 and 123 of the Corrections Management Bill 2006. It may not be intended that the definitions differ.

CIVIL PARTNERSHIPS BILL 2006

This is a Bill for an Act to provide a scheme for two people, regardless of their sex, to enter into a formally recognised partnership (a civil partnership) that is a domestic partnership under Territory law.

Introduction - outline of the scheme of the Bill

Under the proposed Act, any 2 people ("regardless of their sex"– subclause 6(1)) may enter into a civil partnership if:

- neither person is younger than 16 years: clause 7;
- where one person is 16 or 17 years old, that consent is given by "each person with responsibility to make long-term decisions for the person" (subclause 10(1)(b), emphasis added), **or** by the Childrens Court: subclause 10(1)(a), and see subclauses 10(3) and (4);
- neither is married (which presumably means married under the *Marriage Act 1961* (Cth)) or in a civil partnership; (and noting that a regulation "may provide that a relationship under a corresponding law is a civil partnership for the purpose of territory law": subclause 25(1);
- they are not in a prohibited relationship as defined in clause 9; and
- they comply with the prescribed formalities.

To enter into a civil partnership, the 2 people concerned must "give notice to a civil partnership notary of their intention to enter into a civil partnership" (subclause 11(1)). The notary, "as soon as practicable after receiving the notice and statutory declarations", "must give each person a written notice setting out the nature and effect of a civil partnership". The Explanatory Statement says that this is "to ensure that the parties are aware of the nature of the relationship they are creating".

The 2 people may then enter into a civil partnership with each by making a declaration before the civil partnership notary and at least 1 other witness": subclause 12(1). This declaration must be made "not earlier than 5 days, and not later than 18 months, after the day the notice was given to the civil partnership notary": subclause 12(2).

The Committee notes that under the earlier Civil Unions Bill 2006, the provision equivalent to subclause 12(2) provided for "1 month" instead of "5 days", and the Explanatory Statement to the earlier bill said that this time requirement of 1 month "is intended as a cooling off period". The Explanatory Statement offers no explanation for this change.

The declaration:

> must be made by each person to the other and must contain a clear statement that—
>
> (a) names both parties; and
>
> (b) acknowledges that they are freely entering into a civil partnership with each other: subclause 12(3).

The provisions regarding termination are described compendiously in the Explanatory Statement:

> Clause 13 specifies how a civil partnership is terminated. A civil partnership will be automatically terminated on the death or marriage of one of the parties. The parties (clause 14) or the Supreme Court (clause 15) may also terminate a civil partnership.

Clause 14 sets out the procedure for the parties to a civil partnership to terminate the civil partnership. A civil partnership may be terminated by notice given to the Registrar-General. If only one party is seeking to terminate the civil partnership, a copy of the termination notice must also be served personally on the other party. Requirements for personal service are specified in clause 24. A termination notice, unless it is withdrawn, takes effect 12 months after it has been given to the Registrar-General.

Clause 15 provides that a party to a civil partnership may also apply to the Supreme Court for an order terminating a civil partnership. This provision is included to cover situations where the party is unable to use the termination procedures in clause 14 – eg. the whereabouts of other party is unknown.

The 2 people who enter a civil partnership will thereby affect their legal status as a matter of Territory law. This is the effect of subclause 6(3):

(3) The 2 parties to a civil partnership are taken, for all purposes under territory law, to be in a domestic partnership.

(The Committee notes that this subclause represents the major point of difference between this Bill and the earlier Civil Unions Bill 2006. Clause 5(2) of the earlier Bill provided: "(2) A civil partnership is to be treated for all purposes under territory law in the same way as a marriage".)

Some particular aspects of the Bill should be noted.

First, it places no restriction in terms of sex or sexual orientation on the persons who may enter a civil partnership. It may be a vehicle for two persons in any kind of relationship – such as carer and disabled, or carer and elderly – or in no kind of relationship at all, to enter into a civil partnership and thereby gain the benefits that under Territory law may be claimed by the parties to a domestic partnership.

Second, the Bill does not affect the existing provision in section 169 of the *Legislation Act 2001* that creates the legal relationship of a "domestic partnership", being "the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis" (subclause 169(2). Two persons cannot be in a "domestic partnership" unless as a matter of fact they have made a commitment, reflected in the way they conduct themselves towards one another, to live as a couple. This is apparent from the list of examples accompanying subclause 169(2) of indicators to decide whether 2 people are in a domestic partnership.

1 the length of their relationship

2 whether they are living together

3 if they are living together—how long and under what circumstances they have lived together

4 whether there is a sexual relationship between them

5 their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them

6 the ownership, use and acquisition of their property, including any property that they own individually

7 their degree of mutual commitment to a shared life

8 whether they mutually care for and support children

9 the performance of household duties

10 the reputation, and public aspects, of the relationship between them.

It should be noted that any 2 people, and in particular regardless of sex, or age, may be in a domestic partnership. If a dispute arose as to whether they were, the person or body applying the law would need to resolve the matter as a question of fact. That is, 2 people cannot 'declare' themselves to be in a domestic partnership, although such a declaration, depending on how it was made, might have some (but hardly conclusive) probative value as evidence that the parties were in such a relationship.

Third, the Explanatory Statement states that

> Clause 8 provides that a person may not enter a civil partnership if they are married or already in a civil partnership. The rights and obligations flowing from a civil partnership are premised on a primary relationship and this requirement recognises that there can only be one primary relationship at any given time.

The claim that "there can only be one primary relationship at any given time" appears to overstate the situation. It appears from clause 8 that it is no impediment to person A entering into a civil partnership with person B that A is in a domestic partnership with person C. Clause 8 is not applicable here, because the status of being in a civil partnership is only an instance of when a person is in a domestic partnership; (see clause 1.6 of Part 1.2 of the Schedule to the Bill, adding subsection 169(3) to the Legislation Act). It is also the case that a civil partnership is not terminated by reason that a party subsequently enters into a domestic partnership with some person other than the other party to the civil partnership.

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

The object of this is to promote the right to equal protection of the law in accordance with section 8 of the *Human Rights Act 2004*.

8 Recognition and equality before the law

(1) Everyone has the right to recognition as a person before the law.

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

In a letter of 19 August 2005 to the Chief Executive of the ACT Department of Justice and Community Safety, the Human Rights Commissioner argued that

> [r]ecognition of same-sex relationships is important to ensure that minority prejudices are not legitimated and reinforced by the legal framework. It is vital in this context that same-sex relationships are not accorded "second-class" status to heterosexual relationships.

This is not a complete statement of the policy driving the Bill, for its overarching concern is to provide a means for any two people to formalise by legal process a relationship between them.

The rights of children who are cared for in a civil partnership

The parties to a civil partnership may, of course, bring children of their own into the partnership, or subsequently have children of their own. Like its predecessor, the Bill makes no provision concerning the interests of these children upon a party setting in motion the procedure to terminate the civil partnership.

In this respect, the scheme contrasts to that under the *Family Law Act 1975* of the Commonwealth. Parties to a marriage cannot obtain a divorce unless they establish as a matter of fact that they have lived separately (although perhaps under the "one roof") for at least 12 months and one day, which is a condition of establishing that the marriage has broken down and there is no reasonable likelihood that the parties will get back together.

Critically for present purposes, if there are children aged under 18, the court can only grant a divorce if it is satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of those children, or, there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made (paragraph 55A(1)(b)). For this purpose, the court may adjourn the proceedings until a report has been obtained from a family consultant (section 55A(2)).

In contrast, once proper notice to terminate a civil partnership has been given, termination results from the effluxion of 12 months: subclause 14(5). No person or body has power to prevent termination, or attach conditions to termination, in the interest of the children to the civil partnership.

This may be argued to raise a human rights issue. The starting point is HRA subsection 11(2):

> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. (Leaving aside notes and examples).

In a situation where it is proposed to terminate a civil partnership within which the child is at least partly cared for, it is arguable that "the protection needed by the child because of being a child" embraces the ethical principle that the best interests of the children must be addressed and this matter is paramount among the range of matters that are addressed. Just how this ethical principle should be given concrete effect is of course a matter for debate. The provisions of Commonwealth matrimonial law noted above illustrate just one example of how the matter might be addressed.

This line of argument can be buttressed by reference to article 7.1 of the United Nations *Convention on the Rights of the Child*:

> 7.1 **The child shall** be registered immediately after birth and shall **have** the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to** know and **be cared for by his or her parents**. [Emphasis added]

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

CORRECTIONS MANAGEMENT BILL 2006

This is a Bill for an Act to govern the treatment and management of prisoners and other detainees in the Australian Capital Territory. In respect of detainees, its provisions deal with the admission, living conditions, searches, segregation, alcohol and drug testing, the use of force, disciplinary processes and processes for granting leave to detainees. The Act would replace the *Remand Centres Act 1976,* and would govern the new prison anticipated for the ACT (the Alexander Maconochie Centre), as well as any present and future corrections facilities. Together with the *Crimes (Sentencing) Act 2005* and the *Crimes (Sentence Administration) Act 2005,* the Act would complete the suite of new legislation contemplating sentences in the ACT.

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

Strict liability offences and the presumption of innocence

Is the provision for offences of strict liability in subclauses 145(2) and 147(3) a justifiable derogation under HRA section 28 of the presumption of innocence stated in HRA subsection 22(1)?

There are two strict liability offence provisions that require close scrutiny. Under subclause 145(2), a visitor to a correctional centre to whom is given a direction to do (or not do) something commits an offence of strict liability if he or she fails to comply with the direction. Under subclause 147(3), a person to whom is given a direction not to enter, or to leave, a correctional centre, commits an offence of strict liability if he or she fails to comply with the direction. The maximum penalty for both offences is 50 penalty units, imprisonment for 6 months or both.

The possibility of imprisonment raises an issue whether the derogation of the presumption of innocence (HRA subsection 22(1)) involved in the provision of strict liability is justifiable under HRA section 28. In *Scrutiny Report No 38* of the *Fifth Assembly*, the Committee drew attention to the possibility that such derogation would not be justifiable where the potential punishment included imprisonment. In that report, it quoted the words of Lamer CJ of the Supreme Court of Canada in *R v Wholesale Travel Group Inc* [1991] 3 S.C.R. 154 at 184:

> The rationale for elevating mens rea from a presumed element … to a constitutionally required element, was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime.

Moreover, the severity of the punishment for an offence may be such that it will derogate from the HRA right not to be "treated or punished in a cruel, inhuman or degrading way": HRA paragraph 10(1)(b). To imprison a person for committing an act they did not intend to commit might well be regarded as breaching this right.

Since the commencement of the HRA, the Committee has, on a number of occasions, raised the issue whether a strict liability offence to which attaches a punishment of imprisonment can be regarded as a justifiable derogation of one or more of HRA paragraph 10(1)(b), HRA subsection 22(1), or HRA subsection 18(1) (the right to liberty). The point has been reached where the Committee considers that it and the Assembly would be assisted by a statement by the Attorney-General as to whether the Government considers that there is a real issue of compatibility with the HRA and, if so, how it considers the issue might be resolved by the Supreme Court.

An important offsetting factor here is that with respect to both offence provisions, the defendant may avoid guilt by proving, to the evidential standard of proof, that he or she took "reasonable steps to comply with the direction" (subclauses 145(3) and 147(5), and see *Criminal Code 2002* subsection 58(1)). That is, the defendant must present or point to evidence that suggests a reasonable possibility that he or she took reasonable steps; see Criminal Code section 58(7). If the defendant discharges this burden that will cast on the prosecution the legal burden to prove, beyond reasonable doubt, that the defendant did not take reasonable steps. (The Committee has assumed that this is how these provisions will be read as casting an evidential burden on the defendant, but it is possible that a court would read them as casting both an evidential and a legal burden on the prosecution.)

The Committee has often suggested that consideration be given to ameliorating the effect of a strict liability offence by provision of a reasonable diligence defence, and it commends the provision made by subclauses 145(3) and 147(5).

The Explanatory Statement justifies the provision of strict liability by asserting "[p]roviding for mental elements of the offence would diminish the regulating purpose of the offence" (page 60).

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 Explanatory Statement acknowledges the critical significance of setting clear boundaries to the exercise of administrative power. It is said that:

> [t]he Bill is drafted with the intent of clearly setting the boundaries of any power allocated to the Territory's corrections authority. This aims to assist any court reviewing a decision to ascertain the extent of the powers the Assembly intended to give the Minister, the chief executive or corrections officers (page 10).

And further that:

> Rather than allocate various open-ended powers to standing orders, as is currently the case, the Bill provides a context for how the powers are to be exercised. Consequently, the Bill authorises the chief executive to prescribe operating procedures and policies that are within the boundaries set by the Bill (page 10).

It is claimed that "[t]he powers and discretions assigned to the government are not open-ended: they are clear rules for all concerned to abide" (page 2), and that "[b]y clearly setting out the limitations of any discretions to be exercised by corrections officers, the Bill aims to leave no doubt as to what is intended to be lawful, and what is not" (page 10).

The Committee commends this approach, but there are nevertheless many powers that are conferred in wide (or open) terms. To some extent, this is unavoidable. For example, while it does confer on a reviewing court some measure of greater control over the exercise of an administrative discretion, the formula that the decision-maker must believe, on reasonable grounds, that some action is necessary, or prudent, and so forth goes only some way to set a boundary to the discretion. The same may be said of a judgement that something may or must be done "so far as practicable", or that something is "necessary". (The Explanatory Statement at page 20 and at page 22 acknowledges this general point). The statement in the Preamble, and in clauses 7 and 8 will to some extent give guidance to an interpreter of the Act, but the language of these parts of the Bill is also open to different constructions.

The Committee will point to those instances that appear to it to warrant close attention by the Assembly.

Is there an insufficient definition of the powers of commissioner under clause 16 to give directions in relation to a detainee?

Clause 16 provides:

> (1) The chief executive may give directions in relation to a detainee.
>
> (2) Without limiting subsection (1), the chief executive may give a direction that the chief executive considers necessary and reasonable in relation to any of the following:
>
> (a) the welfare or safety of the detainee or anyone else;
>
> (b) security or good order at a correctional centre;
>
> (c) ensuring compliance with any requirement under this Act or another territory law.

This a critical provision, noting in particular that a detainee who contravenes a direction commits a disciplinary breach (see paragraph 151(a)). Yet, given the opening words in subclause 16(2), there is on the face of it no limit to the kinds of directions that may be given (subject to the uncertain effect of the Preamble and clauses 7 and 8). The Committee raises the question of whether anything would be lost by omitting these opening words, given that the words of paragraph 16(2)(b) are very wide.

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

Should the duty of the chief executive under paragraph 52(2)(d) to ensure that detainees are not exposed to risks of infection be qualified by the words "as far as practicable"?

The Explanatory Statement notes that while "[paragraphs] 52(2)(a) to (c) prescribes the duties the chief executive must exercise to meet the standard of health care. Clause 52(2)(d) … prescribes the duties the chief executive must exercise, as far as practicable, to meet the standard of health care". This correctly describes these provisions, (noting that the topic dealt with by (d) is difference to the topics dealt with by (a) to (c)), but there is no explanation as to why the two situations are treated differently.

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

Should the duty of the chief executive under clause 98 to monitor detainees in accord with stated matters also extend to "anything else the chief executive considers relevant"?

Clause 98 provides that in exercising a function under Part 9.3, concerning the monitoring of detainees, the chief executive must ensure that a number of specified matters are "balanced appropriately". Matter (g) is a catchall "anything else the chief executive considers relevant".

There is perhaps a case to argue that the phrase "on reasonable grounds" should be inserted between the words "considers" and "relevant".

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

Should the power of the chief executive under subclause 129(2) to dispose of a thing forfeited to the Territory be qualified by an obligation to act on "on reasonable grounds"?

A similar comment to that just made applies to subclause 129(2), concerning the forfeiture of things seized. There is perhaps a case to argue that the phrase "on reasonable grounds" should be inserted between the words "considers" and "appropriate".

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

The right to liberty (HRA subsection 18(1) and the right to humane treatment when deprived of liberty (HRA section 19)

By HRA subsection 18(1), "[e]veryone has the right to liberty and security". In the first place, given that detention in a facility is a deprivation of liberty, this right bears on the rights compatibility of the whole scheme of the Bill. Of course, a deprivation of liberty consequent upon the sentence of a court will be justifiable under HRA section 28, but the conditions of that detention must be assessed against the rights conferred by HRA section 19:

> **19 Humane treatment when deprived of liberty**
>
> (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
>
> (2) An accused person must be segregated from convicted people, except in exceptional circumstances.
>
> Note An accused child must also be segregated from accused adults (see subsection 20 (1))

(3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

From the standpoint of the detainee, the Bill states very high standards for ensuring that the obligation in section 19 is observed. The Minister is to be commended for presenting a bill in respect of which there is such a sustained endeavour to ensure that the detainees are treated "with humanity and with respect for the inherent dignity of the human person".

The Committee's comments are directed to two matters: (i) whether there is at some points a degree of obscurity or vagueness that might be avoidable, and (ii) whether at some points the restrictions on the way a detainee may be treated raise an issue as to whether the right to liberty and the right to life (HRA subsection 9(1)) of *others* is compromised. In relation to this second point, *Scrutiny Report No 25* of the *Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006, the Committee noted that the European Court of Human Rights had imposed a positive obligation on States to take appropriate steps to safeguard the lives of those within its jurisdiction, including by the adoption of laws protecting life against the acts of third parties. No doubt this proposition would be accepted in the Territory.

Is there an avoidable degree of obscurity concerning the extent of the obligation of the chief executive to make provision for the medical needs of a detainee?

Clause 66 imposes on the chief executive an obligation to make a health assessment of a detainee upon the latter's admission to a correctional centre. It provides:

66 Initial assessment

(1) The chief executive must ensure that—

(a) each detainee admitted to a correctional centre is assessed as soon as practicable to identify any **immediate** physical or mental health, or safety or security, risks and needs; and

(b) any risks and needs identified by the assessment are **addressed**.

(2) In particular, the chief executive must ensure that any **ongoing** risks and needs are **addressed in the detainee's case management plan**. [Emphasis added]

The Explanatory Statement states that the application of this clause is to be governed by a passage from a document generated by some organ of or body within the United Nations. The Explanatory Statement says (at page 33):

> Principle 24 of the United Nation's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) states:
>
> > A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after [their] admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be **provided whenever necessary**. This care and treatment shall be provided **free of charge**. [Emphasis added]

It is not easy to follow how this statement may be said to govern the application of clause 66. The first issue is what, in this context, is meant by the word "addressed". On ordinary usage, it appears to mean that the chief executive must be prepared to deal with the detainee's immediate health needs. The Explanatory Statement assumes that this obligation extends to providing medical care free of charge to deal with the health need.

Assuming that the Explanatory Statement is correct, it then needs to be noted that subclause 66(1) applies only to the "immediate" needs of the detainee. Concerning "ongoing" risks and needs, the obligation is only to address those matters in the case management plan. It should also be noted that by paragraph 77(2)(c), a case management plan "must … (c) be consistent with the resources available to the chief executive to manage the detainee". In this provision there may lie a limit to the ability of the chief executive to provide medical treatment free of charge.

The Committee recommends that the Minister clarify how clause 66 is to be applied.

Should the legality of a use of force by an officer be assessed against a standard that permits a more subjective judgement by the officer?

Whenever force is applied to a person it may be said that there is thereby a derogation of their "right to ... security of the person" (HRA subclause 18(1). The Explanatory Statement implicitly acknowledges that there will be occasions for the use of force against detainees given that "[t]he deprivation of liberty and other stressors as a consequence of detention increase the potential for detainees to engage in violence [and] the same factors may contribute to the potential of detainees refusing to follow direction."

The Committee notes that it is not only the right to security of detainees that is in issue here. The staff of a correctional centre who must deal with detainees, and other detainees and persons in contact with detainees, are also entitled to legal protection such as will enhance their right to security and life.

Subclause 137(1) states "[a] corrections officer may use force that is necessary and reasonable for this Act", and subclause 137(2) provides that "a corrections officer may use force only if the officer believes, on reasonable grounds, that the purpose for which force may be used cannot be achieved in another way".

It may well be that a judgement by a corrections officer about the use of force will often be made in "the heat of the moment", and at times under threat of violence to the officer or to others. It may thus be asked whether the legality of a use of violence by an officer should be assessed against the standards noted above.

There may be a case for distinguishing between situations where there is a risk of injury to the officer, the detainee or anyone else, from other situations. (For other purposes, this distinction is drawn by subclause 138(2).) That is, where there is a risk, the officer's conduct might be assessed against a standard in terms of whether the officer honestly believed that the use of force was necessary. This might be justified in terms of enhancing the right to security and liberty of the officer and others.

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

Is there an avoidable degree of vagueness in the provision (clauses 139(5)) limiting the use of firearms by prison officers?

The use of firearms is of course a matter of great concern. The Bill states the governing rule in subclause 139(5):

> The chief executive must ensure that firearms are not used under this part unless someone's life is under threat or a detainee or other person offers armed resistance to a corrections officer or police officer exercising a function under this Act or another Act.

There is however a great deal of vagueness in the standards used. For example, might a corrections officer fire at a detainee observed to be carrying a firearm and on the point of escaping? While at that point the detainee may not be offering "armed resistance", on their escape from the facility that person will pose a clear risk to the security and life of members of the community.

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

Is there an avoidable degree of obscurity in the provision (clause 26) that authorises the declaration of an emergency?

Clause 26 is a critical provision, in that it provides:

> **26 Declaration of emergency**
>
> (1) This section applies if the chief executive believes, on reasonable grounds, that an emergency (including an imminent emergency) exists in relation to a correctional centre that threatens or is likely to threaten—
>
> (a) security or good order at the centre; or
>
> (b) the safety of anyone at the centre or elsewhere.

The effect of a declaration is that the chief executive is authorised to restrict the behaviour of detainees in ways that would impinge on the humanity of their treatment.

The Explanatory Statement states that clause 26 "authorises the chief executive to declare an emergency at a correctional centre on the basis of a threat to the order or security of a facility, or the safety of anyone at the centre or elsewhere." But read closely, subclause 26(1) states that the power exists in relation to what is an "emergency" (undefined) **and** that emergency exists "in relation to" certain matters. It might be clearer were subclause 26(1) to follow the form of clause 34, and provide that where certain circumstances exist, an emergency may be declared.

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

Is there an avoidable degree of obscurity in the provisions (clauses 122 and 123) concerning the searching of legally privileged material?

The Committee finds some difficulty with provisions concerning what is said in the Bill to be "legally privileged material" in the custody or possession of a detainee. Clauses 122 and 123, concerning searches of a detainee's cell, are taken as illustrative.

The Explanatory Statement states that clause 122 "enables a search of a detainee's cell in the absence of the detainee if the detainee takes legally privileged material with them or the material is stored somewhere else". But how would an officer know or suspect that some material was "legally privileged" without inspecting it, reading it and in many cases taking legal advice? It is notoriously difficult to apply the complicated rules of law that determine whether some communication is "legally privileged", as indicated by the large number decisions of courts on this issue. (In its dictionary, the Bill does limit this "client legal privilege", but is this to be ascertained at common law, or by reference say to the *Evidence Act 1995*?)

Similar issues arise under clause 123.

The Committee recommends that the Minister clarify how these provisions would work.

Is it desirable to displace the obligation in subclause 132(2) of a person to provide a test sample where the person has a reasonable excuse for failing to provide the test sample?

The Committee notes that by subclause 132(2), the obligation of a person to provide a test sample (of breath, saliva and so forth) "does not apply if the person has a reasonable excuse for failing to provide the test sample within a reasonable time of the direction being given".

The Committee observes that there is an objection to provision of an open-ended "reasonable excuse" defence or excuse on the basis that it lacks clarity. In *Taikato v The Queen* [1996] HCA 28, the majority judgment of the High Court said that

> under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other

In recent years, Ministers presenting government bills have often made this point. For example, in the Explanatory Statement to the Planning and Development Bill 2006 (at page 8), it is said that "[w]hat constitutes a reasonable excuse largely depends on the purpose of the offence provision as well as the circumstances of the particular case. This means there is a high level of uncertainty in the application of the defence."

The Committee has accepted this objection, and recommends that the Minister clarify why this excuse has been inserted in subclause 132(2).

<u>There are two issues concerning the provisions relating to review of a decision to impose disciplinary action that are conveniently treated together</u>

Does the Bill make sufficient provision for the suspension of a decision to impose disciplinary action when the detainee seeks a review of that decision?

After a process involving a corrections officer, and an investigator, an administrator, and a presiding officer who makes an inquiry into an alleged disciplinary breach, the presiding officer may take disciplinary action against the accused (the **primary decision**). The nature of this action is outlined in clauses 182 and 183. The provisions in Division 10.3.3 (Internal review of inquiry decision) permit a detainee to seek an **internal review** of a primary

decision (subclause 172(1)). So far as concerns the legal effect of the primary decision, the Explanatory Statement states that

> [c]lause 172(3) clarifies that the disciplinary action determined by the presiding officer continues during the review of the decision, and only ceases if the review officer decides so.

But is this what clause 172(3) provides? The provision says:

> (3) Subject to any decision by a review officer under section 175, the making of the application does not affect the taking of disciplinary action under the decision under review.

Under subclause 175(1), the officer conducting the internal review cannot exercise any function until *after* he or she has completed the review. There may thus be an appreciable period of time between the coming into legal effect of the decision of the presiding officer to take disciplinary action against the accused, and any opportunity for an internal review officer to set aside the effect of the decision. The result would appear to be that in respect of at least some of the penalties that may have been imposed, (such as separate confinement – see paragraph 183(d)), the internal review would have been pointless.

A similar problem arises with respect to subclause 177(3) where there is an external review of the decision of the internal review officer by an "adjudicator".

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

Should the power of an adjudicator under subclause 178(1) to refuse to review a disciplinary decision be qualified on some basis?

After completion of an internal review, a detainee may seek, under the provisions of Division 10.3.4, an **external review** of the decision of the internal review officer by an "adjudicator", who must be a magistrate.

The Committee notes that subclause 178(1) empowers an adjudicator to review a disciplinary decision or refuse to review the decision. This discretion is open-ended in that the Bill does not further specify any criteria according to which this choice may or must be made.

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

A privative clause

Does subclause 16(4) amount to a privative clause, and if so is it incompatible with HRA subsection 21(1) and/or inconsistent with section 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth)?

The Committee has long been concerned about the privative clause, and in recent reports the Committee has buttressed its long-standing concern that a privative clause is an undue trespass on rights by pointing to HRA subsection 21(1). It has also pointed to the possibility that the power of the Assembly to restrict judicial review is limited by subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*; see generally *Scrutiny Report No 11* of the *Sixth Assembly*, concerning the Water Resources Amendment Bill 2005.

Subclause 16(4) provides that:

> (4) A direction by the chief executive under this Act, or anything done under the direction, is not invalid because of a **defect or irregularity** in or in relation to the direction. [Emphasis added]

The Explanatory Statement argues that its scope is limited, being directed only to dealing with a defect in "form". It is said that:

> Clause 16(4) ensures that the substance of any lawful direction given by the chief executive is upheld if there is something wrong with the form of the direction. For example, if a direction is normally issued by way of a standard form the fact that the form was not used would not render the direction invalid.

But the word "form" or something like it is not used in subclause 16(2). In contrast, by subclause 194(5), "[a] decision of the presiding officer at an inquiry is not invalid only because of any informality or lack of form". These different wordings suggest that subclause 16(4) has a wider effect than that described in the Explanatory Statement.

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

The right to privacy

Is the provision for the chief executive to require other chief executives to transmit health reports concerning a detainee to the chief executive under subclause 76(1) a justifiable derogation under HRA section 28 of the right to privacy stated in HRA paragraph 12(a)?

The Explanatory Statement notes that clause 76(1) "provides an explicit authority for the chief executive administering the foreshadowed Act to require health information from other chief executives mentioned in 76(8)", and further states that "[t]he government intends this clause to be a lawful authority for health agencies to provide health records about detainees without having to decide compliance with the privacy principles in the *Health Records (Privacy and Access) Act 1997*.".

This statement underlines the fact that clause 76 appears to engage HRA section 12(a) to the extent that it provides that "[e]veryone has the right (a) not to have his or her privacy, … interfered with unlawfully or arbitrarily …".

In this context, the interference with privacy may not be "arbitrary", but the Explanatory Statement does not address this issue.

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

Comment on the Explanatory Statement

A minor point is that contrary to the assumption at page 27, there is no paragraph 52(2)(e) in the Bill. Has something been omitted in error from the Bill?

A more substantial concern is that at various points, (not all of which are noted here), the Explanatory Statement provides an explanation of concepts used in the Bill in language that appears quite different to the wording of the clause.

For example, concerning the requirement in subclause 27(2) that "[t]he chief executive must ensure that action taken under this section is necessary and reasonable in the circumstances", the Explanatory Statement states that this "ensures that the exercise of emergency powers are proportionate and rationally connected to the task of maintaining order, security and safety".

The Committee suggests that if a principle of proportionality as described in the Explanatory Statement is meant to govern the application of subclause 27(2), it is better stated in the Act.

A similar point arises concerning clause 98 (and see too clause 107). The Explanatory Statement notes that this clause "sets out the factors in (a) to (g) the chief executive must engage when establishing systems to monitor detainees, or exercising the powers to monitor individual detainees". After noting that this balancing requires the exercise of "good judgment", the Explanatory Statement states:

> Clause 98 requires the application of the human rights principle of proportionality. In this case, proportionality requires the exercise of powers must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

No authority is stated as a source of this principle, and the Committee has pointed out that, so far as concerns the application of section 28, there is reason to question whether an assertion that some action must be "the least restrictive in order to accomplish the object" is a correct prediction as to what the Supreme Court will find to be the effect of HRA section 28; see *Scrutiny Report No 25* of the *Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. (If the Explanatory Statement is correct, then the capacity of the courts to invalidate administrative action, and of the Supreme Court to find an incompatibility between a law and the HRA, will be very significant.)

The Committee suggests that if a principle of proportionality as described in the Explanatory Statement is meant to govern the balancing required by clause 98, it is better stated in the Act.

HOUSING ASSISTANCE BILL 2006

This is a Bill for an Act to repeal the *Housing Assistance Act 1987* and to replace it with a new scheme for the provision of housing assistance in the ACT. It would define the powers of the Commissioner for Social Housing; in particular with regard to the making of determinations under Programs established through the Act, and the power to issue operational guidelines to assist staff to interpret and implement provisions of the Act or its programs. These instruments bear directly on the ability of people to receive housing assistance. The Bill also provides for the entering into of joint ventures, the giving of Ministerial directions, the delegation of powers and the making of regulations. The Bill provides power for the Commissioner to seek information from the people receiving housing assistance, and require that information to be provided.

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

Freedom of expression and freedom of information

In two ways, the Bill makes provision for the reduction of the right to information stated in section 10 of the *Freedom of Information Act 1989* (FOI Act). The specific provisions are dealt with below.

The Committee gave extended consideration to the link between the right to freedom of expression stated in HRA section 16 and the concept of freedom of information as found in the FOI Act in *Scrutiny Report No 36* of the *Sixth Assembly*, concerning the Freedom of Information Amendment Bill 2006. Only key points are repeated here.

Section 10 of the FOI Act states that "every person has a legally enforceable right to obtain access" to documents of ministers, departments and agencies. While this Act precedes the HRA, it is widely accepted that there is a link between the two laws. Whether or not the statement in HRA subsection 16(2) that the right to "freedom of expression … includes the freedom to seek, receive and impart information and ideas of all kinds" requires that there be an FOI Act, the latter may be seen as enhancing that right. Section 16 provides:

> **16 Freedom of expression**
>
> (1) Everyone has the right to hold opinions without interference.
>
> (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

It should be noted that it states a "freedom to seek, **receive** and impart information and ideas of all kinds" (emphasis added). Section 16 follows article 19 of the *Universal Declaration of Human Rights* and article 19 of the *International Covenant on Civil and Political Rights*. There are writers on international human rights law who argue that:

> [f]reedom of information has been recognized not only as crucial to participatory democracy, accountability and good governance, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations by a number of international bodies, including the United Nations (UN), the Organization of American States (OAS), the Council of Europe (COE) and the Commonwealth, as well as national developments in countries around the world, amply demonstrate this: T Mendel, "Freedom of Information: An Internationally protected Human Right"
> http://www.juridicas.unam.mx/publica/rev/comlawj/cont/1/cts/cts3.htm

The Australian FOI laws have been introduced on the basis that they will enhance democratic accountability.

Is the provision by subclause 29(1) to create a category of information exempt from access under section 10 of the *Freedom of Information Act 1989* (FOI Act) to cover "protected information" (as defined in subclause 28(1)) incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

The first way the Bill provides for the reduction of the right to information stated in the FOI Act is through clause 29, the effect of which can be understood only by reference to clause 28. Subclause 28(1) defines a concept of "protected information", and the Explanatory Statement summaries its content in this way:

> Protected information includes information which identifies an entity as an applicant, recipient or previous recipient of housing assistance, or would identify a housing assistance property or the personal details of a housing assistance recipient (including telephone number or address), or something which would allow this information to be worked out.

This statement also picks up the definition of "protected personal information" in subclause 28(2). It also needs to be noted that the word "entity" when used in ACT law includes a person; see the *Legislation Act 2001*, Dictionary, Part 1.

Subclause 29(1) then provides:

> (1) For the purposes of the *Freedom of Information Act 1989* (the FOI Act), a document is an exempt document if—
>
> (a) the document is in the possession of the housing commissioner; and
>
> (b) its disclosure under the FOI Act would involve the disclosure of protected information.

(By subclause 29(2), this exemption does not apply where the requester is a person "to whom the document relates".)

While the Explanatory Statement does not address the issue at all, the evident purpose of clause 29 of the Bill is to protect the privacy interest of a person who applies for housing assistance. As such, it will not, in many of the instances where it may be invoked, cut across the purposes of the FOI Act to promote "participatory democracy, accountability and good governance".

Moreover, a rights analysis in terms of the HRA needs to take account of paragraph 12(a) of the HRA, which provides:

> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; … .

Given the purpose of clause 29, it is arguable that if the clause does derogate from HRA section 16, this is justifiable under HRA section 28.

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

Is the proposal (see part 1.2 of Schedule 1) to insert a new section 6AA in the FOI Act to provide for an exemption for lists of housing assistance properties incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

The second way the Bill reduces the content of the right to information stated in the FOI Act is through the amendment to this Act by part 1.2 of Schedule 1 to the Bill, which provides for a new section 6AA of that Act in these terms:

> **6AA Exemption of lists of housing assistance properties**
>
> (1) This Act does not apply to a document that is, or a part of a document that contains, a list of housing assistance properties identified as housing assistance properties.

It is difficult to see how this restriction of the FOI right can be justified as a measure to enhance the right to privacy. Section 6AA would apply merely to "a list of housing assistance properties identified as housing assistance properties". Given that these properties belong to the people of the Territory, dissemination of knowledge of what they are might be argued to promote "participatory democracy, accountability and good governance".

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

Is there an acquisition of property otherwise than on just terms?

Do clauses 102-104 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)?

Introduction – the issue that arose in the *Pinter* case

Paragraph 23(1)(a) of the SG Act provides that "the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms". In *Australian Capital Territory v Pinter* [2002] FCAFC 186, a majority of the Federal Court (Black CJ, Higgins and Spender JJ; Finn and Dowsett JJ dissenting) held that the effect of paragraph 23(1)(a) was that subsection 16(2) of the *Victims of Crime (Financial Assistance) (Amendment) Act 1999* was invalid.

In the words of Spender J, subsection 16(2) effected a "retrospective extinguishment … of the statutory right in each of the respondents to have their application for compensation for criminal injury, including a component for pain and suffering, determined under the *Criminal Injuries Compensation Act 1983 (ACT)*" (above at [98]). Spender J held that:

> [100] The rights in question on this appeal are "property", in my opinion. The fact that those rights are statutory does not defeat that conclusion. … .
>
> [101] … Here, in my opinion, the retrospective extinguishment of the right to claim compensation for pain and suffering by a victim of crime constitutes an acquisition of property. …
>
> [103] In this case, there is …"a direct financial gain to the Territory, measured by the reduction of the liability to make payment to the respondents of a component for pain and suffering, and this constitutes an 'acquisition' [of property] …" …

> [105] … [section] 16(2) is properly to be characterised as a law with respect to the acquisition of property. …
>
> [106] It follows that I [disagree] with the view … that the Territory's assumption of responsibility to pay compensation to victims of crime was legislation which could be revisited and reformed from time to time without the amending (and, importantly, retrospective) legislation attracting the character of a law with respect to property.

Does a similar issue arise under this Bill?

Under the currently applicable law, the entitlement of a person to housing assistance is (the Committee understands) governed critically by Disallowable Instrument DI2006-90 (entitled Housing Assistance Public Rental Housing Assistance Program 2006 (No 1)). This is an instrument made under subsection 12(1) of the *Housing Assistance Act 1987*. Another document of critical significance is the commissioner's determination of needs categories and the criteria for allocating categories to eligible applicants; this document is made under clause 10 of DI2006-90. (It is possible that these documents have been revised, but that will not affect the property protection point that might arise if this Bill is passed into law.) DI2006-90 is, in terms of clause 100 of the Bill, an "old housing assistance program".

If, before the commencement of the Act that will come into force if this Bill is passed, a person applied (under the existing law) for review by the Administrative Appeals Tribunal of a decision made under DI2006-90, the AAT would of course make its decision according to the law as stated in DI2006-90.

Now, what happens if this Act commences before the AAT has made its decision on an application for review lodged before that time?

It is usually provided that in such a case, the law as it stood when the review application was lodged continues to apply to tribunal and court adjudication of the application. Where this is so, no issue concerning conflict with paragraph 23(1)(a) of the SG Act arises. But it may be that this Bill does not make the usual provision.

First, it must be noticed that subclause 102(1) of the Bill provides:

> (1) The housing commissioner may declare that –
>
> (a) an approved housing assistance program corresponds to an old housing assistance program; and
>
> (b) a thing under an old housing assistance program corresponds to a thing under an approved housing assistance program.

An "approved housing assistance program" is defined to mean a housing assistance program approved under clause 19 (Dictionary to the Bill). The terms of a program made under clause 19 might however be very different in terms to DI2006-90 (which is an "old housing assistance program"). Subclause 102(2) is addressed to this situation and provides:

> (2) A declaration may be made under subsection (1) whether or not the programs or things correspond, or substantially correspond, with each other.

In particular, a program approved under clause 19 might be a lesser statement of rights of an applicant for housing assistance when this program is compared to what is provided by DI2006-90.

Then we come to clause 103 of the Bill, which states rules to apply in respect of uncompleted applications for AAT review.

(1) This section applies if-

(a) before the commencement of this section (the *commencement*), an application for review to the administrative appeals tribunal had been made in relation to a decision under an old housing assistance program; and

(b) immediately before the commencement, the proceeding on the application had not ended; and

(c) the thing to which the decision relates is declared under section 102 to be a thing (the *new thing*) under an approved housing assistance program.

(2) If this section applies-

(a) the proceeding may be continued as if the application had been made in relation to the new thing; and

(b) the decision-maker is taken to be the housing commissioner.

The result of these provisions appears to be that the AAT would apply a new body of law – that is, the program made under clause 19 – when making its decision in respect of an uncompleted application for review.

If the program approved under clause 19 provided less in the way of benefits to the applicant for housing assistance, then there would be a diminution of the legal entitlements of the AAT applicant, and in many cases a corresponding financial gain to the Territory. This appears to be a situation analogous to that presented by the *Pinter* case, and there is thus an issue whether this law is invalid on the basis that it is incompatible with paragraph 23(1)(a) of the SG Act. This is also a rights issue in that paragraph 23(1)(a) provides a measure of protection to property.

The Committee recommends that the Minister advise the Legislative Assembly as to whether an issue as identified above does arise out of clauses 102-104 of the Bill, and, if so, how that issue should be resolved in terms of the protection to property afforded by paragraph 23(1)(a) of the SG Act.

PLANNING AND DEVELOPMENT BILL 2006

This is a Bill for an Act to repeal a body of existing ACT law concerning land development (in particular the *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002* and replace it with a reformed regime. Assessment of proposals for land development would be through a track system that aims to match the level of assessment and process to the impact of the proposed development. The definition of development would embrace construction activity or building, and the use, commencement of use or change of use of land or buildings. Subdivision is within the notion of development. Most of the leasing provisions in the Land Act have been incorporated into the proposed Act and remain unchanged. Similarly, the provisions in the Bill for the management of public land are carried over from the Land Act. The Bill also provides for a range of measures to investigate complaints and take action on controlled activities, such as failure to comply with a lease, developments that do not meet approval requirements, developing without approval, unapproved structures and unauthorised use of unleased Territory land.

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

The HRA and administrative power

The way the HRA may impact on schemes of administrative power is outlined above with respect to the Animal Welfare Legislation Amendment Bill 2006.

The Committee notes that many of the provisions of the Bill that confer administrative power are expressed in language that confines or structures the exercise of the power; see for examples, clauses 34 and 404. Some powers are conditioned on the decision-maker having "reasonable grounds" to be satisfied or believe that some action is necessary; for examples, see clauses 356, 370 and 373. But few powers are expressed in subjective language for no apparent reason.

Is the discretion of the planning and land authority under subclause 65(2) incompatible with HRA subsection 21(1) in that it confers a subjective discretion?

For example, while subclause 65(1) provides that the planning and land authority must make copies of the draft plan variation and background papers mentioned in the consultation notice available, subclause 65(2) states that "[i]f in the planning and land authority's opinion, it would not be in the public interest for part of the draft plan variation or of any background paper to be published, the authority must exclude that part from each copy of the document made available under subsection (1)".

Is the open-ended discretion of the Supreme Court under subclause 374(3) to grant an injunction incompatible with HRA subsection 21(1) in that it confers a subjective discretion?

The relevant provisions are:

> (2) The planning and land authority or anyone else may apply to the Supreme Court for an injunction.
>
> (3) On application under subsection (2), the Supreme Court may grant an injunction—
>
> (a) restraining the relevant person from engaging in the conduct; and
>
> (b) if satisfied that it is desirable to do so—requiring the relevant person to do anything.

Should a power of the Minister to issue guidelines be extended to apply to the exercise of any power under the scheme provided for by the Bill?

By clause 412, the Minister has a power the exercise of which will facilitate the structuring of administrative power vested in the Minister.

> **412 Ministerial guidelines**
>
> (1) The Minister may approve guidelines for the exercise of any power by the Minister under this Act.

(2) The Minister may, but need not, consider advice from the planning and land authority before approving guidelines.

(3) Guidelines are a notifiable instrument.

It would be beneficial were this power to extend to every power conferred by the Act.

Natural justice and the suspension or termination of the chief executive

Is the provision for the Legislative Assembly to end the appointment of the chief planning officer under clause 23 incompatible with HRA subsection 21(1), and/or with HRA paragraph 12(a), and, if either is the case, is it a justifiable derogation under HRA section 28?

Clause 23 provides for the suspension or ending of the chief planning officer's appointment.

(1) The Executive may suspend the chief planning executive from duty -

(a) for misbehaviour; or

(b) for physical or mental incapacity, …; or

[(c) and (d) in the case of certain convictions].

(2) The Minister must present to the Legislative Assembly a statement of the reasons for the suspension on the first sitting day after the day the chief planning executive is suspended.

(3) If, not later than 6 sitting days after the day the statement is presented, the Legislative Assembly resolves to require the Executive to end the chief planning executive's appointment, the Executive must end the chief planning executive's appointment.

(4) The chief planning executive's suspension ends -

(a) if the Minister does not comply with subsection (2)—at the end of the day the Minister should have presented to the Legislative Assembly the statement mentioned in that subsection; or

(b) if the Assembly does not pass a resolution mentioned in subsection (3) within the 6 sitting days—at the end of the 6th sitting day.

(5) [Payment of salary while suspended].

The Committee's concerns that the rights of the chief planning executive may be affected in an unacceptable way are based on the considerations that:

- there is no obligation on any person or body to accord any form of natural justice (procedural fairness) to the chief planning executive;
- the effect of an Assembly debate, even if in the end it did conclude in the passing of a resolution of dismissal, might well be to cause irreparable damage to the reputation of the chief planning executive in a situation where the executive would have no direct means of redress;
- the matter just mentioned is particularly acute where the dismissal – or the proposal for dismissal – is based on an alleged physical or mental incapacity of the chief executive. The public discussion of the allegations and their basis would impinge severely on the privacy interest of the chief executive; and

- it will be very difficult, if not impossible, for the executive to challenge the validity of a resolution of dismissal. The courts are very reluctant to intervene in the internal management of a legislature, or more broadly in the exercise of its powers. Apart from considerations of "separation of powers", it is very difficult for a court to make findings of fact about the reasons, or motives, of a deliberative body that is not obliged to give any reasons; see *Yates (Arthur) & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37.

The Committee notes that similar concerns with these clauses were raised by the Standing Committee on Planning and Environment in its report entitled *Exposure Draft Planning and Development Bill 2006* of October 2006. This report has picked up the concerns expressed by this Committee concerning these clauses as they appeared in almost identical form in the Planning and Land Bill 2002 and commented upon in *Scrutiny Report No 17* of the *Fifth Assembly*. The Planning and Environment Committee has added some other points of concern and noted relevant reports of other Committees.

Enforcement powers

By clause 380, "[t]he planning and land authority may appoint a person as an inspector for this part".

The Committee has in the past drawn attention to such a clause. It is usually provided that a public servant may be appointed, or some other indication given of the kinds of persons who may be appointed.

Otherwise, the powers conferred on inspectors in relation to matters such as search and seizure are such as are commonly found, and the Committee raises no matter of concern about them.

Strict liability offences and the presumption of innocence

Is the provision for offences of strict liability in clauses 152, 193, 194, 196, 354, 360, 371, 381, 386 and 387 a justifiable derogation under HRA section 28 of the presumption of innocence stated in HRA subsection 22(1)?

The Bill provides for a number of offences of strict liability in clauses 152, 193, 194, 196, 354, 360, 371, 381, 386 and 387.

The Committee notes and commends the fact that the Explanatory Statement (at pages 6-10) identifies these provisions, offers a justification of why such provision is made, and in this light addresses the issues that arise under the HRA.

The broad rationale offered is that "their inclusion was to protect the health and safety of the public, or to protect the environment". This does not carry the matter very far, but the Explanatory Statement then describes the offences as "regulatory" when it argues, "strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions". It adds that were the prosecution obliged to prove that the defendant intended to commit the acts that make up the physical elements of the offence, that would "affect(s) the level of resources needed to investigate and prosecute" – presumably to increase those resources. There is also a concern that some prosecutions might fail were the prosecution put to proof of intent, for the Explanatory Statement states:

> A widely publicised instance of the authority's inability to prosecute could seriously erode public confidence in the integrity of the supervisory scheme. 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.

It is argued that

> [a]n effective enforcement regime is crucial for the authority to fulfil its role and responsibilities as the regulator of land development. … Strict liability offences reduce risks to the community. An adequately deterrent scheme to ensure development takes place only as approved by the authority reduces the risk of the community being affected by bad and/or inappropriate development.

In relation to compatibility of these provisions for strict liability offences and the HRA, the Explanatory Statement argues that these provisions are, in terms of HRA section 28, a justifiable limitation of the presumption of innocence stated in HRA section 22. It points to the fact that a defendant can bring into play a *Criminal Code 2002* defence only upon satisfying an evidential burden that the defence exists (whereupon the prosecution must establish beyond reasonable doubt that the defence is not made out). The Explanatory Statement notes that a low maximum penalty of $6,000 (60 penalty units) attaches to each offence, and that there is no provision for imprisonment.

The Explanatory Statement also points out that

> [o]f necessity the application of the HRA in circumstances such as these 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 is then in effect a reference back to the justifications offered for the inclusion of strict liability offences – see above.

The Explanatory Statement also deals with the issue of whether a defence of "reasonable excuse" or of "reasonable diligence" should be added to supplement the defences that are otherwise available under the *Criminal Code 2002* (the Code).

Dealing with this issue requires some background. Where a provision creates an offence of strict liability, "there are no fault elements for any of the physical elements of the offence": Code, paragraph 23(a). Nevertheless, the defendant may adduce evidence that he or she, when carrying out the conduct making up the physical elements, considered whether or not facts existed, (in relation to which see subsection 36(2)), and was under a mistaken but reasonable belief about the facts. If, had the facts existed, the conduct would not have been an offence, the defendant is not criminally responsible: Code, subsection 36(1). The defendant need only present or point to evidence that suggests a reasonable possibility that he or she acted in this way: Code, section 58. If this "evidential burden" is discharged, then the prosecution "is required to persuade the jury that there was no mistake or that the mistake was unreasonable".

(It is also to be noted that a defendant may rely on other defences. Code section 39 deals with "Intervening conduct or event". This defence is, however, much narrower than a due diligence defence (see below). Some further protection is afforded by section 40 (duress); section 41, ("Sudden or extraordinary emergency"); section 42 (self-defence); and section 43 (lawful authority)).

However, Code section 36 does not permit a defendant to prove that he or she took reasonable steps to obey the law - what may be called a "reasonable diligence" defence. But the law creating a specific offence may make provision for such a defence, and where it does so it will be easier to maintain that the derogation of the presumption of innocence involved in the provision for strict liability is justifiable under HRA section 28.

In relation to one proposed strict liability offence, the Bill does provide for a defence of due diligence. Subclauses 193(4) to (6) provide:

> (4) A person commits an offence if –
>
> (a) the person undertakes development without development approval; and
>
> (b) the development requires development approval.
>
> Maximum penalty: 60 penalty units.
>
> (5) An offence against subsection (4) is a strict liability offence.
>
> (6) It is a defence to a prosecution for an offence against subsection (4) if the defendant proves that the defendant took all reasonable steps to find out whether the development required development approval before undertaking the development.

The Explanatory Statement (page 9) indicates that provision for a due diligence defence under subclause 193(6) to the offence in subclause 193(4) is for the benefit of the "do-it-yourself" developer (such as homeowner).

An issue that arises is why a similar defence is not available in respect of the strict liability offences relating to:

- undertaking a prohibited development: subclauses 194(4) and (5);
- undertaking an approved development but not in compliance with a condition attaching to the approval: subclauses 196(1) and (2);
- contravention of a controlled activity order: subclauses 354(1) and (2);
- contravention of an order to carry out rectification work: subclauses 360(1) and (2); and
- contravention of prohibition notice: subclauses 371(1) and (2).

The Explanatory Statement addresses this issue insofar as concerns subclauses 194(4) and 196(1). It is argued (it seems) that while provision for a due diligence defence under subclause 193(6) to the offence in subclause 193(4) is aimed at giving the "do-it-yourself" developer (such as home-owner) a defence, no such defence is provided for in relation to the offence in subclause 194(4) because this kind of person is:

> unlikely to contemplate development of a type that is prohibited, for example, they are not likely to build a factory. They are, therefore, unlikely to offend against clause 194 of the Bill and be caught by the strict liability offence. On the other hand, the high impact nature of prohibited development means that the authority needs the full range of penalty tools, including strict liability.

So far as concerns the offence in subclause 196(1), the Explanatory Statement argues that:

> [there] is no justification in distinguishing between professionals and do-it-yourself home builders in relation to clause 196 of the Bill. This is because the home builders, like the professionals, will be aware of the conditions of the development approval because they are given written notice of the approval and conditions. Strict liability is justified where a person agrees to conditions attached to an approval and where public confidence in the merit of such an instrument may be undermined by a person's failure to comply with them.

The Committee considers that the Explanatory Statement might have made a similar argument in justification for not making provision for a due diligence defence in relation to the strict liability offences in subclauses 354(1), 360(1) and 371(1).

The Explanatory Statement is a reasoned and comprehensive consideration of the HRA issues and the Committee commends its approach.

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 DI2006-246 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 8) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-257 and determines specified venues to be sports bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2006-247 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 10) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles or drives competing in the timed special (competitive) stages of the 2006 National Capital Rally.**

Disallowable Instrument DI2006-248 being the Health (Fees) Determination 2006 (No. 4) made under section 36 of the *Health Act 1993* **revokes DI2006-213 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-249 being the Road Transport (Offences) (Declaration of Holiday Period) Determination 2006 (No. 1) made under paragraph 22(1)(e) of the *Road Transport (Offences) Regulation 2005* **determines a specified period to be a holiday period.**

Subordinate Law—No comment

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

Subordinate Law SL2006-50 being the Road Transport (Driver Licensing) Amendment Regulation 2006 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* **reduces the minimum age for eligibility to obtain a licence to drive a public passenger vehicle from 21 year to 20 years.**

Subordinate Law—Comment

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

"Henry VIII" clause - Delayed commencement

Subordinate Law SL2006-49 being the Legal Profession Amendment Regulation 2006 (No. 1) made under the *Legal Profession Act 2006* **changes the date of commencement of Part 3.2 of the Act.**

This subordinate law changes the date of commencement of various provisions of the *Legal Profession Act 2006*. The Explanatory Statement to the subordinate law states:

> The *Legal Profession Act 2006* (the Act) provides for the regulation of legal practice in the ACT and facilitates the regulation of legal practice on a national basis, in conjunction with the National Legal Profession Model Laws Project. The project involved the development of a model Legal Profession Bill and model Legal Profession Regulations.
>
> 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. 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 Part 3.2 of the Act from 1 January 2007 to 1 May 2007, to allow the ACT legal profession adequate opportunity to effectively implement the new costing requirements in the Act.

The Committee notes that 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.

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

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 had previously been explicitly provided for in the primary legislation. The Committee notes, however, that the delay in commencement is relatively slight – from 1 January 2007 to 1 May 2007 – and that a reason has been given for the delay – ie to allow the ACT legal profession adequate opportunity to implement the new requirements. The Committee hopes that no further delay will be required.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Treasurer, undated, in relation to comments made in Scrutiny Report 32 concerning the Revenue Legislation Amendment Bill 2006 (No. 2).
- The Treasurer, dated 12 December 2006, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instrument DI2006-214, being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 6).
- The Minister for Health, dated 20 December 2006, in relation to comments made in Scrutiny Report 35 concerning Disallowable Instrument DI2006-237, being the Health Professionals (Dental Board) Appointment 2006 (No. 2).
- The Minister for Education and Training, dated 21 December 2006, in relation to comments made in Scrutiny Report 35 concerning:
  - Disallowable Instrument DI2006-235, being the University of Canberra (Courses and Awards) Amendment Statute 2006 (No. 2); and
  - Disallowable Instrument DI2006-236, being the University of Canberra (University Facilities) Amendment Statute 2006.
- The Minister for Health, dated 5 January 2007, in relation to comments made in Scrutiny Report 34 concerning the Health Legislation Amendment Bill 2006 (No. 2).
- The Minister for the Territory and Municipal Services, dated 19 January 2007, in relation to comments made in Scrutiny Report 36 concerning Subordinate Law SL2006-46, being the Water Resources Amendment Regulation 2006 (No. 1).
- The Attorney-General, dated 22 January 2007, in relation to comments made in Scrutiny Report 36 concerning the Court Legislation Amendment Bill 2006.
- The Minister for Industrial Relations, dated 6 February 2007, in relation to comments made in Scrutiny Report 35 concerning DI2006-229, being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 3).

The Committee wishes to thank the Treasurer, the Minister for Health, the Minister for Education and Training, the Minister for the Territory and Municipal Services, the Attorney-General and the Minister for Industrial Relations for their helpful responses.

Further comment on the response of the Deputy Chief Minister to the report of the Committee concerning the Health Legislation Amendment Bill (No 2) 2006

The Committee appreciates the Minister's kind statement thanking the Committee for its comments on this Bill, and in particular notes that the government will reconsider the means by which the law will empower the President of the Health Professionals Tribunal to ensure the attendance of a person summonsed as a witness.

As a contribution to the dialogue between the legislative and executive branches of government concerning the impact of the HRA on legislative choice, the Committee wishes to add two brief comments on the Minister's response.

First, the Committee acknowledges that its brief researches into Territory law did not reveal that there is a precedent to what was proposed by the insertion into the *Health Professionals Act 2004* of section 59A. The Committee does not have the resources for thorough research and it respectfully suggests that where the proponent of a Bill relies on a precedent it will assist the Committee and the Assembly if it is identified. That said, it remains the case that many pre-HRA legislative precedents need to be carefully reviewed in the light of the HRA.

Second, the Committee was of unaware of the advice from Monash University Castan Centre, or of that of the Human Rights Unit of the Department. Again, the Committee would welcome the public revelation of any such advice at the time a Bill is presented to the Assembly. This will facilitate pre-enactment dialogue about the impact of the HRA.

As to the merits of the debate, the Committee cannot follow the advice of the Castan Centre that a provision such as the proposed section 59A (the Centre was dealing with the precedent provision) is under HRA section 28 a justifiable derogation of the right to liberty in HRA section 18(1) simply because the provision is "necessary". While there is room for debate over how strict is the test under section 28, (see the Committee's remarks at the end of its report Corrections Management Bill 2006), a test of whether the law is simply necessary is far too lenient. What must be further asked is whether the means for achieving the object of the law is proportionate. The Minister does note that the Castan Centre went on the say that "[the tribunal] cannot function properly if people are free to escape attendance from it". This is so, but given that there are many tribunals that function without having a power to order the detention of a potential witness. (and certainly not a power conferred in the open-ended terms of proposed section 59A), there is much room to doubt that this power is a proportionate means of dealing with the problem.

Zed Seselja, MLA
Chair

February 2007

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 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)

Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management Plan) 2005

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 DI2005-127 – 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)

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 DI2006-141 - Attorney General (Fees) Determination 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

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)
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)
Freedom of Information Amendment Bill 2006
Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

COPY

Jon Stanhope MLA

CHIEF MINISTER

TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ARTS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
GPO Box 1020
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Dear Mr Stefaniak

I refer to comments made by the Standing Committee on Legal Affairs in Scrutiny Report No 32 of 18 September 2006 relating to the Revenue Legislation Amendment Bill 2006 Number 2, in which the Committee has commented extensively on a rights issue in relation to proposed section 239 of the *Duties Act 1999* (Duties Act).

The Committee draws the attention of the Assembly to what it characterises as 'insufficient definition of the powers of the commissioner under proposed section 239 of the Duties Act to approve the making of an assessment and the payment of duty electronically, and then to amend, suspend or cancel such an approval'. The query raised is whether there are sufficient guidelines to the exercising of that power, and whether any review of that decision would be available.

The Committee's primary concerns relate to:

- The level of guidance provided in how decisions might be made by the commissioner in approving access to the new electronic lodgment and payment service; and
- The mechanism for reviewing decisions made by the commissioner.

For the following reasons, I do not consider that the proposed legislation needs to be amended to address these concerns:

- Firstly, any decisions in this area made by the commissioner would be subject to review by the Administrative Decisions Judicial Review framework; and
- Secondly, the commissioner will publish a Revenue Circular closer to the implementation date that will set out for transparency in administration, the decision-making framework in regard to access to the new service. Further advice on the administration of this access is included in the application forms, a draft of which is currently subject to consultation with the ACT Law Society.

Overall, I consider that the potential for the exercising of this power in a manner that would contravene the principles of the Human Rights Act is extremely remote.

I thank the Committee for its report.

Yours sincerely

Jon Stanhope MLA
Treasurer

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Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Seselja

On 28 November 2006 I wrote to the Standing Committee on Legal Affairs in response to comments in *Scrutiny of Bills and Subordinate Legislation Report No. 34* of 13 November 2006 regarding Disallowable Instrument DI2006-214 which was notified by the Gambling and Racing Commission on 3 October 2006.

At that time I advised the Committee that, in light of its comments, the Gambling and Racing Commission had sought advice from the Government Solicitor's Office (GSO) as to the most appropriate legislative means of ensuring that all wagering activity made in good faith by consumers and the sports bookmaking licensee operating at the Wests@Turner Club are rendered lawful and any related concerns are removed.

The Commission has now advised me that it has received advice from GSO that indicates that the Commission should revoke Disallowable Instrument DI2006-214 and make a fresh disallowable instrument which provides retrospective approval to Wests@Turner Club to cover the short period when it was not properly determined as a sports bookmaking venue in accordance with section 21 of the *Race and Sports Bookmaking Act 2001*. I understand that the GSO concluded that the retrospective approval would not adversely affect a person's rights nor would it impose liabilities on a person as the retrospective validation would merely ensure that the legal situation accords to the expectation of the parties involved in the betting transactions. I have been advised by the Commission that a new instrument will be notified in the near future.

Again, I thank the Committee for bringing this matter to my attention. I trust that these comments assist the Committee.

Yours sincerely

Jon Stanhope MLA
Treasurer

17 DEC 2006

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Katy Gallagher MLA

DEPUTY CHIEF MINISTER

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MINISTER FOR DISABILITY AND COMMUNITY SERVICES MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr ~~Seselja~~ Zed

The Standing Committee on Legal Affairs, in Scrutiny Report No. 35 of 2006, commented on Disallowable Instrument 2006-237 - Health Professionals (Dental Board) Appointment 2006 (No. 2) made under the *Health Professionals Act 2004* and the *Health Professionals Regulation 2004*.

The instrument referred to Section 10 of the *Health Professionals Regulation 2004*, which relates to the appointment of board members, but omitted reference to Section 5 of the *Health Professionals Regulation 2004*, which relates to the appointment of the President. The Explanatory Statement referred to both sections correctly.

I have noted the findings of the Committee for this Disallowable Instrument and will ensure that future Disallowable Instruments will refer to all relevant sections of acts and regulations.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
20/12/06

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Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for the ACT
GPO Box 1020
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Dear Mr ~~Seselja~~ Zed

I write to you in response to the Scrutiny of Bills and Subordinate Legislation Committee Report No. 35 of 2006 that was tabled in the Legislative Assembly on Tuesday 21 November 2006.

I note that the report contained comments on subordinate legislation made under the *University of Canberra Act 1989* (DI2006-235 and DI2006-236).

In relation to DI2006-236, being the University of Canberra (University Facilities) Amendment Statute 2006, the statute being amended is currently available on the ACT Legislation Register.

In relation to DI 2006-235, being the University of Canberra (Courses and Awards) Amendment Statute 2006 (No. 2), I note that the statute being amended is not currently available on the ACT Legislation Register and the explanatory statement does not refer to its availability.

I will ensure that relevant explanatory statements direct those who need to refer to these instruments to the place where they can be found.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

21 DEC 2006

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MEMBER FOR MOLONGLO

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

Dear Mr Zed Seselja

I am writing in response to the comments made by the Scrutiny of Bills Committee in Scrutiny Report 34 in respect of the Health Legislation Amendment Bill (No 2) 2006. I have considered the report and provide the following comments in response.

The report addresses a number of issues arising under the Committees terms of reference. In respect of the first issue addressed by the Committee arising under paragraph 2(c) (iv) of the Committees terms of reference regarding an inappropriate delegation of legislative power the Committee concludes that the proposed changes were an appropriate delegation of legislative power.

The next seven matters raised by the Committee fall under its responsibility to report under section 38 of the *Human Rights Act 2004* on any human rights issues raised by Bills and paragraph 2(c) (i) on any clauses in Bills that unduly trespass on personal rights and liberties. In respect of five of the matters reported on, the Committee has concluded that it can see no rights objection to the amendments.

In respect of the amendment proposed in the Bill to insert the abortion provisions in section 250 of the *Health Act 1993* which was to operate retrospectively there is a request that the Minister state that the effect of the proposed amendment would be that it would not affect adversely the rights or interests of a person. A revised explanatory statement will be provided to address this matter in accordance with the Committees recommendation.

In respect of section 59A to provide the President of the Health Professionals Tribunal the power to issue a warrant for the detention of a person the Committee raised a number of concerns regarding the incompatibility of this provision with the *Human Rights Act 2004* and, in particular, the right to liberty and security contained in section 18 of that Act.

The Committee stated in its report that: "On its face, the power in section 59A is extraordinary. While many tribunals have a power as is found in section 59(1), it is most unusual for a tribunal to have the power to order the detention of a person who is ordered to appear before the tribunal as a witness. The only precedent the Committee found is in the *Australian Crime Commission (ACT) Act 2003*. Clearly, a provision such as proposed in section 59A engages a number of HRA rights. Most obviously, there is an apparent derogation of the right in HRA section 18." These comments are somewhat surprising given that identical warrant powers have been available to

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the President of the Mental Health Tribunal under section 92 of the *Mental Health (Care and Treatment) Act 1994* for the past 12 years and that these powers were considered compatible with the *Human Rights Act 2004* by the Monash University Casten Centre for Human Rights Law as recently as 2005 in its audit of ACT Health legislation.

In respect of section 92 of the Mental Health Treatment and Care Act 1994 the Monash University Casten Centre for Human Rights Law made this assessment: " Under section 92, the presidential member of the Mental Health Tribunal (MHT) can issue a warrant to compel the attendance of a person at the MHT. Again this raises issues regarding the right to liberty (s.18 (1) HRA). However, s.92 is necessary, and therefore justified under s.28 HRA, to facilitate the processes of the MHT. It plainly cannot function properly if people are free to escape attendance before it." In addition, the Human Rights Unit of the Department of Justice and Community Safety advised that after making a minor amendment to section 59A so that the detained person is brought before the tribunal as soon as reasonably possible that the warrant provisions contained in section 59A were consistent with the *Human Rights Act 2004*. This minor amendment was made.

However, in view of the adverse comments made by the Committee it was decided that it would be preferable to omit section 59A from the Bill. This was decided with the possibility of revisiting this clause at a later date after considering more fully the Committee's comments and determining whether it is possible to modify some aspects of this power to make it more acceptable to the Committee.

Finally, I would like to express my thanks to the Committee for the time it has taken to carefully look at these powers and to provide detailed and useful comments in respect of these powers. The Government as always is willing to listen to helpful constructive comments that will lead to improvements in the quality of the legislation to be considered by the Legislative Assembly.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

5/1/07

John Hargreaves MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR ENVIRONMENT AND SUSTAINABILITY
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS

Member for Brindabella

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No. 36 dated 11 December 2006. I offer the following response in relation to the matters raised by your Committee.

The Report contained comments in relation to Subordinate Law SL-2006-46 the Water Resources Amendment Regulation 2006 (No.1) made under the *Water Resources Act 1998* Explanatory Statement:

Comments on the Explanatory Statement

I note the Committee states that the Explanatory Statement indicates that this subordinate law is made to correct an error, namely the inadvertent omission of the Arboretum and Kingston Foreshores Eco-pond from section 4 of the Water Resources Regulation. The Committee notes, however, that the subordinate law is not given retrospective effect. The Committee has sought my advice as to whether there were any adverse consequences of that inadvertent omission, and if so, what has been done to redress those adverse consequences.

I am pleased to inform you that there were no adverse consequences of the omission. The regulation allows me as Minister to allocate water for irrigation from the Ecopond in Kingston and from groundwater in the Arboretum. Neither of these projects were at a stage in their development where the water was required before the omission was detected and corrected.

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The Committee's comments have been noted.

Yours sincerely

John Hargreaves MLA
Minister for Territory and Municipal Services
17 January 2007

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Scrutiny of Bills & Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2601

Zed

Dear Mr Seselja

Thank you for your Scrutiny of Bills Report No.36 of 11 December 2006. I offer the following response in relation to the matter raised by your Committee on the Court Legislation Amendment Bill 2006.

I note the Committee's comment on the explanatory statement for the Court Legislation Amendment Bill 2006. The explanatory statement for the Bill explains that clause 20 removes an unnecessary reference in section 311 of the *Magistrates Court Act 1930* to the *Evidence (Miscellaneous Provisions) Act 1991*. I am advised that the Bill does not remove all references in this section to the *Evidence (Miscellaneous Provisions) Act 1991*, as a reference to section 20 of that Act is still relevant.

I trust that this information addresses the Committee's concerns about the Court Legislation Amendment Bill 2006.

Yours sincerely

Simon Corbell MLA
Attorney General

22.1.07

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Dear Mr ~~Seselja~~ Zed

The Standing Committee on Legal Affairs in Scrutiny Report 35 of 20 November 2006 commented on the appointment of members of the Default Insurance Fund Committee under Schedule 3 of the *Workers Compensation Act 1951*.

Specifically, the Report queried the basis of the appointment of an alternate member in the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No 3). The Report noted that the *Workers Compensation Act 1951* does not authorise this.

The power to appoint an alternate member comes from subsection 209(1) of the *Legislation Act 2001* which provides that

> "... the power to make an appointment also includes power to appoint a person, ...to act in the position – ...
>
> b) during any period, or all periods, when the appointee cannot for any reason exercise functions of the position."

The appointment in DI2006-229 for an alternate member is to act as a member where a DIF Committee Member representing insurers is unable to exercise the functions of the position, which is within subsection 209(1)(b).

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations
- 6 FEB 2007

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