Legislative Assembly for the ACT

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

Scrutiny Report

13 NOVEMBER 2006

Report 34

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bill—No comment

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

HUMAN RIGHTS COMMISSION AMENDMENT 2006

This Bill would amend the *Human Rights Commission Act 2005* to abolish the position of President of the Human Rights Commission and remove all references to the President.

STATUTE LAW AMENDMENT BILL 2006 (NO 2)

This Bill would amend a number of Acts and regulations for statute law revision purposes only.

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2006

This Bill would amend the *Children and Young People Act 1999* to remove the sunset provisions concerning (1) the power to make standing orders – so as to permit the completion of a review of the existing standing orders at Quamby Youth Detention Centre in the light of contemporary procedures and human rights requirements; and (2) the exemption of work experience for under school leaving age young people from the operation of the employment chapter – so as to permit the finalisation of proposed amendments to the Act.

EMERGENCIES AMENDMENT BILL 2006

This Bill would amend the *Emergencies Act 2004* to regulate the disposition of donations to a rural fire brigade, or to a member of a rural fire brigade for the rural fire brigade, or to an SES operational unit, or to a member of an SES operational unit for the SES operational unit.

Bill—Comment

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

HEALTH LEGISLATION AMENDMENT BILL 2006 (NO. 2)

This Bill would amend the *Health Professionals Act 2004* and a number of other Acts and regulations to the purposes of (1) making consequential amendments arising from the transfer of health professional registration legislation to the *Health Professionals Act 2004*; (2) achieving consistency with the *Human Rights Act 2004*; and (3) making other minor amendments to the statute book.

For the most part, this Report will deal with issues arising under the Committee's terms of reference as those issues have been raised in the Minister's presentation speech.

Is the extension of the period of operation of Part 15 of the *Health Professionals Act 2004* from 18 November 2006 to 9 January 2009 an inappropriate delegation of legislative power?

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

As it stands, Part 15 of the Act contains a number of provisions to permit the transition from an earlier scheme of regulation to that scheme created by the *Health Professionals Legislation Amendment Act 2004*. Many of these provisions are quite detailed, and there is conferred on the Executive by section 151 a general power to make regulations to "prescribe savings or transitional matters necessary or convenient to be prescribed". By section 152 such regulations "may modify the operation of this part (including in its operation in relation to another territory law) to make provision with respect to any matter that is not already, or is not (in the Executive's opinion) adequately, dealt with in this part". By section 153, Part 15 of the Act – including of course the provisions just noted – would expire on 18 November 2006.

The power conferred on the Executive is a very wide form of the "Henry VIII clause". In *Scrutiny Report No 23* of the *6th Assembly*, concerning the Duties Amendment Bill 2006, the Committee noted that evaluation of whether a particular clause was justified required attention to both the extent of the Executive's power to amend an Act, and the measure of control over the exercise of the power retained by the Assembly. (A detailed response by the Minister to this Report may be found in the attachments to *Scrutiny Report No 24* of the *6th Assembly*.)

The Committee will not canvass these issues here, given that the Bill does not propose a change of substance to the Executive's power.

What is proposed is replacement of section 153 to the effect that Part 15 of the Act would expire on 9 January 2009 (see paragraphs 1.21 and 1.22 of Schedule 1).

On the face of it, the Minister's Presentation Speech makes a persuasive justification to this change, and the Committee does not consider that there is, by reason of this change, an inappropriate delegation of legislative power.

Report under section 38 of the Human Rights Act 2004
Para 2(c)(i) – undue trespass on rights and liberties

Is reduction of the period of efficacy of a warrant issued under section 172 of the *Gene Technology Act 2003* necessary to achieve compliance with the *Human Rights Act 2004?*

Currently, under subsection 172(2) of this Act, "a magistrate may issue the warrant if the magistrate is satisfied, by evidence on oath, that it is reasonably necessary that 1 or more inspectors should have access to the premises for monitoring compliance with this Act". The warrant must "specify the day (not later than 6 months after the issue of the warrant) the warrant ceases to have effect": paragraph 172(2)(c).

This Bill (see paragraph 2.22 of Schedule 1) would amend paragraph 172(2)(c) by substituting for the words "specify the day (not later than 6 months …" the words "state the day (not later than 28 days …".

The Committee notes that the Presentation Speech does not provide any reasoning to support the view arrived at by the Monash University Castan Centre as to why the existing paragraph 172(2)(c) of the Act is inconsistent with the *Human Rights Act 2004*. It is presumably thought that this provision derogates from HRA section 12, but there is no inconsistency with the HRA unless the derogation cannot be justified under HRA section 28. What this assessment involves is explained at length in *Scrutiny Report No 25* of the *6th Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. The Committee cited the words of Richardson J in *Ministry of Transport v Noort* [1992] NZLR 260 at 283) (adapting them to section 28) that the tests involved in the application of section 28 "necessarily involve public policy analysis and value judgements on the part of the Courts", and that "in principle [the inquiry] will properly involve consideration of all economic, administrative and social implications".

In relation to the existing paragraph 172(2)(c) of the Act, it may have been thought that the efficacy of the scheme for monitoring compliance justified the policy that a warrant should remain efficacious for 6 months (although the Explanatory Statement to the Gene Technology Bill 2002 does not offer any justification). If some such justification is the basis for the existing paragraph 172(2)(c), would reducing the period of the warrant to 28 days undermine it?

The advice of the Monash University Castan Centre is not available to the Committee, and perhaps it does offer reason to think that the existing paragraph 172(2)(c) is not HRA compatible, and that the proposed amendment is.

On the information available to it, and inasmuch as this amendment further restricts the ability of an inspector to enter premises – and thus enhances the protection of the right to privacy (HRA section 12) and of the right to property (see Article 17 of the *Universal Declaration of Human Rights*, and the *Australian Capital Territory (Self-Government) Act 1988* paragraph 23(1)(a)), the Committee does not see any basis for a rights objection to the proposed amendment.

The Committee considers that, so far as practicable, the promoter of a bill should make available to the Committee such advice as the promoter receives concerning the compatibility of the bill with the Human Rights Act. Such disclosure will promote pre-enactment dialogue between the promoter (who, of course, will usually be a Minister) and the Assembly. The Committee notes that the Government has, on occasion, made such advice available to the Committee and the Assembly and indeed to the public.

In this instance, the Committee is aware that the advice from the Monash University Castan Centre dealt with compatibility issues over a much broader range than the issues it raised in relation to the statutes sought to be amended by this Bill. On the other hand, it may well have been possible to make available only those parts of the Centre's report that dealt with these particular issues.

Is reduction of the scope of the power of an authorised officer, acting under section 76 of the *Public Health Act 1997*, to enter non-residential premises necessary to achieve compliance with the *Human Rights Act 2004?*

Powers to enter premises

Currently, subsection 76(1) of this Act provides a scheme for the entry onto premises by an authorised officer.

76(1) Where an authorised officer has reasonable grounds for believing that it is necessary to do so for the purposes of this Act, he or she may, using such reasonable force and assistance as is necessary –

(a) **if the officer has reasonable grounds for believing a public health risk activity to be carried on**, or a public health risk procedure to be performed, at any place -

(i) enter the place at any reasonable time; or

(ii) enter the place at any time with the consent of the occupier, or pursuant to a warrant issued under section 80 or 81;

(b) **in the case of any other place, except a place used, or used in part, for residential purposes** –

(i) enter the place at any reasonable time; or

(ii) enter the place at any time with the consent of the occupier, or pursuant to a warrant issued under section 80 or 81; or

(c) **in the case of a place used, or used in part, for residential purposes**, except a place referred to in paragraph (a) - **enter** the place at any time **with the consent of the occupier, or pursuant to a warrant** issued under section 80 or 81.

It will be seen that so far as concerns residential premises – which of course are of a kind that attracts the protection of the right to privacy (HRA section 12) – the officer cannot enter "at any reasonable time" unless:

- the officer has reasonable grounds for believing a public health risk activity to be carried on, or a public health risk procedure to be performed at those premises, or
- the occupier of the residential premises consents to the entry, or
- a warrant to enter is obtained.

On the face of it, existing subsection 76(1) is an attempt to accord particular recognition to the occupier of residential premises, and thus recognises the significance of the right to privacy.

For reasons that are not explained in the material available to the Committee, the Monash University Castan Centre takes the view that paragraph 76(1)(b) needs be amended so that power of an officer to enter the relevant premises (which of course cannot be residential premises) could no longer be exercised "at any reasonable time". The Bill (see paragraph 2.37 of Schedule 1) proposes that paragraphs 76(1)(b) and (c) be replaced by a single provision to read:

(b) for any other place - enter the place at any time with the consent of the occupier, or in accordance with a warrant issued under section 80 or section 81.

The Committee notes, however, that the Presentation Speech does not provide any reasoning to support the view arrived at by the Monash University Castan Centre that the current subsection 76(1) is incompatible with HRA section 12. It is not obvious why this is so given the degree of protection to the occupiers of residential premises it affords.

On the information available to the Committee, and inasmuch as this amendment further restricts the ability of an inspector to enter premises and thus enhances the protection of the right to privacy and of the right to property, the Committee does not see any rights objection to the proposed amendment.

Is amendment of sections 100 and 101 of the *Public Health Act 1997* in ways that would limit the scope of the discretionary powers conferred by those provisions necessary to achieve compliance with the *Human Rights Act 2004*?

Currently, subsection 100(1) of the *Public Health Act 1997* provides that "the Minister may … determine" certain matters in relation to a disease or medical condition.

The amendment proposed by paragraph 2.38 of Schedule 1 of the Bill would limit this open-ended discretion so that the Minister could not make a determination "unless the Minister believes, on reasonable grounds, that the determination is necessary to protect public health".

Currently, subsection 101(1) of the *Public Health Act 1997* provides that the chief health officer "may, if he or she considers it to be necessary or desirable in the interests of public health, in writing declare" certain matters in relation to a disease or medical condition.

The amendment proposed by paragraph 2.39 of Schedule 1 of the Bill would limit this discretion further so that a declaration could not be made "unless the chief health officer believes, on reasonable grounds, that the declaration is necessary to protect public health".

The Committee has long adopted the standpoint that administrative power should be confined in its scope so far as practicable. Paragraph 2(c)(ii) of the Committee's terms of reference require it to report on whether a clause of a bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative power. The Committee's report on the Legal Profession Bill 2006 in *Scrutiny Report No 26* of the *6th Assembly* is illustrative. In *Scrutiny Report No 32* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (No 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).

Whether or not the amendments proposed to sections 100 and 101 of the *Public Health Act 1997* are necessary to achieve compliance with either or both of HRA sections 12 and 21, the Committee supports the proposal in accordance with its standpoint on administrative powers.

Is amendment of the *Public Health Act 1997* to insert a provision requiring review by the decision-maker of a power to confine a person to a particular place for a particular period necessary to achieve compliance with section 12 (privacy) of the *Human Rights Act 2004*?

Currently, paragraph 113(1)(e) of the Act provides:

> 113 (1) Where the chief health officer has reasonable grounds for believing that it is necessary to prevent or alleviate a significant public health hazard, he or she may issue any or all of the following directions to a person for that purpose:
>
> …
>
> (e) a direction requiring a person who has a transmissible notifiable condition, or a contact of such a person, to be confined to a particular place for a specified period, being the least restrictive confinement appropriate to the person's medical condition;
>
> …

The Bill (see paragraph 2.40 of Schedule 1) would add proposed section 115A:

> 115A(1) This section applies if the chief health officer gives a public health direction under section 113 (1) (e) requiring a person who has a transmissible notifiable condition, or a contact of the person, (the confined person) to be confined to a stated place for a stated period.
>
> (2) The chief health officer must review the public health direction not later than 48 hours after the confined person was first confined under the direction.

So far as the Committee can ascertain, review of a decision of the chief health officer acting under paragraph 113(1)(c) would be possible only by expensive action in the Supreme Court, or by means of a costless – but perhaps less effective – complaint to the Ombudsman.

Thus, provision by means of proposed section 115A for mandatory internal review by the decision-maker will, on its face, tend to support a claim that the scheme surrounding the power in paragraph 113(1)(c) complies with HRA section 12 and/or section 21.

The Committee does query, however, why it is not provided that mandatory internal review by the chief health officer should occur at the expiration of each 48 hours the person is confined.

Is it necessary to amend subsection 129(5) of the *Health Professionals Act 2004*, and section 145 of the *Food Act 2001*, to ensure that these provisions are subject to *Human Rights Act 2004* and to the *Evidence Act 1995* (Commonwealth)?

Currently, subsection 129(5) of the *Health Professionals Act 2004* provides:

> (5) An informed person need not divulge or communicate protected information to a court, or produce a document containing protected information to a court unless it is necessary to do so for this Act or another Act.

The Bill (by paragraph 1.17 of Schedule 1) would replace this provision with:

> (5) An informed person need not divulge or communicate protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act, another territory law or another law applying in the ACT.

Similar amendments would be made to the *Food Act 2001*; see paragraphs 2.20 and 2.21 of Schedule 1.

The intent of these amendments accords with the standpoint of the Committee that any law that restricts the ability of a party to adduce evidence relevant to proving their case is on its face in conflict with the right to a fair trial stated in HRA subsection 21(1), but that in particular circumstances such a derogation might be justified under HRA section 28; see *Scrutiny Report No 26* of the *6th Assembly*, concerning the Revenue Legislation Amendment Bill 2006 (and note the Minister's response of 5 July 2006 attached to *Scrutiny Report No 28*).

Preservation of the operation of the *Evidence Act 1995* (Commonwealth) will accord protection to the right to a fair trial in the sense just described. The Committee, citing Supreme Court authority, has suggested that an ACT law cannot displace this Act, for the reason that it operates of its own force and prevails over any inconsistent ACT law; see *Scrutiny Report No 28* of the *6th Assembly*, concerning the Public Interest Disclosure Bill. If this view is correct, the amendments proposed are not necessary.

On the other hand, the government appears to take the view that any ACT law inconsistent with the Evidence Act will prevail by reason of subsection 8(4) of the latter; see the Minister's response of 5 July 2006 attached to *Scrutiny Report No 28*. If this view is correct, then perhaps the amendments proposed will have some effect. There is however some doubt, because it might still be argued that the words "or another law applying in the ACT" in the proposed subsection 115(5) will only pick up laws that do apply, and on the government's view the Evidence Act is displaced by the words "[a]n informed person need not divulge or communicate protected information to a court, or produce a document containing protected information to a court".

Much uncertainty surrounds the interaction between the Evidence Act and ACT laws that purport to regulate the admission of evidence in ACT courts. Given, however, that intent of these amendments accords with the standpoint of the Committee that any law that restricts the ability of a party to adduce evidence relevant to proving their case is on its face in conflict with the right to a fair trial stated in HRA subsection 21(1), the Committee sees no rights objection to the amendments.

The proposal to insert section 250 in the *Health Act 1993* (see paragraph 2.25 of Schedule 1) would, as described in the Explanatory Statement, provide for "a transitional provision to make it abundantly clear that anything done during the prescribed period in a medical facility approved under a prescribed notifiable instrument is taken for all purposes to have been done in a medical facility that had been approved under section 30D(1). This is to overcome the mistaken repeal of these notifiable instruments on the 7 July 2005.".

Is it in these circumstances justifiable to provide for the retrospective operation of a law?

Section 25 of the *Human Rights Act 2004* states a principle against the retrospective application of criminal laws. It is, however, generally accepted, as a common law right, that a law should not have a retrospective operation, and, in particular, where that would affect adversely the rights or interests of a person.

There is a presumption that an enactment is not intended to have a retrospective effect, but an enactment may displace the presumption if it manifests an intention that the law operate retrospectively. This is now stated in section 75B of the *Legislation Act 2001*:

> **75B** Retrospective commencement requires clear indication
>
> (1) A law must not be taken to provide for the law (or another law) to commence retrospectively unless the law clearly indicates that it is to commence retrospectively.
>
> …
>
> (2) This section is a determinative provision.
>
> *Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

The Committee recommends that the Minister state whether the effect of proposed section 250 would or would not affect adversely the rights or interests of a person.

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

Is the proposal to empower the president of the health professions tribunal to issue a warrant for the detention of a person who has been given a notice to appear before the tribunal and who does not appear incompatible with HRA subsection 18(1) (right to liberty and security)?

Existing section 59 of the *Health Professionals Act 2004* provides:

> 59 (1) A presidential member of the tribunal, or a person authorised in writing by a presidential member, may, by written notice given to a person, require the person to appear before the tribunal at a hearing, at a stated time and place, to do either or both of the following:
>
> (a) to give evidence;
>
> (b) to produce a stated document or other thing relevant to the hearing.

The Bill (see paragraph 1.9 of Schedule 1), by the insertion of proposed section 59A, would enhance this power by empowering a presidential member to issue a warrant for the detention of a person.

> 59A Warrant for failure to appear
>
> (1) If a person who is given a notice under section 59 (1) does not appear before the tribunal as required, the presidential member may issue a warrant to detain the person.

(2) A warrant authorises -

(a) the detention of the person named in the warrant; and

(b) the bringing of the person before the tribunal; and

(c) the detention of the person at the place stated in the warrant until the person is released by order of the tribunal.

(3) A warrant may be executed by a police officer.

(4) A police officer executing a warrant –

(a) may, with necessary and reasonable assistance and force, enter any premises to detain the person named in the warrant; and

(b) must use the minimum amount of force necessary to detain the person and remove the person to the place stated in the warrant; and

(c) must, before removing the person, explain to the person the purpose of the warrant; and

(d) must bring the person before the tribunal as soon as possible.

On its face, the power in section 59A is extraordinary. While many tribunals have a power as is found in subsection 59(1), it is most unusual for a tribunal to have the power to order the detention of a person who is ordered to appear before the tribunal as a witness. The only precedent the Committee found is in the *Australian Crime Commission (ACT) Act 2003*.

Clearly, a provision such as proposed section 59A engages a number of HRA rights. Most obviously, there is an apparent derogation of the right in HRA section 18:

18 Right to liberty and security of person

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

In *Scrutiny Report No 25* of the *6th Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006, (and adopting what it has said in *Scrutiny Report No 14* of the *Sixth Assembly* concerning the Litter Amendment Bill), the Committee took the view that these provisions were to be read as stating that:

- by subsection 18(1), a detention may be "arbitrary" even if it is authorised by a law, so that while all unlawful detentions are arbitrary, a lawful detention may also be arbitrary if it exhibits features of inappropriateness, injustice, or lack of predictability or proportionality; and
- subsection 18(2) states an additional requirement - that is, a deprivation of liberty must also be "on the grounds and in accordance with the procedures established by law": subsection 18(2). What this adds is that the detention "must be specifically authorized and sufficiently circumscribed by law": S Joseph, et al, *International Covenant on Civil and Political Rights* (2nd ed, 2004) [11.10].

On this view, any argument that a detention is justified will focus on the notion of "arbitrary" in subsection 18(1), and possibly on the additional requirement in subsection 18(2). In other words, there is no need to take section 28 into account directly. On the other hand, the same kind of analysis as takes place where section 28 is relevant will occur as a result of the focus on the notion of "arbitrary" in subsection 18(1).

Account must also be taken of HRA subsection 19(1):

> (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

At the outset of any analysis of the justifiability or otherwise of a detention power, the Committee points out again the effects of an exercise of such a power. In *Scrutiny Report No 25* of the *6th Assembly*, it said:

> A denial of liberty by reason of detention by an executive authority derogates from several rights. In an earlier Report dealing with a Bail Bill the Committee observed:
>
> > A denial of an application for bail results in the person being detained in custody, in circumstances not unlike that of a jail. The effects on that person and on others were noted by Hunt CJ at CL in *R v Kissner* (Supreme Court, NSW, 17 January 1992, unreported; quoted in *Chau v DPP* (Commonwealth) 132 ALR 430 at 433):
> >
> > > the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and to his family, and usually with severe effects upon the applicant's business or employment, his finances, and his abilities to prepare his defence and to support his family.

As the Committee pointed out in *Scrutiny Report No 25* of the *6th Assembly*, some might argue that a provision such as section 59A is necessarily an "arbitrary" deprivation of the right to liberty (and thus incompatible with HRA subsection 18(1)) simply upon the principle that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". (Some exceptional cases might be allowed, but they would not cover detention of a potential witness to a tribunal hearing).

There is some judicial support in High Court authority for the principle just stated (see *Scrutiny Report No 25* of the *6th Assembly*). But other High Court judges do not preclude the validity of detention otherwise than as a result of an adjudication by a court, and outside the accepted "exceptional cases", either by an exercise of judicial power, or by executive power (see *Scrutiny Report No 25* of the *6th Assembly*).

On this second view, close attention must thus be paid to the circumstances in which the power to detain may be exercised, and the nature of the protections afforded to the person placed in detention.

There are a number of matters that might be thought to give rise to a concern about whether proposed section 59A is compatible with HRA sections 18 and/or 19:

- the power in section 59 (and thus in section 59A) is not limited in its application to a party to a matter before the tribunal, but can extend to any person who upon being ordered to appear fails to do so;
- the powers are cast in the form of open-ended discretions – see the words "may … require the person to appear before the tribunal" in subsection 59, and the words "may issue a warrant to detain the person" in subsection 59A(1). In this respect, compare to the much more limited power in section 27 of the *Australian Crime Commission (ACT) Act 2003*, which requires that the decision-maker must have "reasonable cause to believe" that one or other of specified circumstances must exist; (and note the amendments proposed to sections 100 and 101 of the *Public Health Act 1997*);
- there is no time limit to a detention, for the tribunal has an open-ended discretion as to how long the person will be kept in detention – see the words "until the person is released by order of the tribunal" in paragraph 59A(2)(c);
- while the "presidential member" must be a magistrate (see subsection 41(2) of the *Health Professionals Act 2004*), the power is not exercised as a judicial power, and the status of a magistrate is of course at a much lower level that a Supreme Court judge). In this respect, compare to section 27 of the *Australian Crime Commission (ACT) Act 2003*, which requires that the powers to detain be exercised by a Federal or Supreme Court judge who is not a member of the relevant tribunal;
- there is no provision for the detainee to be granted bail. In this respect, compare to paragraph 27(5)(a) of the *Australian Crime Commission (ACT) Act 2003*;
- there is no provision for an independent review of the exercise of the power to detain – compare to subsection 27(6) of the *Australian Crime Commission (ACT) Act 2003;*
- there is no provision as to the evidentiary status in a later court proceeding of any statements – and in particular of admissions – made by the detainee while in detention. Nothing is said about whether the detainee can be questioned while in detention. In contrast, a person detained by the police in the investigation of crime is heavily protected in this respect (see in particular the comments in *Scrutiny Report No 25* of the *6th Assembly* concerning this topic);
- no person bears any obligation to permit the person detained to communicate with any other person, whether to family, lawyers, or persons such as the ombudsman and the human rights commissioner;
- no provision is made as to the manner of detention (not even that it be "in a suitable place"), or that it be such as to respect the observance of HRA rights. In this respect, compare to section 43 of the *Terrorism (Extraordinary Temporary Powers) Act 2006.*

It is arguable that the character of the power to detain in proposed section 59A is such that it might well be characterised by a court as an arbitrary deprivation of the right to liberty in HRA subsection 18(1).

The Committee notes that the Explanatory Statement states merely that the provision is "necessary to ensure the attendance of witnesses at disciplinary proceedings involving health professionals". The Minister's presentation speech makes no reference to the power to detain dimension of proposed section 59A.

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2006-209 being the Radiation (Fees) Determination 2006 (No. 1) made under section 77 of the *Radiation Act 1983* **revokes DI2005-208 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-210 being the Public Place Names (Oaks Estate) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of streets in the division of Oaks Estate.**

Disallowable Instrument DI2006-211 being the Public Place Names (Jerrabomberra & Majura Districts) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of roads in the districts of Jerrabomberra and Majura.**

Disallowable Instrument DI2006-213 being the Health (Fees) Determination 2006 (No. 3) made under section 36 of the *Health Act 1993* **revokes DI2006-197 and determines the fees payable for the purposes of the Act.**

Disallowable Instrument DI2006-215 being the Public Place Names (Franklin) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new streets in the Division of Franklin.**

Disallowable Instruments—Comment

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

Minor drafting issues

Disallowable Instrument DI2006-212 being the Utilities (Water Restriction Scheme) Approval 2006 (No. 1) made under section 234 of the *Utilities Act 2000* **and regulation 9 of the** *Utilities (Water Conservation) Regulation 2006* **approves the temporary water restriction scheme developed by ACTEW Corporation.**

The Committee notes that the introductory part of this instrument incorrectly refers to it being made under the *Utilities (Water Conservation) Regulation**s** 2006.* The Explanatory Statement then incorrectly refers to the ***Utility** (Water **Restriction**s) Regulation 2006.*

Correction of drafting error

Disallowable Instrument DI2006-214 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 6) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2006-206 and approves specified sub-agencies as approved sports bookmaking venues.**

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

> This instrument amends the details of the specified sub-agencies in DI2006-206 by adding two new sub-agencies to the Schedule and correcting a drafting error in the previous instrument.
>
> ……
>
> This instrument also reinstates sports bookmaking venue known as Wests@Turner Club that was inadvertently revoked under DI2006-206.

The Committee notes that there is no suggestion of the correction referred to above having a retrospective effect. While the Committee notes that the time during which the venue in question was inadvertently omitted from the list of approved sports bookmaking venues appears to have been relatively brief, the Committee would appreciate the Minister's advice as to whether there were any adverse consequences of that inadvertent omission and, if so, what has been done redress those adverse consequences.

Subordinate Law—No comment

Subordinate Law SL2006-45 being the Heritage Regulation 2006 made under the *Heritage Act 2004* **prescribes the procedures for the administration of the ACT Heritage Council.**

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 16 October 2006, in relation to comments made in Scrutiny Report 32 concerning the Tobacco (Compliance Testing) Amendment Bill 2006.
- The Treasurer, dated 18 October 2006, in relation to comments made in Scrutiny Report 33 concerning the Duties Amendment Bill 2006 (No. 2).
- The Attorney-General, dated 18 October 2006, in relation to comments made in Scrutiny Report 32 concerning the Carers Recognition Legislation Amendment Bill 2006.

- The Minister for Disability and Community Services, dated 18 October 2006, in relation to further comments made in Scrutiny Report 32 concerning Disallowable Instrument DI2006-153, being the Children and Young People (Childrens Services Council) Appointment 2006 (No. 1).
- The Attorney-General, dated 19 October 2006, in relation to comments made in Scrutiny Report 32 concerning the Justice and Community Safety Legislation Amendment Bill 2006.
- The Attorney-General, dated 31 October 2006, in relation to comments made in Scrutiny Report 30 concerning:
  - Subordinate Law SL2006-41, being the Supreme Court (Corporations) Repeal Rules 2006; and
  - Subordinate Law SL2006-29, being the Court Procedures Rules 2006.
- The Attorney-General, dated 31 October 2006, in relation to comments made in Scrutiny Report 30 concerning:
  - Disallowable Instrument DI2006-151, being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2006 (No. 1); and
  - Disallowable Instrument DI2006-186, being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2006 (No. 2).
- The Attorney-General, dated 9 November 2006, in relation to comments made in Scrutiny Report 33 concerning the Medical Treatment (Health Directions) Bill 2006.
- The Attorney-General, dated 9 November 2006, in relation to comments made in Scrutiny Report 33 concerning the Powers of Attorney Bill 2006.

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

ADDITIONAL COMMENTS—TOBACCO (COMPLIANCE TESTING) AMENDMENT BILL 2006—GOVERNMENT RESPONSE

The Committee acknowledges respectfully the response of the Minister for Health of 16 October 2006 but considers it necessary to respond to the Minister's statement that "the Bill is fully compliant with the *Human Rights Act 2004* …, and a copy of the Compliance Statement was tabled when I presented the Bill in the Legislative Assembly".

The relevant statement by the Attorney-General – more accurately described as a Compatibility Statement – states only that:

> "In accordance with section 37 of the *Human Rights Act 2004* I have examined the Tobacco (Compliance Testing) Amendment Bill 2006. In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*."

With respect to the Minister for Health, this statement of opinion – given in particular that it is not supported by any reasoning (though no doubt based on an undisclosed reasoned opinion by government lawyers) – can have little or no bearing on whether a court would or would not find that the relevant law was HRA compatible. Even a reasoned legal opinion is just that – an educated guess as to what a court would conclude if a compatibility issue fell for decision by the court.

Zed Seselja, MLA
Chair

November 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

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

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

Report 28, dated 7 August 2006

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

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-141 - Attorney General (Fees) Determination 2006

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

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

Bills/Subordinate Legislation

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)
Education (School Closures Moratorium) Amendment Bill 2006 **(PMB)**
Education Amendment Bill 2006 (No. 3)

Report 32, dated 18 September 2006

Revenue Legislation Amendment Bill 2006 (No. 2)

Report 33, dated 16 October 2006

Canberra Institute of Technology (Validation of Fees) Bill 2006
Fisheries Amendment Bill 2006

Katy Gallagher MLA

DEPUTY CHIEF MINISTER

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

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Chair
Chamber Support Office
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Seselja

I would like to thank the Standing Committee for Scrutiny Report No 32 concerning the Tobacco (Compliance Testing) Amendment Bill 2006 (the Bill). The Government has considered the Report and offers the following comments in response.

The Government acknowledges that from a human rights perspective, a proposal to use young persons in compliance testing could be seen as controversial. In this regard I note that while Scrutiny Report No 32 discusses both the views that support and views critical of the Bill, the Report does not find one way or the other. It should be noted that the Bill is fully compliant with the *Human Rights Act 2004* (Human Rights Act), and a copy of the Compliance Statement was tabled when I presented the Bill in the Legislative Assembly.

It is also acknowledged that the Explanatory Statement should have mentioned the Human Rights Act .

With regard to the Standing Committee's suggestion that clause 42E(2), which relates to informed consent by a person with parental responsibility needs careful consideration, I wish to advise that this clause was specifically drafted to be consistent with the requirements of the *Children and Young People Act 1999*. In addition, the Bill was developed in consultation with the Department of Justice and Community Safety and the Office for Children, Youth and Family Support.

Again, I wish to thank the Standing Committee for their comments.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
16/10/06

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

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

Mr Zed Seselja MLA
Chair
Scrutiny of Bills Committee
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Seselja

I am writing in response to the comments of the Scrutiny of Bills Committee in Scrutiny Report 33 (16 October 2006) on the *Duties Amendment Bill 2006 (No 2)* (the Bill).

In Report 33, the Committee considered whether the provisions which empower the Executive to make regulations to facilitate the transition from one tax regime to another in the new Chapter 15, Transitional – Duties Amendment Act 2006 (No 2), are an appropriate delegation of legislative power. As noted in the Explanatory Statement to the Bill, the Committee made similar comments in Scrutiny report 23 (27 March 2006) in relation to the transitional arrangements in the *Duties Amendment Bill 2006*.

The main purpose of both of these Bills is to remove the liability for taxes from particular dates, and the provisions were designed to ensure that taxpayers discharge the liabilities they incur prior to the abolition dates. Because every avoidance issue that may arise cannot be anticipated, there is provision for the Executive to make transitional regulations to deal quickly with unanticipated issues, including those that may arise during the implementation phase. Accordingly, when an issue is identified, a transitional regulation may be made to apply prospectively to ensure that taxpayers discharge their liabilities notwithstanding any legislative deficiency.

The Committee has acknowledged circumstances in which the delegation of legislative power may be useful, for example, as would apply to the implementation of the arrangements provided by both amending Bills. The transitional regulations are subject to disallowance by the Assembly, and it is for the Assembly to decide whether such a degree of supervision is adequate.

Importantly, the transitional regulations expire 12 months after commencement. This is considered to be an appropriate timeframe as it enables scrutiny by the Assembly while also providing for unanticipated issues to be dealt with in subordinate legislation. The timeframe allows for any issue dealt with by regulation to be put to the Assembly as an amendment to the *Duties Act 1999*.

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

The Committee's suggested alternative that the regulations only commence on a positive resolution provision does not allow for a quick reaction to a prevent tax avoidance, or provide certainty in the application of legislation when a new unanticipated issue is identified that requires a legislative response.

Thank you for the opportunity to address the Committee's concerns.

Yours sincerely

Jon Stanhope MLA
Treasurer

19 OCT 2006

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Cc: Mr Max Kiermaier, Deputy Clerk and Serjeant at Arms of the Legislative Assembly

Dear Mr Seselja Zed

Thank you for Scrutiny Report Number 32 of 18 September 2006. I note that the report offered comments relating to the Carers Recognition Legislation Amendment Bill 2006.

In particular, the Committee commented in relation to the provision amending the *Discrimination Act 1991*, namely clause 5 of the Bill. The committee has queried whether clause 5 of the Bill would further derogate from the principle in paragraph 21(1) (a) of the *Discrimination Act 1991*.

The Government notes and acknowledges the Committee's concerns in relation to the provision of accommodation services in respect of particular premises. Section 26 of the *Discrimination Act 1991* ensures that the prohibition on discrimination in the provision of accommodation in section 21 does not unduly trespass upon the personal beliefs of the person in their private life. The rationale for this exception is that one is entitled to decide whom to live with as that is, and should be entirely dependent on, personal choice.

Accordingly, the Government is of the view that the amendment to the *Discrimination Act 1991* is an appropriate extension of section 26 of the Act.

I trust that this addresses the concerns raised by the Scrutiny Committee.

Yours sincerely

Simon Corbell MLA
Attorney General
18-10-06

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

Received 5.25pm 19/10/06

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

Dear Mr Seselja

I am writing with regard to the Scrutiny of Bills Report No. 32, dated 18 September 2006. The following response is offered in relation to the matter raised by your Committee.

The Scrutiny Committee maintains in Report No. 32, DI2006-153, that the Minister lacks the ability to appoint a Deputy Chair of the Council under the Children and Young People Act. Therefore a new Disallowable Instrument appointing Ms Orr as a member has been made in accordance with Section 36. The Office of Parliamentary Counsel has been consulted on the validity of both DI2006-153 and the new Disallowable Instrument to ensure compliance with the Legislation Act 2001.

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

Yours sincerely

Katy Gallagher MLA
Minister for Children and Youth
18 October 2006

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly Committee Office
GPO Box 1020
Canberra ACT 2601

Cc: Max.Kiermaier@parliament.act.gov.au

Dear Mr Seselja

Thank you for the Scrutiny Report of 18 September 2006 released by the Scrutiny of Bills and Subordinate Legislation Committee. I note that the report offered comments relating to the explanatory statement for the Justice and Community Safety Legislation Amendment Bill 2006.

In particular, the Committee commented in relation to the explanatory notes for provisions amending the *Security Industry Act 2003.* The committee has noted that the human rights issues relating to the offence in section 42 have not been addressed, but that an adequate discussion of the issues is made in relation to the offence provision in section 42A.

I thank the committee for their response and can confirm that the explanatory notes are intended for both sections 42 and 42A of the *Security Industry Act 2003.* The offences in those provisions are strict liability offences; however they have low penalties, and are necessary to address the potential mischief that can be caused by members of the security industry in not wearing or carrying their licence.

I trust that this addresses the concerns raised by the Scrutiny Committee.

Yours sincerely

Simon Corbell MLA
Attorney General
19.10.06

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

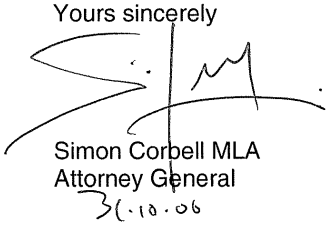
Thank you for your Scrutiny of Bills Report No.30 of 21 August 2006. I offer the following responses in relation to the matters raised by your Committee on the Supreme Court (Corporations) Repeal Rules 2006 and the Court Procedures Rules 2006.

The Committee's concerns about rule 3553 in the Court Procedures Rules 2006 are noted. I am advised that the effect of this rule and the rules in part 3.10 is that, consistent with a plain English modern approach, all writs have been abolished. That said, the relief granted by the writs of mandamus, prohibition, certiorari and quo warranto is still available. It is only the procedure that is used to obtain the relief which has changed. On this basis, I believe that this procedural change is appropriately made in the Court Procedures Rules 2006 and is not a matter that should properly be dealt with in an Act of the Legislative Assembly. As the change is procedural, I am satisfied that there is no trespass on rights previously established by law.

I note the Committee's comment on the absence of the explanatory statement for the Supreme Court (Corporations) Repeal Rules 2006. I am advised that an explanatory statement was prepared for this subordinate law and a copy of this explanatory statement is attached for the information of the Committee. I have asked my Department to ensure that the explanatory statement is included on the Legislation Register.

I trust that this information addresses the Committee's concerns about the Supreme Court (Corporations) Repeal Rules 2006 and that the Court Procedures Rules 2006.

Yours sincerely



Simon Corbell MLA
Attorney General
31.10.06

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.30 of 21August 2006. I offer the following responses in relation to the matters raised by your committee on disallowable instruments DI2006-151 and DI2006-186, made under section 84(1) of the *Legal Profession Act 2006*.

As the committee noted, the first paragraph in the explanatory statement, for both instruments, incorrectly states the power conferred by paragraph 84(1)(a).

The instrument (DI2006-151) deals with fees for granting all practising certificates – restricted and unrestricted certificates for (essentially) solicitors, and barrister practising certificates for barristers. The reference to "barrister practising certificates" in the first paragraph of the statement should have been to "restricted or unrestricted practising certificates". The typographical error in the statement for DI2006-151 was not detected, and was therefore repeated, in the statement for DI2006-186.

The committee also said that it was not clear why DI2006-186 (dated 25 July 2006) revoked DI2006-151 so soon after it was made (30 June 2006).

The original instrument was revoked only because the Bar Association wished the instrument to make clear the position that the Law Society could only charge a fee once in a financial year for each barrister. The Association advised (after 30 June 2006) that Readers, who hold a practising certificate on certain conditions, might complete their readership during a financial year and apply for a new certificate without conditions. It had been agreed that those practitioners would not pay for their second certificate.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

The instrument required immediate amendment, as several barristers were completing their readership. The explanatory statement for DI2006-186 states the following, with the new words underlined:

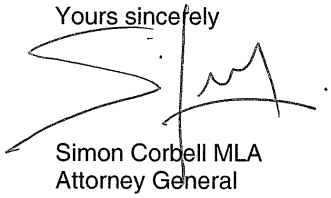
> Clause 4 determines a fee for the services that the law society council provides as the licensing body in relation to the grant or renewal of barrister practising certificates. The fee applies to each application for the grant or renewal of a barrister practising certificate, <u>but may be imposed only once in a financial year for each person who applies</u>.

The other changes made by DI2006-186 were minor:

- Clause 5 of the instrument was changed to reflect the fact that barristers pay their fees to the Bar Association, which then pays the Law Society for its services.
- Note 1 in DI2006-151 was converted to clause 7 in new DI2006-186.

I thank the committee for its comments on these disallowable instruments.

Yours sincerely



Simon Corbell MLA
Attorney General

31.10.06

COPY

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2601

Cc: Max.Kiermaier@parliament.act.gov.au

Dear Mr Seselja

Thank you for your Scrutiny Report No. 33 of 16 October 2006. I offer the following response in relation to the matters raised by your Committee on the Medical Treatment (Health Directions) Bill 2006.

I note that the Committee's suggestions are to make minor changes to the Bill with a view to clarifying the effect of certain provisions. The Bill is a consequential amendment to the *Medical Treatment Act 1994* in view of the Powers of Attorney Bill, and re-writes provisions of the Act that deal with medical directions people could give to refuse, or request the withdrawal of, medical treatment to themselves. The Act also provides for powers of attorney to authorise another person to make a decision to refuse, or request the withdrawal of, medical treatment on behalf of the maker of the power of attorney. The latter provisions would become redundant because the Powers of Attorney Bill proposes to deal with all types of power of attorney, and are to be omitted.

The provisions of the Bill carry the same meaning as the provisions of the Act. I do not think there is any ambiguity in them. Some changes in the Bill relate to the current drafting style and the need for consistency with the Powers of Attorney Bill as regards some terms.

I would like to provide the following comments on your Committee's specific suggestions:

Subclause 13(1)
I note the Committee's concern about the likelihood of a large number of people being embraced within the concepts of "a health professional or someone else" in subclause 13(1), and its view that the intent might be to limit this class to the class of people referred to in subclause 10(1). Subclause 10(1) is to enable a person to revoke a health direction by clearly expressing the decision to "a health professional or someone else". Clause 13 obliges a health professional or someone else to notify a health care facility if they had become aware of a person making or revoking a health direction. I do not think that the

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

intent is that the class of people referred to in both provisions should be the same. In fact, a health professional or someone else under subclause 13(1) could include those who are not covered by subclause 10(1). The class of people under subclause 10(1) is narrower than that under subclause 13(1) in that it covers only those to whom a person expressed his or her decision to revoke their health direction. A health professional or someone else under subclause 13(1) could also become aware that a person has made a direction (and not yet revoked) or become aware, by means other than the person expressing it directly to them, that the person had revoked it but had not expressed the decision to them.

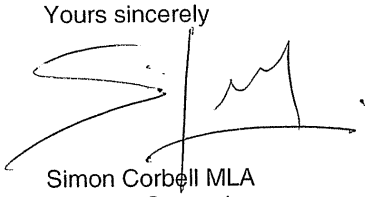
Clause 14
The Committee was also concerned about a possible ambiguity in relation to clause 14 as to whether it would not cover a non-written health direction. This provision obliges a health care facility to take steps to place in a patient's file a copy of the patient's direction or revocation. Subclause 14(b) provides for a note about the direction or revocation to be placed in the file, if it is not possible obtain a copy. The reference to "if it is not possible to get a copy" would cover not only if a written direction or revocation is not available but also if a direction or revocation is a non-written one. The obligation is to "take reasonable steps to ensure" that a copy is of a direction is placed in the file. If a direction were not written, no reasonable steps would be possible to take to place a copy of it in the file.

Paragraphs 18(1)(b) and 19(1)(b)
Events in paragraphs 18(1)(b) and 19(1)(b) would need to occur respectively after the events in paragraph 18(1)(a) and 19(1)(a), i.e. after a health direction has been made. These provisions reflect the current drafting style and do not have ambiguity.

Care needs to be exercised to ensure that any changes to the current provisions of the Bill would not be such that they could give rise to a different interpretation to the provisions they seek to replace.

I trust that this information addresses the Committee's concerns about the Medical Treatment (Health Directions) Bill.

Yours sincerely



Simon Corbell MLA
Attorney General

9.11.06

COPY

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2601

Cc: Max.Kiermaier@parliament.act.gov.au

Dear Mr Seselja

Thank you for your Scrutiny Report No. 33 of 16 October 2006. I offer the following response in relation to the matters raised by your Committee on the Powers of Attorney Bill 2006 (the Bill).

Paragraph 32(2)(b) of the Bill

I note the Committee's concern about the possible meaning of paragraph 32(2)(b) (which is referred to in its report as paragraph 32(b), by mistake). The effect of clause 32 of the Bill is that a principal's impaired decision-making capacity does not revoke his or her enduring power of attorney and the attorney can exercise a power under it during the principal's impaired decision-making capacity irrespective of whether or not the condition that must be satisfied before exercising the power has been satisfied.

Your Committee is of the view that, on the face of it, this paragraph seems to negate the point of attaching conditions to the exercise of the power and that the matter requires further explanation.

I acknowledge that there is an ambiguity in paragraph 32(2)(b), as noted by the Committee. The intent of the paragraph is that the attorney can exercise a power under an enduring power of attorney if the principal has become a person with impaired decision-making capacity even though the document specifies after when the power can be exercised. For example, where an enduring power of attorney states a power can be exercised after a time or event, the attorney can still exercise the power (i.e. will have the authority to exercise the power) before the specified time or event if the principal has become a person with impaired decision-making capacity. I will introduce an amendment to the Bill to revise paragraph 32(2)(b) to clarify its meaning.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

Phone (02) 6205 0000 Fax (02) 6205 0535 Email corbell@act.gov.au

Concern about whether statutory conditions could be ignored

My response to the Committee's concern whether a condition stated in the Bill – such as those stated in clauses 33 and 46, would be affected by paragraph 32(2)(b), is as follows: I draw your attention to my response on what is the intent of paragraph 32(2)(b). This paragraph does not enable ignoring any statutory conditions under the Bill, including the restrictions provided in clauses 33 and 46.

As the Committee has also referred to clauses 33 and 46, I would like to clarify their effect. Clause 33 provides that an attorney under an enduring power of attorney cannot authorise anyone else (for example, a substitute) to exercise the powers of the attorney while the principal has impaired decision-making capacity, unless the power of attorney expressly allows such authorisation. Where the enduring power of attorney does not expressly provide so, the attorney cannot ignore the statutory restriction under clause 33.

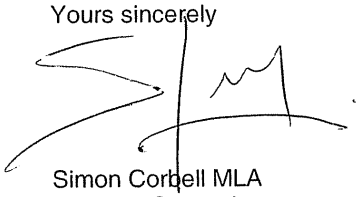
Clause 46 prohibits an attorney from asking to withhold or withdraw medical treatment from the principal, without consulting a doctor on matters specified in the provision and forming a belief, on reasonable grounds, that the principal would make the same request if the principal could make a rational judgment, and were to give serious consideration to the principal's own health and wellbeing. This is not a kind of condition that a principal may impose in the document before a power under it can be exercised.

Comment on the Explanatory Statement

I also note that the Committee has observed that on page 9 of the Explanatory Statement, the second reference to clause 31 should be to clause 32. This error will be corrected.

I trust that this information addresses the Committee's concerns about the Powers of Attorney Bill.

Yours sincerely



Simon Corbell MLA
Attorney General

9.11.06