Legislative Assembly for the ACT

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

Scrutiny Report

11 DECEMBER 2006

Report 36

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:

TERRITORY-OWNED CORPORATIONS AMENDMENT BILL 2006

This Bill would amend the *Territory-owned Corporations Act 1990* to remove Rhodium Asset Solutions Limited from the application of the Territory-owned Corporations Act 1990 in order to facilitate the sale of the shares in the company.

UNIVERSITY OF CANBERRA AMENDMENT BILL 2006

This Bill would amend the *University of Canberra Act 1989* primarily in relation to the composition of the Council of the University, to the effect that the Chief Minister will appoint a majority (8) of the members of the Council, with the remaining 7 to be comprised of 3 University office-holders, and 4 persons elected by staff and students.

Bills—Comment

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

COURT LEGISLATION AMENDMENT BILL 2006

This Bill would amend various laws relating to the courts to clarify what is meant by contempt of court and to deal with other matters of a technical nature.

Comment on the Explanatory Statement

While it is said in the Explanatory Statement that the proposed section 311 "removes a reference to provisions of the *Evidence (Miscellaneous Provisions) Act 1991* which no longer apply", paragraph 311(1)(a) of proposed section 311 retains a reference to this Act. It thus appears that the Explanatory Statement should be amended.

CRIMES AMENDMENT BILL 2006

This Bill would amend the *Crimes Act 1900* to create a new offence where a person is in possession of a knife in or in the vicinity of licensed premises, subject to a defence that the possession is necessary or reasonable for, or for a purpose incidental to, the lawful pursuit of the person's occupation, or the possession is of a prescribed kind; and to amend that Act and the *Prohibited Weapons Act 1996* to increase the penalties attaching to existing offences of a similar kind.

***Report under section 38 of the* Human Rights Act 2004**
Para 2(c)(i) – undue trespass on rights and liberties

Are the penalties to be attached to the commission of the various offences created or affected by this Bill proportionate?

Proportionality in sentencing

Section 10 of the *Human Rights Act 2004* provides:

> **10 Protection from torture and cruel, inhuman or degrading treatment etc**
>
> (1) No-one may be—
>
> …
>
> (b) treated or punished in a cruel, inhuman or degrading way.

Just what a Territory court will say this means is conjectural, but it is clear that "[i]n various jurisdictions around the world it is a constitutional principle that no person should be subjected to a grossly disproportionate sentence": D van Zyl Smit and A Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) 67 *Modern Law Review* 541 at 541. The authors quote from a decision of the Constitutional Court of South Africa: "The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, …" (*S v Dodo* 2001 (3) SA 382 (CC) 303).

This constitutional principle is mirrored in Australian law by common law principle. In *Veen v The Queen (No 2)* [1988] HCA 14, the High Court approved of the approach of the sentencing judge that "[t]he sentencing principle [is that a sentence should be] "proportionate to the gravity of the offence" unless, perhaps, the applicant's history warrants some departure from the principle" (at [7]). Their Honours said:

> The principle of proportionality is now firmly established in this country. … a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender: … [C]are to be exercised in imposing a sentence merely to educate possible offenders (at [8]).

The HRA compatibility of a number of amendments proposed by the Bill might be assessed the light of this principle.

- Existing subsection 382(1) of the Act provides for an offence where a person, without reasonable excuse, has a knife in his or her possession in a public place or school. Subsection 382(2) provides a non-exhaustive definition of what may constitute a reasonable excuse. The maximum penalty is **10 penalty units**, imprisonment for **6 months** or both. This Bill would amend section 382 to increase this penalty to **100 penalty units**, imprisonment for **2 years** or both.
- The penalty that would attach to the new offence of being in possession of a knife in or in the vicinity of licensed premises is 100 penalty units, imprisonment for **2 years** or both.
- The penalty attaching to a breach of section 5 of the *Prohibited Weapons Act 1996* (unauthorised possession of a prohibited weapon) would increase from 100 penalty units, imprisonment for **1 year** or both, to 100 penalty units, imprisonment for **2 years** or both.

- The penalty attaching to a breach of section 6 of the *Prohibited Weapons Act 1996* (unauthorised possession of a prohibited article) would increase from 50 penalty units, imprisonment for **6 months** or both, to 100 penalty units, imprisonment for **1 year** or both.
- The penalty attaching to a breach of section 8 of the *Prohibited Weapons Act 1996* (failing to deliver a prohibited weapon or prohibited article to the police or a person authorised by permit to possess the weapon or article) would increase from 50 penalty units, imprisonment for **6 months** or both, to 100 penalty units, imprisonment for **1 year** or both.

ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Road Transport (Safety and Traffic Management) Act 1999* to increase the penalty attaching to a breach of section 16 of the Act, which makes it an offence for a driver of a vehicle involved in an accident, in which someone dies or is injured, to fail to stop and give any necessary assistance within the driver's power to give.

***Report under section 38 of the* Human Rights Act 2004**
Para 2(c)(i) – undue trespass on rights and liberties

Are the penalties to be attached to the commission of the various offences created or affected by this Bill proportionate?

Proportionality in sentencing

See the references immediately above. The HRA compatibility of a number of amendments proposed by the Bill might be assessed in light of the principle of proportionality in sentencing.

The Bill would amend section 16 of the Act by increasing the penalty for the offence from a maximum of 50 penalty units and/or imprisonment for six months to a maximum of 200 penalty units and/or two years imprisonment. The Explanatory Statement states that "[t]he amendment made by the Bill is intended to more appropriately reflect the seriousness of the offence and render the ACT penalty more consistent with penalties for similar offences in other Australian jurisdictions".

FREEDOM OF INFORMATION AMENDMENT BILL 2006

This Bill would amend the *Freedom of Information Act 1989* in a number of ways and in particular: (i) would insert a new exemption for documents the disclosure of which would affect national security, defence or international relations and provide for a Minister to make a conclusive certificate to strengthen a claim for this exemption; (ii) to expand the width of the existing exemption to protect the privacy of a person other than the requester by substituting for the concept of "information relating to the personal affairs of that person" with the broader concept of "personal information about the person"; (iii) to expand the circumstances in which an agency may refuse to process a request on workload grounds; and (iv) to provide for consultation procedures where the nature of the document in issue is such that its disclosure would affect the interests of various kinds of other persons or bodies.

***Report under section 38 of the* Human Rights Act 2004**
Para 2(c)(i) – undue trespass on rights and liberties

Introduction

Section 10 of the *Freedom of Information Act 1989* (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 *Human Rights Act 2004* (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.

The FOI Act was modelled closely on the Commonwealth FOI Act, but the latter has been amended in various ways to the overall effect of reducing the scope of the right to access. This Bill would amend the Territory FOI Act to copy some of those amendments.

Some amendments proposed by the Bill would better protect the interests of "third parties" whose affairs would be affected in specified ways by the disclosure of the document(s) to the requester. This protection would result from the provision of consultation procedures where the nature of the document in issue is such that its disclosure would affect the interests of various kinds of other persons or bodies; see clauses 8, 9, 10 and 16. In addition, the substitution for the concept of "information relating to the personal affairs of that person" with the broader concept of "personal information about the person" in section 48 of the Act would have the effect of expanding the range of persons who may request that a document to which the person has gained access be amended in some respect(s); to appeal against a refusal to amend the documents; and, even if the appeal is unsuccessful, to request that an annotation be attached to accompany the record when it is shown to any person; see clause 15.

The Committee does not gainsay the enhancement of the right to privacy (see HRA paragraph 12(a)) that flows from these amendments. Given, however, its terms of reference, the Committee will focus on those amendments which would reduce the scope of the right to access.

The Committee has identified three major issues:

Is the proposal (see clause 13) to insert a new section 37A to provide for an exemption for documents the disclosure of which would affect national security, defence or international relations, and provide for a Minister to make a conclusive certificate to strengthen a claim for this exemption, incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

Is the proposal (see clause 14) to amend FOI Act section 41 by substituting the concept of "information relating to the personal affairs of that person" with the broader concept of "personal information about the person" incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

Is the proposal (see clause 7) to replace the existing subsection 23(1) of the Act with new provisions, and thus expand the circumstances in which an agency may refuse to process a request on workload grounds, incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

Is the proposal (see clause 13) to insert a new section 37A to provide for an exemption for documents the disclosure of which would affect national security, defence or international relations, and provide for a Minister to make a conclusive certificate to strengthen a claim for this exemption, incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

To resolve these questions, the Assembly might address:

- whether HRA subsection 16(2)'s statement of a right "to seek information … of all kinds" embodies a right to access to government-held information; and
- if so, whether it follows from such a right that any exemption from the right must be narrowly expressed and subject to a public interest override; and/or
- whether the law must provide for oversight by an independent administrative body of a claim of exemption.

In addressing these questions, the Assembly might consider the common law concerning public interest immunity, which, in contexts similar to those envisaged by proposed section 37A, allows to government an ability to resist disclosure of information to a litigant seeking documents held by government.

As noted, 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. This right is, however, subject to various limitations. In particular, the right does not extend to matter in a document that is exempt from disclosure.

Thus, upon a person making a request for access to a document of an agency (or an official document of a Minister), the relevant decision-maker must grant access unless he or she considers that the document is exempt (and determines to assert that claim in denial of access).[1]

If an exemption is claimed, the requester may seek an internal review, and if still not satisfied may seek review by the Administrative Appeals Tribunal, a body established by the *Administrative Appeals Tribunal Act 1989* (ACT). Its "characteristic function … is to undertake what is sometimes called 'merits review' of administrative decisions, determining whether the decision under review was, on the material before the Tribunal, the correct or (in the case of discretionary decisions) the preferable one" (*McKinnon v Secretary, Department of Treasury* [2006] HCA 45 [1] per Gleeson CJ and Kirby J). A common way to express this is to say that the AAT stands in the shoes of the agency decision-maker, and on the basis of the facts presented to it on the review, (which are often very different to the facts considered by the decision-maker), takes its own view – uninfluenced by the view of the agency decision-maker – as to what is the correct or preferable decision to be made. Adapting the words of Gleeson CJ and Kirby J, "[w]hen the *Freedom of Information Act [1989* (ACT)] ("the FOI Act") was enacted, the Tribunal, by [s 62(1)], was given that function in relation to what might be described as ordinary or routine decisions concerning requests for access to a document of an agency or an official document of a Minister" (above, at [1]).

[1] An agency or Minister may grant access to an exempt document (section 13), but it should be noted that on a review the AAT cannot grant access (section 62(2)).

But the function of the AAT is very different where a conclusive certificate of a Minister supports a claim that a document is exempt; (see sections 62-64 of the FOI Act). An applicant can appeal to the AAT to seek review of a claim of exemption that is supported by a conclusive certificate, but the tribunal cannot overrule the claim. Rather, it may decide only whether there exist "reasonable grounds" for the claim of exemption. If the AAT determines that there are not reasonable grounds for the certificate, the Minister has a choice whether to maintain or revoke the certificate. If the certificate is maintained, notice must be provided to the applicant and tabled in Parliament.

To illustrate, the exemption provided for in FOI Act section 36 applies to many of the internal advice memorandums generated within government where they relate to the "deliberative processes" of government. But such a document is not exempt unless its disclosure would be contrary to the public interest. (There are various limitations to section 36 which are not noted here.) If a claim for exemption is made *without* the support of a conclusive certificate, the AAT, on a review, decides for itself whether the document relates to the "deliberative processes" of government, and, if so, whether its disclosure would be contrary to the public interest.

Where a Minister makes a conclusive certificate to support the claim (see subsection 36(3)), the AAT can review only the question whether the document is a deliberative process document. It cannot determine whether disclosure would be contrary to the public interest. However, it may refer this question to a panel of the Tribunal constituted by a presidential member or members in accordance with section 64. This panel may then determine whether there exist reasonable grounds for the claim made: subsection 62(5). But the decision of the panel operates only as a recommendation to the appropriate Minister, who thus retains the power to decide whether to revoke the certificate (see section 63). Thus, as Hayne J said in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, "the Act provides for a series of steps to be taken whose ultimate sanction is evidently intended to lie in the political arena of the Parliament".

To appreciate what follows, it is important to note the structure of section 62. While subsection 62(2) states a general rule to apply where a certificate under section 34, 35 or 36 is in force in respect of a document, there are then separate subsections making provision for the powers of the AAT. Thus, the power to assess whether there are reasonable grounds for a conclusive certificate claim under section 36 is provided for in subsection 62(5).

Against this background, the proposal in clause 13 of the Bill to insert a new section 37A into the Act can now be examined.

Subsection 37A(1) specifies circumstances in which a document will be exempt:

> **37A Documents affecting national security, defence or international relations**
>
> (1) A document is an exempt document if its disclosure under this Act—
>
> (a) would, or could reasonably be expected to, cause damage to—
>
> (i) the security of the Commonwealth, the Territory or any State; or
>
> (ii) the defence of the Commonwealth, the Territory or any State; or
>
> (iii) the international relations of the Commonwealth; **or**

(b) would divulge any information or matter communicated in confidence by or for a foreign government, an authority of a foreign government or an international organization to the government of the Commonwealth or Territory, to an authority of the Commonwealth or Territory or to a person receiving the communication of the Commonwealth or Territory or of an authority of the Territory.

(The notion of "security of the Commonwealth, the Territory or any State" is defined in subsection 37A(5).)

If an agency decision-maker determined that a document was exempt in any of these circumstances, the requester could seek review by the AAT, and the tribunal would stand in the shoes of the decision-maker *unless* the Minister signed a conclusive certificate under subsection 37A(2). This provides:

(2) If a Minister is satisfied that a document is an exempt document under subsection (1), the Minister may sign a certificate to that effect stating the reason and, subject to part 7, the certificate, while in force, establishes conclusively that the document is an exempt document.

Part 7 of the Act contains the provisions concerning review of agency decisions, and includes section 62. It would appear that the intention was to permit the AAT to review a Ministerial decision to issue a conclusive certificate on the same grounds as the AAT may review, for a example, a certificate issued to support a claim for exemption under section 36. To achieve this objective, it would however be necessary to amend section 62 to make provision for review of a certificate issued to support a claim for exemption under proposed section 37A.

But the Bill does not contain a proposal to amend section 62 in this way, but the Committee's comments will however proceed on the basis that there will be proposed an amendment to the Bill (probably by a proposal to amend section 62), to empower the AAT to determine if there are reasonable grounds to support a claim for exemption under proposed section 37A.

If no such amendment is proposed, then the rights issue will be more acute. If no such proposal is forthcoming by way of an amendment to the Bill, the result would be that the AAT would have no power at all to review a certificate issued to support a claim for exemption under proposed section 37A, and the document(s) in issue would be conclusively exempt.

On the basis that the AAT will be empowered to determine if there are reasonable grounds to support a claim for exemption under proposed section 37A, the Committee nevertheless reports to the Assembly that an issue arises under the *Human Rights Act 2004*.

The issue may be presented by way of reference to the judgments of the High Court in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, where it addressed the issue of what was "the test to be applied to a review under the *Freedom of Information Act 1982* (Cth) ("the Act") of a conclusive certificate of a Minister denying access to documents produced in or to the Minister's department" (at [75] per Callinan and Heydon JJ).

The whole of the High Court held that the review function of the AAT when a Minister had issued a conclusive certificate was very different from its usual function. Gleeson CJ and Kirby J said:

> Such a decision of a Minister is subject to review by the Tribunal. However, the power of review … does not involve the exercise of the characteristic function of full merits review described at the commencement of these reasons. … The Tribunal does not ask itself whether, on the evidence before it, the Tribunal is satisfied that the disclosure of the document would be contrary to the public interest. The question that … is raised for the Tribunal's decision is a related, but different, question. It is "whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest" (at [7]).

The majority of the High Court held that in answering that question, the AAT should focus upon whether the grounds stated in the conclusive certificate are reasonable grounds for the claim that disclosure would be contrary to the public interest *and should not attempt to "balance" the strength of these grounds against other grounds or claims that would point to disclosure being in the public interest*. Callinan and Heydon JJ said:

> The real issue will almost invariably then be whether the document in question, having regard to its date, its author, the position of its author, and its contents, is one in respect of which the Minister can hold the requisite opinion. The Act provides no mandate for any balancing exercise. To have regard to extraneous matters such as other competing reasons, if the requisite statutory reason for non-disclosure has been demonstrated, gives rise to a risk that a de facto balancing act will take place (at [131]); see too Hayne J at [65].

The rights issue can now be stated.

In attempting to persuade the High Court that it should find that the FOI Act mandated a balancing exercise, the requester in *McKinnon* argued that if the review function of the AAT in a conclusive certificate case was limited (in the way the High Court held that it was), then this result was in tension with the objects of the FOI Act. So far as relevant, the identical objects provision of ACT FOI Act reads:

> (1) The object of this Act is to extend as far as possible the right of the Australian community and, in particular, the citizens of the Territory, to access to information in the possession of the Territory by —
>
> …
>
> (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.

What is of interest is that Callinan and Heydon JJ appear to have accepted that there was a tension. They said:

> It may be accepted, as the appellant submitted, that there is a tension between the objects of the Act and the restricted function of the Tribunal in undertaking a review. But that tension is resolved here by the explicit language of Pt IV of the Act which in language free of all ambiguity states what the function of the Tribunal is in reviewing the conclusiveness of a Minister's certificate. In short, the relevant sections clearly and designedly limit the broad and high-sounding objects (at [111]).

However, in the Territory an issue under the *Human Rights Act 2004* arises if it may be said that the objects of the FOI Act state principles that inhere in any provisions of the Act. In this regard, sections 16 and 17 are relevant:

> **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.
>
> **17 Taking part in public life**
>
> Every citizen has the right, and is to have the opportunity, to—
>
> (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
>
> (b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
>
> (c) have access, on general terms of equality, for appointment to the public service and public office.

Section 16 is most obviously relevant. It should be noted that it states a "freedom to **seek**, receive and impart information and ideas of **all** kinds" (emphasis added). In providing for a right to seek information, section 16 follows article 19 of the *Universal Declaration of Human Rights* and article 19 of the *International Covenant on Civil and Political Rights*.[2]

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

[2] It must be noted that article 10 of the *European Convention on Human Rights* protects the right to "receive and impart", but not the right to "seek", information. Thus, case-law of the European Court of Human Rights and of United Kingdom courts that has not recognised that article 10 confers a general right to receive information from government is not a reliable guide to how HRA section 16 might be understood; see Mendel (cited in the text) concerning the European law, and the UK cases noted in R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) para 15.136A. Some national constitutional courts have held that open government is "an emanation from the right to know which seems implicit in the right of free speech and expression" (*S.P. Gupta v. President of India* [1982] AIR (SC) 149 at 234, Supreme Court of India), while others have not (see *Houchins v. KQED, Inc* (1978) 438 US 1 at 15, Supreme Court of the United States of America). Again, there are significant differences in the wording of the various national constitutions; see generally Mendel. The issue is considered in Peter Bayne, "Freedom of Information and Political Free Speech", in T Campbell (ed), *Freedom of Communication* (1994) at 204-207.

The argument continues that the notion of freedom of information (FOI) embodies three major elements:

> The right to freedom of information refers primarily to the right to access information held by a wide range of public bodies. It reflects the principle that public bodies do not hold information on their own behalf, but rather for the benefit of all members of the public. Individuals should thus be able to access this information, unless there is an overriding public interest reason for denying access. However, the right to freedom of information goes beyond the passive right to access documents upon request, and includes a second element, a positive obligation by States to publish and widely disseminate key categories of information of public interest.
>
> A third aspect of the right to freedom of information is starting to emerge, namely the right to truth. This refers to States' obligation to ensure that people know the truth about serious incidents of human rights abuse and other traumatic social events, such as a major rail disaster or sickness: Mendel, above.

The basis for an FOI law is tied directly to provisions such as HRA section 16. Mendel continues:

> The primary human rights or constitutional source of the right to freedom of information is the fundamental right to freedom of expression, which includes the right to seek, receive and impart information and ideas, although some constitutions also provide separate, specific protection for it. In a more general sense, it can also be derived from the recognition that democracy, and indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend.[3]

As to the substance of an FOI law, in particular with regard to the first element, Mendel argues that

> [o]ver time, authoritative statements, court decisions and national practices have elaborated certain minimum standards which such laws and policies must meet. These include, among other things:
>
> - a strong presumption in favour of disclosure (the principle of maximum disclosure);
>
> …
>
> - clear and narrowly drawn exceptions, subject to a harm test and a public interest override; and
> - effective oversight of the right by an independent administrative body.

[3] It might be noted that while the High Court has found that a right to political free speech is embedded in the Constitution, those decisions are not authority for a proposition that the right includes a right to obtain information from the government. In *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45 at [22]; (1992) 177 CLR 106, McHugh J did suggest that that the right to political free speech "might simply part of a general right of freedom of communication in respect of the business of government of the Commonwealth". His Honour quoted the view of Quick and Garran to the effect that "the Constitution gave rights of access to federal officials and records". The justification for recognition of a right to political free speech – that it is essential to the efficacy of representative and responsible government - is of the same nature as the justification offered for the enactment of Australian FOI laws; see generally Bayne, above note 2.

If HRA subsection 16(2) is interpreted such that it states a right to information in the possession of government and its agencies according to the standards just stated, then clearly here is an issue as to whether proposed section 37A of the *Freedom of Information Act 1989* is compatible with section 16. An argument for incompatibility might point to

- the absence of a public interest override in the statement of the scope of the exemption in proposed section 37A; and
- the lack of effective oversight of the right by an independent administrative body given that a claim under section 37A could be supported by a conclusive certificate.

On the other hand, an approach to what HRA subsection 16(2) requires might be influenced by the Australian common law approach that has accorded great weight to maintaining the secrecy of certain kinds of government held information. This doctrine might at least be relevant to the application of HRA section 28 should an incompatibility with HRA paragraph 16(2) be found.

One protected category concerns information the revelation of which would compromise the working of collective responsibility. In *Commonwealth v Northern Land Council* [1993] HCA 24 at [6], the High Court said:

> it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made.

Another protected category concerns documents the disclosure of which might damage national security. *Alister v The Queen* (1983) 154 CLR 404 concerned a claim for non-disclosure (not under an FOI law but in response to a subpoena) based on an assertion that:

> Effective security, in relation to the Organization and its activities, can only be maintained if the Organization is able to refuse in all cases, where information or documents are sought, to divulge whether such information or documents are available or do exist.

Dawson and Wilson JJ said:

> Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister. On the other hand, notwithstanding the importance of matters of national security, the Minister's claim is not conclusive. … It is conceded by counsel for ASIO that the duty lies with the court to balance the competing aspects of the public interest. No doubt that duty will often be little more than a formality unless in the face of a claim based on security a compelling case is made out for the production of the documents.

Their Honours also said:

> National security undoubtedly forms a category of public interest of special importance. In *D. v. National Society for the Prevention of Cruelty to Children*, (1978) AC 171, at p 233 Lord Simon of Glaisdale referred specifically to this category, saying:

> "If a society is disrupted or overturned by internal or external enemies, the administration of justice itself will be among the casualties. *Silent enim leges inter arma*. So the law says that, important as it is to the administration of justice that all relevant evidence should be adduced to the court, such evidence must be withheld if, on the balance of public interest, the peril of its adduction to national security outweighs its benefit to the forensic process - as to which, as regards national security in its strictest sense, a ministerial certificate will almost always be regarded as conclusive: see Lord Parker of Waddington in *The Zamora*." (1916) 2 A.C. 77, at p. 107: (154 CLR at 436).

These statements may be compared to Brennan J's observation that:

> It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way: … (154 CLR at 456).

That disclosure of a document would prejudice the conduct of the "affairs of government at the highest level" has been recognised as another ground for a claim of immunity from production of the document in litigation: see *Sankey v Whitlam* (1978) 142 CLR 1 at 58 per Stephen J. In that case, the High Court accepted that certain Loan Council documents were immune from disclosure on the basis that there would be detriment to the public interest if the discussions "between representatives of the governments of each entity in our federation and of the circumstances of those discussions … designedly held in secret, are to be subject to disclosure" (at 66, per Stephen J).

These High Court pronouncements were made in the context of a claim by government that it should not be obliged to produce a document in the course of litigation. This is a context in which the courts give weight to the interests of the litigant seeking access. In the FOI Act context, the interests of the requester are often less significant.

The Committee trusts that this brief discussion will assist the Assembly to assess clause 13 of the Act against the standards in the HRA.

Is the proposal (see clause 14) to amend FOI Act section 41 by substituting the concept of "information relating to the personal affairs of that person" with the broader concept of "personal information about the person" incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

To resolve these questions, the Assembly might address:

- whether HRA subsection 16(2)'s statement of a right "to seek information … of all kinds" embodies a right to access to government-held information; and
- if so, whether the proposed expansion of the scope of the existing exemption in section 41 of the FOI Act travels beyond the degree of protection needed to protect the privacy interests of person other then the person requesting the disclosure of the documents in issue.

Existing section 41 of the Act states an exemption designed to protect the privacy interests of persons other than the particular person who has requested access to the government held document. It states:

> 41 (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

Such persons are given a right to object to any proposed disclosure before the decision whether or not to disclose is made, and a right to appeal against any decision to disclose to another person. Clauses 10 (by insertion of a new section 27A) and 16 (by insertion of a new section 69A) would improve these aspects of the law and the Committee makes no comment on them.

The significant change would be the deletion of the words "information relating to the personal affairs of" and their replacement with the words "personal information about".

The latter is a much more extensive category than the former. While there is some debate about how far it extends, it has been understood by courts and tribunals to encompass much more than information of a personal nature concerning the relevant person.

The reach of the concept of "personal information about"

Clause 4 of the Bill would insert into subsection 4(1) of the Act a definition of "personal information" in these terms:

> ***personal information*** means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Thus, it is the case that

> [w]hat is critical is the fact that the information is capable of identifying an individual rather than its specific nature. If a person's identity is clear, or reasonably capable of being ascertained, then any information about them is covered, irrespective of whether or not it is sensitive: M Paterson, *Freedom of Information and Privacy in Australia* (2005) [6.6].

The reach of the concept of "information relating to … personal affairs"

In contrast, the notion of "information relating to … personal affairs" requires attention to the quality of the information. In *Young v Wicks* (1986) 13 FCR 85 at 89, Beaumont J said that the concept referred to "matters of private concern to a person". The later Federal Court case of *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 held however that the concept embraced "information which concern[ed] or affect[ed] the person as an individual, whether it is known to other persons or not". "In *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 625 the New South Wales Court of Appeal interpreted personal affairs as meaning 'the composite collection of activities personal to the individual concerned'": M Paterson, above at [6.9].

The courts and tribunals have distinguished such information from information relating to business or financial affairs (although the exemption may apply where such information is also to be characterised as "information relating to … personal affairs"). Critically, they have distinguished it from information relating to the performance of duties of employment by public servants. Thus, "in *University of Melbourne v Robinson* [1993] 2 VR 177 at 187 the

Victorian Supreme Court drew a distinction between those aspects of an individual's life which might be said to be of a private character, and those relating to or arising from any position, office or public activity with which the person occupies his or her time": M Paterson, above at [6.11], and see *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606. It is fair to say that the courts have been conscious of a need to apply the notion of "information relating to … personal affairs" in a way that will facilitate the use of the FOI Act as a means to find out more about why public servants acted as they did.

The rights issue

The issue that arises is whether this amendment broadens the privacy exemption in FOI Act subsection 41(1) to the point where it is incompatible with HRA paragraph 16(2). But in this context, the competing consideration is whether a broader exemption furthers the right to privacy and reputation stated in HRA paragraph 12(a), 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; … .

Whether section 12 is relevant turns on what meaning is given to the notion of "privacy". A recent paper by the Australian Law Reform Commission noted that:

> [i]t has been suggested that privacy can be divided into a number of separate, but related, concepts:
>
> **Information privacy**, which involves the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records. It is also known as 'data protection';
>
> **Bodily privacy**, which concerns the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches;
>
> **Privacy of communications**, which covers the security and privacy of mail, telephones, e-mail and other forms of communication; and
>
> **Territorial privacy**, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks: *ALRC Issues Paper 31, Review of Privacy* at [1.88]. http://www.austlii.edu.au/au/other/alrc/publications/issues/31/

In the context of this Bill to amend the FOI Act, the relevant category is that of information privacy.

Later in this paper, when referring to the definition of personal information, (which is defined in the same way as is proposed by this Bill), the ALRC noted that:

> 3.24 Personal information includes written or electronic records about individuals such as social security records and doctors' records, but may also include photos or videos, where the person can be identified from the context or in other ways. A person's name appearing on a list of clients or patients may also fall within the definition of personal information because the context provides information, possibly sensitive personal information, about the individual.

The ALRC's concern thus appears to be with information that would be more accurately described as information relating to the personal affairs of a person, as that notion has been understood by Australian courts and tribunals. Nevertheless, the ALRC does not propose that the *Privacy Act 1988* (Commonwealth) should not continue to employ the notion of "personal information" as it is in that Act and as it would be in the amended FOI Act as proposed by this Bill.

The Committee trusts that this brief discussion will assist the Assembly to assess clause 14 of the Act against the standards in the HRA.

Is the proposal (see clause 7) to replace the existing subsection 23(1) of the Act with new provisions, and thus expand the circumstances in which an agency may refuse to process a request on workload grounds, incompatible with HRA subsection 16(2), and, if so, is it justifiable under HRA section 28?

- whether HRA subsection 16(2)'s statement of a right "to seek information … of all kinds" embodies a right to access to government-held information; and
- if so, whether the proposed expansion of the scope of the existing facility in section 23 of the FOI Act to refuse to process a request - that is, to refuse to make a determination that each document sought must be disclosed - to now permit refusal based on agency assessment of the time it would take to make such an assessment, travels beyond what is required to give adequate recognition to the workload demands that FOI Act requests place on agencies.

As the Act stands, the right to access stated in section 10 is also displaced by a provision that allows that an agency or a Minister may refuse to grant access, without having caused the processing of the request to be undertaken, if satisfied that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations, or would interfere substantially and unreasonably with the performance by the Minister of his or her functions, as the case may be. The agency or Ministerial decision-maker must have regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister": FOI Act paragraph 23(1)(b).

The effect of clause 7 is that this facility for refusal is retained with the addition that the agency or Ministerial decision-maker must *also* have regard to

> "the number and volume of the documents and the resources that would have to be used in—
>
> …
>
> (ii) examining the documents and consulting on the documents with any entity in relation to the request; and
>
> (iii) copying the documents; and
>
> (iv) preparing an itemised schedule of the documents; and
>
> (v) notifying the applicant of any interim or final decision on the request; … .

The Explanatory Statement states that the point of this amendment is to ensure "that all [potential] work involved in an FOI request is taken into account in a determination whether to refuse a request on the grounds that the request involves an unreasonable diversion of resource". The Explanatory Statement does not indicate whether the existing section 23 has proved to be inadequate in any way.

There is however the potential abuse of this facility for refusal given that the application of proposed paragraph 23(1A)(a)(ii) gives considerable choice to the agency to say how much work would be involved in "examining the documents" and "consulting" with others. The agency decision could be reviewed by the AAT, but it will be very difficult for the requester to challenge an agency view.

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 DI2006-240 being the Public Place Names (Kingston) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new streets in the Division of Kingston.**

Disallowable Instrument DI2006-241 being the Health (Interest Charge) Determination 2006 (No. 1) made under section 37 of the *Health Act 1993* **revokes DI2004-260 and determines interest charged for the purposes of the Act.**

Disallowable Instrument DI2006-242 being the Public Place Names (District of Gungahlin) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of two roads in the District of Gungahlin and amends DI1991-96 by revoking the name of a specified road.**

Disallowable Instrument DI2006-243 being the Public Place Names (District of Gungahlin) Determination 2006 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the name of a nature reserve in the District of Gungahlin.**

Disallowable Instrument DI2006-244 being the Public Place Names (District of Gungahlin) Determination 2006 (No. 3) made under section 3 of the *Public Place Names Act 1989* **determines the names of two roads in the District of Gungahlin.**

Disallowable Instrument DI2006-245 being the Public Place Names (Gungahlin) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new street in the Division of Gungahlin.**

Subordinate Laws—No comment

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

Subordinate Law SL2006-47 being the Agents Amendment Regulation 2006 (No. 3) made under the *Agents Act 2003* **amends the Agents Regulation 2003 to exempt one of the directors of a public company, whose core business is the provision of a travel service, from the statutory requirement of obtaining a qualification when applying for a travel agent's licence.**

Subordinate Law SL2006-48 being the Public Health Amendment Regulation 2006 (No. 1) made under the *Public Health Act 1997* **requires a person to obtain approval for the installation or alteration of an effluent disposal system and toilet, as well as the septic tank.**

Subordinate Law—Comment

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

Correction of drafting error

Subordinate Law SL2006-46 being the Water Resources Amendment Regulation 2006 (No. 1) made under the *Water Resources Act 1998* **corrects an error in the Water Resources Regulation 2006 by exempting the Arboretum and Kingston Foreshores Eco-pond projects from the moratorium exempting allocation of water and licensing of water taking and bore construction on land subject to urban open space.**

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

> The purpose of this Regulation is to correct an error in the *Water Resources Regulation 2006*. The intention of the regulation was to allow a number of important public infrastructure projects, for example the development of Harrison and Forde, Stromlo Forest Park and also the Arboretum and Kingston Foreshores Eco-pond, to be exempt from the moratorium.
>
> The wording of the Regulation inadvertently excluded two projects, the Arboretum and Kingston Foreshores Eco-pond, from the exemption. In order for these projects to be exempt under the moratorium without exempting other unrelated projects it is necessary to refer directly to the land parcels of the Arboretum and Eco-pond in the Regulation.

It is useful if the Committee begins by setting out the way that the provisions of this subordinate law operate.

The "moratorium" referred to is contained in section 63A of the *Water Resources Act 1998*, which suspends the operation of various provisions of the Water Resources Act that allow for the allocation of water and the granting of licences and permits to take water. Section 63A is expressly subject to section 63B of the Water Resources Act, which provides for exceptions to the moratorium.

Subsection 63B(12) provides that the regulations may prescribe exceptions to the moratorium, in addition to those set out in subsection 63B. Section 4 of the *Water Resources Regulation 2006* sets out various exceptions for the purposes of subsection 63B(12). In simple terms, the various subsections of section 4 provide that the operation of certain specified provisions of the Water Resources Act is not suspended in relation to various specified situations. This has the effect of dis-applying the "moratorium".

As indicated above, this subordinate law amends the Water Resources Regulation by adding three new subsections to section 4. The three new subsections provide that the operation of certain specified provisions of the Water Resources Act is not suspended in relation to a specified block in Belconnen and two specified blocks in Kingston. The Committee assumes that the block in Belconnen relates to the Arboretum and the blocks in Kingston relate to the Kingston Foreshores Eco-pond.

The Explanatory Statement indicates that this subordinate law is made to correct an error, namely the inadvertent omission of the Arboretum and the 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. This being the case, the Committee would appreciate the Minister's 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.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Treasurer, dated 28 November 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 Education and Training, dated 6 December 2006, in relation to comments made in Scrutiny Report 35 concerning:
  - Disallowable Instrument DI2006-224, being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 9); and
  - Disallowable Instrument DI2006-225, being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 10).

The Committee wishes to thank the Treasurer and the Minister for Education and Training for their helpful responses.

Zed Seselja, MLA
Chair

December 2006

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

REPORTS—2004-2005-2006

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

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

Report 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 32, dated 18 September 2006

Revenue Legislation Amendment Bill 2006 (No. 2)

Report 34, dated 13 November 2006

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)
Health Legislation Amendment Bill 2006 (No. 2)

Report 35, dated 20 November 2006

Disallowable Instrument DI2006-227 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 1) .....
Disallowable Instrument DI2006-228 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 2) .....
Disallowable Instrument DI2006-229 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 3) .....
Disallowable Instrument DI2006-230 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 4) .....
Disallowable Instrument DI2006-231 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 5) .....
Disallowable Instrument DI2006-232 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 6) .....
Disallowable Instrument DI2006-233 - Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 7) .....
Disallowable Instrument DI2006-235 - University of Canberra (Courses and Awards) Amendment Statute 2006 (No. 2).....
Disallowable Instrument DI2006-236 - University of Canberra (University Facilities) Amendment Statute 2006 .....
Disallowable Instrument DI2006-237 - Health Professionals (Dental Board) Appointment 2006 (No. 2) .....

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

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

Dear Mr Seselja

I am writing in response to the comments by the Standing Committee on Legal Affairs 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.

The Committee noted that the Explanatory Statement for the Instrument DI2006-214 stated that the Instrument amended details of the specified sub-agencies by including two new sub-agencies to the Schedule and reinstated a sub-agency known as Wests@Turner Club that was inadvertently omitted under DI2006-206.

I have been advised that the Gambling and Racing Commission has noted the Committee's concern and has conducted an assessment of all sports betting activity that took place while the ACTTAB sub-agency at Wests@Turner Club was not covered by the approval.

The assessment concluded that at this point in time there were no adverse consequences detected as a result of the inadvertent omission of the venue from the list of approved sports bookmaking venues. The Commission's advice also indicated that the omission had not adversely affected any person's rights and had not imposed any liabilities on any person.

Nevertheless, in light of the Committee's comments, the Commission has sought advice from the Government Solicitor's Office as to the most appropriate legislative means of ensuring that all wagers and winnings paid in good faith are legitimised and that any concerns about the legality of the wagering activity that took place for that four-week period at the Wests@Turner Club are removed.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
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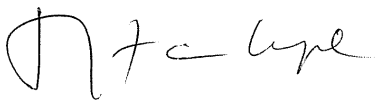
I thank the Committee for bringing this matter to my attention. I will write to the Committee again with further information once the Commission has obtained the relevant advice. I trust that these comments assist the Committee.

Yours sincerely



Jon Stanhope MLA
Treasurer
28 NOV 2006

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
C/- Scrutiny of Bills committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Zed Seselja

The Standing Committee on Legal Affairs, in Scrutiny Report No. 35, of 20 November 2006, commented on the following two appointments:

- Disallowable Instrument DI2006-224 Canberra Institute of Technology (Advisory Council) Appointment 2006 (No 9); and
- Disallowable Instrument DI2006-225 Canberra Institute of Technology (Advisory Council) Appointment 2006 (No 10).

I offer the following response in relation to the matters raised by your Committee.

These persons are appointed under section 30(2)(e) of the *Canberra Institute of Technology Act 1987*. These members possess expertise relevant to the management and operation of the Institute.

I note the comments of the Committee, and will ensure that future appointments address the issues that you have raised.

Thank you for providing me with the opportunity to respond to this matter.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

- 6 DEC 2006

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