



Legislative Assembly for the ACT

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

Scrutiny Report

27 JUNE 2005

Report 12

TERMS OF REFERENCE

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:**Bill—Comment**

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2005

This is a Bill to amend the *Children and Young People Act 1999* to provide for the making of Standing Orders for places of detention; to expand the regulation making power under the Act; and to give retrospective statutory effect to a number of instruments made under the Act.

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

The principle against the retrospective operation of the law

Are the standing orders to be made under proposed section 418(2) objectionable on the ground that they would have a retrospective operation?

Proposed subsection 403(1) of the Act (see clause 4 of the Bill) would empower the Minister to make standing orders for the purposes of the Act, and, in addition, for various matters specified in subsection 403(2).

Subsection 418(2) provides that a standing order made under section 403 may, (if made within 28 days of the commencement of section 418), be specified to commence retrospectively – that is, on a date not earlier than 10 May 2000. Subsection 418(3) then provides:

- (3) Subsection (2) has effect despite the Legislation Act, section 76 (Non-prejudicial provision may commence retrospectively).

It is generally accepted, as a common law right, that a law should not have a retrospective operation.

The essential idea of a legal system is that current law should govern current activities. ... Retrospective legislation ‘is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the existing law’: F A R Bennion, *Statutory Interpretation* (3rd ed, 1997) 235, citations omitted.

Adapting the words of an English judge “Parliament [should not] alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them”: *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724. The statement from Bennion (above) points to one way in which a retrospective law is unfair – that is, that it disappoints the expectations of those who assumed that the quality of their past acts would be

assessed on the basis of the law as it then stood. It is important to keep this in mind when assessing whether a particular law having retrospective effect is unfair.

Standing orders made under section 403 are a species of statutory instrument, and this being so, section 76 of the *Legislation Act 2001* provides a default rule for the application of the principle against retrospective law.

76 Non-prejudicial provision may commence retrospectively

- (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
- (2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.

[Example omitted]

- (3) This section is a determinative provision.

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

- (4) In this section:

non-prejudicial provision means a provision that is not a prejudicial provision.

prejudicial provision means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

- (a) adversely affecting the person's rights; or
- (b) imposing liabilities on the person.

But, as has been noted, proposed subsection 418(3) displaces section 76 of the *Legislation Act*. It is thus assumed that standing orders made under section 403, and specified to operate retrospectively under subsection 418(2), may adversely affect a person's rights, or impose liabilities on a person.

The critical rights issue raised by subsection 418(2) is thus whether it is fair that a retrospective standing order should adversely affect their rights, or impose a liability on them.

In terms of the rationale for the principle against retrospective laws, this will depend on whether the particular standing order:

- (1) is, in effect, of the same nature, in terms of substance and of any penalty, to a standing order that was thought, incorrectly, to be in operation at the time the person committed the acts that would now be affected by the standing order made under subsection 418(2); or
- (2) is a new rule in the sense that in terms of its substance and of any penalty, it does not match a rule that was thought to be in effect at the time the person committed the acts.

In case (1), it may be argued that the particular standing order is not unfair, in that the person concerned could have ascertained that their acts would be regarded by the relevant authorities as in breach of the law. Thus, it may be said that they could not have undertaken those acts in the expectation that what they did was lawful; (and compare to the cases discussed in R Clayton and H Tomlinson, *The Law of Human Rights* (2000, and Supplements), para 11.146).

In case (2), the opposite holds, and such standing orders do offend the principle against retrospective laws.

There should be some explanation of whether the standing order proposed to be made under proposed subsection 418(2) will, in substance, restate the existing (but legally ineffective) standing orders or, on the other hand, will introduce new matter.

It is apparent from what has just been said that in the Committee's view, the Legislative Assembly cannot assess whether proposed subsection 418(2) is objectionable on the ground that it breaches the principle against retrospective laws unless there is clarity about what kinds of standing orders will be made under this provision.

This issue is not addressed in the Explanatory Statement, and the Committee suggests that the matter be addressed by the Minister.

Are the standing orders to be made under proposed section 418(2) objectionable on the ground that they are incompatible with HRA section 25?

As Bennion notes, "the strongest case against retrospective penalties relates to the act of making something an offence which was not so when committed ...": above, at 237. This dimension of the principle against retrospective laws is stated in HRA section 25:

25 Retrospective criminal laws

- (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
- (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

These particular principles are relevant, given that proposed paragraph 403(2)(k) of the Act permits the Minister to make standing orders in relation to "discipline, including penalties and the withdrawal of entitlements".

However, on what may be the most likely reading of the effect of paragraph 418(4)(c), (as to which, see below), a standing order that offended HRA section 25 would be invalid unless it could be justified under HRA section 28:

28 Human rights may be limited

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

Of course, in a particular case there might be an argument that a retrospective operation is authorised by HRA section 28, in particular where the situation is as described as a “case (1)” type as described above.

Thus, in the end, it appears that the right stated in HRA section 25 is protected, although by reason of HRA section 28 some standing orders having retrospective effect in ways that are in breach of section 25 may not be invalid.

Do the proposals in proposed sections 420 to 424 to give retrospective operation to declarations by a Minister that

- certain places be attendance centres, and for other purposes;
- an approval was given; and
- an appointment was made,

offend the principle against the retrospective operation of the law?

In the light of the analysis above of proposed section 403, noting the distinction drawn between “case 1” and “case 2” situations – the Committee does not see cause for concern with proposed sections 420 to 424. It is very unlikely that a person would have arranged their affairs other than on the basis that the relevant declarations were valid when purportedly made.

Drafting point: on the text seen by the Committee, the Bill has two different statements of a proposed section 424 of the Act. The second should presumably be styled as ‘section 425’.

Privative clauses

Proposed subsection 418(4) is a privative clause, in that it seeks to restrict the ordinary jurisdiction of a court to review the legality of an exercise of administrative power (including of a power to make subordinate law). Restricting or removing the power of the courts raises a significant rights issue.

418 Standing orders may operate retrospectively etc

- (1) This section applies to a standing order made under section 403 within 28 days after the day this section commences.
- (2) The standing order may provide that the standing order (or a provision of the standing order) commences on a date not earlier than 10 May 2000.
- (3) Subsection (2) has effect despite the Legislation Act, section 76 (Non-prejudicial provision may commence retrospectively).

- (4) The standing order has effect—
- (a) as if it had been enacted by an Act; and
 - (b) despite anything in—
 - (i) this Act (other than this section); or
 - (ii) any other territory law, including the *Listening Devices Act 1992*; but
 - (c) subject to the *Human Rights Act 2004*.

Example for par (c)

The standing orders are subject to the right to liberty and security of the person under the *Human Rights Act 2004*, section 18.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (5) Subsections (1) to (4) are laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

The Committee addressed the rights issues thrown up by a privative clause in *Report No 11* of the *Sixth Assembly*, in relation to the Water Resources Amendment Bill 2005. It concluded by stating that, in general, such clauses were objectionable on rights grounds in that they deprived a person of the ability to resort to the courts to challenge the legal validity of some governmental action. In that Report, the Committee noted that in *Report 53* of the *Fifth Assembly*, concerning privative clauses in the Electricity (Greenhouse Gas Emissions) Bill 2004, it said:

Critical to the rule of law is the principle that bodies invested with statutory power should stay within the boundaries of their power; (in legal terms, the body should not act *ultra vires* - "beyond power"). Legislative qualification of this principle raises a concern.

The Committee repeated this concern in relation to proposed section 63B of the Water Resources Amendment Bill 2005, addressing the issue of whether there was some incompatibility with the *Human Rights Act 2004*.

Similar concerns arise in respect of proposed subsection 418(4) of the Children and Young People Amendment Bill 2005. A number of specific questions arise.

Is a privative clause inconsistent with subsection 48A(1) of the Australian Capital Territory (Self-Government) Act 1988?

It may be that any kind of attempt to restrict the judicial review function of the Supreme Court may be ineffective. This question was addressed in *Report No 11* of the *Sixth Assembly*.

What would be the effect of proposed section 418(4)?

Proposed subsection 418(4) is designed to make it difficult for a person to challenge the validity of a standing order made under subsection 418(1), but it is difficult to assess just what will be its effect. In turn, it is difficult for this Committee to provide clear advice to the Assembly.

The Explanatory Statement says little on the subject:

This section also provides for the Standing Order to have effect as if it were made by an Act, despite anything in the Act or any other territory law, but subject to the Human Rights Act 2004.

The effect that the retrospective validation of the Standing Orders is not inconsistent with the Human Rights Act 2004 because its purpose is to correct a technical defect and promote legal certainty. Moreover, it does not leave individuals without any remedy for acts or omissions which constituted a breach of human rights.

(The second sentence appears to have words omitted.)

The use of the phrase “as if it had been enacted by an Act” gives rise to considerable obscurity. There is no settled view in the case-law about what it means: see the review in *Report No 49* of the *Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004.

The Committee is of the view that if the phrase “as if it had been enacted by an Act” is to be used in Territory laws, the relevant Explanatory Statement should state what effect is intended.

On the widest view, the effect of this phrase in paragraph 418(4)(a) is that the courts must treat a standing order as if its text was contained in an Act. On this basis, a court could not entertain any challenge to the validity of the standing order on the ground that the Minister had exceeded her or his powers under section 403. The only practical effect of paragraph 418(4)(c) would be that the Supreme Court would have jurisdiction to make a declaration that the relevant standing order was incompatible with the *Human Rights Act 2004*. This is of little value to a person aggrieved unless the Assembly were then to amend the Act.

On the narrowest reading, the effect of the phrase “as if enacted by an Act” is that it does no more than point to the fact that the power to make standing orders derived from a grant of power in the Act – that is, from section 403. This reading would render the provision nugatory.

The likely effect of the privative clause in proposed section 418(4).

A third reading is that whatever the effect of the phrase “as if enacted by an Act”, the effect of paragraph 418(4)(c) is that a person may challenge the validity of a standing order on the ground that it is in some way(s) incompatible with an HRA right. The Example stated in the text of section 418 suggests that this is intended. This reads:

Example for par (c)

The standing orders are subject to the right to liberty and security of the person under the *Human Rights Act 2004*, section 18.

If this is the appropriate reading, two points need to be made.

The first is that whether a standing order is incompatible with an HRA right is not simply a question of whether it derogates from that right. Assessment of incompatibility also involves consideration of whether any derogation is justifiable under HRA section 28; see the discussion in *Report No 11* of the *Sixth Assembly*. The point is that the example stated in the text of section 418 is slightly misleading in that a more complete statement of the law would add the words “subject to the permissible derogation of that right under *Human Rights Act 2004*, section 28”.

Secondly, and of more substance, it needs to be appreciated that the *Human Rights Act 2004* is not a full statement of the rights of persons, as that concept is often understood. In particular, the Universal Declaration of the Rights states that “Everyone has the right to own property ...”, and that “No one shall be arbitrarily deprived of his property”: Article 17(2). In the context of this Bill, this is significant given that under subsection 403(2) a standing order may impinge on “personal property”. Of course, an ACT court may read this power restrictively so as to protect the property interests of persons affected by the particular standing order. In the end, however, the point remains that the rights stated in the HRA have a higher degree of protection than other rights.

On what appears to be its intended reading, subsection 418(4) may, in some respects, operate as a privative clause, and be objectionable on this basis.

This conclusion is based on assumptions that:

- the use of the phrase “as if it had been enacted by an Act” will have some effect on the scope of judicial review of the legality of a standing order made under section 418(1);
- that a standing order thus protected could affect adversely the rights of a person;
- that section 418(4)(c) has the effect described above; and
- that some significant rights are not protected by the *Human Rights Act 2004*.

Has there been an inappropriate delegation of legislative power?

Is there an inappropriate delegation of legislative power in that:

- the Minister may certify that the publication of a stated provision of a Standing Order of a particular character would be contrary to the public interest; and
- the Executive may, by way of a regulation, add to the categories of Orders of the relevant character?

By proposed subsection 403A(1) of the Act, the Minister may certify that the publication of a stated provision of a Standing Order of a particular character would be contrary to the public interest. The relevant standing orders are those that apply to:

- (i) the security of a place of detention; or
- (ii) the safety of people at a place of detention; or
- (iii) anything else prescribed by regulation; ... (paragraph 403A(1)(a)).

A number of significant provisions of the *Legislation Act 2002* (including the power of the Assembly to disallow) do not apply to the provisions so certified: see proposed subsection 403A(4).

The issue which arises is whether it is desirable to vest in the Executive a power, by regulation, to add to the statement in paragraph 403A(1)(a) of the kinds of provisions that may be certified by the Minister.

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 comment on them:

Disallowable Instrument DI2005-63 being the Heritage (Council Chairperson and Deputy Chairperson) Appointment 2005 (No. 1) made under section 17 of the *Heritage Act 2004* appoints specified persons as Chairperson and Deputy Chairperson of the ACT Heritage Council.

Disallowable Instrument DI2005-64 being the Nature Conservation (Special Protection Status) Declaration 2005 (No. 1) made under section 33 of the *Nature Conservation Act 1980* revokes Disallowable Instrument DI2002-42 and declares specified species to be endangered.

Disallowable Instrument DI2005-65 being the Utilities (Variation of Industry Code) Determination 2005 (No. 1) made under section 61 of the *Utilities Act 2000* determines variations to the Consumer Protection Code.

Disallowable Instrument DI2005-67 being the Land (Planning and Environment) Criteria for Direct Grant of Leases (Small Parcels of Contiguous Land) Determination 2005 made under subsection 161(7) of the *Land (Planning and Environment) Act 1991* establishes criteria for the direct grant of a Crown lease over small parcels of land for consolidation with an existing adjoining Crown lease.

Disallowable Instrument DI2005-68 being the Occupational Health and Safety (Sexual Services Industry) Code of Practice 2005 (No. 1) made under section 206 of the *Occupational Health and Safety Act 1989* revokes Disallowable Instrument DI1998-259 and approves the ACT Sexual Services Industry Code of Practice.

Disallowable Instrument DI2005-69 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 7) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used by vehicles taking part in the timed special stages of the 2005 Snowy Hydro Southcare Canberra Rally Experience.

Disallowable Instrument DI2005-70 being the Adoption (Fees) Determination 2005 made under section 118 of the *Adoption Act 1993* revokes Disallowable Instrument DI2004-138 and determines the fees payable for the purposes of the Act.

Disallowable Instrument DI2005-72 being the Health (Fees) Determination 2005 (No. 1) made under section 36 of the *Health Act 1993* revokes Disallowable Instrument DI2004-135, determines the fees payable for the purposes of the Act and increases the Pharmaceutical Co-payment (Y) in line with the Commonwealth and other State and Territory Governments.

Disallowable Instrument DI2005-74 being the Land (Planning and Environment) (Further Rural Lease Grant Conditions) Determination 2005 (No. 1) made under subsection 171A(2) of the *Land (Planning and Environment) Act 1991* revokes Disallowable Instrument DI2003-323 and determines the conditions that apply to the grant of a further rural lease.

Disallowable Instrument DI2005-75 being the Rehabilitation of Offenders (Interim) (Sentence Administration Board) Appointment 2005 (No. 2) made under paragraph 68(1)(b) of the *Rehabilitation of Offenders (Interim) Act 2001* appoints a specified person as deputy chairperson of the Sentence Administration Board.

Disallowable Instrument DI2005-76 being the Hotel School Acting Appointment 2005 made under section 16 of the *Hotel School Act 1996* appoints a specified person as an acting non-executive member of the board of management of the Australian International Hotel School.

Disallowable Instrument DI2005-80 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2005 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes Disallowable Instrument DI2004-70 and determines fees payable for the renewal of vehicle registration and related transactions.

Disallowable Instrument DI2005-81 being the Taxation Administration (Rates) Determination 2005 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-43 and determines variable rating factors for the purposes of the calculation of rates payable under the *Rates Act 2004*.

Disallowable Instrument DI2005-82 being the Road Transport (General) (Driver Licence and Related Fees) Determination 2005 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes Disallowable Instrument DI2004-71 and determines the fee payable for the grant or renewal of a driver licence or other matter.

Disallowable Instruments—Comment

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

No Explanatory Statement

Disallowable Instrument DI2005-58 being the Water Resources (Fees) Determination 2005 (No. 1) made under section 78 of the *Water Resources Act 1998* revokes Disallowable Instrument DI2004-114 and determines the fees payable for the purposes of the Act.

The Committee notes that no Explanatory Statement is available in relation to this instrument. The Committee also notes, however, that "Schedule 2" of the instrument contains "additional Explanatory Notes", which take the form of what the Committee would expect to see in an Explanatory Statement.

Disallowable Instrument DI2005-61 being the Radiation (Fees) Determination 2005 (No. 1) made under section 77 of the *Radiation Act 1983* revokes Disallowable Instrument DI2004-198 and determines fees payable for the purposes of the Act.

The Committee notes that no Explanatory Statement is available in relation to this instrument.

Drafting issues

Disallowable Instrument DI2005-62 being the Heritage (Council Members) Appointment 2005 (No. 1) made under section 17 of the *Heritage Act 2004* appoints specified persons as members of the ACT Heritage Council.

This instrument is made under section 17 of the *Heritage Act 2004*, which allows the Minister to appoint members of the Australian Capital Territory Heritage Council. In particular, paragraph 17(1)(c) allows the Minister to appoint 3 people as "public representatives" and paragraph 17(1)(d) allows the Minister to appoint 6 people as "experts". Subsections 17(3) and (4), respectively, then prescribe 3 groups that the public representative must, in the Minister's opinion, "adequately" represent and 11 disciplines that the experts must, in the Minister's opinion, "adequately" represent.

The Committee notes that section 3 of the instrument simply appoints 9 individuals. There is no indication, on the face of the instrument, as to the basis on which (or the authority under which) each of the individuals are appointed. The Explanatory Statement does provide enlightenment on this issue, however, with the last 3 appointed persons listed being identified as "Aboriginal Community Representative/Aboriginal Culture and History", "Community Representative/History" and "Property Representative". As the 3 groups that the public representatives must "adequately" represent are:

- (a) the community;
- (b) the Aboriginal community; and
- (c) the property, ownership, management and development sector,

the Committee assumes that the last 3 appointed persons listed represent each of these 3 groups, respectively, and are appointed under paragraph 17(1)(c). It would be preferable, however, if this was made clear on the face of the instrument.

Disallowable Instrument DI2005-66 being the Vocational Education and Training Authority Appointment 2005 (No. 1) made under subsection 12(2) of the *Vocational Education and Training Act 2003* appoints a specified person as a part-time member of the ACT Vocational Education and Training Authority.

This instrument appoints a (named) person as a "non-public employee part-time member" of the ACT Vocational Education and Training Authority ("Authority"). The instrument states that it is made under subsection 12(2) of the *Vocational Education and Training Act 2003* ("VET Act").

Subsection 12(1) of the VET Act provides that the Authority consists of the following members:

- (a) a chairperson;
- (b) 2 people appointed, after consultation with the trades and labour council, to represent the interests of employees;
- (c) 2 people appointed, after consultation with employer organisations, to represent the interests of employers;
- (d) 1 person who, in the Minister's opinion, represents the interests of registered training organisations which are private providers of vocational education and training;
- (e) 1 person who, in the Minister's opinion, represents the interests of providers of industry training advisory services;
- (f) 1 person who, in the Minister's opinion, represents the interests of indigenous communities;
- (g) 1 person who, in the Minister's opinion, represents the interests of the ACT Council of Parents & Citizens Associations Inc.;
- (h) 1 other person who, in the Minister's opinion, is of good standing in the community;
- (i) the director of the Canberra Institute of Technology;
- (j) the chief executive;
- (k) the chairperson of the accreditation and registration council.

Subsection 12(2) then requires the Minister to appoint the authority members (other than the director of the Canberra Institute of Technology or the chief executive).

It is not clear to the Committee, from the information provided either in the instrument or in the Explanatory Statement, under which of these paragraphs the person in question is appointed. The Committee also queries the reference to the person being a "part-time member", as there is no provision in the VET Act for part-time members. The Committee would appreciate the Minister's clarification on this issue.

Disallowable Instrument DI2005-71 being the Public Sector Management Amendment Standard 2005 (No. 5) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standards.

This instrument is made under section 251 of the *Public Sector Management Act 1994*, which allows for the Commissioner for Public Administration to make Management Standards, with the written approval of the Chief Minister. This instrument amends the Management Standards.

In *Report No 4 of the Sixth Assembly*, the Committee observed (in relation to an earlier amendment to the Management Standards) that it is not possible to work out what the Managements Standards provided *before* the amendment, without some effort, because the relevant part of the ACT Legislation Register directs the inquirer to the Public Sector Management Legislation and Standards website (www.psm.act.gov.au/legislation.htm) for the "current version" of the Management Standards but that version is as amended by instrument being examined at the time. This means that it is not possible to work out what the Management Standards contained prior to the amendments made by (in this case) DI2005-71 without starting with the Management Standards as originally made and then tracking each amendment made since.

As the Committee noted in *Report No 4 of the Sixth Assembly*, this is not easily done. The earliest relevant instrument on the ACT Legislation Register that the Committee has been able to locate is the Public Sector Management Amendment Standards 2001 (DI2001-348). The Committee noted (in the earlier Report) that that instrument indicates that the original Management Standards were made by "Instrument 1/1994". That instrument is not readily locatable on the ACT Legislation Register.

The Chief Minister responded to the concerns that the Committee expressed in its *Report No 4 of the Sixth Assembly* in a letter dated 22 March 2005 (which was published in the Committee's *Report No 6 of the Sixth Assembly*). In that letter, the Chief Minister acknowledged the issue and advised the Committee that discussions were under way with the Office of Parliamentary Counsel to determine how best to resolve the issue, within existing resource constraints.

The Committee would be grateful if the Chief Minister could advise of any progress in relation to this issue.

Disallowable Instrument DI2005-73 being the Utilities (Gas Restriction Scheme) Approval 2005 (No. 1) made under the *Utilities Act 2000* and *Utilities (Gas Restrictions) Regulation 2004* approves a gas restriction scheme for the ACT.

This instrument is made under section 6 of the *Utilities (Gas Restrictions) Regulation 2005* (Regulation), which allows the Minister to approve a gas restriction scheme in the ACT. It supports the Regulation, which provides for restrictions on the use of gas in times of shortage, or situations likely to give rise to shortages.

The Scheme provided for in the instrument comprises a range of restriction measures that the gas utility (being the person licensed to provide gas services) may impose, by public notice, when a declaration of gas restriction is in force.

The restriction measures that may be imposed include the maximum period or periods each day during which each of the measures set out in the instrument are to apply. This is set out in the Appendix to the instrument, by reference to the target group of consumers (i.e. residential and commercial/industrial) and the particular restriction measures, which include:

For residential use

- no use of gas for decorative, atmospheric or recreational purposes (eg decorative fire place, hobby kiln);
- a requirement to turn off unnecessary gas space heating;
- a requirement to turn off unnecessary gas water heating units;
- a requirements to minimise use of gas cooking equipment;
- no use of gas operated pool heating, spa or sauna; and
- a total ban on the use of gas; and

For commercial industrial use

- no use of gas for decorative, atmospheric, recreational or advertising purposes (eg decorative fire place, hobby kiln);
- a requirement to turn off unnecessary gas space heating;
- a requirement to adjust the thermostat of gas space heating units to "the specified temperature";
- no use of gas operated pool heating, spa or sauna;
- no use of gas cooking equipment; and
- a total ban on the use of gas except for the provision of essential services.

The Committee notes that, in relation to each of the identified restriction measures, the "maximum timing of reduction" that is specified is "24 hours per day". The Committee queries whether, as a matter of construction, this can validly be regarded as setting a "maximum" period of reduction, given that there are only 24 hours in a day. The real effect of the instrument is that, in relation to the restriction measures identified, the gas utility has an unlimited capacity to impose restrictions. It is therefore (at the very least) misleading to suggest that there is a "maximum" level on the gas utility's capacity to impose a restriction.

Minor drafting issues

Disallowable Instrument DI2005-77 being the Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 1) made under paragraph 48(1)(b) of the Mental Health (Treatment and Care) Act 1994 approves the Canberra Hospital as a mental health facility.

Disallowable Instrument DI2005-78 being the Mental Health (Treatment and Care) Mental Health Facility Approval 2005 (No. 2) made under paragraph 48(1)(b) of the Mental Health (Treatment and Care) Act 1994 approves the Brian Hennessy Rehabilitation Centre as a mental health facility.

These 2 instruments are dealt with in a single Explanatory Statement. The Committee assumes that the reference in the 1st line of the 4th paragraph of the Explanatory Statement to the Canberra Hospital as the "principle" assessment and treatment facility should, in fact, be a reference to it being the "principal" facility.

Subordinate Laws—No Comment

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

Subordinate Law SL2005-9 being the Magistrates Court (Litter Infringement Notices) Amendment Regulation 2005 (No. 1) made under the *Magistrates Court Act 1930* amends the Magistrates Court (Litter Infringement Notices) Regulation to include police officers in the class of persons who may issue infringement notices for certain offences under the Litter Act 2004.

Subordinate Law SL2005-10 being the Agents Amendment Regulation 2005 (No. 1) made under the *Agents Act 2003* extends the sunset clause which allows salespersons employed by a licensed real estate corporation that provides commercial real estate services to its parent company to be exempt from the requirement to obtain qualifications for registration.

INTERSTATE AGREEMENTS

The Committee has examined the National Packaging Covenant and the associated National Environment Protection (Used Packaging Materials) Measure and offers these comments:

The Committee notes that the Note to Clause 1 of the Draft Variation to the National Environment Protection (Used Packaging Materials) Measure states:

This variation commences on gazettal (See *National Environment Protection Council Act 1994*, s 21 and *Acts Interpretation Act 1901*, s 48 as applied by s 46A).

The Committee notes that sections 46A and 48 of the *Acts Interpretation Act 1901* were repealed by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*. Further, the Committee assumes that, in fact, section 12 of the *Legislative Instruments Act 2003* governs the commencement of the Variation (and that the Variation commences when the Variation is registered on the Federal Register of Legislative Instruments).

The Committee appreciates that jurisdictions at times face tight timeframes to develop their approaches to national schemes, and to fulfil consultation requirements. Nonetheless, if the Committee is to adequately consider interstate agreements then it should be involved as early as possible and be provided with all associated documentation to enable it to fully carry out its function.

In this particular instance, the Committee was given little more than a week to respond. Besides providing greater time, its task would have been aided if at the outset it had been provided with copies of the proposals, or at least links to these.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSE

The Committee has received a response from:

- The Attorney-General, dated 3 June 2005, in relation to comments made in Scrutiny Report 4 regarding Subordinate Law SL2004-53 being the Supreme Court Amendment Rules 2004 (No. 4).

The Committee thanks the Attorney-General for his helpful response.

Bill Stefaniak, MLA
Chair

June 2005

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

REPORTS—2004-2005

RESPONSES

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

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

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

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 10, dated 2 May 2005</u>	
Crimes (Child Sex Offenders) Bill 2005	No. 11
Crimes (Sentencing) Bill 2005	No. 11
Crimes Amendment Bill 2005 (PMB)	
Disallowable Instrument DI2005-21 - Waste Minimisation (Fees)	No. 11
Amendment Determination 2005 (No. 1)	
Disallowable Instrument DI2005-32 - Road Transport (Public	No. 11
Passenger Services) Maximum Fares Determination 2005	
(No. 1)	
Disallowable Instrument DI2005-34 - Health (Nurse Practitioner	
Criteria for Approval) Determination 2005 (No. 1)	
Human Rights Commission Bill 2005	No. 11
<u>Report 11, dated 20 June 2005</u>	
Disallowable Instrument DI2005-33 - Health Records (Privacy and	
Access) (Fees) Determination 2005 (No. 1)	
Disallowable Instrument DI2005-41 - Domestic Violence (Prevention	
Council) Appointment 2005	
Disallowable Instrument DI2005-53 - Legal Aid Commission	
Appointment 2005	
Disallowable Instrument DI2005-54 - Liquor Licensing Board	
Appointment Amendment 2005	
Disallowable Instrument DI2005-55 - Road Transport (Safety and	
Traffic Management) Parking Authority Declaration 2005	
(No. 2)	
Subordinate Law SL2005-6 - Tertiary Accreditation and Registration	
Amendment Regulation 2005 (No. 1)	
Subordinate Law SL2005-7 - Road Transport (Safety and Traffic	
Management) Amendment Regulation 2005 (No. 1)	
Subordinate Law SL2005-8 - Utilities (Gas Restrictions) Regulation	
2005	
Water Resources Amendment Bill 2005	



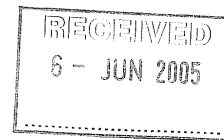
Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chairperson
Standing Committee on Legal Affairs
ACT legislative Assembly
CANBERRA ACT 2601



Dear Mr Stefaniak

I refer to your Committee's comments in the Scrutiny of Bills report No.4 of 7 March 2005 relating to the Subordinate Law SL2004-53 being the *Supreme Court Amendment Rules 2004 (No.4)*, which makes comprehensive provision for the regulation of that Court's procedure in criminal proceedings.

The Committee appears to be concerned that the power to dispense with a particular criminal rule, as provided for in Part 8, Order 80, Division 80.2, may undermine a person's right to a fair trial. I can advise that as the Rules quite properly do not create that right – that is a matter for either the common law or the relevant provision of the *Human Rights Act 2004* – the power to dispense cannot have that effect.

As you would be aware, since the commencement of the *Court Procedures Act 2004* on 10 January 2005, a judicial Joint Rules Committee makes all the Rules of Court for both the Supreme Court and the Magistrates Court. Prior to that time, the Judges of the Court made the Rules of the Supreme Court. Primarily the Judges and Magistrates implement the Rules, however made, in the context of individual cases. The Courts must therefore not only apply the Rules, but also do so in a way that protects substantive legal and human rights and is not inconsistent with principal legislation or common law rights, such as those to a fair trial.

The power to dispense with strict formal compliance has long existed for the Supreme Court in its inherent jurisdiction, and is always subject to the general legal obligation of Courts to ensure that the rights and responsibilities of all litigants are fairly protected and enforced. That power is most often exercised where technical compliance is redundant (eg. the need to serve documents when they have already been served, as in the case of oral applications in the presence of both parties), or where the circumstances of the case dictate that particular provisions be altered or suspended in the interests of justice (eg. where a time limit cannot be met as the relevant party was ill).

ACT LEGISLATIVE ASSEMBLY

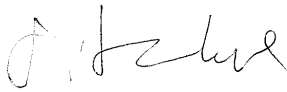
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433



A decision to dispense with compliance with a particular Rule is reviewable by the Court, and is often made after submissions from the opposing side.

I hope that the above information clarifies the matter raised by the Committee in its report.

Yours sincerely

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

Jon Stanhope MLA
Attorney General

- 3 JUN 2005