Legislative Assembly for the ACT

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

Scrutiny Report

26 FEBRUARY 2007

Report 38

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bill—Comment

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

LAND (PLANNING AND ENVIRONMENT) LEGISLATION AMENDMENT BILL 2007

This Bill would (i) retrospectively amend section 275 of the *Land (Planning and Environment) Act 1991* (the Act) to the effect that only the applicant for development approval or the Heritage Council may apply to the AAT for a review of a decision to give a development approval subject to a condition; (ii) retrospectively amend the regulation making power in paragraph 282(1)(e) by removing the words "of a kind" from the existing provision; and (iii) provide that SL2006-13 is to be taken, for all purposes, to have been validly made under the Act. The Bill would make consequential amendments to the *Land (Planning and Environment) Regulation 1992*.

Background to the Bill

Two companies - Direct Factory Outlets Canberra Pty Limited and Capital Planners ACT Pty Limited (collectively DFO) – obtained from the Planning and Land Authority (PLA) approval of a development that involves the erection of a bulky goods and factory outlet retail centre at Fyshwick. Other companies - Capital Property Projects (ACT) Pty Limited (CPP), Canberra International Airport Pty Limited and Brand Depot Pty Limited - sought under section 276 of the Act to have that decision reviewed by the Administrative Appeals Tribunal (AAT). Upon a challenge to the jurisdiction of the AAT to entertain the appeal, CPP and the other companies sought from the Supreme Court a declaration that certain laws were invalid. The Supreme Court granted one of the declarations sought; see *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122, per Gray J.

The result was that the AAT could proceed to entertain the appeal by CPP, subject to any appeal from the decision of Gray J. It appears that an appeal to the Court of Appeal is on foot.

The purpose of this Bill is to change the law – with retrospective effect – so that any body – including the Supreme Court or the AAT – would be obliged to find that the AAT no longer had jurisdiction to entertain the appeal by CPP.

The legal background to the decision of Gray J is explained lucidly in the Presentation Speech and need not be repeated in detail, but a brief note of the main points may assist an understanding of the rights issues thrown up by the Bill.

Section 276 of the Act enables a person who objected to a development application (or who had reasonable grounds for not objecting) to appeal to the AAT, whereupon the tribunal undertakes a merits review and makes its own decision as whether the development application should be granted. However, paragraph 282(1)(e) authorises the making of regulations "exempting development of a kind specified by regulation …" from the application of provisions in Part 6 of the Principal Act, which includes section 276.

282(1) A regulation may make provision for –

…

(e) exempting a *development of a kind specified* by regulation, either absolutely or subject to conditions, from the application of this part or any provision of this part: … [emphasis added].

Section 43(1) of the Land (Planning and Environment) Regulation (the Regulation) provides that

(1) The Act, section 276 does not apply in relation to a decision of the relevant authority about a development listed in schedule 7.

Thus, schedule 7 of the Regulation lists categories of activity that are not amenable to third party appeal under section 276.

This list was amended by SL2006-13, the *Land (Planning and Environment) Amendment Regulation 2006 (No 2)* (the Amending Regulation) to provide for a new item 10A (which has now been re-numbered to be item 11). As Gray J put it, "[item 11(c)] was … inserted to exclude completely development in the Civic centre area, a town centre area or an industrial area".

It was because item 11(c) was expressed in these terms that Gray J held that section 43 when read with item 11(c) was invalid as not authorised by paragraph 282(1)(e). Gray J reasoned that the item did not refer to a "development of a kind". He found that the clear intention of paragraph 282(1)(e) (and his Honour referred to the relevant Explanatory Statement) "was to restrict the regulation-making power to the specification of **certain** activities (be it development or controlled). There is no underlying purpose which would authorise all activities to be exempted" [emphasis in the original]. The latter was, however, what item 11(c) purported to do. Thus, "the failure to relate the description of the kind of development to the activity encompassed by its definition is a deficiency which is fatal to the validity of the regulation".

As the Explanatory Statement puts it, "[t]he Court concluded that the phrase "of a kind" in paragraph 282(1)(e) required such a regulation to say *what kind of* development is exempt. The Court decided that it was not sufficient in this respect for the regulation to simply specify "industrial area"".

Another legal issue raised in the Supreme Court proceeding but not resolved by Gray J was whether section 275 of the Act, when read with Schedule 4, Part 4.1, Item 4 of the Act, also gave the plaintiffs the right to bring proceedings seeking review. Section 275(1) provides:

A person whose interests are affected by a decision mentioned in schedule 4, part 4.1, column 4 may apply to the AAT for review of the decision.

The unresolved issue was whether the plaintiffs were persons whose interests are affected as far as section 275 of the Act is concerned.

What the Bill does

First, clause 4 proposes amendment of section 275:

> to make it clear that only the applicant or the Heritage Council may apply to the AAT for a review of a decision to give a development approval subject to a condition (refer to clause 4, new section 275(1A) and revised section 275(2)). This amendment is necessary to make it clear that section 275 cannot be used to bypass or avoid the exemptions from section 276 third party appeals (Explanatory Statement).

These amendments would be retrospective - see proposed section 275(5)(b). The Explanatory Statement notes: "The amendments in clause 4 are deemed to have been in place and to always have been in place in connection with any decisions covered by new section 275(1A) (decision to grant an approval subject to a condition)".

Thus, assuming that CPP is a person whose interests are affected by the development approval, and that it has sought review, (and both assumptions must be made for the purposes of addressing the rights issues), then the effect of clauses 4 and 5 – if enacted - will be that CPP will no longer be able to pursue its appeal.

Second, clause 6 proposes amendment of the regulation making power in paragraph 282(1)(e) to remove the words "of a kind" from the existing provision, and by providing Examples that state that a development may be exempted "by reference to any matter, including, for example, location, land use, or policy for land use under the territory plan".

As amended, a regulation such as SL2006-13 - the Amending Regulation found to be invalid by Gray J – would be valid. By proposed section 282(5)(b), the revised power in paragraph 282(1)(e) "is taken to apply, and always to have applied, in relation to a regulation made, or purportedly made, under subsection (1)(e) or (f) before the day this subsection commences". Since SL2006-13 is a regulation of a kind just described, the effect is to give it retrospective validity from the date it was notified. This date is prior to the date on which CPP applied to the AAT for review of the decision of the PLA to grant approval for the development of the Fyshwick land by DFO. Thus, when (and if) the AAT resumes its consideration of the appeal, it will be bound to regard SL2006-13 as valid. Similarly, when (and if) the Court of Appeal resumes its consideration of the appeal from the decision of Gray J, it too will be bound to regard SL2006-13 as valid.

Third, apparently to further ensure that SL2006-13 would be given retrospective effect, proposed sections 288A and 288B of the Act (see clause 8 of the Bill) "specifically validates the regulation found to be invalid in part by the Supreme Court and also any other regulations made or purportedly made under subsections 282(1)(e) or 282(1)(f) of the Principal Act" (Explanatory Statement).

Thus, while CPP currently has the ability to pursue its application to the AAT to have it revoke the PLA's approval to DFO to develop the Fyshwick land – (subject of course to whether the Court of Appeal might reverse the holding of Gray J) - the effect of clauses 6, 7 and 8 (if enacted) will be that CPP will no longer have that ability.

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

Do any the clauses of the Bill "unduly trespass on personal rights and liberties"?

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

Section 25 of the *Human Rights Act 2004* states a principle against the retrospective application of criminal laws. This provision is not in issue here.

It is, however, generally accepted, as a common law right, that a law should not have a retrospective operation, in particular where that would affect adversely the rights or liabilities of a person. In *Maxwell v Murphy* [1957] HCA 7 at [9] Dixon CJ described the common law principle as "the presumption [when reading a statute] against the operation of new laws upon rights that have already accrued or immunities that have already been established or acquired".[1] Of course, as a presumption, the principle is displaced where the statute makes it clear, either expressly or "with reasonable certainty" (above at [7], or "by clear implication" – see at [13]), that it is to be read as having retrospective effect.[2] His Honour approved of a "practical summary of the principle" in *Dixie v Royal Columbian Hospita*l (1941) 2 DLR 138 139-140, per Sloan JA:

> unless the language used plainly manifests in express terms or by clear implication a contrary intention - (a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

The distinction between categories (a) and (b) was said by Fullagar J to be "probably best stated by saying that it is between statutes which create or modify or abolish substantive rights or liabilities on the one hand and statutes which deal with the pursuit of remedies on the other hand" (above at [5]).

In *Scrutiny Report No 12* of the *6th Assembly*, concerning the Children and Young People Amendment Bill 2005, the Committee said:

> 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.

[1] Dixon J (as he then was) put it more elaborately in *Kraljevich v Lake View & Star Ltd* (1945) 70 CLR 647 at 652: "The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends, appears with reasonable certainty".

[2] For the ACT, this principle is stated in section 75B of the *Legislation Act 2001*.

Bennion's statement 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.

Concerning the notion of a "right" in this context, the majority judgment of the High Court in *Carr v Finance Corporation of Australia Ltd (No 2)* [1982] HCA 43 said:

> [24] … The common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right. If it were otherwise, the essential justice of the rule would be eroded.

So far as concerns the ability to institute an appeal against a lower court decision, in *Worrall and Another Applicants v The Commercial Banking Company of Sydney Ltd* [1917] HCA 67, the High Court said that:

> [t]here can be no doubt that the power to "appeal" is a right, and not procedure. Procedure may and generally does surround it, but the central notion of an appeal is undoubtedly a right. Lord Westbury described it thus: "An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below" (*Attorney-General v. Sillem* 10 H.L.C., 704, at p. 724).

It is thus very likely that the courts would classify as a "right" the ability of CPP to pursue its appeals to the AAT against the decision of PLA to grant development approval to DFO. These rights (under sections 275 and 276 of the Act) had accrued (or vested) prior to the date on which the Act that will be brought into existence if this Bill is passed will commence. In other words, we have a situation in which "[a right which was] immediately exercisable prior to the coming into operation of the amendments [was] no longer capable of such exercise": *Carr* above at [19].

As the quotation from *Carr* above indicates, the judges assert that the common law principle rests on a notion of what is 'essentially just'. In a particular situation, however, what justice requires involves a weighting of the interests of the person directly affected by the retrospective law (individual justice) against the interests of others (distributive justice). This point was well made by Isaacs J in *George Hudson Limited v The Australian Timber Workers' Union* [1923] HCA 38 at [5]:

> In presence of decisions and judicial utterances apparently of varying aspect, it behoves the Court to find the basic principle by which to test any given case. That principle is stated in *Maxwell on Statutes*, 6th ed., at p. 381, on the authority of the *Institutes* (2 Inst., 292) in these terms: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation." That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.

This brings into focus the justifications offered in the Explanatory Statement for the enactment of this retrospective law. There is a brief reference below to these justifications, and the Committee refers the Assembly to the full statement in the Explanatory Statement. The general thrust is that the needs of distributive justice justify the application of a retrospective law against the interests of individuals who had acted in reliance upon the law being otherwise.

On the other hand, it might be argued that the balance between the competing interests of individual justice and distributive justice might be achieved by making provision in the Bill to ensure that the AAT's determination of the matters currently before it are not to be affected by the retrospective law. Some argue that while retrospective laws may be required in the interests of sound policy (subject to constitutional limitation), "[p]reservation of the fruits of a litigant's victory will usually be desirable, assuming that is possible": P Rishworth, et al, *The New Zealand Bill of Rights* (2003) at 769. There are legislative precedents for such provisions. A recent one known to the Committee is in clause 13 of the Justice Legislation (Further Amendment) Bill 2006 (Victoria).

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

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

The legal background can be sketched by reference to parts of the judgment of Gray J in the *Capital Projects* case:

> [13] The planning of the ACT and the management of land in it upon self-government becoming effective was governed by the *PALM Act*. That Act provided for a National Capital Plan to be administered by the National Capital Authority in relation to designated areas in the National Capital. Otherwise, planning in the Territory was to be the province of the Legislative Assembly of the Territory which was to be responsible for establishing a Territory planning authority and preparing a Territory Plan not inconsistent with the National Capital Plan.
>
> [14] Section 25 of the PALM Act sets out what was required of the Assembly in making those laws. It provides:
>
> (1) The Assembly shall, as soon as practicable, make laws providing for:
>
> (a) establishing a Territory planning authority; and
>
> (b) conferring functions on the authority, including the functions of:
>
> (i) preparing and administering a plan in respect of land, not inconsistent with the National Capital Plan; and
>
> (ii) keeping the plan under constant review and proposing amendments to it when necessary.
>
> …
>
> (4) The laws shall include provision for:
>
> …

> (c) the procedures for just and timely review, without unnecessary formality, of appropriate classes of decisions on planning, design and development of land; … .

Paragraph 25(4)(c) limits the legislative power of the Assembly,[3] and two Supreme Court judges have commented upon the nature of this limitation. In *Capital Property* Gray J adopted the comments of Higgins J (as he was then) in *Blicharz v Minister for Urban Services and Others* [2000] ACTSC 45. Gray J said:

> In referring to s 29(2)(b) of the PALM Act, which is in the same terms as s 25(4)(c) of that Act, set out above, [Higgins J said at] [58]:
>
> > What is an "appropriate" class of decision or "just and timely" review thereof is a matter of policy and judgment on which minds might reasonably differ. It would, therefore, be unlikely that a decision by the Assembly or the Executive to exempt some classes of decision from review would, in itself, offend the principles contained in s 29(2)(b) of the Australian Capital Territory (Planning and Land Management) Act. It might be otherwise if the exemption was, for example, only for a particular developer or development (not relevantly distinguishable from any other) or if no meaningful notification was required for any proposal. It is possible to conceive of provisions which unquestionably would offend those principles.
>
> [17] In the present case, I accept that these matters are matters for the Assembly and the Executive and the value judgments involved do not call for objective assessment by a court.

Both Justices limited their remarks and what they said does not amount to a proposition that an assessment of whether provisions of a Territory Act (or subordinate law – see *Blicharz* [36]) offended the principles stated in paragraph 25(4)(c) is non-justiciable. Indeed, Higgins J postulated, and in a non-exhaustive way, cases in which those principles would be offended.[4]

The Committee can identify three matters to consider in an assessment of whether the Bill offends these principles. In the end, they might be taken together in the assessment.

First, the most obvious basis for an argument that this Bill offends these principles is that its provisions have retrospective effect in the way described above. It might be argued that the Bill has not provided for "just … review" of decision concerning the development of land; rather, by taking away a vested right to review a particular development, the Bill has made an unjust provision.

[3] The PALM Act probably has this effect of its own force, but see too section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth): "(1) A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law". Such a law is one that is "in force in the Territory" (paragraph 28(2)(a)), and that of course includes the PALM Act.

[4] That said, it is arguable that their Honours overstated the scope of judicial deference to the judgment of the Assembly. It is clear that the application of the standard in paragraph 25(4)(c) will involve "a matter of policy and judgment on which minds might reasonably differ", but that is true of many other limitations on legislative competence found in constitutional documents. A relevant analogy is the *Human Rights Act 2004*, and, in particular, of what is involved in the application of HRA section 28.

This raises the question: What is encompassed within the notion of a 'just review'?

By subsection 15AA(1) of the *Acts Interpretation Act 1901*, a court should adopt "a construction that would promote the purpose or object underlying" paragraph 25(4)(c) of the PALM Act, although just how in this context this would advance an argument for validity or invalidity is speculative.[5]

A more precise argument might be that in assessing the import of the notion of what is "just" in paragraph 25(4)(c):

> there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment: *Al-Kateb v Godwin* [2004] HCA 37 [19] per Gleeson CJ.[6]

Gleeson CJ was dealing with the common law right to personal liberty, but it is arguable the broader category of "certain human rights or freedoms" encompasses the presumption against the retrospective operation of a statute.

A second string of an argument that this Bill offends the principles contained in paragraph 25(4)(c) of the PALM Act might build on the comment by Higgins J in *Blicharz* that the principles "might be" offended "if the exemption was, for example, **only** for a particular developer or development (not relevantly distinguishable from any other)" [emphasis added]. There is nothing on the face of the Bill to suggest that this is the case here. However, the Explanatory Statement does acknowledge that "[t]he Bill makes changes to address issues raised by a decision of the Supreme Court" in the *Capital Property Projects* case (see above).

The immediate impact of the Bill will benefit a particular developer – being DPO – but the Explanatory Statement asserts that other approvals for development "may now be [as a result of *Capital Property Projects*] open to section 276 third party appeals in some circumstances". It is argued that it is desirable to remove this possibility to promote the object of the 2006 changes to the law – which were to "improve the development assessment process within the Civic centre area, a town centre area and industrial areas by increasing certainty and reducing delays and costs". The Explanatory Statement also argues that the Bill will serve the public interest in that it will "restore the legal position that was originally intended and so maintain the certainty and continuity essential to a positive climate for property investment and home building in the Territory".

[5] The PALM Act is a Commonwealth law and its interpretation is unaffected by section 139 of the Legislation Act (and see section 7). Nor does section 30 of the HRA have any bearing on the issue.

[6] In *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40 at [21], Gleeson CJ said: "the presumption against modification or abrogation of fundamental rights … is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law".

On the basis of information publicly known, it would be very difficult to establish the factual basis for a claim that this Bill is designed only to protect the interests of a particular developer.

A third string of an argument that this Bill offends the principles contained in paragraph 25(4)(c) of the PALM Act might point to the absence in the Bill of any provision for payment of compensation to CPP (and to any others similarly placed) who, in reliance upon their right to do so, expended legal and other costs in seeking AAT review of development approvals. That reliance would of course be set at nought if the Bill is passed.

Against these lines of argument it may of course be argued that what amounts in a particular situation to a "just … review" must take into account the need to achieve distributive justice. Again, the Committee refers the Assembly to the full statement in the Explanatory Statement.

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

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

In *Scrutiny Report No 49* of the *5th Assembly*, the Committee examined the bases upon which this kind of argument might be made in the situation presented by the making of SL2004-12 *Land (Planning and Environment) Amendment Regulations 2004 (No 1)*. This was the first of a number of laws aimed at precluding legal challenge to the construction of the Gungahlin Drive Extension (GDE), and the effect of this regulation was to change the law relevant to a challenge that was on foot at the time the regulation took effect.

One of the bases of the argument canvassed in this earlier Report might be noted here. The Committee said:

> An independent line of argument might be founded on the fact that the law is aimed at the particular litigation concerning the O'Connor Ridge. This may not in form be the appearance of the effect of clause 6, but in substance this is its effect (as the Explanatory Statement acknowledges); and see *Nicholas v The Queen* (1998) 193 CLR 173 at 260ff per Kirby J. Some judges take legislative judgment aimed at particular people as an indication that the law interferes in the curial process; (see *Nicholas* at 221 [113] per McHugh J and at 257 [201], per Kirby J). Justice Gaudron has taken the view that laws that are specific and not general in their operation may be invalid because they require or authorise the court "to proceed in a manner that does not ensure equality before the law" (*Nicholas* at 208 [74]).

Again, on the basis of information publicly known, it would be very difficult to establish the factual basis for a claim that this Bill is designed primarily or even substantially to frustrate a particular litigant – here CPP.

On the other hand, the High Court decision in *HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547 suggests that the legislative action proposed by the Bill is not an interference with curial process. The case is canvassed in *Scrutiny Report No 49* of the *5th Assembly*, and the Committee quoted this passage from the judgment of the court:

> Let it be accepted, as the plaintiff contends, that the pursuit by the plaintiff of its rights as an objector to the application of the third defendant, and the possibility of further legal proceedings, constituted the occasion for the intervention by the Queensland Parliament in the matter of the proposed Morayfield shopping centre development, and prompted the decision to facilitate the development by creating a special legal regime which would apply by way of amendment to that set up by the Planning and Environment Act. It does not follow that the legislature was acting beyond power, or interfering in any relevant sense with the exercise of judicial power. Parliament had the power to enact a special law relating to the use of land at Morayfield. It was not deprived of that power by pending, or threatened, legal proceedings under another law which it had previously enacted, and which it could repeal or amend as it saw fit (at 562 [16]).

(The implied statement that the Queensland Parliament was not acting beyond power was of course made in the context of the powers of that legislature. It is not affected by an Act such as the PALM Act.)

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

In *Scrutiny Report No 37* of the *6th Assembly*, the Committee examined the bases upon which this kind of argument might be made in the situation presented by the Housing Assistance Bill 2006. The Committee made particular reference to the Federal Court decision in *Australian Capital Territory v Pinter* [2002] FCAFC 186, where a majority held that the effect of paragraph 23(1)(a) of the SG Act was that subsection 16(2) of the *Victims of Crime (Financial Assistance) (Amendment) Act 1999* was invalid. Spender J of the majority said "the retrospective extinguishment of the right to claim compensation for pain and suffering by a victim of crime constitutes an acquisition of property" (above at [101]). With reference to the High Court doctrine that governs the application of paragraph 23(1)(a), Spender J held that this extinguishment was accompanied by a direct financial gain to the Territory, measured by the reduction of the liability to make payment to the respondents of a component for pain and suffering, and thus the extinguishment constituted an 'acquisition' of property.

The Committee noted that where a change in the law occurs at a time when a matter in a court of tribunal is on foot, it is usually provided that the law as it stood when the review application was lodged continues to apply to tribunal and court adjudication of the application. In such a case, no issue concerning conflict with paragraph 23(1)(a) of the SG Act arises.

The Land (Planning and Environment) Legislation Amendment Bill 2007 does not make the usual provision, and there thus arises the question whether, as in *Pinter*, the scheme of the Bill amounts to an "acquisition of property otherwise than on just terms".

This is a very complex legal question, for the relevant High Court doctrine is far from easy to apply, as illustrated by the fact that a number of the judges involved in the *Pinter* case in the Full Court of the Federal Court and at lower levels held that there had been no acquisition of property. That the extinguishment of CPP's right to maintain their appeal to the AAT is not accompanied by a financial benefit to the Territory government is not material. In *Wylkian Pty Ltd v ACT Government* [2002] ACTSC 97, Gyles J quoted a passage from the judgment of Gaudron J in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [79] where her Honour said:

> If a law modifies or extinguishes a statutory right which has no basis in the general law in circumstances in which some person obtains some consequential advantage or benefit in relation to property, that law may and, ordinarily, will effect an acquisition. … In [a case of this] kind, there is something more than the mere modification or extinguishment of a right that is inherently susceptible to that course; the law also operates to confer a benefit.

The Committee recommends that the Minister advise the Legislative Assembly as to whether there is a question whether the Bill would bring about an acquisition of property, and, if so, how that question should be answered in terms of the protection to property afforded by paragraph 23(1)(a) of the SG Act.

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

In *Scrutiny Report No 49* of the *5th Assembly*, the Committee canvassed this issue in the analogous circumstances presented by the Gungahlin Drive Extension Authorisation Bill 2004 and the Projects of Territorial Significance Bill 2004. The Committee also refers to its extended consideration of subsection 21(1) in *Scrutiny Report No 32* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006.

Without traversing this area, the Committee advises the Assembly that it agrees with the comment in the Explanatory Statement that "[o]pportunities for input into planning and development applications and the existence of a right to judicial review … satisfy the requirement of the right to a fair trial".

The Committee also accepts the Explanatory Statement comment that that "[c]ase law in relation to human rights legislation containing the equivalent of [HRA] section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy".

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2006-250 being the Electoral Commission (Chairperson and Member) Appointment 2006 (No. 3) made under section 12 of the *Electoral Act 1992* **appoints specified persons as chairperson and a member of the ACT Electoral Commission.**

Disallowable Instrument DI2006-251 being the Taxation Administration (Levy) Determination 2006 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2006-8 and determines the new relevant amount to be used to calculate the monthly ambulance levy paid by health benefits organisations.**

Disallowable Instrument DI2006-252 being the Road Transport (General) (Driver Licence and Related Fees) Determination 2006 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2006-127 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-253 being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2006 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2006-128 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-254 being the Victims of Crime (Victims Assistance Board) Appointment 2006 (No. 1) made under subsection 7(2) of the *Victims of Crime Regulation 2000* **appoints specified persons as the AFP member, the legal profession member, the indigenous member and the migrant member of the Victims Assistance Board.**

Disallowable Instrument DI2006-255 being the Public Place Names (Bonython) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new streets in the Division of Bonython.**

Disallowable Instrument DI2006-256 being the Casino Control (Fees) Determination 2006 (No. 2) made under section 143 of the *Casino Control Act 2006* **revokes DI2006-61 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-257 being the Road Transport (Vehicle Registration) Authorisation and Approval of Premises Guidelines 2006 (No. 1) made under section 153A of the *Road Transport (Vehicle Registration) Regulation 2000* **determines guidelines about the exercise of the Road Transport Authority's functions regarding the approval of an authorised examiner or the proprietor of approved premises.**

Disallowable Instrument DI2006-258 being the Dangerous Substances (Storage and Handling Code of Practice) Approval 2006 made under section 219 of the *Dangerous Substances Act 2004* **approves the National Occupational Health and Safety Commission National Code of Practice for the Storage and Handling of Workplace Dangerous Goods [NOHSC:2017(2001)] as a code of practice under the Act.**

Disallowable Instrument DI2006-259 being the Road Transport (Driver Licensing) Accreditation Guidelines 2006 (No. 1) made under section 122A of the *Road Transport (Driver Licensing) Regulation 2000* **approves guidelines for assessing the suitability of a person to hold an accreditation as a driving instructor in deciding when applications for accreditation can be refused and when action in relation to accreditation may be taken.**

Disallowable Instrument DI2006-260 being the Road Transport (Public Passenger Services) Accreditation Guidelines 2006 (No. 1) made under section 19A of the *Road Transport (Public Passenger Services) Regulation 2002* **approves guidelines about the exercise of the Road Transport Authority's functions concerning refusal of accreditation.**

Disallowable Instrument DI2006-261 being the Road Transport (Driver Licensing) Public Vehicle Licence Guidelines 2006 (No. 1) made under section 90A of the *Road Transport (Driver Licensing) Regulation 2000* **approves the guidelines for assessing the suitability of a person to hold a public vehicle driver licence.**

Disallowable Instrument DI2006-262 being the Road Transport (Public Passenger Services) Exemption 2006 (No. 2) made under section 127 of the *Road Transport (Public Passenger Services) Act 2001* **exempts the chief executive, in his capacity as the Australian Capital Territory Road Transport Authority, from the operation of subsection 514(a) of the Road Transport (Public Passenger Services) Regulation 2006, when issuing a wheelchair-accessible taxi licence.**

Disallowable Instrument DI2006-263 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 11) made under section 13 of the *Road Transport (General) Act 1999* **exempts the owners and users of specified vehicles within the fenced area of Exhibition Park in Canberra whilst participating in the Street Machine Magazine 20th Summernats Car Festival.**

Disallowable Instrument DI2006-264 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 12) made under section 13 of the *Road Transport (General) Act 1999* **exempts the registered operator or user of specified vehicles within the fenced area of Exhibition Park in Canberra whilst participating in the Street Machine Magazine 20th Summernats Car Festival.**

Disallowable Instrument DI2006-265 being the Taxation Administration (Amounts payable—Home Buyer Concession Scheme) Determination 2006 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2005-157 and determines the eligibility and methods of calculation for the Home Buyer Concession Scheme.**

Disallowable Instrument DI2006-266 being the Taxation Administration (Amounts payable—Home Buyer Concession Scheme) Determination 2006 (No. 3) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2006-105 and determines the thresholds to be used to calculate concessional duty payable for eligible property.**

Disallowable Instrument DI2006-267 being the Utilities (Consumer Protection Code) (Industry Code) Determination 2006 (No. 1) made under section 59 of the *Utilities Act 2000* **revokes DI2005-132 and determines the Consumer Protection Code.**

Disallowable Instrument DI2006-271 being the Taxation Administration (Amounts payable—Utilities (Network Facilities Tax)) Determination 2006 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **determines the amount of tax payable by the owners of utility network facilities on land within the ACT.**

Disallowable Instrument DI2006-272 being the Independent Competition and Regulatory Commission (Utilities (Network Facilities Tax)) Declaration 2006 (No. 1) made under paragraph 4C(1)(a) of the *Independent Competition and Regulatory Commission Act 1997* **determines that statutory fees affecting the cost of utility services under the Utilities (Network Facilities Tax) Act 2006 may be passed on in full to consumers by owners of network facilities.**

Disallowable Instrument DI2007-1 being the Children and Young People (Places of Detention) Provision of Information, Review of Decisions and Complaints Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-2 being the Children and Young People (Places of Detention) Records and Reporting Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-3 being the Children and Young People (Places of Detention) Aboriginal and Torres Strait Islander Residents Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-4 being the Children and Young People (Places of Detention) Admission and Classification Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-5 being the Children and Young People (Places of Detention) Health and Wellbeing Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-6 being the Children and Young People (Places of Detention) Visits, Phone Calls and Correspondence Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-7 being the Children and Young People (Places of Detention) Safety and Security Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-8 being the Children and Young People (Places of Detention) Use of a Safe Room Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-9 being the Children and Young People (Places of Detention) Use of Force Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-10 being the Children and Young People (Places of Detention) Police Interviews Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-11 being the Children and Young People (Places of Detention) Death in Custody Standing Order 2007 (No. 1) made under section 403 of the *Children and Young People Act 1999* **determines minimum standards to be met by all staff when carrying out their duties at Quamby Detention Centre.**

Disallowable Instrument DI2007-24 being the Mental Health (Treatment and Care) (Mental Health Facility) Approval 2007 (No. 1) made under paragraph 48(1)(b) of the *Mental Health (Treatment and Care) Act 1994* **repeals NI2000-95 and approves a specified facility as a mental health facility.**

Disallowable Instrument DI2007-26 being the Long Service Leave (Building and Construction Industry) Board Appointment 2007 made under the *Long Service Leave (Building and Construction Industry) Act 1981* and *Financial Management Act 1996* **revokes DI2006-268 and appoints a specified person as chair of the Long Service Leave (Building and Construction Industry) Board.**

Disallowable Instrument DI2007-29 being the Public Place Names (Harrison) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new street in the Division of Harrison.**

Disallowable Instrument DI2007-31 being the Nature Conservation (Flora and Fauna Committee) Appointment 2007 (No. 2) made under section 18 of the *Nature Conservation Act 1980* **revokes DI2004-221 and appoints specified persons as chair and deputy chair of the Flora and Fauna Committee.**

Disallowable Instrument DI2007-32 being the University of Canberra (Obligations) Amendment Statute 2007 made under section 40 of the *University of Canberra Act 1989* **amends the Obligations Statute 1995 to allow the Vice-Chancellor to delegate, to an officer of the University, any or all of his or her powers or functions under the Statute.**

Disallowable Instrument DI2007-33 being the Gas Safety (Appliance Worker Accreditation Code) Approval 2007 made under subsection 17A(1) of the *Gas Safety Regulation 2001* **revokes DI2006-239 and approves the Gas Safety (Appliance Worker Accreditation Code).**

Disallowable Instrument DI2007-34 being the Land (Planning and Environment) Section 167 Leases Determination 2007 made under subsection 167(1) of the *Land (Planning and Environment) Act 1991* **revokes DI2003-193 and excludes leases granted to the Australian Capital Territory or budget funded authorities from application of section 167 of the Act.**

Disallowable Instrument DI2007-35 being the Racing Appeals Tribunal Appointment 2007 (No. 1) made under section 42 of the *Racing Act 1999* **appoints a specified person as an assessor to the Racing Appeals Tribunal.**

Disallowable Instrument DI2007-36 being the Health Professionals Exemption 2007 (No. 1) made under section 130 of the *Health Professionals Act 2004* **exempts locally registered physiotherapists, chiropractors and osteopaths from the requirement to register in the ACT when visiting the ACT to provide services to a sporting team or attending a training activity.**

Disallowable Instrument DI2007-38 being the Emergencies (Bushfire Council Members) Appointment 2007 made under section 129 of the *Emergencies Act 2004* **appoints specified persons as members of the ACT Bushfire Council.**

Disallowable Instrument DI2007-39 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2007 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2002-149 and determines a specific organisation to be a parking authority within specified areas in the suburb of Phillip.**

Disallowable Instruments—Comment

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

No Explanatory Statement – Is this instrument made under the correct section?

Disallowable Instrument DI2006-268 being the Long Service Leave (Building and Construction Industry) Board Appointment 2006 made under section 8 of the *Long Service Leave (Building and Construction Industry) Act 1981* **appoints a specified person as chair of the Long Service Leave (Building and Construction Industry) Board.**

Disallowable instrument DI2006-268 indicates that it is made under section 8 of the *Long Service Leave (Building and Construction Industry) Act 1981*. The Committee noted that section 8 merely establishes the Construction Industry Long Service Leave Authority. Section 13 of the Act provides for the appointment of the governing board of the Authority:

> **13 Governing board members**
>
> (1) The governing board has 4 members.
>
> *Note 1* The chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.
>
> *Note 2* The registrar is a member of the governing board (see dict, def *registrar* and *Financial Management Act 1996*, s 80 (4)).
>
> (2) One member of the governing board must be appointed to represent employer organisations.
>
> (3) One member of the governing board must be appointed to represent employee organisations.
>
> (4) The chair of the governing board must not be the member mentioned in subsection (2) or (3).
>
> (5) A member of the governing board must not be appointed for a term of longer than 5 years.
>
> *Note* A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def *appoint*).
>
> (6) The Minister may, under the Legislation Act, section 209, appoint a person to act as a member.
>
> (7) The registrar is a non-voting member of the governing board.
>
> *Note* The *Financial Management Act 1996*, s 95 (2) and s 96 (1) deal with non-voting members of governing boards.

Note 1 to subsection 13(1) of the Act indicates that the chair of the governing board must be appointed under section 79 of the *Financial Management Act 1996*. This instrument does not comply with that requirement. That being so, the Committee queries whether the appointment is valid.

The Committee also notes that there is no Explanatory Statement to DI2006-268. This denies the Committee (and the Legislative Assembly) information as to whether the other requirements of section 13 of the Act have been met by this appointment.

The Committee notes, however, that these errors are remedied by DI2007-26, which *does* have an Explanatory Statement.

Inadequate Explanatory Statement?

Disallowable Instrument DI2006-269 being the Road Transport (Driver Licensing) Driving Instruction Code of Practice 2006 (No. 1) made under section 188 of the *Road Transport (Driver Licensing) Regulation 2000* **revokes DI2005-169 and approves the Code of Practice for Accredited Driving Instructors.**

The Committee notes that the Explanatory Statement to this disallowable instrument helpfully indicates that the instrument amends "section 6 1" of the existing Code of Practice. The Committee assumes that the reference should be to section **6.1**. The Explanatory Statement does not, however, indicate the nature or substance of the amendment. There is also an errant quotation mark at the end of the last sentence on the first page of the Explanatory Statement. The Committee considers that it would have been more helpful if the Explanatory Statement identified the nature of the amendment made by this disallowable instrument.

Positive comment

Disallowable Instrument DI2006-270 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 9) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2006-214 and determines specified venues as sports bookmaking venues and provides for the retrospective approval of a specified venue.**

The Committee notes with approval that this instrument addresses concerns raised by the Committee in its *Report No 35* of the *Sixth Assembly*.

Typographical error

Disallowable Instrument DI2007-12 being the Health Professionals (Fees) Determination 2007 (No. 1) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-13 being the Health Professionals (Fees) Determination 2007 (No. 2) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-14 being the Health Professionals (Fees) Determination 2007 (No. 3) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-15 being the Health Professionals (Fees) Determination 2007 (No. 4) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-16 being the Health Professionals (Fees) Determination 2007 (No. 5) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-17 being the Health Professionals (Fees) Determination 2007 (No. 6) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-18 being the Health Professionals (Fees) Determination 2007 (No. 7) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-19 being the Health Professionals (Fees) Determination 2007 (No. 8) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2007-20 being the Health Professionals (Fees) Determination 2007 (No. 9) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

The Committee notes that the Explanatory Statement to Disallowable Instrument DI2007-12 indicates that it is made under the "Health **professionals** Act 2004". This typographical error is repeated in the Explanatory Statements for the following 8 instruments. The Committee suggests that this demonstrates one of the dangers in using an Explanatory Statement for one instrument as a template for successive instruments and demonstrates that care must be taken to ensure that errors are not replicated.

Are these appointments valid?

Disallowable Instrument DI2007-21 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2007 (No. 1) made under section 121 of the *Mental Health (Treatment and Care) Act 1994* **appoints a specified person as an official visitor.**

Disallowable Instrument DI2007-22 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2007 (No. 2) made under section 121 of the *Mental Health (Treatment and Care) Act 1994* **appoints a specified person as an official visitor.**

These instruments appoint 2 named persons as Official Visitors under section 121 of the *Mental Health (Treatment and Care) Act 1994*. That section provides:

> **121 Appointment etc**
>
> (1) For this Act, the Minister may appoint 1 or more official visitors for an approved mental health facility.
>
> (2) A person is eligible for appointment as an official visitor if the person—
>
> (a) is a legal practitioner who has not less than 5 years practicing experience; or
>
> (b) is a medical practitioner; or
>
> (c) has been nominated by a body representing consumers of mental health services; or
>
> (d) has experience and skill in the care of persons with a mental dysfunction or mental illness.
>
> (3) A person shall not be appointed an official visitor if the person—
>
> (a) is a public servant; or
>
> (b) has a direct interest in a contract with an approved mental health facility or a mental health care provider; or
>
> (c) has a financial interest in a private hospital.
>
> (4) A person shall not be appointed as an official visitor unless the Minister is satisfied that the person has appropriate qualifications and experience to perform the duties of an official visitor.
>
> (5) The Minister may terminate the appointment of an official visitor—
>
> (a) for misbehaviour; or
>
> (b) for physical or mental incapacity; or
>
> (c) who is convicted, in Australia or elsewhere, of an offence punishable on conviction by imprisonment for 1 year or longer; or
>
> (d) if the person ceases to be a person who is eligible for appointment.

The Committee notes that the Explanatory Statement to neither of these instruments addresses the eligibility requirements in subsection 121(2) of the Act or the 2 of the 3 ineligibility requirements in subsection 121(3). The Committee has consistently maintained that it would assist the Committee and the Legislative Assembly if the Explanatory Statement to an instrument of appointment indicated that any eligibility requirements for an appointment are met. As a result, the Committee draws the Legislative Assembly's attention to these instruments, under principle (b) of the Committee's terms of reference, on the basis that their Explanatory Statements do not meet the technical or stylistic standards expected by the Committee.

Inadequate Explanatory Statement? – Minor typographical error

Disallowable Instrument DI2007-23 being the Health Professionals (Chiropractors and Osteopaths Board) Appointment 2007 (No. 1) made under the *Health Professionals Act 2004* and *Health Professionals Regulation 2004* **appoints specified persons as president and members of the ACT Chiropractors and Osteopaths Board.**

This instrument appoints 1 named person as president and 4 named persons as members of the ACT Chiropractors and Osteopaths Board. The Explanatory Statement to this instrument states:

> Schedule 13 to the *Health Professionals Regulations 2004* states that the ACT Chiropractors and Osteopaths Board is made up of the President and four appointed members and two elected members. The board must be comprised of three chiropractors, three osteopaths and one community representative.

The Committee notes that the reference should be to the *Health Professionals* ***Regulation*** *2004*.

The Explanatory Statement goes on to indicate that the person appointed as president is a chiropractor and that, of the 4 persons appointed as members, one is a chiropractor, 2 are osteopaths and one is a community representative.

Item 13.5 of Schedule 13 of the Regulation provides:

> **13.5 Board membership—Act, s 24**
>
> (1) The board is made up of the president and the following people:
>
> (a) 2 elected members;
>
> (b) 4 appointed members.
>
> (2) The elected members must be—
>
> (a) a chiropractor elected by chiropractors; and
>
> (b) an osteopath elected by osteopaths.
>
> (3) The appointed members must be a community representative and—
>
> (a) if the president is a chiropractor—1 chiropractor and 2 osteopaths; or
>
> (b) if the president is an osteopath—1 osteopath and 2 chiropractors.
>
> (4) For subsection (3), if the president is a chiropractor and osteopath, the president must choose a profession before the members are appointed and give the Minister written notice of the choice.

(5) If the Minister has taken all reasonable steps to appoint a member from a particular profession (the *prescribed profession*) for subsection (3) and has been unable to do so, the Minister may appoint temporarily—

(a) if the prescribed profession is the chiropractic profession—an osteopath; or

(b) if the prescribed profession is the osteopathic profession—a chiropractor.

(6) An appointment under subsection (5) ends when the Minister appoints a member from the prescribed profession.

Having examined Items 13.5(1), (2) and (3), it is evident that these appointments fulfil the requirements of the Regulation. The Committee considers, however, that both the Committee and the Legislative Assembly would be assisted in their scrutiny of appointments such as this if more detail is included, addressing any requirements for appointment and whether or not they have been satisfied. As a result, the Committee draws the Legislative Assembly's attention to this instrument, under principle (b) of the Committee's terms of reference, on the basis that the Explanatory Statement does not meet the technical or stylistic standards expected by the Committee.

Positive comment

Disallowable Instrument DI2007-25 being the Legal Profession (Disciplinary Tribunal) Appointment 2007 (No. 1) made under subsection 566(1) of the *Legal Profession Act 2006* **appoints specified persons as chair and deputy chair of the Legal Profession Disciplinary Tribunal.**

The Committee notes with approval that the Explanatory Statement to this instrument of appointment indicates that the requirements for appointments are met by the persons appointed. The Committee commends this approach to others who make statutory appointments.

Inadequate Explanatory Statement?

Disallowable Instrument DI2007-27 being the Land (Planning and Environment) Criteria for the Direct Grant of a Crown Lease for the National Zoo and Aquarium Determination 2007 made under subsection 161(7) of the *Land (Planning and Environment) Act 1991* **establishes criteria for the direct grant of two Crown leases for the expansion of the National Zoo and Aquarium.**

Section 161 of the *Land (Planning and Environment) Act 1991* allows the planning and land authority to grant leases. It provides:

161 Granting of leases

(1) The planning and land authority may grant a lease by—

(a) auction; or

(b) tender; or

(c) ballot; or

(d) direct grant.

Note A fee may be determined under s 287 for this section.

(2) A lease granted under this section may include provisions—

(a) requiring the lessee to develop the land comprised in the lease, or any unleased territory land, in a specified way; or

(b) requiring the lessee to give security for the performance of any of his or her obligations under the lease.

(3) The planning and land authority may restrict the people eligible for the grant of a lease under subsection (1) (a), (b) or (c) by specifying, in the relevant notice of auction, tender or ballot, a class of people eligible or ineligible for the grant of a lease under the auction, tender or ballot.

(4) If, under a restriction imposed under subsection (3), only 1 person is eligible for the grant of a lease under subsection (1) (a), (b) or (c), the planning and land authority may grant a lease to that person under subsection (1) (d) without auctioning the lease, calling tenders or conducting a ballot.

(5) A lease granted under subsection (1) (d) must be granted subject to the provisions that are agreed between the planning and land authority and the applicant for the lease.

(6) The planning and land authority must not grant a lease of territory land under subsection (1) (d) otherwise than in accordance with criteria specified under subsection (7).

(7) The Executive may, for this section, in writing—

(a) specify criteria for the granting of leases under subsection (1) (d); or

(b) amend or revoke criteria so specified.

(8) An instrument under subsection (7) is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

This instrument prescribes criteria in relation to the direct grant of 2 Crown leases, one of approximately 20 hectares that is part of Block 1502 District of Belconnen (the first Crown lease) and one comprising the balance of the land in Block 1502 (the second Crown lease). The direct grants are to occur on or before 4 September 2016, to a specified lessee, Sridate Pty Limited (ACN 008 657 009), for the expansion of the National Zoo and Aquarium.

The criteria that are specified are

1. ……

a. the proposed first and second Crown leases must be only for the purpose of a public zoo and aquarium;

b. the applicant for the first Crown lease must:

(i) be Sridate Pty Limited A.C.N. 008 657 009; and

(ii) pay all statutory fees and charges applicable to the grant of the first Crown lease;

c. the precise area of land comprising the first Crown lease must be determined by the Planning and Land Authority;

d. the applicant for the second Crown lease must:

(i) be the Crown lessee of the land comprised in the first Crown lease and of Block 1496 District of Belconnen; and

(ii) pay all statutory fees and charges applicable to the grant of the second Crown lease.

e. the first and second Crown leases must be granted subject to terms and conditions determined by the Planning and Land Authority;

f. Sridate Pty Limited must execute any document stipulated by the Planning and Land Authority, collateral to or associated with the grant of the first Crown lease;

g. the applicant for the second Crown lease must execute any document stipulated by the Planning and Land Authority, collateral to or associated with the grant of the second Crown lease;

h. the first Crown lease must be granted to Sridate Pty Limited without payment of an amount under section 169 of the *Land (Planning and Environment) Act 1991;*

i. the second Crown lease must be granted to the applicant for the second Crown lease without payment of an amount under section 169 of the *Land (Planning and Environment) Act 1991* and

2. The grant of the second Crown lease will be subject to the development to the satisfaction of the Planning and Land Authority of at least 70% of the land in the first Crown lease in accordance with an approved Master Plan.

The Committee notes that the Explanatory Statement for this instrument essentially repeats the text of the instrument.

The Committee notes that the criteria specified in relation to the second Crown lease include that the applicant for the direct grant be the Crown lessee of the land comprised in the first Crown lease and of Block 1496 District of Belconnen. The Crown lessee of the land comprised in the first Crown lease would appear to be Sridate Pty Limited. This seems to be a requirement of criterion 1(h). As a result, it would appear that the second Crown lease must also be granted to Sridate. The Committee is, therefore, confused as to why the reference to Block 1496 is included. In any event, the Committee considers that it would assist it (and the Legislative Assembly) in its consideration of the instrument if the Explanatory Statement explained the relevance of Block 1496 and its current Crown lessee.

The Committee would appreciate the Minister's assistance in explaining the relevance of the reference to Block 1496.

Minor typographical error

Disallowable Instrument DI2007-28 being the Public Place Names (Belconnen) Determination 2007 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends note published in Gazette No. S266 (Cwlth) by defining the location of a specified street and determines the names of two new roads in the Division of Belconnen.**

The Committee notes that, in the Schedule to this instrument, "Ibbott" is mis-spelled (as "Ibbot") on the first occurrence under "Significance".

Are these appointments valid?

Disallowable Instrument DI2007-30 being the Nature Conservation (Flora and Fauna Committee) Appointment 2007 (No. 1) made under section 17 of the *Nature Conservation Act 1980* **revokes DI2004-220 and appoints specified persons as member of the Flora and Fauna Committee.**

This instrument appoints 6 named persons to the Flora and Fauna Committee, under section 17 of the *Nature Conservation Act 1980*. Section 17 provides:

> **17 Membership**
>
> (1) The committee shall consist of 7 members appointed, in writing, by the Minister, at least 2 of whom shall not be public servants.
>
> (2) The Minister shall not appoint a person as a member unless the Minister is satisfied that the person has appropriate expertise in biodiversity or ecology.
>
> (3) A member holds office as a part-time member.
>
> (4) A member holds office for such period, not exceeding 3 years, as is specified in the instrument of appointment.
>
> (5) A member holds office on such terms and conditions (in respect of matters not provided for by this part) as are determined by the Minister in writing.
>
> *Note 1* A person may be reappointed to a position if the person is eligible to be appointed to the position (see *Legislation Act 2001*, s 208 (1) (c) and dict, def of *appoint*).
>
> *Note 2* A power to appoint a person to a position includes power to appoint a person to act in the position (see *Legislation Act 2001*, s 209 (1)-(3)).

Subsection 17(1) of the Act states that the Flora and Fauna Committee shall consist of 7 members. This instrument appoints only 6 members. The instrument that it revokes (DI2004-220) also appointed only 6 members. The Committee can identify no instrument appointing a 7th member. As a result, the Committee would appreciate the Minister's advice as to whether or not the Flora and Fauna Committee complies with the requirements of subsection 17(1) of the Act.

Inadequate Explanatory Statement?

Disallowable Instrument DI2007-37 being the Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints specified persons as members of the Professional Standards Council.**

This instrument appoints 3 named persons as members of the Professional Standards Council, under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002*. Section 4.38 provides:

> **4.38 Membership of council**
>
> The council is to consist of 11 people appointed by the Minister who have the experience, skills and qualifications the Minister considers appropriate to enable them to make a contribution to the work of the council.
>
> *Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

The Explanatory Statement to the instrument states:

> All States and Territories have enacted legislation enabling the establishment of a Professional Standards Council. The objects of the legislation are to constitute Professional Standards Councils, to enable the creation of schemes to limit the civil liability of professionals and others, to facilitate the improvement of occupational standards, and to protect consumers.
>
> Section 4.36 of Schedule 4 of the *Civil Law (Wrongs) Act 2002* provides for the establishment of the ACT Professional Standards Council (ACT Council). The ACT Council consists of 11 people appointed by the Minister who have the experience, skills and qualifications the Minister considers appropriate to enable them to make a contribution to the work of the ACT Council.
>
> All States and Territories have agreed to appoint the same 11 members to their Councils. The Councils will comprise one member nominated by each of the States and Territories and the Commonwealth, with the exception of NSW and Victoria who will nominate two.

The Committee does not understand the meaning of the paragraph immediately above. In particular, the Committee does not understand why this instrument appoints 4 persons if a Territory can only nominate one member. As the Committee reads the statutory requirements, the only possible explanation is that the 3 persons appointed include persons nominated by other jurisdictions. The Committee would appreciate the Minister's confirmation that this is the case.

Subordinate Laws—No comment

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

Subordinate Law SL2006-51 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2006 (No. 2) made under the *Road Transport (Safety and Traffic Management) Act 1999* **amends the** *Road Transport (Safety and Traffic Management) Regulation 2000* **to facilitate the introduction of new fixed red light speed cameras and to include new sites for the operation of fixed red light and mobile speed cameras.**

Subordinate Law SL2006-52 being the Construction Occupations (Licensing) Amendment Regulation 2006 (No. 1) made under the *Construction Occupations (Licensing) Act 2004* **amends section 17 of the** *Construction Occupation (Licensing) Regulation 2004* **by changing a number of references to "person" to "applicant".**

Subordinate Law SL2006-55 being the Water Resources Amendment Regulation 2006 (No. 2) made under the *Water Resources Act 1998* **provides for an exception to the moratorium for the abstraction of water in relation to Gungahlin Drive Extension works.**

Subordinate Law SL2006-57 being the Liquor Amendment Regulation 2006 (No. 1) made under the *Liquor Act 1975* **declares specified areas as prescribed public places during Summernats 2007.**

Subordinate Law SL2006-58 being the Court Procedures Amendment Rules 2006 (No. 2) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules 2006.**

Subordinate Law SL2006-59 being the Road Transport Legislation (Accreditation and Licensing) Amendment Regulation 2006 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999, Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2001* and *Road Transport (Vehicle Registration) Act 1999* **amends specified regulations to enable the Road Transport Authority, when considering an applicant's suitability, to have regard to any conviction it considers relevant to the applicant holding a public vehicle licence; accreditation as a public passenger service operator or a driving instructor; authorisation as an examiner of vehicles; or approval of premises for the inspection of certain classes of vehicles.**

Subordinate Law SL2006-60 being the Road Transport (Driver Licensing) Amendment Regulation 2006 (No. 2) made under the *Road Transport (Driver Licensing) Act 1999* **determines eligibility requirements for a learner motorcycle or car licence.**

Subordinate Law SL2006-61 being the Victims of Crime Amendment Regulation 2006 (No. 1) made under the *Victims of Crime Act 1994* **transfers responsibility for managing the Victims Services Scheme from the Chief Executive, ACT Health to the Chief Executive, Department of Justice and Community Safety.**

Subordinate Laws—Comment

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

Incorporation of material by reference

Subordinate Law SL2006-53 being the Gas Safety Amendment Regulation 2006 (No. 1) made under the *Gas Safety Act 2000* **recognises a type A appliance that is listed in the SAI Global On-Line Certification Register as currently certified as an approved appliance.**

Among other things, this subordinate law amends the definition of what is an "approved appliance" for the purposes of section 18B of the *Gas Safety Regulation 2001*. It adds to the categories of approved appliances the following:

(d) a type A appliance that is listed in the SAI Global On-Line Certification Register as currently certified.

Note The SAI Global On-Line Certification Register can be accessed at http://www.saiglobal.com.

The Committee notes that this provision incorporates the requirements of an external instrument (ie the SAI Global On-Line Certification Register), by reference. The Committee also notes, however, that, as required by subsection 47(3) of the *Legislation Act 2001,* the provision incorporates that Register as it exists at the time of the making of the subordinate law. The Committee also notes, with approval, that the amendment incorporates into the Gas Safety Regulation a reference to the on-line location of the Register. The only possible problem, however, is whether or not the on-line Register will indicate to users what its content was at the time that this provision takes effect. That is, will the on-line Register clearly indicate that a particular version of the Register is the applicable on for the purposes of paragraph (d), in the same way that the ACT Legislation Register (for example) indicates the date and effect of particular versions of laws. The Committee would appreciate the Minister's advice on this matter.

"Henry VIII" clause

Subordinate Law SL2006-54 being the Gungahlin Drive Extension Authorisation Amendment Regulation 2006 (No. 1) made under the *Gungahlin Drive Extension Authorisation Act 2004* **determines the *Water Resources Act 1998* to be a relevant law under the Act.**

The Committee notes that the effect of this subordinate law is to amend the *Gungahlin Drive Extension Authorisation Act 2004*. It does so by amending the definition of "relevant law" in section 4 of the *Gungahlin Drive Extension Authorisation Regulation 2004.* Section 4 of the Regulation prescribes certain laws to be "relevant" laws for the purposes of the Act.

Subsection 4(4) of the Act provides:

> … in making a decision under this section in relation to an authorization required or allowed to be given under a relevant law, the Minister may have regard to (but is not required to have regard to, consider or otherwise comply with) any requirement, precondition or other provision relating to the making of a decision of that kind under a relevant law.

This subordinate law makes the *Water Resources Act 1998* a relevant law.

While the Committee notes that the effect of this subordinate law is to make use of a "Henry VIII" clause (ie in that it allows the amendment of a primary law by a subordinate law), the Committee also notes that this exercise is authorised by the Act. As a result, the Committee makes no further comment on the subordinate law.

Exemption of the ACT Government Solicitor from the operation of the Freedom of Information Act

Subordinate Law SL2006-56 being the Freedom of Information Amendment Regulation 2006 (No. 1) made under the *Freedom of Information Act 1989* **exempts the government solicitor from the operation of the Act in regard to documents of the government solicitor that relate to the government solicitor acting as legal practitioner under the *Government Solicitor Act 1989*.**

This subordinate law amends the *Freedom of Information Regulation 1991* to include in Schedule 2 of the Regulation references to the ACT Government Solicitor and the Department of Justice and Community Safety, in relation to certain documents of the ACT Government Solicitor. The effect of the amendments is to exempt the ACT Government Solicitor and the Department of Justice and Community Safety from the operation of the *Freedom of Information Act 1989*, insofar as it would otherwise apply to certain documents of the ACT Government Solicitor.

The Explanatory Statement to the subordinate law states:

> The amending Regulation exempts the government solicitor from the operation of the FOI Act in relation to documents of the government solicitor that relate to the government solicitor acting as legal practitioner under the *Government Solicitor Act 1989*. It also exempts the Department of Justice and Community Safety in relation to documents of the government solicitor that relate to the government solicitor acting as legal practitioner under the *Government Solicitor Act 1989*, because if the government solicitor alone is exempted, then FOI applicants could apply to the Department of Justice and Community Safety for access to documents of the government solicitor that relate to the government solicitor acting as legal practitioner under the *Government Solicitor Act 1989.* The government solicitor is still subject to the FOI Act in relation to its internal administrative documents.
>
> The public interest in access to documents is still maintained because, despite the exemption of the government solicitor from the operation of the FOI Act, the public can still seek to obtain the documents from the government solicitor's clients and the clients can then determine whether or not to claim legal professional privilege.
>
> The government solicitor's Commonwealth counterpart, the Australian Government Solicitor is exempted from the operation of the *Freedom of Information Act 1982* (Cth). The exemption of the government solicitor from the operation of the FOI Act will place the government solicitor and the Territory, in the Territory context, on a footing equivalent to that enjoyed by the Australian Government Solicitor and the Commonwealth, in the Commonwealth context. Critically, it will place the government solicitor in a better position to discharge its core obligations to provide efficient, timely and effective legal services to the Territory.

The Committee notes that this subordinate law evidently takes away an existing right, namely the right of access to certain documents. This may be considered to be a trespass on rights previously established by law, under principle (a)(ii) of the Committee's terms of reference. The Committee also notes, however, that the Explanatory Statement to the subordinate law provides an explanation as to why this is considered necessary. The Committee draws that explanation to the attention of the Legislative Assembly and leaves the Assembly to judge whether this is an "undue" trespass on existing rights.

REGULATORY IMPACT STATEMENT

The Committee has examined the following regulatory impact statement and offers no comment on it:

Disallowable Instrument DI2006-271 being the Taxation Administration (Amounts payable—Utilities (Network Facilities Tax)) Determination 2006 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **determines the amount of tax payable by the owners of utility network facilities on land within the ACT.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 16 February 2007, in relation to comments made in Scrutiny Report 30 concerning Disallowable Instrument DI2006-143, being the Attorney General (Fees) Determination 2006.
- The Minister for Disability and Community Services, dated 16 February 2007, in relation to comments made in Scrutiny Report 37 concerning the Children and Young People Amendment Bill 2006 (No. 2).
- The Attorney-General, dated 21 February 2007, in relation to comments made in Scrutiny Report 37 concerning Subordinate Law SL2006-49, being the Legal Profession Amendment Regulation 2006 (No. 1).

The Committee wishes to thank the Attorney-General and the Minister for Disability and Community Services for their helpful responses.

Zed Seselja, MLA
Chair

February 2007

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

REPORTS—2004-2005-2006-2007

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

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

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No 4)

Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No 1)

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

Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**

Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No 1)

Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No 1)

Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No 1)

Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)

Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No 1)

Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No 2)

Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)

Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)

Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)

Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)

Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)

Hotel School (Repeal) Bill 2005

Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

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

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 **(PMB)**

Report 19, dated 21 November 2005

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

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 **(PMB)**

Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

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

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

Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006
Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006
Crimes Amendment Bill 2006 (PMB)
Freedom of Information Amendment Bill 2006
Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007
Animal Welfare Legislation Amendment Bill 2006
Civil Partnerships Bill 2006
Corrections Management Bill 2006
Housing Assistance Bill 2006
Planning and Development Bill 2006

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Seselja

Thank you for your Scrutiny Report No 30 of 21 August 2006. I write in reply to the Committee's comments in relation to there being no Explanatory Statement for the *Attorney General (Fees) Determination 2006*, Disallowable instrument DI2006-141.

As you note in your report, the face of the instrument expressly states that explanatory notes are included in the text of the instrument, in italics and that "General Explanatory Notes" are set out on the final page of the instrument.

The instrument itself is made under a number of different acts and the determination of fees in relation to these. Due to the larger number of different acts involved, it would be too cumbersome to provide an Explanatory Statement that would effectively express the terms of the instrument beyond that provided.

Schedule 2 to the instrument fully details each piece of legislation the instrument is made under, and the effect of each item. All 254 items included in Schedule 2 have an Explanatory Note so as to mitigate the need to provide an all-encompassing Explanatory Statement. At page 27 to Schedule 2 of the instrument, there are *General Explanatory Notes* that provide any other information that would have been required in an Explanatory Statement.

I thank the Committee for its comments in relation to this instrument and note that at this stage there is no legislative requirement for an Explanatory Statement to be provided for Disallowable Instruments. I also note the same comments were made in Scrutiny Report No 15 of 22 August 2005 and were addressed by John Stanhope MLA, as previous Attorney General.

Yours sincerely

Simon Corbell MLA
Attorney General

16.2.07

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Katy Gallagher MLA
DEPUTY CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR CHILDREN AND YOUTH
MINISTER FOR DISABILITY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
MEMBER FOR MOLONGLO

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

Dear Mr Seselja

I am writing in response to the comments made by the Committee in Scrutiny Report No. 37 of 12 February 2007 on the Children and Young People Amendment Bill 2006 (No. 2).

Firstly, I thank the Committee for its commendation regarding the sustained endeavour in the Bill to protect the human rights of detainees. Children and young people in detention are a particularly vulnerable population with high levels of early trauma and adversity. The Bill recognises this and will ensure that children and young people are protected from unlawful or arbitrary interferences with their privacy.

The scheme for pre-natal reporting

In response to the Committee's comments on the scheme in general, I note that the Government considers that pre-natal reporting is necessary and proportionate to the objective served by the provisions in reducing the likelihood of future abuse or neglect of children.

The Committee queried whether it is a reasonable and proportionate intrusion on a pregnant woman's right to privacy for the record of a pre-natal report to be retained in government files.

The Bill proposes an obligation for the Chief Executive to record and retain pre-natal reports for a number of reasons. Firstly, the Bill proposes that pre-natal report information will be classified as sensitive information under the secrecy provisions of the Act. This classification will ensure that there is an appropriately high level of protection for pre-natal report information. Sensitive information may only be shared in certain limited circumstances and there is an offence for disclosing sensitive information without lawful authority.

Secondly, the Bill proposes extending the existing protection from civil and criminal liability for reporters of all child protection reports to include people making pre-natal reports. The Bill also proposes to expand the offence for people making dishonest child protection reports to include reporters making pre-natal reports and achieve adequate deterrence for reports made dishonestly and vexatiously. The proposed obligation for the Chief Executive to record and retain pre-natal reports is necessary to support the operation of these provisions.

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For these reasons, it is my view that the requirement to retain pre-natal report records is a reasonable and proportionate intrusion on a pregnant woman's right to privacy.

The scheme for search and seizure in relation to detainees

The Committee queried whether there is an avoidable degree of obscurity concerning the extent of the obligation of the Chief Executive to make provision for the medical needs of detainees under proposed section 401AL and recommended that I clarify how this section is to be applied.

Proposed section 401AL is intended to provide a statutory obligation for the Chief Executive to ensure a detainee's immediate physical or mental health needs or risks are assessed within 24 hours by a doctor or nurse and responded to appropriately. The time of admission to detention for a child or young person is a key transition period and it is intended that the standing orders will provide guidance for operational staff on assessing and responding to their immediate needs.

The Committee has correctly identified that this proposed obligation extends only to an assessment of the detainee's immediate needs. As the Committee will note, the Bill specifically addresses processes associated with the admission of a detainee to a place of detention. The Bill does not extend to address minimum entitlements to health care and case management, such as assessment and treatment of a detainee's ongoing health needs. This is currently addressed through standing orders made pursuant to section 403 of the *Children and Young People Act 1999*.

As you would be aware, an exposure draft of the *Children and Young People Bill 2007* has been released for community consultation and this Bill provides a detailed scheme for the administration of the youth detention centre, including a proposed minimum entitlement for detainees to have access to suitable health services and facilities.

The Committee also queried whether there is an avoidable degree of obscurity in the provisions concerning the searching of privileged material and recommended that I clarify how proposed sections 401AZH and 401AZI are intended to operate.

The provisions reflect the common law in relation to the treatment of privileged information in the possession of a person in custody. The Bill envisages that in most circumstances a detainee will identify their own privileged material and remove or store the material prior to the search of a cell occurring. Clause 401AZH enables a search of a detainee's cell in the absence of the detainee if the detainee takes legally privileged material with them or the material is stored somewhere else. It is intended that detainees will have access to a system of storage for legally privileged material and the details of this storage system are currently being worked out.

The existence of a storage system for legally privileged material does not, however, absolve responsibility of officers if they find material during a search that they believe to be legally privileged, for example, a document containing the letterhead of a lawyer. If an officer finds material during a search that they suspect to be legally privileged, the search must either stop or the detainee must be present. A standing order will provide operational guidance for staff conducting searches where privileged material may be present.

The Committee also notes that the definition of privileged material is wider than the definition for clauses 122 and 123 of the Corrections Management Bill 2006. Protected confidences within the meaning of Division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* can be in the possession of a person who has been the subject of abuse. Many young detainees have been subjected to abuse. While it is anticipated that this circumstance will rarely arise, I consider that the definition of privileged material should include protected confidences under Part 4.5 of the above Act.

I trust that the above comments clarify the provisions and the issues raised and I thank the Committee for its comments.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Disability and Community Services
16 February 2007

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Thank you for the comments of the Standing Committee on Legal Affairs regarding subordinate law SL2006-49, being the Legal Profession Amendment Regulation 2006 (No 1) made under the *Legal Profession Act 2006*. That subordinate law changes the date of commencement of part 3.2 of the above act.

In the committee's comments it noted that this subordinate law relies on a "Henry VIII" clause, and that the use of such provisions is generally disapproved of. The committee also noted that in this particular instance the exercise of this clause was expressly authorised by the Legislative Assembly. The committee also raised the fact that the subordinate law delays the commencement of various provisions, in circumstances where their commencement was specifically provided for in the primary legislation.

I note, as did the committee, that this delay is a relatively minor delay. The government is reluctant to resort to the use of such provisions but, because of the nature of parliamentary process, it is sometimes necessary to build into complex legislation an ability to alter its implementation if certain circumstances change.

In this particular case, the implementation of the *Legal Profession Act 2006* is dependent to a significant degree on finalisation of the national model law and, consequently, the capacity of the local legal profession to prepare itself for an effective commencement. In fact, due to further delays in finalisation of some aspects of the model, it may be necessary to again postpone the commencement of some provisions.

I thank the committee for these comments.

Yours sincerely

Simon Corbell MLA
Attorney General
21.2.07

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