Legislative Assembly for the ACT

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

Scrutiny Report

18 SEPTEMBER 2006

Report 32

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bill—No comment

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

SUPREME COURT (JUDGES PENSIONS) AMENDMENT BILL 2006

This Bill would amend the Supreme Court Act 1933 to make provisions concerning superannuation entitlements and allowances for Territory and Federal Court Judges.

Bills—Comment

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

CARERS RECOGNITION LEGISLATION AMENDMENT BILL 2006

This Bill would amend three Acts so that they better support carers in the Territory. A person is a carer of a dependant if the latter is dependent on the person for ongoing care and assistance; and the person cares for the dependant otherwise than because of a commercial arrangement, or an arrangement that is substantially commercial.

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

Is it justifiable to further derogate from the principle that it is unlawful for a person to discriminate against another person by refusing the other person's application for accommodation?

Paragraph 21(1)(a) of the *Discrimination Act 1991* provides that it is unlawful for a person to discriminate against another person in the refusal of the other person's application for accommodation (and makes similar provision for allied activities).

By clause 5 of the Bill, section 26 of the Act would be amended to permit discrimination in the provision of accommodation services in respect of particular premises, where one or more carers of the person who provides or proposes to provide the accommodation lives or intends to reside in the premises. At present, this dispensation from the obligation not to discriminate in the provision of accommodation is limited to the case where the resident or intending resident is the accommodation provider or a "near relative" of that person. It should also be noted that the dispensation is not applicable where the accommodation in the premises is for more than 6 people (excluding the provider, near relative or carer).

The Explanatory Statement explains that "[t]he result of the amendment is to provide appropriate recognition to the close relationship between a carer and a dependent person, which is much like a family relationship".

Paragraph 21(1)(a) of the Act may be seen as legislative recognition of the right stated in subsection 8(3) of the *Human Rights Act 2004*:

> (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.

Given that this clause of the Bill would further derogate from the principle in paragraph 21(1)(a), the Committee must point to the rights issue thus raised. In this particular case, there is no issue of significance **if** the policy of the existing section 21 is accepted. On the face of it, there is perhaps more justification for recognition of the relationship between the provider of the accommodation and a carer than is of recognition of the near relative - who may or may not provide any care to the provider.

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2006

This Bill would amend a number of laws administered by the ACT Department of Justice and Community Safety.

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

Is the provision for offences of strict liability in proposed sections 42 and 42A of the *Security Industry Act 2003* a justifiable derogation of the presumption of innocence?

(See Schedule Part 1.14 for the amendments proposed to this Act.)

The Explanatory Statement notes that a substituted section 42 of the *Security Industry Act 2003* "removes the requirement for employees to wear their licence, and replaces it with a requirement to carry the licence and produce it for inspection on demand" (although it appears that employees carrying out some kinds of duties will be required to wear the licence). A new section 42A permits the commissioner of fair trading to "exempt a licensee from a provision of section 42 if satisfied that it is appropriate to exempt the licensee because of the special nature of the licensee's functions" and such an exemption "may be subject to conditions".

Both proposed sections create offences of strict liability in relation to a failure to observe a requirement for the wearing or production of a licence (section 42) or the failure to observe a condition attached to an exemption (section 42A). In both cases, the maximum penalty is 10 penalty points. The Committee has expressed a view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Scrutiny Report No 2* of the *6th Assembly*.

On the face of it, these provisions derogate from the presumption of innocence stated in HRA subsection 22(1), and raise the issue of whether derogation is justifiable under HRA section 28; (see generally *Scrutiny Report No 2* of the *6th Assembly*).

The Explanatory Statement does not address this issue in relation to section 42, but what it says in relation to section 42A is relevant to both:

> This offence has a low penalty, and addresses the potential mischief that can be caused by members of the security industry in not complying with conditions of an exemption from wearing or carrying their licence. The offence serves the public interest in ensuring that regulatory schemes are observed through the sanction of criminal penalties, and prevents potential abuse of the scheme of granting exemptions from section [42A].

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

REVENUE LEGISLATION AMENDMENT BILL 2006 (NO 2)

This Bill would amend the *Duties Act 1999* and the *Taxation Administration Act 1999* to facilitate the introduction of an electronic lodgement and payment service for certain duty transactions.

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

Is there an insufficient definition of the powers of commissioner under proposed section 239 of the *Duties Act 1999* to approve the making of an assessment application and the payment duty electronically, and then to amend, suspend or cancel such an approval?

Proposed section 239 of the *Duties Act 1999* would in part provide:

> **239 Electronic assessment and payment of duty**
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> (1) A person may apply to the commissioner, in writing, for approval to make assessment applications and pay duty electronically.
>
> …
>
> (2) On application under subsection (1), the commissioner must—
>
> (a) approve the application; or
>
> (b) refuse to approve the application.
>
> (3) An approval may be given subject to conditions stated in the approval.
>
> …
>
> (4) The commissioner may amend, suspend or cancel an approval given to a person under this section by written notice given to the person.

It is evident that the commissioner has an unfettered discretion to approve the making of an assessment application and the payment duty electronically, and then to amend, suspend or cancel such an approval. On the face of it, these powers are insufficiently defined. The Explanatory Statement does not state why it is necessary to confer these powers in such wide terms.

In *Scrutiny Report No 6* of the *Sixth Assembly*, the Committee said:

> A Committee will review the terms in which administrative power is conferred in discharge of its function to ascertain whether "rights, liberties and/or obligations" have been made "unduly dependent upon insufficiently defined administrative powers". In particular, the Committee is concerned with the following matters.
>
> A power expressed in very wide terms—such as that the decision-maker simply "may" do something—does, on its face, appear to be "insufficiently defined". A court would no doubt read down such a power so that its lawful exercise would require that the decision-maker have regard only to those matters the court, by reference to its view of the object of the Act, thinks were intended by the Act to be relevant to the exercise of the power. Nevertheless, the Committee's term of reference indicates that the law should provide a sufficient definition of relevant (and/or irrelevant) matters.

The Committee may comment on a Bill from the perspective that where an administrative discretion is conferred, then:

- as far as practicable having regard to the nature of the power, the decision-maker be required to address specific matters;
- if a generally worded residual discretion to act is desirable, that completely subjective language be avoided (and instead, for example, a power to act on "reasonable grounds" be conferred); and
- that some person or body, (preferably including the decision-maker, but perhaps some other superior authority too), be empowered to issue guidelines which state how in general the administrative discretion should be exercised. Guidelines might be prescriptive as to the range of matters the decision-maker may consider, or, in some circumstances, might leave a residual discretion to the decision-maker.

These issues may appear relatively insignificant given the nature of the administrative power that would be conferred by proposed section 239.

So far as concerns proposed section 239, the Committee draws the attention of the Assembly to the lack of any indication in the statute of the circumstances in which it would or would not be appropriate to exercise these administrative powers. To be balanced against the need for greater definition is the low impact an exercise of these powers may have on a person.

The Committee nevertheless considers that important rights issues are involved.

First, the more confined is the expression of the scope of an administrative power, the more it may be said that a fundamental aspect of the "rule of law" is observed. Second, although it is far from evident if regard is had merely to the words of HRA subsection 21(1), the more likely it is too that the legal framework surrounding the grant of power will comply with the HRA.

So far as concerns the HRA, the legal situation is quite complex, and the Committee takes this opportunity to expand on its position by reference to subsection 21(1) of the *Human Rights Act 2004*. After stating the essence of the matter, the Committee records the advice it has received from its legal adviser concerning how it is that HRA section 21(1) limits legislative choice in the design of schemes for the exercise of administrative power and of judicial review. It takes these steps both to inform the Assembly of the reasoning that underlies its comments on schemes of administrative power, and to contribute to the "dialogue" between the Assembly and the Executive.

On the basis of this legal advice, the Committee takes the view that the terms on which administrative power is conferred by statute may not comply with HRA subsection 21(1) where, having regard to matters such as the potential effect of the exercise of the power on persons:

(1) the circumstances in which the power may be exercised (which of course requires attention to the scope of the discretionary elements of the power) are insufficiently defined;

(2) the procedure to be followed in the exercise of the power does not meet the requirements of natural justice (or "procedural fairness"); and

(3) the scope for judicial review of the legality of an exercise of the power is not sufficient.

This does not exhaust the range of matters relevant to an assessment of HRA subsection 21(1) compliance, but indicates the major matters to which the Committee has often drawn attention.

A statute that vests in a body or person (other than a court or tribunal) a power to take action that affects the rights or obligations of a person on its face derogates from HRA subsection 21(1). But such a scheme might be found under HRA section 28 to be a justifiable derogation of subsection 21(1) if, in the words of the theory applied by the European Court of Human Rights, and adopted in the United Kingdom House of Lords in their application of Article 6 of the *European Convention on Human Rights*, "the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires": (*R (on the application of Thompson) v Law Society* [2004] 2 All ER 113 at 129, per Clarke LJ). It is this theory that reveals how section 21(1) limits legislative choice in the design of schemes for the exercise of administrative power and of judicial review.

In assessing "whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient" (Lord Hoffman), **the courts look at the scope for review by a court of the administrative decision, and at the nature of the power itself – including the conditions under which it may be exercised – and the nature of the process to be followed in the exercise of the power.** In this way, the courts necessarily review the design of the decision-making scheme.

Of course, the matters that a court may address under HRA subsection 21(1) **are also matters that the Assembly should address when considering a bill for an Act that would create (or add to) an administrative decision-making scheme**.

(In addition, the theory confers on the ACT Supreme Court an extensive power to re-fashion the principles of administrative law, and to decide just how far its jurisdiction to review the legality of administrative action can be modified. This result is, however, of a kind which flows from the enactment of a law like the HRA.)

One important matter is clear. The **assessment of whether the derogation from ssubsection 21(1) is justified under section 28 will turn critically on the ability of the person affected to seek legality review of the decision by a court**. In relation to this last matter, in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 328 [81] Lord Hoffman said that the European Court saw Article 6(1) "as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals", adding:

> The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision (at 329 [84]).

Before setting out its legal advice, the Committee will add further to what it has said in other reports about privative clauses; see in particular *Scrutiny Report No 49* of the *5th Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004 and *Scrutiny Report No 11* of the *6th Assembly*, concerning the Water Resources Amendment Bill 2005. In the latter, the Committee drew attention to HRA subsection 21(1) and to section 48A of the *Australian Capital Territory (Self-Government) Act 1988*. Subsection 48A(1) provides: "(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.". The Committee suggested that the power of the Assembly to restrict judicial review is limited by subsection 48A(1).

The Committee notes support for this view in the reasoning of Crispin J in *Commissioner for Housing v Ganas* [2003] ACTSC 34, where his Honour said:

> 12. … The Self-Government Act is, of course, the Commonwealth statute which, like a constitution, confers and delineates the powers of the ACT legislature. It may be noted that subs 48A(2) authorises the Territory to confer further jurisdiction upon the Supreme Court but does not authorise it to reduce or limit the jurisdiction conferred by sub (1). The Supreme Court Act was also a Commonwealth Act until 1992 and the ACT *Supreme Court (Transfer) Act 1992* (Cth), which provided for that Act to be taken to be a Territory enactment, both amended s 20 (formerly s 11) of the Supreme Court Act to its current form and inserted s 48A into the Self Government Act. Whilst s 20 of the Supreme Court Act thus provided that the Supreme Court "has" all original and appellate jurisdiction necessary for the administration of justice in the Territory, s 48A of the Self Government Act provided that the Supreme Court "is to have" such jurisdiction. In this context it seems clear that the future tense was adopted to make it clear that the Supreme Court would continue to have such jurisdiction notwithstanding the transfer of legislative power over the Supreme Court to the Territory. Hence, in my view, this broad jurisdiction is effectively entrenched by s 48A.
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> 13. Section 28 of the Self Government Act expressly provides that a provision of a Territory enactment has "no effect" to the extent that it is inconsistent with a law of the Commonwealth in force in the Territory. Hence, the provisions of a Territory enactment cannot limit the effect of a Commonwealth law such as s 48A either expressly or by implication, whether arising from principles such as the *generalia specialibus non derogant* principle or otherwise.

> 14. … s 48A must be given full force and effect notwithstanding any provision of an ACT enactment.

A similar view of the effect of subsection 48A(1) might be implicit in the judgment of Higgins CJ in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 61, and see too *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, where the High Court considered the effect of s 75(v) of the *Constitution* on privative clauses.

The Committee's legal advice concerning how HRA subsection 21(1) limits legislative choice in the design of schemes for the exercise of administrative power and provision for judicial review of administrative decisions

> **21 Fair trial**
>
> (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.

The concept of decisions concerning "rights and obligations recognised by law" embraces many kinds of administrative decisions. HRA subsection 21(1) derives from Article 14(1) of the ICCPR, which latter in part provides: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee of the United Nations has said of ICCPR Article 14 that a "suit at law" embraces a determination by an administrative decision-maker, where that determination is of a claim "of a kind subject to judicial supervision and control".[1] (But must those decisions be final decisions, or are interim decisions included?[2] The language of Article 14 ICCPR ("determination") suggests a final disposition of the matter, but HRA subsection 21(1) omits this language.[3])

Subection 21(1) provides that a person has the right to have the decision made by a "court or tribunal", and only "after a fair and public hearing".[4] It might be thought that this produces an absurd result. On its face, a law which reposed the power of making an administrative decision in a body other than a court or tribunal would be derogate from subsection 21(1). Yet, of course, thousands of administrative powers are conferred on persons and bodies which are not courts or tribunals. Conflict with subsection 21(1) would arise without getting to the question of whether the decision-maker made its decision fairly, or after a public hearing. Even if the word "tribunal" is read very broadly to encompass any administrative decision-maker,[5] most administrative

[1] Joseph S, Schultz J, and Castan M, *The International Covenant on Civil and Political Rights* (OUP, 2nd ed, 2004) [14.07]. Commentary on s 27 of the New Zealand Bill of Rights sees this language as confirmatory of the scope of judicial review of administrative action; see Guscroft G, "The Right to Justice", in Rishworth et al, n 18, at 760-765.
[2] The kind of problem that may arise is illustrated by *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113.
[3] The Explanatory Statement to the Human Rights Bill contains no commentary to s 21.
[4] It does not say that s 21(1) applies only where a "court or tribunal" makes a decision of the kind described. That perhaps is what was meant, but clearly it is not what it says.
[5] That Act statutes employ the word "tribunal" in a narrow sense will not be controlling, for one would think that the ACT Supreme Court will apply the principle that the words of the HRA must be given an autonomous meaning, in the sense that their meaning cannot be controlled by another ACT law unless the other law is clearly designed to amend the HRA, (and excepting of course other laws - such as a Commonwealth statute - of higher status to the

decisions are not made after a "pubic hearing". Thus, on some basis, most administrative decision-makings schemes would derogate from subsection 21(1).

But any such scheme might be found under HRA section 28 to be a justifiable derogation of subsection 21(1) if, in the words of the theory applied by the European Court of Human Rights, and adopted in the United Kingdom House of Lords in their application of Article 6 of the *European Convention on Human Rights*, "the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires".[6] It is this theory that shows how HRA subsection 21(1) limits legislative choice in the design of schemes for the exercise of administrative power and of judicial review.

The House of Lords spelt out this theory in *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430. Having presented herself as homeless to the Tower Hamlets Council, Runa Begum was provided with temporary accommodation under a non-secure tenancy, terminable upon a month's notice. She was then assessed as eligible for assistance and in priority need. In accord with a statutory duty, the Council offered her a secure tenancy, which she refused, citing various reasons. The council then determined that this refusal was unreasonable, and that it had thus discharged its duty. Runa Begum was given notice to quit the temporary accommodation. On an internal review, in accord with a procedure which afforded her an interview by a council officer and a right to make representations in writing, the reviewing officer also decided that her refusal was unreasonable. She then exercised her right to appeal to a county court on "any point of law arising from the decision". This enabled an applicant "to complain not only that the council misinterpreted the law but also of any illegality, procedural impropriety or irrationality which could be relied upon in proceedings for judicial review" (at 443 [17] (Lord Hoffman).

Eventually, the House of Lords was called on to consider whether this scheme for decision-making and appeal satisfied the provision in Article 6(1) of the European Convention that in the determination of a person's "civil rights and obligations" he or she was guaranteed "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The Lords held that the review officer could not, by reason of her employment by the Council, be regarded as "an independent and impartial tribunal established by law" (for example, at 438 [3] (Lord Bingham). But did the decision of the review officer amount to a determination of Runa Begum's "civil rights"? One possible answer was that Article 6 had no application to an exercise of administrative power. This was arguable on the basis that "the *travaux préparatoires* and other background to the Convention" revealed that:

> the term "civil rights and obligations" was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the

HRA). The autonomous meaning approach enhances the status of the HRA as a statute designed to set limits to what may be provided for by other statutes.

[6] *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113 at 129, per Clarke LJ.

> adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration (at 445 [28] (Lord Hoffman)).

Nevertheless, the absence of "addition to the Convention to deal with administrative decisions" led the European Court of Human Rights "to develop the law" (at 445 [28] (Lord Hoffman)) concerning Article 6 in various ways to the general effect that it applies to much (but not all) administrative decision-making. (Each Law Lord declined to decide this issue, being content to assume that the decision of the review officer was a determination of Runa Begum's "civil rights".)

But this development of the law posed a problem. In the practice of the European states administrative decision-making was commonly entrusted to an administrative official who was *not* "an independent and impartial tribunal established by law", and whose decision was *not* subject to a right of appeal on the merits to a court ((at 446 [31] (Lord Hoffman)).[7] On one view, such a scheme did not comply with article 6(1) because at no stage did a body which was "independent and impartial" make the decision. To avoid this absurd result, article 6(1) had to be interpreted 'flexibly'. Lord Bingham LC said that if an "elastic" interpretation is given to "civil rights", this must be accompanied by a "flexible … approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided" (at 439 [5]).

Before turning to this flexible approach, it should be noted Lord Hoffman pointed to *Kaplan v United Kingdom*, in which the European Commission on Human Rights had

> offered what would seem to an English lawyer an elegant solution, which was not to classify the administrative decision as a determination of civil rights or obligations, requiring compliance with article 6, but to treat a dispute on arguable grounds over whether the administrator had acted lawfully as concerned with civil rights and obligations, in respect of which the citizen was entitled to access to a fully independent and impartial tribunal. By this means a state party could be prevented from excluding any judicial review of administrative action (as in the Swedish cases which I have mentioned) but the review could be confined to an examination of the legality rather than the merits of the decision (at 446 [32]).[8]

Of course, what an examination of the legality of a decision must involve in the particular context would remain for debate, as it does under the theory (see below) that has been adopted. For example, a short limitation period on the availability of review might render the scheme non-compliant.[9] But the European Court has not adopted this solution, and in *Runa Begum* the House of Lords confirmed that United Kingdom courts should follow suit. Lord Hoffman does not elaborate, but the rejection of this theory might derive from the lack in many European states of a system of judicial review akin to the English system. It is however a solution open to a Territory court in its application of HRA subsection 21(1), and on the face of it has much in its favour.

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[7] Citing the decision of European Commission of Human Rights in *Kaplan v United Kingdom* (1980) 4 EHRR 64 at 90 [161].

[8] Lord Hoffman perhaps meant to refer to (1980) 4 EHRR 64 at [153]-[155], and [163]-[164]. Relevant extracts from the opinion of the Commission are in Farran S, *The UK Before the European Court of Human Rights* (Blackstone Press, 1996) pp 153-157.

[9] This issue was issue examined in *A v Hoare* [2005] EWHC 2161.

To turn now to the "flexible" theory that has been adopted, Lord Hoffman summarised its elements in four propositions:

> **first**, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, **secondly**, **if the administrator is not independent** (as will virtually by definition be the case) **it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient**. **Thirdly**, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And **fourthly**, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with the case as the nature of the decision requires." (at 447 [33], emphasis added, and see for a shorter statement, at 463 [100]-[101] (Lord Millett)).

There is much vagueness in these propositions, and the UK courts continue to work out their ramifications.[10] The key difficulty is to reconcile what article 6 (or HRA subsection 21(1)) requires and the role of the judiciary, with the need for efficient administration and a recognition that there also exists a process of democratic accountability through Ministerial responsibility. It appears that the House of Lords has shifted its theory towards granting more scope to the parliament to determine matters such as the nature of the administrative scheme and the scope for judicial review. A brief review of what was said in *Runa Begum* may assist an understanding of at least the complexity of the law.

In relation to the third proposition, Lord Hoffman noted that "the English conception of the rule of law [which] requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts" is "accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament" (at 447 [35]). Concerning the application of the third proposition to the case at hand, *it was argued* by the appellant that:

> when a decision turns upon questions of policy or "expediency", it is not necessary for the appellate court to be able to substitute its own opinion for that of the decision maker. That would be contrary to the principle of democratic accountability. But, when, as in this case, the decision turns upon a question of contested fact, it is necessary either that the appellate court have full jurisdiction to review the facts or that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial (at 447-448 [37]).

[10] The UK cases that elaborate on the Bryan approach are discussed in Feldman D (ed), *English Public Law* (OUP, 2004) at [12.29]-[12.36], and in P Craig, "The Human Rights Act, Article 6 and Procedural Rights" [2003] Public Law 753.

Lord Hoffman *rejected this distinction* as a helpful guide to deciding whether an administrative decision-making scheme is Article 6 compliant.[11] But he did draw some other distinctions. Dealing with *Bryan v United Kingdom* (1995) 21 EHRR 342, Lord Hoffman said that a finding of fact by an administrator in the context of an enforcement proceeding "was closely analogous to a criminal trial" (at 448 [41][12]), thus suggesting, it appears, that the decision was affected by a general principle which he then stated:

> The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker: see *De Cubber v Belgium* (1984) 7 EHRR 236 (at 448-449 [42]).

On the other hand,

> utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. … in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament (at 448-449 [42]).

Consideration of these factors in a particular context might justify (in terms of what Article 6(1) requires) a finding that fact-finding may be entrusted to an administrator subject only to a limited degree of judicial review of fact-finding. In this context, review of fact on "conventional principles of judicial review" (at 451 [50])[13] was appropriate.

Just what degree of judicial review is necessary will depend on the nature of the decision. In the *Runa Begum* context, Lord Hoffman noted that an earlier Lords decision had held that housing authority decisions should not be easily susceptible to judicial review.[14] Less clear is the statement that:

> When one is dealing with a welfare scheme which, in the particular case, does not engage human rights (does not, for example, require consideration of article 8) then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme (at 451 [49]).[15]

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[11] Although conceding that he had made an "incautious remark" in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 338 [117], which did support the appellant's argument.

[12] One might think that a decision on a criminal charge must be made by a court after a "fair and public hearing" to be s 21(1) complaint. Why then s 21(1) contemplates decision of a criminal charge by a "tribunal" is a puzzle.

[13] Of course, this raises the question of just what are the conventional principles, and how far they may be qualified. Whether an ACT court adopts the theory applied in *Runa Begum*, or the simpler theory of *Kaplan*, it may hold in some particular context, or even generally, that legislative restriction of its power to review findings of fact under say s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) is such as to render its power of review less than that required by HRA s 21(1).

[14] Citing *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484 at 518.

[15] The reference to article 8 may have been made to acknowledge that a court might quash a decision, in cases in which Convention rights were engaged, on the ground of lack of proportionality; see *R (Daly) v Home Secretary* [2001] 2 AC 532 at 547 [27] (Lord Steyn) quoted above.

He described the review officer's decision as "a "classic exercise of an administrative discretion"". That is, "the decision was arrived at was by the review process, at a senior level in the authority's administration and subject to rules designed to promote fair decision-making" (at 452 [52]). He held that "the Strasbourg court has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient", (at 452 [53]), and that "[i]n the normal case of an administrative decision, however, fairness and rationality should be enough (at 452 [54]). By the "normal case", it appears that he referred to decisions in "areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators", and included decisions which were based on "preliminary findings of fact" (at 453 [56]).

Thus, Lord Hoffman rejected the notion that:

> the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain (at 453 [58]).

Rather,

> the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact (at 454 [59]).

Lord Hoffman offered some more general guidance as to how a court should assess whether a particular decision-making scheme coupled to some form of judicial review was Article 6(1) compliant. He cited "the great principle" which *Bryan v United Kingdom* (1995) 21 EHRR 342 at 360 [45] decided, being that

> in assessing the sufficiency of the review ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal ([2003] 2 AC 430 at 451-452 [51]).

In that case, the European Court took account of the safeguards that attached to the making of the decision that was the subject of the review. The decision-maker was an inspector, and the Court referred to:

> the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality.

TOBACCO (COMPLIANCE TESTING) AMENDMENT BILL 2006

This Bill would amend the *Tobacco Act 1927* to enable the conduct of compliance testing in aid of the enforcement of the prohibition on the sale of smoking products to persons under the age of 18. Compliance testing is a strategy which involves test purchases of cigarettes or other tobacco products made by trained young persons under the supervision of an authorised officer.

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

The Committee's limited research reveals that, when viewed from a rights perspective, a proposal to use children in compliance testing is controversial. The Explanatory Statement states that this "is a strategy which involves test purchases of cigarettes or other tobacco products made by trained young persons under the supervision of an authorised officer".

Perhaps most clearly, the proposal engages subsection 11(2) of the *Human Rights Act 2004*:

> (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.

This may be read as casting an obligation on government to provide that protection, as well as to refrain from laws that diminish it. In this context, however, citation of subsection 11(2) can cut more than one way. On the one hand, the proponents of this Bill can argue that it will enhance the enforcement of a law designed to protect the health of children. This way of looking at the scheme is noted, although only quite briefly, in the Explanatory Statement. On the other, critics can point to the dangers to children posed by their acting as agents of the enforcing authorities.

The Explanatory Statement does not mention the HRA. To assist debate from this perspective, the Committee sets out competing views that provide a framework that may assist the Assembly.

The rights debate

<u>Views supportive of the proposal</u>

This kind of scheme has been supported by several government agencies in Australia. A Discussion Paper issued by Queensland Health noted that:

> In 2001 the Commonwealth Department of Health and Ageing commissioned the report, A National Approach for Reducing Access to Tobacco In Australia by Young People Under 18 Years of Age, which recommends a system of routine compliance monitoring of tobacco retailers as a strategy for doing this. This report stated that "regular compliance checks involving the participation of young people are the most effective, least costly and practical means of monitoring illegal sales of tobacco to young people" (Commonwealth Dept of Health & Ageing, 2001: 11). This is a position endorsed by authorities in the United States, the United Kingdom and New Zealand, and most states and territories of Australia (Commonwealth Dept of Health & Ageing, 2001). [The reference is to Commonwealth Department of Health & Ageing (2001) *A National Approach for Reducing Access to Tobacco In Australia by Young People Under 18 Years of Age*.]

In relation to the concern with the safety of the children involved, the paper said:

> 126. Concern has been expressed that aggrieved shopkeepers may harm young people in some way, however, no adverse incidents have ever been reported in the literature on this subject. All protocols and procedural guidelines produced for training purposes by those jurisdictions involved in this type of compliance monitoring activity highlight the importance of undertaking procedures for removing young people from the shop when health officials or other enforcement officers confront shopkeepers with evidence of the sale (Commonwealth Dept of Health & Ageing, 2001).

The document is at www.health.qld.gov.au/atods/documents/23179.pdf.

The Report of Queensland Health dealt with the policy issues in more detail; see Queensland Health, *The Tobacco and Other Smoking Products Act 1998, Review, Report*, October 2004 - www.health.qld.gov.au/atods/tobaccolaws/documents/25400.pdf.

It cited submissions of 'health groups' that:

> the current system of surveillance is not effective, as some 58% of retailers in Queensland routinely sell tobacco products to children under the age of 18 years. They provided an example of the Tasmanian Government, which recently reduced the proportion of retailers illegally selling to minors from 48% to 5%, following the introduction of a system using children, and publicising prosecutions;

and that

> out of some 250,000 supervised test purchases around the world, there has been not one reported incident involving any minors coming to harm. Further, they argued that research and evaluation suggest the children involved in the test purchases felt empowered in that they were doing something worthwhile for society, and they were more likely to discuss smoking with their peers, and to encourage peers and family to quit or to avoid initiating smoking.

The report also noted that:

> 108. The Office of Youth Affairs, the Office of Child Safety, and the Commission for Children and Young People supported the introduction of a system using children, subject to certain conditions.

- The Office of Youth Affairs would require that ethical guidelines and protocols be developed.
- The Department of Child Safety would require that a legal position as to the legality of Queensland Health enforcement officers procuring the unlawful sale of a tobacco product be determined.

- The Commission for Children and Young People would require that adequate consultation be made with young people in the development of ethical guidelines and protocols, that particular attention and care should be taken with the development of those protocols that deal with a child's giving evidence in a Court, and the children involved should be adequately remunerated.

The Report concluded:

> 110. Finally, the problems associated with acquiring enough evidence to prosecute retailers who break the law would be alleviated, if a system using children was used. This would be because the child's true age would be known beyond all reasonable doubt. The process of gathering evidence for prosecutions would be greatly simplified by not having to prove the age of the child.

Views critical of the proposal

The Committee is aware that the ACT Council of Social Services (ACTCOSS) has drawn attention to the rights issue thrown up by the proposal to use children to test retailer compliance with the law concerning the sale of tobacco products. It did so in a comment to the "Consultation Paper: Effective Enforcement of the 'Sales to Minors' Requirements of the ACT Tobacco Act 1927". The relevant document is ACTCOSS, On the Consultation Paper: Effective Enforcement of the "Sales to Minors" Requirements of the ACT Tobacco Act 1927 www.actcoss.org.au/.../Publications%202005/Comments/Cmt%20on%20Tobacco%20Act%201927%20Consultation.doc.

ACTCOSS noted that it received "the consultation papers on 17 May, less than 2 weeks before the close of consultations. Our understanding is that the consultation has not been widely distributed, nor is it publicly available (for example, by being displayed on the ACT Health website)", and added that "there is a divergence in views among the community sector about the appropriateness of Controlled Purchase Operations [CPOs]. Our impression is that while health orientated organisations appear very supportive, those who focus more on human rights and child protection are less enthusiastic.".

ACTCOSS expressed concern at the proposals, pointing in particular (inter alia) to

- The use of children in operations involving committing offences; [and]
- The use of triggering an offence by way of deception, regardless of whether this is legally defined as 'entrapment' or otherwise.

[ACTCOSS recognised that one Victorian Supreme Court case has held that a CPO is not "legally considered 'entrapment'": see *Rice v Tricouris* [2000] VSC 73. The Committee notes that this decision addresses only the issue of whether the evidence obtained is admissible on a trial, and not the broader range of rights issues.]

ACTCOSS acknowledged that "the use of children for CPOs in Australia is not new and is practiced in a number of jurisdictions. We also understand that there is little evidence that children involved in CPOs are likely to be psychologically harmed by their involvement or more likely to commence or maintain smoking behaviours". The submission continued:

> The stated aim of CPOs is to increase compliance with the Tobacco Act, and presumably, this is done by convincing retailers that a child who seeks to buy tobacco products may be, in fact, a stooge sent by the Department of Health, resulting in a decreased propensity to offend against the provisions of the Tobacco Act. However, this approach necessarily casts children as deceptive and not to be trusted, and ACTCOSS raises the concern that inducing retailers to distrust children is not an ideal means to enforce legislation.
>
> ACTCOSS would point out that children and young people are already the subject of community distrust, and are more likely to be subject to surveillance for shoplifting or engaged by security officers in retail environments. While ACTCOSS supports increased compliance with tobacco legislation, doing so by creating an environment that utilises suspicion in child behaviour as a motivation is less than welcome.
>
> Deception and Law Enforcement
>
> In a more general sense, ACTCOSS continues to question proposals that seek to enhance compliance with the law or securing convictions by using deception by police or other public authorities. One of the aims of the Canberra Social Plan is to "promote fairness and understanding". The use of deception by Governments promotes distrust and suspicion and works to reduce community cohesion and undermines social capital.
> …
> While [these proposals are] aimed a very specific area of public policy, it should not be considered in isolation from the more general principles of good governance. ACTCOSS supports open, honest and transparent government, and adopting practices that necessarily involve deception by the State erodes public trust in government and appeals to fear rather than the more ethical instincts of people.

As to the likely effect of the scheme, ACTCOSS said:

> As the ACT Government's own research shows, less than a quarter of young people actually derive their cigarettes through illegal sales. Many more obtain tobacco products through friends and relatives, or through others buying them on their behalf. The obviously point to note that even if CPO completely eliminated direct tobacco sales to minors, this would make only incremental reductions in the total availability of tobacco to children.
>
> A broader approach to enforcing tobacco regulation would also place greater attention to reduction in these forms of obtaining tobacco, rather than only through illegal sales direct to children. ACTCOSS is unaware of additional ACT Government strategies in this area.

Parental responsibility and the use of a young person as a purchase assistant

The Committee draws attention, in particular, to proposed subsection 42E(2) of the Act. This provides that a young person may be used as a "purchase assistant" if that person "and at least 1 person who has parental responsibility … have given informed consent to the young person being a purchase assistant.". The Committee suggests that this proposal needs careful consideration.

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

SUBORDINATE LEGISLATION

Disallowable Instrument—Comment

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

Minor drafting issue

Disallowable Instrument DI2006-195 being the Remuneration Tribunal (Fees and Allowances) Determination 2006 (No. 1) made under section 20 of the *Remuneration Tribunal Act 1995* **revokes DI2005-173 and determines fees and allowances for members of the ACT Remuneration Tribunal.**

This instrument states that it revokes the determination "dated 27 July 2005". Neither the instrument nor the Explanatory Statement sets out the number of the earlier instrument. It appears that the instrument that it revoked is the *Remuneration Tribunal (Fees and Allowances) Determination 2005 (No 1)*, which is Disallowable instrument DI2005-173. It would assist the Committee (and the Legislative Assembly and others who might need to refer to these instruments) in locating the revoked instrument if either this instrument or the Explanatory Statement to the instrument gave either the title of the earlier instrument or the "DI" number.

Subordinate Laws—No Comment

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

Subordinate Law SL2006-43 being the Court Procedures Amendment Rules 2006 (No. 1) made under section 7 of the *Court Procedures Act 2004* **prescribes an oath or affirmation as part of the admission ceremony for legal practitioners.**

Subordinate Law SL2006-44 being the Births, Deaths and Marriages Registration Amendment Regulation 2006 (No. 1) made under the *Births, Deaths and Marriages Registration Act 1977* **provides for an Aboriginal indicator on death notification forms.**

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Housing, dated 24 May 2006, in relation to comments made in Scrutiny Report 25 concerning Disallowable Instrument DI2006-57, being the Housing Assistance (Public Rental Housing Assistance Program) Review Committee appointments 2006 (No. 1).
- The Minister for the Territory and Municipal Services, dated 23 August 2006, in relation to comments made in Scrutiny Report 28 concerning:
  - the Road Transport (Safety and Traffic Management) Amendment Bill 2006; and
  - Disallowable Instrument DI2006-85, being the Cemeteries and Crematoria (Fees) Determination 2006 (No. 1).
- The Chief Minister, dated 24 August 2006, in relation to comments made in Scrutiny Report 31 concerning the Remuneration Tribunal Amendment Bill 2006.
- The Treasurer, dated 30 August 2006, and the Department of Treasury, dated 11 September 2006, in relation to comments made in Scrutiny Report 30 concerning:
  - Disallowable Instrument DI2006-101, being the Taxation Administration (Rates) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-102, being the Taxation Administration (Rates—Rebate Cap) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-103, being the Taxation Administration (Objection Fees) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-104, being the Rates (Certificate and Statement Fees) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-105, being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-109, being the Taxation Administration (Amounts Payable—Duty) Determination 2006 (No. 1);
  - Disallowable Instrument DI2006-129, being the Taxation Administration (Rates—Fire and Emergency Services Levy) Determination 2006 (No. 1); and
  - Disallowable Instrument DI2006-136, being the First Home Owner Grant (Objection Fees) Determination 2006 (No. 1).
- The Treasurer, dated 1 September 2006, in relation to comments made in Scrutiny Report 25 concerning Disallowable Instrument DI2006-53, being the Gambling and Racing Control (Governing Board) Appointment 2006 (No. 1).
- The Minister for Industrial Relations, dated 4 September 2006, in relation to comments made in Scrutiny Report 30 concerning Disallowable Instrument DI2006-147, being the Occupational Health and Safety (Fees) Determination 2006.

- The Chief Minister, dated 7 September 2006, in relation to comments made in Scrutiny Report 30 concerning Disallowable Instrument DI2006-187, being the Public Sector Management Standards 2006.
- The Minister for Health, dated 10 September 2006, in relation to comments made in Scrutiny Report 30 concerning Subordinate Law SL2006-38, being the Health Professionals Amendment Regulation 2006 (No. 5).
- The Minister for Disability and Community Services, dated 10 September 2006, in relation to comments made in Scrutiny Report 30 concerning Disallowable Instrument DI2006-153, being the Children and Young People (Childrens Services Council) Appointment 2006 (No. 1).
- The Minister for Police and Emergency Services, dated 11 September 2006, in relation to comments made in Scrutiny Report 30 concerning Disallowable Instrument DI2006-164, being the Emergencies (Fees and Charges 2006/2007) Determination 2006.

The Committee wishes to thank the Chief Minister, the Treasurer and his officials, the Minister for the Territory and Municipal Services, the Minister for Housing, the Minister for Health, the Minister for Industrial Relations, the Minister for Disability and Community Services and the Minister for Police and Emergency Services for their helpful responses.

MINISTERIAL RESPONSE

Children and Young People (Childrens Services Council) Appointment 2006 (No. 1)

On 10 September 2006, the Deputy Chief Minister wrote to the Committee to respond to comments made in the Committee's *Report No 30* of the Sixth Assembly, concerning the Children and Young People (Childrens Services Council) Appointment 2006 (No. 1) (DI2006-153). This instrument appoints certain named persons as members of the Childrens Services Council. It also appoints two named persons as Chair and Deputy Chair of the Council. The Committee noted that the relevant provision, section 36 of the *Children and Young People Act 1999* makes no provision for the appointment of a Deputy Chair. That being so, the Committee queried whether the appointment was valid.

The Minister's response states (in part):

> The Scrutiny Committee … noted that the instrument appoints two named persons as Chair and Deputy Chair of the Council, where only the Chairperson need to be named under section 37 of the Act. Whilst not a statutory requirement, the inclusion of the reference to the Deputy Chair on the Disallowable Instrument was added for transparency and accountability on the public record.

The Committee applauds the Minister's desire to enhance the transparency and accountability of the appointments to the Council. The Committee remains of the view, however, that there is no power in the relevant Act to appoint a person as Deputy Chair.

In this regard, the Committee draws the Minister's attention to comments made by the Committee in its *Report No 21* of the Sixth Assembly, in relation to a similar concern that the Committee expressed in relation to an appointment under the *Gambling and Racing Control Act 1999*. The former Deputy Chief Minister responded to those comments in a letter dated 14 March 2006, which was published in the Committee's *Report No 23* of the Sixth Assembly.

The Committee notes that the response states that discussions between the Government Solicitor and the Office of Parliamentary Counsel had showed that the appointment in question was invalid.

The Committee is unable to distinguish the present example from that dealt with in the earlier Reports. As a result, the Committee repeats its concern that the appointment of a Deputy Chair of the Childrens Services Council is invalid.

Bill Stefaniak, MLA
Chair

September 2006

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

REPORTS—2004-2005-2006

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

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

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

Report 4, dated 7 March 2005

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

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

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

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

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

Report 6, dated 4 April 2005

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

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

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

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

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

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

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

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

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

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

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

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

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

Hotel School (Repeal) Bill 2005

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

Report 16, dated 19 September

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

Report 18, dated 14 November 2005

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

Report 19, dated 21 November 2005

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

Report 25, dated 8 May 2006

Disallowable Instrument DI2006-69 - Legal Aid (Commissioner (Bar Association Nominee)) Appointment 2006 (No. 1)

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

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

Report 26, dated 5 June 2006

Legal Profession Bill 2006

Report 28, dated 7 August 2006

Disallowable Instrument DI2006-75 - Liquor Licensing Board Appointment 2006

Disallowable Instrument DI2006-90 - Housing Assistance Public Rental Housing Assistance Program 2006 (No. 1)

Public Interest Disclosure Bill 2006

Bills/Subordinate Legislation

Subordinate Law SL2006-17 - Road Transport (Third-Party Insurance) Amendment Regulation 2006 (No. 1)

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-93 - University of Canberra (University Seal) Amendment Statute 2006
Disallowable Instrument DI2006-131 - Tertiary Accreditation and Registration (Fees) Determination 2006
Disallowable Instrument DI2006-132 - Road Transport (Dimensions and Mass) Higher Mass Limits (HML) Exemption Notice 2006
Disallowable Instrument DI2006-134 - Road Transport (Dimensions and Mass) Concessional Mass Limits (CML) Exemption Notice 2006
Disallowable Instrument DI2006-141 - Attorney General (Fees) Determination 2006
Disallowable Instrument DI2006-151 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-169 - Fisheries (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-181 - Radiation (Council) Appointment 2006 (No. 1)
Disallowable Instrument DI2006-186 - Legal Profession (Barristers and Solicitors Practising Fees) Determination 2006 (No. 2)
Disallowable Instrument DI2006-188 - Pharmacy (Fees) Determination 2006 (No. 1)
Disallowable Instrument DI2006-190 - Health Professionals (Medical Board) Appointment 2006 (No. 2)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)
Subordinate Law SL2006-29 - Court Procedures Rules 2006

COPY

John Hargreaves MLA
MINISTER FOR THE TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR HOUSING
MINISTER FOR MULTICULTURAL AFFAIRS
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

DI2006-57: Housing Assistance (Public Rental Housing Assistance Program) Review Committee Appointments 2006 (No.1)

Thank you for your Scrutiny of Bills Report No. 25, dated 8 May 2006. I offer the following response in relation to the matter raised by your Committee.

The Committee considered that it would be appropriate (and that it would not cause any great inconvenience) if a statement regarding whether the appointees are public servants or not, was included in the Explanatory Statement appointing the persons in question.

However, following consultation with Parliamentary Counsel's Office, the Instrument would need to be re-notified through the Legislative Assembly if amendments are made to the Explanatory Statement. Therefore, the Department of Disability, Housing and Community Services has noted this administrative oversight and will ensure future instruments of appointment will clearly identify members' status and confirm correct spelling.

If you require further information, please contact my office on 6205 0430.

Yours sincerely

John Hargreaves
Minister for Housing
24 May 2006

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

Dear Mr Stefaniak Bill

Thank you for the Scrutiny of Bills Report No. 28 dated 7 August 2006. I offer the following response in relation to the matters raised by your committee.

Road Transport (Safety and Traffic Management) Amendment Bill 2006

The Committee's human rights analysis of this bill is noted. In my presentation speech for the bill I acknowledged that the vehicle impoundment and seizure provisions in the *Road Transport (Safety and Traffic Management) Act 1999* raised human rights issues, and may require further consideration in terms of human rights compatibility. These provisions will be reviewed as part of a wider human rights audit of the road transport legislation to be conducted in the second half of this year.

In the interim, this Bill is required to address an anomaly in the Act identified by the AFP following a specific incident, which allowed the police to retain a seized vehicle from a "first offender" for a longer period of seizure than the court could have imposed. By addressing this anomaly the Bill is arguably rending the Act more protective of the human rights of alleged offenders than is currently the case. The Bill requires the Chief Police Officer to release a vehicle seized from a "first offender" after 3 months if the matter has not been finalised by the court.

In the wider context, vehicle impoundment has a valuable deterrent effect. Providing police with the ability to immediately seize vehicles of offenders emphasises that the law will be swift, certain and severe on those who commit burnouts and similar dangerous activities. The importance of this message can not be underestimated. Police confront various difficulties when trying to

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arrest offenders, particularly as a result of the use of mobile phones to warn offenders about the police's arrival

Many motorists who commit burnouts and participate in street races are part of a subculture that put a lot of time and money into expensive high performance vehicles. These activities are used as an opportunity to display these vehicles to others. The threat of vehicle impoundment is arguably one of the few measures (if not the only measure) to have a significant deterrent effect on these activities. Other forms of punishment, such as fines or licence suspensions have had a limited effect.

I also note the committee's comments with respect to the discrepancy between the explanatory statement for the bill presented to the Legislative Assembly, and the version that appears on the Legislation Register. The version on the register has now been corrected.

Cemeteries and Crematoria (Fees) Determination 2006 (No.1)

The committee's comment with respect to the omission of the year "2003" following the citation of the Act is noted. This will be rectified in future instruments.

Yours sincerely

John Hargreaves MLA
Minister ~~for the~~ Territory and Municipal Services

23 August 2006

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

COPY

Mr Bill Stefaniak MLA
Chair
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Dear Mr Stefaniak Bill

I refer to your comments on the Remuneration Tribunal Amendment Bill 2006, in Report 31 of the Scrutiny of Bills and Subordinate Legislation Committee. In that Report you raise whether there has been a trespass on personal rights and liberties with respect to the retrospective operation of the Bill.

As you identify, proposed subsection 11(3) expressly states that proposed subsection 11(2) will apply to persons appointed on or after 1 July 2006. This complies with the requirements of section 75B of the *Legislation Act 2001* (the *Legislation Act*), where a law is not to be taken to be retrospective unless it clearly indicates that it is to commence retrospectively. The Bill provides that subsection 11(2) applies on and after 1 July 2006.

As provided under section 76 of the *Legislation Act*, a law cannot commence retrospectively if it is prejudicial. In the particular context of new Public Sector Management Standards, the Bill clarifies that any Territory law or Commonwealth law, or instrument of appointment prevails over existing Remuneration Tribunal determinations. In this case, where there is inconsistency, the Standards and not the relevant determination will apply to executives and statutory office holders on and after 1 July 2006.

The new Standards, which commenced on 1 July 2006, provide for 9% employer superannuation contributions and an entitlement to a four-cylinder vehicle. The Standard implemented 2006-07 Budget initiatives in relation to executives and statutory office holders. My Department sought advice from the Government's Chief Solicitor in developing this Standard.

As you have identified, the Budget papers publicly indicate that new entrants to ACT Public Service will receive 9% superannuation contributions, and that the Government has decided to progressively replace six-cylinder vehicles with four cylinder vehicles.

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In relation to the issue of retrospective commencement in this case, as the persons have been engaged or appointed in the knowledge that the employment conditions specified in the amended Standards apply to them, then the provisions do not operate prejudicially.

In that context, my Department advises that all executive contracts, instruments of appointment and relevant contractual documentation such as letters of offers, issued on or after 1 July 2006 incorporate the entitlements set out in the Standards for superannuation and vehicles.

Therefore, affected individuals have being engaged on condition of accepting the entitlements available under the Standard. On that basis, retrospective commencement of proposed subsection 11(2) of the Bill is justified, as the Bill will not have a prejudicial effect.

I trust this addresses the concerns raised by the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

24 AUG 2006

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

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

Dear Mr Stefaniak Bill

I refer to comments made by the Standing Committee on Legal Affairs in Scrutiny Report No 30 of 21 August 2006 relating to several Disallowable Instruments made under the *Taxation Administration Act 1999*, the *Rates Act 2004*, and the *First Home Owner Grant Act 2000*.

The Committee noted that the Disallowable Instruments listed determine various fees, charges, rates and threshold amounts, and was concerned that the Explanatory Statements did not adequately advise whether the charges were new, the magnitude of increases or changes to existing charges, and the basis for any change. The Committee acknowledged that there is no formal requirement to do so, however, it would prefer to see this information in Explanatory Statements associated with legislation.

The Committee was also concerned about the validity of an instrument that supersedes an earlier instrument that had not been revoked. I am assured that the later instrument is valid and that there is an implied repeal of the earlier instrument, as is now shown on the Legislation Register.

The Committee's comments are noted and I have been advised that future Disallowable Instruments of this nature will provide further explanatory material where appropriate.

I thank the Committee for its comments.

Yours sincerely

Jon Stanhope MLA
Treasurer
30 AUG 2006

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Shannon, Anne

From: Sernack, Merrilyn
Sent: Monday, 11 September 2006 5:50 PM
To: Shannon, Anne
Cc: Pearse, Jan; Paul, Kas; Bain, Glenn; Dowell, Graeme
Subject: Treasurer's Response to Scrutiny Committee

Dear Ms Shannon

In Scrutiny Report No 30 dated 21 August 2006, the Scrutiny Committee made general comments on the Explanatory Statements for a number of Disallowable Instruments that determine various fees, charges, rates and threshold amounts. The Explanatory Statements the subject of the comments related to Disallowable Instruments DI2006-101, DI2006-102, DI2006-103, DI2006-104, DI2006-105, DI2006-109, DI2006-129 and DI2006-136.

The Committee commented that these Explanatory Statements did not adequately advise whether the charges were new, the magnitude of increases or changes to existing charges, and the basis for any change. The Committee acknowledged that, although there is no formal requirement to do so, it would prefer to see this information in either the Instrument or the Explanatory Statement.

The Treasurer's response of 30 August 2006 to the Committee Chair acknowledged the Committee's preferences without referencing them to the instruments in question. For the sake of complete clarity and certainty, the Explanatory Statements and related instruments the subjects of the Treasurer's response are those specified above.

The Committee also questioned whether DI2006-136 was valid because it did not expressly revoke an earlier instrument.

In his response, the Treasurer assured the Committee Chair that DI2006-136 was valid because a subsequent determination supersedes an earlier one and, accordingly, there was an implied revocation of the earlier instrument.

While the Treasurer's response noted the implied repeal, for the sake of complete clarity and certainty, the earlier instrument was DI2002-36 and it is recorded as repealed on the Legislation Register. DI2006-101, DI2006-102, DI2006-103, DI2006-104, DI2006-105, DI2006-109 and DI2006-129 are also valid (unless disallowed by the Assembly) and there is no need to remake them.

By way of clarifying the Treasurer's response, Explanatory Statements for Disallowable Instruments that determine fees, charges, rates and threshold amounts will provide the information referred to by the Committee where it is appropriate to do so. Also, a subsequent instrument that impliedly revokes an earlier instrument will expressly state that the earlier instrument is being revoked, and identify it, for the avoidance of any doubt.

Yours sincerely

Dr Merrilyn Sernack
Manager
Executive Unit
Department of Treasury

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Jon Stanhope MLA

CHIEF MINISTER

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

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
performing the functions of the Scrutiny of Bills Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

On 8 May 2006 the Standing Committee on Legal Affairs commented on Disallowable Instrument DI2006-53 which appoints the deputy chair to the Gambling and Racing Commission. The Committee noted a minor drafting issue and the absence of an Explanatory Statement. The appointment was made under section 11 of the *Gambling and Racing Control Act 1999* and section 78 of the *Financial Management Act 1996* (FMA).

The Committee noted that Section 11 of the Gambling and Racing Control Act merely establishes the governing board and section 78 of the FMA refers to the establishment of governing board members, not the chair and deputy Chair. The Committee has noted that the power to appoint the deputy chair is contained in section 79 of the FMA.

Up to 1 January 2006, appointments to the Gambling and Racing Commission were made under the Gambling and Racing Control Act. However, following recent amendments made to the FMA, appointments are now also made under section 79 of that Act. The appointment of the deputy chair to the Commission in March this year was the first time that the appointment was made under the new provisions. This may have inadvertently led to the original Instrument not citing a key provision of the FMA.

The Committee also noted that no Explanatory Statement was submitted with the previous Instrument of Appointment. An Explanatory Statement had been prepared, however I understand that it was inadvertently omitted from the notification request when the instrument was notified. A new Explanatory Statement has now been prepared and will be notified.

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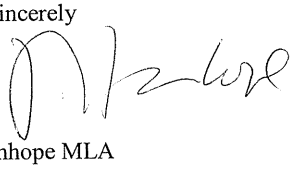
I have signed a new Instrument of Appointment which revokes the original Instrument and appoints the deputy chair under the new provisions.

I thank the Committee for its comments.

Yours sincerely



Jon Stanhope MLA
Treasurer

- 1 SEP 2006

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Bill Stefaniak
Chair
Scrutiny of Bills and Subordinate
Legislation Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak Bill

I refer to comments made by the Scrutiny of Bills and Subordinate Legislation Committee in relation Disallowable Instrument No 2006-147, Occupational Health and Safety (Fees) Determination 2006.

The Committee was concerned that the Instrument incorrectly referred to 'the ACT Government Legislation Register'. This error has been noted, and future notifications will use the Register's correct title.

Thank you for bringing this matter to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

4 SEP 2006

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Stefaniak

I refer to comments on Disallowable Instrument DI2006-187 being the Public Sector Management Standards 2006 made under section 251 of the *Public Sector Management Act 1994*, in Report No 30 of the Scrutiny of Bills and Subordinate Legislation Committee.

In the context of referring to the re-making of the Public Sector Management Standards for the purposes of inclusion on the ACT Legislation Register, the Committee comments that the instrument which re-makes the Standards does not expressly repeal the former Standards.

My department advises that there would be an implied repeal of the Standards as noted by the Committee in Report No 30. I am advised that the changes to the Standards as a result of the re-making process were technical in nature. This involved significant re-numbering of the Standards, grammatical changes and consequential changes to the format of the Standards to bring the Standards closer in line with the presentation of other ACT legislation. I understand that during the re-making process, no changes were made to obligations or entitlements under the Standards. In that context, I am advised that no conflict with the previous Standards as immediately in force can arise.

I trust this addresses the concerns raised by the Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

- 7 SEP 2006

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Katy Gallagher MLA

DEPUTY CHIEF MINISTER

MINISTER FOR HEALTH MINISTER FOR CHILDREN AND YOUTH
MINISTER FOR DISABILITY AND COMMUNITY SERVICES MINISTER FOR WOMEN

MEMBER FOR MOLONGLO

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

Dear Mr Bill Stefaniak

In report number 30 of the Scrutiny of Bills Committee dated 21 August 2006 the Committee has requested an explanation as to why the default commencement date has been extended by 12 months.

The extension of the commencement provision of the *Health Professionals Act 2004* by 12 months was necessary because the *Health Professionals Act 2004* requires the gradual transition of identified health professions in the ACT from their current legislative arrangements to the *Health Professionals Act 2004*. The medical, nursing and midwifery professions have already undertaken the transition and the following regulated health professions are progressing through this transition stage:

a) Pharmacists;
b) Dentists;
c) Psychologists;
d) Podiatrists;
e) Physiotherapists;
f) Optometrists;
g) Veterinary Surgeons;
h) Chiropractors;
i) Osteopaths; and
j) Dental Technicians and Dental Prosthetists.

The transition process has been time consuming and requires that individual professions develop new schedules specific to their particular profession to replace the corresponding health profession registration Act. Once the new health profession schedules are formally commenced the corresponding health profession registration Act is repealed. The extension of the commencement provision was necessary to allow sufficient time to ensure that the new schedules for the remaining ten health professions were completed.

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In respect of the expiry of the last six month extension of the default commencement provisions in the *Health Professionals Act 2004* which were scheduled to take effect on 9 July 2006 would have caused substantial disruption to the regulation of health professions in the ACT if they had not been extended. On that day all the remaining ACT health professional registration legislation that had not been transferred by way of a health profession specific schedule to the *Health Professional Act 2004* would have been repealed. This would have lead to uncertainty and confusion in the health professional registration area if the current registration Acts were repealed without a corresponding health profession specific schedule to replace that legislation.

To overcome this dilemma the default commencement provisions of the *Health Professionals Act 2004* were amended to extend them by a further six months. This was to allow sufficient time to ensure that the remaining schedules and consequential amendments were made before the default commencement provisions took effect.

Yours sincerely,

Katy Gallagher

Katy Gallagher MLA
Minister for Health
18/9/06

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

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

Dear Mr Stefaniak

I am writing with regard to the Scrutiny of Bills Report No. 30, dated 21 August 2006. The following response is offered in relation to the matter raised by your Committee.

The appointments to the Children's Services Council were made in accordance with section 36 (in its entirety), which is clearly outlined in the Disallowable Instrument and Explanatory Statement. The Committee's preference for a particular style has been noted for future instruments.

The Scrutiny Committee also noted that the instrument appoints two named persons as Chair and Deputy Chair of the Council, where only the Chairperson need be named under section 37 of the Act. Whilst not a statutory requirement, the inclusion of the reference to Deputy Chair on the Disallowable Instrument was added for transparency and accountability on the public record.

I am grateful for the opportunity to respond to this matter.

Yours sincerely

Katy Gallagher MLA
Minister for Disability and Community Services
10 September 2006

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Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I refer to the Committee's Scrutiny of Bills report No.30 – 21 August 2006.

In relation to Disallowable Instrument DI2006-164, being the Emergencies (Fees and Charges 2006/2007) Determination, the Committee noted that there is no Explanatory Statement for this Instrument and also noted that the instrument is, however, heavily annotated with "explanatory notes".

Acknowledging the Committee's preference for a separate Explanatory Statement to be prepared for each Instrument, my department will prepare future Instruments accordingly.

The Committee's further comments, regarding general quality of Explanatory Statements, will also be taken into account by my department.

Yours sincerely

Simon Corbell MLA
Minister for Police and Emergency Services

11.9.06

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