Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

22 February 2010

Report 19

TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (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 Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

(e) 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.

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Ms Janice Rafferty
(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.

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EDUCATION AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Education Act 2004* to enable the Chief Executive of the Department of Education and Training and the Director, Catholic Education Office, Archdiocese of Canberra and Goulburn, to delegate their existing authority to suspend a student, for a maximum of ten days, to a school principal (instead of the existing provisions that permit suspension for a maximum of 5 days).

Report under section 38 of *the Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

The Explanatory Statement states in justification that these provisions will allow

> wider discretion in dealing with incidents in public [and Catholic] schools. It will enhance their capacity to appropriately manage anti-social behaviour in their schools and to apply proportionate sanctions, reiterating the Territory's zero-tolerance approach to bullying and its focus on schools as safe places for all.

This proposal does, however, raise the issue of whether sufficient recognition has been given "to the right of a child to the protection needed by the child because of being a child" (subsection 11(2)). It is arguable that a right to education is a component of the HRA right. The right of a child to education is also more explicitly recognised in international treaties such as the *International Covenant on Economic Social and Cultural Rights and the Convention on the Rights of the Child*.[1] In making this assessment, a Member of the Assembly may wish to take into account the interests of other children who attend the relevant school.

A further consideration is that this amendment to the *Education Act 2004* will have the effect of extending the period in which there will be a review of the need for a suspension and for arrangements to be made in consequence of the suspension.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

[1] See the discussion is *Scrutiny Report No 26* of the *Sixth Assembly,* concerning the Education Amendment Bill 2006.

EDUCATION (SUSPENSIONS) AMENDMENT BILL 2010

This is a Bill for an Act to amend the *Education Act 2004* to enable the Chief Executive of the Department of Education and Training and the Director, Catholic Education Office, Archdiocese of Canberra and Goulburn, to delegate their existing authority to suspend a student, for a maximum of twenty days, to a school principal (instead of the existing provisions that permit suspension for a maximum of five days); and to require the chief executive to issue guidelines about students returning to school after suspension.

Do any clauses of the Bill "inappropriately delegate legislative powers"?
Do any clauses of the Bill "insufficiently subject the exercise of legislative power to parliamentary scrutiny"?

(Clause 4.) By proposed subsection 17B(1), the chief executive "must issue guidelines about students returning to school after suspension", and the "principal of a school must take reasonable steps to comply with the guidelines" (subsection 17B(3)). By subsection 17B(2), any such guideline is a notifiable instrument.

An issue arises concerning the scope of this power, which is limited only by the reach of the concept of "about students returning to school after suspension". The Explanatory Statement states that the aim of these guidelines would be "to ensure a supportive and streamlined re entry to school after suspension, for the student and the school community", which is a narrower concept.

The issue is whether it is inappropriate to delegate a power to issue guidelines, which are in the nature an exercise of legislative power, in the terms stated in the Bill.

Another issue is whether the guidelines should be subject to disallowance by the Assembly. As "notifiable" instruments they would not.

The Committee draws these matters to the attention of the Assembly and recommends that the Member respond.

Report under section 38 of *the Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

The proposals to enable the Chief Executive of the Department of Education and Training and the Director, Catholic Education Office, Archdiocese of Canberra and Goulburn, to delegate their existing authority to suspend a student, for a maximum of twenty days, are to be found in proposed new subsection 36B(1) (clause 7), and section 104B (see clause 16).

The comments and issues raised with respect to the Education Amendment Bill 2010 (see above) apply to these proposals.

The Committee draws this matter to the attention of the Assembly and recommends that the Member respond.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2010

This is a Bill for an Act to amend a number of laws administered by the Department of Justice and Community Safety.

ACT Civil and Administrative Tribunal Act 2008

(This Act is henceforth referred to as the ACAT Act.)

Proposed amendments to this Act are contained in Part 1.1 of Schedule 1 of the Bill.

Report under section 38 of the Human Rights Act 2004
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?
Do any clauses of the Bill "make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers"?

It is convenient to take in turn each clause in Part 1.1 that deserves comment.

Clause 1.2: proposed subsection 29(6) and the narrowing of the circumstances in which a person will have standing to seek to join in an application to ACAT

The general nature of ACAT's power to join a person as a party to an original appeal application

By existing paragraph 29(5)(a), ACAT may join a person as a new party to an application if "the person has an interest in the application".

This probably does not mean that it is sufficient that a person is interested in the outcome of the matter. Generally speaking,

> [w]hat is required is an interest that is 'special' to the extent that it is greater than the interest of an ordinary member of the public and is substantial and significantly different than the interests of any other party to the proceedings (*Re Scott & Secretary, Dept of Social Security* (1996) 42 ALD 738 at 741).[2]

In *Re Peters & Department of Health and Aged Care*,[3] the Commonwealth AAT held that

> if it is found that the interests of a person seeking to join are affected by the decision under review, then "ordinarily" there will arise a duty to make an order joining that party. But a discretion remains, and in its exercise it is relevant to take into account matters which bear on the interests of the other parties in the fair, efficient and timely hearing and determination of this proceeding, and in the minimisation of the costs of the proceeding.[4]

[2] Quoted in *Coonan & Commissioner of Taxation* [2006] AATA 329 [10].
[3] [1999] AATA 293 (also in (1999) 56 ALD 561), per Bayne SM.
[4] At [51].

There is no limit to what kind of interest might be affected, and generally any kind personal, pecuniary or property interest that could be affected adversely by an ACAT decision on the application would suffice. The scope of these interests could be taken quite widely. In part, a judgement by ACAT would turn on the "zone of interests" that were recognised as deserving of protection or of warranting regulation by the law under which the relevant administrative decision was made.[5]

In the exercise of its discretion under subsection 29(5) of the ACAR Act, the tribunal must of course have regard to the *Human Rights Act 2004*, and apply the provision in a manner that is compatible with the HRA.

The amendment proposed

By clause 1.2 proposed subsection 29(6) would in effect add a further qualification to the tribunal's power by providing:

> (6) The tribunal must not join a person as a new applicant to an application if the person is not entitled to apply to the tribunal under the authorising law under which the application is made.

This is a provision that would have general application. Its scope would not be limited by the fact that the Example given of the way it would apply draws attention only to the fact that "[u]nder the *Planning and Development Act 2007*, s 408(1) only an entity mentioned in relation to a decision in that Act may apply for review of a decision".

This provision would apply to any kind of application before ACAT, and thus HRA section 8 (recognition and equality before the law) is not engaged.

In its application to some kinds of application however, and having regard to the "zone of interests" factor noted above, proposed subsection 29(6) might derogate from a more particular HRA right.

The particular reference to a decision under subsection 408(1) of the Planning and Development Act might be illustrative. It provides that "[a] eligible entity for a reviewable decision may apply to the ACAT for review of the decision". This Act regulates land planning, a subject of great importance to all who live in the Territory, and the range of reviewable decisions under that Act is very wide.[6] To take one example, a decision under section 162 to approve a development application in the impact track subject to a condition, or to refuse to approve the application, is a decision reviewable by the applicant for the development.[7] It would appear that only an "entity that made a representation under s 156 in relation to the application" would, as a result of the insertion of subsection 29(6), be able to seek to be joined as a party to an application by the applicant to ACAT.[8] (Section 156 deals with representations about development applications within the "consultation period".)

[5] See *Re Peters* at [23] and generally.
[6] See Schedule 1 of the Act.
[7] Schedule 1, item 5.
[8] Schedule 1, column 5.

It is however conceivable that a person who had not made a representation under section 156 might, on the common law test that would otherwise apply, be able to establish that their interest in how the decision affected the environment in which they lived was within the zone of interests protected and regulated by the Planning and Development Act. Such an argument would gain assistance from the very broadly worded objects of the Act stated in section 6:

> **6 Object of Act**
>
> The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—
>
> (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
>
> (b) in accordance with sound financial principles.

There is also an HRA dimension. The interest of the applicant to join might be such that if they were joined it could be said that this would support their HRA right "to have the opportunity(,) to – (a) take part in the conduct of public affairs *directly*, or through freely chosen representatives" (HRA paragraph 17(a)). Contrawise, a bar on joinder as a result of proposed subsection 29(6) would derogate from that right. In other cases, the nature of the administrative decision might be such that a bar to joinder would derogate from other rights, such as the right to life (HRA subsection 9(1)) and the right to privacy (HRA section 12).

It would be difficult for ACAT or the Supreme Court to "read down" proposed subsection 29(6) to accommodate the recognition of the HRA rights. In any event, the Committee has often said that it is not desirable that a person be put to the expense of legal action to ascertain if a court or tribunal will read down an apparently clear administrative power in this way.

Committee comment

The Committee raises for consideration by the Assembly and the Minister two issues:

- whether proposed section 29(6) would unduly restrict the application of the common law test for standing to join an application for review by ACAT; and
- whether the application of subsection 29(6) would derogate from HRA rights in particular circumstances.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Clause 1.4: proposed paragraph 48(2)(d), to empower ACAT to require an applicant to pay costs in limited circumstances

By subsection 48(1) of the Act, "[T]he parties to an application must bear their own costs unless this Act otherwise provides or the tribunal otherwise orders". Subsection 48(2) states three situations in which ACAT may order costs, and section 49 elaborates on the provision in paragraph 48(2)(c). These provisions apply to all kinds of application.

Proposed paragraph 48(2)(d) would confer on ACAT a discretion to order an applicant to pay the reasonable costs of the other party arising from the application where the tribunal makes an order under subsection 32 (2) refusing or dismissing the application on the basis that the application is frivolous or vexatious, or that the person who made the application had been dealt with as frivolous or vexatious by a court or tribunal in Australia. But this rule is applicable only in relation to an application for review of a decision under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*.

Given this limited application of paragraph 48(2)(d), the amendment appears to derogate from the injunction in HRA subsection 8(3) that "[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination". In this case, applicants for review of a decision under any one of the 3 named Acts would be subject to a rule that would not apply to an applicant to the ACAT under any other law.

What then might be the justification for this derogation of subsection 8(3)? The Explanatory Statement does not recognise that any HRA issue arises, and thus does not address the range of issue involved in the application of HRA section 28.

On the face of it, an applicant under any one of the three named Acts is no more or less likely to behave in a frivolous or vexatious manner than any other kind of applicant. The Explanatory Statement asserts that "[t]his change is intended to ensure certainty in relation to these types of reviews (consistent with section 22P of the ACAT Act …". It is hard to follow this line of argument. All that the amendment would do is to make certain that in relation to a decision under any one of the three named Acts, ACAT "may" (involving exercise of an open-ended discretion) award costs where it adjudges that the applicant was "frivolous or vexatious" in making the application (which again is a question permitting a wide range of choice as to the answer).

The Explanatory Statement justification does not address the "equality before the law" concern noted above.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Drafting query. According to the Register version of the Act, subsection 48(2) comprises only three paragraphs. Proposed paragraph 48(2)(d) would add a fourth, and it is thus not clear why its text in the Bill ends with a semi-colon followed by the word "or".

Clause 1.5: the meaning of "costs" for the purposes of proposed paragraph 48(2)(d)

Proposed subsection 48(3) provides that:

> (3) For subsection (2) (d), ***reasonable costs of the other party arising from the application*** include reasonable legal costs but do not include holding costs.

This a non-exhaustive definition, and it leaves open the question of what general principle(s) should guide the exercise of the power of ACAT to award costs under proposed paragraph 48(2)(d). The Committee notes that the costs payable where ACAT makes a costs award under existing paragraph 48(2)(c) are those "payable in accordance with the scale of costs in the rules under the *Court Procedures Act 2004* applying in relation to the Supreme Court". This provides clarity to all parties and the question arises why this rule is not applied to an order for costs under proposed paragraph 48(2)(d).

Should it be stated explicitly that "reasonable costs" under proposed paragraph 48(2)(d) are to be assessed in the same way as costs under existing paragraph 48(2)(c)?

The text of proposed subsection 48(3) provides examples of "holding costs", but otherwise this unusual term is not explained.

Should the Bill contain a provision that states a general principle to govern what are "holding costs"?

The Committee draws these questions to the attention of the Assembly and recommends that the Minister respond.

Clause 1.6; proposal to replace existing subsection 60(4) with a new provision to govern the content of an ACAT reasons statement

The Explanatory Statement summarises the changes that would be made if this clause is passed into law.

> [Subsection 60(2)] of the Act requires the tribunal to provide a party with a statement of reasons for the making of a tribunal order where requested by the party. Subsection (4) currently excludes interim orders made by the tribunal, under section 53, from the requirement to give a statement of reasons.
>
> Existing subsection (4) is repealed and replaced with a new provision which retains the existing exemption and includes a new exemption, which excludes orders of a procedural nature. The exclusion of procedural orders in the exemptions is necessary to clarify for users of the tribunal system that section 60 does not extend to orders of an ancillary nature. The amendment does not exclude the giving of reasons for substantive matters, such as a refusal on an application to join an action, or the Tribunal from giving reasons where it considers it appropriate to do so.
>
> The amendment also inserts some examples of the types of orders which would be considered orders of a procedural nature. These examples include adjournments, order of a default nature and an order joining a party to a proceeding. The provision does not preclude the tribunal providing a statement of its reasons of its own volition.

This amendment engages HRA subsection 21(1):

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Whether the Supreme Court would hold that the amendment would derogate from HRA subsection 21(1) is problematic, but it may be said that this provision is "engaged" in that the question is open. The High Court decision in *Public Service Board of New South Wales v Osmond*[9] that at common law reasons are not legally required of administrative decision-makers stands,[10] but this will not

[9] (1986) 159 CLR 656.

[10] Although perhaps on increasingly shaky ground; see the discussion Michael Taggart, 'Australian exceptionalism' in judicial review at 13-14;

govern – although it is relevant to - the interpretation of subsection 21(1). On the other hand, some "international jurisprudence" does support a view that subsection 21(1) requires that reasons be given, although only in context-specific circumstances.[11]

The Assembly is not bound to guess what a court might find subsection 21(1) to mean in this respect. In forming a view about the proposed amendment might have regard to the justifications offered for requiring administrative decision-makers to give reasons for decisions. The two primary justifications have been summarised in this way:

> The "right" to reasons is articulated in two ways. The first is that it is generally felt that people should know why they have lost a case or adminstrative appeal; such information implies a level of respect for an individual's intelligence and dignity. The second more utilitarian reason is that without reasons for a decision you cannot properly appeal it. … [U]nless an individual is equipped with proper reasons for an administrative decision, they cannot [effectively apply] for judicial review. If therefore such an application is stopped in its tracks, the applicant has been deprived of their right of access to court … .[12]

The argument in the Explanatory Statement that the amendment will clarify that the obligation to give reasons "does not extend to orders of an ancillary nature" warrants some comment. This is not supported by any evidence that there was a lack of clarity about the scope of the existing exception in respect of interim orders. What such orders involve is clearly stated in section 53.

The result of the amendment will give rise to a significant lack of clarity, in that there can be much debate about what will amount to "an order of a procedural nature". To illustrate, the assumption (made in the Examples to the proposed subsection 60(4)) that an order joining a party to a proceeding is of such a nature is debateable. Such an order has a direct bearing on the ability of a person to join the proceeding, and could well from that person's viewpoint be regarded as "substantive". This makes the general point that decisions on matters of what appear to be procedure have a very great bearing on whether a substantive right has any practical content.[13] A failure on ACAT's part to give reasons for a decision refusing to join a person as a party to an application might well be incompatible with HRA subsection 21(1).

It should also be noted that subsection 60(3) of the ACAT Act states the extent of ACAT's obligation to give reasons:

> (3) The statement of reasons must set out—
>
> (a) any principles of law relied on by the tribunal; and
>
> (b) the way in which the tribunal applied the principles of law to the facts.

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http://law.anu.edu.au/Cipl/Conferences&SawerLecture/2007/Sawer%20Lecture%202007/SawerLectureFinal.pdf

[11] R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) para 11.218.

[12] http://www.1cor.com/1315/?form_1155.replyids=461

[13] This point has been encapsulated in the aphorism that "rights and liberties are secreted in the rules of procedure". A ruling as to the availability of a writ or order habeas corpus is illustrative.

To this must probably[14] be added the requirement in subsection 179(2) of the *Legislation Act 2001* that a reasons statement required by law "must also set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based".

It will not be difficult for ACAT to comply with these principles when it makes a ruling on a procedural question raised before it, and if a written transcript is available, this will satisfy the need to provide "written reasons".

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Clauses 1.7 to 1.14: proposed amendments to Part 8 of the Act, dealing with referrals and appeals from an ACAT panel

To appreciate their significance of these amendments, some background explanation of ACAT's function may assist.

The nature of ACAT's function on an administrative review

In its administrative review jurisdiction, ACAT may review a "reviewable decision". In plain terms, such a decision is one

- made by an administrative decision-maker acting pursuant to a power conferred on the decision-maker by a Territory statute, or some kind of subsidiary law that has been made pursuant to a statue; and
- in respect of which a Territory law has provided may be reviewed by ACAT.

That is, ACAT does not have jurisdiction to review any and all kinds of administrative decisions made under Territory law, but only those in respect of which a law has said there may be ACAT review.

While the ACAT Act speaks of a "review" by ACAT, in the traditional language of the common law ACAT hears an appeal against the decision "on the merits" of the matter. ACAT's function may be considered by reference to the review of an exercise of the power conferred by subsection 76(1) of the *Tree Protection Act 2005* on the conservator of flora and fauna to "give the owner or occupier of land where a protected tree is located … a written direction (a tree protection direction) to do or not do something for the protection of the tree" (such as to erect a fence around a tree).[15] Part 1.2 of Schedule 1 of the Act provides that a decision to give tree protection direction under subsection 76(1) is reviewable on the application of an owner or occupier of land to which direction relates.

Upon such a review, ACAT "may exercise any function given by an Act to the entity for making the decision" (subsection 68(2) of the ACAT Act), and it must, by order:

(a) confirm the decision; or

[14] Section 179 is a "determinative provision" (subsection 179(3)), and it would not apply only if it could be said that subsection 60(3) of the ACAT Act has displaced subsection 179(2) by a "manifest contrary intention".

[15] Such a direction may only be given in accordance with the criteria (if any) that the conservator has determined under section 75; see subsection 76(2).

(b) vary the decision; or

(c) set aside the decision and—

(i) make a substitute decision; or

(ii) remit the matter that is the subject of the decision for reconsideration by the decision-maker in accordance with any direction or recommendation of the tribunal (subsection 68(3)).

The order "is taken to be the decision of the decision-maker" (paragraph 69(2)(a) of the ACAT Act).

In respect of the particular administrative power (in this example, the power in subsection 76(1) of the of the Tree Protection Act) the exercise of which is under appeal, ACAT is in effect a superior body to the decision-maker in the hierarchy of decision-making in respect of that particular power. When hearing an application for review, ACAT must not accord any weight to the fact that the decision-maker has made a particular decision, (although it may find persuasive the fact-finding and reasoning of the original decision-maker). It must have regard to any evidence adduced by a party to the application, and to any legal argument made by a party, whether or not that matter was considered by the original decision-maker.

Compared to review of the legality of the exercise of a power by the Supreme Court, appeal to ACAT is more efficacious in that ACAT may address the merits of the decision, and in many cases the costs of an appeal would be far less expensive by many thousands of dollars. Compared to complaint to the Ombudsman, appeal to ACAT is more efficacious in that ACAT may substitute a new decision for that made by the decision-maker.

ACAT review of an administrative decision and HRA subsection 21(1)

By HRA subsection 21(1),

> everyone has the right to have … rights and obligations recognised by law (,) decided by a competent , independent and impartial court or tribunal after a fair and public hearing.

Supposing, as is probably the case, that a decision of the conservator under subsection under 76(1) of the of the Tree Protection Act is one that affects the rights (or more probably) the obligations of an owner or occupier of the land on which the tree is situated, that person is entitled by HRA subsection 21(1) to have a decision on the extent of the obligation (if any) "decided by a competent , independent and impartial court or tribunal after a fair and public hearing".

In the first place, a decision will of course be made by the conservator, or a delegate thereof. It is unlikely that this decision-maker, and more particularly the process followed in making the decision would satisfy subsection 21(1).

On the other hand, having regard to

- the nature of ACAT review;
- that an ACAT panel or member is thoroughly independent of the branch of the executive in which the conservator is located; and
- the public and procedurally fair process followed by ACAT;

there is little doubt that the provision for review by ACAT of a decision under subsection 76(1) satisfies HRA subsection 21(1) in respect of an exercise of the power in subsection 76(1) of the Tree Protection Act.

How the amendments would alter the scheme of the ACAT Act in respect of reviewable decisions under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*

The amendments to the process of review within ACAT

Section 77: Referral of questions of law within tribunal

Proposed subsection 77(1A) (see clause 1.7) would provide simply that section 77 of the ACAT Act "does not apply to an application for review under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*".[16]

An ACAT panel or member "dealing with an application" (ACAT Act subsection 77(1)), "on its own initiative or on application by a party, [may] ask the appeal president to allocate 1 or more tribunal members to a tribunal (the ***ruling tribunal***) to give a ruling on a question of law" (subsection 77(2)). If the ruling tribunal gives a ruling on a question of law, the requesting tribunal is bound by the ruling. This mechanism provides another level of review of questions of law involved in the making of the administrative decision.

On the face of it, section 77 serves the purpose of providing a more expeditious means of obtaining a ruling on a question of law other than by resort to an ACAT appeal panel, and/or to some process before the Supreme Court. More particularly, the process enables such a ruling to be obtained without the need for the original tribunal member or panel having to determine all other issues of fact and law involved.

The Explanatory Statement for this Bill asserts that:

> [t]his change is intended to ensure certainty in relation to these types of reviews (consistent with section 22P of the ACAT Act which provides that the tribunal must decide applications under these Acts within 120 days after the day the application is made).

Subsection 22P(1) provides that in relation to an application for review by the tribunal of a decision under the three Acts noted above, "[t]he tribunal must decide the application within 120 days after the day the application is made". It is fair to point to this provision as an indication of the need for expedition in finalising ACAT process, although the point is weaker if regard is had to subsection 22P(2), which provides that "the general president may, in writing, extend the period for deciding the application if satisfied that the extension is in the interests of justice". Given that the delay will lie entirely within ACAT, it is hard to conceive that an extension will not be granted if a decision dealing fairly with the issues requiring decision could not be delivered within 120 days.

[16] Proposed section 77A (see clause 1.8) is a transitional provision designed to preserve the existing position under section 77 in respect of requests for rulings made prior to commencement day.

The question for the Minister is how the claim in the Explanatory Statement that this change will expedite the finalisation of a matter is consistent with what appears to be the purpose of section 77 – that is, to avoid the need for a tribunal deciding an application to determine all issues of fact and law involved prior to a particular question of law being resolved.

Section 78: Correction requests

Proposed subsection 78(1A) (see clause 1.9) would provide simply that section 78 of the ACAT Act "does not apply to an application for review under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*".[17]

Section 78 grants a power to the ACAT general president to request a correction of an order made by the tribunal on an original application. A specially constituted correction panel of ACAT will decide the issue. It has a discretion to hear submissions from the parties, and, if satisfied that no party would be disadvantaged by the tribunal not hearing submissions, the tribunal may take this course.

On the face of it serves the purpose of avoiding the need for a party to seek to have an error corrected by an appeal to an ACAT appeal panel, or to the Supreme Court, or perhaps to seek Supreme Court judicial review.

The Explanatory Statement in respect of clause 1.9 of this Bill asserts that the removal of this facility in respect of decisions under the 3 Acts "is intended to ensure certainty in relation to these types of reviews (consistent with section 22P of the ACAT Act …".

The question for the Minister is how this claim is consistent with what appears to be the purpose of section 78 – that is, to avoid the need for resort to costly and time-consuming methods of correcting errors.

Section 79: Appeals within tribunal

Proposed subsection 79(1A) (see clause 1.11) would provide simply that section 79 of the ACAT Act "does not apply to an application for review under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*".[18]

If this amendment passes into law, the result would be in relation to an application for review of a decision made under the Heritage Act, the Planning and Development Act or the Tree Protection Act, there would, unlike reviews of other kinds of decisions, be no provision for a party to the original application to appeal *within* ACAT the decision on the application for review.

The Committee does not consider that removal of an internal appeal within the ACAT structure would be incompatible with HRA subsection 21(1). Given that the removal operates only in respect of the specified application, there remains however an "equality before the law" concern that also arises in regard to the other amendments noted above.

[17] And see the transitional provision in proposed section 78A (see clause 1.10).
[18] And see the transitional provision in proposed section 79A (see clause 1.12).

The amendments would establish a separate regime in respect of appeals and referrals in relation to decisions under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*. It is proposed that a person may still apply for a merits review by ACAT in respect of a reviewable decision made under the Heritage Act, the Planning and Development Act or the Tree Protection Act, but in respect such a review there would be:

- no provision under section 77 for referral of a request for a ruling on a question of law by an ACAT "ruling panel";
- no power lying in the general president of ACAT under section 78 to request a correction to the ACAT order on the application for review; and
- no provision under section 79 for a party to the original application to appeal within ACAT the decision on the application for review.

The Committee has noted and commented upon the justifications offered in the Explanatory Statement for these changes. On the face of it, this regime is incompatible with HRA subsection 8(3). In the end, the issue is whether the institution of a separate regime for review of decisions under these 3 Acts has been sufficiently justified in terms of HRA section 28.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

Amendment to the process of appeal to the Supreme Court

Under ACAT Act subsection 86(1), a party to an application may appeal to the Supreme Court on a question of fact or law from a decision of an ACAT appeal tribunal (and from other decisions of similar effect). However, such an appeal "may be brought only with the Supreme Court's leave" (subsection 86(2)).

By clause 1.13 (when read with clause 1.14), it is proposed that section 86(1) would not apply to an application in relation to review of a decision under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*. The rationale for this provision is no doubt that as framed, subsection 86(1) is not adapted to accommodate an ACAT "original" decision on an application for review, for it assumes that there has been a subsequent decision following an appeal to ACAT from an original decision. Under the amendment proposed by clause 1.11 (see above), there can in respect of these decisions be no further appeal within ACAT from an original decision.

By clause 1.14, it is proposed that section 86(1A) be inserted to make provision for an "appeal to the Supreme Court on *a question of law* from the original decision of the tribunal" by a party to an application in relation to review of a decision under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005*.

It is critical to note however that in respect of these decisions, the Bill does not propose to amend subsection 86(3) of the ACAT Act, with the result that a party may not appeal to the Supreme Court on a question of law as of right, but only with leave of the Supreme Court. This position contrasts with that under the Commonwealth AAT Act, where there is no provision for an internal appeal within the AAT, and a party may appeal an AAT decision as of right to the Federal Court of Australia, on a question of law.[19]

[19] Subsection 44(1).

A further matter to note is that the appeal to the Supreme Court under proposed subsection 86(1A) in relation to a decision under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005* may be on a question of law only. In contrast, an appeal under existing subsection 86(1) in respect of decisions made under some other Territory law may be on a question of "fact or law".

HRA subsection 8(3) provides that "[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination". In this regard, the question arises: what is the justification for limiting an appeal to the Supreme Court in relation to an ACAT decision in respect a decision under the *Heritage Act 2004*, the *Planning and Development Act 2007* or the *Tree Protection Act 2005* to a "question of law" only?

The Explanatory Statement argues that

> [t]his provision is intended to restrict the number of occasions on which a party may canvass the merits of a decision, rather than the legal basis on which the decision was made. This restores the position relating to appeals in relation to land, planning and environment matters to that existed under section 44 of the *Administrative Appeals Tribunal Act 1989*.

On this reasoning however, subsection 86(1) should be amended to reduce the scope of Supreme Court appeal in respect of all decisions made by ACAT, (at least in its administrative review jurisdiction), for under the 1989 AAT Act all kinds of appeals against such decisions were on a question of law only.[20]

On the face of it, appellants in respect of ACAT decisions in respect of reviewable decisions under the 3 named Acts are treated less favourable to appellants in respect of other kinds of reviewable decisions. It is not apparent why this should be so.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

PERSONAL PROPERTY SECURITIES BILL 2010

This is a Bill for an Act relating to personal property securities to make provision consequent on the enactment by the Parliament of the Commonwealth of the *Personal Property Securities Act 2009* (Cwlth).

Does a clause of the Bill inappropriately delegate legislative power?

This comment is addressed to clause 8 of the Bill, which provides:

> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.

[20] *Administrative Appeals Tribunal Act 1989* subsection 46(1). The Committee stands to be corrected on this point, but so far as its research was able to go, this was the position.

(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

The relevant background is set out in the Explanatory Statement:

> The Personal Property Securities Bill 2010 (the Bill) introduces consequential amendments to support the operation of the Commonwealth *Personal Property Securities Act 2009* (the Commonwealth PPS Act). The Commonwealth PPS Act replaces all State and Territory legislation governing transactions which use personal property to secure payment or performance of an obligation. …
>
> The savings and transitional provisions of this Bill protect existing security agreements, and ensure that the ACT will be capable of transitioning to the new Commonwealth system. …
>
> The transitional regulation making power included has been drafted to allow for modifications of this Act as necessary. Due to the scope and comprehensive nature of the Commonwealth PPS reform project, it is possible that unforeseen circumstances will present over the course of the transition. As such instances arise, transitional regulations may modify this Act to ensure that the ACT is able to participate in the reform effectively. This regulation making power is also necessary because changes in other jurisdictions' legislation, including the Commonwealth, may impact directly upon the operation of this Act. The transitional regulations will give the Executive the capability of responding to these changes and continuing the ACT's participation in the broader reform.

Subclause 8(2) is an extensive power to modify the Act, in that the reference in it to "this part" encompasses all the clauses of the Bill except the preliminary clauses in part 1, and the clauses and the relevant schedules concerning repeals and amendments of existing laws.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

The Committee notes however that the provision in subclause 8(3) (and see a similar provision in subclause 6(3)) to provide that a regulation made under the Act, or a section of the Act, will operate despite anything in … another Territory law" will be ineffectual. The Committee understands such a provision is inconsistent with the provision in subsection 22(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cwth) that " Subject to this Part and Part VA,[21] the Assembly has power to make laws for the peace, order and good government of the Territory". That is, a Territory law that purports to restrain the power of the Legislative Assembly to make laws is inconsistent with a grant of power by the Act to the Assembly that is plenary except so far as modified by the Act, and of course, subject to the Commonwealth Constitution.

[21] These provisions do not bear on the issue addressed.

The Committee has made this comment on many occasions and invites the Minister to advise the Assembly of the basis of a view that a law of the Territory can restrain the power of the Assembly to enact laws.

Report under section 38 of the *Human Rights Act 2004*
Do any clauses of the Bill "unduly trespass on personal rights and liberties"?

Subclause 14(1) provides that "The registrar-general may refuse to exercise a registration function during the pre-PPS transitional period".

The clause does not state any grounds that condition an exercise of the power. It is undesirable that administrative power be conferred in terms that are not expressly limited by reference to stated grounds. Of course, a court or tribunal would "read in" limitations by reference to the object and purpose of the Act, but, as the Committee has often pointed out, a person affected by an exercise of a power should not be put to the expense of finding out what a court or tribunal thinks are the limits of the power. At least some general indication of those limits should be apparent on the face of the statutory provision.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

SUBORDINATE LEGISLATION

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

Disallowable Instruments—No comment

Disallowable Instrument DI2009-229 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2009 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2009 National Capital Rally.**

Disallowable Instrument DI2009-230 being the Public Place Names (Casey) Determination 2009 (No. 4) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Casey.**

Disallowable Instrument DI2009-231 being the Public Place Names (Franklin) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Franklin.**

Disallowable Instrument DI2009-232 being the Public Place Names (Bonner) Determination 2009 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Bonner.**

Disallowable Instrument DI2009-233 being the Public Place Names (Kingston) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new road in the Division of Kingston.**

Disallowable Instrument DI2009-234 being the Environment Protection (Noise Measurement Manual) Approval 2009 (No. 1) made under section 29A of the *Environment Protection Regulation 2005* **approves the Noise Measurement Manual as the manual for the measurement of noise.**

Disallowable Instrument DI2009-237 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 4) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member who has skills in, and knowledge of, vocational education and training to the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2009-238 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 5) made under section 31 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as a member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2009-239 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 6) made under section 31 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as a member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2009-240 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 7) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member who has skills in, and knowledge of, vocational education and training to the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2009-241 being the Taxation Administration (Ambulance Levy) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2008-291 and determines the monthly ambulance levy imposed on health benefits organisations in respect of each person or family insured.**

Disallowable Instrument DI2009-242 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2009 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2009 Rallye des Femmes.**

Disallowable Instrument DI2009-244 being the Taxation Administration (Amounts Payable—Eligibility—Home Buyer Concession Scheme) Determination 2009 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2009-113 and determines, for the purposes of the scheme, the income test and thresholds, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.**

Disallowable Instrument DI2009-245 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2009 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2009-114 and determines the property value threshold amounts applicable to the calculation of concessional duty.**

Disallowable Instrument DI2009-246 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2009 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2009-111 and determines, for the purposes of the scheme, the income test and thresholds, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.**

Disallowable Instrument DI2009-247 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2009 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2009-112 and determines the property value threshold amounts applicable to the calculation of concessional duty.**

Disallowable Instrument DI2009-248 being the Legal Aid (Commission President) Appointment 2009 made under subsection 16(2) of the *Legal Aid Act 1977* **appoints a specified person as part-time president of the Legal Aid Commission.**

Disallowable Instrument DI2009-249 being the Road Transport (General) (Australian Road Rules—Nightlink Taxis) Exemption Revocation 2009 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2009-7 which exempted Nightlink taxis from Australian Road Rules ARR 132(2) and 208(2)(a) as the service has ceased operating.**

Disallowable Instrument DI2009-251 being the Children and Young People (Employment) Standards 2009 (No. 1) made under section 887 of the *Children and Young People Act 2008* **makes the ACT Children and Young People Employment Standards.**

Disallowable Instrument DI2009-252 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 4) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **appoints a specified person, as a member with expertise in vocational education and training, to the ACT Accreditation and Registration Council.**

Disallowable Instrument DI2009-254 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 8) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as an acting member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2009-255 being the Road Transport (General) (Application of Road Transport Legislation) (Summernats 2010) Declarations 2009 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **removes application of the Road Transport (Third-Party Insurance) Act to ACT registered entrant, promotional and unregistered vehicles participating in the Street Machine 23 Summernats Car Festival, and exempts vehicles from the provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.**

Disallowable Instrument DI2009-257 being the Long Service Leave (Portable Schemes) Contractors Levy Determination 2009 made under subsection 56(1) of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by registered contractors for the building and construction industry.**

Disallowable Instrument DI2009-258 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2009 (No. 1) made under sections 20 and 21 of the *Long Service Leave (Portable Schemes) Act 2009* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as chair of the Long Service Leave (Portable Schemes) Governing Board.**

Disallowable Instrument DI2009-259 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2009 (No. 2) made under sections 20, 21 and 22 of the *Long Service Leave (Portable Schemes) Act 2009* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as deputy chair and the member not appointed to represent employer or employee organisations of the Long Service Leave (Portable Schemes) Governing Board.**

Disallowable Instrument DI2009-260 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2009 (No. 3) made under sections 20 and 21 of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Portable Schemes) Governing Board, representing employer organisations.**

Disallowable Instrument DI2009-261 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2009 (No. 4) made under sections 20 and 21 of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Portable Schemes) Governing Board, representing employee organisations.**

Disallowable Instrument DI2009-262 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2009 (No. 5) made under sections 20 and 21 of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave (Portable Schemes) Governing Board, representing employee organisations.**

Disallowable Instrument DI2009-263 being the University of Canberra Council Appointment 2009 (No. 1) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2009-264 being the University of Canberra Council Appointment 2009 (No. 2) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2009-265 being the Health (Fees) Determination 2009 (No. 3) made under section 192 of the *Health Act 1993* **revokes DI2009-107 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2009-267 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2009 (No. 1) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2008-211 and determines the rules for sports bookmaking.**

Disallowable Instrument DI2009-268 being the Civil Law (Wrongs) Australian Computer Society (NSW) Scheme 2009 (No. 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the ACS Limited Liability (NSW) Scheme.**

Disallowable Instrument DI2010-1 being the Public Place Names (Barton) Determination 2010 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a road in the Division of Barton.**

Disallowable Instrument DI2010-2 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2010 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **repeals DI2007-296 and declares a specified company to be a parking authority for the areas of block 13, section 81 and block 1, section 177 in the suburb of Phillip.**

Disallowable Instrument DI2010-4 being the Planning and Development (Land Development Agency Board) Appointment 2010 (No. 1) made under section 42 of the *Planning and Development Act 2007* **and paragraph 78(5)(b) of the** *Financial Management Act 1996* **appoints a specified person as a member of the Land Development Agency Board.**

Disallowable Instrument DI2010-5 being the Racing (Race Field Information Charge) Determination 2010 (No. 1) made under section 61S of the *Racing Act 1999* **determines the amount payable to ACT racing controlling bodies by approved licensed wagering operators for the use of race field information.**

Disallowable Instrument DI2010-6 being the Architects Board Appointment 2010 (No. 1) made under subsection 70(2) *Architects Act 2004* **appoints specified persons as members of the Australian Capital Territory Architects Board.**

Disallowable Instrument DI2010-7 being the Public Place Names (Gordon) Determination 2010 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes the name of a planned road that has not been constructed, in the Division of Gordon.**

Disallowable Instrument DI2010-8 being the Nature Conservation (Fees) Determination 2010 (No. 1) made under section 139 of the *Nature Conservation Act 1980* **revokes DI2009-153 and determines fees payable for the purposes of the Act.**

Disallowable Instruments—Comment

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

Minor drafting issues

Disallowable Instrument DI2009-235 being the Attorney General (Fees) Amendment Determination 2009 (No. 5) made under section 18 of the *Civil Partnerships Act 2008* **amends DI2009-116 by adding specified words to item 354 and inserting new item 356.1 to Schedule 2.**

The Committee notes that the formal part of this instrument refers to the 30 Acts under which the instrument amended by the instrument – the *Attorney-General (Fees) Determination 2009* – was made. The amendment actually made by the instrument only relates to fees under the *Civil Partnerships Act 2008*. That being so, the Committee considers that it is unnecessary for the formal part of the instrument to refer to the other 29 Acts. The Committee notes that this was the approach taken in Disallowable Instrument DI2009-269 (which the Committee has also considered for the purposes of this report).

The Committee also notes that this instrument (and the instrument it amends) refers to "the Attorney General", while the Dictionary in the *Legislation Act 2001* defines the position of "Attorney-General".

Minor drafting issue

Disallowable Instrument DI2009-236 being the Canberra Institute of Technology (Advisory Council) Appointment 2009 (No. 3) made under section 31 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as deputy chair of the Canberra Institute of Technology Advisory Council.**

This instrument reappoints a specified person as both a member and as the deputy chair of the Canberra Institute of Technology Advisory Council. The Committee notes that the formal part of the instrument indicates that it is made under section 31 of the *Canberra Institute of Technology Act 1987*. That section provides for the appointment of members of the Council. The Committee notes that subsection 32(1) of the Act provides for the appointment of the chair and the deputy chair of the Council. That being so, the Committee considers that the formal part of the instrument should also refer to subsection 32(1) of the Act.

Minor drafting issue

Disallowable Instrument DI2009-250 being the Gambling and Racing Control (Governing Board) Appointment 2009 (No. 2) made under section 11 of the *Gambling and Racing Control Act 1999* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member and chair of the Gambling and Racing Commission.**

The Committee notes that this instrument appoints a specified person as both a member and the chair of the Gambling and Racing Commission. The formal part of the instrument indicates that it is made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* and section 78 of the *Financial Management Act 1996*.

The Committee notes that section 11 of the Gambling and Racing Control Act establishes the governing board of the Commission. Section 12 of that Act provides for the appointment of the members of the governing board.

The Committee notes that section 78 of the Financial Management Act provides generally for the appointment of members of the governing board of a "territory authority". "Territory authority" is defined in the Dictionary of the *Legislation Act 2001* as "a body established for a public purpose under an Act, but does not include a body declared by regulation not to be a territory authority". The Commission has not been so declared.

The Committee notes that subsection 79(1) of the Financial Management Act provides the power to appoint a chair and a deputy chair of a territory authority, in the absence of a specific power to do so in the particular Act. That being so, the Committee considers that the formal part of this instrument should also refer to section 79 of the Financial Management Act.

Is this appointment valid?

Disallowable Instrument DI2009-253 being the Training and Tertiary Education (Accreditation and Registration Council) Appointment 2009 (No. 5) made under subsection 12(2) of the *Training and Tertiary Education Act 2003* **appoints a specified person as a member of the ACT Accreditation and Registration Council, representing the interests of employees.**

The Committee notes that this instrument appoints a specified person to the ACT Accreditation and Registration Council, to represent the interests of employees. The appointment is made under subsection 12(2) of the *Training and Tertiary Education Act 2003*. The Committee notes that paragraph 12(1)(e) deals with the appointment of the relevant person. It requires that the person appointed to represent the interests of employees be appointed "after consultation with the trades and labour council".

There is no indication, either in the instrument in question or in the Explanatory Statement for the instrument, that the relevant consultation has taken place in this case. While this may be assumed (ie from the fact that the appointment is now being made and from the fact that the appointment has apparently been considered by the Standing Committee on Education, Training and Youth Affairs), the Committee considers that it would be appropriate if the Explanatory Statement contained a statement to this effect. The Committee notes that it has consistently maintained that, for appointments that involve pre-requisites, it is preferable that either the face of the instrument or the Explanatory Statement for the instrument indicate that any pre-requisites for appointment have been met. This allows the Committee (and the Legislative Assembly) to be satisfied that an appointment has been validly made.

The Committee would appreciate the Minister's assurance that the relevant consultation has taken place.

Minor typographical error

Disallowable Instrument DI2009-256 being the Long Service Leave (Portable Schemes) Employers Levy Determination 2009 made under subsection 51(1) of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by employers in the building and construction and contract cleaning industries.**

The Committee notes that the Explanatory Statement for this instrument indicates that it sets a levy in relation to wages paid by employers to employees in the "contact" cleaning industry. The Committee notes that the body of the instrument indicates that the levy is set by reference to the wages paid to employees in the contract cleaning industry.

Minor drafting issue

Disallowable Instrument DI2009-266 being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2009 (No. 1) made under subsection 20(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2008-210 and determines specified events to be sports bookmaking events for the purposes of the Act.**

This instrument determines certain specified sporting events to be "sports bookmaking events", for the purposes of the *Race and Sports Bookmaking Act 2001*. The practical effect of the determination is that bets can be placed and taken in relation to the events in question.

The Committee notes that, in item 4 of "event" 25, events sanctioned by The Football Association (which the Committee assumes is the English Football Association) and the Scottish Football League are mentioned. Item 4 refers to:

(i) The Football League;

(ii) Football League One;

(iii) Football League Two;

(iv) Scottish First Division;

(v) Scottish Second Division.

The Committee notes that, according to the (English) Football Association website (at www.thefa.com), the Football Association runs 11 competitions. The Committee also notes that several of the Football Association's better-known competitions – the FA Cup, the League Cup, the Premier League and the Championship – are not mentioned in item 4. The Committee assumes that this means that bets can be neither placed nor taken on these events. The Committee would be grateful if the Minister could confirm that this is the case.

Retrospectivity – Positive comment

Disallowable Instrument DI2009-269 being the Attorney General (Fees) Amendment Determination 2009 (No. 6) made under section 21 of the *Scaffolding and Lifts Act 1912* **amends DI2009-116 and authorises the Parliamentary Counsel to reprint the amended instrument.**

The Committee notes that this instrument, which amends the principal instrument by which fees are determined for legislation administered by the Attorney-General, is expressed to operate retrospectively. It is dated 23 December 2009 and is expressed to operate from 1 July 2009.

The Committee notes that the Explanatory Statement for the instrument states:

> The fees determined in DI 2009-116, in relation to fees under the *Scaffolding and Lifts Act 1912*, were the first revision of fees under that Act since 2006. Because of the length of time between redeterminations of fees, there was a significant rise in the fees.
>
> The increase in fees under the revised instrument had an unintended consequence in relation to Item 342 in DI2009-116, which sets fees for notification of intention to commence work under the *Scaffolding and Lifts Act 1912*. The fee applies where the cost of work for a single dwelling house exceeds $265,000. The threshold amount of $265,000 has not been substantially revised since 1996, but actual construction costs have increased significantly since then.
>
> This instrument is retrospective, taking effect from 1 July 2009. It does not adversely affect any person's rights or impose liability on any person. The retrospective commencement results in fewer people having to pay the fee listed in item 342.

In the light of this explanation, the Committee makes no further comment on this instrument.

Positive comment

Disallowable Instrument DI2010-3 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2010 (No. 1) made under subsection 121(1) of the *Mental Health (Treatment and Care) Act 1994* **appoints a specified person as an official visitor.**

This instrument appoints a specified person as an "official visitor", under subsection 121(1) of the *Mental Health (Treatment and Care) Act 1994*. Section 121 sets out various eligibility requirements for appointment to the position. It also sets out various criteria that make a person ineligible to be appointed.

The Committee notes with approval that the Explanatory Statement for this instrument addresses the eligibility and ineligibility requirements set out in the Act. In so doing, the Explanatory Statement addresses comments made by the Committee in *Scrutiny Report No 12* of the *Seventh Assembly*, in relation to Disallowable Instrument DI2009-169, which appointed the previous official visitor.

Subordinate Law—No comment

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

Subordinate Law SL2009-52 being the Road Transport (Offences) Amendment Regulation 2009 (No. 1) made under the *Road Transport (General) Act 1999* **amends the Road Transport (Offences) Regulation 2005 to incorporate revised penalties.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Transport, dated 10 February 2010, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instruments:
  - DI2009-132 being the Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2); and
  - DI2009-133 being the Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2).
- The Minister for Transport, dated 10 February 2010, in relation to comments made in Scrutiny Report 10 concerning Subordinate Law SL2009-22, being the Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1).
- The Minister for Planning, undated, in relation to comments made in Scrutiny Report 18 concerning the Planning and Development Amendment Bill 2009 (No. 2).
- The Minister for Children and Young People, dated 19 February 2010, in relation to comments made in Scrutiny Report 18 concerning the Children and Young People Amendment Bill 2009 (No. 2).
- The Minister for Territory and Municipal Services, dated 15 February 2010, in relation to comments made in Scrutiny Report 18 concerning the Domestic Animals Amendment Bill 2009.
- The Attorney-General, dated 16 February 2010, in relation to comments made in Scrutiny Report 18 concerning Disallowable Instrument DI2009-227, being the Independent Competition and Regulatory Commission (Investigation into Projected Costs of the enlarged Cotter Dam water security project) Terms of Reference Determination 2009.
- The Minister for Gaming and Racing, dated 19 February 2010, in relation to comments made in Scrutiny Report 16 concerning the Racing Amendment Bill 2009.

The Committee wishes to thank the Minister for Transport, the Minister for Planning, the Minister for Territory and Municipal Services, the Attorney-General, the Minister for Children and Young People and the Minister for Gaming and Racing for their helpful responses.

Vicki Dunne, MLA
Chair

February 2010

JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

REPORTS—2008-2009-2010

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

Report 2, dated 4 February 2009

Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

Report 3, dated 23 February 2009

Subordinate Law SL2008-55 - Firearms Regulation 2008

Report 4, dated 23 March 2009

Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1)

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009

Report 10, dated 10 August 2009

Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

Report 11, dated 24 August 2009

Disallowable Instrument DI2009-104 - Government Procurement Appointment 2009 (No. 1)

Disallowable Instrument DI2009-116 - Attorney General (Fees) Determination 2009

Disallowable Instrument DI2009-147 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009

Bills/Subordinate Legislation

Subordinate Law SL2009-34 - Agents Amendment Regulation 2009 (No. 1)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)
Crimes (Assumed Identities) Bill 2009
Disallowable Instrument DI2009-185 - Public Sector Management Amendment Standards 2009 (No. 7)
Eggs (Cage Systems) Legislation Amendment Bill 2009 (PMB)

Report 13, dated 12 October 2009

Education Amendment Bill 2009

Report 14, dated 9 November 2009

Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58 - Heritage (Council Chairperson) Appointment 2009 (No. 1)
Education (Participation) Amendment Bill 2009

Report 15, dated 16 November 2009

Disallowable Instrument DI2009-210 - Attorney General (Fees) Amendment Determination 2009 (No. 3)
Disallowable Instrument DI2009-211 - Emergencies (Strategic Bushfire Management Plan for the ACT) 2009
Subordinate Law SL2009-48 - Crimes (Sentencing) Amendment Regulation 2009 (No. 1)

Report 16, dated 7 December 2009

Fair Trading (Motor Vehicle Repair Industry) Bill 2009

Report 17, dated 9 December 2009

Civil Partnerships Amendment Bill 2009 (No. 2)

Report 18, dated 1 February 2010

Health Practitioner Regulation National Law (ACT) Bill 2009
Human Rights Commission Legislation Amendment Bill 2009
Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)
Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2009 (PMB)

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
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ACT Legislative Assembly
London Circuit
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Vicki

Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No 11 dated 24 August 2009 regarding the Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No 2) and the Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No 2).

Thank you for acknowledging that both these instruments contain helpful references as to where material incorporated by reference can be located on the Internet.

The Committee noted a minor typographical error in one of the references. I have asked the Department to take more care in the drafting of future instruments.

Yours sincerely

Jon Stanhope MLA
Minister for Transport

10 FEB 2010

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Vicki

Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No 10 dated 11 August 2009 regarding the Gungahlin Drive Extension Regulation 2009 (No 1). The committee noted that this regulation extends the operation of the *Gungahlin Drive Extension Authorisation Act 2004* in accordance with section 14(1)(b) of that Act. The Committee noted that the section had the same effect as a "Henry VIII" clause, but further observed that as the Legislative Assembly has explicitly authorised this particular exercise of legislative power it would make no further comment on the Regulation.

I thank the Committee for its comments.

Yours sincerely

Jon Stanhope MLA
Minister for Transport

10 FEB 2010

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Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR PLANNING
MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
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ACT Legislative Assembly
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Dear Mrs Dunne

Scrutiny Report No. 18—*Planning and Development Amendment Bill 2009 (No 2).*

I refer to Scrutiny Report No. 18 of 1 February 2010 and the Committee's comments regarding the *Planning and Development Amendment Bill 2009 (No 2)* (the Bill).

The Committee raised two issues in respect of section 38 of the *Human Rights Act 2004*. The first is that the proposed provision does not state the grounds that an exercise of power to require that public notification and agency referral steps should stop once a call-in is made and secondly whether the Minister should be vested with any power to stop public notification and agency referral steps.

The Minister's call-in power, in the Act, remains unchanged and includes criteria for directing an application to be referred to the Minister and requires that the Minister present to the Legislative Assembly a statement containing, amongst other things, details of the Ministers decision and the grounds for the decision. The current provision in the *Planning and Development Act 2007* provides that ACT Planning and Land Authority must take no further action that would lead to a decision by the Authority on the application when an application is called in, including (although this is not made explicit) work on notification and agency referrals.

In effect, currently the Minister can forego public notification and agency referral steps by the timing of the call in (ie the stage ACTPLA's assessment processes have reached). It is noted that the Scrutiny of Bills Report No37 February 2007 when considering the Planning and Development Bill did not comment on this provision at that time.

The proposed amendment is intended to make the existing provision more transparent by making it clear that unless directed to by the Minister the Authority continues to complete procedural steps which includes agency referral and public notification. Agency referral and notification processes continue unless the Minister considers that such processes are not required in order for the Minister to make a decision in accordance with Planning and Development Act, and instructs ACTPLA to cease its referral and notification processes.

The Legislative Assembly, in passing the original Planning and Development Act in 2007, has already decided the issue of whether or not the Minister should have the power to stop public notification and agency referral. The Bill does not seek to change this position in principle but to make the implementation of the principle more transparent.

In respect of criteria the issue of notification and agency referral is integral to the implementation of the Minister's call-in power. Once an application has been called-in the Minister's decision on the application and the basis for his decision rests with the Minister and compliance with the Act. As noted above, the initial decision whether to make a call-in is already guided by criteria.

I would like to thank the Committee for their consideration and review of the issues raised by the Bill.

Yours sincerely

Andrew Barr MLA
Minister for Planning

Joy Burch MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR WOMEN

MEMBER FOR BRINDABELLA

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety (performing duties of a Scrutiny of Bills and Subordinate Legislation Committee)
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mrs Dunne

I am writing in response to the issues raised by the Standing Committee on Justice and Community Safety (performing duties of a Scrutiny of Bills and Subordinate Legislation Committee) in Report 18 2010 concerning the proposed amendments to the *Children and Young People Act 2008* (the Act).

The Report states that the amendment proposed for a new section 865A extends the range of persons to whom protected information may be disclosed, and that the consequence of such disclosure could result in a criminal investigation and more particularly in criminal proceedings.

The Act already provides for investigative entities, including Police, to be provided with protected and sensitive information. The amendment does not extend the range of persons to whom protected information may be disclosed but seeks to authorise the provision of this specific information to Police when requested or when in the best interests of children and young people, for example, allegations of paedophilia. This authorises the provision of reporter identity information, currently prohibited.

In relation to the Committees concern that the consequences of referring a matter to Police pursuant to section 360(4)(c) could result in a criminal investigation and criminal proceedings, this is information already provided to Police as it is not prohibited to do so when in the best interests of children and young people. A criminal investigation and proceedings will arise only when Police are satisfied there is sufficient evidence to proceed.

The Report notes that these consequences would impact on the privacy and reputation of the persons subject to the investigation or proceeding and that the evident purpose of proposed section 865A is to balance the value for privacy against the value of effective law enforcement directed to the protection of children and young people.

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The privacy and reputation of the persons subject to the investigation or proceeding is not impacted by the proposed amendment as information in a child protection report, in so far as it does not identify the reporter, is already provided to Police by the Chief Executive.

Upon Police receiving this information, they must comply with the strict information sharing provisions of the Act. The Act does not enable Police to share information regarding a reporter or any information that would identify a reporter with others. Police may only provide this information if requested by a Court and the Court must meet the requirements of section 866 before allowing sensitive information to be provided to others.

I consider this information addresses fully the issues raised by the Committee.

Yours sincerely,

Joy Burch MLA
Minister for Children and Young People
4 February 2010

Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
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Mrs Vicki Dunne
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Vicki

Dear Mrs Dunne

I refer to Scrutiny Report No. 18 prepared by the Standing Committee on Justice and Community Safety (the Committee) on the Domestic Animals Amendment Bill 2009. I note that the Committee is satisfied there is no issue of incompatibility arising with the *Human Rights Act 2004*.

Could you please convey my appreciation to the Committee for its comments.

Yours sincerely

Jon Stanhope MLA
Minister for Territory and Municipal Services

15 FEB 2010

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Simon Corbell MLA

ATTORNEY GENERAL
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MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR ENERGY

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs Dunne

I am writing in response to comments in the *Scrutiny Report No 18* of 1 February 2010 in relation to DI2009-227 *Independent Competition and Regulatory Commission (Investigation into Projected Costs of the enlarged Cotter Dam water security project) Terms of Reference Determination 2009.*

Section 15(8) of the *Independent Competition and Regulatory Commission Act 1997* relates specifically to the amendment or withdrawal of a reference to the Commission. DI2009-227 does not amend or withdraw a reference to the Commission; subsequently a notifiable instrument is not required.

Thank you for raising this matter with me. I trust that this information is of assistance.

Yours sincerely

Simon Corbell MLA
Attorney General

16.2.10

cc Deputy Clerk, ACT Legislative Assembly

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MINISTER FOR GAMING AND RACING

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly
GPO Box 1020
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Dear Mrs Dunne

I am writing in response to comments in the Scrutiny of Bills Report No 16 of 7 December 2009 in relation to the *Racing Amendment Bill 2009*.

The comments raised were addressed at the Debate of the Bill on 10 December 2009. The first matter addressed referred to the Committees concerns that subsection 61I(3) would make it difficult for an officer to make a defence if a corporation does not cooperate in providing information. However, the officer can get a summons or subpoena to obtain information from the corporation. It is a criminal offence not to comply with a summons or subpoena.

The second matter addressed referred to proposed section 61L which describes matters which the Gambling and Racing Commission must consider in deciding who is a suitable person to be approved to use ACT race fields information.

Under administrative law, subsection (2) needs to be considered in the context of subsection 61L(1), which outlines the specific matters to be considered in deciding if an applicant is a suitable person. This constrains what can be considered under "any other relevant issues" in subsection (2). This suggests that the provision is not as open-ended as the Committee suggests.

I trust these comments assist the Committee and address its concerns.

Yours sincerely

Andrew Barr MLA
Minister for Gaming and Racing

19 FEB 2010

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