Legislative Assembly for the ACT

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

Scrutiny Report

20 JUNE 2005

Report 11

TERMS OF REFERENCE

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

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

- (i) is in accord with the general objects of the Act under which it is made;
- (ii) unduly trespasses on rights previously established by law;
- (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

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

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

- (i) unduly trespass on personal rights and liberties;
- (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bills—No Comment

The Committee has examined the following Bills and offers no comment on them.

Appropriation Bill 2005-2006

This is a Bill for an Act to appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2005, and for other purposes.

Construction Occupations Legislation Amendment Bill 2005

This is a Bill to amend the *Construction Occupations (Licensing) Act 2004*, and some associated laws. Apart from minor and technical amendments, the Bill would permit corporations and partnerships to be licensed under Act in the construction occupation of plumbing plan certifier; and provide exemptions to the application of certain provisions of the Building Code of Australia, in certain described circumstances.

Gaming Machine Amendment Bill 2005 (No 2)

This is a Bill to amend the *Gaming Machine Act 2004* to remove the GST credit scheme that currently applies to clubs in the ACT, and for associated purposes; and to increase some gaming machine tax rates from 1 July 2007.

Rates Amendment Bill 2005

This Bill would amend the Rates Act 2004 to bring the calculation of rates liability for rural land into line with the method used to determine the rates liability for residential and commercial land. It allows the inclusion of a fixed charge component into the formula used to calculate rates liability for rural land. The Bill would also make rural land with an average unimproved land value of equal to or less than the rates free threshold, liable to the fixed charge component only.

Revenue Legislation Amendment Bill 2005

This is a Bill to amend the *Payroll Tax Act 1987* to expand the definition of wages to capture the value of employee share schemes; to amend the *Land Tax Act 2004* and the *Rates Act 2004* to simplify the calculation of land tax; and the *Duties Act 1999* so as to make it possible for people seeking an exemption from the duty on the registration of a motor vehicle to be able to do so at the place where the registration is processed.

Unit Titles (Staged Development) Amendment Bill 2005

This is a Bill to amend the *Unit Titles Act 2001* to permit the staged development of Class A units after the first stage has been built

Utilities (Shortage of Essential Services) Amendment Bill 2005

This is a Bill to amend the *Utilities Act 2000* to provide for a new regulatory framework for dealing with shortage of essential services, including provision for a head of power whereby the Minister responsible for the legislation can make regulations in relation to the implementation of essential service restrictions in the ACT.

Bills—Comment

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

Water Resources Amendment Bill 2005

This is a Bill to amend the *Water Resources Act 1998* to allow the Environment Protection Authority (EPA) to issue a public water utility a licence that allows the utility to take water in a quantity greater than that expressed in any particular water allocation, from either the same catchment to which the applications apply, or some other catchment; and to establish the power to declare a moratorium on the granting of further licenses or allocations to access surface or ground water resources.

Has there been an inappropriate delegation of legislative power?

Is there an inappropriate delegation of legislative power in that:

- the Minister may, by declaration, suspend the operation of other Territory laws; or
- the Executive may add by way of a regulation to the Territory laws which cannot be a vehicle for challenge to the legality of a declaration?

There are two aspects of the Bill which need to be addressed under this term of reference.

The scope of the power in proposed section 63A

By clause 5 of the Bill, a new subsection 63A(1) would be inserted in the *Water Resources Act 1998*, to provide:

> (1) The Minister may, in writing, declare that 1 or more of the following provisions are suspended for a period or periods stated in the declaration:

(a) section 28 (1) to (6) (Allocation of water);

(b) section 35 (1) to (4) (Licence to take water);

(c) section 44 (1) and (2) (Bore construction permit);

(d) section 47 (2) to (6) (Unlicensed recharge);

(e) section 77 (3) (Review of decisions).

The effect of a declaration would be to preclude a person from seeking the particular permits and licences which may be the subject of an application (as the Act now stands). This gives effect to the object of the Bill to create a scheme for the declaration of a moratorium on the granting of further licenses or allocations to access surface or ground water resources.

The power to suspend the operation of a law might be seen as an inappropriate delegation of legislative power in the sense that the Minister can suspend the operation of a statute. On the other hand, this power is granted by statute, and any suspension by a declaration is a disallowable instrument. The ability of the Assembly to disallow the declaration might be thought to be an appropriate protection of the legislative power of the Assembly.

The power to add to the Territory laws which cannot be a vehicle for challenge to the legality of a decision to make a declaration

This issue arises out of proposed paragraph 63B(3)(b). Whatever its effect (see below), there is a question whether it is inappropriate to delegate to the Executive a power to add, by the making of a regulation, to the Territory laws which cannot be a vehicle for challenge to the legality of a decision to make a declaration under proposed section 63A. It could be argued that the jurisdiction of the Supreme Court to review administrative action is so fundamental to the maintenance of the rule of law that any qualification to that power should be by way of an Act, and not by regulation.

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

Are rights, liberties and/or obligations made unduly dependent upon insufficiently defined administrative powers?

Is there an insufficient definition of the power of the Minister under proposed section 63A to make a declaration suspending the operation of specified Territory laws?

The wide scope of the power of a Minister to make a declaration under proposed section 63A

The power vested in the Minister by proposed subsection 63A(1) is expressed in very wide terms. The Minister is not obliged to exercise the power (see the word "may"), and no criteria for its exercise are stated. The Committee generally draws such administrative powers to the attention of the Assembly; (see *Report No 6 of the Sixth Assembly*). On its face, the power appears to be "insufficiently defined".

On the other hand, in this context, the concerns that attach to such widely expressed powers might be thought to lack significance. First, it may be said that an exercise of this power will not have an impact on existing rights of any person, and thus will not affect "rights, liberties and/or obligations". Looked at in the light of the Committee's term of reference, there is no issue to be addressed.

Secondly, there are in any event, legal limits to just when the Minister could lawfully make a declaration under proposed section 63A(1). The power could not lawfully be exercised except in pursuance of the purposes for which the power is vested in the Minister. The Minister – or a court considering a challenge to an exercise of the power – would ascertain those purposes by reference to the whole of the Act, and in terms of other documents such as the Explanatory Statement and the Presentation Speech. The Explanatory Statement states that the purpose lying behind the conferral of the power in proposed section 63A on the Minister to suspend the operation of certain laws (that is, to declare a moratorium) is to "provide an opportunity to review the criteria under which access to water is granted".

In addition the *Human Rights Act 2004* operates to set limits to the exercise of any administrative (or legislative or judicial) power. This is explained below.

In these circumstances, the Committee does not consider that rights, liberties and/or obligations have been made unduly dependent upon an insufficiently defined administrative power, but draws the matter to the attention of the Assembly.

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

Privative clauses

Proposed section 63B of the Act, and proposed clause 10 of Schedule 1 of the Administrative Decisions (Judicial Review) Act 1989

Proposed section 63B of the Act seeks to protect against legal challenge an exercise by the Minister of the power to make a declaration under proposed section 63A.

63B Declaration cannot be challenged

(1) The making of a declaration under section 63A does not create a right.

(2) Accordingly, a decision to make (or not to make) a declaration is final and conclusive.

(3) To remove any doubt and without limiting subsection (2), the following do not apply to decisions mentioned in that subsection:

(a) section 77 (Review of decisions);

(b) a territory law relating to the review of decisions that is prescribed by a regulation.

(4) This section has effect despite any other territory law, whether passed before or after the commencement of this Act.

(5) To remove any doubt, a right under subsection (1) means any right or interest, whether public or private.

Clause 6 of the Bill adds to this attempt to preclude judicial review of the legality of a declaration by amending the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act), Schedule 1, by the addition of a new clause 10.

10 This Act does not apply to decisions of the Minister under the Water Resources Act 2005, section 63A (Moratorium on granting licences etc).

The nature of privative clauses

Each of proposed section 63B of the Act, and proposed clause 10 of the ADJR Act, is a privative clause. By this is meant that each is a provision which seeks to restrict the ordinary jurisdiction of a court to review the legality of an exercise of administrative power (including of a power to make subordinate law). Restricting or removing the power of the courts raises a significant rights issue.

Scrutiny Committees have long been concerned about privative clauses. In the words of a judge whose book was a major influence leading to the creation of the first Australian Scrutiny Committee:

> In passing such a clause Parliament, it may be thought, was really stultifying itself, because, having inserted [limitations on the relevant administrative power] by means of [the privative clause, it] rendered such provisions nugatory: (Lord Hewart, *The New Despotism* (1929) at 72).

In several reports (see in particular *Report No 49 of the Fifth Assembly*), the Committee has noted that Australian judges speak of provisions that restrict or remove the ability of a citizen to have access to the courts to challenge the acts of a state official as involving a derogation from "the ordinary rights of individuals": *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 417. One consequence of this view is that, while acknowledging that in general a statute may make provision which denies or restricts access to the courts, a court will only find that the statute has this effect if its wording very clearly does so. In other words, the courts presume that a law does not intend to detract from the jurisdiction of the courts; see *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 417 (see the reference to “strictly construed”), and *Bropho v Western Australia* (1990) 171 CLR 1 at 17.

There is, however, reason to think that the Legislative Assembly has only a limited capacity to enact laws which deny or restrict access to the courts. Before turning to this question, it is necessary to consider just what would be the effect of proposed section 63B of the Act, and proposed clause 10 of the ADJR Act.

The effect of the proposed privative clauses

Proposed section 63B of the Act may not operate as a significant restriction on the Supreme Court's power to review the legality of a declaration. The statement that a declaration is to be taken as "final and conclusive" may have no effect on judicial review. Case-law suggests that it would be taken only as a statement that there is no right of appeal; see *Hockey v Yelland* (1984) 157 CLR 124 at 130, and at 142. To provide that the making of a declaration "does not create a right" has no bearing on the *availability* of review (although it might have some effect on its scope).

The effect of proposed paragraph 63B(3)(b) is also doubtful. On its face, it seems to empower the Executive (see section 79 of the *Water Resources Act 1998*) to specify by a regulation what "territory law[s] relating to the review of decisions" do not apply to a decision of the Minister to make a declaration under proposed section 63A. It is, however, quite unclear just what kinds of Territory laws might be so specified. The judicial review powers of the Supreme Court derive from the *Supreme Court Act 1933*, and it is difficult to see how this statute could be characterised as a law "relating to the review of decisions". The uncertainty might well be resolved in favour of preserving the administrative law jurisdiction of the Supreme Court; see *Bropho v Western Australia* (1990) 171 CLR 1 at 17, (cited above).

Proposed clause 10 of schedule 1 of the ADJR Act would take affect according to its terms. Thus, a person aggrieved by the making of a declaration by the Minister under proposed subsection 63A(1) of the Act could not seek the remedy of judicial review provided for by section 5 of the ADJR Act. The removal of this remedy is not a significant restriction on judicial review, as other similar remedies are available from the Supreme Court.

Denial of an ability to obtain reasons for the exercise of power under proposed section 63A

Is the denial to a person aggrieved by the making of a declaration of an ability to obtain a statement of reasons an undue trespass on rights?

The significant effect of proposed clause 10 will be to preclude a person aggrieved a declaration made by the Minister from obtaining from the Minister a statement of reasons for the making of a declaration. That is, section 13 of the ADJR Act, which would otherwise require such a statement, is displaced by clause 10.

The ability of a person to challenge an exercise of statutory power turns critically on what they can find out about the reasons motivating that exercise. The High Court has, however, not accepted that the obligation of an administrative decision-maker to observe procedural fairness (or natural justice) normally includes an obligation to give reasons; see *Public Service Board of NSW v Osmond* [1986] HCA 7. In that case, the Court did not accept the view of Kirby P, stated in the NSW Court of Appeal, that

> "The overriding duty of public officials who are donees of statutory powers is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a

> facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review to ensure that it complies with the law and to ensure that matters have been taken into account which should have been taken into account or that matters have not been taken into account which ought not to have been taken into account": see at [1986] HCA 7 [5].

(In the High Court, Gleeson CJ did note that Kirby P "recognized exceptions to the obligation to state reasons, for example, where it would be otiose to do so, or where it was clear by inference or otherwise what the reasons were, or where the giving of reasons would disclose confidential information or invade privacy: ibid.)

In the Territory, there has been legislative adoption of the approach of Kirby P. By combination of section 13 of the ADJR Act, and section 26 of the *Administrative Appeals Tribunal Act 1989*, the law provides a comprehensive regime for the provision of reasons by decision-makers. This scheme can, however, be displaced by a law of the Territory, and this is what proposed clause 10 of the ADJR Act does in relation to declarations by the Minister under proposed section 63A of the *Water Resources Act 1998*.

It may well be, however, that one effect of HRA subsection 21(1) is that normally – or at least in many cases – an administrative decision-maker will be obliged to give reasons for their decision. The effect of subsection 21(1) on administrative decision-making is obscure, and given that it is unlikely that a declaration by the Minister under proposed section 63A is a kind of decision falling within HRA subsection 21(1), the Committee does not suggest that there is conflict between these two provisions.

There remains a question whether the effect of proposed clause 10 of the ADJR Act is an undue trespass on rights of a person aggrieved by the making of a declaration.

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

An ineffective attempt to protect the privative clauses in proposed section 63 from repeal or amendment

Is proposed subsection 63B(4) a misleading statement of the law?

Subsection 63B(4) provides that: "This section [63B] has effect despite any other territory law, whether passed before or after the commencement of this Act".

On its face, the effect of this provision is that proposed section 63B would continue to operate in the face of a later Act of the Assembly inconsistent with the terms of proposed section 63B. But, as matter of law, it cannot have the effect. The Legislative Assembly does not have the power to entrench a statute and preclude its later repeal or amendment. This raises a rights issue in that proposed subsection 63B(4) is misleading.

Provisions such as proposed subsection 63B(4) have been inserted in previous Bills. On the Committee's understanding of their effect, they are ineffective and misleading.

The capacity of the Legislative Assembly to enact privative clauses

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

<u>The *Australian Capital Territory (Self-Government) Act 1988*</u>

In the first place, account must be taken of subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*, which provides:

> (1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

Given that subsection 48(1) is found in Part VA of the Act, it is reasonable to read this provision as a limitation on the legislative power of the Assembly under subsection 23(1), which provides:

> (1) Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.

It may be argued that it "is necessary for the administration of justice in the Territory" that the Supreme Court have power to review the legality of the exercise of any statutory power. A privative clause does undermine the notion of the rule of law. This argument could also find support in the common law approach to privative clauses, and by reference to the consequences of the *Human Rights Act 2004* (see below).

If this line of argument is correct, then it is beyond the power of the Assembly to enact privative clauses which purport to deny, or perhaps even to restrict, access to the Supreme Court by persons seeking to challenge the legality of an exercise of statutory power.

<u>The *Human Rights Act 2004*</u>

Is a privative clause inconsistent with the *Human Rights Act 2004*?

A significant effect of the *Human Rights Act 2004* is that in the exercise of any statutory power – whether administrative, judicial, or legislative – the decision-maker *must*, unless the law conferring the power provides otherwise, proceed on the basis that the power does not authorise action inconsistent with a right stated in the HRA. This comes about as a product of HRA section 30(1):

> 30(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

(A "Territory law" is "an Act or statutory instrument": HRA Dictionary.)

Assessment of whether there is inconsistency between a particular exercise of a statutory power (the 'action') and the HRA requires a two-step process. The first question is whether the action derogates from an HRA right, and the second is whether that derogation is justified under HRA section 28. It is only where the first question is answered 'yes', and the second 'no', that it follows (subject to a qualification) that the decision-maker did not have power to take the relevant action. The qualification is that the action taken is lawful if the law authorising the power clearly authorised action inconsistent with the HRA. (In this case, the Supreme Court could, under HRA section 32, entertain an application for a declaration that the empowering law was in conflict with the HRA. The action would, however, remain lawful, even if a declaration was made.)

While it may be presumed that the Assembly intends that statutes and statutory instruments be understood so as not to authorise action inconsistent with an HRA right, the position is complicated by HRA section 30(2). This states a limitation of uncertain scope to the operation of section 30(1):

> "30(2) Subsection (1) is subject to the Legislation Act, section 139".

The Note accompanying section 30(2) reads:

> "Legislation Act, section 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test)".

Lying in section 30(2) may be a significant qualification to section 30(1). On the face of it, the interpreter (a court, an administrative decision-maker, or whomsoever) must ascertain the purpose of some particular provision of a law, and then must take a view of the meaning of the provision that will best accord with its purpose. In this exercise, the interpreter must disregard any question about the consistency of that view with the statement of rights in Part 3. This is the effect of the words "subject to" in section 30(2). Thus, the decision-maker cannot, in "working out the meaning" of the law under section 30(1), read it in a way that avoids inconsistency with an HRA right where to do so would not "best achieve the purpose of a law". Nor can it, in every case, be presumed that the purpose of the authorising law is to avoid conflict with an HRA right.

Thus, while in respect of many statutory powers it may be argued that they must be exercised in a way which avoids a conflict with an HRA right, this will not be so in two kinds of case: (1) where the empowering law provides clearly that action may be in conflict, and (2) where, in the light of the purpose of the law, it must be read as authorising action in conflict. It will be for a court to determine whether the HRA is displaced in either of these ways.

It is apparent that the HRA has a profound impact on the exercise of statutory power. This impact would be rendered ineffective by a privative clause aimed at preventing the Supreme Court from granting a remedy for an excess of the relevant statutory power. This raises the question whether the Supreme Court would find that a privative clause is inconsistent with the HRA.

The HRA does not, in explicit terms, contain any unqualified statement of a right to judicial review of statutory power. Subsection 21(1) provides:

> (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.

It may be that HRA subsection 21(1) will operate to restrain the use of the privative clause, but only where the particular exercise of administrative power which is sought to be protected by the privative clause affects "rights" or "obligations" of the person seeking review: (see the discussion of subsection 21(1) in *Report No 49 of the Fifth Assembly*). An exercise of the power conferred on the Minister by proposed section 63A may not be a power of this kind.

Another possible basis for an argument that the HRA states a right to judicial review of statutory power may be located in HRA subsection 8(3):

> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Is this a right to "protection of the law"? On this basis, it may be seen as a right of access to the courts. But it may be read as stating only that all persons have a right to whatever protection is afforded by the law, and thus, if no person has access to the courts, there is no conflict with subsection 8(3).

Whether or not the HRA will be understood to state a right to judicial review of statutory power, its effect on the scope of statutory powers underlines the common law view that privative clauses are inconsistent with the notion of the rule of law, and impinges on the rights of a person affected by an exercise of the relevant power.

Conclusion

In *Report 53 of the Fifth Assembly*, concerning the Electricity (Greenhouse Gas Emissions) Bill 2004, the Committee said:

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

The Committee repeats this concern in relation to proposed section 63B of the Water Resources Amendment Bill 2005.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2005-26 being the Residential Tenancies (Tribunal) Selection 2005 made under subsection 112(5) of the *Residential Tenancies Act 1997* **appoints a specified person as a member of the Residential Tenancies Tribunal.**

Disallowable Instrument DI2005-36 being the Electoral Commissioner Appointment 2005 made under section 22 of the *Electoral Act 1992* **appoints a specified person as Electoral Commissioner for the ACT.**

Disallowable Instrument DI2005-38 being the Public Sector Management Amendment Standard 2005 (No. 2) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards to support the Territory Records Act 2002.**

Disallowable Instrument DI2005-39 being the Nature Conservation (Species and Ecological Communities) Declaration 2005 (No. 1) made under section 38 of the *Nature Conservation Act 1980* revokes Disallowable Instrument DI2003-319 and declares specified species as vulnerable or endangered.

Disallowable Instrument DI2005-40 being the Public Place Names (Harrison) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes Disallowable Instrument DI2004-79 and determines the names of public places that are Territory land in the division of Harrison.**

Disallowable Instrument DI2005-42 being the Surveyors (Commissioner for Surveys) Appointment 2005 (No. 1) made under section 7 of the *Surveyors Act 2001* **appoints a specified person as Commissioner for Surveys.**

Disallowable Instrument DI2005-43 being the Road Transport (General) (Parking Ticket Fees) Declaration 2005 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes Disallowable Instrument DI2004-205, determines parking ticket fees and converts the car park located in section 84, City Division, from a multi-stay to a short-stay ticket car park.**

Disallowable Instrument DI2005-44 being the Land (Planning and Environment) Criteria for Direct Grant of a Lease (City West Precinct) Determination 2005 (No. 1) made under subsection 161(7) of the *Land (Planning and Environment) Act 1991* **establishes the criteria for the direct sale of land within the City West precinct to the Australian National University.**

Disallowable Instrument DI2005-45 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to ACT roads and road related areas used by vehicles competing in the ACT timed special (competitive) stages of the Subaru Rally of Canberra.**

Disallowable Instrument DI2005-46 being the Public Sector Management Amendment Standard 2005 (No. 3) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards.**

Disallowable Instrument DI2005-47 being the Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 2) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes Disallowable Instrument DI2005-32 and determines the maximum fares for ACTION Authority regular route services.**

Disallowable Instrument DI2005-48 being the Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2005 (No. 2) made under section 22 of the *Race and Sports Bookmaking Act 2001* **revokes Disallowable Instrument DI2005-11 and determines directions for the operation of sports bookmaking venues.**

The Committee notes that this instrument corrects descriptive errors in DI2005-11, including errors identified by the Committee in its *Report No 5 of the Sixth Assembly*.

Disallowable Instrument DI2005-49 being the Public Sector Management Amendment Standard 2005 (No. 4) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards.**

Disallowable Instrument DI2005-50 being the Financial Management Amendment Guidelines 2005 (No. 1) made under section 67 of the *Financial Management Act 1996* **amends the Financial Management Guidelines.**

Disallowable Instrument DI2005-51 being the Hotel School Appointment 2005 (No. 1) made under section 16 of the *Hotel School Act 1996* **appoints a specified person as a member of the Board of Management of the Australian International Hotel School.**

Disallowable Instrument DI2005-52 being the Rehabilitation of Offenders (Interim) (Sentence Administration Board) Appointment 2005 (No. 1) made under paragraph 68(1)(c) of the *Rehabilitation of Offenders (Interim) Act 2001* **appoints a specified person as a member of the Sentence Administration Board.**

Disallowable Instrument DI2005-56 being the Remand Centres (Official Visitor) Appointment 2005 made under section 6A of the *Remand Centres Act 1976* **appoints a specified person as an Official Visitor for ACT Remand Centres.**

Disallowable Instrument DI2005-57 being the Public Place Names (Duffy) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new road in the Division of Duffy.**

Disallowable Instrument DI2005-59 being the Taxation Administration (Rates—Rebate Cap) Determination 2005 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes Disallowable Instrument DI2004-58 and determines the rebate cap for the purposes of the Act.**

Disallowable Instrument DI2005-60 being the Taxation Administration (Land Tax) Determination 2005 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes Disallowable Instrument DI2004-61 and determines the rates for the calculation of land tax for residential and commercial land.**

Disallowable Instruments—Comment

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

No Explanatory Statement

Disallowable Instrument DI2005-33 being the Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes Disallowable Instrument DI2000-279 and determines fees payable for the purposes of the Act.**

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

Minor drafting issues

Disallowable Instrument DI2005-41 being the Domestic Violence (Prevention Council) Appointment 2005 made under section 6 of the *Domestic Violence Agencies Act 1986* **appoints specified persons to the Domestic Violence Protection Council.**

The Committee notes that the Explanatory Statement to this instrument states:

> The format for these appointments has been varied to facilitate ease of access to membership details (both current and historical) for the council. In future this instrument will be amended to include future appointments and changes to the membership of this council.

The Committee would appreciate the Minister's advice as to how the variation to the format of the instrument will facilitate ease of access to membership details for the council.

This comment also applies in relation to the appointments made by DI2005-53 and DI2005-54.

Disallowable Instrument DI2005-53 being the Legal Aid Commission Appointment 2005 made under section 7 of the *Legal Aid Act 1977* **appoints a specified person as a part-time Commissioner to the Legal Aid Commission.**

See comment above.

Disallowable Instrument DI2005-54 being the Liquor Licensing Board Appointment Amendment 2005 made under section 12 of the *Liquor Act 1975* **amends Disallowable Instrument DI2004-268 and appoints a specified person as a member of the Liquor Licensing Board.**

See comment above.

Disallowable Instrument DI2005-55 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares a specified company to be a Parking Authority in the suburb of Belconnen.**

The Committee notes that this instrument indicates that it is made under "*Road Transport (Safety and Traffic Management) Regulation 2000*, Section no 75A(2) (Parking Authorities)". The Committee notes that the "no" is superfluous.

Subordinate Law—No Comment

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

Subordinate Law SL2005-6 being the Tertiary Accreditation and Registration Amendment Regulation 2005 (No. 1) made under the *Tertiary Accreditation and Registration Act 2003* **prescribes the circumstances under which a higher eduction course, accredited under the Act, may be cancelled.**

Subordinate Laws—Comment

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

Minor drafting issue

Subordinate Law SL2005-7 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2005 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **determines an additional ten declared sites identified by the Camera Enforcement Safety Management Committee as crucial sections of road for the operation of mobile speed cameras.**

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

> This amending regulation amends Schedule 1 to insert references to an additional ten declared sites, identified by the Camera Enforcement Safety Management Committee, as crucial sections of road to be included for the operation of mobile speed cameras.
>
> These sites represent "gaps" in the mobile speed camera network along existing major routes. For example, Adelaide Avenue becomes Yarra Glen from the intersection with Kent Street in Deakin. While Adelaide Avenue is a declared road Yarra Glen is not.
>
> This amendment will allow mobile speed cameras to operate along the continuous section of road known as Adelaide Avenue and then Yarra Glen. The amendment will similarly "fill in" gaps in the mobile speed camera network on other major roads.

The Committee notes that sections 5 and 6 of the subordinate law also make amendments to the examples set out in subsections 108(4), (5) and (6) of the *Road Transport (Safety and Traffic Management) Regulation 2000.* While it appears to the Committee that these amendments relate to minor drafting issues, the Committee would appreciate the Minister's confirmation that this is the case.

Strict liability offences

Subordinate Law SL2005-8 being the Utilities (Gas Restrictions) Regulation 2005 made under the *Utilities Act 2000* **provides for the introduction and enforcement of a gas restriction scheme in the ACT.**

Section 9 of the *Utilities (Gas Restrictions) Regulation 2005* (the Regulation) allows the Minister to declare that an "approved gas restriction scheme" (which the Minister can approve under section 6 of the Regulation) is in force. Section 10 the allows "the utility" (being the gas distributor) to impose gas restriction measures, under the scheme. Subsection 10(3) requires that the imposition of restrictions be publicly notified.

Subsection 10(5) provides that a failure to notify does not affect the validity of the restriction.

Part 3 of the Regulation deals with enforcement of gas restrictions. Subsection 14 (1) provides that a person commits an offence if:

- he or she is the occupier of premises; and
- gas is used on the premises, in contravention of a gas restriction; and
- the gas restriction has been properly notified, under section 10 of the Regulations.

An offence under subsection 14(1) carries a maximum penalty of 10 penalty units (ie $1,000). Under subsection 14(2), an offence under subsection 14(1) is expressly a strict liability offence. The Committee notes, however, that subsection 14(3) goes on to provide that it is a defence to a prosecution for an offence against section 14 if the defendant proves that he or she did not know that a gas restriction had been imposed.

Section 16 also creates a strict liability offence, also punishable by a maximum penalty of 10 penalty units, of contravening a direction given by an authorised person under section 15 of the Regulation. Unlike section 14, however, no defence is provided for in section 16.

As noted in *Report No 2 of the Sixth Assembly*, the use of strict liability offences is a recurring issue for the Committee. In *Report No 2 of the Sixth Assembly* (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred to the principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences.

In particular, the Committee noted that, in its *Report No 38 of the Fifth Assembly*, it had proposed that where a provision of a bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Report No 38 of the Fifth Assembly*, the Committee went on to say:

> The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be

> shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that Explanatory Statement to this subordinate law does not address any of the issues above.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

INTERSTATE AGREEMENTS

The Committee has not been advised of any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 4 May 2005, in relation to comments made in Scrutiny Report 4 regarding Disallowable Instrument DI2004-261, being the Liquor Licensing Standards Manual Amendment 2004 (No. 1).
- The Minister for Urban Services, dated 9 May 2005, in relation to comments made in Scrutiny Report 10 regarding the following Disallowable Instruments:
  - DI2005-32 being the Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 1); and
  - DI2005-21 being the Waste Minimisation (Fees) Amendment Determination 2005 (No. 1).
- The Minister for Urban Services, dated 11 May 2005, in relation to comments made in Scrutiny Report 6 regarding Subordinate Law SL2005-4, being the Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1).
- The Attorney-General, dated 13 May 2005, in relation to comments made in Scrutiny Report 2 regarding the Justice and Community Safety Legislation Amendment Bill 2004 (No. 2).
- The Attorney-General, dated 3 June 2005, in relation to comments made in Scrutiny Report 10 regarding the Crimes (Child Sex Offenders) Bill 2005.
- The Attorney-General, dated 3 June 2005, in relation to comments made in Scrutiny Report 10 regarding the Crimes (Sentencing) Bill 2005.

- The Acting Attorney-General, dated 7 June 2005, in relation to comments made in Scrutiny Report 10 regarding the Human Rights Commission Bill 2005.

The Committee thanks the Attorney-General, the Acting Attorney-General and the Minister for Urban Services for their helpful responses.

ADDITIONAL COMMENTS

Further comment on the Crimes (Child Sex Offences) Bill 2005

The Committee has noted with appreciation the detailed response by the Attorney General to the report of the Committee concerning the Crimes (Child Sex Offences) Bill 2005. It offers these further comments on two particular matters for the assistance of the Assembly.

The position of young offenders

In reporting under section 38 of the *Human Rights Act 2004*, the Committee reported about an issue arising out of HRA section 11(2), which provides:

> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The Committee noted that:

> Given that the kinds of child sex offences that may trigger the operation of the scheme include some that would be involved in internet down-loading and swapping of child pornography, there is a prospect that many young people will commit the trigger offences. The issue then is whether, in addition to whatever will follow from their conviction of an offence, the young offender should be treated as a registrable offender and subject to the scheme of this Bill. (The Committee has noted that the operation of the scheme is in some respects modified as it applies to young offenders.)

The Committee's reference to "trigger offences" reflects the fact that a person is a "registrable offender" by virtue of the operation of the law – that is, where he or she is sentenced for a "registrable offence": paragraph 8(1)(a). No court has the power to prevent the law taking effect in this way. In addition, a person who is not sentenced for such an offence may nevertheless be ordered to be classified as such by order of the sentencing court; see clauses 15 to 18.

The Committee's comment was that the matter of how the Bill applied to young offenders called for explanation.

In response, the Attorney states that the government carefully considered whether the Bill was HRA compatible. In particular, and addressing the Committee's report, the Attorney points out that "the registration scheme would not automatically apply to a young offender who commits a registrable offence of an act of indecency with a young person or possessing child pornography.

Clause 9 of the Bill is included as a safeguard against the influx of young offenders on the register for the commission of these offences”.

The Committee’s reading of paragraph 9(1)(c) is that is takes out of the category of “registrable offender” only a young offender who has been sentenced for a *single* offence of an act of indecency with a young person or possessing child pornography. Thus, it does not affect the position of a young offender who is sentenced for more than one offence of such a kind where the offences arise out of more than one incident (see subclause 9(3)), or where the young offender has a previous conviction for the offence.

The Committee did not mention this in its Report on this Bill, but it adds here that it is puzzled by a reference in the outline of the Act, provided in paragraph 6(2)(c), to the Act “[allowing] the sentencing court to order young offenders to comply with the reporting obligations of the Act”. So far as the Committee can ascertain, a sentencing court has no discretion in the matter once the young offender is sentenced for a trigger offence.

The keeping and disclosure of identification material

The Committee addressed this issue in terms of whether there was a tension between clause 82 of the Bill and Information Privacy Principle 11 (IPP) (see section 14 of the *Privacy Act 1988* (Commonwealth), and noting that this Act applies in the ACT).

In response, the Attorney makes two points:

- that since clause 82 is concerned only with the keeping of information, and not its disclosure, IPP 11 has no application; and

- that clause 118 regulates disclosure “the material”, and it mimics IPP 11, and further outlining what clause provides by way of access to “the register”.

The Committee sees the matter somewhat differently. First, “the material” referred to in clause 82 does not include the child sex offenders register. It refers to copies of documents, fingerprints, or photographs that may have been taken under Part 3.4 from, or in relation to, the offender. Clause 82 then provides that the chief police officer may, during a registrable offender’s reporting period, keep such material for law enforcement, crime prevention or child protection purposes.

The Committee has read clause 82 as authorising the use of this material kept under clause 82 for these purposes. The wording of clause 82 – “keep for law enforcement, crime prevention or child protection purposes” – suggest this to the Committee. To keep information for a purpose suggest that it may be used for that purposes. (Clause 118 has no bearing on the matter given that it applies only to the child sex offenders register.)

If the Committee is correct, then two rights issue arise out of clause 82. The first is whether clause 82 is consistent with IPP 11 (which governs the disclosure of personal information), or with IPP 10, (which governs the use of personal information). The Committee appreciates that both IPPs permit of use or disclosure "required or authorised by or under law". The legal question is whether an ACT law can make such provision. Secondly, if an ACT law can do so, the issue then is whether clause 82 is consistent with HRA section 12, and, in particular, with whether clause 82 amounts to a breach of the right of a person "not to have his or her privacy … interfered with unlawfully or arbitrarily".

Karin MacDonald, MLA
Deputy Chair

June 2005

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

REPORTS—2004-2005

RESPONSES

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

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

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

Bills/Subordinate Legislation	Responses received—Scrutiny Report No.
Report 7, dated 6 April 2005	
Workers Compensation Amendment Bill 2005 **(Passed 7.04.05)**...	**No. 10**
Report 10, dated 2 May 2005	
Crimes (Child Sex Offenders) Bill 2005	**No. 11**
Crimes (Sentencing) Bill 2005	**No. 11**
Crimes Amendment Bill 2005 **(PMB)**	
Disallowable Instrument DI2005-21 - Waste Minimisation (Fees) Amendment Determination 2005 (No. 1)	**No. 11**
Disallowable Instrument DI2005-32 - Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No. 1)..	**No. 11**
Disallowable Instrument DI2005-34 - Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)....................	
Human Rights Commission Bill 2005	**No. 11**

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

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

COPY

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.4 of 7 March 2005. I offer the following responses in relation to the matters raised by your Committee on Disallowable Instrument DI2004-261 being the Liquor Licensing Standards Manual Amendment 2004 (No. 1).

The Committee's comments on alternative ways of drafting the instrument and the delay in notifying the instrument are noted. I am advised that the instrument is valid in its current form and that the delay in notifying the instrument has not affected the validity of the instrument, only the commencement date.

I have asked my department to take the Committee's comments into account in the preparation of future instruments and to ensure that unnecessary delays in notification do not occur.

Yours sincerely

Jon Stanhope MLA
Attorney General
- 4 MAY 2005

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JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR URBAN SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

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

Dear Mr Stefaniak Bill

Thank you for your Scrutiny of Bills Report No. 10 dated 2 May 2005. I offer the following response in relation to the matter raised by your Committee.

1. **Disallowable Instrument DI2005-32 – Road Transport (Public Passenger Services) Maximum Fares Determination 2005 (No 1).**

The Committee suggested that it would be more appropriate for paragraph 2 of the instrument to refer to "ACT Legislation Register" and "on" the Register on 19 July 2004.

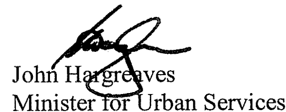
The Committees comments have been noted and will be monitored in the future.

2. **Disallowable Instrument DI2005-21 – Waste Minimisation (Fees) Amendment Determination 2005 (No 1)**

The Committee noted that there was no Explanatory Statement provided in relation to the Instrument. The Explanatory Statement is scheduled at No.4 on the Instrument. Clarification of the schedule is included in the Additional Explanatory Notes.

The Committees comments have been noted.

Yours sincerely



John Hargreaves
Minister for Urban Services

9 May 2005

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MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR BRINDABELLA

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

Dear Mr ~~Stefaniak~~ Bill

Thank you for your Scrutiny of Bills Report No. 6 dated 4 April 2005. I offer the following response in relation to the matter raised by your Committee.

Subordinate Law LS2005-4 - Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1)

The Committee comments that the Explanatory Statement to the subordinate law does not address the need to explain the reasons why a fault element is not required for the strict liability offences contained in the Amendment Regulation.

The strict liability offences on which the Report comments are regulatory offences applied in the interests of public and industry safety, consumer protection (including protection from the risk of dishonest activity), and ensuring standards are met.

For the majority of the offences, a fault element is not considered to be necessary as a defendant could be reasonably expected, because of his or her professional involvement, to know what the requirements of the law are. Public passenger service operators and drivers are expected to be aware of the requirements placed on them by the regulatory regime for their profession.

A small number of the offences relate to passenger conduct and a fault element is not considered to be needed in these cases as the offences are relatively minor regulatory offences imposed for reasons of comfort and safety. The rules reflect a simple commonsense approach to passenger behaviour and the penalties are of the lowest order.

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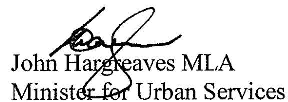
The Committee raises issues about the location, within the *Road Transport (Public Passenger Services) Regulation 2002* (the Regulation), of powers to enter and search. The Committee considers that such powers should only be provided in primary legislation.

The views of the Committee have been discussed with Parliamentary Counsel who agrees that the provisions should be relocated in the primary legislation. A proposal will be developed to relocate the enter and search powers from the Regulation to the *Road Transport (Public Passenger Services) Act 2001.*

The Committee also refers to the discussion of new Section 229 on page 9 of the Explanatory Statement. In comparison with old Section 170 (which Section 229 replaces), the new section clarifies that a 'contravention of conditions' is included as an example of the situations in which the Authority, a police officer or an authorised person may exercise the powers. The power is not widened by this change. The use of the word 'clarify' rather than 'indicate' may have been more appropriate in this instance.

Yours sincerely



John Hargreaves MLA
Minister for Urban Services

11 May 2005

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MEMBER FOR GINNINDERRA

COPY

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.2 of 14 February 2005. I offer the following response in relation to the matters raised by your Committee on the Justice and Community Safety Legislation Amendment Bill 2004 (No. 2) (the Bill).

Given the time constraints between when the Committee's comments were received and the debate of the bill in the Legislative Assembly, I responded to the Committee's comments in my close of debate speech for the bill. For completeness, however, I am happy to reiterate my comments again. During the debate, I pointed out that the amendment in clause 41 prevented the automatic cancellation of a liquor licence by the Court in circumstances where the cancellation may not be proportionate to the severity of the offence. For example, the Court may be required to find a licensee guilty on the facts before it, but the automatic cancellation of the liquor licence may not be proportionate to the severity of the offence. In these circumstances, the licensee should not be denied natural justice in terms of stating their case against cancellation before the Liquor Licensing Board. The Board may, for example, issue enforceable directions to the licensee which may better serve the public interest.

I hope this information addresses the Committee's concerns about the Justice and Community Safety Legislation Amendment Bill 2004 (No 2).

Yours sincerely

Jon Stanhope MLA
Attorney General

13 MAY 2005

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Jon Stanhope MLA

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ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
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Mr Bill Stefaniak MLA
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Standing Committee on Legal Affairs
GPO Box 1020
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Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No 10 of 2 May 2005. I offer the following comments in relation to the matters raised by your committee on the Crimes (Child Sex Offenders) Bill 2005 (the Bill).

Trespass on rights and liberties

The committee has questioned whether this Bill unduly trespasses on rights and liberties and makes reference to a number of fundamental human rights engaged by the legislation.

The purpose of the Bill is to require certain offenders to report specified personal information to police for inclusion in a Register of Sex Offenders, and to report such details annually to police. The impetus for the legislation stems from the obligation to ensure, as far as possible, the safety and protection of children from sexual assault and violence. The *Human Rights Act 2004* (HRA) recognises that children are entitled to special protection because of their status as a child (s11 (2) HRA). The obligation to protect children from violence is also underlined in the provisions of numerous international human rights instruments, including the Convention on the Rights of the Child.

The government has taken into account the need to balance the rights and interests of all parties affected by the legislation and to ensure that any limitations of rights is strictly proportionate to the objective of the legislation. In my view, the reporting requirements imposed on registrable offenders are not onerous and the subsequent limitations on the rights to privacy, liberty and freedom of movement for registrable offenders are both necessary and proportionate to achieve the aims of the legislation. Consequently, there is no incompatibility with the HRA on the face of the legislation or the Bill.

The committee will also recall that it is a statutory duty of the police and the court to interpret and give effect to the legislation in a manner that is consistent with the HRA so far as it is possible to do so. Section 30 of the HRA requires that administrative and judicial bodies must exercise their discretion consistently with human rights unless expressly authorised to act inconsistently with those rights.

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Young Offenders

The committee has questioned the extent to which the legislation impacts upon the right of young offenders to protection under s 11(2) HRA. S11 (2) HRA applies to all children, including young offenders. The HRA also affords special protection to all children in the criminal process and recognises the child's right to procedures that take account of the child's age and promotes his or her rehabilitation (s22 (3) HRA). The government has carefully considered the application of the legislation to young offenders and has sought to ensure that their treatment under the Bill is proportionate to their status as children.

In considering the effect of the legislation on young offenders it needs to be emphasised that the registration scheme would not automatically apply to a young offender who commits a registrable offence of an act of indecency with a young person or possessing child pornography. Clause 9 of the Bill is included as a safeguard against the influx of young offenders on the register for the commission of these offences.

Privacy Issues

The committee has questioned whether this Bill unduly impinges on the privacy interests of persons (registrable offenders) affected by the requirement to register and report details to police. The committee raises specific privacy issues in relation to the manner of reporting, the lack of clarity of reporting obligations, the use of identifying material, and access to the register. The intent of the registration scheme is that a registrable offender will report in person to a police station. The committee has raised an issue over whether there should be provided other forms of reporting that would be less public in character. In my view, the obligation imposed on a registrable offender to report personally to a police station does not unduly impinge on that person's right to privacy when reporting. The Bill explicitly provides for a right to privacy for a registrable offender when reporting in person (clause 73) and when being photographed (clause 79). In addition, a person making a report is entitled to make the report outside the hearing of members of the public (clause 73). These safeguards provide legislative protection against arbitrary interferences with the right to privacy. The Bill further allows for the reporting of travel details to be made by post, fax or email (clauses 48 and 49.)

The committee has expressed concern in relation to clause 82 of the Bill. Clause 82 relates to the keeping of identification material for the purposes of law enforcement, crime prevention, or child protection. At the end of the registrable offender's reporting period, the chief police officer must ensure that any item that is being kept is destroyed.

The committee is concerned that the material being kept under clause 82 may be used more generally for law enforcement and crime prevention. In this way, the committee argues that the purpose for which the material can be used has been broadened outside the scope of Privacy Principle 11 (section 14 of the *Privacy Act 1988*), which only permits disclosure where it is reasonably necessary for the enforcement of the criminal law.

In my view, the concerns of the committee in relation to the keeping of identification material, and the subsequent use of that material are unfounded. The committee is basing its concerns on the disclosure of information, which is governed by Privacy Principle 11 and is merging the distinction between the keeping of material (under section 82 of the Bill) with the disclosure of material under Privacy Principle 11. Clause 82 outlines the purposes for which identification material may be kept. Clause 118(1)(b) of the Bill outlines the disclosure of the material and mimics the disclosure of material in accordance with Privacy Principle 11. Under clause 118, access to the register is restricted to people authorised by the chief police officer or under regulation and personal information can only be disclosed by a person with access to the register for law enforcement activities or as required under an Act or other law.

Freedom of movement

The committee questions whether the regulation of the movement of registrable offenders nationally and internationally breaches section 13 of the HRA. Section 13 provides that everyone has the right to move freely within the ACT and to enter and leave the ACT. While section 13 of the HRA engages a right to freedom of movement, this right is not absolute. For example, the right to freedom of movement may be justifiably limited in situations involving family law custody, in cases where a person is required to give evidence in a court of law, or is a suspect in the commission of a crime. Where a provision interferes with a particular right or freedom, it may nevertheless be consistent with the HRA if it is justifiable in terms of section 28 of the HRA. Section 28 provides any law that interferes with a right must be reasonable and demonstrably justifiable in a free and democratic society. It must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued.

The Bill does not negate the right to freedom of movement; it only requires registrable offenders to report on their travel movements both within and outside the ACT. A registrable offender still maintains that right to move freely within the ACT and to enter and leave the ACT. The limitation is therefore justifiable and proportionate in terms of section 28 HRA.

Presumption of innocence

The committee has expressed concern over the provisions of the Bill (clauses 12, 13, 129 and 130) which impose reporting obligations on persons who are appealing a sentence, have had a finding of guilt quashed, or requires a person to disclose the fact of being charged to a prospective employee. The committee argues that this is in conflict with the presumption of innocence and may breach section 22 of the HRA.

Section 22 of the HRA provides that a person charged with a criminal offence has the right to be presumed innocent, and treated as innocent, until and unless he or she is convicted in proceedings which meet the requirements of a fair trial. The right to be presumed innocent essentially requires all the relevant authorities to refrain from prejudging any case. For example, no inconsistency with section 22 HRA arises where the authorities publicly name a suspect, or state that a suspect has been arrested, has confessed or has been charged, so long as there is no declaration that the person is guilty.[1]

As the Bill is preventative, and not punitive in nature, and registrable offenders are not being dealt with as if they are guilty of an offence, it is my view that the Bill is consistent with the presumption of innocence.

Restrospectivity

The committee is concerned over some provisions of the Bill that may breach section 25(2) of the HRA. Section 25(2) provides that a penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty applied to the offence when it was committed.

In my view the provisions of the Bill are not subject to section 25 of the HRA as this section depends on the imposition of a criminal penalty. International human rights jurisprudence has viewed child sex offender schemes as an administrative risk-prevention measure, rather than criminal punishment. The retrospective application of sex offender registration schemes was considered by the European Commission for Human rights (in relation to the UK scheme) and was found not to amount to a retrospective penalty. The protective nature and coverage of the scheme would be diminished if persons who are currently serving sentences were not included.

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[1] *Krause v. Switzerland*, 13 DR 73, 3 October 1978; see also *Worm v. Austria*, (83/1996/702/894), European Court, 29 August 1997

Free speech

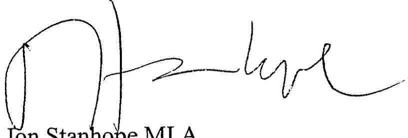
The committee has raised an issue of whether the imposition of an obligation on a registrable offender to provide personal information breaches this right. In my view the Bill does not breach section 16 of the HRA relating to freedom of expression. In support of my argument, I wish to highlight the advice given from the Ministry of Justice to the New Zealand Attorney General in relation to the Sex Offenders Registry Bill (which the Committee highlighted in the report), that a statement of an individual's name and address is not sufficiently expressive to attract the protection afforded by the right of freedom of expression.
[http://www.justice.govt.nz/bill-of-rights/bill-list-2003/s-bill/sex-offenders.html]

Due process of law

The provisions of clause 15 (not 43 as mentioned by the committee) for a court to declare a person to be a registrable offender have also created concern for the committee. Part 2.2 of the Bill provides for a sentencing court, upon application by the prosecution, to declare that a person is a registrable offender and therefore subject to reporting obligations. The committee is concerned that this provision does not afford an offender due process of the law.

Due process is a range of procedural safeguards to ensure fairness when a person is arrested and faced with prosecution or punishment and prosecution. In my view, the Bill does not breach due process as the defendant is present in court, has the opportunity to defend and respond to the application, and all processes of natural justice are accorded. The order is part of the sentencing process and ensures that a person is not declared a registrable offender unless that person has been sentenced for a registrable offence.

Yours sincerely



Jon Stanhope MLA
Attorney General

- 3 JUN 2005

Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No 10 of 2 May 2005. I write in reply to the committee's brief comment on the Crimes (Sentencing) Bill 2005.

As you note in your report, clause 43 provides the author of a pre-sentence report — an assessor — with the authority to obtain relevant information from entities for a pre-sentence report. Clause 43 also ensures that cooperation in good faith by entities is not a breach of professional standards, or a ground for civil proceedings.

The authority to gather the information is essential for the completion of a pre-sentence report, as set out in clause 42. The matters contemplated by a pre-sentence report are by their very nature personal: social history; medical history; financial circumstances etc. This kind of information is sensitive and places the onus upon the assessor to act lawfully.

The Bill provides what would be the lawful framework for the use of this information. As stipulated in clause 41(4), an assessor is a person delegated under the *Public Sector Management Act 1994*. Any assessor would be required to abide by section 9 of the *Public Sector Management Act 1994,* which includes a clear requirement not to unlawfully disclose any information acquired as a consequence of their employment.

Consistent with section 22(2)(i) of the *Human Rights Act 2004* (HRA) the Bill also retains the right of an accused not to be compelled to testify against themself.

In my view the authority and protections set out in clause 43 of the Bill, in order to give effect to clause 42, is a reasonable limitation (consistent with section 28 of the HRA) on section 12 of the HRA and necessary to provide the court with relevant and accurate information for sentencing.

I thank the Committee for its compliment regarding the Bill's Explanatory Statement.

Yours sincerely

Jon Stanhope MLA
Attorney General

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- 3 JUN 2005

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Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
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Dear Mr Stefaniak Bill

Thank you for your Scrutiny of Bills Report No.10 of 2 May 2005. As the Attorney General is currently overseas I am responding on his behalf. I offer the following response in relation to the matters raised by your Committee on the Human Rights Commission Bill 2005 (the Bill).

Section 97 of the Bill deals with notification of incorporated documents and any amendment or replacement of incorporated documents. The provisions of the Bill relating to when a person may make a complaint about services refer to a variety of standards that service providers should comply with. Many of those standards are made by bodies that are not ACT government agencies. As a result it may not be possible to provide an electronic copy on the ACT Legislation Register. The scheme for notification and inspection of incorporated documents set out in sections 96 and 97 is designed to ensure that information about relevant service and professional standards is readily available to people in the ACT.

Section 99 of the Bill contains secrecy provisions that reflect existing provisions in section 122 of the *Discrimination Act 1991.* If the effect of the *Evidence Act 1995* (Cwlth) was to require the information to be divulged or communicated then sections 99(3) and 99(5) would operate to allow that to happen without breach of the provision. The definition of 'law of the territory' in the *Legislation Act 2001* means that the term 'territory law' used in those sub-sections covers Commonwealth law that operates in the ACT. However, the effect of section 56 of the *Evidence Act 1995* (Cwlth) is to make material admissible rather than compellable.

Section 66(2) of the Bill is not intended to define when section 131 of the *Evidence Act 1995* (Cwlth) applies but to extend its effect by applying it to matters to which it would not otherwise apply. While an ACT Act cannot alter the effect of a Commonwealth Act, there is nothing to prevent it importing the effect of specific provisions in this way.

In relation to displacement of the privilege against self-incrimination and the provision instead for direct-use and derivative-use immunity in section 75 of the Bill, the committee suggests that, while not of concern, some justification should be offered. It is true that provisions relating to a number of investigative bodies contain similar provisions. The Human Rights Commission will be an investigative body that will look into a wide range of issues of both private and public importance.

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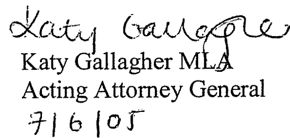
It will be able to make recommendations to service providers and also, where appropriate, to government agencies but it will not be able to make any enforceable decisions. In order to properly carry out its function of assisting in resolving matters of concerns between service providers and service users and of providing recommendations on issues of public policy it is essential that the Human Rights Commission is able to receive full and open communication from people who are able to give it relevant information or insights. This is facilitated by removing the constraints of the self-incrimination privilege. Participants in the inquiry process are protected by the direct-use and derivative-use immunity.

In relation to conciliation, it is generally accepted that the process cannot work if parties to a dispute are compelled to participate. However, parties who might be reluctant to attend can be persuaded to participate freely in a conciliation if they can first be induced to attend. In particular where there is a large power imbalance between the parties the more powerful one may refuse to consider attempting conciliation at all, perhaps preferring to deal with the matter only if the other party takes legal action in another forum. However, if both parties are subject to an equal statutory compulsion to attend a conciliation, the party that would not have otherwise taken part may do so and a successful conciliation may result. Parties that attend but still do not want to participate in the conciliation are appropriately under no compulsion to do so.

Yours sincerely



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7/6/05