Legislative Assembly for the ACT

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

Scrutiny Report

7 AUGUST 2006

Report 28

TERMS OF REFERENCE

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

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (i) is in accord with the general objects of the Act under which it is made;

  (ii) unduly trespasses on rights previously established by law;

  (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

  (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (iv) inappropriately delegate legislative powers; or

  (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bills—No Comment

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

APPROPRIATION BILL 2006-2007

This is a bill for an Act to appropriate moneys for the financial year 2006-2007.

CIVIL UNIONS AMENDMENT BILL 2006

This Bill would amend the *Civil Unions Act 2006* to reduce the minimum period of time between the giving of notice of intention to enter a civil union and the entering of the union.

Bill—Comment

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

PUBLIC INTEREST DISCLOSURE BILL 2006

This is a Bill for an Act to provide for procedures for making, investigating and addressing disclosures about public maladministration. In particular, it would protect the identity of disclosers of public interest information, and protect disclosers from unlawful reprisals. It would cast obligations on officials to investigate, and provide for independent supervision of the process. The *Public Interest Disclosure Act 1994* would be repealed.

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

A general perspective

One might say that the provisions of the Bill attempt to strike a balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the reputations of those who are implicated in an allegation by a whistleblower.

The Chief Minister's Presentation Speech says that "[p]eople who disclose information about maladministration in government, whether this is occurring because of negligence, fraud or other improper conduct, are performing a valuable public service". This service might be seen as a component of the right to free speech stated in subsection 10(2) of the *Human Rights Act 2004*:

> (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 (emphasis added).

The courts in Western countries have accorded a high value to political expression. The European Court of Human Rights

> takes the view that political expression is central to a democratic system which requires that even ideas that "offend, shock and disturb" be published. [*Handyside v United Kingdom* (1976) 1 EHRR 737 para 49.] Freedom of political debate and the press gives the public one of the best means of discovering and forming an opinion about the ideas and attitudes of political leaders and is a core concept of a democratic society. [*Lingens v Austria* (1986) 8 EHRR 103 para 42.]: R Clayton, *Whistleblowing and The Human Rights Act* (2003) http://www.39essex.co.uk/index.php?art_id=219.

On the other hand, those individuals who are the subject of a whistleblower's allegations may find their reputations traduced without adequate redress. This brings HRA paragraph 12(b) into focus:

> 12 Privacy and reputation
>
> Everyone has the right—
>
> …
>
> (b) not to have his or her reputation unlawfully attacked.

The Committee recommends that the Assembly keep this balance in mind when evaluating the scheme of the Bill. This report takes the form of an outline of this Bill interspersed with comments.

Outline of the scheme for whistleblowing

What conduct can be the subject of a report of maladministration?

In colloquial (but simplistic) terms, the process commences when a person – the whistleblower - makes a report of maladministration (including corruption and fraud). The Bill however refers to this person as the "discloser", to the report as "a public interest disclosure", which is then defined as a disclosure that "contains *public interest information* implicating a government entity or government official" (paragraph 7(1)(a)). Such *information* is then defined as information that tends to show that a government entity or official was engaging in, is engaging in, or is likely in the foreseeable future to engage in conduct "contrary to the public interest" (subclause 8(1)).

In ordinary usage, the notion of "*conduct contrary to the public interest*" encompasses a very wide range of conduct. The notion is not further defined, and the objects clause (clause 6) does not provide any guidance. The Explanatory Statement states that "[t]he public interest is a concept that will involve something broader than the interests of an individual", and goes on to illustrate by citing the Examples stated in the Bill. That is, conduct contrary to the public interest might be constituted by:

- systemic failure – a failure by a government entity or official to implement a system to give effect to a law;
- policy failure – the adoption of a policy by a government entity or official that is inconsistent with a law;
- pattern of non-compliance – repeated failure by a government entity or official to comply with a government policy or a law;

- fraud – for example, intentionally falsifying a document; and
- corruption – for example, receiving a benefit for divulging confidential information.

The Note to clause 8 states, "[a]n 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)". On the face of it, a public interest disclosure might concern conduct of an entity of government or of an official that has none of the characteristics – or is in any way analogous to – the examples stated above. There is thus potential for the Scheme to be used to seek review of a very wide range of government action. The discloser/whistleblower need have no personal interest at stake in the matter reported.

The breadth of the subject matter that may be the subject of a public interest disclosure is emphasised by the definition of the notion of "*disclosure*" as "a statement made by a person that the person knows, believes or *suspects something* about an event, action or circumstance" (subclause 7(2) – emphasis added).

The concept of "*government entity*" is defined broadly in clause 9 (and by paragraph 9(1)(h) the Executive may by regulation add to the list). It does not include the ombudsman; or a judge, the master of the Supreme Court, or a magistrate; or a member of the Legislative Assembly or a person employed under the *Legislative Assembly (Members' Staff) Act 1989*; or "an entity prescribed by regulation for this subsection" (subclause 9(2)(g)). The concept of "*government entity*" is defined in clause 10 and it should be noted includes former employees and contractors.

Do paragraphs 9(1)(h) and 9(2)(g) inappropriately delegate legislative power (see term of reference (c)(iv)

Under paragraph 9(1)(h) the Executive may by regulation add to the list of bodies who are entities, and by paragraph 9(2)(g) may stipulate that a body is not to be regarded as an entity. This latter power is significant in that the scheme of the Act would then not apply so far as concerns activities of that body.

The question for the Assembly is whether these paragraphs amount to an inappropriate delegation of legislative power. The result of their removal would be that the Act would need to be amended to add or exclude entities.

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To whom is a report made?

Part of the definition of "public interest disclosure" stipulates that such a disclosure must be one "made to a contact person for the disclosure (the ***receiver***)" (paragraph 7(1)(b)), and clause 11 states exhaustively who is a contact person. In practice, the most convenient contact person will be the ombudsman. Any kind of report may also be made to a "declared contact person" of the relevant entity, or to the CEO (defined in clause 12) of the entity if no such person has been declared. Certain kinds of report may also be made, as appropriate, to the auditor-general or to the commissioner for public administration.

How is a report made?

By clause 15, the public interest disclosure may be made "orally or in writing". If made orally, the receiver (the relevant contact person) must make a written record of the disclosure.

What the receiver of a report must do

The receiver must make, or cause to be made, "a record of the public interest disclosure" in "the public interest disclosures register": clause 18.

Clause 16 states what the receiver/contact person must do so far as concerns the discloser/whistleblower who has made the public interest disclosure to that contact person (see subclause 15(1)). The name and contact details of the discloser must be requested, and if not provided, that person is to be told (as appropriate) that the matter may not be investigated, or that they will not be told about the progress of the investigation. The discloser must also be informed about their immunities and how they may be lost, and warned of the penal consequences of providing false information.

Clause 17 states what the receiver/contact person must do so far as concerns an implicated government entity; (see subclause 8(2) for a statement of when an entity is implicated). A copy of the disclosure must be given to the declared contact person or the CEO.

Clause 17 states that a copy of the disclosure must be given to the "supervisor for the public interest disclosure" (paragraph 17(1)(a)). By subclause 13(1), the ombudsman is the supervisor for any kind of disclosure, and for certain kinds of report the supervisor will also be, as appropriate, the auditor-general or the commissioner for public administration. (Where there is more than one supervisor, the supervisors must decide which of them is to be the supervisor (subclause 13(2)), but there is no provision for resolving any disagreement.)

Who will investigate?

The effect of clause 20 is that the person who will investigate the report (the public interest disclosure) will be either:

- an "*entity-appointed investigator*" – being a person appointed by the CEO of an entity implicated in the report; or
- the *supervisor*, where there is either no entity-appointed investigator, **or** the supervisor "is satisfied, on reasonable grounds, that the supervisor should be the investigator for the disclosure". Thus, as the Presentation Speech states, "[t]he supervisor is able to step in and take responsibility for investigating a public interest disclosure, if satisfied that it would be better for the supervisor to investigate the matter". The Explanatory Statement provides illustrations of where this might occur. The supervisor may choose to appoint a person – the *supervisor-appointed investigator* - to be the investigator for a public interest disclosure for the supervisor.

Clause 21 requires an appointed investigator to disclose a "material interest in an issue being investigated" "to the person who appointed the appointed investigator as soon as practicable after the relevant facts come to the appointed investigator's knowledge". The Bill makes no provision as to what may then happen.

What the investigator must do

As "soon as practicable" after a public interest disclosure is made, the investigator for the disclosure must give certain contact details to the discloser/whistleblower; see clause 22.

The investigator "must investigate the disclosure": subclause 23(1). (No time is stipulated, but by section 151B of the Legislation Act, the investigation must commence "as soon as possible".)

The circumstances in which the investigator **must refuse** to investigate are set out in clause 24. The Explanatory Statement summarises the effect of these exclusions as being where:

- the "investigator … [is] satisfied that the information in the public interest disclosure is subject to legal professional privilege, and the person who made the disclosure does not have the authority to waive that privilege" (see paragraph 24(a));

- the "investigator … [is] satisfied that the information in the public interest disclosure has already been fully investigated under this Act (including the former *Public Interest Disclosure Act 1994*) or in another way" (see paragraph 24(b)); or

- the "investigator … [is] satisfied that the information in the public interest disclosure could be dealt with in a more appropriate way, and that alternative approach is reasonably available to the discloser" (see paragraph 24(c)).

Comment

There is a potential problem with the way the exclusion in paragraph 24(a) is worded. What is to occur where (as will be very likely) only some of the information in the report of the discloser/whistleblower "is subject to legal professional privilege"? The way paragraph 24(a) is worded – see the wording "**the** information in the public interest disclosure …" may suggest that *all* of the information must be subject to legal professional privilege. This reading would be beneficial in the sense that it would cut down the scope of this exclusion and thus serve the object of the Bill. On the other hand, this reading would cut down the scope of paragraph 24(a) quite severely and cut across the interest (which may be described as a privacy interest) of the person who would be entitled to claim the benefit of the privilege. Militating against this result is that the relevant information would be seen by only a few officials, who must observe the restrictions on disclosure of the information they obtain in the performance of their functions.

The circumstances in which the investigator **may refuse** to investigate are set out in clause 25. The Explanatory Statement summarises the effect of these exclusions as being where

- the person who made the disclosure withdraws the disclosure (see paragraph 25(a));
- the person who made the disclosure has decided to remain anonymous (see paragraph 25(b));

- the investigator is "satisfied that the information in the disclosure is trivial or insubstantial" (see paragraph 25(c));
- the investigator is "satisfied that the discloser had made the public interest disclosure dishonestly, or with recklessness as to the truth of the disclosure" (see paragraph 25(d));
- the investigator is "satisfied that the discloser is not protected by the immunity given by this Act" (see paragraph 25(e)); or
- the investigator is "satisfied that in all the circumstances, investigation or further investigation is not warranted" (see paragraph 25(f)).

Comment

On the face of it the investigator has a discretion – that is, can make a choice – as to whether or not to refuse; see section 146 of the Legislation Act concerning the word "may".

It is not apparent why such a choice should exist where one of the circumstances stated in paragraphs 25(c), (d) and (f) exists. The Explanatory Statement does not provide any justification in this regard, although it does so far as concerns the other paragraphs in clause 25.

What happens if there is a refusal to investigate

The discloser/whistleblower must be told (by a written notice) by the investigator of the ground(s) for a refusal to investigate under either clause 24 or clause 25.

Where the investigator is **not** the supervisor, the discloser/whistleblower must also be told that he or she "may, not later than 21 days after the day the refusal notice is given to the discloser, apply to the supervisor for review of the investigator's decision": subparagraph 26(2)(c)(ii). This scheme for a "merits" appeal to the supervisor is spelt out in clauses 27 to 29.

Where the investigator **is** the supervisor, the discloser must be told that "the decision is not reviewable under the *Administrative Appeals Tribunal Act 1989*": subparagraph 26(2)(c)(i).

By subclause 26(3), the investigator must not however reveal to the discloser "informant identifying information", which is defined in clause 60 to be information that either "identifies a person who gave information to an investigator under section 31; or … would allow the identity of the person to be worked out".

Comment

The Explanatory Statement to both clauses 24 and 25 also points out that that the decision of an investigator to refuse to investigate is "reviewable under the *Administrative Decisions (Judicial Review) Act 1989*". This is correct, but the decision of the supervisor is also reviewable in this way, and given that the supervisor's decision is not reviewable by a process provided for in the scheme, **it is important that the Explanatory Statement make clear that the supervisor's decision is also reviewable under the *Administrative Decisions (Judicial Review) Act 1989***.

Subparagraph 26(2)(c)(i) is a curious provision. The AAT has no jurisdiction to review any decisions made under this scheme, and it is hard to see how the discloser might think that they did – unless there is an assumption that anybody aggrieved by a decision of an ACT officer would think that they could appeal to the AAT. The Committee doubts that this is what many would think. If that is the assumption, then one would expect to find a provision similar to subparagraph 26(2)(c)(i) in relation to every administrative power conferred by an ACT law.

How an investigation is conducted

Prompt action required

By clause 37. "[t]he investigator for a public interest disclosure must carry out and complete the investigation promptly".

Keeping the whistleblower (discloser) informed

Subject to exclusion of "informant identifying information", and "information that the investigator is satisfied would be likely to adversely affect the investigation", "the investigator of a public interest disclosure must tell the discloser about the progress of the investigation at least once every 3 months": see clause 30.

Acquiring information

The powers of an investigator to acquire information relevant to making an investigation are somewhat weaker than is generally the case where a statute confers on a person a power to investigate and make findings.

The investigator can "ask anyone to give the investigator information, including protected information, relevant to the investigation of the disclosure": subclause 31(1). There is, however, no power to compel anyone asked to provide the information. On the other hand, "[a] government entity or government official must promptly comply with a request made to the entity or official": subclause 31(2).

Comment

What would happen if there was not prompt compliance is not spelt out. Perhaps some kind of sanction available under other law might be brought to bear, although no indication is given in the Explanatory Statement.

So far as concerns information sought from discloser/whistleblower, the investigator, when asking, "must tell the discloser that failure to comply with the request before the end of 14 days after the day it is made disqualifies the discloser from protection under section 49 (Immunity for discloser)": subclause 31(3).

Anyone asked for information must be told by the investigator "that giving false or misleading information is an offence against the Criminal Code, section 338 (Giving false or misleading information)".

Protections for information providers

Protections for persons in respect of the information they give are provided for in clauses 32 and 49. (Clause 49 deals with the discloser/whistleblower and is dealt with below. Subclause 49(1) makes very similar provision to subclause 32(1)).

Clause 32 does not apply to the discloser/whistleblower; see subclause 32(2). Clause 32(1) provides:

32 Protection of people giving information

(1) If someone gives information honestly and without recklessness to an investigator under section 31—

(a) the giving of the information is not—

(i) a breach of confidence; or

(ii) a breach of professional etiquette or ethics; or

(iii) a breach of a rule of professional conduct; and

(b) the person does not incur civil or criminal liability only because of the giving of the information; and

(c) the person is not liable to disciplinary action, or dismissal, (however described) only because of the giving of the information.

Comment

Note should be taken of the words "only because" in paragraph 32(1)(c). Supposing the person providing the information is a public servant, any fear they might hold of reprisal may not be substantially lessened by this provision. This is because they would have to prove that any disciplinary action, or dismissal they suffered subsequent to their providing information to an investigator, was due *only – that is, solely* – to their having provided the information. This might be very difficult to do.

The qualification that the giving of the information was "without recklessness" might also cause some to hesitate to provide information, given that a person will not be aware of what they do not know.

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

Privacy

Do the provisions displacing breach of confidence law in subclauses 32(1) and 49(1) derogate from the right to privacy stated in HRA paragraph 12(a), and, if so, are they justifiable under HRA sections 12 and/or 28?

The protections that would be afforded by subsection 32(1) will no doubt find their rationale in the policy of facilitating the provision of information to the investigator, but the Committee must draw attention to their potential impact on the right to privacy stated in *Human Rights Act 2004* paragraph 12(a):

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

In relation to provisions which derogate from the right to privacy in HRA section 12, the issue for the Assembly is whether the derogation is "arbitrary". If it is not, there is no breach of section 12; if it is, it is hard to see how it could be justified under HRA section 28; see *Scrutiny Report No 2* of the *Sixth Assembly*, concerning the Water Efficiency Labelling and Standards Bill 2004. Assessment or whether a derogation is "arbitrary" involves much the same analysis as involved in the application of HRA section 28; see generally *Scrutiny Report No 25* of the *Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Measures) Bill 2006.

The protection afforded by the law concerning breach of confidence may, depending on the particular confidential information protected, be seen as a concrete expression of the right in HRA paragraph 12(a). This body of law is one of the major means available under the general law for the protection of privacy. Briefly, this body of law permits a person to obtain a remedy from a court in relation to the disclosure of information where that person disclosed the information to another, and

- that information was confidential in the sense of secret and not in the public domain;
- that it was imparted in circumstances where the recipient knew or should have known that it was to remain secret; and
- there has been or will be a misuse of that information.

Most commonly, there is a misuse of the information where it is disclosed to persons beyond the range of those to whom disclosure was contemplated by the express or implied undertaking of confidentiality.

The simple point is that to remove the protection of the law concerning breach of confidence is a significant derogation of the right to privacy in HRA paragraph 12(a). The derogation may however be justifiable on the basis that it is not "arbitrary" and/or (if this is the correct approach) justifiable under HRA section 28.

In relation clause 32, the Explanatory Statement makes no reference to the *Human Rights Act 2004* and does not provide any justification for this derogation from the right to privacy in HRA paragraph 12(a).

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

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Clause 49 applies only to the whistleblower (the discloser). Clause 49(1) is identical to subclause 32(1) – see above, and the comment and the privacy right issue.

As the Explanatory Statement notes, the immunity granted by clause 49 is lost "if the discloser refuses to cooperate with an investigation of the disclosure; or if the discloser divulges the information in the public interest disclosure otherwise than in accordance with the Act or other legislation": see subclauses 49(2) and (3).

Natural justice for government entities or officials

The Explanatory Statement summarises the content of clause 33:

> If an investigator suspects, as a result of the investigation of a public interest disclosure, that a government entity or government official may have engaged, or will engage, in conduct contrary to the public interest, the investigator must either give that entity or official a written investigation notice, or refer the matter to the police.
>
> An investigation notice must set out the investigator's suspicion and the nature of the suspected conduct that is contrary to the public interest by the entity or official. The notice must also advise that the person has 21 days to make a submission to the investigator. The investigation notice must not contain sensitive information (including information that would identify disclosers or informants).
>
> If the government entity or official makes a submission within the 21-day period, the investigator is obliged to consider the submission.

Clauses 34 and 35 govern what is to occur whether there is a reference of a matter to the police.

Completing an investigation

In essence, the investigation is complete when, after making due inquiry, the investigator "formed a conclusion, on reasonable grounds", that a government entity or official has – or has not - been engaging in, is or is likely to engage in conduct contrary to the public interest, **or** that there is no reasonable likelihood that the investigator can determine whether either of these results have occurred; see clause 38.

An investigation may also end in the circumstances stated in clauses 24 and 25 (see clause 39), and in certain circumstances where the matter has been referred to the police (see clause 40).

Upon completion, the investigator must cause the fact of completion to be recorded in the public interest disclosures register; see clause 41.

The investigator's report to the CEO

Upon completion, the investigator must give a report (an investigation report) about the investigation to "(a) the CEO for each implicated government entity; and (b) if the investigator is not the supervisor for the public interest disclosure—the supervisor for the disclosure": subclause 42(1). (Clause 42 also specifies the time frame for reporting.)

This report "must include all information relevant to the investigation of the public interest disclosure that is known to the investigator at the completion of the investigation" (subclause 43(1), including protected information (which also include sensitive information).

Where the investigation was fully investigated and completed under clause 38 – that is, that the investigator has "formed a conclusion, on reasonable grounds", that a government entity or official has – or has not - been engaging in, is or is likely to engage in conduct contrary to the public interest, or that there is no reasonable likelihood that the investigator can determine whether either of these results have occurred (see paragraph 38(e)) – the report must include "(a) the conclusion; and (b) the investigator's reasons for forming the conclusion": subclause 44(1). (Subclauses 44(2) and (3) concern the content of a report where the investigation ended under clauses 39 and 40).

Any kind of report "must not include in the investigation report information that the investigator suspects on reasonable grounds may adversely affect a police investigation or a proceeding arising out of a police investigation": subclause 43(4).

Comment

The requirement in subclause 43(1) that a report "must include all information relevant to the investigation, etc" is, if taken literally, quite onerous. A piece of information will be relevant if it was taken into account in the process of forming conclusions and might thus be of a quite minute and insubstantial character when viewed against other kinds of information taken into account. There is an alternative formulation used in ACT laws that impose obligations on administrative decision-makers. This is to require the decision-maker to state their findings on material questions of fact and to refer to the sources and kinds of information used as a basis for those findings of material fact. While not defined in the law, a material fact is one that was of some importance in the fact-finding process. Thus, these obligations might be cast in the form of an obligation to state:

- a conclusion;
- the reasons for forming that conclusion;
- the findings of material fact; and
- the sources and kinds of information used.

The investigator's report must include a recommendation that the CEO either take – or not take – action against a government official or otherwise (subclause 45(1), and "may include a recommendation to the CEO of an implicated government entity that the CEO take stated action to prevent, or reduce the likelihood of, future conduct contrary to the public interest happening" (subclause 45(2)).

What the CEO must do

After giving consideration to a report (paragraph 46(2)(a)), the CEO must:

(b) decide whether to take—

(i) any action recommended in the investigation report; and

(ii) other action to prevent, or reduce the likelihood of, conduct that is contrary to the public interest happening in the future; and

(iii) other action to prevent, or reduce the likelihood of, detrimental action being taken against the discloser; and

Note ***Detrimental action*** is defined in s 50.

(iv) any other action the CEO considers appropriate.

Where the CEO decides to take some action, he or she must give a written report – the action report – to the discloser and to the supervisor (subclause 47(2)), although the discloser must not be given informant identifying information (subclause 47(3)).

Where the CEO chooses to take no action at all, or, in the opinion of the supervisor, has taken action that is not "adequate and appropriate in the circumstances about the matters and recommendations in the investigation report" (subclause 48(1)), "the supervisor must tell the Chief Minister about the investigation report and the CEO's actions" (subclause 48(2)).

The Bill does not require the Chief Minister to do anything upon receipt of this report from the supervisor.

Protection for discloser/whistleblowers

Immunities

Clause 49 provides a degree of immunity for a person who makes a public interest disclosure honestly and without recklessness as to the truth of the disclosure. Subclause 49(1) makes provision identical to that made by subclause 32(1) – see comments above concerning subclause 32(1).

In addition, the discloser/whistleblower cannot be disciplined in or dismissed from his or her employment only because of the making of the public interest disclosure. (The discloser/whistleblower might however find it hard to prove that dismissal, etc was "only" due to having made the disclosure.)

The immunity available to the discloser/whistleblower is lost where either discloser refuses to cooperate with an investigation of the disclosure; or divulges the information in the public interest disclosure otherwise than in accordance with the Act or other legislation (subclauses 49(2) and (3)).

Offences by others where detrimental action taken or threatened against a discloser/whistleblower

Clause 51 creates offences in respect of conduct that amounts to the taking of, and of threatening to take, detrimental action against another person in order to deter that person from making a public interest disclosure. Clause 50 defines "detrimental action" to be:

conduct that involves—

(a) discriminating against the other person by treating, or proposing to treat, the other person unfavourably; or

(b) harassing or intimidating the other person; or

(c) injuring the other person; or

(d) damaging the other person's property.

Clause 52 creates offences where the action is taken or threatened in order to punish a discloser/whistleblower.

A new remedy in tort

The Explanatory Statement explains the effect of clause 53 in these words:

> If a person takes or threatens to take detrimental action against another person in order to deter that person from making a public interest disclosure, or to punish that person for making a public interest disclosure, then the person who took the detrimental action is liable in damages to anyone who suffers detriment as a result.
>
> The damages may be recovered in a court of competent jurisdiction, for instance the ACT Supreme Court. Any remedy that is available to the court for a tort is available in a proceeding under this clause, including exemplary damages.
>
> However, in order to prevent 'double dipping', an award of damages is to be reduced by the amount of any compensation already ordered in relation to the same detrimental action under the *Discrimination Act 1991*.

The remedy under the *Discrimination Act 1991*

By amendment to the *Discrimination Act 1991* (see Schedule 1, Part 1.2), the Bill would insert a new section 68A into that Act. This section would provide that it is unlawful to take or threaten to take detrimental action against someone to deter the person from or punish the person for making a public interest disclosure. A person could then make a complaint alleging such action to the Human Rights Commission, and if the matter was not resolved at that stage, the matter could be referred to the Discrimination Tribunal.

By other amendment to the *Discrimination Act 1991* (see Schedule 1, Part 1.6), the Bill adds to the powers of this tribunal where a complaint relates to proposed section 68A. The Note to clause 50 of the Bill outlines what the tribunal might do.

Information sharing and secrecy

Part 7 of the Bill contains a scheme to regulate and protect from disclosure information that is generated under the scheme. The provisions delineate several categories of such information. The encompassing category is that of "protected information", which is information that is obtained by or disclosed to an information holder because he or she is an information holder under the Act. Within this category there is that of "sensitive information", which embraces a number of more specific

categories, being public interest disclosure information (defined in clause 58); discloser identifying information (defined in clause 59); informant identifying information (defined in clause 60); and information prescribed by regulations to be sensitive information.

Clause 61 would create offences in respect of the making of a record of, or the divulging of, information that is generated under the scheme. There are then exceptions to clause 61.

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

The Explanatory Statement explains clause 65 in this way:

> The offence in clause 61 does not apply if an information holder makes a record of or divulges protected information, where the record is made, or the information is divulged, for a proceeding in a court or tribunal.
>
> However, **discloser identifying information and informant identifying information may only be provided to a court or tribunal if the respective discloser or informant has agreed** to that information being provided to the court or tribunal.
>
> This is because the information will generally be publicly available once it has been provided to a court or tribunal.

The words emphasised indicate that clause 65 is attempting to regulate what evidence might be adduced in a court. In *Scrutiny Report No 26 of the Sixth Assembly*, concerning the Revenue Legislation Amendment Bill 2006, the Committee explained at length why this kind of provision gave rise to two kinds of rights question. The first is:

> Does clause 65 conflict with the principle that on a trial all relevant evidence is admissible – being a component of the right to a fair trial stated in HRA subsection 21(1) - and, if it does, is it nevertheless justifiable under HRA section 28, at least in part on the basis that it enhances the right to privacy stated in HRA section 12?

Unlike the Explanatory Statement accompanying the Revenue Legislation Amendment Bill 2006, the Explanatory Statement to this Bill does not address the "fair trial" issue that arises out of clause 65. That the Supreme Court will take this issue seriously is indicated by the comments of Master Harper in *Pappas v Noble* [2006] ACTSC 39 (see *Scrutiny Report No 26*).

If there is a derogation from the right to a fair trial, the issue then becomes whether that can be justified under HRA section 28.

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

The second issue is:

Is clause 65 inoperative to the extent that it is inconsistent with subsection 56(1) of the Evidence Act 1995 (Commonwealth)?

The Committee's views on the ability of ACT legislation to prohibit the giving of evidence to an ACT court where that evidence would otherwise be admissible under the *Evidence Act 1995* of the Commonwealth were stated in *Report No 26*, and the Committee referred to the analysis of Master Harper in *Pappas v Noble* and to the earlier remarks of Higgins CJ and Crispin J in *Habda v The Queen* [2004] ACTSC 62 [12]. In a response of 5 July 2006 to the Committee report (see attached), the Treasurer states that the *Pappas* analysis is "generally considered to be wrong in law", for the reason, it may be assumed, that subsection 8(4) of the *Evidence Act 1995* "preserves the operation of otherwise 'inconsistent' ACT evidence laws".

The Committee cannot express a firm opinion on this issue, other than to note that it may at least be arguable that the reference in paragraph 8(4)(b) to "any other Act of the Australian Capital Territory" might, when read in the context of the whole of the subsection, be a reference to such ACT Acts as had been enacted when the *Evidence Act 1995* came into effect.

ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT BILL 2006

This Bill would amend the *Road Transport (Safety and Traffic Management) Act 1999* (to clarify the period the Chief Police Officer is required to keep vehicles seized in relation to the commission of certain dangerous driving offences.

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

By clause 4 of the Bill, new subsection 10E(1) of the Act would read:

> (1) This section applies if a motor vehicle is seized under section 10C (1) (a) (Powers of police officers to seize and impound vehicles used in committing certain offences) by a police officer because the police officer believes the vehicle has been used by a person in committing an offence.

Subsection 10E(2) then (in effect) prescribes the time at which the seized vehicle must be released to its owner. This must be within 28 days if a prosecution for the offence is not started within that time, or otherwise after legal process has concluded – subject to a 3 month limit where the person has not been convicted, or found guilty, of a relevant offence within the 5-year period before the day the vehicle is seized.

As the hard copy of the Explanatory Statement noted, "the vehicle seizure and impoundment provisions [of the Act] may require further consideration by Government in terms of [human rights] compatibility". (This paragraph of the hard copy does not appear on Legislation Register site version of the Explanatory Statement.)

The Assembly in its consideration of this Bill cannot avoid this issue. In terms of the *Human Rights Act 2004*, the issue might be posed as to whether there is derogation from HRA section 10 (Protection from torture and cruel, inhuman or degrading treatment etc) which, as the Committee has often pointed out, may be seen to incorporate a principle that punishment should not be disproportionate to the offence. In this case of course, the seizure of the property occurs before any finding of guilt. The issue might also be seen as raising a breach of the right to privacy in HRA subsection 10(1): "Everyone has the right— (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; …". This view requires an extensive interpretation to the concept of "home".

In other jurisdictions, this kind of issue is seen as one of whether there is a derogation of the right to property, and in that context the courts have focussed on the value of the property and the extent of the hardship that is caused by its seizure: see R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) Second Supplement, 18.109B. While the HRA does not include a right to property, this right is stated in international treaties (in particular Article 17 of the Universal Declaration of Human Rights, and see United Nations Commission on Human Rights, "The Right of Everyone to Own Property Alone as well as in Association with Others", UN Doc/E/CN.4/1994/19 (1993) at 90-92). In a modified form, it is a right of full constitutional status so far as concerns the legislative power of the Legislative Assembly; see paragraph 23(1)(a) of the *Australian Capital Territory ((Self- Government) Act 1988*.

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 DI2006-74 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 5) made under section 13 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to vehicles for driver competing in the ACT timed special (competitive) stages of the 2006 BRM Silverstone Safari Rally.**

Disallowable Instrument DI2006-76 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2006 (No. 1) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2005-260 and determines the rules for sports bookmaking.

Disallowable Instrument DI2006-77 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2006 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **determines the Chief Executive of ACT Health to be a parking authority for specified locations.**

Disallowable Instrument DI2006-78 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2006 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **determines Calvary Health Care ACT to be a parking authority for a specified location.**

Disallowable Instrument DI2006-79 being the Occupational Health and Safety Council Appointment 2006 (No. 1) made under paragraph 21(1)(b) and subsection 21(2) of the *Occupational Health and Safety Act 1989* **appoints specified persons as acting members of the Occupational Health and Safety Council.**

Disallowable Instrument DI2006-80 being the Health Professionals (Regulation of Health Profession) Decision 2006 (No. 1) made under section 20 of the *Health Professionals Act 2004* **determines Medical Radiation Scientists as a new health profession under the Act.**

Disallowable Instrument DI2006-81 being the Dentists (Fees) Determination 2006 (No. 1) made under section 85 of the *Dentists Act 1931* **revokes DI2004-55 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-84 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2006-34 and determines a specified sub-agency as an approved sports bookmaking venue.**

Disallowable Instrument DI2006-86 being the Taxation Administration (Amounts payable—Payroll Tax) Determination 2006 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2002-94 and determines amounts payable for the purposes of the Act.**

Disallowable Instrument DI2006-87 being the Financial Management (Cultural Facilities Corporation Deputy Chair) Appointment 2006 (No. 1) made under section 79 of the *Financial Management Act 1996* **appoints a specified person as deputy chair of the Board for the Cultural Facilities Corporation.**

Disallowable Instrument DI2006-88 being the Financial Management (Cultural Facilities Corporation Governing Board Members) Appointment 2006 (No. 1) made under section 78 of the *Financial Management Act 1996* **appoints specified persons as governing board members of the Cultural Facilities Corporation.**

Disallowable Instruments—Comment

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

Is this a disallowable instrument?

Disallowable Instrument DI2006-75 being the Liquor Licensing Board Appointment 2006 made under section 12 of the *Liquor Act 1975* **appoints a specified person as chairperson of the Liquor Licensing Board.**

The Committee notes that this instrument re-appoints a named person as Chairperson of the Liquor Licensing Board. As noted in the Explanatory Statement to the instrument, section 12 of the *Liquor Act 1976* provides that the Board is constituted by the Registrar of Liquor Licences, a

Chairperson and three other members. The Chairperson and the three other members are appointed by the Minister.

As also noted by the Explanatory Statement, section 13 of the Liquor Act provides that the Minister **must not** appoint a person as Chairperson of the Board unless the person has been a lawyer for not less than 5 years.

Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument. This requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointment contained in it is not a public servant appointment. The Committee notes that there is no such statement in the Explanatory Statement to this instrument. As a result, the Committee (and the Assembly) has no way of knowing whether or not the appointment made by this instrument is a public servant appointment and, as a result, whether or not this is, in fact, a disallowable instrument. While this might be inferred from the fact that (as noted by the Explanatory Statement) the Standing Committee on Legal Affairs has considered the appointments (ie in its non-scrutiny capacity), the Committee considers that it would be appropriate (and that it would not cause any great inconvenience) if a statement to this effect was included in the instrument appointing the persons in question.

In this context, the Committee notes that this instrument expressly re-appoints a person as the Chairperson of the Board. That being the case, the Committee (and the Assembly) may be entitled to assume that the person in question has been a lawyer for not less than 5 years, a condition that the person would have had to meet at the time of the original appointment. Nevertheless, the Committee considers that it would assist the Committee (and the Assembly) if the Explanatory Statement to an instrument of appointment expressly indicated that the person appointed meets any mandatory requirements for appointment.

Minor drafting issue

Disallowable Instrument DI2006-82 being the Financial Management (Territory Authorities prescribed for Outputs) Guidelines 2006 made under section 107 of the *Financial Management Act 1996* **prescribes certain territory authorities for output reporting for the purposes of the Act.**

Disallowable Instrument DI2006-83 being the Financial Management (Departments) Guidelines 2006 made under section 107 of the *Financial Management Act 1996* **revokes DI2005-276 and prescribes certain departments for the purposes of the Act.**

The Committee notes that these instruments state that they are made under section 107 of the *Financial Management Act 1996* (**FM Act**), which is identified as the "guideline-making power". In the current version of the FM Act, the guideline-making power is set out in section 133. The Committee also notes, however, that at the time that the instruments were made (ie 19 May 2006), the guideline-making power was, in fact, set out in section 107 of the FM Act. As a result, the Committee makes no further comment on the instruments.

Minor drafting issue

Disallowable Instrument DI2006-85 being the Cemeteries and Crematoria (Fees) Determination 2006 (No. 1) made under subsection 49(1) of the *Cemeteries and Crematoria Act 2003* **revokes DI2005-105 and determines fees payable for the purposes of the Act.**

The Committee notes that this instrument states that it is made under subsection 49(1) of the "Cemeteries and Crematoria Act". The year of the Act - 2003 - is omitted. The Committee also notes, however, that both the header to the Schedule to the instrument and the Explanatory Statement to the instrument set out the full citation of the Act.

Positive comment / Point of clarification

Disallowable Instrument DI2006-90 being the Housing Assistance Public Rental Housing Assistance Program 2006 (No. 1) made under subsection 12(1) of the *Housing Assistance Act 1987* **amends the Public Rental Housing Assistance Program to facilitate new needs-based priority categories and to limit eligibility to persons resident in the ACT.**

The Committee notes with approval that the Explanatory Statement to this instrument contains a brief but informative summary of the changes to the Public Rental Housing Assistance Program (**PRHAP**) that are made by the instrument. The Explanatory Statement states:

> As the Legislation Register does not permit consolidations of Statutory Instruments to be placed on it, a fresh Program has been prepared to enable a complete document to be available on the Register.

The Committee is a little perplexed by this statement. The Committee notes that Chapter 11 of the *Legislation Act 2001* deals with the republication of laws to take account of amendments to those laws. "Law" is defined (for the purposes of Chapter 11) in section 107 of the Legislation Act to include a "statutory instrument". "Statutory instrument" is, in turn, defined, in section 13 of the Legislation Act, to include a disallowable instrument. This being so, the Committee cannot understand how it can be the case that the Legislation Register "does not permit consolidations of Statutory Instruments to be placed on it". The Committee would appreciate the Minister's views on this issue.

Subordinate Laws—No Comment

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

Subordinate Law SL2006-15 being the Building Amendment Regulation 2006 (No. 1) made under the *Building Act 2004* **creates transitional provisions relating to the introduction of energy efficiency requirements in the 2006 edition of the Building Code of Australia.**

Subordinate Law SL2006-16 being the Tree Protection Regulation 2006 made under the *Tree Protection Act 2005* **provides that, when considering decisions made by the Conservator under the Tree Protection Act 2005, shall apply the criteria determined under that Act.**

Subordinate Law SL2006-18 being the Agents Amendment Regulation 2006 (No. 1) made under the *Agents Act 2005* **modifies the qualification requirements for ACT travel agents.**

Subordinate Law—Comment

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

Inadequate Explanatory Statement?

Subordinate Law SL2006-17 being the Road Transport (Third-Party Insurance) Amendment Regulation 2006 (No. 1) made under the *Road Transport (General) Act 1999* **determines the maximum premiums that can be charged for various premium classes for compulsory third party policies taking effect on or after 15 June 2006.**

This subordinate law amends the *Transport (Third-Party Insurance) Regulation 2000*, by increasing the maximum premiums that can be charged for the various premium classes for Compulsory Third Party (**CTP**) insurance policies, with effect from 15 June 2006. The Explanatory Statement states:

> The premiums set out in schedule 1 to the amending regulation have been developed following a peer review by Cumpston Sarjeant Pty Ltd, an independent actuary engaged by the Government to ensure that the interests of the ACT community are protected.
>
> **Revenue/Cost Implications**
>
> The Government retains no premium revenue. Accordingly, there are no revenue implications.
>
> There are cost implications. ACT agencies will pay CTP premiums in accordance with schedule 1 for registered vehicles that carry CTP insurance.

The Committee notes that, while the Explanatory Statement gives an indication of the basis on which the new premiums were set, there is no indication in the Explanatory Statement as to the magnitude of the increase in premiums. While the Committee accepts that there is no formal requirement to provide such information, the Committee considers that it would assist the Committee - and the Legislative Assembly - if, as a matter of course, all subordinate laws that set new (ie increased) fees or charges are accompanied by an explanation as to the magnitude of (and the reasons for) any increase.

The Committee considers that this is a matter that is appropriate to raise under paragraph (b) of the Committee's terms of reference, which requires the Committee to:

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

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, undated, in relation to comments made in Scrutiny Report 27 concerning the Administrative (Miscellaneous Amendments) Bill 2006.
- The Acting Minister for the Territory and Municipal Services, dated 7 June 2006, in relation to comments made in Scrutiny Report 25 concerning DI2006-54, being the Tree Protection (Advisory Panel) Appointment 2006 (No. 1).
- The Minister for Eduction and Training, dated 4 July 2006, in relation to comments made in Scrutiny Report 26 concerning DI2006-71, being the Education (Non-government Schools Education Council) Appointment 2006 (No. 1).
- The Treasurer, dated 5 July 2006, in relation to comments made in Scrutiny Report 26 concerning the Revenue Legislation Amendment Bill 2006.
- The Treasurer, dated 6 July 2006, in relation to comments made in Scrutiny Report 25 and the Treasurers response dated 15 May 2006 concerning SL2006-10, being the Racing (Jockeys Accident Insurance) Regulation 2006.
- The Minister for Health, dated 10 July 2006, in relation to comments made in Scrutiny Report 26 concerning the Health Legislation Amendment Bill 2006.
- The Minister for Planning, dated 14 July 2006, in relation to comments made in Scrutiny Report 26 concerning:
  - SL2006-12 being the Land (Planning and Environment) Amendment Regulation 2006 (No. 1); and
  - SL2006-13 being the Land (Planning and Environment) Amendment Regulation 2006 (No. 2).
- The Minister for Education and Training, dated 17 July 2006, in relation to comments made in Scrutiny Report 26 concerning the Education Amendment Bill 2006.
- The Acting Chief Minister, dated 21 July 2006, in relation to comments made in Scrutiny Report 25 concerning SL2006-9, being the Utilities (Water Conservation) Regulation 2006.
- The Minister for Education and Training, dated 27 July 2006, in relation to comments made in Scrutiny Report 26 concerning DI2006-72, being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 6).

The Committee wishes to thank the Chief Minister, the Treasurer, the Acting Minister for the Territory and Municipal Services, the Minister for Health, the Minister for Planning, the Minister for Education and Training and the Acting Chief Minister for their helpful responses.

Bill Stefaniak, MLA
Chair

August 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)

Bills/Subordinate Legislation

Report 14, dated 15 August 2005

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

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No. 2)
Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1)
Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No. 2)
Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No. 1)
Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No. 2)
Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No. 3)
Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No. 2)
Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No. 1)
Hotel School (Repeal) Bill 2005 **(Passed 25.08.05)**
Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No. 1)

Report 16, dated 19 September

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

Report 18, dated 14 November 2005

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 22, dated 6 March 2006

Construction Occupations Legislation Amendment Bill 2006 **(Passed 30.03.06)**

Report 25, dated 8 May 2006
Disallowable Instrument DI2006-53 - Gambling and Racing Control (Governing Board) Appointment 2006 (No. 1)
Disallowable Instrument DI2006-57 - Housing Assistance (Public Rental Housing Assistance Program) Review Committee Appointments 2006 (No. 1)
Disallowable Instrument DI2006-69 - Legal Aid (Commissioner (Bar Association Nominee)) Appointment 2006 (No. 1)

Bills/Subordinate Legislation

Radiation Protection Bill 2006
Registration of Relationships Bill 2006 **(PMB)**
Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Report 26, dated 5 June 2006

Legal Profession Bill 2006

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

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

Bill

Dear Mr Stefaniak

I refer to comments in Scrutiny Report No 27 of 8 June 2006 about the Administrative (Miscellaneous Amendments) Bill 2006 (the Bill).

I note that the Committee has commented on the provisions in new Division 9.6, which the Bill inserts into the *Financial Management Act 1996*. The Committee comments that those provisions might trespass on the right to privacy by allowing information to be passed for the purpose of facilitating the transfer of the assets of a territory authority to which the division applies. The Committee comments further that the provisions could apply to information that constitutes "trade secrets" and could involve infringement of a right to property in that information.

The Committee notes that, if the provisions do represent a derogation from the rights, such a derogation may be justified on the basis that it is not "arbitrary". In addition the Committee notes, in relation to the issue of privacy, that it is unlikely that any information to which the provisions in new Division 9.6 applies will involve personal information about any person.

While it is true that provisions permitting information to be passed freely from one entity to another may strictly speaking involve a breach of confidence and privacy, there are balancing factors arising from the context in which the passing of the information is allowed. The provisions of Division 9.6 clearly state that they apply to the transfer of assets of statutory authorities that are being abolished. In order for Division 9.6 to apply to a territory authority the authority must be prescribed by regulation for that purpose. As a result the provisions only apply where the government has an announced intention of abolishing a territory authority and transferring its functions elsewhere. The provisions of section 110 and 111 permit the giving of information as part of the giving of assistance in the transfer process. They have the effect of removing existing privacy and property protections applying to that information only for the very limited purpose of providing assistance in the transfer of assets from prescribed territory authorities. In addition, section 112 allows the use of that information only for the purpose of transferring those assets. In this context the derogation is not "arbitrary" but is limited and directed to a particular, defined purpose.

ACT LEGISLATIVE ASSEMBLY

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In relation to the issue of the right to property and the possibility that property rights in "trade secrets" could be infringed by the provisions allowing the passing of information to facilitate the transfer of assets from a prescribed territory authority, the provisions of sections 113 and 114 are relevant. Those sections provide for the responsible Minister or the territory authority itself to enter into contracts in relation to the protection of information that is passed under the provisions of sections 110 and 111. By providing for such contracts, the legislation acknowledges that third parties that have been dealing with the territory authority may have an interest in protecting commercially sensitive information and provides a mechanism for that protection to be agreed upon.

While the provisions of Division 9.6 provide explicitly for information to be passed before the relevant territory authority is actually abolished, those provisions must be read together with the provisions of Division 9.7, which vest all assets, liabilities, rights and obligations of the abolished authority in the Territory, once the authority ceases to exist. The Territory becomes the successor in law of the abolished authority and all its records become records of the Territory.

The Committee also comments on minor amendments made to the *Fuels Control Act 1979* in Schedule 1 of the Bill, to the effect that sections 12(3) and 12(4) in combination create an offence of strict liability. Presumably the Committee intended to refer to sections 12(2) and 12(3). As the Explanatory Statements says, those amendments make no substantive change to the provisions in the *Fuels Control Act 1979* and the Committee acknowledges that the statement is accurate. In fact there has been no change to the way in which the provisions have been drafted, except to replace a reference to the Emergency Services Authority with a reference to the Emergency Services Commissioner. Since the amendment is of a minor consequential nature, the issue of the object of the provision in the context of the *Fuels Control Act 1979* did not arise to be addressed in the Explanatory Statement.

I note that the Attorney-General has issued a statement under section 37 of the *Human Rights Act 2004* that the Bill is consistent with that Act.

Yours sincerely

Jon Stanhope MLA
Chief Minister

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

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

Dear Mr Stefaniak

Thankyou for your Scrutiny of Bills Subordinate Legislation Committee Report No. 25 dated 8 May 2006. I offer the following response in relation to the matters raised by your committee.

In relation to the matters raised by the Committee in relation to Disallowable Instrument DI2006-54 being the Tree Protection (Advisory Panel) Appointment (No. 1) 2006, I am advised that Environment ACT short-listed five suitable candidates from a pool of 15 applicants. Those people had extensive experience in one or more of the following fields, arboriculture, forestry, horticulture, landscape architecture and natural and cultural heritage as required under the Act.

The recommendations for additional wording in the Explanatory Statement are noted and will be included in future appointments.

In addition, the comments raised by the Committee in relation to Disallowable Instrument (2006-55 and 2006-60) being the Tree Protection (Approval Criteria) Determination (No. 1) and (No.2) are noted.

Thank you for the opportunity to comment on the report.

Yours sincerely

Jon Stanhope MLA
Acting Minister for the Territory and Municipal Services

7 June 2006

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Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
c/- Scrutiny Committee Secretary
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

I refer to the Standing Committee on Legal Affairs Scrutiny Report No. 26 of 5 June 2006, and in particular comments relating to Disallowable Instrument DI2006-71.

The Committee examined a number of disallowable instruments, including Disallowable Instrument DI2006-71, being the Education (Non-government Schools Education Council) Appointment 2006 (No. 1) made under subsection 109(1) of the *Education Act 2004*.

The Committee noted that this instrument appoints a named person as an education member of the Non-government Schools Education Council (NGSEC). The Committee states that, although it is not strictly necessary for an instrument of appointment to set out the category in which an individual is appointed, it would have assisted the Committee and the Assembly to include this information in the Explanatory Statement.

I have noted the findings of the Committee in relation to Disallowable Instrument DI2006-71 and will ensure that future Explanatory Statements regarding appointments of education members to NGSEC contain information on the category in which an individual is appointed.

I hope this information addresses the Committee's concerns and thank you for bringing this matter to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training
- 4 JUL 2006

ACT LEGISLATIVE ASSEMBLY

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Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
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CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to comments made by the Standing Committee on Legal Affairs in Scrutiny Report No 26 of 5 June 2006 relating to the Revenue Legislation Amendment Bill 2006 (Bill), in which the Committee has commented extensively on a rights issue in relation to proposed section 99 of the *Taxation Administration Act 1999* (TAA).

Existing section 99 of the TAA seeks to prevent the release of "confidential" information or documents to a court. As "confidential" is not defined, tax officers and the courts must determine the meaning by reference to the common law definition.

For the sake of certainty and clarity in the administration of section 99, and for the avoidance of litigation, proposed section 99 seeks to restrict disclosures to a court by a current or former tax officer that contain protected information to those that are necessary for the administration or execution of a tax law.

Accordingly, the issue is whether proposed section 99 of the TAA conflicts with the principle that at trial, all relevant evidence is admissible, this being a component of the right to a fair trial stated in ss21(1) of the *Human Rights Act 2004* (HRA).

The issue also engages the right to privacy in s12 of the HRA.

The issue was addressed at length in the Explanatory Statement to the Bill, which was prepared with the assistance of the JACS Human Rights Unit.

In acknowledging the issue, the Statement concluded that on balance the restriction was justifiable and did not unduly trespass on rights previously established by law.

The Committee explicitly acknowledges in Scrutiny Report No 26 that a Territory law extending the occasions on which a person may refuse to disclose evidence to a court may avoid incompatibility with the HRA, either because the law is not incompatible with a fair trail or, if it is, the derogation is justifiable under s28 of the HRA.

Accordingly, the Committee has left it to the Assembly to consider whether the ability of a party to adduce relevant evidence at trial to prove their case or disprove their opponent's case should be restricted by proposed section 99 of the TAA.

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The Committee also identified a second issue in Scrutiny Report No 26, being an alleged inconsistency between proposed section 99 of the TAA and ss56(1) of the Commonwealth *Evidence Act 1995* as would render proposed section 99 inoperative.

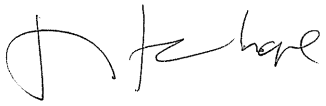
I am advised that the Committee has erred in law in failing to take into account section 8(4) of the Commonwealth *Evidence Act 1995*, which preserves the operation of otherwise 'inconsistent' ACT evidence laws.

The Committee's comment is based on the decision by the Master in *Pappas v Noble.* I understand this was an *ex-tempore* decision in which the Master appears to have been unaware of ss8(4) of the Commonwealth Evidence Act. As a result, the Master had regard only to ss56(1) of the Commonwealth Evidence Act, which states that "Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding". The Master therefore concluded that any Territory Act that makes any of these classes of evidence inadmissible - or even simply imposes barriers to the admission of the evidence - is inconsistent with the Commonwealth Act and therefore fails.

The decision in *Pappas v Noble* is generally considered to be wrong in law. As a result of accepting *Pappas v Noble* as authoritative, the Committee's conclusion with regard to proposed section 99 of the TAA would appear to be in error.

I thank the Committee for its comments.

Yours sincerely



Jon Stanhope MLA
Treasurer

- 5 JUL 2006

Jon Stanhope MLA
CHIEF MINISTER
TREASURER MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT
MINISTER FOR INDIGENOUS AFFAIRS MINISTER FOR THE ARTS
MEMBER FOR GINNINDERRA

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

My Department has been informed that my letter to you of 15 May 2006, regarding Scrutiny comment on the Racing (Jockeys Accident Insurance) Regulation 2006, did not accurately describe the reason why the numbering of sections in the Explanatory Statement did not fully match the amended *Racing Act 1999*.

Following advice from Treasury, my letter advised that the Parliamentary Counsel's Office renumbered clause 61BA of the proposed amendments to the *Racing Act 1999* and omitted to advise my Department of the change. However, Treasury has since been advised that as a result of clause 61BA being inserted in the bill by a Government amendment, it was renumbered by the Clerk as section 61C under Assembly Standing Order 191. As a consequence, the remaining provisions of section 61 were renumbered as sections 61D and 61E. Notwithstanding this, the Explanatory Statement was prepared to be consistent with the originally proposed amendments to the Regulation, rather than the Act as renumbered and notified.

While I believe that this matter has been satisfactorily resolved for the Committee, I would be grateful if the Committee could note, for the record, that the original explanation for why the difference in numbering occurred was based on a misunderstanding by Treasury. Treasury regrets any inconvenience caused by this misunderstanding.

Yours sincerely

Jon Stanhope MLA
Treasurer

- 6 JUL 2006

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MINISTER FOR DISABILITY AND COMMUNITY SERVICES MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
c/- Scrutiny Committee Secretary
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GPO Box 1020
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Dear Mr Bill Stefaniak

Thank you for your Scrutiny of Bills Report No 26 of 5 June 2006. In relation to the *Health Legislation Amendment Bill 2006,* the Committee asked:

> *Are the provisions regulating the admissibility of evidence in Territory courts incompatible with Human Rights Act 2004 (HRA) subsection 21(1) and/or the Evidence Act 1995 (Commonwealth)?*

The *Health Legislation Amendment Bill 2006* was introduced into the Assembly on 11 May 2006, and was passed by the Assembly on 6 June 2006.

The Act plays a central role in promoting quality assurance activities within the health sector. The legislation provides protection from litigation to members of committees established under the Act, and those supporting them in relation to those activities. Immunity is the very essence of the legislation, as it facilitates full and frank disclosure and discussion of the issues before a quality assurance or clinical privileges committee.

Provisions within the Act restrict access to documents produced expressly for an approved committee, or statements made within the committee. The legislation will not restrict access to those documents normally produced in the health sector. These documents are subject to the powers of courts and tribunals to compel disclosure.

ACT Health commissioned the Castan Centre to review its legislation in relation to the *Human Rights Act 2004.* Their comments in relation to provisions around secrecy, admissibility of evidence and members not being compellable are recorded below.

"The privilege conferred by Part 8 of the Act may not be so clearly compatible with human rights principles. Nevertheless, it is submitted that the privileges conferred under that section are justified under HRA, in that they facilitate the smooth functioning of the health sector committees by encouraging the frank disclosure of information, an aim which is justified to protect public health, and the rights of privacy of persons (eg a health professional's right to reputation) to whom privileged information may pertain. Clinicians should be encouraged to facilitate the

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gathering of information regarding diseases and other health impediments, and may not do so if they fear that another person could reveal the information in open court."

Section 8 is designed to reinforce the confidentiality of quality assurance and clinical privileges committees. Section 28 HRA allows for the interference with procedural rights in ss 21 and 22. Furthermore, the section is aimed at protecting the countervailing privacy rights of the person to whom the privileged information pertains.

In respect to the later part of the question: *Are the provisions regulating the admissibility of evidence in Territory courts incompatible the Evidence Act 1995 (Commonwealth).* The decision by Master Harper, in Pappas v Noble was an ex-tempore decision. In this case the Master appears not to have been referred to section 8(4) of the Commonwealth *Evidence Act 1995*, which preserves the operation of ACT laws. The decision is generally considered to be wrong in law.

I hope this information addresses the Committee's concerns, and thank you for bringing this matter to my attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
10/7/06

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

Thank you for the Scrutiny Report Number 26 of 5 June 2006. The report offers comment on several matters. In this letter I consider the matters raised in connection with the *Land (Planning and Environment) Amendment Regulation 2006 (No 1)* and the *Land (Planning and Environment) Amendment Regulation 2006 (No 2)*.

The *Land (Planning and Environment) Amendment Regulation 2006 (No 1)* was made under the *Land (Planning and Environment) Act 1991* on 7 April 2006, notified on the 10 April 2006 and considered by the Scrutiny of Bills Committee. The regulation removed a requirement for remission of change of use charges (CUC) in connection with the redevelopment of local centres.

The Committee concluded that the regulation did alter existing rights and as such raised questions as to whether it trespassed unduly on those rights and whether the measure should be achieved through legislation. In my view, the answer to both of these questions is no for the following reasons.

As the Committee noted, remission is only required following a declaration of the Planning and Land Authority to the effect that the relevant local centre is not viable (or will cease to be viable in three years) and is unlikely to be developed if no remissions for CUC were allowed. The making of such a declaration is at the discretion of the Authority on application from the proponent.

Importantly, again as the Committee noted, the requirement for remission of charges was created by regulation. Section 184C of the Land (Planning and Environment) Act requires remission of CUC in circumstances prescribed in the regulation. The Act therefore clearly permits such circumstances to be prescribed or not as the case may be and for any such regulations to be amended or removed.

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These elements of the remission requirement indicate that it is a highly contingent right only. Therefore its removal does not represent an undue trespass on rights and it is appropriate for this to be achieved through regulation. The substantive reasons for the removal of this right, as set out in the explanatory statement, remain valid and compelling.

The *Land (Planning and Environment) Amendment Regulation 2006 (No 2)* was made under the Land (Planning and Environment) Act on 20 April 2006, notified on the same date and considered by the Scrutiny of Bills Committee. The regulation exempts from third party appeal applications for approval of developments in the Civic centre area, town centres and industrial areas. The Committee's Report addressed several matters relating to this regulation.

The Committee concluded that the regulation did remove some existing rights of review and as such raised several issues. These issues included whether the regulation:

- trespasses unduly on existing rights;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter that should more properly be dealt with through legislation.

I note with interest the Committee's comments on this regulation. I also note that the Committee has generally accepted the rationale for this regulation, as set out in the regulation's Explanatory Statement.

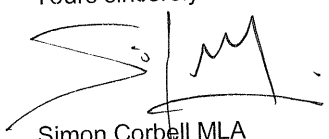
The Committee appears to express, however, some reservations about the appropriateness of exempting certain types of development applications from third party merit appeals, suggesting that this matter is more appropriately dealt with in legislation. As you are aware the Land (Planning and Environment) Act has long contained a power to exempt certain development applications from the application of Part 6 of the Act dealing with development assessment, including the application of third party appeal rights. As you are also undoubtedly aware, a number of exemptions from third party appeal rights have been made over the years.

As the Committee acknowledges, the rationale for this regulation is provided in the regulation's Explanatory Statement. The regulation achieves an appropriate balance between the general benefit to the ACT community of facilitating development in the Civic centre area, the other town centres and industrial areas and the protection of the interests of residents and others likely to be affected by such development. As the Committee notes, persons affected by particular development proposals are able to make submissions on individual proposals or relevant Territory Plan variations and the rights under the *Administrative Decisions (Judicial Review) Act 1989* are not affected.

In light of the above, I conclude that the removal of specified rights of merit appeal is warranted, does not represent an undue trespass on existing rights and is an appropriate matter for regulation.

Once again, thank you for raising these matters with me.

Yours sincerely



Simon Corbell MLA
Minister for Planning

14.7.06

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

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Dear Mr Stefaniak Bill

I refer to the Standing Committee on Legal Affairs Scrutiny Report No. 26 of 5 June 2006, and in particular comments relating to the *Education Amendment Bill 2006.*

The Committee has raised two issues arising from the proposed subsection 26(2) in the Bill – whether the appropriate delegation of power to determine fees has been established and whether the proposed subsection 26(2) derogates from a right to education by trespassing on personal rights and liberties.

The provision in proposed subsection 26(2) allows the Minister to give guidance on those optional enrichment activities that may be offered to enrich the school experience, but not for curriculum requirements. The clause was not intended as a strict determination of fees provision.

I am advised that a right to free education would not be impaired if a parental contribution was made for optional enrichment activities that are delivered in addition to the existing school curriculum.

I agree with the issue raised by the Committee that there should be a clear demarcation between the curriculum and optional enrichment activities and this has been noted.

I am seeking to table a Government Amendment during the debate of the Bill with the intention of clarifying this issue and I thank the Committee for their findings.

I hope this information addresses the Committee's concerns and thank you for bringing these findings to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

17 JUL 2006

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Dear Mr Bill Stefaniak

Thank you for the Scrutiny of Bills Report No. 25 of 8 May 2006. On behalf of the Chief Minister who is currently on leave I offer the following response in relation to the comments on the *Utilities (Water Conservation) Regulation 2006*.

The Committee has sought further justification for the imposition of strict liability to the offences in the *Utilities (Water Conservation) Regulation 2006 (the Regulation)*. Strict liability offences are usually employed in cases where it is necessary to ensure the integrity of a regulatory scheme, particularly those relating to public health and safety, the environment and the protection of the revenue. Such offences are primarily aimed at the less serious side of the criminal spectrum with penalties generally at the lower end of the scale. In this case, the Regulation provides a scheme to ensure water is conserved for future use. Sections 7, 14, 17 and 23 of the Regulation are important to the scheme in that they are intended to ensure a person complies with a notified water conservation measure. Accordingly, the Government considers strict liability appropriate in this case, particularly given the level of penalty attached to offences.

I also add that the Regulation was replacing and revising the *Utilities (Water Restriction) Regulation 2002*, where similar offences were included. However, while the Regulation's Explanatory statement did not provide a detailed explanation of the need for strict liability offences I understand that under the Legislation Act 2001 this letter of response to you will be published with the Regulation on the ACT Legislation Register and so will become part of the interpretation of the regulation.

I trust that this information satisfactorily addresses the matters raised in the Committee's report.

Yours sincerely

Katy Gallagher MLA
A/g Chief Minister
21/7/06

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MEMBER FOR MOLONGLO

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Dear Mr ~~Stefaniak~~ Bill

The Standing Committee on Legal Affairs, in Scrutiny Report No. 26 of 5 June 2006, commented on Disallowable Instrument DI2006-72.

The Committee noted (as a minor drafting issue) that it might assist in the understanding of the instrument if (a) the provision under which the person was appointed was specifically identified and/or there was punctuation in the operative part of the instrument (ie around "as the Chairperson of the Vocational Education and Training Authority").

The suggestion is noted and will be taken into account when creating Disallowable Instruments in the future.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

27 JUL 2006

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