



Legislative Assembly for the ACT

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

Scrutiny Report

22 AUGUST 2005

Report 15

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:

HOTEL SCHOOL (REPEAL) BILL 2005
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This is a Bill to repeal the *Hotel School Act 1996* to coincide with the sale of the business undertakings of the Australian International Hotel School.

Bills—Comment

The Committee has examined the following Bill and offers this comment on it:

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2005 (NO 3)
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This is a Bill to amend the *Public Sector Management Act 1994* to amend elements of contract employment arrangements for chief executives and executives in the ACT Public Service, and also to make amendments to the executive employment provisions to clarify the employment powers of certain persons on whom chief executive powers are conferred under this or other legislation.

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

The privative clause in proposed subsection 33B

Are provisions stating that some action is “not invalid because of a defect or irregularity in relation to the [action]”
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| <ul style="list-style-type: none"> • contrary to the notion of the rule of law, and/or • incompatible with HRA subsection 21(1)? |
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This issue arises in relation to 2 sets of clauses. By clause 17 of the Bill it is proposed to insert section 33A into the Act, and the Explanatory Statement states:

New section 33A will clarify the power to transfer chief executives on long term contracts between offices. The new arrangements permit the Chief Minister to transfer chief executives to other chief executive offices or any other office in a department or to exercise any stated public sector function.

Subsection 33A(1) states:

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- (1) The Chief Minister may, in writing, for a person engaged by a contract under section 28 (Chief executives—engagement)—
 - (a) transfer the person from the office of chief executive under the contract to—
 - (i) another office of chief executive; or
 - (ii) any other office (including an executive office) in an administrative unit; or
 - (b) assign the person to exercise other stated functions in the public sector.

A decision by the Chief Minister would ordinarily be subject to judicial review by the Supreme Court on the usual grounds upon which administrative action may be challenged. Subsection 5(1) of the *Administrative Decisions (Judicial Review) Act 1989* (the ADJR Act) states the grounds of challenge available under that Act, and is a good guide to the common law grounds of challenge that may be made via an application for some other administrative law remedy (such as an application for a declaration of invalidity). The grounds stated in subsection 5(1) are:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorised by the enactment under which it was purported to be made;
- (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (i) that the decision was otherwise contrary to law.

Subsection 5(2) provides that:

the reference in subsection (1) (e) to **an improper exercise of a power includes a reference to –**

- (a) taking an irrelevant consideration into account in the exercise of a power; and
- (b) failing to take a relevant consideration into account in the exercise of a power; and
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

- (d) an exercise of a discretionary power in bad faith; and
- (e) an exercise of a personal discretionary power at the direction or behest of another person; and
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power; and
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (i) any other exercise of a power in a way that constitutes abuse of the power.

Subsection 5(3) elaborates further by providing that:

The ground specified in **subsection (1) (h)** shall not be taken to be made out unless –

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

While very elaborate and comprehensive, these grounds for challenge do not permit the Supreme Court to undertake a “merits review” of the decision under challenge. That is, the court cannot – as, in contrast, can the Administrative Appeals Tribunal – simply reverse the decision and substitute one that the court considers the better decision. The court can review only to see if the decision was lawfully made in the sense of being within the powers of the decision-maker granted by the empowering law.

The extent of the powers granted by the empowering law will be determined by:

- the words used to describe the power – so that, for example, a power to do something unrestricted by reference to what considerations are or are not relevant to its exercise is, on its face, wider than a power which is restricted in these ways; and
- the extent to which the power is “polycentric” – that is, requires the decision-maker to take into account not merely the particular circumstances of the person(s) affected by the exercise of the power, but also the interests of a part or the whole of the general public. In this latter case, the courts permit the decision-maker wider latitude, in respect of both the procedure followed – so that the person(s) directly affected might be given a lesser measure of natural justice (in the sense of procedural fairness), and the matters considered relevant to the exercise of the power – so that the interests of the person(s) affected are only part of the picture.

It will be seen that one ground for challenge is “that procedures that were required by law to be observed in connection with the making of the decision were not observed” (paragraph 5(1)(a) of the ADJR Act). Thus, attention must be given to the extent that the empowering statute does prescribe procedures, and in this connection the Explanatory Statement notes that “new section 33A(2) includes requirements for consulting the chief executive before the transfer occurs”. It provides:

- (2) The Chief Minister may transfer or assign the person only if the Chief Minister has—
 - (a) given the person an opportunity to state the person’s views about the transfer or assignment; and
 - (b) considered the person’s views (if any).

Proposed subsection 33A(2) affords a measure of natural justice to a chief executive, and to that extent protects the rights of the executive affected by the Chief Minister’s decision. It would require only that the Chief Minister provide the opportunity, which would however involve informing the person of the action that is proposed and why it is, and then “genuinely” take the person’s views into account. The executive could not stultify the process by refusing to state their views.

So far as concerns observance of the law in action taken by the executive and administrative arms of government, the jurisdiction of the Supreme Court to assess the lawfulness of such action in terms of the principles of review reflected in section 5 of the ADJR Act, is the means for the enforcement of the rule of law. Thus, proposals to cut down this jurisdiction must be scrutinised carefully. (There may be a real constitutional issue as to whether, in the light of section 48A of the *Australian Capital Territory (Self-Government) Act 1988*, the Supreme Court of the Territory can be deprived of this jurisdiction, but this will be left aside.)

This brings subsection 33B(1) into focus. It appears to qualify the power of the Supreme Court to apply the principles of review outlined above and, in particular, to derogate from the protection afforded by section 33A. Subsection 33B(1) provides that:

- (1) A transfer, or anything done in relation to a transfer, is not invalid only because of a defect or irregularity in relation to the transfer.

The effect of this provision **might** be that a chief executive affected by a transfer could not challenge a transfer decision on the ground of non-compliance with section 33A; (and, perhaps, could not make a challenge on the ground of non-compliance with natural justice on the basis that these principles were displaced by the specific provision for consultation).

(This statement above assumes that a court would find non-compliance with subsection 33A(2) is one of the kinds of defects and irregularities to which subsection 33B(1) refers. On the other hand, a court might not read the concepts of “defect or irregularity” in this way, but perhaps more narrowly to preserve the protective policy of subsection 33A(2). Again, despite subsection 33A(2), other kinds of challenge such as stated in section 5 of the ADJR Act might be available, depending on how widely the court reads the words “defect or irregularity in relation to the transfer”. The comments that follow assume the accuracy of what has been stated above.)

Provisions such as proposed subsection 33B(1) have appeared in other bills. The Committee has commented that they appear to negate the notion that administrative powers must be exercised in accordance with the empowering law. In *Report 53 of the Fifth Assembly*, concerning the Electricity (Greenhouse Gas Emissions) Bill 2004, the Committee addressed a clause designed (in the words of the Explanatory Statement) to “make it clear that an assessment of liability to pay greenhouse penalty is not affected because a provision of the Principal Act, the regulations or the greenhouse gas benchmark rules has not been complied with”. The Committee commented:

Critical to the rule of law is the principle that bodies invested with statutory power should stay within the boundaries of their power; (in legal terms, the body should not act *ultra vires* – “beyond power”). Legislative qualification of this principle raises a concern. Proposed section 20 appears to be a major qualification of the *ultra vires* principle; indeed, it appears to set it aside completely.

Given the critical significance of the rule of law in our constitutional system, any qualification of it should be justified. None appears in the Explanatory Statement.

These comments apply to proposed section 33B. They also apply to proposed section 80B – see clause 33 of the Bill.

In relation to proposed section 33B, the Explanatory Statement states:

New section 33B explains that a transfer under new section 33A will not be regarded as invalid merely because there is a defect or irregularity in the way the transfer is made. This provision is similar to other provisions relating to executive contracts, such as section 32.

This does not explain why it is necessary to protect decisions under proposed section 33A in this way. That the provision is similar to an existing provision in the Act is not an adequate explanation, and overlooks the impact of the *Human Rights Act 2004* on ACT laws.

The HRA might be relevant in that the effect of proposed section 33B might be to give rise to an incompatibility between, on the one hand, proposed sections 33A and 33B and, on the other, HRA subsection 21(1), which provides:

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.

There is a very complex matter, but the argument that there is incompatibility might be based on the following propositions:

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- a decision of the Chief Minister to take action under proposed subsection 33A(1) affects a “right recognised by law” of the chief executive affected;
 - thus, a dispute concerning action taken by the Chief Minister must be “decided by a competent, independent and impartial court or tribunal after a fair and public hearing”;
 - apart from proposed subsection 33B(1), the chief executive would be able to seek judicial review by the Supreme Court on grounds that the Chief Minister acted unlawfully, which might justify a conclusion that the requirements of HRA section 21(1) were met;
 - but the effect of proposed subsection 33B(1) is to preclude the chief executive from seeking judicial review on at least some unlawfulness grounds;
 - with the result that a chief executive could not obtain a “[decision] by a competent, independent and impartial court or tribunal after a fair and public hearing”, thus creating an incompatibility between proposed subsection 33B(1) and HRA subsection 21(1).

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

The retrospective element

HRA section 25 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; see the discussion in *Report No 12 of the Sixth Assembly*, concerning the Children and Young People Amendment Bill 2005. This is the basis for the presumption that an enactment is not intended to have a retrospective effect. However, an enactment may displace the presumption if it manifests an intention that the law operate retrospectively.

The rights of employees that may be affected by action taken under the amendments to the *Public Sector Management Act 1994* proposed by this Bill are a mixture of rights created under contract and by statute. If the employee agrees to a variation in the terms of their employment, no objection could be raised on the ground that the change was retrospective, and some provisions of the Bill operate retrospectively only on agreement (such as proposed section 72A).

However, some provisions of the Bill will operate retrospectively irrespective of agreement by the employee; see proposed sections 28D, 33A and 75A. In these circumstances, the Explanatory Statement should address the question whether the retrospective operation of these proposed sections could affect adversely those rights.

The Explanatory Statement does address this issue. In relation to proposed sections 28D and 75A, there is an assurance that the provisions would confer a benefit that would not otherwise apply, and in relation to proposed section 33A, that its operation cannot adversely affect a chief executive’s entitlements.

The Committee thus notes that there is no apparent basis for concern that these provisions may operate retrospectively, and commends the Explanatory Statement for having made this clear.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

Disallowable Instrument DI2005-121 being the Gungahlin Drive Extension Authorisation 2005 (No. 1) made under subsection 9(2) of the *Gungahlin Drive Extension Authorisation Act 2004* approves Development Application 200502117 as required under section 230 of the *Land (Planning and Environment) Act 1991*.

Disallowable Instrument DI2005-122 being the ACTION Authority (Appointment) 2005 (No. 1) made under sections 11 and 12 of the *ACTION Authority Act 2001* appoints specified persons to be members of the ACTION Authority Board.

Disallowable Instrument DI2005-123 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2005 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-263 and determines the thresholds to be used to calculate duty payable for the Home Buyer Concession Scheme.

Disallowable Instrument DI2005-125 being the Planning and Land (Land Development Agency Board) Appointment 2005 (No. 1) made under section 59 of the *Planning and Land Act 2002* appoints a specified person as Chair of the Land Development Agency Board.

Disallowable Instrument DI2005-126 being the Planning and Land (Land Development Agency Board) Appointment 2005 (No. 2) made under section 59 of the *Planning and Land Act 2002* appoints specified persons as members of the Land Development Agency Board.

Disallowable Instrument DI2005-129 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2005 (No. 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes Disallowable Instrument DI2004-136 and determines the maximum fares relating to hiring or using a taxi.

Disallowable Instrument DI2005-130 being the Psychologists (Fees) Determination 2005 (No. 1) made under section 54 of the *Psychologists Act 1994* revokes Disallowable Instrument DI2003-94 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2005-131 being the Health (Fees) Determination 2005 (No. 2) made under section 36 of the *Health Act 1993* revokes Disallowable Instrument DI2005-72 and determines the fees payable for the purposes of the Act.

Disallowable Instrument DI2005-134 being the Public Baths and Public Bathing (Active Leisure Centre Fees) Determination 2005 made under section 37 of the *Public Baths and Public Bathing Act 1956* determines fees payable for pool admission, classes and swim school provided by the Active Leisure Centre.

Disallowable Instrument DI2005-135 being the Tertiary Accreditation and Registration (Fees) Determination 2005 made under section 111 of the *Tertiary Accreditation and Registration Act 2003* revokes Disallowable Instrument DI2004-137 and determines fees payable under the Act.

Disallowable Instrument DI2005-146 being the Workers Compensation (Fees) Determination 2005 made under section 221 of the *Workers Compensation Act 1951* revokes Disallowable Instrument DI2004-146 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2005-147 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2005 (No. 1) made under subsections 10(2) and 20(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes Disallowable Instrument DI2004-124 and determines the conditions under which Members may employ staff and engage consultants and contractors for the 2005-2006 financial year.

Disallowable Instrument DI2005-148 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2005 (No. 1) made under subsections 5(2) and 17(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes Disallowable Instrument DI2004-134 and determines the conditions under which the Speaker may employ staff and engage consultants and contractors for the 2005-2006 financial year.

Disallowable Instrument DI2005-150 being the Dental Technicians and Dental Prosthetists (Fees) Determination 2005 (No. 1) made under section 73 of the *Dental Technicians and Dental Prosthetists Registration Act 1988* revokes Disallowable Instrument DI2003-115 and determines the fees payable under the Act.

Disallowable Instrument DI2005-151 being the Chiropractors and Osteopaths (Fees) Determination 2005 (No. 1) made under section 54 of the *Chiropractors and Osteopaths Act 1983* revokes Disallowable Instrument DI2003-241 and determines the fees payable under the Act.

Disallowable Instrument DI2005-157 being the Taxation Administration (Amounts payable—Home Buyer Concession Scheme) Determination 2005 (No. 2) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-262 and determines the eligibility and methods of calculation for the Home Buyer Concession Scheme.

Disallowable Instrument DI2005-158 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2005 (No. 3) made under section 139 of the *Taxation Administration Act 1999* revokes Disallowable Instrument DI2004-263 and determines the thresholds to be used to calculate duty payable for the Home Buyer Concession Scheme.

Disallowable Instrument DI2005-164 being the Housing Assistance Public Rental Housing Assistance Program 2005 (No. 1) made under subsection 12(1) of the *Housing Assistance Act 1987* consolidates the Public Rental Housing Assistance Program as a single instrument.

Disallowable Instrument DI2005-166 being the University of Canberra (Courses and Awards) Amendment Statute 2005 (No. 1) made under section 40 of the *University of Canberra Act 1989* adds new awards to the principal statute.

Disallowable Instrument DI2005-168 being the Children and Young People (Places of Detention) Standing Order 2005 (No. 2) made under section 403 of the *Children and Young People Act 1999* makes a standing order in relation to the use of the Seclusion Room at Quamby Youth Detention Centre.

Disallowable Instrument DI2005-169 being the Road Transport (Driver Licensing) Code of Practice for Driving Instruction 2005 (No. 1) made under section 118 of the *Road Transport (Driver Licensing) Regulation 2000* revokes Disallowable Instrument DI2002-7 and determines the Code of Practice for Driving Instruction.

Disallowable Instruments—Comment

No Explanatory Statement/Minor drafting error

Disallowable Instrument DI2005-109 being the Roads and Public Places (Fees) Determination 2005 (No. 3) made under section 9A of the *Roads and Public Places Act 1937* revokes Disallowable Instrument DI2003-98 and determines fees payable for the purposes of the Act.

The Committee notes that no Explanatory Statement is available for this instrument.

The Committee notes that the instrument states that it is made under the "*Roads and Public Places ACT 1937*".

No Explanatory Statement

Disallowable Instrument DI2005-110 being the Waste Minimisation (Fees) Determination 2005 (No. 1) made under subsection 45(1) of the *Waste Minimisation Act 2001* revokes Disallowable Instrument DI2004-122 and determines fees payable for the purposes of the Act.

The Committee notes that the final page of this instrument is headed "Additional Explanatory Notes". There is no Explanatory Statement, as such. Unlike other instruments that are provided without Explanatory Statements, however, the relevant entry on the ACT Legislation Register does not contain the annotation "Explanatory statement not available for this instrument". Instead, the page headed "Additional Explanatory Notes" is attached as the Explanatory Statement.

The Committee simply notes that it would be simpler and less confusing if the page headed "Additional Explanatory Notes" was expressly designated as the Explanatory Statement.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-113 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2005 (No. 2) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* revokes Disallowable Instrument DI2005-10 and determines the rules for sports bookmaking.

This instrument is accompanied by a 1 page Explanatory Statement that states:

The *Race and Sports Bookmaking Act 2001* (the Act) regulates the activities of bookmakers in the Australian Capital Territory.

Part 3 of the Act provides for the conduct and control of sports bookmaking. In particular, the legislation empowers the Commission to determine rules for sports bookmaking.

Section 23(1) of the Act provides that the Commission may determine rules for sports bookmaking for the purpose of the Act.

This instrument revokes determination DI2005-10, dated 15 March 2005 and notified on the Legislation Register on 24 March 2005, and is the result of an extensive revision of the rules for sports bookmaking following public consultations.

The instrument in question, including the Schedule, which contains the substantive part of the instrument, is 48 pages. It contains detailed provisions dealing with various aspects of race and sports bookmaking. Unlike the Explanatory Statement to DI2005-10 (dated 15 March 2005), which this instrument revokes and replaces, this Explanatory Statement gives no indication as to the changes made by the instrument.

Paragraph (b) of the Committee's terms of reference require it to:

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.

The Committee considers that the Explanatory Statement relating to this instrument is inadequate, as it does not indicate what changes to the previous instrument are made by this instrument. As a result, the Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Minor drafting issue

Disallowable Instrument DI2005-124 being the Public Place Names (Belconnen) Determination 2005 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of an unnamed road in the division of Belconnen.

The Committee notes that paragraph 2 of the Explanatory Statement to this instrument refers to the requirements of "Part 254A" of the *Legislation Act 2001*. As the Committee noted in its *Report No 4 of the Sixth Assembly*, in relation to Disallowable Instrument DI2004-269 (being the Public Place Names (Gungahlin) Determination 2004 (No. 4)), the reference should be to "**section 254A**".

No Explanatory Statement

Disallowable Instrument DI2005-127 being the Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1) made under section 201 of the *Emergencies Act 2004* determines the fees payable for the purposes of the Act.

The Committee notes that no Explanatory Statement is provided in relation to this instrument. The Committee also notes, however, that the face of the instrument expressly states that explanatory notes are included in the text of the instrument, in italics.

No Explanatory Statement

Disallowable Instrument DI2005-128 being the Attorney General (Fees) Determination 2005 made under the *Consumer Credit (Administration) Act 1996, Liquor Act 1975, Sale of Motor Vehicles Act 1977, Trade Measurement (Administration) Act 1991, Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, Prostitution Act 1992, Second-hand Dealers Act 1906, Pawnbrokers Act 1902, Public Trustees Act 1985, Associations Incorporation Act 1991, Business Names Act 1963, Births, Deaths and Marriages Registration Act 1997, Instruments Act 1933, Land Titles Act 1925, Registration of Deeds Act 1957, Security Industry Act 2003, Cooperatives Act 2002, Agents Act 2003, Partnership Act 1963 and Courts Procedures Act 2004 determines fees payable for the purposes of those Acts.*

The Committee notes that no Explanatory Statement is provided in relation to this instrument. The Committee also notes, however, that the face of the instrument expressly states that explanatory notes are included in the text of the instrument, in italics and that "General Explanatory Notes" are set out on the final page of the instrument.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-132 being the Utilities (Variation of Industry Code) Determination 2005 (No. 2) made under section 61 of the *Utilities Act 2000* determines variations to the Consumer Protection Code.

Section 61 of the *Utilities Act 2000* (the Act) allows the Independent Competition and Regulatory Commission (the Commission) to vary an industry code, as it has done here. Subsection 61(1) requires that, subject to subsections 61(2) and (3), the other provisions of Part 5 of the Act apply to such a variation, as if it were a new industry code.

One of the requirements of Part 4, set out in section 60, is that, before it approves or determines an industry code, the Commission must undertake a process of public consultation. There is nothing in the Explanatory Statement to the instrument to indicate that such consultation has been undertaken in this instance.

Subsections 61(2) and (3) of the Act set out circumstances in which public consultation is not required. Again, there is nothing in the Explanatory Statement to this instrument to indicate that it fits within the circumstances provided for in the exceptions.

The Committee considers that the Explanatory Statement should indicate either that the requirements of Part 4 of the Act have been met or that those requirements need not be met, because the exceptions contained in subsections 61(2) or (3) apply. As it does neither (and as the requirements in question are statutory requirements), the Committee considers that the Explanatory Statement to this instrument is inadequate.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Minor drafting issue/Is this a disallowable instrument?

Disallowable Instrument DI2005-133 being the Emergencies (Bushfire Council Members) Appointment 2005 (No. 2) made under section 129 of the *Emergencies Act 2004* appoints specified persons as members of the ACT Bushfire Council.

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

The provisions of division 19.3.3 of the *Legislation Act 2001* are used for the appointment.

There are no public servants included on this instrument, as they are exempt from the above division by subsection 227(2) of the *Legislation Act 2001*.

The Committee assumes that the second of the paragraphs quoted above is intended to indicate that while public servants are also being appointed to the ACT Bushfire Council at that time, those appointments are not dealt with in this instrument because of the operation of paragraph 227(1)(a) of the *Legislation Act 2001*, which exempts public servant appointments from the operation of Part 19.3.3 of the *Legislation Act*. The Committee would, however, appreciate the Minister's confirmation that this is what is meant by the Explanatory Statement.

Is this a disallowable instrument?

Disallowable Instrument DI2005-136 being the Community and Health Services Complaints (Appointment) 2005 (No. 2) made under section 8 of the *Community and Health Services Complaints Act 1993* appoints a specified person as the Community and Health Services Complaints Commissioner.

The Committee notes that, while subsection 8(3) of the *Community and Health Services Complaints Act 1993* expressly provides that an instrument appointing the Community and Health Services Complaints Commissioner is a disallowable instrument, Division 19.3.3 of the *Legislation Act 2001* generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no such statement.

Minor drafting issue

Disallowable Instrument DI2005-137 being the Road Transport (General) (Hire Car) Exemption 2005 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* revokes Disallowable Instrument DI2002-22 and determines a specified person, and a vehicle he proposes to operate as a hire car, to be exempt from provisions of road transport legislation relating to the operation of vehicles as hire cars.

The Committee assumes that the reference in paragraph 2 of the Explanatory Statement to this instrument to the "principle" impact of the exemptions provided for by the instrument should be to the "principal" impact of those exemptions.

Are these disallowable instruments?

Disallowable Instrument DI2005-138 being the Planning and Land Council Appointment 2005 (No. 1) made under section 28 of the *Planning and Land Act 2002* appoints a specified person as Deputy Chairperson of the Planning and Land Council.

Disallowable Instrument DI2005-139 being the Planning and Land Council Appointments 2005 (No. 2) made under section 28 of the *Planning and Land Act 2002* appoints a specified person as a member of the Planning and Land Council.

Disallowable Instrument DI2005-140 being the Planning and Land Council Appointments 2005 (No. 3) made under section 28 of the *Planning and Land Act 2002* appoints a specified person as a member of the Planning and Land Council.

The Committee notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the *Legislation Act* operates to exclude public servant appointments from the operation of Part 19.3.3. It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no such statement.

Minor drafting issues/Inadequate Explanatory Statement

Disallowable Instrument DI2005-141 being the Pharmacy (Fees) Determination 2005 (No. 1) made under section 57 of the *Pharmacy Act 1931* revokes Disallowable Instrument DI2004-116 and determines fees payable for the purposes of the Act.

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

This instrument revokes Disallowable Instrument DI2004-116, determination of fees and sets new fees for initial registration in accordance with Section 18; fee for annual renewal registration pursuant to Section 28(1); fee for interim registration pursuant to Section 12; entitlement to re-registration in accordance with Section 30(1), fee for a duplicate certificate pursuant to Section 31(4); fee for alteration of particulars in the register pursuant to Section 33(2); fee to inspect an entry in the register pursuant to Section 56(1) and fee to obtain a certified copy of an entry in the register pursuant to Section 56(1).

The fees for initial registration, annual renewals and other miscellaneous fees have been set at levels which reflect the administrative costs associated with those activities, and to meet the agreed costs of operating the Health Professions Boards Secretariat.

The Committee notes that it appears that words or punctuation are missing from the first paragraph quoted above.

As to the second paragraph quoted above, the Committee notes that, unlike other instruments and/or Explanatory Statements (and, indeed, unlike the Dental Technicians and Dental Prosthetists (Fees) Determination 2005 (No 1), which is mentioned in the "no comment" section above), the Explanatory Statement to this instrument gives no indication of the increase to the various fee levels that is effected by the instrument. The Committee notes that it is of great assistance to the Committee – and to the Assembly – if the level of fee increases are readily discernible from the face of an instrument and/or the accompanying Explanatory Statement.

In this context, the Committee commends the approach taken in the Workers Compensation (Fees) Determination 2005 (DI2005-146) and the Explanatory Statement to that instrument (*see* copy attached). The Committee considers that this is an excellent example of the approach that it would prefer to see in relation to a fees determination.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Minor drafting issue

Disallowable Instrument DI2005-142 being the Dangerous Substances (Fees) Determination 2005 (No. 2) made under section 221 of the *Dangerous Substances Act 2004* revokes Disallowable Instrument DI2004-141 and determines the fees payable for the purposes of the Act.

The Committee notes that the reference in the fifth paragraph of the Explanatory Statement to the "*Dangerous Substances (General Regulation) 2004*" should be a reference to the "*Dangerous Substances (General) Regulation 2004*".

Minor drafting issue

Disallowable Instrument DI2005-143 being the Machinery (Fees) Determination 2005 made under section 5 of the *Machinery Act 1949* revokes Disallowable Instrument DI2004-142 and determines fees payable for the purposes of the Act.

The Committee notes that the reference to "Determinations" in the fifth line of this instrument should presumably be a reference to "Determination".

Minor drafting issue

Disallowable Instrument DI2005-144 being the Occupational Health and Safety (Fees) Determination 2005 made under section 225 of the *Occupational Health and Safety Act 1989* revokes Disallowable Instrument DI2004-144 and determines fees payable for the purposes of the Act.

The Committee notes that the regulations referred to in the schedule to this instrument are out of numerical order.

Minor drafting issue

Disallowable Instrument DI2005-145 being the Scaffolding and Lifts (Fees) Determination 2005 made under section 21 of the *Scaffolding and Lifts Act 1912* revokes Disallowable Instrument DI2004-145 and determines fees payable for the purposes of the Act.

The Committee notes that the sections referred to in the schedule to this instrument are out of numerical order.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-149 being the Electoral (Fees) Determination 2005 made under section 8 of the *Electoral Act 1992* revokes Disallowable Instrument DI2004-159 and determines the fees payable for the purposes of the Act.

The Committee notes that, unlike other instruments and/or Explanatory Statements, neither this instrument nor its Explanatory Statement specifies the magnitude of the increase to the various fee levels that is effected by the instrument. Instead, the Explanatory Statement indicates, in various places, that fees and charges have been increased to take account of "increased costs, particularly salary and CPI increases". The Committee notes that it is of great assistance to the Committee – and to the Assembly – if the level of fee increases are readily discernible from the face of an instrument and/or the accompanying Explanatory Statement.

In this context, the Committee commends the approach taken in the Workers Compensation (Fees) Determination 2005 (DI2005-146) and the Explanatory Statement to that instrument (*see* copy attached). The Committee considers that this is an excellent example of the approach that it would prefer to see in relation to a fees determination.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-152 being the Veterinary Surgeons (Fees) Determination 2005 (No. 1) made under section 58 of the *Veterinary Surgeons Act 1965* revokes Disallowable Instrument DI2003-133 and determines fees payable under the Act.

The Committee notes that, unlike other instruments and/or Explanatory Statements, neither this instrument nor its Explanatory Statement specifies the magnitude of the increase to the various fee levels that is effected by the instrument. Instead, the Explanatory Statement refers to the relevant Board's dependence on fees for its operating revenue. The Committee notes that it is of great assistance to the Committee – and to the Assembly – if the level of fee increases are readily discernible from the face of an instrument and/or the accompanying Explanatory Statement.

In this context, the Committee commends the approach taken in the Workers Compensation (Fees) Determination 2005 (DI2005-146) and the Explanatory Statement to that instrument (*see* copy attached). The Committee considers that this is an excellent example of the approach that it would prefer to see in relation to a fees determination.

Inadequate Explanatory Statement/Is this a disallowable instrument?

Disallowable Instrument DI2005-153 being the Health Professionals (Medical Board) Appointment 2005 (No. 1) made under Schedule 2, section 2.6 of the *Health Professionals Regulation 2004* appoints specified persons as the president and members of the Health Professionals (Medical Board).

Section 2.6 of Schedule 2 of the *Health Professionals Regulation 2004* deals with the composition of the Medical Board. It provides that the Board is made up of the president and the following people:

- (a) 3 elected members;
- (b) 5 appointed members, 2 of whom are community representatives.

Subsection 2.6(2) provides that one of the community representatives must be a lawyer who has been a lawyer for a continuous period of at least 5 years before the day of appointment.

The Explanatory Statement to this instrument indicates that, for purposes of continuity, the current members of the Board have been appointed under the new and recently-commenced legislation. There is no indication, however, as to which of the stipulated categories of members the 4 individuals (who are all evidently doctors) appointed by this instrument belong (other than the person who is appointed as president of the Board). While it may be assumed that the requirements of section 2.6 are met, it would assist the Committee, and the Assembly, if this were set out in the Explanatory Statement.

In this context, the Committee notes that if one also examines the Explanatory Statements to the Health Professionals (Medical Board) Appointment 2005 (No. 2) and the Health Professionals (Medical Board) Appointment 2005 (No. 3) (discussed below), which appoint the remaining members of the Board, the position becomes clearer. It would be preferable, however, if this explanation was provided without reference to extraneous documents.

The Committee also notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the Legislation Act operates to exclude public servant appointments from the operation of Part 19.3.3. It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no such statement.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Are these disallowable instruments?

Disallowable Instrument DI2005-154 being the Health Professionals (Medical Board) Appointment 2005 (No. 2) made under Schedule 2, section 2.6 of the *Health Professionals Regulation 2004* appoints a specified person as a community member of the Health Professionals (Medical Board).

Disallowable Instrument DI2005-155 being the Health Professionals (Medical Board) Appointment 2005 (No. 3) made under Schedule 2, section 2.6 of the *Health Professionals Regulation 2004* appoints a specified person as a community member of the Health Professionals (Medical Board).

The Committee notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the Legislation Act operates to exclude public servant appointments from the operation of Part 19.3.3. It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statements to these instruments contain no such statement.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-156 being the Electoral (Chairperson and Member) Appointment 2005 (No. 1) made under section 12 of the *Electoral Act 1992* appoints specified persons as the chairperson and a member of the ACT Electoral Commission.

The Committee notes that subsection 12(2) of the *Electoral Act 1992*, which deals with the appointment of the chairperson of the ACT Electoral Commission, requires that a person shall not be appointed as the chairperson unless he or she:

- (a) is or has been a judge; or
- (b) has been a justice of the High Court; or
- (c) has been a chief executive; or
- (d) has held an office of Secretary within the meaning of the *Public Service Act 1999* (Cwlth); or
- (e) has been a member of the electoral commission or of an authority of the Commonwealth, a State or another Territory equivalent to the electoral commission.

The Committee notes that there is no indication in the Explanatory Statement to this instrument as to which of the stipulated categories the person appointed as chairperson by this instrument falls into. While the Committee recognises that this does not, of itself, affect the validity of the appointment, it would assist the Committee, and the Assembly, if such information were set out in the Explanatory Statement.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Is this instrument valid?/Is it a disallowable instrument?

Disallowable Instrument DI2005-159 being the Tree Protection (Interim Scheme) Appointment 2005 made under subsection 21(1) of the *Tree Protection (Interim Scheme) Act 2001* appoints specified persons as advisers to the Conservator of Flora and Fauna.

Subsection 21(1) of the *Tree Protection (Interim Scheme) Act 2001* requires the Minister to appoint "a person" to advise the conservator about the exercise of functions under Part 3 of that Act. This instrument appoints 2 named persons as advisers. The Committee queries whether this is a valid exercise of the power to appoint conferred by subsection 21(1). While the Committee notes the effect of paragraph 145(b) of the *Legislation Act 2001* – which provides that words in an Act or instrument that are expressed in the singular are to be interpreted to include the plural – and also section 212 of the *Legislation Act* – an appointment is not invalid only because of a defect or irregularity in or in relation to the appointment – the Committee considers that there are real issues as to whether there has been a valid exercise of the power here and seeks the Minister's views.

The Committee also notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the *Legislation Act* operates to exclude public servant appointments from the operation of Part 19.3.3. It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no such statement.

Minor drafting issue

Disallowable Instrument DI2005-160 being the Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 1) made under subparagraph 8(1)(a)(ii) of the *Victims of Crime Regulation 2000* appoints a specified person as the Australian Federal Police member of the Victims Assistance Board.

The Committee assumes that, as the person appointed by this instrument is explicitly a member of the Australian Federal Police, she is not a public servant appointment.

Are these disallowable instruments?

Disallowable Instrument DI2005-161 being the Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 2) made under paragraph 8(1)(e) of the *Victims of Crime Regulation 2000* appoints a specified person as the health professions member of the Victims Assistance Board.

Disallowable Instrument DI2005-162 being the Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 3) made under paragraph 8(1)(f) of the *Victims of Crime Regulation 2000* appoints a specified person as the victims group member of the Victims Assistance Board.

Disallowable Instrument DI2005-163 being the Victims of Crime (Victims Assistance Board) Appointment 2005 (No. 4) made under paragraph 8(1)(g) of the *Victims of Crime Regulation 2000* appoints a specified person as the psychiatrist/psychologist member of the Victims Assistance Board.

The Committee notes that Division 19.3.3 (and particularly section 229) of the *Legislation Act 2001* operates to make instruments appointing people to statutory positions disallowable instruments. However, paragraph 227(2)(a) of the *Legislation Act* operates to exclude public servant appointments from the operation of Part 19.3.3. It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statements to these instruments contain no such statement.

Inadequate Explanatory Statement

Disallowable Instrument DI2005-165 being the Health Professionals (Fees) Determination 2005 (No. 1) made under section 132 of the *Health Professionals Act 2004* determines the prescribed fees for the purposes of the Act.

The Committee notes that, unlike other instruments and/or Explanatory Statements, neither this instrument nor its Explanatory Statement specifies the magnitude of the increase to the various fee levels that is effected by the instrument. Instead, the Explanatory Statement refers to need for the relevant Board to ensure that it covers the cost of administering the Act. The Committee notes that it is of great assistance to the Committee – and to the Assembly – if the level of fee increases are readily discernible from the face of an instrument and/or the accompanying Explanatory Statement.

In this context, the Committee commends the approach taken in the Workers Compensation (Fees) Determination 2005 (DI2005-146) and the Explanatory Statement to that instrument (*see* copy attached). The Committee considers that this is an excellent example of the approach that it would prefer to see in relation to a fees determination.

The Committee draws the Assembly's attention to the instrument, as it may be considered to offend against principle (b) of the Committee's terms of reference.

Retrospective operation/Minor drafting issue/Inherently intrusive nature of some of the powers conferred

Disallowable Instrument DI2005-167 being the Children and Young People (Places of Detention) Standing Order 2005 (No. 1) made under sections 403 and 418 of the *Children and Young People Act 1999* sets out the minimum permanent standard to be met by all youth worker staff at the Quamby Youth Detention Centre.

The Committee notes that this instrument is expressly retrospective in its operation. Section 2 provides that it is taken to have commenced on 10 May 2000. This retrospective operation is explicitly allowed by section 418 of the *Children and Young People Act 1999*, (the Act) which was inserted by section 7 of the *Children and Young People Amendment Act 2005* (the Amending Act). The Amending Act was notified on 1 July 2005. Subsection 418(1) provides that a retrospective standing order must be made within 21 days after the commencement of section 418, which commenced on 2 July 2005. Subsection 418(2) provides that a retrospective standing order cannot commence before 10 May 2000.

This instrument is within the parameters set by section 418 of the Act. It was made on 27 July 2005 and does not commence earlier than 10 May 2005.

As the retrospective operation of this instrument has been explicitly provided for by primary legislation and is within the parameters set by that primary legislation, the Committee makes no further comment on that retrospective operation. The Committee suggests, however, that it seems unusual that the Explanatory Statement to the instrument makes no attempt to explain the need for the retrospectivity, other than to make clear that it is within the statutory authority.

The Committee notes that page 2 of the instrument contains the following Note:

Note: The provisions of this attachment have been certified by the Minister for Children, Youth and Family Support as relating to the safety of people in a place of detention, and that their publication would be contrary to the public interest.

See Notifiable Instrument NI2005- 270

It is not immediately obvious, on the face of the instrument, as to what "this attachment" refers to. The Committee notes that page 2 of the Explanatory Statement indicates that 10 specified standing orders are not published, on the basis that such publication would be contrary to the public interest. It is not clear, however, to which attachment the Note on page 2 of the instrument relates.

Finally, the Committee notes that the instrument confers various powers that, on their face, are inherently intrusive or have an adverse impact on the rights of individuals. Some of the powers are not even disclosed to the Assembly, as a result of the non-publication mechanism discussed immediately above. They include:

- section 3.6.11 – strip searches;
- section 6.12.1 – loss of privileges;
- section 7.2 – loss of privileges;
- section 8 – video surveillance and recording (not published);
- section 9.11 – refusal of visits;
- section 14 – use of force (not published);
- section 15 – searches (not published);
- section 17 – assaults (not published);
- section 26 – access and physical security.

While the Committee notes that these sorts of provisions (to the extent that the Committee is able to examine them) are expressly authorised by section 403 of the Act, which provides a relatively wide-ranging power to make standing orders, the Committee also notes that, as a rule, it is preferable that intrusive and coercive powers be conferred by primary rather than subordinate legislation. The Committee notes in this regard the excellent analysis of the relevant issues and principles set out by the Senate Standing Committee for the Scrutiny of Bills in its 2000 report entitled *Entry and search provisions in Commonwealth legislation* (available at www.apf.gov.au/Senate/committee/scrutiny/completed_inquiries/index.htm, see, eg, pages 72-3).

While the Committee does not formally draw the provisions identified to the attention of the Assembly (not the least because the Committee has not even been able to scrutinise many of the provisions), the Committee considers that the Assembly should be aware of the intrusive nature of some of the provisions contained in this instrument.

Minor drafting issues

Disallowable Instrument DI2005-170 being the Public Places Names (Watson) Determination 2005 (No. 2) made under section 3 of the *Public Place Names Act 1989* revokes Disallowable Instrument DI2001-275 and determines the name of the park in the Division of Watson.

Disallowable Instrument DI2005-171 being the Public Places Names (Mitchell) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new street in the Division of Mitchell.

The Committee notes that paragraph 2 of the Explanatory Statement to each of these instruments refers to the requirements of "Part 254A" of the *Legislation Act 2001*. As the Committee noted in its *Report No 4 of the Sixth Assembly*, in relation to Disallowable Instrument DI2004-269 (being the Public Place Names (Gungahlin) Determination 2004 (No. 4)), the reference should be to "**section 254A**".

Subordinate Laws—No Comment

Subordinate Law SL2005-11 being the Road Transport (Offences) Regulation 2005 made under the *Road Transport (General) Act 1999* repeals the Road Transport (Offences) Regulation 2001 and determines offences for which an infringement notice can be issued and the applicable penalties.

Subordinate Law SL2005-12 being the Magistrates Court (Construction Occupations Infringement Notices) Amendment Regulation 2005 (No. 1) made under the *Magistrates Court Act 1930* amends the Magistrates Court (Construction Occupations Infringement Notices) Regulation 2004.

Subordinate Law SL2005-13 being the Court Procedures Amendment Rules 2005 (No. 1) made under section 7 of the *Court Procedures Act 2004* amends the Magistrates Court (Civil Jurisdiction) Rules 2004 and the Supreme Court Rules 1937.

Subordinate Law SL2005-14 being the Health Professionals Amendment Regulation 2005 (No. 1) made under the *Health Professionals Act 2004* provides for the transfer of the medical profession to the Health Professionals Act 2004.

Subordinate Law—Comment*Strict liability offence*

Subordinate Law SL2005-15 being the Periodic Detention Amendment Regulation 2005 (No 1) made under the *Periodic Detention Act 1995* enables the Chief Executive to approve the procedures to be followed in relation to breath testing, the analysis of a sample or specimen tested and the instrument required for the test.

Section 8 of this instrument replaces section 20 of the *Periodic Detention Regulations 1995* (the Regulations). The replacement regulation makes the offence created by the existing section 20 (which makes it an offence to use threatening or abusive language or behave in a threatening way while serving a detention period) a strict liability offence, carrying a maximum penalty of 10 penalty units. Subsection 133(1) of the *Legislation Act 2001* defines a penalty unit, for an individual, as \$100.

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

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

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

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

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Explanatory Statement to this subordinate law does not address these issues. In addition, the Explanatory Statement, unlike other Explanatory Statements, does not even identify the fact that section 8 introduces a strict liability offence into the Regulations. It merely states that "the offence of threatening behaviour will be amended to incorporate the Criminal Code" (at page 3) and that section 8 "applies the Criminal Code to the offence of threatening behaviour contained in section 20 of the Regulation" (at page 4).

Not only does the Explanatory Statement not deal with the strict liability offence issue in the way previously suggested by the Committee, it does not even expressly identify the fact that the new section 20 is a strict liability offence.

The Committee must also note, however, that the Chief Minister has recently (in a letter to the Committee dated 1 August 2005) assured the Committee that subordinate legislation (or amendments to subordinate legislation) containing a strict liability offence will be addressed in the Explanatory Statement, as suggested by the Committee. The Committee is grateful to the Chief Minister for this assurance. While the Committee notes that the assurance was given in the context of subordinate legislation made under the *Utilities Act 2000*, the Committee commends this approach to all Ministers.

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

INTERSTATE AGREEMENTS:

The Committee did not consider any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Children, Youth and Family Support, dated 18 August 2005, in relation to comments made in Scrutiny Report 14 concerning the Human Rights Commission (Children and Young People Commissioner) Amendment Bill 2005.
- The Minister for Children, Youth and Family Support, dated 18 August 2005, in relation to comments made in Scrutiny Report 14 concerning the Public Advocate Bill 2005.

The Committee thanks the Minister for Children, Youth and Family Support for her helpful responses.

The Committee notes, however, that a large number of responses, particularly in relation to subordinate legislation, is outstanding and looks forward to this issue being addressed.

Bill Stefaniak, MLA
Chair

August 2005

Australian Capital Territory

Workers Compensation (Fees) Determination 2005*

Disallowable Instrument DI 2005—146

made under the

Workers Compensation Act 1951, Section 221 – Determination of fees

1. I **REVOKE** Determinations No DI 2004-146 dated 29 June 2004 and I **DETERMINE** that the fees for the purposes of the Act shall be in accordance with the Schedule.
2. Where applicable, GST inclusive fees are marked with a double asterisk (**).
3. The fees determined in this schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.
4. This Instrument commences on 1 July 2005.

Katy Gallagher
Minister for Industrial Relations
29 June 2005

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

*SCHEDULE TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WORKERS
COMPENSATION ACT 1951*

Relevant Section/ Regulation for which a fee is payable (1)	Description of Matter for which fee is payable (2)	Fee Payable \$ 2004-2005 (3)	Fee Payable \$ 2005-2006 (4)
<i>Workers Compensation Act 1951, Sections 145 and 152</i>	Application Fee to be an approved insurer or an exempt employer for the purposes of workers compensation in the ACT	5,749.00**	5,878.00**
<i>Workers Compensation Act 1951, Sections 145 and 152</i>	Fee to be an approved insurer or an exempt employer for the purposes of workers compensation in the ACT (valid for three years)	5,749.00**	5,878.00**
<i>Workers Compensation Act 1951, Section 200</i>	Final Infringement notice for a prescribed offence under the Act – an additional fee to be paid by persons not wishing the prescribed offence to be prosecuted in court	\$34.00**	\$30.90

Minister's Initials _____

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Australian Capital Territory

Workers Compensation (Fees) Determination 2005

Disallowable Instrument DI 2005-146

made under the

***Workers Compensation Act 1951*, Section 221 – Determination of fees**

Explanatory Statement

The *Workers Compensation Act 1951* (the Act) regulates compensation to workers for injuries arising out of or in the course of their employment.

Section 221 of the Act provides the Minister for Industrial Relations with the power to determine fees for the purposes of the Act.

This instrument revokes the previous determination of fees Instruments DI2004-146 that set fees for the 2004-05 financial year and determines the new fees for the 2005-2006 financial year.

Under sections 145 and 152, insurers can apply to be approved insurers or exempt employers for the purposes of the Act. Instrument DI2004-146 set fees for this purpose. These fees have been adjusted based on the Consumer Price Index (CPI) of 2.25%. The CPI was derived by the Department of Treasury in its Economic conditions forecasts (see page 61 of 2005-2006 Budget Paper 3).

The 2005-06 fees are GST inclusive and take effect from 1 July 2005.

Under section 200, an inspector may serve a final infringement notice on a person:

- who fails to pay the on-the-spot-fine referred to in an infringement notice issued in relation to a prescribed offence under the Act, and fails to apply for the withdrawal of the infringement notice; or
- if an application for the withdrawal of the infringement notice is unsuccessful and the person then fails to pay the on-the-spot-fine within the allowed extended period.

Section 200 provides that if a person does not wish the offence to be prosecuted in court, the person may pay the on-the-spot-fine, in addition to the determined fee. The determined fee covers the administration costs of serving the final infringement notice. Instrument DI2004-146 set fees for this purpose. This fee has not been adjusted for CPI to maintain consistency with other regimes enacted under the generic infringement notice provisions in the *Magistrates Court Act 1930*. The only change is the removal of GST for the Final Infringement Notice, following listing under division 81 of the *A New Tax System (Goods and Services Tax) Act 1999* as GST exempt fee.

This 2005-2006 fee takes effect from 1 July 2005.

The determination under section 221 is a disallowable instrument.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

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

REPORTS—2004-2005

RESPONSES

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

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<p>Government Procurement Amendment Bill 2004 <i>Act citation: Government Procurement Amendment Act 2005 (Passed 15.02.05)</i></p> <p>Justice and Community Safety Legislation Amendment Bill 2004 (No. 2) <i>Act citation: Justice and Community Safety Legislation Amendment Act 2005 (Passed 17.02.05)</i></p> <p>Water Efficiency Labelling and Standards Bill 2004 <i>Act citation: Water Efficiency Labelling and Standards Act 2005 (Passed 10.03.05)</i></p>	<p>No. 3</p> <p>No. 11</p> <p>No. 5</p>
<u>Report 3, dated 17 February 2005</u>	
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KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

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

Dear  Mr Stefaniak

I refer to your Committee's comments in the Scrutiny of Bills Report No 14 of 15 August 2005 relating to the Human Rights Commission (Children and Young People Commissioner) Amendment Bill 2005. This Bill amends the *Human Rights Commission Act 2005* to create the office of the Children and Young People Commissioner within the Human Rights Commission.

I would like to thank the Committee for its report under section 38 of the *Human Rights Act 2004* and its attention given to the Explanatory Statement to the Bill which sets out the alignment with international Human Rights law.

I would also like to address the Committee's concern about the restriction of the power of the Ombudsman to investigate agency action in relation to the provision of a disability service, a health service, a service for children and young people or a service for older people.

The Committee's concern is that "the Ombudsman's general grant of jurisdiction has been qualified, both as a matter of general principle and having regard to the particular difficulties that would be created by proposed section 5(2)(n) of the *Ombudsman Act 1989*."

The amendments to section 5(2)(n) of the *Ombudsman Act 1989* are consequential amendments flowing from the provisions in the Human Rights Commission Bill 2005 and mirror amendments to that section in the Human Rights Commission Legislation Amendment Bill 2005 (clause 1.115).

Currently section 5(2)(n) of the *Ombudsman Act 1989* excludes from the Ombudsman's investigation anything that would fall into the jurisdiction of the Community and Health Services Complaints Commissioner. In addition, current provisions in section 5(2)(i) prevent the Ombudsman from investigating any action of any kind by the Community and Health Services Commissioner. The amendments to section 5(2)(n) update the provision to exclude substantive matters that will be subject to oversight by the Human Rights Commission (HRC) however, the amendments to section 5(2)(i) extend the power of the Ombudsman to investigation of any action by the HRC except those taken as part of its deliberative functions.

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These amendments are consistent with the 'Right System for Rights Protection: An ACT Government Position Paper on the System of Statutory Oversight in the ACT' in which the Government stated:

"[A]ll oversight bodies be made subject to the jurisdiction of the Ombudsman in relation to their administrative processes ... however it is inconsistent with the independent scrutiny role of those oversight bodies to have the statutory functions of investigation, monitoring and conciliation subject to the Ombudsman's jurisdiction" (in response to Recommendation 17, p. 40)

The Government's position is that it is not appropriate for the Ombudsman to review the substance of any complaint considered by the HRC as it would effectively provide a second oversight process. It is, however, appropriate for the Ombudsman to be able to consider the administrative processes employed by the HRC in dealing with complaints. This will put the HRC in the same position as most other government agencies. Administrative oversight by the Ombudsman helps to ensure that proper processes are employed. Amendments to the *Ombudsman Act 1989* to achieve that outcome are included in this Bill (Schedule 1 Amendment 1.2) and the Human Rights Commission Legislation Amendment Bill 2005 (Schedule 1 Amendments 1.117 and 1.118), which the Chief Minister introduced in April at the same time as the Human Rights Commission Bill 2005. As a result the Ombudsman will be able to investigate activities of the HRC except action taken in the exercise of its specialist deliberative functions.

The Committee also raised concern that because of the amendment to s 5(2)(n) of the *Ombudsman Act* the HRC or Public Advocate may not be able to investigate an "agency of government that does not 'provide' a disability service, etc," ... but "might nevertheless take action 'for the purpose of' providing a service". It appears that the Committee is concerned that some actions of agencies may 'fall through gaps' and concludes that the Ombudsman should not be excluded from investigating these gaps as the HRC and Public Advocate cannot.

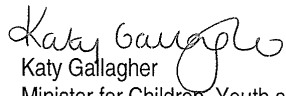
I can advise that the power of the HRC to investigate matters is extremely broad. This power derives from the definition of service, which includes services that are outside Government's purview (for example Clause 7 of the Bill), ensuring that many people who receive services in the ACT may complain to the HRC. Because of the breadth of the functions of the HRC, including its capacity to consider issues without the need for a formal complaint, it is extremely unlikely that any agency action in the relevant area would be excluded from its consideration. Any administrative action taken in relation to issues raised with it, even if not ultimately accepted as a complaint, would be reviewable by the Ombudsman.

In addition, the Government considers that the detrimental effects of creating an additional statutory oversight process for the matters that fall within the scope of the HRC functions, with the attendant risks of forum shopping, outweigh the minimal risks attached to this minimal narrowing of the Ombudsman's area of review.

I thank the Committee for their suggested alternatives in relation to s 6A of the *Ombudsman Act 1989* but for the reasons mentioned above I do not consider the need for amendments.

I hope that the above information clarifies the matter raised by the Committee in its report.

Yours sincerely


Katy Gallagher
Minister for Children, Youth and Family Services

18 August 2005



KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGO

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.14 of 15 August 2005. I offer the following response in relation to the matters raised by your committee on the Public Advocate Bill 2005 (the Bill).

Clause 15 of the Bill reflects the provisions in section 46 of the *Children and Young People Act 1999*, which protects people who give information in good faith and with reasonable care to the Community Advocate or the official visitor. The provision is designed to avoid situations where a person who has information that could be used by the Public Advocate to better protect a child, young person or person with a disability is not constrained by professional conduct rules or fear of defamation action from passing that information on. The protection is similar to that given under the *Children and Young People Act 1999* to people who make mandatory reports about suspected child abuse. Without this kind of statutory protection people will be reluctant to come forward with information to help the Public Advocate carry out the core function of providing assistance and protection to vulnerable individuals.

The right to privacy in section 12 of the *Human Rights Act 2004* (HRA) is not absolute. Where a provision interferes with a particular right or freedom, it may nevertheless be consistent with the HRA if it can be considered a reasonable limit that is justifiable in terms of section 28 of the HRA. Section 28 of the HRA provides any law that interferes with a right must be reasonable and demonstrably justifiable in a free and democratic society. It must pursue a legitimate aim and be proportionate to the aims being pursued.

It should also be noted that the right to reputation, protected by section 12 (b) of the HRA, is narrower than the general right to privacy to take account of the importance of freedom of expression. It is limited to protection from public attacks intended to harm the reputation of the person and which is based on untrue statements.

The provision is a proportionate limitation on section 12 of the HRA, serving the legitimate purpose of enabling the Public Advocate to carry out his or her functions.

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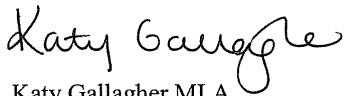


Sufficient safeguards exist:

- Clause 15(1) says that the information must be given ‘honestly and without recklessness’. This would rule out information unless it is given honestly for the purpose of engaging a function of the Public Advocate and given without reckless disregard for the reputation of the subject person.
- Clauses 16 and 17 provide conditions related to disclosure of information. The provisions must be viewed in the context of the requirement that the Public Advocate must interpret and give effect to the legislation in a manner that is consistent with the HRA so far as it is possible to do so. Section 30 of the HRA requires that administrative and judicial bodies must exercise their discretion consistently with human rights unless expressly authorised to act inconsistently with those rights.
- Under the *Privacy Act 1988*, the collection and storage of personal information by public authorities is regulated; and a person is able to request the correction of incorrect personal information.

In my view, any limitation on the right to privacy is therefore both necessary and proportionate to achieve the aims of the legislation. Consequently, there is no incompatibility with the HRA on the face of the Bill.

Yours sincerely



Katy Gallagher MLA
Minister for Children, Youth and Family Support

18/8/05