



Legislative Assembly for the ACT

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

Scrutiny Report

25 May 2004

Report 49

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.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
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ASSISTANT SECRETARY: MS ANNE SHANNON
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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:

Comment

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

Gungahlin Drive Extension Authorisation Bill 2004
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This is a Bill to provide the Territory and its agents with the necessary powers to enable completion of the construction of the Gungahlin Drive Extension (GDE). A Minister would be authorised to make the required approvals under relevant laws. Rights to appeal such approvals would be limited.

[**Note:** there may be a mistake in subclause 8(3), where the reference to “(1)” should perhaps be to “(2)”.]

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

General perspectives

The land upon which the GDE is proposed to be constructed is owned by the government on behalf of the citizens of Canberra and in a general but in a critical sense the land must be used and developed for their benefit. It is therefore legitimate to approach the rights issues thrown up by this Bill from the perspective of rights that may be said to be held by the community, or at least parts of the community. This assessment is one for the Members of the Legislative Assembly, who, as representatives of the community, have a unique role in making that assessment. (It should be noted that the *Human Rights Act 2004* notes expressly that it “is not exhaustive of the rights an individual may have under domestic or international law”: section 7.)

The Committee cannot attempt a comprehensive review of the competing community rights in issue. It will, however, note two contrasting perspectives.

On the one hand, the Presentation Speech notes an aspect of the rights of at least some of those who live in Gungahlin:

The GDE will greatly improve road access to the high growth area of Gungahlin for its residents and for all Canberrans by providing a road link from Gungahlin of a standard similar to that provided to other residential areas of the Territory.

Implicit in this statement is a claim that the residents of Gungahlin are entitled to equal treatment in terms of road access to the parts of Canberra.

On the other hand, there is in paragraph 43(2)(b) the *Human Rights Act 2004* an acknowledgment that there are “environment-related human rights”, although these are not further spelt out. There is, however, in various international treaties, support for the notion that there are rights, shared by all citizens, to a healthy environment, and to biodiversity. Those who oppose the construction of the GDE are claiming the benefit of these rights.

More particular rights issues are now addressed.

The potential application of the *Kable* doctrine

In Report No 48 (2004), the Committee outlined the *Kable* doctrine and how it might (and might not) apply to the *Land (Planning and Environment) Amendment Regulations 2004* (No 1) – Subordinate Law No 12 of 2004. The same general questions arise in relation to the *Gungahlin Drive Extension Authorisation Bill 2004*:

- Is this Bill, on the one hand, an exercise of legislative power that amounts to an interference with or infringement of judicial power?

or, in contrast,

- Would it be a law that simply affects rights in issue in legal proceedings, and in this way is not a legislative interference with the exercise of judicial functions?

It might be argued that, taken as a whole, the Bill is designed to create a legal regime to deal only with a particular development of land and in so doing to thwart and/or preclude legal challenge to decisions made in relation to that development.

The Committee again notes, as it did in report No 48, that the decision of the High Court in *HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547 may provide an answer to these arguments. The issue is, however, one for the Assembly to address.

There are certain aspects of the Bill that might be taken into account.

- The preamble asserts:

5 After careful consideration, and weighing the advantages and disadvantages to different community groups, the Legislative Assembly considers that—

- further litigation about the GDE is expensive and divisive and does not reflect the wishes of the Canberra community as a whole.

As a matter of law, this assertion of fact would not bind a court addressing the *Kable* issue. On the other hand, it might be taken as an indication that the law is aimed at precluding legal challenge to decisions made in relation to the GDE.

- The object of clause 8 is described in the Explanatory Statement:

Clause 8 confirms that no further or additional inquiries or assessments are required to be undertaken in relation to the environmental impact of the GDE by the *Land (Planning and Environment) Act 1991* ('the Land Act').

This would create an element in the special legal regime to govern the GDE.

- The object of clause 9 is described in the Explanatory Statement:

Clause 9 empowers the Minister to make any necessary authorisations required by relevant Acts in relation to the construction of the GDE.

The great width of the powers conferred on the Minister to make any necessary authorisations, and in particular the displacement of existing laws governing those powers, might be taken into account in an assessment of whether the *Kable* doctrine has been breached.

- Clause 10 adds to the special character of the powers given to the Minister to make any authorisations under clause 9. In particular, it purports to protect those decisions from review. If this scheme applies to the courts, it gives some support to the application of the *Kable* doctrine.
- Clauses 11 and 12 also add to the special character of the powers given to the Minister to make any authorisations under clause 9. These clauses also appear to make it more difficult to challenge an exercise of Ministerial power. These elements of the scheme do clearly apply to the courts, and give some support to the application of the *Kable* doctrine.

Has an exercise of delegated legislative power been made sufficiently subject to parliamentary scrutiny? - Para 2(c)(vi)

Under this term of reference, the Committee notes that subclause 5(2) empowers the Minister to alter the definition of “GDE” in subclause 5(1) by giving an approval in writing to this effect. This amounts to an amendment of the statutory definition.

The Committee notes that such an approval is not a disallowable instrument, but only notifiable.

The Committee also notes that by subclause 6(1) the Minister is empowered to declare that in writing that works are part of the construction of the GDE or related to the construction of the GDE. By subclause 6(2), a declaration is a disallowable instrument.

In relation to sub-clauses 5(2) and 6(1), the Committee draws the attention of the Assembly to the existence of three options for dealing with the role of the Assembly in relation to a subordinate law.

The first is that the subordinate law be only notifiable. The result is that the law takes effect and cannot be disallowed by the Assembly.

The second is that the subordinate law be disallowable. In this case, the subordinate law will have a legal effect until the time it is disallowed by the Assembly.

The third is that the law will not have any effect at all until by a positive resolution of approval the Assembly gives legal effect to the subordinate law.

Are rights, liberties and/or obligations unduly dependent upon non-reviewable decisions? - Para 2(c)(iv)

Privative clauses

Three clauses of the Bill fall for comment under this term of reference. In relation to each, the Committee draws the attention of the Assembly to the issue. The rights dimensions are stated in relation to clause 7, and also apply to clauses 10 and 15.

Clause 7

The point of clause 7 is explained in the Explanatory Statement:

Clause 7 puts beyond doubt that the *Land (Planning and Environment) Amendment Regulations 2004 (No 1)* SL2004-12, have and have had effect from the day after their notification day as if they had been made in an Act. They still have effect only according to their terms and only apply to future actions.

Clause 7 attempts to achieve this objective by providing that the regulations “have effect, and are taken to have had effect from the day after their notification day, as if they had been enacted by an Act”.

Clause 7 is a privative clause. It is so-called because, to some extent, it ousts the jurisdiction of the courts to determine whether the *Land (Planning and Environment) Amendment Regulations 2004 (No 1)* SL2004-12 are a valid exercise of the power (contained in the *Land (Planning and Environment) Act 1991*) to make regulations.

Whether, as a matter of law, it has this effect, is not yet settled. The case-law suggests that this kind of privative clause cannot preclude a court from examining the validity of the relevant subordinate law to determine if (i) it is in fact made by the relevant repository of the power, (ii) if it purports to relate to the subject matter of the power, and (iii) is not patently or absurdly irrelevant to that subject matter; (see Aronsen and Dyer, *Review of Administrative Action* (2nd ed, 2000) 701, and see *Ousley v The Queen* [1997] HCA 49, per McHugh J at n 169.) It is possible that the High Court, under the influence of the doctrine in *Kable*, would give this clause a much narrower effect, even possibly to the extent of holding that it does no more than point to the fact that the power to make the regulation derived from a grant from the legislature.

If the clause does have the effect that it is generally understood to have, (as described in the three points above), then it does restrict significantly the ability of a person to challenge the validity of SL2004-12.

This raises an issue of rights as it is stated in the Committee’s term of reference. The justification is stated in the Explanatory Statement: “Rights to appeal such approvals are limited by the Bill so as to ensure that construction of the GDE is not delayed by further expensive and divisive litigation which does not reflect the wishes of the Canberra community as a whole”; and see the preamble.

The Assembly needs to address the issue of whether there is sufficient justification for clause 7. The following remarks may assist. (These remarks are also relevant in respect of clauses 10 and 15.)

The courts have long regarded as a fundamental the ability of a citizen to have access to the courts to challenge some administrative action on the ground that it is invalid. In Anglo-Australian law, "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen" (A V Dicey, *Law of the Constitution* (9th ed, 1952) 193. The point made by Dicey was that, in contrast to some European systems of law, English law and practice set its face against a policy that a person's legal action against the state must be litigated in administrative tribunals as distinct from the ordinary courts. Our law has also adopted the policy that whether the person obtained a remedy against the state should not be judged according to a body of law that did not apply in ordinary litigation. In our system, the ordinary courts hear challenges to administrative and executive action. The principle stated by Dicey applies with as much, if not more force, where a law seeks to protect the acts of a state official from challenge on the ground of illegality. In this case, the person has no remedy in law at all.

The courts commonly speak of statutory provisions that restrict or remove the ability of a citizen to have access to the courts to challenge the acts of a state official as involving a derogation from "the ordinary rights of individuals": *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 417. The courts have adopted a policy of giving a strict construction to such provisions, so as to limit the extent to which they do restrict these rights (*ibid*). In so doing, the courts have in effect presumed that the legislature would not derogate from these rights. In this way, the courts can maintain that they are giving effect to the purpose of the relevant statute; (see *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 594, per Kirby J).

In *Puntoriero*, Kirby J noted a more functional rationale for the policy of the courts. He said:

Obviously, to deny legal rights to a person which that person would otherwise enjoy, ostensibly because of some wider social purpose which appeals to the legislature, in effect obliges that person to underwrite (at its economic cost) the achievement of such objectives deemed beneficial to many. In particular circumstances, such deprivation of rights may constitute an effective acquisition of property from the person affected [*Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 551; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *New South Wales v McMullin* (1997) 73 FCR 246; cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 155, 185, 247-249; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 660-661]. Even where such a course is constitutionally unimpeachable, it does not seem unreasonable to insist that Parliament should be clear as to its purpose in enacting legislation having such potentially drastic and unjust consequences.

Applied to the parliamentary context where the desirability of a provision restricting access to the courts is in question, this suggests that those who sponsor the Bill should articulate clearly just what "wider social purpose" justifies a restriction on the right of a person to seek a remedy against a state official from the ordinary courts.

The Assembly must also be conscious that in some circumstances, a restriction on a person's ability to challenge some administrative action, or in some other way to resort to the courts for vindication of a legal right, may amount to "an effective acquisition of property from the person affected". This principle has been applied to invalidate a Territory law (see *Frank v Australian Capital Territory*, Supreme Court of the Act, 15 May 2001).

Clause 10

By subclauses 10(3) and (5), decisions in relation to authorisations by the Minister made under section 9 are "final and conclusive". This has probably no effect on the availability of judicial review, or of non-judicial review (such as by the Administrative Appeals Tribunal) where that is available under a statute.

But subclause 10(6) would have a more precise effect. It specifically displaces non-judicial review under a number of statutes, and more generally, there is made **in**applicable to authorisations by the Minister made under section 9, "a Territory law relating to the review of decisions that is prescribed under the regulations": paragraph 9(6)(e).

It is not clear whether paragraph 9(6)(e) extends to judicial review. It may not have this effect when read in the context of the preceding paragraphs (a) to (d). Those paragraphs deal only with non-judicial review, and the phrase "review of decisions" in paragraph 9(6)(e) is capable of being read down to deal only with other kinds of non-judicial review. A court might well read it this way; see above, *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 594, per Kirby J.

Clause 15

By this clause, the *Administrative Decisions (Judicial Review) Act 1998* does not apply to decisions that would be made under the *Gungahlin Drive Extension Authorisation Act 2004*.

It should be noted, however, that displacement of the ADJR Act does not affect the jurisdiction of the Supreme Court to issue other forms of relief, whether by way of the prerogative orders, or the equitable remedies of injunction and declaration.

On the other hand, the Committee draws attention to sub-clause 11(1) which would stipulate a period of 21 days within which a court proceeding could be instituted to challenge an authorisation by the Minister under clause 9. In addition, by sub-clause 12(2) a person could not bring a proceeding unless he or she had notified the Minister of this intention at least 14 days before commencing proceeding. These provisions modify the normal rules for invoking the jurisdiction of the courts.

Has there been an insufficient definition of administrative power? - Para 2(c)(ii)

The Committee notes that both subclauses 9(2) and (3) speak of the Minister being vested with an “absolute discretion”. It is unlikely that this wording does much to restrict judicial review of an exercise of the relevant power. A court would still fix limits to the scope of the discretion by reference to the objects of the statute. Given the high ‘policy’ content of the discretion, those limits may be very broad.

The Committee raises the issue of whether it is ever desirable to provide for an “absolute discretion”. Such a provision does raise the question of whether there has been an insufficient definition of administrative power.

The width of the discretions, and the point of the question just asked, is underlined by subclause 9(4), which has the effect of amending other laws which confer powers that are, by clause 9, exercisable by the Minister.

Projects of Territorial Significance Bill 2004

This is a Bill for an Act which would allow a Chief Minister to declare a project to be a project of Territorial significance and thus streamline the approval procedures. The Bill contains in a schedule a regulation declaring the Gungahlin Drive Extension project to be such a project. In particular, such a project, while subject to the normal approval process, would not be subject to third party appeal for any aspect of the work.

Has there been an undue trespass on rights and liberties? - Para 2(c)(i)

The potential application of the *Kable* doctrine

In terms of this doctrine:

- Is this Bill, on the one hand, an exercise of legislative power that amounts to an interference with or infringement of judicial power?

or, in contrast,

- Would it be a law that simply affects rights in issue in legal proceedings, and in this way is not a legislative interference with the exercise of judicial functions?

It might be argued that, taken as a whole, the Bill is designed to create a legal regime to deal only with a particular development of land and in so doing to thwart and/or preclude legal challenge to decisions made in relation to that development.

The Committee again notes, as it did in report No 48, that the decision of the High Court in *HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547 may provide an answer to these arguments. The issue is, however, one for the Assembly to address.

There are certain aspects of the Bill that might be taken into account.

- The general object of the Bill is to create a special legal regime to apply to a project of territorial significance. Such a project is one prescribed as such by regulation.
- By subclause 8(1), a critical element of this scheme would be the exclusion of review, by the AAT, of certain decisions, being (i) a decision of the relevant authority under part 6 of the *Land (Planning and Environment) Act 1991*, where these decisions are about the approval of a project of territorial significance, and (ii) a decision about an associated approval.
- By subclause 9(1), the *Land (Planning and Environment) Act 1991* would not apply at all “in relation to any aspect of a project of territorial significance that is, or that is to be, carried out in a designated area”. A designated area is as defined in the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).
- By subclause 11(1), there is enacted the *Projects of Territorial Significance Regulations 2004*, which are to be taken to have been made under clause 10. The Gungahlin Drive extension (as defined) is stated to be a project of territorial significance.
- By clause 12, the scheme in the Act would apply retrospectively to decisions under the *Land (Planning and Environment) Act 1991* about the approval of the Gungahlin Drive extension, and would affect the initiation, or the continuation, of appeals to the AAT by third party objectors in respect of such decisions. Clause 9 would also have a retrospective effect.

Retrospective laws

Independently of the *Kable* doctrine, the retrospective nature of key elements of the scheme in the Act raises a rights issue.

Are rights, liberties and/or obligations unduly dependent upon non-reviewable decisions? - Para 2(c)(iv)

Independently of the *Kable* doctrine, the removal of rights to appeal to the AAT by third party objectors raises an issue for the Assembly to address. See the general discussion in relation to the *Gungahlin Drive Extension Authorisation Bill 2004*.

ADDITIONAL COMMENT

Do the Bills involve a breach of subsection 21(1) of the *Human Rights Act 2004*?

For the purposes of addressing subsection 21(1), the following assumptions are made.

- The *Gungahlin Drive Extension Authorisation Bill 2004*, and the *Projects of Territorial Significance Bill 2004*, would confer on the Minister the power to make decisions which affect people's rights to the ownership, use or enjoyment of land.

By reason of not being privy to the detail of the litigation that has been on foot, the Committee is not able to comment on whether particular persons will suffer a detriment to their property interests. It will be assumed that there might be such a deprivation. The Committee is conscious of the fact that the *Human Rights Act 2004* does not recognize a right to property. The Committee does not attach significance to this given that to some extent this right has a higher law status in the ACT under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

Alternatively, the concept of the rights of persons “to the ... use or enjoyment of land” might be taken, with reference in particular to international treaties concerning protection of the natural environment, to embrace the claims that have been made by those who have opposed the construction of the GDE.

- The Bill would remove any rights to independent administrative review (such as by the AAT) that would have existed previously in relation to the decisions.
- The Minister would have a role in both formulating policy in relation to the land affected by her or his decisions, and then in making those particular decisions. The Bill would provide that the Minister could do so “in the Minister’s absolute discretion”.
- Notwithstanding clause 15 of the Bill, it remains the case that a person aggrieved by a decision of the Minister could invoke the jurisdiction of the Supreme Court to issue other forms of relief, whether by way of the prerogative orders, or the equitable remedies of injunction and declaration. The scope of judicial review under these forms of relief is measured by the common law (as to which, see below).

The question arises whether this scheme is compatible with section 21 of the *Human Rights Act 2004*. This 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.

It may be assumed that a person who would wish to object to a decision made by, or proposed to be made by, the Minister under the powers vested in the Minister falls within the category of “Everyone has the right to have ... rights and obligations recognised by law ...”.

Thus the critical issue is whether the Bill fails to make provision for decisions on those rights to be “decided by a competent, independent and impartial court or tribunal after a fair and public hearing”.

It is possible to construct an argument that the schemes for vesting decision-making power in the Minister as are found in these two Bills are in breach of subsection 21(1) of the *Human Rights Act 2004*.

The argument might begin with the proposition that decision-making by the Minister cannot satisfy section 21. It is necessary to note now that subsection 21 is close in wording to Article 6 of the European Convention on Human Rights. Then, to adapt what was argued in the English case of *Regina (Alconbury Developments Ltd and Others) v. Secretary of State* [2001] 2 All ER 929 ('*Alconbury*'), it may be said that:

A limitation on the rights guaranteed by article 6 is permissible where it pursues a legitimate aim, involves a reasonable proportionality between aim and means and does not extinguish the essence of the right: see *Fayed v United Kingdom* (1994) 18 EHRR 393. However, the minimum requirements of article 6(1) are: (1) a fair hearing on the merits before a tribunal which is in fact substantially impartial and independent as to merits; and (2) an effective review by an article 6(1) compliant body. The [Minister] does not satisfy requirement (1). He is literally judge in his own cause as he is deciding whether or not to grant himself the relevant powers. He is also the promoter of the scheme on which he makes the relevant determination. Claims that the requirements of article 6(1) can be adapted to allow for a democratic model of decision making where private interests are balanced against a wider public interest cannot justify entrusting effective power of decision making to the executive when its interests are so directly involved that it cannot be regarded as independent of the parties or as an impartial tribunal in relation to the merits of the dispute.

It is thus likely that decision-making by the Minister under the two Bills would not satisfy subsection 21(1) of the *Human Rights Act 2004*.

The question is then whether the existence of an avenue of judicial review in the Supreme Court of the Territory, (and further appeal to higher courts), satisfies subsection 21(1).

In *Bryan v United Kingdom* (1995) 21 EHHR 342, the European Court of Human Rights stated that in assessing, for the purpose of Article of the European Convention, the sufficiency of judicial review of administrative action:

45 ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

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

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

The Court noted that the relevant court having the power of judicial review (which was the English High Court) did **not** have power to entertain a claim that the inspector's decision was erroneous as a matter of "fact and degree"; (or, in other words, the proceeding before the court was not a re-determination of the dispute 'on the merits'). But the European Court did note aspects of the extent of judicial review before the English High Court:

it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational.

In a later case - *Chapman v United Kingdom* (2001) 33 EHRR 399 – the European Court said:

124. The court recalls that in the case of *Bryan v United Kingdom* (1995) 21 EHRR 342 it held that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with article 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue.

In *Bryan*, the European Court held that provision in the law in question in that case which permitted judicial review of the character just described, was such as to lead to the result that the scheme of decision-making by an inspector, followed by judicial review by a court, satisfied Article 6.

This conclusion is not necessarily transposable to an assessment of whether the schemes under the *Gungahlin Drive Extension Authorisation Bill 2004* and under the *Projects of Territorial Significance Bill 2004* meet the requirements of subsection 21(1) of the *Human Rights Act 2004*. A critical difference between the scheme addressed in *Bryan*, and the schemes under the Bill, is that under the Bills the primary decision-making is by a Minister. The Minister lacks the degree of independence possessed by the inspectors in *Bryan*, and has an interest in the outcome of the decision that he or she will make. The Minister will participate in setting the policy framework for the making of decisions under the two Bills, and then make particular decisions to implement that policy. A more particular point was made in the context of the *Alconbury* case: "Judicial review is not an adequate safeguard of the article 6 rights as its effectiveness is dependent on the decision maker being honest about the facts which he took into account. A limited review is an adequate safeguard only when there is fundamental confidence in the decision making process ...".

This difference between the scheme addressed in *Bryan*, and the schemes under the Bills, **might** be taken as sufficient to say that the scope for judicial review of decisions taken by the Minister under the Bills is **not** such as to meet the requirements of subsection 21(1) of the *Human Rights Act*. A similar view was taken by the Queens' Bench Division of the English High Court in *Alconbury* [2001] 2 All ER 929 at 958-959. There are decisions of the courts of Scotland which support this reasoning.

But, on the other hand, the difference might be regarded as immaterial. In *Alconbury*, in a situation closely analogous to that thrown up by the two Bills, the English House of Lords reversed the Queens' Bench Division decision in *Alconbury*. In so doing, it laid particular stress on the character of decision-making concerning land planning.

The kind of reasoning of the House of Lords may be gathered from what was said by Lord Hoffman:

68 [These] cases involve general social and economic issues. They concern the rights of individuals to use, enjoy and own their land. But the number of persons potentially interested is very large and the decisions involve the consideration of questions of general welfare, such as the national or local economy, the preservation of the environment, the public safety, the convenience of the road network, all of which transcend the interests of any particular individual.

Democracy and the rule of law

69 In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example: Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the general or special commissioners or the courts. On the other hand, sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.

70 There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision

requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

71 All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of the public interest. This is reflected in the terms of article 1 of Protocol 1 to the Convention:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

72 Thus, under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest so requires. And, under the second paragraph, the use of property may be restricted without compensation on similar grounds. Importantly, the question of what the public interest requires for the purpose of article 1 of the First Protocol can, and in my opinion should, be determined according to the democratic principle - by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.

73 There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in article 1 of the First Protocol that a taking of property must be "subject to the conditions provided for by law". The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.

His Lordship (in concurrence with the other judges) went on to hold that

article 6(1) conferred the right to an independent and impartial tribunal to decide whether a policy decision by an administrator such as the Secretary of State was lawful but not to a tribunal which could substitute its own view of what the public interest required.

He held further that the availability of judicial review by the English courts was sufficient to satisfy the need for there to be an independent and impartial tribunal to decide whether a policy decision by an administrator such as the Secretary of State was lawful. On this point, Lord Slynn said:

The judgments [of the European Court of Human Rights] to which I have referred do not require that this should constitute a rehearing on an application by an appeal on the merits. It would be surprising if it had required this in view of the difference of function between the minister exercising his statutory powers, for the policy of which he is answerable to the legislature and ultimately to the electorate, and the court. What is required on the part of the latter is that there should be a sufficient review of the legality of the decisions and of the procedures followed. The common law has developed specific grounds of review of administrative acts

Lord Slynn said that according to common law review, a court could find unlawfulness where the Minister

misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps - failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires - the court may interfere.

Without attempting to refine the point, this is substantially the scope of review available from the Supreme Court of the ACT on a challenge to a decision of the Minister under the *Gungahlin Drive Extension Authorisation Bill 2004* or under the *Projects of Territorial Significance Bill 2004*.

SUBORDINATE LEGISLATION:

No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them:

Subordinate Law SL2004-11 being the Supreme Court Amendment Rules 2004 (No. 2) made under section 36 of the *Supreme Court Act 1933* modernise the Rules to provide for more efficient and cost-effective procedures.

Disallowable Instrument DI2004-65 being the Public Sector Management Amendment Standard 2004 (No. 5) made under section 251 of the *Public Sector Management Act 1994* amends the Management Standard dealing with the employment of chief executives and executives.

Disallowable Instrument DI2004-67 being the Public Place Names (Watson) Determination 2004 (No. 1) made under section 3 of the *Public Place Names Act 1989* details the names, origin and significance of new street names in the Division of Watson.

Disallowable Instrument DI2004-68 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used for the Neal Bates Toyota Team Racing testing session on 10 May 2004 in the Oakey Creek area of the Pierces Creek Forest.

Subordinate Legislation – Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them:

A matter for comment?

Disallowable Instrument DI2004-53 being the Commissioner for the Environment Appointment 2004 (No. 1) made under section 4 (1) of the *Commissioner for the Environment Act 1993* extends the term of the incumbent Commissioner for the Environment.

The Committee notes that there is no prejudicial retrospectivity associated with this appointment. However, the Committee also notes that, whilst the instrument was made on 31 March 2004, it was not notified on the Legislation Register until 30 April 2004.

Incorrect extract in Explanatory Statement

Disallowable Instrument DI2004-57 being the Blood Donation (Transmittable Diseases) Donor Form 2004 made under section 10 (3) of the *Blood Donation (Transmittable Diseases) Act 1985* revokes Disallowable Instrument DI2003-255 and Approved Form AF2003-10 and notifies the revised Donor Declaration form AF2004-2.

The Committee notes that, in the explanatory statement to the instrument, paragraph 5 (1) (a) of the Act is quoted. A check on the Legislation Register of the current Act, reveals that this quote is incorrect.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Planning, dated 13 May 2004, in relation to comments made in Scrutiny Report 48 regarding Subordinate Law SL2004-12 being the Land (Planning and Environment) Amendment Regulations 2004 (No 1).
- The Minister for Urban Services, dated 17 May 2004, in relation to comments made in Scrutiny Report 44 regarding Disallowable Instrument DI2004-322 being the Cemeteries and Crematoria (Appointments) 2003 (No 1).
- The Treasurer, dated 20 May 2004, in relation to comments in Scrutiny Report 47 regarding Disallowable Instruments DI2004-35 being the Hotel School Appointment 2004 (No 1) and DI2004-36 being the Hotel School Appointment 2004 (No 2).

The Committee thanks the Minister for Planning, the Minister for Urban Services and the Treasurer for their helpful responses.

Bill Stefaniak MLA
Chair

May 2004

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

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>REPORTS – 2001-2004</u>	
<u>Report No. 1, dated 12 December 2001</u>	
Nil	
<u>Report No. 2, dated 19 February 2002</u>	

Crimes Amendment Bill 2001 (No. 2) (PMB) <i>Act citation: Crimes Amendment Act 2002 (Passed 5.3.02)</i>	No. 5
Crimes (Abolition of Offence of Abortion) Bill 2001 (PMB).....	
Health Regulation (Maternal Health Information) Repeal Bill 2001 (PMB).....	
Land (Planning and Environment) Legislation Amendment Bill 2001 (PMB).....	
Supreme Court Amendment Bill 2001 (No. 2) (PMB).....	
Subordinate Law No 40 – Building Regulations Amendment.....	No. 8
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001.....	
Subordinate Law No 42 – Crimes Regulations 2001.....	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment.....	No. 8
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002.....	No. 8
Subordinate Law No 46 – Road Transport Amendment Regulations 2001.....	
Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001.....	No. 10
Health Professions Board (Procedures) Act – Determination No 221 of 2001.....	No. 10

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Health Professions Board (Procedures) Act –	
Determination Nos. 216-220, 222, 225 to 237 of 2001.....	No. 10
Independent Pricing and Regulatory Commission Act -	
Determination No. 291 of 2001.....	No. 8
Legislative Assembly (Members’ Staff) Act -	
Determination No. 292 of 2001.....	No. 23
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001..	
Rehabilitation of Offenders (Interim) Act 2001 -	
Determination No. 305 of 2001.....	
Commissioner for the Environment Act -	
Determination No. 315 of 2001.....	No. 8
Psychologists Act - Determination No. 318 of 2001.....	No. 10
Auditor-General Act – Determination No. 323 of 2001.....	
Drugs of Dependence Act – Determination No. 328 of 2001.....	No. 10
National Exhibition Centre Trust Act - Determination Nos. 330 and	
331 of 2001.....	No. 8
Appointment to the Racing Tribunal.....	No. 8
<u>Report No. 3, dated 21 February 2002</u>	
Rehabilitation of Offenders (Interim) Amendment Bill 2002	
(Passed 21.2.02).....	
<u>Report No. 4, dated 5 March 2002</u>	
Inquiries Amendment Bill 2002 (PMB).....	
Gene Technology Bill 2002 (Passed 27.11.03)	No. 12
Legislation Amendment Bill 2002 (Passed 15.4.02).....	No. 9
Subordinate Law No 49 – Road Transport (Offences)	
Regulations 2001.....	No. 8
Road Transport (Safety and Traffic Management) Regulations 2000 –	
Disallowable Instrument No 4.....	No. 8
Road Transport (Driver Licensing) Regulations 2000 –	
Disallowable Instrument No 7.....	No. 8
Health and Community Care Services Act – Determinations	
Nos 5 and 15.....	
<u>Report No. 5, dated 5 March 2002</u>	
Nil	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No. 6, dated 7 March 2002</u>	
Nil	
<u>Report No. 7, dated 27 March 2002</u>	
Drugs of Dependence Amendment Bill 2002 (Passed 14.5.02).....	No. 10
Duties Amendment Bill 2002 (Passed 11.4.02).....	No. 8
Fair Trading Amendment Bill 2002 (PMB) (Passed 29.08.02).....	
Subordinate Law 2002 No 1 – Radiation Regulations 2002.....	No. 10
<u>Report No. 8, dated 1 May 2002</u>	
Discrimination Amendment Bill 2002 (PMB) (Passed 5.6.02).....	
Gaming Machine (Women’s Sports) Amendment Bill 2002 (Passed 4.6.02).....	No. 10
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002.....	No. 15
Subordinate Law No. 4 – Community Title Regulations 2002.....	No. 15
Road Transport (Public Passenger Services) Regulations 2002 – Disallowable Instruments Nos 12 and 18.....	No. 15
Road Transport (General) Act – Disallowable Instrument No. 20.....	No. 15
Public Place Names Act – Disallowable Instrument No. 24.....	No. 15 (No. 32)
<u>Report No. 9, dated 7 May 2002</u>	
Nil	
<u>Report No. 10, dated 14 May 2002</u>	
Building Amendment Bill 2002 (Passed 16.5.02).....	No. 16
<u>Report No. 11, dated 14 May 2002</u>	
Nil	
<u>Report No. 12, dated 16 May 2002</u>	
Justices of the Peace Act – Disallowable Instrument No. 25.....	
Residential Tenancies Act – Disallowable Instrument No. 26.....	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No. 13, dated 29 May 2002</u>	
Cemeteries and Crematoria Bill 2002.....	No. 15
Duties (Insurance Exemptions) Amendment Bill 2002.....	No. 15
Road Transport Legislation Amendment Bill 2002.....	No. 16
<u>Report No. 14, dated 4 June 2002</u>	
Statute Law Amendment Bill 2002 (Passed 29.08.02).....	No. 15
<u>Report No. 15, dated 20 June 2002</u>	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002....	No. 17
Remuneration Tribunal Act – Disallowable Instrument No. 34.....	No. 23
Hotel School Act – Disallowable Instrument No. 35.....	No. 18
Road Transport Act – Disallowable Instrument No. 39.....	No. 17
Commissioner for the Environment Act No. 38.....	No. 17
<u>Report No. 16, dated 25 June 2002</u>	
Maternal Health Legislation Amendment Bill 2002 (PMB).....	
Medical Practitioners (Maternal Health) Amendment Bill 2002 (Passed 21.08.02) (PMB).....	
Health and Community Care Services Act – Disallowable Instrument No. 41.....	No. 19
Public Place Names Act – Disallowable Instrument No. 43.....	No. 17
Disallowable Instrument No. 44.....	No. 17
Building Act – Disallowable Instrument No. 50.....	No. 17
<u>Report No. 17, dated 9 August 2002</u>	
Justice and Community Safety Legislation Amendment Bill 2002 (Passed 22.08.02).....	
Magistrates Court (Refund of Fees) Amendment Bill 2002 (Passed 25.09.02).....	
Planning and Land Bill 2002 (Passed 12.12.02).....	No. 20
Plant Diseases Bill 2002 (Passed 12.11.02).....	No. 18
Revenue Legislation Amendment Bill 2002 (Passed 22.08.02)	No. 18

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002...	
Land (Planning and Environment) ACT Heritage	
Council Appointments 2002 (No 1) - DI 2002—56.....	No. 20
Roads and Public Places (Fees) Revocation and Determination	
2002 (No 1) - DI 2002—71.....	No. 19
Roads and Public Places (Fees) Revocation and Determination	
2002 (No 2) - DI 2002—72.....	No. 19
Roads Transport (General) (Fees) Revocation and Determination	
2002 – DI2002—73.....	No. 19
Hawker (Fees) Revocation and Determination 2002 – DI2002—74....	No. 19
Roads and Public Places (Fees) Revocation and Determination 2002	
(No 3) – DI2002-75.....	No. 19
Water Resources (Fees) Revocation and Determination 2002 –	
DI2002-76.....	No. 19
Stock (Fees) Revocation and Determination 2002 (No 1) – DI2002-77	No. 19
Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	No. 19
Pounds (Fees) Revocation and Determination 2002 – DI2002-79.....	No. 19
Nature Conservation (Fees) Revocation and Determination 2002 –	
DI2002-80.....	No. 19
Lakes (Fees) Revocation and Determination 2002 – DI2002-81.....	No. 19
Environment Protection (Fees) Revocation and Determination 2002 –	
DI2002-82.....	No. 19
Domestic Animals (Fees) Revocation and Determination 2002 –	
DI2002-83.....	No. 19
Animal Welfare (Fees) Revocation and Determination 2002 –	
DI2002-84.....	No. 19
Animal Diseases (Fees) Revocation and Determination 2002 –	
DI2002-85.....	No. 19
Road Transport (General) (Parking Permit Fees) Revocation and	
Determinations 2002 – DI2002-86.....	No. 19
Road Transport (General) (Vehicle Impounding and Seizure/Speed	
Tests) Revocation and Determination 2002 – DI2002-89.....	No. 19
<u>Report No. 18, dated 27August 2002</u>	
Cooperatives Bill 2002...(Passed 19.11.02).....	No 22
<u>Report No. 19, dated 20 September 2002</u>	
Adventure Activities (Liability) Bill 2002 (PMB)	
Civil Law (Wrongs) Bill 2002 (Passed 26.09.02)	No. 20

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Injuries Compensation Framework Bill 2002 (PMB)	
Prostitution Amendment Bill 2002 (Passed 24.09.02)	
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	No. 22
Disallowable Instrument DI 2002—103 being the Building (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—104 being the Building (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—105 being the Community Title (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—106 being the Construction Practitioners Registration (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—109 being the Water and Sewerage (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—110 being the Water and Sewerage (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—111 being the Land (Planning and Environment) (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—112 being the Land (Planning and Environment) (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—114 being the Surveyors (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—115 being the Unit Titles (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—116 being the Unit Titles (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—120 being the Plumbers, Drainers and Gasfitters Board (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—130 being the Workers’ Compensation (Fees) Revocation and Determination 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	No. 22
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	No. 22
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002	No. 32
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2)	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1)	No. 22
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002	No. 32
<u>Report No 20, dated 11 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (Passed 4.03.03)	
Criminal Code 2002 (Passed 10.12.02)	No. 22
Planning and Land Bill 2002 (Further response)	No. 22
Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1)	No. 24
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)	No. 24
<u>Report No 21, dated 19 November 2002</u>	
Administrative Appeals Tribunal Amendment Bill 2002	No. 23
Building (Water Efficiency) Amendment Bill 2002 (PMB)	
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1)	
Disallowable Instrument DI2002-183 being the Justices of the Peace Appointment of Justices of the Peace 2002	
<u>Report No 22, dated 21 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (No 2) (PMB)	
Crimes Amendment Bill 2002 (PMB)	
Revenue Legislation Amendment Bill 2002 (No 2) (Passed 10.12.02)	No. 23
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) Veterinary Surgeons Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	No. 24
<u>Report No 23, dated 6 December 2002</u>	
Discrimination Amendment Bill 2002 (No 2) (Passed 13.03.03)	
Health and Community Care Services (Repeal and Consequential Amendments) Bill 2002 (Passed 10.12.02)	
Litter Amendment Bill 2002 (PMB)	
<u>Report No 24, dated 28 January 2003</u>	
ACTION Authority Amendment Bill 2002 (Passed 18.2.03)	
Taxation (Government Business Enterprises) Bill 2002 (Passed 11.03.03)	No 27

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Community Based Sentences (Transfer) Bill 2002 (Passed 20.2.03) .. Cemeteries and Crematoria Bill 2002 (No 2) (Passed 6.03.03) Hawkers Bill 2002 (Passed 6.03.03) Security Industry Bill 2002 (Passed 20.2.03).....	 No 32 No 32
<u>Report No 25, dated February 2003</u>	
Confiscation of Criminal Assets Bill 2002 (Passed 4.3.02) Crimes (Industrial Manslaughter) Amendment Bill 2002 (Passed 27.11.03) Disallowable Instrument DI2002-193 being the Supervised Drug Injection Trial Advisory Committee Appointments 2002 (No 1)... Disallowable Instrument DI2002-194 being the Residential Tenancies - Tribunal Selections 2002 Disallowable Instrument DI2002-195 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2002 (No 7) Disallowable Instrument DI2002-197 being the Domestic Violence Prevention Council Appointments 2002-2004.....	 No 26 No 32 No 32
<u>Report No 26, dated 27 February 2003</u>	
Consumer and Trader Tribunal Bill 2003 (Passed 1.04.03)..... Land (Planning and Environment) (Compliance) Amendment Bill 2003..... Subordinate Law SL2003-1 being the Urban Services (Application of Criminal Code) Amendment Regulations 2002 Disallowable Instrument DI2002-207 being the Gambling and Racing Commission – Appointments 2002 (No 1)..... Disallowable Instrument DI2002-212 being the National Exhibition Centre Trust Appointment 2002 (No 2)..... Subordinate Law SL2002-37 being the Trade Measurement (Miscellaneous) Amendment Regulations 2002 Disallowable Instrument DI2002-219 being the Health Professions Boards (Procedures) – Nurses Board of the ACT Appointments 2002 (No 2) Disallowable Instrument DI2002-220 being the Water Restriction Scheme Approval 2002 (No 2) Disallowable Instrument DI2002-223 being the Occupational Health and Safety Council – Appointment 2002 (No 3)	 No 32 No 30 No 30 No 32 No 32 No 30

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-224 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	No 30
Disallowable Instrument DI2002-225 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	No 30
Disallowable Instrument DI2002-232 being the Road Transport (General) Revocation of Declaration for Traffic Marshals 2002....	No 32
Disallowable Instrument DI2003-3 being the Hotel School Appointment 2003 (No 1).....	No 30
Disallowable Instrument DI2003-5 being the Tree Protection (Interim Scheme) Determination of Criteria 2002.....	No 32
<u>Report No 27, dated 11 March 2003</u>	
Bushfire Inquiry (Protection of Statements) Bill 2003 (PMB) (Passed 12.03.03)	
Bushfire Reconstruction Authority Bill 2003 (PMB)	
Charitable Collections Bill 2002 (Passed 1.04.03)	No 31
Disallowable Instrument DI2003-21 being the Plumbers, Drainers and Gasfitters Board Appointments 2003 (No 1)	
Disallowable Instrument DI2003-23 being the Occupational Health and Safety (Fees) Revocation and Determination 2003	No 32
<u>Report No 30, dated 31 March 2003</u>	
Agents Bill 2003 (Passed 6.05.03)	
Legislation (Statutory Interpretation) Amendment Bill 2003 (Passed 3.04.03)	
<u>Report No 31, dated 11 April 2003</u>	
Animal and Plant Diseases Amendment Bill 2003 (Passed 25.09.03).	
Road Transport (Public Passenger Services) Amendment Bill 2003	No 32
Sentencing Reform Amendment Bill 2003 (PMB)	
Tertiary Accreditation and Registration Bill 2003 (Passed 21.08.03) .	
Vocational Education and Training Bill 2003 (Passed 21.08.03)	
Disallowable Instrument DI2003-26 being the Public Trustee – Appointments to the Public Trustee Investment Board 2003 (No 1)	No. 37
Disallowable Instrument DI2003-27 being the Utilities (Dam Safety Code) Variation Determination 2003	No 32

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No 32, dated 15 May 2003</u>	
Bushfire Reconstruction Levy Bill 2003	No 34
Long Service Leave (Private Sector) Bill 2003 (PMB).....	
Nurses Amendment Bill 2003.....	No 34
<u>Report No 33, dated 5 June 2003</u>	
Electoral Amendment Bill 2003 (Passed 14.5.04) (Act citation: Electoral Amendment Act 2004)	
Gaming Machine (Political Donations) Amendment Bill 2003	
<u>Report No 34, dated 24 June 2003</u>	
Bushfire Inquiry (Protection of Statements) Amendment Bill 2003 (No 2)	
Firearms (Prohibited Pistols) Amendment Bill 2003	
Disallowable Instrument DI2003-52 being the Tree Protection (Interim Scheme) Instrument of Appointment 2003.....	
Disallowable Instrument DI2003-57 being the Scaffolding and Lifts (Fees) (Bushfire Emergency) Determination 2003	No 39
Disallowable Instrument DI2003-58 being the Dangerous Goods (Fees) (Bushfire Emergency) Determination 2003	No 39
Disallowable Instrument DI2003-59 being the Territory Records Advisory Council Appointments 2003 (No 1).....	No 35
Disallowable Instrument DI2003-60 being the Stadiums Authority Board Appointments 2003 (No 1).....	
Disallowable Instrument DI2003-61 being the Stadiums Authority Board Appointments 2003 (No 2)	
Disallowable Instrument DI2003-62 being the Stadiums Authority Board Appointments 2003 (No 3)	
Disallowable Instrument DI2003-65 being the Victims of Crime – Appointment of Victims of Crime Coordinator 2003	No 36
Disallowable Instrument DI2003-74 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2003 (No 1).....	No 35
Disallowable Instrument DI2003-81 being the Victims of Crime Appointment to Victims Assistance Board 2003 (No 1)	No. 36
Disallowable Instrument DI2003-84 being the Land (Planning and Environment) ACT Heritage Council Appointments 2003 (No 1).	No 35

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2003-112 being the Cultural Facilities Corporation Act 1997 Appointment to Cultural Facilities Corporation Board 2003 (No 1)	No 35
<u>Report No 35, dated 22 July 2003</u>	
Bail (Serious Offences) Amendment Bill 2003	
Civil Law (Sale of Residential Property) Bill 2003 (Passed 28.08.03)	No 38
Civil Law (Wrongs) Amendment Bill 2003 (Passed 21.08.03)	
Smoking (Prohibition in Enclosed Public Places) Bill 2003 (Passed 19.11.03)	
Disallowable Instrument DI2003-122 being the Planning and Land Council Appointments 2003 (No 1)	
Disallowable Instrument DI2003-123 being the Planning and Land Council Appointments 2003 (No 2).....	
Disallowable Instrument DI2003-124 being the Planning and Land Council Appointments 2003 (No 3).....	
Disallowable Instrument DI2003-125 being the Planning and Land Council Appointments 2003 (No 4).....	
Disallowable Instrument DI2003-126 being the Planning and Land Council Appointments 2003 (No 5).....	
Disallowable Instrument DI2003-127 being the Planning and Land Council Appointments 2003 (No 6).....	
Disallowable Instrument DI2003-128 being the Planning and Land Council Appointments 2003 (No 7).....	
Disallowable Instrument DI2003-129 being the Land Agency Board Appointments 2003 (No 1)	
Disallowable Instrument DI2003-130 being the Land Agency Board Appointments 2003 (No 2)	
Disallowable Instrument DI2003-131 being the Land Agency Board Appointments 2003 (No 3)	
Disallowable Instrument DI2003-132 being the Land Agency Board Appointments 2003 (No 4)	
Disallowable Instrument DI2003-133 being the Land Agency Board Appointments 2003 (No 5)	
Disallowable Instrument DI2003-135 being the Planning and Land Council Appointments 2003 (No 8).....	No 37
Disallowable Instrument DI2003-136 being the Planning and Land Council Appointments 2003 (No 9).....	No. 37
Disallowable Instrument DI2003-137 being the Planning and Land	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Council Appointments 2003 (No 10).....	No. 37
Disallowable Instrument DI2003-138 being the Planning and Land Council Appointments 2003 (No 11).....	No. 37
Disallowable Instrument DI2003-139 being the Planning and Land Council Appointments 2003 (No 12).....	No. 37
Disallowable Instrument DI2003-140 being the Planning and Land Council Appointments 2003 (No 13).....	No. 37
Disallowable Instrument DI2003-141 being the Planning and Land Council Appointments 2003 (No 14).....	No. 37
Disallowable Instrument DI2003-142 being the Land Agency Board Appointments 2003 (No 6)	No. 37
Disallowable Instrument DI2003-143 being the Land Agency Board Appointments 2003 (No 7)	No. 37
Disallowable Instrument DI2003-144 being the Land Agency Board Appointments 2003 (No 8)	No. 37
Disallowable Instrument DI2003-145 being the Land Agency Board Appointments 2003 (No 9)	No. 37
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**Simon Corbell** MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
GPO box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 48 of 12 May 2004. I offer the following response in relation to Subordinate Law 2004-12.

The Government acknowledges the comments of the Committee particularly given the detailed comment that the Committee has made in regard to the possible inference where the exercise of legislative power may amount to an interference with or infringement of judicial power. As noted in your comments the explanatory memorandum clearly sets out the background to these regulations, that is to say the Supreme Court decision of Justice Crispin. I am grateful for the guidance provided by the Committee's comments particularly with regard to the High Court decision in H A bachrach Pty Limited v State of Queensland.

The subject matter of this subordinate law is clearly town planning and it is not intended to interfere in any relevant sense with the exercise of judicial power.

Yours sincerely

Simon Corbell MLA
Minister for Planning

15.5.04

ACT LEGISLATIVE ASSEMBLY

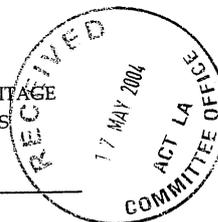
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Bill Wood MLA

MINISTER FOR URBAN SERVICES MINISTER FOR THE ARTS AND HERITAGE
 MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
 MINISTER FOR POLICE AND EMERGENCY SERVICES



MEMBER FOR BRINDABELLA

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

Dear Mr *Bill* Stefaniak

Thank you for your Scrutiny of Bills Report No. 44 of 24 February 2004. I offer the following response in relation to the matters raised by your Committee.

Disallowable Instrument DI 2004-322 – Cemeteries and Crematoria (Appointments) 2003 (No 1)

The Committee has noted that Disallowable Instrument DI2003-322 is supported by an Explanatory Statement which states that one of the appointees is a public servant. An instrument appointing a public servant is not a disallowable instrument under section 227 (2) (a) of the *Legislation Act 2001*.

Further investigation has also revealed that a Disallowable Instrument is not required for a period of less than six months. Disallowable Instruments DI2003-322 and DI2004-16 have been revoked by DI2004-34. The new Instrument does not include the appointment of a public servant and has been made for a period of three years. A notifiable instrument has been made for information purposes only, to notify the appointment of Ms Diane Kargas who is a public servant.

Legal advice has been sought and I have been advised that the original Instrument was valid from the date of notification up to the date of repeal.

Yours sincerely

Bill Wood

Bill Wood MLA
 Minister for Urban Services

17.5.04

ACT LEGISLATIVE ASSEMBLY

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**Ted Quinlan MLA**

DEPUTY CHIEF MINISTER

TREASURER MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM

MINISTER FOR SPORT, RACING AND GAMING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

Bill

I am writing in response to comments in the Standing Committee on Legal Affairs' Scrutiny Report No. 47 concerning Disallowable Instruments DI2004-35 and DI2004-36.

Your Committee noted that the explanatory statements for appointments to the Australian International Hotel School referred to Section 17 of the Act rather than Section 16 of the Act.

I confirm that the explanatory statements should have referred to Section 16 of the Act, appointment and terms of office of non-executive members.

Yours sincerely

Ted Quinlan MLA
Treasurer

26.5.2004

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