Legislative Assembly for the ACT

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

Scrutiny Report

5 JUNE 2006

Report 26

TERMS OF REFERENCE

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

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

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

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

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

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

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

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

  (i) unduly trespass on personal rights and liberties;

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

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

  (iv) inappropriately delegate legislative powers; or

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

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

Human Rights Act 2004

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

MEMBERS OF THE COMMITTEE

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

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

ROLE OF THE COMMITTEE

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

BILLS:

Bills—No Comment

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

ASBESTOS LEGISLATION AMENDMENT BILL 2006 (NO 2)

This is a Bill to amend the *Asbestos Legislation Amendment Act 2006* to the effect that it will commence on 1 July 2006.

STATUTE LAW AMENDMENT BILL 2006

This is a Bill to amend Acts and regulations for statute law revision purposes only.

Bills—Comment

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

EDUCATION AMENDMENT BILL 2006

This is a Bill to amend the *Education Act 2004* to make provision relating to financial contributions by parents to schools; the registration of home-educated children; the election of school boards; and to address a number of issues concerning the wording and structure of the Act.

* * *

A free education issue

Is a power to levy charges for activities, services and facilities provided in relation to a government school incompatible with HRA section 11(2) and/or with a right to free education stated in international treaties?

Currently, subsection 26(1) provides that

(1) Education in government schools is to be free and no fees are chargeable for it.

The object of clause 9 of the Bill is to qualify this principle by inserting these three new subsections:

(2) However, the Minister may determine guidelines about charges for activities, services and facilities provided in relation to a government school.

(3) To remove any doubt, subsection (1) has effect subject to any guideline in force under subsection (2).

(4) A determination is a disallowable instrument.

Note: A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The Explanatory Statement states:

> [Clause 9] amends the provisions on free education enabling the Minister to determine guidelines about charges for activities, services and facilities provided in relation to government schools. This will allow schools to charge parents only for some specific activities, services and facilities (such as overseas excursions and canteen facilities) that they want their child to use at, or in relation to, a government school. Students will continue to be entitled to free access to government school facilities to meet curriculum requirements and will have access to the school curriculum regardless of their capacity to pay.
>
> The determination of the guidelines will be a disallowable instrument. While it is unusual to use subordinate legislation to modify primary legislation, the amendment seeks to reflect the principle of free education in general, but also to allow schools to offer some activities, services and facilities that are paid for by a student's parents. These activities, services and facilities would be determined in the guidelines issued by the Minister. Making the instrument disallowable provides for additional scrutiny of what is contained in the guidelines.

A preliminary issue is whether proposed subsection 26(2) does empower the Minister, by making a document called a guideline, to require a person to pay a charge in respect of some activity, service or facility provided in relation to a government school. The Explanatory Statement appears to assume that the provision would have this effect, but perhaps more natural reading of the provision is that it merely permits the Minister to give guidance as to the circumstances in which someone empowered by law to require such charges should exercise this power. The basis for this view is that a 'guideline' is a device to structure the exercise of a power, and not a means to confer a power.

If proposed subsection 26(2) does not empower the Minister by a guideline to require a person to pay a charge, where does the power to levy charges come from? What provision authorises charges to be levied? One possibility is that a charge may be imposed by a regulation made under subsection 155(1) of the Act, which provides that "The Executive may make regulations for this Act". But this does not appear to be sufficient, even noting the definition of the word "for" in the Dictionary of the *Legislation Act 2001*.

If proposed subsection 26(2) does have the effect apparently intended, two issues arise.

- ***Is subsection 26(2) an inappropriate delegation of legislative power?***
- ***Does subsection 26(2) trespass on personal rights and liberties in that it derogates from a right to education?***

The two issues are connected in that if the provision derogates from a right to education, that makes it less desirable that the derogation be by way of a subordinate law.

Two international treaties to which Australia is a party state a right to "free" education. Article 26(1) of the *Universal Declaration of Human Rights* states:

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.

Article 13.2 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) states the matter similarly:

> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
>
> (a) Primary education shall be compulsory and available free to all;
>
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; … .

A United Nations body known as the Committee on Economic, Social and Cultural Rights has adopted "general Comments" on articles of the ICESCR, and in *General Comment No. 11* said of article 13.2(a):

> Free of charge. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.

(From *General Comment No. 11,* which is part of the document *General Comments Adopted by the Committee on Economic, Social and Cultural Rights,* HRI/GEN/1/Rev available at http://www.ohchr.org/english/bodies/icm-mc/documents.htm (as at May 30, 2006)).

As this Comment states, the nature of a right to free education is unequivocal, and there is no provision in the ICESCR which permits of its derogation. There might be debate as to whether a particular kind of charge is an 'indirect cost' which may be permissible (although what the Committee considered was embraced by this indefinite category is not at all clear).

The Committee also said of the right to education that

> The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.

On this basis, the right to an education, including the free education component, might be seen as a component of section 11(2) of the *Human Rights Act 2004*, which states:

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

The Human Rights Committee, the former United Nations body responsible for superintendence of the International Covenant on Civil and Political Rights (ICCPR), said of Article 24.1 of that Covenant (upon which HRA subsection 11(2) is closely modelled):

> 1. Article 24 of the International Covenant on Civil and Political Rights recognizes the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. …
>
> 3. In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The Committee notes in this regard that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural. … In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.

(From *General comment No. 17: Article 24 (Rights of the child)*, which is part of the document *General Comments Adopted by the Human Rights Committee*, to be found in HRI/GEN/1/Rev – see above.)

Some Australian commentators on the ICCPR have thus argued that "a right to education … is therefore an important component of article 24 protection": S Joseph, et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 21.13.

The Explanatory Statement does not allude to any possible incompatibility with the HRA or any other rights instrument. The justification for the levying of charges appears to rest on the notion that they will not be in respect of "access to government school facilities to meet curriculum requirements". Just what this encompasses is not further explained, and there might be much debate about whether some particular charge is justifiable under this rubric.

The Bill itself does not contain any such limitation, and it is debatable whether a court would read it in.

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

HEALTH LEGISLATION AMENDMENT BILL 2006

This Bill would amend the *Health Act 1993* and some other laws to make changes to the establishment, procedures and privileges of quality assurance committees and clinical privileges committees, particularly in respect of disclosure of information.

* * *

The regulation of the admissibility of evidence in Territory courts

Are the provisions regulating the admissibility of evidence in Territory courts incompatible with HRA subsection 21(1) and/or inconsistent with the *Evidence Act 1995* (Commonwealth)?

The reason for asking this question is set out later in this report in the comments on the Revenue Legislation Amendment Bill 2006.

To appreciate the nature of the question, regard need be had to two definitions:

- that "information is ***protected information*** about a person if it is information about the person that is disclosed to, or obtained by, an information holder because of the exercise of a function under this Act by the information holder or someone else" (section 123); and

- that "***sensitive information*** means information that - (a) identifies a person who - (i) has received a health service; or … (b) would allow the identity of the person to be worked out" (section 124).

The provisions of the Bill then restrict the capacity of various persons or bodies to disclose this information to a court. This, as the Explanatory Statement acknowledges, engages HRA subsection 21(1).

Clause 43, clause 73, and subclause 125(5) purport to preclude protected information from being given to a court. The latter two, and perhaps the first, appear inconsistent with section 56 of the *Evidence Act 1995* (Commonwealth), as has been explained in other parts of this Report.

These provisions also engage the fair trial right in HRA subsection 21(1), and the right to privacy in HRA section 12. The Explanatory Statement addresses this issue:

> Appropriate limitations on disclosure of information are required in the context of the functions and powers within the bill to obtain and create documents relating to individuals. However, the right to privacy must be balanced against the right of a party to a civil or criminal proceeding to access this information where appropriate.
>
> The right to privacy is safeguarded by the requirement that disclosure of protected information must be necessary for the purpose of the Act. Moreover, information held by Quality Assurance and Clinical Privileges Committees, in the form of oral statements and admissions, reports and opinions cannot be divulged to a court or tribunal. Other information held by Quality Assurance Committees may only be disclosed to the Coroner's Court if it is likely to facilitate the improvement of health services in the ACT.

The Committee notes however that the concept of protected information is quite wide, and will embrace information which has no bearing on the extent of a privacy interest of a person who is the subject of the information. In other words, the privacy rationale for these provisions appears to be overstated.

The Explanatory Statement also states that:

> The right to a fair trial is safeguarded by the fact that most of the information available to Quality Assurance and Clinical Privileges Committees will be available from other sources that are subject to the powers of courts and tribunals to compel disclosure.

The Committee notes however that there can be no guarantee that this will be true of the particular piece of information a litigant proposes to adduce in court. The prediction made appears to be highly speculative.

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

LEGAL PROFESSION BILL 2006

This Bill would repeal the *Legal Practitioners Act 1970* and make provision for an Act to regulate legal practice in the ACT in a way that would facilitate the regulation of legal practice on a national basis. The Bill deals with the topics of: the general requirements for engaging in legal practice; the conduct of legal practice; complaints and discipline; external investigation into the conduct of legal practice; the powers of investigators; the constitution and powers of regulatory bodies; and the constitution and powers of professional bodies.

* * *

Comment on the Explanatory Statement

The Bill throws up a wide range of rights issues and other issues that fall for comment under the Committee's terms of reference. The Committee's task has been made more difficult by the failure of the Explanatory Statement to meet the standards expected by the Committee and which are generally observed. It bears repeating that in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 [82], the Chief Justice observed of an Explanatory Statement that "consistently with the apparent purpose of such documents", it "explain[ed] as little as possible". This is true of the Explanatory Statement to the Legal Profession Bill 2006. This Committee has in the past expressed the hope that an Explanatory Statement will not only summarise the effect of a provision of a Bill, but in addition will explain:

- how the new provision would operate in the context of the existing law;
- why the change in the law is necessary; and
- address any human rights issue that arises.

This last matter is critically significant to the task of the Committee in making a report under HRA subsection 38(1). Moreover, there cannot be a "dialogue" between the promoters of a Bill and the Assembly unless the Explanatory Statement exposes points where a provision of the Bill may engage a HRA right and offers some justification of why there is no incompatibility with the HRA.

Although it is very clear in some cases (and certainly arguable in others) that provisions of the Bill engage an HRA right, the Explanatory Statement makes no mention at any point of the HRA. Indeed, several of these provisions are not mentioned by name for any purpose.

One other matter may be mentioned. The Committee appreciates that the Legal Profession Bill implements an inter-governmental agreement, and that thereby the Territory was obliged to make certain kinds of provision. It must be noted, however, that the HRA applies as much to this kind of Bill as it does to any other Bill. The Committee has noted earlier instances where the Explanatory Statement has in terms of HRA section 28 justified a derogation of an HRA right on the basis that the Bill implemented inter-governmental agreement. In the Explanatory Statement to the Civil Law (Wrongs) Amendment Bill 2005 (No 2) it was argued that the Bill "serve[d] the legitimate purpose of promoting a uniform Australian defamation law. It gives full faith and credit to the laws of the various jurisdictions"; see *Scrutiny Report No 21 of the Sixth Assembly*.

There is some force in this argument, but it can undercut the HRA's statement of rights very significantly. Taken too far, it has the effect that an Executive decision to enter an inter-governmental agreement that requires the government to procure the enactment of a law displaces the HRA so far as concerns that law.

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

The Bill would confer on a number of decision-makers a wide range of powers. Many of these powers are discretionary in nature in that "the decision-maker is allowed some latitude as to the choice of the decision to be made": *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47, per Gleeson CJ, Gaudron and Hayne JJ.

It is characteristic of a discretionary power that it calls for the exercise of "value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right": *Norbis v Norbis* (1986) 161 CLR 513 513 at 518 per Mason and Deane JJ. That being so, and focussing on the issue of what matters are relevant to making the value judgement, a court will hold that a particular exercise of the power is invalid only if either (1) it was based on some consideration (value judgement) that the statute granting the power stated – either directly or indirectly – to be irrelevant to the exercise of the discretion, or (2) it was taken in disregard of some consideration that the statute provided *was* relevant and must have been taken into account.

Spanning now over a 100 years, much judicial and academic commentary has been directed to making the basic point that the rule of law is enhanced by statutory statements of discretionary powers which state directly what considerations are or are not relevant to the exercise of the particular powers conferred by the statute. The elimination of unnecessary discretionary power better protects the citizen, and provides better guidance to the decision-maker. It also better exposes the issue of whether the power is capable of exercise in a way that would derogate from an HRA right.

Nevertheless, modern statutes – such as the Legal Profession Bill 2006 – are replete with discretionary powers unaccompanied by any such statements. On the other hand, it has long been accepted by the Australian courts that where the statutory statement of the discretionary power does not contain a positive indication of the considerations upon which it is intended that the power shall or shall not be exercised, "[the] discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view": *Water Conservation and Irrigation Commission (New South Wales) v Browning* [1947] HCA 21, per Dixon J, and see *Coal and Allied Operations* above at [19]. In logic, there is no reason why the scope and purpose of the statute may not be a basis to find that the decision-maker must have regard to some particular consideration.

Should a discretion be conferred in terms that the decision-maker is empowered to act in its "absolute discretion"?

A question posed by two provisions of the Bill is whether the empowering statute can remove the minimum level of judicial control stated in *Browning*. Subclause 337(1) provides:

(1) The law society council may, at its absolute discretion, make payments to a claimant in advance of deciding a claim if satisfied that –

(a) the claim is likely to be allowed; and

(b) payment is justified to alleviate hardship

The Explanatory Statement does note this rule, but provides no explanation of why it is cast in this way. See too subclause 445(1).

In *Browning*, the statute provided that the grant or refusal of a consent "shall be entirely in discretion" of the decision-maker. Nevertheless, Dixon J said: "use of the word "entirely," while it indicates that the discretion is meant to rest in the Commission alone, does not necessarily indicate that it is intended to be arbitrary and unlimited". In *F.A.I. Insurances Ltd. v Winneke* [1982] HCA 26 [40], Mason J said that "the court will not ordinarily regard a statutory discretion the exercise of which will affect the rights of a citizen as absolute and unfettered", but also allowed that "[if] Parliament intends to make such a discretion absolute and unfettered it should do so by a very plain expression of its intent".

The conferment of discretionary powers in terms of an "absolute discretion" is now so rare that there is little more modern judicial authority on their effect; (such provisions in the Commonwealth Migration Act were repealed quite some time ago.) A modern court might well find that such a provision does not operate to displace the minimum level of judicial control stated in cases such as *Browning*.

The Committee raises the issue of whether it is ever desirable to provide for an "absolute discretion". Such a provision raises the question of whether there has been an insufficient definition of administrative power. There are more fundamental constitutional objections.

The first objection is that such clauses are contrary to the rule of law as understood in the sense that it excludes arbitrary power, or perhaps of wide discretionary power on the part of government; (see A V Dicey, *Introduction to the Study of the Law of the Constitution* (1959, 10th ed, at 202). To put this another way, the rule of law is promoted by rules stated in such a way that a person may foresee with some certainty how the government will employ its powers and thus be able to plan the conduct of their affairs.

A second is that an exercise of an absolute discretion – being uncontrollable by the courts – permits the decision-maker to act in ways that are contrary to the purpose or object of the empowering statute. In this way, the decision-maker can in effect act in ways contrary to the intent of the legislature.

Third, if a court cannot review an exercise of the absolute discretion, then it operates in the same way as a privative clause, which raises the question of whether it is compatible with HRA subsection 21(1).

The Committee commends the adoption of techniques for stating the scope of discretions illustrated by clauses 422 and 426.

The discretionary powers that would be created by this Bill are stated in a great variety of ways. The result is that there would be great variety in the extent of judicial review available to a person affected adversely by the exercise of the powers. It is not apparent from the face of the Bill why there should be such a variation, and the Explanatory Statement makes no attempt at explanation. For reasons stated above, it is desirable that discretion should be conferred in terms that restrict as far as possible the extent of choice of the decision-maker. To end on a positive note, the Committee commends clauses 422 and 426 as illustrative of how discretion can be conferred in terms narrower than the unconfined discretion so frequently employed throughout this Bill.

Has there been an inappropriate delegation of legislative power?

Should the Bill confer on various decision-makers power to dispense with a provision of the Bill by means of an unconfined discretion?

To an unusual extent, this Bill would confer in various decision-makers powers to dispense with a provision of the Bill in the sense that the provision would not operate where according to the statute it should. That is, the decision-maker is granted power in unconfined terms to determine that some provision of the law should simply not apply to a particular person or in some particular situation. This is in effect a delegation of power by the Assembly to the decision-maker to set aside the statute. In some cases, the dispensation may be by way of a regulation – see paragraphs 16(4)(e) and 101(2)(f), and subclauses 365(1), 366(1) and 585(6). In these cases, the Assembly would retain some measure of control by reason of the power of disallowance (although this might be too late to reverse the effect of the dispensation). In one case, the dispensation may be by way of a decision of the Supreme Court or an admissions board (subclause 22(3)); in another by decision of the law society council (subclause 111(6)); and in another by decision of "the relevant council" (clause 310).

In some cases at least, the aspect of the statute dispensed with appears fundamental. For example, by clause 309 the purpose of Part 3.3 "is to provide for a scheme for professional indemnity insurance to protect clients of law practices from professional negligence". But then clause 310 states:

> The relevant council may exempt an Australian legal practitioner from the requirement to be insured under this Act on the grounds the council considers sufficient.

The Explanatory Statement provides no justification for permitting the council to remove the protections afforded to clients of lawyers provided by Part 3.3.

The Committee commends the provision made by clause 579 for public consultation prior to the making of legal profession rules.

It is rare to find a provision delegating legislative power accompanied by a requirement that the repository of the power consult with the public and/or interested parties prior to making the subordinate law. The Committee would wish to encourage this practice, and commends clause 579 as a model.

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

Strict liability offences

Are the provisions creating offences of strict liability offence compatible with the presumption of innocence stated in HRA subsection 22(1), and, if not, are they justifiable under HRA section 28?

The Bill would create a number of strict liability offences: see clauses 39, 91, 92, 104-106, 136, 191, 221-226, 228, 232, 252, 254, 258, 479, 485, 492, and 529. As the Committee has often explained, such a provision engages the presumption of innocence stated in HRA subsection 22(1).

The Explanatory Statement does not mention the fact that any clause creates a strict liability offence, nor provide anything by way of justification.

The Committee has reviewed each provision of the Bill. In terms of the discussion in earlier Committee reports where the issue of justification has been discussed, it appears to the Committee that:

- each provision is designed to promote the legitimate policy that imposition of strict liability will enhance the observance by lawyers of rules with which they should be familiar; and
- the penalty for breach does not exceed 50 penalty points.

Thus, the Committee concludes that while the provisions are not compatible with the presumption of innocence stated in HRA subsection 22(1), they are justifiable under HRA section 28.

The regulation of the admissibility of evidence in Territory courts

Are the provisions regulating the admissibility of evidence in Territory courts incompatible with HRA subsection 21(1) and/or inconsistent with the *Evidence Act 1995* (Commonwealth)?

The reason for asking this question is set out later in this report in the comments on the Revenue Legislation Amendment Bill 2006. In relation to the Legal Profession Bill, the Committee points to:

- clause 404, and subclause 467(3), which appear to be inconsistent with section 56 of the Evidence Act;
- subclause 346(2), which appears to be inconsistent with the rule for the exclusion of hearsay evidence in section 59 of the Evidence Act; and
- clause 465, which appears to be inconsistent with the compellability rule in section 13 of the Evidence Act.

Two other points about the effect of the Evidence Act should be made.

Should clause 424 be amended to refer to the law of evidence contained in the Evidence Act and to the common law that is unaffected by that Act?

The statement in clause 424 that "the disciplinary tribunal is bound by the rules of evidence in conducting a hearing …" does not specify what body of the rules of evidence. The Evidence Act will not apply of its own force because it applies only in ACT courts. The most natural reading is that clause 424 refers to the common law (and this is supported by case-law which has held that the Act does not apply to the pre-trial discovery process). This result appears undesirable.

Are these provisions regulating the admissibility of evidence incompatible with HRA subsection 21(1) and, if so, are they justifiable derogations under HRA section 28?

This issue is more fully explored in the comments concerning the Revenue Legislation Amendment Bill 2006.

Should subclause 499(3) be amended to refer to the privilege against self-incrimination stated in section 128 of the Evidence Act?

Clause 499 deals with a proceeding in the Supreme Court, where, by section 4 of the Evidence Act, that Act applies. Subclause 499(3) refers however to the "common law privileges against selfincrimination or exposure to the imposition of a civil penalty". It appears that it would be more sensible to refer to these privileges as stated in the Evidence Act.

A privative clause

Is the privative clause in subclause 349(4) incompatible with HRA subsection 21(1) and/or inconsistent with section 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth)?

Clause 349 states what the law society council may do if it is of the opinion that the fidelity fund is likely to be insufficient to meet the fund's ascertained and contingent liabilities. Subclause 349(4) then provides that "A decision of the law society council made under this section is final and is not subject to appeal or review".

The Committee has long been concerned about the privative clause, and in recent reports the Committee has buttressed its long-standing concern that a privative clause is an undue trespass on rights by pointing to HRA s 21(1). It has also pointed to the possibility that the power of the Assembly to restrict judicial review is limited by s 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*; see generally *Scrutiny Report No 11 of the Sixth Assembly*, concerning the Water Resources Amendment Bill 2005.

The Explanatory Statement does not mention the existence of the privative clause in subclause 349(4).

A closed court provision

Is the provision in subclause 490(6) requiring the Supreme Court to close the court to the public compatible with HRA compatible with HRA subsection 21(1), and, if so, is it justifiable under section 28?

Under clause 490, the Supreme Court may entertain an application for the appointment of a receiver for a law practice. Subclause 490(6) then provides:

> (6) Before starting to hear the application, the Supreme Court must order from the precincts of the court anyone who is not—
>
> (a) an officer of the court; or
>
> (b) a party, an officer or employee of a party, a legal representative of a party, or a clerk of a legal representative of a party; or
>
> (c) a principal of the law practice; or
>
> (d) a person who is about to or is in the course of giving evidence; or
>
> (e) a person permitted by the court to be present in the interests of justice.

On its face, this provision derogates from that aspect of HRA subsection 21(1) which requires that rights and obligations recognised by law be decided "after a fair and public hearing".

The Explanatory Statement does not mention the existence of subclause 490(6).

Criminal proceedings?

Are any of these proceedings criminal proceedings and thus affected by HRA section 22?

A question that can merely be raised without exploration is whether some proceedings under the Act would, in terms of HRA section 22, amount to the hearing of a charge of a criminal offence. If the Supreme Court classified the proceedings in this way, the rights in HRA section 22 would be engaged.

One indication that the investigation of a complaint against an Australian legal practitioner is in substance the hearing of a criminal charge is that the relevant council may impose a fine in an amount up to $1500 under subclause 413(3). Similarly, one indication that the determination of a disciplinary tribunal upon a complaint against an Australian legal practitioner is in substance the hearing of a criminal charge is that the relevant council may impose a fine in an amount up to $75,000 under subclause 430(9).

So far as concerns the meaning to be given to the concept of a "criminal offence" in HRA section 22, it may be concluded from case-law in other jurisdictions that this is approached as a matter of substance and is not controlled by the formal designation of the proceeding in the law under which the proceeding takes place. There is some Canadian law which suggests that proceedings under this Bill would not be classified as criminal in nature; see R Clayton and H Tomlinson, *The Law of Human Rights* (2000 and Supplements) at 11.392. This is nevertheless the kind of human rights issue which is thrown up by provisions of the Bill and should be addressed.

REVENUE LEGISLATION AMENDMENT BILL 2006

This Bill would amend: the *Duties Act* 1999 to allow self managed superannuation funds to access concessional duty treatment when an existing trustee retires, or a new trustee is appointed; the *Payroll Tax Act 1987* to include in the concept of wages the payment of wages by means of an instruction to credit an account; and the *Taxation Administration Act 1999* to prevent a tax officer from being required to release "protected" information or documents to a court unless such information is necessary for the administration or execution of a tax law.

* * *

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

Proposed section 99 of the *Taxation Administration Act 1999* raises a rights issue to which the Committee has pointed in several previous reports. It would provide:

99 Restrictions on disclosures to courts and tribunals

(1) A person who is or has been a tax officer is not required to divulge protected information to a court, or produce a protected document or a document containing protected information to a court, unless its disclosure or production is necessary for the purpose of the administration or execution of a tax law.

(2) In this section:

court includes a tribunal, authority or person having power to require the production of documents or the answering of questions.

divulge includes communicate.

produce includes allow access to.

protected document means a document obtained or created in the administration or execution of a tax law.

protected information means information obtained in the administration or execution of a tax law.

Right to a fair trial

Does proposed section 99 conflict with the principle that on a trial all relevant evidence is admissible – being a component of the right to a fair trial stated in HRA subsection 21(1) - and, if it does, is it nevertheless justifiable under HRA section 28, at least in part on the basis that it enhances the right to privacy stated in HRA section 12?

HRA section 12 states:

12 Privacy and reputation

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily … .

Subsection 21(1) states:

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.

In *Scrutiny Report No 21 of the Sixth Assembly*, concerning the Children and Young People Amendment Bill 2005 (No 2), the Committee exposed the fair trial issue thrown up by provisions such as proposed section 99:

The ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent, is an element of a fair trial. This is reflected in the common law rule that the starting point for the admission of evidence is that any relevant evidence is admissible. The rule is restated in the *Evidence Act 1995* (Commonwealth), which applies in the Territory and which prevails over any inconsistent Territory law. Subsection 56(1) provides:

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

Subsection 55(1) then defines the notion of relevance:

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

In simpler terms, a piece of evidence (information) submitted to an adjudicator (such as a court) is admissible if that evidence – assuming that the adjudicator accepts that it has some value - would tend to establish the existence, or non-existence, of a fact in issue which must be resolved as a step towards adjudication. The rights dimension of this principle was made clear by Spigelman CJ in *R v Young* [1999] NSWCCA 166:

75 The starting point is that the search for the truth requires all oral and documentary information, which is directly or indirectly relevant or material, to be available. As Rich J has put it:

"The paramount principle of public policy is that truth should always be accessible to the established courts of the country." *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 87).

76 However, in recognition of the fact that truth may sometimes cost too much, the common law recognises a specific list of privileges. This list has been modified by statute.

77 Such privileges include legal professional privilege, the privilege against self incrimination, clergy-communicant privilege, "without prejudice" privilege. (See eg McNicol *Law of Privilege* (1992) pp7-11; also Lord Simon of Glaisdale in *D v NSPCC* supra at 231-233). Each category reflects a different form of public policy and, in that sense, represents a "public interest".

The common law does not recognise any all-embracing privilege in respect of information that is provided from one person to another in confidence. Nor does the *Evidence Act 1995*, which does, however, provide for a number of particular privileges, some of which accord protection to specific kinds of information provided in confidence.

<u>The issue under HRA subsection 21(1)</u>

It is no doubt the case that a Territory law extending the occasions on which a person may refuse to disclose evidence to a court may avoid incompatibility with the HRA, either on the basis that such a law is not incompatible with a fair trial, or, if it is, that this derogation is justifiable under HRA section 28.

The Explanatory Statement to the Revenue Legislation Amendment Bill 2006 accepts that proposed section 99 engages the right to a fair trial stated in HRA subsection 21(1), but argues that derogation is justified. To appreciate the rights issues involved, it needs to be noted that section 99 speaks of two kinds of legal proceedings:

- first, those where disclosure or production of the protected information "is necessary for the purpose of the administration or execution of a tax law" – in which case the tax officer may divulge the information; and

- second, those "other proceedings" where disclosure or production is not necessary in this way, but in some other way is relevant to proof of an issue of fact – in which case the tax officer cannot be required to divulge the information.

The first line of justification in the Explanatory Statement relies on the privacy protection object of section 99:

> The exercise of coercive powers under tax laws to obtain and create documents relating to individuals are subject to limitations generally regarded as appropriate to circumstances of investigation and inquiry. In this context, the right to privacy must be balanced against the right of a party to a civil or criminal proceeding to access information relevant to their claim. The appropriate limitation in these circumstances in safeguarding the right to privacy is that any disclosure of protected information must be necessary for the purpose of a proceeding relating to the administration or execution of a tax law.

Two comments are appropriate. The first is that there is no general rule applicable in the curial process that excludes from evidence information the disclosure of which would in some way infringe upon the privacy interest of some person. Were this so, a great deal of relevant information would be excluded. It is not clear why such information that ends up under the control of a taxation administrative officer should be in a different category. The Explanatory Statement relies on the fact that the information was obtained by the exercise of coercive power by some person or body. The point is that the person whose privacy interest would be invaded by later disclosure of the information in a court was required by law to provide the information. Again, however, this is true of a great deal of information routinely disclosed in courts and tribunals. Moreover, the information that may be divulged to a court under section 99 may also have been obtained by the exercise of coercive power.

In the second place it must be noted that the concepts of "protected information" and "protected document" extend to any kind of information obtained or created in the administration or execution of a tax law. Thus, the information does not necessarily concern the private affairs of a person. It is sufficient if the information was obtained or created in the course of the work of the relevant tax administrative body or person. No justification is offered for extending section 99 to this kind of information.

Another line of justification is that "the *Taxation Administration Act 1999* provides for protected information to be disclosed in other proceedings if it does not contain personal information (section 96) or if it is the subject of a permitted disclosure (section 97)". (The reference to "other proceedings" is to court or tribunal proceedings other than those in which disclosure or production is necessary for the purpose of the administration or execution of a tax law.)

Looking at the matter from the point of view of the litigant seeking to adduce relevant evidence that is caught by proposed section 99, there are two problems. The first is that section 96 vests the power of disclosure in the commissioner and section 97 vests the power in a tax officer. Apart from the sheer difficulty in the litigant obtaining the consent of these persons to disclosure in a court or tribunal proceeding, these persons are not obliged to disclose to the court.

Second, given that section 99 deals with the specific topic of disclosure to a court or tribunal, it may well be that its provisions prevail over and control what may be done in the way of disclosure by the commissioner under section 96 and the tax officer under section 97.

The third line of justification is in these terms:

> the right to a fair trial is safeguarded primarily by the ordinary pre-trial litigation process. In a proceeding relating to the administration or execution of a tax law, protected information will be available to all of the parties through the subpoena process. [In other proceedings?] protected information disclosed to a party will be available to other parties:
>
> - in civil and criminal proceedings - through the discovery and inspection processes; and
> - in criminal proceedings - through the special disclosure obligations of the Director of Public Prosecutions.

This is hard to follow. Supposing some proceeding other than one in which disclosure or production is necessary for the purpose of the administration or execution of a tax law, information sought by the subpoena process is not provided directly to the litigant seeking the information. It is provided to the court, and the court decides whether to disclose it to that party. Section 99 would operate to preclude the court from being given the information by the tax officer. In a criminal proceeding, the Director of Public Prosecutions would be free to make 'special disclosure" of information of a kind described in section 99, but the question is how the DPP would obtain this information.

In the end, it is for the Assembly to consider whether the ability of a party to adduce evidence relevant to proving their case, or disproving the case of an opponent – which is a fundamental element of a fair trial – should be cut down by proposed section 99.

In addressing this issue of the compatibility of section 99 with HRA subsection 21(1), regard should be had to the comments of the Master of the Supreme Court in *Pappas v Noble* [2006] ACTSC 39 – see below.

Is proposed section 99 inoperative to the extent that it is inconsistent with subsection 56(1) of the *Evidence Act 1995* (Commonwealth)?

An issue that cannot be avoided is whether section 99 would be compatible with subsection 56(1) of the *Evidence Act 1995.* In *Habda v The Queen* [2004] ACTSC 62 [12], Higgins CJ and Crispin J said:

> The ACT Legislative Assembly clearly has power to redefine the elements of any Territory offences, to define such concepts as intention and voluntariness and, subject to the provisions of the Evidence Act 1995 (Cth), to restrict the admissibility of evidence.

The Committee has drawn attention to this effect of the Evidence Act in earlier reports; see *Scrutiny Report No 10 of the Sixth Assembly*, concerning the Human Rights Commission Bill 2005, and the response of the Minister by letter of 7 June 2005, which is appended to *Scrutiny Report No 11 of the Sixth Assembly*). The Committee acknowledged that there was no problem where the provision restricting the admissibility of evidence was qualified by provision permitting disclosure under a Territory law", for that concept included the Evidence Act. The Minister's response also argued that "the effect of section 56 of the *Evidence Act 1995* (Cwth) is to make material admissible rather than compellable". The Committee responded that this is so, but noted that section 12 of the Evidence Act provided that a person who is competent to give evidence is compellable to do so. A compellable witness who refused to give evidence, either generally or about a particular topic, would be in contempt of the court.

The recent decision of the Master of the Supreme Court in *Pappas v Noble* [2006] ACTSC 39 takes a view of the issue which concurs with the Committee's standpoint. Section 84 of the *Civil Law (Wrongs) Act 2002* provides that expert medical evidence may be given only by a single expert either agreed between the parties or appointed by the court, and makes the opinion evidence of any other medical expert inadmissible. Master Harper pointed to section 4 of the *Evidence Act 1995* – which provides that the Act applies to a proceeding in an ACT court – and to section 56 (see above). There was thus an inconsistency between section 84 and 56 of the respective laws, and by reason of section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth) section 84 had no effect.

By parity of reasoning, proposed section 99 the *Taxation Administration Act 1999* will have no effect where it would otherwise apply in any kind of proceeding in an ACT court to make relevant evidence inadmissible.

Master Harper also considered the possible effect of HRA subsection 21(1), saying:

> 14. There seems to me a respectable argument that a provision in another Territory Act which makes inadmissible evidence which would otherwise be relevant and admissible and which might be determinative of issues in the trial of a civil action, might well be categorised as inconsistent with the right to a decision after a fair hearing.

His Honour also considered that section 84 of the Civil Law (Wrongs) Act could not be read down under HRA section 30 in a way that render it compatible with HRA subsection 21(1). He then alluded to the Court's power to make a declaration of incompatibility:

> 17. The court is given power to make what is called in the Act a declaration of incompatibility. This is not a case where it is appropriate for the court to go as far as that, involving as it does notice to the Attorney-General and to the Human Rights Commissioner, and the provision of an opportunity to the holders of both of those offices to intervene in the proceedings.

Master Harper did not mention HRA section 28, according to which a derogation of subsection 211) might be justified. Nevertheless, there is a significant possibility that the Supreme Court would find that proposed section 99 the *Taxation Administration Act 1999*, to the extent that it would apply in any kind of proceeding in an ACT court to make relevant evidence inadmissible, was incompatible with HRA subsection 21(1).

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2006-68 being the Housing Assistance Redundant Programs Revocation 2006 (No. 1) made under subsection 12(4) of the *Housing Assistance Act 1987* **revokes DI1989-65, DI1990-19, DI1990-20, DI1990-21, DI1990-22, DI1991-78, DI1992-68, DI1992-83, DI1992-131, DI1992-151, DI1992-152, DI1993-135, DI1993-137, DI1993-138, DI1993-140, DI1993-141, DI1993-142, DI1994-1, DI1994-144, DI1995-17, DI1995-18, DI1995-101, DI1996-76, DI1996-211, DI1997-74, DI1998-155, DI2000-229, DI2000-376, DI2002-214, DI2003-121, DI2003-320 and DI2003-321.**

Disallowable Instrument DI2006-73 being the Public Place Names (City) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **revokes a specified street and determines the extension of a specified street in the Division of City.**

Disallowable Instruments—Comment

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

Drafting issue

Disallowable Instrument DI2006-71 being the Education (Non-government Schools Education Council) Appointment 2006 (No. 1) made under subsection 109(1) of the *Education Act 2004* **appoints a specified person as an education member of the Non-government Schools Education Council.**

The Committee notes that this instrument appoints a named person as an "education member" of the Non-government Schools Education Council. The appointment is made under subsection 109(1) of the *Education Act 2004*. Section 109(1) provides:

> **109 Members of council (non-government)**
>
> (1) The Minister must appoint the following members of the council:
>
> (a) a chairperson;
>
> (b) 4 people who, in the Minister's opinion, represent the views of the general community (the ***community members***);

(c) 6 people who, in the Minister's opinion, represent the views of non-government school education (the ***education members***).

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

It is also relevant to note that subsection 109(2) of the Education Act sets out further requirements in relation to the appointment of education members under paragraph 109(1)(c). It provides:

(2) For subsection (1) (c), the Minister must appoint—

(a) 3 education members chosen from nominations of organisations representing Catholic schools; and

(b) 1 education member chosen from nominations of organisations representing non-Catholic independent schools; and

(c) 1 education member chosen from nominations of the non-government school union; and

(d) 1 education member chosen from nominations of organisations representing parent associations of non-government schools.

The Explanatory Statement does not indicate which of the categories this appointment falls into. It states:

> This instrument appoints Mr Graham Willard as an education member following the resignation of Mr Allan Hird. The appointment will be for three years from the day after notification.

The Committee has examined DI2005-37, which most recently appointed Mr Hird, and neither the instrument nor the Explanatory Statement to the instrument indicate under which category of subsection 109(2) the appointment of Mr Hird was made, so it is not possible for the Committee to divine the basis of this appointment.

The Committee notes that it is not strictly necessary for an instrument of appointment to set out the category in which an individual is appointed. The Committee also notes that the Explanatory Statement states that the Legislative Assembly's Standing Committee on Education, Training and Young People has been consulted in relation to the appointment. That being the case, the Committee may be entitled to assume that there are no irregularities in the appointment and, in particular, that the requirements of section 109 of the Education Act have been met. Nevertheless, the Committee notes that section 109 contains mandatory requirements (indicated by the use of "must") and suggests that it would assist the Committee (and the Assembly) in its scrutiny of instruments of appointment if the Explanatory Statements to such instruments expressly addressed any formal requirements of such appointments. In making

this statement, the Committee does not consider that providing such assistance would greatly inconvenience the Ministers and agencies making appointments.

Drafting issue

Disallowable Instrument DI2006-72 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 6) made under section 30 of the *Canberra Institute of Technology Act 1987* **appoints a specified person, in their role as chairperson of the Vocational Education and Training Authority, to be a member of the Canberra Institute of Technology Advisory Council.**

This instrument appoints a named person as a member of the Canberra Institute of Technology Advisory Council. The operative part of the instrument states:

> I appoint Ms Rosemary Follett as the Chairperson of the Vocational Education and Training Authority Member on the Canberra Institute of Technology Advisory Council from 1 January 2006 to 31 December 2008.

The appointment is made under section 30 of the *Canberra Institute of Technology Act 1987*, which provides:

30 Membership of council

(1) The council consists of—

(a) the chairperson; and

(b) the deputy chairperson; and

(c) 10 other members.

(2) Of the members mentioned in subsection (1)(c)—

(a) 1 must be a representative of an organisation that represents the teaching staff; and

(b) 1 must be a representative of the student body; and

(c) 1 must be a representative of industry and commerce; and

(d) 1 must be the chairperson of the vocational education and training authority; and

(e) the remaining 6 members must be people possessing expertise relevant to the management and operation of the institute.

The Committee assumes that the appointment is made under paragraph 30(2)(d) above and that the named person is appointed in her capacity as Chairperson of the Vocational Education and Training Authority. That being the case, it might assist in the understanding of the instrument if (a) the provision under which the person was appointed was specifically identified and/or there was punctuation in the operative part of the instrument (ie around "as the Chairperson of the Vocational Education and Training Authority".

The Committee notes that the appointment is expressed to operate from 1 January 2006. It therefore has a retrospective operation. The Committee also notes, however, that the Explanatory Statement states that "no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than Territory or a Territory Authority) during this period of retrospectivity", referring to section 76 of the *Legislation Act 2001* and the general prohibition against retrospective operation of legislation. As a result, the Committee has no further concerns with the instrument.

Subordinate Laws—No comment

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

Subordinate Law SL2006-14 being the Water Resources Regulation 2006 made under the *Water Resources Act 1998* **exempts allocation of water and licensing of water taking and bore construction on land subject to urban open space from the current moratorium.**

Subordinate Laws—Comment

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

Trespass on rights previously established by law/Containing matter which should properly be dealt with in an Act of the Legislative Assembly

Subordinate Law SL2006-12 being the Land (Planning and Environment) Amendment Regulation 2006 (No. 1) made under the *Land (Planning and Environment) Act 1991* **repeals sections of the Land (Planning and Environment) Regulation 1992 regarding remission of change of use charge for lease variations.**

Section 184A of the *Land (Planning and Environment) Act 1991* (**LPE Act**) provides that the planning and land authority (**Authority**) must not execute a variation of a nominal rent lease unless the lessee has paid to the Territory a "change of use charge" (**CUC**) in relation to the variation. According to the Explanatory Statement to this subordinate law:

> CUC is typically levied where value is added to the land through a change to the Crown lease (normally 75% of the added value).

Section 184C of the LPE Act provides that the Authority **must** remit (see subsection 184C(1)) or increase (see subsection 184C(2)) a CUC in circumstances prescribed by regulation.

Section 17 of the *Land (Planning and Environment) Regulation 1992* (**LPE Regulation**) provides that the Authority **must** remit in full the CUC for the variation of a lease in a local centre if:

(a) the lease is over land lying completely within a local centre; and

(b) the planning and land authority has made a declaration in relation to that lease under section 18.

On application by a lessee, the Authority can declare, under section 18 of the LPE Regulation:

(a) that the local centre is no longer viable as such a centre or that it will cease to be so viable within 3 years if the lease is not varied in the way proposed in the application; and

(b) that the local centre is unlikely to be developed if no remissions under the Act, section 184C (1) were allowed in relation to change of use charges for variations of leases of land within the local centre.

Regulations 28 and 29 of the LPE Regulation make similar provision for the remission of the CUC in the case of consolidation and subdivision of leases.

This subordinate law repeals regulations 17, 18, 28 and 29. In so doing, it removes from the LPE Regulation a *requirement* that the Authority remit the CUC in certain circumstances. It should be noted, of course, that the requirement only operates if the Authority makes a declaration under section 18 or 29 (as the case my be) and that the decision to issue (or not issue) a declaration is at the discretion of the Authority.

On its face, the effect of this subordinate law is to take away an existing right, ie the right to a remission of the CUC in certain circumstances, albeit that the circumstances are discretionary.

The Committee's terms of reference require it to (among other things):

(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;

This subordinate law raises potential issues with paragraphs (ii) and (iv) above. Clearly, by removing an existing right to the remission of a CUC in certain circumstances, it can be considered to trespass on rights previously established by law. The issue is whether it does so *unduly*.

The Explanatory Statement to this subordinate law sets out, by way of "background", the reasons behind the removal of the remission powers. The reasons include that the existing provisions "have … proved difficult to apply in practice".

More problematic is the question of whether the subordinate law contains matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly. In its *40th Parliament Report*, the Senate Standing Committee on Regulations and Ordinances re-stated criteria that it had set out in its *Seventy-Seventh Report* as assisting in applying a similar principle in that Committee's terms of reference. The Senate Committee stated that the principle might be invoked where (for example) delegated legislation:

- manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities ….

Clearly, this subordinate law alters and redefines an existing right to remission of the CUC (in certain circumstances).

That said, it could be argued that, as the capacity to remit fees is provided by way of regulation, why is it not appropriate that the capacity to remit fees be *removed* by regulation?

It is a matter for the Legislative Assembly as to whether or not it accepts the justifications provided in the Explanatory Statement for the removal of the requirement that the CUC be remitted in the circumstances prescribed in the LPE Regulation.

The Committee draws this subordinate law to the attention of the Assembly, as it may be considered to trespass on rights previously established by law and/or contain matter which should properly be dealt with in an Act of the Legislative Assembly, contrary to paragraphs (a)(ii) and (iv) of the Committee's terms of reference, respectively.

Trespass on rights previously established by law/Making rights, liberties and/or obligations unduly dependent upon non-reviewable decisions/Containing matter which should properly be dealt with in an Act of the Legislative Assembly

Subordinate Law SL2006-13 being the Land (Planning and Environment) Amendment Regulation 2006 (No. 2) made under the *Land (Planning and Environment) Act 1991* **amends the Land (Planning and Environment) Regulation 1992 to create exemptions from third party appeals in relation to development in the Civic centre area, a town centre area, or an industrial area.**

Section 276 of the *Land (Planning and Environment) Act 1991* (**LPE Act**) allows "objectors and third parties" to successful development applications to apply to the Administrative Appeals Tribunal (**AAT**) for a review of the application. Section 282 of the LPE Act then provides that the Executive may make regulations to provide exemptions to the requirements of Part 6 of the LPE Act (ie including section 276). In particular, it provides (in part):

> **Regulations for pt 6**
>
> **282 (1)** A regulation may make provision for—
>
> ……..
>
> (c) the exemption of the Territory or a territory authority from the requirements of all or any of the provisions of this part; and
>
> (d) the circumstances, whether generally or in a particular case, in which an exemption under paragraph (c) applies; and
>
> (e) exempting a development of a kind specified by regulation, either absolutely or subject to conditions, from the application of this part or any provision of this part; and
>
> (f) exempting a controlled activity of a kind specified by regulation, either absolutely or subject to conditions, from the application of this part or any provision of this part; …….

The Executive has made the *Land (Planning and Environment) Regulation 1992* (**LPE Regulation**). Regulation 43 provides that section 276 of the LPE Act does not apply to a decision about a development listed in Schedule 7 of the LPE Regulation.

This subordinate law amends Schedule 7 by creating exemptions from third party appeals in relation to all development within "the Civic centre area", "a town centre area" and "an industrial area", as defined by the new definitions that are inserted into the Dictionary for the LPE Regulation by section 12 of this subordinate law. As a result, the subordinate law takes away from objectors and third parties existing rights of review rights. These are significant rights.

The Explanatory Statement to this subordinate law expressly deals with the issues that arise from the removal of the review rights: It states:

> The Government in its Directions paper and technical papers for the Planning System Reform Project proposed to modify third party appeal rights, so that in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third party appeals.
>
> The Government's response, after considering the comments from the community on the Planning System Reform Project proposals, was to affirm its intention to continue with the development of a track based assessment system, in which there would be certain cases, such as town centres, where there might be notification but no third party appeal rights. The amendment regulation is broadly consistent with the Government's response.
>
> The *Human Rights Act 2004*, in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the amendment regulation. However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial.
>
> Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.
>
> To the extent that the amendment regulation limits any rights afforded by the *Human Rights Act 2004*, these limitations must meet the proportionality test of section 28 of that legislation. In this case the amendment regulation serves to improve the development assessment process within the Civic centre area, a town centre area and industrial areas by increasing certainty and reducing delays and costs. It should serve to facilitate development in these areas, which is of general benefit to the Territory. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas.

Importantly, the Explanatory Statement goes on to state:

> Rights of judicial review remain.

Earlier in the Explanatory Statement, there is also the following statement:

> The amendment regulation also does not affect rights persons may have under the *Administrative Decisions (Judicial Review) Act 1989*.

The Committee notes that there is no formal requirement for it to examine *subordinate laws* against the Human Rights Act. The requirement in section 38 of the Human Rights Act is that the Committee "report to the Legislative Assembly about human rights issues raised by **bills** presented to the Assembly". That said, the Committee is mindful of the Human Rights Act in its consideration of subordinate legislation. The Committee is also mindful of the approach of the ACT Supreme Court, evidenced by Chief Justice Higgins' decision in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, which is to interpret subordinate legislation by reference to the Human Rights Act.

As to the merits of this particular regulation, as the Committee has already noted, it removes significant existing review rights. In so doing, however, the Explanatory Statement both expressly acknowledges that this is the case and also provides a reasonably detailed explanation as to why the measure is appropriate. In particular, the Committee notes that the explanation refers to the "proportionality test" contained in section 28 of the Human Rights Act, which provides:

> **28 Human rights may be limited**
>
> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The Committee's terms of reference require it to (among other things):

(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;

This subordinate law raises potential issues with paragraphs (ii), (iii) and (iv) above. Clearly, by removing an existing right of review, it can considered to trespass on rights previously established by law. The issue is whether it does so unduly. As the Committee has already noted, the Explanatory Statement puts forward arguments that go to whether or not it does so "unduly".

In addition, by removing existing review rights, this subordinate law makes certain rights, etc dependent on decisions that are (now) non-reviewable by the AAT. The issue is whether it does so unduly. Again, the Explanatory Statement both sets out the rationale for the removal of the existing review rights and also refers to the review rights that are retained (ie judicial review).

More problematic is the question of whether the subordinate law contains matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly. In its *40th Parliament Report*, the Senate Standing Committee on Regulations and Ordinances re-stated criteria that it had set out in its *Seventy-Seventh Report* as assisting in applying a similar principle in that Committee's terms of reference. The Senate Committee stated that the principle might be invoked where (for example) delegated legislation:

- manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities ….

Clearly, this subordinate law alters and redefines existing rights of review.

That said, as the Committee has already noted, section 282 of the LPE Act expressly allows the Executive to make regulations to provide exemptions to the requirements of Part 6 of the LPE Act, including the review rights set out in Part 6 of the LPE Act. This means that the subordinate law is within an express power granted by the Legislative Assembly. The Explanatory Statement to the subordinate law is both unequivocal about its effect and provides a justification for the amendments it makes.

It is a matter for the Legislative Assembly as to whether or not it accepts the justifications provided in the Explanatory Statement.

The Committee draws this subordinate law to the attention of the Assembly, as it may be considered to trespass on rights previously established by law, makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions and/or contain matter which should properly be dealt with in an Act of the Legislative Assembly, contrary to paragraphs (a)(ii), (iii) and (iv) of the Committee's terms of reference, respectively.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Attorney-General, dated 10 May 2006, in relation to comments made in Scrutiny Report 25 concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006.
- The Minister for Education and Training, dated 10 May 2006, in relation to comments made in Scrutiny Report 24 concerning Disallowable Instrument DI2006-36, being the Canberra Institute of Technology (Fees) Determination 2006.
- The Attorney-General, dated 11 May 2006, in relation to comments made in Scrutiny Report 25 concerning the Civil Unions Bill 2006.
- The Treasurer, dated 15 May 2006, concerning comments made in Scrutiny Report 25 concerning Subordinate Law SL2006-10, being the Racing (Jockeys Accident Insurance) Regulation 2006

- The Minster for Health, dated 21 May 2006, in relation to comments made in Scrutiny Report 24 concerning:
  - Disallowable Instrument DI2006-38, being the Transplantation and Anatomy (Designated Officers) Appointment 2006 (No. 1); and
  - Disallowable Instrument DI2006-51, being the Transplantation and Anatomy (Designated Officers) Revocation 2006 (No. 1).
- The Minister for Health, dated 23 May 2006, in relation to comments made in Scrutiny Report 24 concerning:
  - Disallowable Instrument DI2006-48, being the Health Professionals Pharmacy Board Appointment 2006 (No. 1); and
  - Disallowable Instrument DI2006-50, being the Health Professionals Podiatrists Board Appointment 2006 (No. 1).
- The Minister for Health, dated 28 May 2006, in relation to comments made in Scrutiny Reports 3, 4, 5, 10, 11, 12, 18, 22 and 23 concerning:
  - Health Records (Privacy and Access) Amendment Bill 2005;
  - Disallowable Instrument DI2004-260, being the Health (Interest Charge) Determination 2004 (No. 1);
  - Subordinate Law SL2004-52, being the Health Professionals Amendment Regulation 2004 (No. 1);
  - Disallowable Instrument DI2005-12, being the Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1);
  - Disallowable Instrument DI2005-8, being the Community and Health Services Complaints Appointment 2005 (No. 1);
  - Disallowable Instrument DI2005-34, being the Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1);
  - Disallowable Instrument DI2005-33, being the Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1);
  - Disallowable Instrument DI2005-61, being the Radiation (Fees) Determination 2005 (No. 1);
  - Disallowable Instrument DI2005-209, being the Health (Fees) Determination 2005 (No. 3);
  - Disallowable Instrument DI2005-212, being the Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1);
  - Disallowable Instrument DI2005-298, being the Health (Fees) Determination 2005 (No. 6);
  - Disallowable Instrument DI2005-302, being the Public Health (Risk Activities) Declaration 2005 (No. 1);
  - Disallowable Instrument DI2005-303, being the Public Health (Infection Control) Code of Practice 2005;

- Disallowable Instrument DI2006-11, being the Health Professionals (ACT Nursing and Midwifery Board) Appointment 2006 (No. 1);
- Disallowable Instrument DI2006-12, being the Health Professionals (Medical Board) Appointment 2006 (No. 1);
- Disallowable Instrument DI2006-24, being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2006 (No.1);
- Subordinate Law SL2006-1, being the Health Professionals Amendment Regulation 2006 (No.1); and
- Subordinate Law SL2006-2, being the Health Professionals Amendment Regulation 2006 (No. 2).

The Committee wishes to thank the Attorney-General, the Minister for Education and Training, the Treasurer and the Minister for Health for their helpful responses.

Bill Stefaniak, MLA
Chair

June 2006

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

REPORTS—2004-2005-2006

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2004 (No. 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2004 (No. 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin) Determination 2004 (No. 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1)
Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management Plan) 2005
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 **(PMB)**
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination 2005 (No. 1)
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination 2005 (No. 1)
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination 2005 (No. 1)
Long Service Leave Amendment Bill 2005 **(Passed 6.05.05)**

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 **(PMB)**

Bills/Subordinate Legislation

Report 12, dated 27 June 2005

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

Report 14, dated 15 August 2005

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

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No. 2)
Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No. 1)
Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No. 2)
Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No. 1)
Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No. 2)
Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No. 3)
Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No. 2)
Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No. 1)
Hotel School (Repeal) Bill 2005 **(Passed 25.08.05)**
Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No. 1)

Report 16, dated 19 September

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

Report 18, dated 14 November 2005

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

Report 19, dated 21 November 2005

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

Bills/Subordinate Legislation

Report 22, dated 6 March 2006

Construction Occupations Legislation Amendment Bill 2006 **(Passed 30.03.06)**

Report 25, dated 8 May 2006

Disallowable Instrument DI2006-53 - Gambling and Racing Control (Governing Board) Appointment 2006 (No. 1)
Disallowable Instrument DI2006-54 - Tree Protection (Advisory Panel) Appointment 2006 (No. 1)
Disallowable Instrument DI2006-57 - Housing Assistance (Public Rental Housing Assistance Program) Review Committee Appointments 2006 (No. 1)
Disallowable Instrument DI2006-69 - Legal Aid (Commissioner (Bar Association Nominee)) Appointment 2006 (No. 1)
Radiation Protection Bill 2006
Registration of Relationships Bill 2006 **(PMB)**
Subordinate Law SL2006-9 - Utilities (Water Conservation) Regulation 2006
Terrorism (Preventative Detention) Bill 2006 **(PMB)**

Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 25 of 8 May 2006. I appreciate the detailed analysis provided by your Committee of the human rights issues raised by the Terrorism (Extraordinary Temporary Powers) Bill 2006.

I welcome the Committee's assessment that the Bill fulfils an important and significant objective, namely to protect the community against terrorist activity, and that the measures adopted are rationally connected that that objective.

In keeping with the transparency that has existed in developing this Bill, the compatibility statement for the Bill is supported by detailed independent legal advice from Ms Kate Eastman. I note that the report was prepared in advance of that advice.

We have made a serious effort to construct this Bill in a way that is human rights compliant and to ensure that any limitations on rights are strictly proportionate to the objective of the legislation. I am confident that the ACT Government has honoured its commitment to provide laws that protect national security as well as comply with our human rights obligations.

Thank you again for your comments.

Simon Corbell MLA
Attorney General

10.5.06

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Responses to Queries in Scrutiny Report No 25: Terrorism (Extraordinary Temporary Powers) Bill 2006

Query 1. So far as the calculation of the 14 days is concerned, is the time up to 14 days to run from the date of the preventative detention order, or from the time the Supreme Court hears the matter, or from the date of the application to the Supreme Court by the senior police officer?

Given that it is the Supreme Court that must be satisfied of the matters in cl 18, the 14-day time period would logically be calculated from the time of the order.

Query 2. There is perhaps some lack of clarity surrounding the words "is to be detained" in paragraph 18(6)(d). Is this period fixed in terms of what the senior police officer stipulated in the application as "the period for which the person is to be detained" …, or might the Supreme Court fix a different period? Then, when applying paragraph 18(6)(d), can the Supreme Court have regard to the possibility that the period of the order might be extended under clause 26? (it would appear not).

There is nothing in the bill to suggest that the period of detention will be fixed in terms of the period that is stipulated in the application. The power of the Supreme Court is not limited to mere acceptance or rejection of applications. The bill gives the Court the power to set the time when an order commences and the time when it ceases to have effect (cl 22). In so doing, the Court must be satisfied that the period of detention is reasonably necessary (cl 18(6)(d)). It would be remiss of the Court make an order if it was not so satisfied.

In the process the Court is not required to consider the possibility of an order being extended. This is an issue that will arise on an application for extension. The Court must be satisfied that the extension, and therefore the period of continued detention, is reasonably necessary for the purpose for which the order was originally made (cl 26(1)).

Query 3. What meaning should the Supreme Court give to the word "same". Does it mean 'exactly the same' - in which case paragraph 21(3)(b) may not often apply - or does it mean 'substantially the same'? Also complex is the question of how the Supreme Court should describe the components of a terrorist act. For example, is the date on which the act is expected to occur a material point of difference?

The policy behind the time limits on orders and the prohibitions on multiple orders is that a person may only be detained for 14 days for a given threat. Under the bill, a given threat is defined in terms of 'the same terrorist act', with some leeway to account for the same acts within different periods (cl 12). This language was chosen so as to provide maximum flexibility to the courts to deal with different scenarios against a clear statement of legislative policy.

Attempts to define the target acts with greater precision will increase the complexity of the legislation without a corresponding increase in certainty. A statute cannot

guard against every possible instance of its own abuse. This is why the bill involves the Supreme Court as the independent arbiter.

Query 4. Subclause 12(1) refers to an order made under subclause 18(4). As the Note explains, "It will be possible to apply for, and make, another preventative detention order for the person on the basis of preserving evidence of, or relating to, the terrorist act if it happens". … It appears … that subclause 21(3) would set a limit as to what might be stipulated as the end point of [an order to preserve evidence of a terrorist act that follows an order to prevent the same terrorist act].

Subclause 21(3) sets time limits for a period of detention in relation to a terrorist act. Both the 7-day time limit and the 14-day time limit in cl 21(3) are calculated from the time that a person is *first* taken into custody and detained for the *same* terrorist act. These time limits clearly operate in relation to a single continuous period of detention.

It is clear from the operation of cl 12 that multiple orders may be made in relation to the same terrorist act, provided they relate to different periods or different purposes. See the comments in relation to Query 5 and 6 below.

The obvious purpose of cl 21(3) is to set a time limit on a single period of continuous detention for the same terrorist act, over the same period and for the same purpose.

Query 5. It is also noted that the body of evidence to which order A relates may be completely different to the body of evidence to which order B relates. In such a case, the prohibition in subclause 12(1) will apply (so long as both orders relate to the same terrorist act) Is this result intended?

The prohibition on multiple detention orders in cl 12(1) applies to orders that relate to the same terrorist act within the same period, regardless of the supporting evidence.

Once an order has been made, and a person is detained under the order, a later application for the same terrorist act relating to the same period and same purpose will be prohibited even if there is a completely different body of evidence.

Compare this with cl 12(3). The intention behind cl 12(1) and 12(3) is that a person may not be detained twice for the same terrorist act unless it serves different purposes (either to prevent the terrorist act or to preserve evidence relating to the act). It is immaterial in this case that an application is based on different evidence.

See also the comments in relation to Query 6 below.

Query 6. Under subclause 12(2), if order A is made on the basis of assisting in preventing a terrorist act happening within a particular period, then order B cannot be made for the person on the basis of assisting in preventing a different terrorist act happening within that period, unless "the application, or the order, is based on information that became available only after" A was made … Available to whom? What will be a different body of information?

Subclause 12(2) is drafted so as to provide maximum flexibility to the courts.

The operation of cl 12(2) is supported by the prohibition on using the same information alone to support multiple orders (s 12(4)), the requirement that every application must identify any fresh information (s 17(3) and (4)) and that it must contain all information relevant to the order, whether favourable or adverse (s 17(5)).

Query 7. It is also noted that the body of evidence to which order A relates may be completely different to the body of evidence to which order B relates. See above the comment made in relation to subclause 12(1).

See comments above in relation to Query 5.

Query 8. Subclause 12(4) applies only to a preventative detention order made under the ACT regime (and not to a corresponding preventative detention order). Why this should be so is not apparent, and not explained in the Explanatory Statement.

The ACT courts need to deal sensibly with orders from other jurisdictions. One restriction on multiple orders relates to re-use of information (cl 12(4)).

An ACT court may be able to identify the purpose of a corresponding order (for example, to prevent a particular terrorist act within a particular period) but it may not be able to identify evidence that is given in other proceedings. Applicants need only give particulars of the outcomes, etc of the proceedings under corresponding preventative detention laws (cl 17(1)(k)).

It would be impractical to prevent an application from re-using information that was used in a proceeding under a corresponding preventative detention law.

Query 9. [P]aragraph 12(5)(c) uses the word "after", and, as a matter of ordinary English, this is not the equivalent of the words "follow on" used in the Explanatory Statement. The word "after" does not suggest that order B should follow closely in point of time the making of (corresponding) order A. The Committee suggests that it needs to be explained - by reference to the words of paragraph 12(5)(c) and desirably a case-scenario - how it is that subclauses 12(1) to 12(3) have any application where the order A is a corresponding preventative detention order.

The legislative intention behind cl 12(5)(c) was to allow an order to be made in the ACT which, *in effect*, extends a corresponding order made in another jurisdiction.

Paragraphs 12(5)(a) and 12(5)(c) allowed orders to be made '*after*' the making of earlier interim orders or corresponding orders over the same terrorist act. This language that was used recognised that these are separate orders with separate effect. They are not orders that extend an existing order or reinstate a lapsed order.

The clear intention was that cl 12(5)(a)-(d) would relax the prohibitions on multiple orders to allow extensions subject to the global 14-day time limit.

It is intended that these provisions be collapsed to a single exception relating to:

> [T]he making of a preventative detention order for a person for a terrorist act *while the person is detained under an interim preventative detention order or corresponding preventative detention order for the same terrorist act.*

In this way, "order B" will only be available during the life of "order A".

This reflects the intention in relation later orders that "follow on" from earlier orders.

Query 10. An application … is made by a senior police officer to the Supreme Court … Among other matters, the officer must "state the period for which the person is to be detained under a preventative detention order ..." … The application must also "state whether an interim order is applied for ..." (subclause 17(1)(c)). [W]ould it assist to insert the word "also" in subclause 17(1)(c) - and in para 20(1)(b)?

The clear intention is that an application for an order must state whether it also *includes* an application for an interim order at first instance.

This is reiterated in the Explanatory Statement: 'The application must … state whether the application incorporates an application for an interim order'.

As noted above, while it assists a general understanding to view 'full' orders as extending interim orders, they are separate orders with separate effect.
It is not possible to extend an interim order to the global 14-day time limit as the truncated procedural rights (cl 13(1)) would breach the right to fair trial.

Query 11. [D]etention must occur within 48 hours of the making of the interim preventative detention order for otherwise the order will lapse (paragraph 22(2)(a)). The hearing of the application for the "full" order (spoken of by the Bill as a "resumed hearing") must however have commenced within 24 hours of the making of the interim order … By the end of that period, the person may not yet be in detention. What would happen then? Extension of the interim preventative detention order under subclause 23(2) is not possible because subclause 23(3) could not be satisfied – because the person has not yet been detained.

When an interim order is made, the court must set a date and time for the 'resumed hearing' within 24 hours after the interim order is made (cl 20(6)).

Ordinarily, an interim order will allow a person to be detained in advance of the resumed hearing. However, if a person is not detained, it would be open for the court at the resumed hearing to adjourn the hearing to a later date.

This is consistent with the ordinary power of the court to control its process. It would have no impact on the rights of the person the subject of the order.
It would have no impact on period of the interim order because the end time is calculated from the time the person is first detained under it (cl 21(2)).

The power would be unaffected by the express power to adjourn in cl 23(2)(a).

Query 12. If the person is in detention, the Supreme Court may consider that it cannot determine the application without an adjournment of the hearing. Thus, the Supreme Court is given power under paragraph 23(2)(a) to adjourn a resumed hearing, and under paragraph 23(2)(b) to "extend, or further extend, the period for which the interim order is in force until the adjourned hearing". But subclause 23(3) then prescribes: '(3) The period as extended, or further extended, must be stated in the order and must end no later than 24 hours after the person is first detained under the order'. On the face of it, the words "the order" refer to the interim order. By subclause 21(2), the end time for an interim order can be no later than 24 hours after the person is first detained under the order. Clause 23(3) appears to say that as extended the order must also end at this point.

Clause 23 gives an express power to extend an interim order and to adjourn the resumed hearing, after a person has been detained under the order.

So, for example, assume that an interim order is made on Monday at Midday and the court fixes a time for the hearing to resume at Midday on Tuesday.

A person is then detained under the order at 9.00 am on Tuesday morning.
The hearing may resume at Midday and be adjourned until 9.00 Wednesday.

Then assume that the court set the interim order to end at Midnight Tuesday. In this case it would be necessary not only to adjourn the hearing, but also to extend the period for which the interim order is in force until that hearing.

Query 13. While clause 40 assumes that force may be used, there may be a prospect that the Supreme Court will not read clause 40 as an authority to use force. It might so conclude by analogy with the reasoning of the High Court in *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, that a power to derogate from the right to liberty must be conferred in explicit terms.

Section 40 does not authorise the use of force *per se*. It is restrictive rather than facilitative in its language. The use force is otherwise governed by the common law.

Query 14. Is it sufficient to merely imply that this power exists? See the *Coco* problem, noted above.

Clause 41, by contrast does authorise ordinary and frisk searches.

Query 15. Subclause 43(6) contemplates that the arrangements may be changed, but it is not clear whether the obligations to consult and seek approval prescribed by subclauses 43(1) and (2) apply to a change. It is not said who may change the arrangements. Is this covered by the *Legislation Act 2001*?

It is clear that detention arrangements cannot be made without consulting the chief executive, &c and without the Minister's approval (cl 40(1) and (2)). According to ordinary statutory interpretation principles, a power to make an instrument carries with it a power to amend, subject to the same procedures.

Subclause 40(6) is merely a requirement that copies of the orders, as made, are given to the human rights commissioner, ombudsman and public advocate.

The obligations to consult would be unaffected by the requirement in cl 40(6).

Query 16. [I]t is noted that there is no provision for a circumstance where the detainee may wish to speak or write to a person responsible for the detention of the detainee. Is this deliberate?

The prohibition on contact in cl 49 is focused on persons outside detention. It would breach the rights of a detainee, and the detention arrangements, if a detainee could not contact the person responsible for their own detention.

Query 17. Given clause 57, it is not clear why subclauses 52(7) and 52(8) contain the words "subject to any prohibited contact order". Would these subclauses be subject to the effect of such an order in any event? If that is so, the inclusion of these words creates some confusion.

There are references to prohibited contact orders in the provisions governing contact with lawyers (cl 52(7) and (8)) and there is a stand alone caveat to that effect relating to contact with families, lawyers and other people, etc (cl 57).

This duplication ensures that the issue is understood at all points in the bill.

Query 18. There is a lack of clarity surrounding [the rule in cl 50(4)]. The reference to "further contact" might be taken to suggest that the person with whom contact is authorised by the preventative detention order must be one of the persons mentioned in subclause 50(1). Is this intended? Why is the reference to "the person's family" rather than to a 'member of the person's family'? Does the qualifying phrase "that is allowed under the preventative detention order" attach to both of the phrases "the person's family" and "anyone else", or only to the latter? The latter reading is perhaps the more natural, but may not be intended.

The purpose of cl 50(4) was to reflect the power of the court to confer contact rights to a person additional to those minimum rights that are provided for in cl 50(1)-(3).

It is intended that the provisions governing the content of the orders (cl 21(10)) will be amended to specifically refer to the general power to set conditions on contact rights.

Query 19. Given the absence of a provision similar to subclause 56(10) (see below), it may be that the monitoring police officer may record the communications. Is this intended?

There is sound policy behind the requirement that while communications with lawyers may be monitored, they must not be recorded (cl 56(10)). That policy relates to the relationship between lawyer and client, but does not extend to other relationships.

Query 20. In the absence of any restriction on the use that may be of the content of the communications between the detainee and family, etc, (which, as has been noted, may be recorded by the monitoring police officer), it would appear that there is no restriction. Is this intended?

See above.

Query 21. Subclause 52(1) begins by stating that "[a] person detained under a preventative detention order is entitled to contact a lawyer privately and at any time for the purpose of" (and then follow various purposes …) The effect of the use of the words "at any time" is not clear. Clauses 50 to 53 make no provision as to the time at which contact may occur. On general principle, such contact would be limited to contact at a "reasonable" time, thus excluding, in the absence of some particular factor, contact in the middle of the night. The use of the words "at any time" in subclause 52(1), if read literally, appear to allow to the detainee the right to insist on contact at such times.

The intention behind cl 52(1) is to allow contact with a lawyer 'at any time'.
So the detainee and the lawyer may discuss a matter at any time if they wish.

Query 22. Paragraph 52(1)(e) deals with the purpose of "arranging for a lawyer to act for the person in relation to an appearance, or hearing, before a court or tribunal that is to take place while the person is detained under the order". The Committee does not query the justification in human rights terms of this provision, but wonders why it is not available where the detainee wishes to simply obtain legal advice in relation to some issue that is of pressing importance. This situation may be covered by subclause 52(9) …

The particular issue raised is dealt with, as suggested, by cl 52(9).

Query 23. [Subclause 52(9) provides that] 'the police officer detaining the person must allow the person to have reasonable contact with a lawyer for a purpose other than a purpose mentioned in subsection (1)'. The word "reasonable" would, it might be thought, have been read in to the other forms of contact specified in at least clauses 50, 52 and 53. Does the specific reference to the word here mean that it cannot be read into the provisions concerning other forms of contact? This would not appear to be sensible.

A detainee must be entitled to contact a lawyer in relation to other legal rights or entitlements of the person may be affected while the person is in detention. However, this entitlement is not at large, it must be for a reasonable purpose.

The words 'reasonable contact' in cl 52(9) relate to the purpose of the contact. They do not have any bearing on the other contact entitlements in the bill.

Query 24. The "purpose other than a purpose mentioned in subsection (1)" presumably means a purpose in respect of which a lawyer can assist by reason of skill as a lawyer. If this is accepted, should this be stated? And if this is so, is there any point in making specific provision as is made in subclause 52(1)? Would not subclause 52(9), with some statement as has just been suggested, suffice? This would make it easier to understand the scheme.

The contact provided for in cl 52(9) is based on an assessment of whether the contact fulfils a reasonable purpose. Relevant to that assessment would be the question of whether it is a purpose in respect of which a lawyer could assist.

However, it is important to note that this requires the exercise of discretion.

The contact with a lawyer provided for in cl 52(1) is an absolute entitlement. Provided it is contact that fulfils one of the stated purposes, it will be given.

There are sound policy reasons for retaining the absolute requirement in cl 52(1).

Query 25. There is an ambiguity in [cl 52(12)]. Should this be read as a statement that evidence of the communication is not admissible "in any court proceeding" because it is subject to legal professional privilege? Or is it to be read as stating two rules: (a) that the communication is subject to legal professional privilege – which would have the effect that it could not be adduced in proceedings other than a "court proceeding", and (b) evidence of the communication is not admissible "in any court proceeding" without consideration of whether it is subject to legal professional privilege.

The intention was that cl 52(12) protect all communications between a person who is detained and their lawyer against disclosure in any subsequent court proceedings.

It was not intended to alter the law relating to client legal privilege.

It is anticipated that this provision will be amended to reflect this intention.

Query 26. The Committee notes that so far as concerns the circumstances in which the court may order the return of a seized thing, it is given an unconfined discretion. This compares to the statement in clause 90 that a police officer is obliged to return the thing only where satisfied that "its retention as evidence is not required" (paragraph 90(1)(b). It is not apparent why the court's discretion is not similarly limited.

Clause 90 provides that a police officer who has seized a thing must return it to the owner or person who had lawful possession of it before it was seized if the officer is satisfied that its retention as evidence is not required and it is lawful for the person to have possession of the thing.

Clause 91 provides that a court may make an order that property that has been seized by a police officer be delivered to the person who appears to be lawfully entitled to it or, if that person cannot be ascertained, be dealt with as the court thinks fit.

Clause 91 does not limit the courts power to make an order in relation to the property only if it is "satisfied that its retention as evidence is not required" (as is the case in clause 90 in relation to police officers).

It is not necessary to provide such an express statement. The power to make an order is discretionary and a court is unlikely to make an order that a person is lawfully entitled to property and that it must be returned if the property is required for retention as evidence.

Query 27. The Committee queries whether the Explanatory Statement has correctly described the scope of clause 83.

The Committee is correct in its view that the explanation incorrectly runs together subclauses 83(1) and (2). An improved explanation is:

> *Clause 83 empowers police officers to enter and search premises.*
>
> *Subclause (1) empowers police to enter and search premises in an area named or described in a special powers authorisation (the target area). This is an open-ended power, but on general principle would be limited to a search for a purpose which could be said to fall within the purposes under Division 3.4 (see subclauses 78(1) and 78(2)).*
>
> *Subclause (2) empowers a police officer to enter and search any premises – whether or not located in a target area – if the officer suspects on reasonable grounds, that a person or vehicle that is named or described in a special powers authorisation is at, on or in the premises.*
>
> *Subclause (3) empowers police to detain a person who is at, on or in premises entered for as long as is reasonably necessary to conduct the search of the premises.*

Andrew Barr MLA

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

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
c/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

The Standing Committee on Legal Affairs, in Scrutiny Report No. 24 of 1 May 2006, commented on Disallowable Instrument DI2006-36.

The Committee noted as a minor drafting issue that, whilst the Disallowable Instrument, referring to the Canberra Institute of Technology (Fees) Determination 2006, had been made under subsection 53(1) of the Canberra Institute of Technology Act 1987, duly acknowledged in the Explanatory Statement, the subsection had not been included in the prefatory section of the instrument.

The omission is noted and will be included when creating Disallowable Instruments in the future.

Yours sincerely

Andrew Barr MLA
Minister for Education and Training

10 MAY 2006

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Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

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

13.11

Dear Mr Stefaniak

I refer to Scrutiny Report No. 25 of the Standing Committee on Legal Affairs that was issued by the Committee on 8 May 2006, and in particular, to Committee's comments on the Civil Unions Bill 2006.

In its report, the Committee noted clause 14 of the Bill and queried whether the Supreme Court would be able to find that it was not the intention of both parties to be in the civil union if one party was not contactable. Clause 14(1)(b) provides for the court to consider whether it is not the intention, or is no longer the intention, of both parties to be in the civil union. It would be sufficient for this clause if the court considered that it was no longer the intention of one of the parties (the applicant) to be a party to the civil union. While it may or may not be the intention of the other party, the fact that it is one party's intention means that it is no longer the intention of *both* to still be in the civil union.

The Committee has queried whether the Supreme Court would be able to terminate a civil union before the effluxion of 12 months where there are compelling reasons to do so. There is no provision for this other than in circumstances that may exist under clause 14. The Committee's attention is also drawn to clause 12(1)(a) which provides that a civil union is automatically terminated on the marriage of either party. A civil union represents a serious commitment and this is one of the consequences of entering in to this type of serious commitment. The parties to a civil union will be aware of these consequences at the outset through the provision of the written notice setting out the nature and effect of a civil union as required under clause 9(3).

The Committee has also observed that there is no impediment to a person entering a civil union with one person while remaining in a domestic partnership with another person. This is quite correct. This Bill is concerned with those relationships where the parties, through declaring their intention to enter a civil union, have indicated the primacy of that

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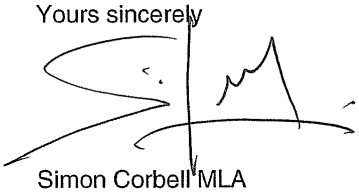
relationship. A civil union or a marriage exists as a matter of law, whereas a domestic partnership (other than a civil union or a marriage) exists as a matter of fact.

I thank the Committee for their comments on the Civil Unions Bill and trust that this clarifies the Committee's queries.

Yours sincerely



Simon Corbell MLA
Attorney General

11-5-06

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

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

Dear Mr Stefaniak

I am writing in response to comments on the *Racing (Jockeys Accident Insurance) Regulation 2006* by the Standing Committee on Legal Affairs (Scrutiny Report No 25 of 8 May 2006).

The Explanatory Statement at the time of writing correctly identified clause 61BA as the head of power for the proposed amendments to the *Racing Act 1999* because at that time the Bill specified that numbering.

Subsequent to the preparation of the Explanatory Statement and before it was presented to the Assembly, the Parliamentary Counsel's Office renumbered clause 61BA as clause 61B. Treasury was not made aware of this drafting change in time for the Explanatory Statement to be amended to reflect it.

I appreciate the fact that the Committee has seen fit to bring this matter to my attention.

Yours sincerely

Jon Stanhope MLA
Treasurer

15 MAY 2006

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
c/- Scrutiny Committee Secretary
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GPO Box 1020
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Dear Mr Bill Stefaniak

Thank you for your Scrutiny of Bills Report No 24 of 1 May 2006. I offer the following response in relation to Disallowable Instrument DI2006-51, being the Transplantation and Anatomy (Designated Officers) Revocation 2006 (No 1) and Disallowable Instrument DI2006-38 being the Transplantation and Anatomy (Designated Officers) Appointment 2006 (No. 1). These instruments are made under section 5 of the *Transplantation and Anatomy Act 1978*.

The Committee noted that the Explanatory Statement for DI2006-51 did not provide sufficient information regarding the effect of the instrument. I acknowledge these concerns and attach for the Committee's information a revised Explanatory Statement.

I have noted the findings of the Committee in relation to Disallowable Instrument DI2006-38 and will ensure that future instruments do not contain typographical errors.

I hope this information addresses the Committee's concerns, and than you for bringing this matter to my attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
21/5/06

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COPY

Australian Capital Territory

Explanatory Statement

Transplantation and Anatomy (Designated Officers) Revocation of Appointments 2006 (No 1)

Disallowable instrument DI2006 — 51

made under the

Transplantation and Anatomy Act 1978, section 5

Section 5 of the *Transplantation and Anatomy Act 1978* allows for the appointment of Designated Officers by the Minister. Designated Officers are medical practitioners who have the authority to authorise, in writing, the removal of tissue from the body of a deceased person for the purpose of transplantation to the body of a living person or for other therapeutic, medical and scientific purposes.

Section 46 of the *Legislation Act 2001* allows the Minister to amend or repeal the instrument.

A review has been under taken of previous instruments, which identifies those officers who are still performing the duties of a designated officer. Of the 17 officers identified on the instruments only 8 officers have retained this role. All medical practitioners who wish to remain designated officers, are staff of ACT Health.

These 8 officers are considered to be Public Servants as defined in the *Legislation Act 2001*. In consequence, Section 5 of the *Transplantation and Anatomy Act 1978* requires that these appointments be made in writing, and not by a disallowable instrument.

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Bill

Dear Mr Stefaniak

The Standing Committee on Legal Affairs, in Scrutiny Report No.24 of 6 March 2006, commented on the DI 2006-48 Health Professionals Pharmacy Board Appointment 2006 (No. 1) and DI 2006-50 Health Professionals Podiatrists Board Appointment 2006 (No 1).

Your assumption that the appointees are not public servants is correct as disallowable instruments were not prepared for the public servants who were appointed to the Boards. Their appointments were notified on Notifiable Instruments NI 2006-95 and NI 2006-85.

I have noted the findings of the Committee for this Disallowable Instrument and will ensure that future explanatory statements to Disallowable Instruments will state that appointees are not public servants.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

23/5/06

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Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate
Legislation Committee
ACT Legislative Assembly
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Dear Mr Bill Stefaniak

I refer to the Scrutiny of Bills and Subordinate Legislation Committee Report No. 24 of 1 May 2006, and in particular, the schedule of outstanding responses attached to the Committee's report.

Please find attached a response for each of the outstanding issues raised by the Committee and I apologise for the delay in providing the responses.

I would also like to thank the Committee for their input and assure the Committee that every effort will be made to ensure that material drafted in the future takes into consideration the important comments of the Committee.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health
28/5/06

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Responses to outstanding issues raised by the Scrutiny of Bills and Subordinate Legislation Committee

Title	Number	Comment by Committee	Response
Report No. 3 of 17 February 2005			
Health Records (Privacy and Access) Amendment Bill 2005	N/A	**Summation** – The Assembly might see resolution of the question as to whether proposed section 14A of the *Health Records (Privacy and Access) Act 1997* should be enacted as requiring a comparative assessment of: • On the one hand, the rights of the informant (right to life: *HRA* section 9; security of their person: section 18(1)), and privacy; section 12), taken together with the interests of the child (the rights just stated, and protection of the child: section 11 (2)), and the government agencies to whom the information is given; and • On the other, the rights of the person whose personal information is contained in the information (privacy and protection of reputation: *HRA* section 12).	The Committees comments were noted and considered prior to the debate of the legislation in the Legislative Assembly on Thursday 17 February 2006. The Minister, in her debate speech, noted the Scrutiny of Bills Committee comments and thanked them for its speedy consideration of the matter.
Report No. 4 of 7 March 2005			
Health (Interest Charge) Determination 2004 (No. 1)	DI2004-260	This instrument has a confusing citation. It revokes 'Determination of Interest Charge DI2003-313', which appears on the legislation register as 'Health Determination of Interest Charge 2003-04 (No 1)'. The title of the actual determination is 'Health – Determination of Interest Charge 2003-04 (No 1)'.	The Committees comment is noted.
Health Professionals Amendment Regulation 2004	SL2004-52	The comment raised concerns regarding retrospectivity. The report states that there is nothing in the Explanatory Statement to indicate whether the amendments that are given retrospective operation are prejudicial or non-prejudicial provisions. In the absence of such information, the Committee draws the Assembly's attention to the subordinate law, on the basis that it may trespass unduly on personal rights and liberties, contrary to paragraph (a)(ii) of the Committee's terms of reference.	The Committees comments are noted, however, it should be noted that this piece of subordinate legislation has now been repealed.

Title	Number	Comment by Committee	Response
Report No. 5 of 14 March 2005			
Health Professionals Boards (Procedures) Pharmacy Board Appointment 2005 (No 1)	DI2005-12	*Is this a disallowable instrument?* The Committee noted that the explanatory statement gave no indication as to whether the persons being appointed are public servants.	The Committees concerns are noted and future explanatory statements will include a statement as to the employment status of the person being appointed, with particular reference, to public servant status.
Community and Health Services Complaints Appointment 2005 (No 1)	DI2005-8	*Is this instrument disallowable?* The Committee noted that the instrument gives no indication as to whether or not the person being appointed is a public servant. The Committee also noted that the instrument merely determined the term of the appointment, and no other terms and conditions as required by the Act.	The Committees comments are noted, however, this instrument has now been repealed.
Report No. 10 of 2 May 2005			
Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No 1)	DI2005-34	The Committee noted that there is no explanatory statement for this instrument.	The Committee's comment is noted. Every effort will be made to ensure Explanatory Statements are provided in the future.
Report No. 11 of 20 June 2005			
Health Records (Privacy and Access) (Fees) Determination 2005 (No 1)	DI2005-33	The Committee noted that there is no explanatory statement available in relation to this instrument.	The Committees comments are noted, however, this instrument has now been repealed.
Report No. 12 of 27 June 2005			
Radiation (Fees) Determination 2005 (No 1)	DI2005-61	The Committee noted that there is no explanatory statement available in relation to this instrument.	The Committees comments are noted, however, this instrument has now been repealed.
Report No. 18 of 14 November 2005			
Health (Fees) Determination 2005 (No 3)	DI2005-209	The Committee noted that reference to Commonwealth legislation was incorrect.	The Committees comments are noted, however, this instrument has now been repealed.
Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No 1)	DI2005-212	*Is this a disallowable instrument?* The Committee noted that the explanatory statement gave no indication as to whether the persons being appointed are public servants	The Committees concerns are noted and future explanatory statements will include a statement as to the employment status of the person being appointed, with particular reference, to public servant status.

Title	Number	Comment by Committee	Response
Report No. 22 of 6 March 2006			
Health (Fees) Determination 2005 (No 6)	DI2005-298	*Response to the Committee's comments on previous instrument? Minor drafting issues* - The Committee raised a number of concerns regarding a previous instrument and the deletion of Item M2. The Committee noted that this version of the instrument deletes Item M2. In the absence of any explanation to the contrary, the Committee assumes that this was done in response to the Committee's concerns. The Committee also noted incorrect reference to Commonwealth legislation.	As indicated in a letter from the former Minister for Health to the Chair of the Committee, dated 14 December 2005, arrangements were being made to have the relevant fees removed from the determination – hence, the removal of Item M2. The Committee's comments are noted in relation to the reference to Commonwealth legislation. Consideration will be given to correcting this provision in the near future.
Public Health (Risk Activities) Declaration 2005 (No 1)	DI2005-302	*Minor drafting issue* – The Committee noted that the definitions set out in section 6 of the instrument are not in alphabetical order.	The Committees comment is noted.
Public Health (Infection Control) Code of Practice 2005	DI2005-303	*Minor drafting issue* – The Committee suggested that the inclusion of a statement preceding the substantive requirements might enhance the operation of the code.	The Committees comments are noted. Consideration will be given to the inclusion of the suggested statement when drafting subsequent codes.
Report No. 23 of 27 March 2006			
Health Professionals (ACT Nursing and Midwifery Board) Appointment 2006 (No 1)	DI2006-11	*Drafting issue / Is this a disallowable instrument?* The Committee raised concern with the appointments and sought clarification. The Committee also suggested that the explanatory statement include relevant information to make the appointment of these members clear for the members of the Assembly. They also raised the inclusion of information in the explanatory statement regarding whether or not the appointments were of public servants.	The Committees concerned are noted. Future Explanatory Statements will contain relevant information pertaining to the status of appointees being appointed to the Board.
Health Professionals (Medical Board) Appointment 2006 (No 1)	DI2006-12	*Drafting issue / Is this a disallowable instrument?* The Committee raised concern with the appointments and sought clarification. The Committee also suggested that the explanatory statement include relevant information to make the appointment of these members clear for the members of the Assembly. They also raised the inclusion of information in the explanatory statement regarding whether or not the appointments were of public servants.	It is accepted that the Explanatory Statement did not contain a statement that the "community member (legal)" fulfilled the requirement to be a lawyer for a continuous period of five years before the day of appointment. It appears that advice of this was not included in the Explanatory Statement as Ms Higgins was being re-appointed to the Medical Board and her legal status has previously been checked and verified. The required statement will be included in future Explanatory Statements.

Title	Number	Comment by Committee	Response
	DI2006-12 (continued)		It is also accepted that the Explanatory Statement did not contain a statement that the two appointees were not public servants. This was an oversight. Future Explanatory Statements for Medical Board appointments will include a statement indicating, where appropriate, that the appointments contained in it are not public servant appointments.
Mental Health (Treatment and Care) (Official Visitors) Appointment 2006 (No 1)	DI2006-24	*Drafting issue* – the Committee can identify no power to appointment a "Principal Official Visitor" and can only identify the power to appoint official visitors. As a result the Committee seeks the Minister's assistance in explaining the basis on which the appointment of a "Principal Official Visitor" is made. The Committee also raised a concern regarding the eligibility of the appointees.	The Committee's comments are noted. The reference to "Principal Official Visitor" as opposed to "Official Visitor" is a distinction to aid the internal workings of the official visitor scheme. The creation of a "Principal" is based on the NSW official visitor scheme and allows for improved liaising with Mental Health ACT and between the official visitors. There is no difference in terms of legislative powers between the Principal Official Visitors and other Official Visitors. In the future, all legislative references will be to Official Visitors only. All future Explanatory Statements for these appointments will include information that the indicates that the appointments meet all the eligibility criteria.
Health Professionals Regulation 2006 (No 1)	SL2006-1	*Minor drafting issue* – The Committee notes that there appears to be a word (or words) missing from the last sentence of one of the paragraphs included in the explanatory statement.	The Committee's concerns are noted. The last sentence of the extract from the Explanatory Statement should read 'the Regulation, from the commencement date, will apply the provisions of the *Health Professionals Act 2004* to the nursing and midwifery professions in the ACT'. An amended Explanatory Statement will be resubmitted.
Health Professionals Regulation 2006 (No 2)	SL2006-2	*Inadequate Explanatory Statement* – The Committee raised a number of concerns regarding the Explanatory Statement.	The Explanatory Statement in respect of the amendment to remove four notifiable instruments from the Legislation Register incorrectly referred to the regulation making power contained in Section 134 instead of the transitional power contained in section 152 as the source of authority for this amendment. The removal of these instruments was transitional as it was incidental to the transfer of the registration of the nurses profession from the previous system of registration to the new regime contemplated by the *Health Professional Act 2004*.

Title	Number	Comment by Committee	Response
	SL2006-2 (continued)		The notifiable instruments to be removed included personal intimate details regarding misconduct by nurses involved in completed disciplinary proceedings. The subject matter reported in the instruments involved incidents that had occurred in the past and all the nurses involved had been disciplined and in most cases have been allowed by the Board to return to work subject to practice conditions. Section 92 of the *Nurses Act 1988* provided a positive obligation to place these notifiable instruments on the Legislation Register and the proposed repeal of the *Nurses Act 1988* would not automatically provide authority to remove those instruments from the Legislation Register. As it was no longer considered appropriate from a human rights perspective to keep these instruments on the Register indefinitely and that their removal was incidental to the transfer of the regulation of nursing to the new legislative regime it was considered appropriate to provide authority under section 152 to remove these instruments from the Register prior to the repeal of the *Nurses Act 1988*. I hope the above explanation clarifies how the removal of the instruments was transitional and appropriate. A revised Explanatory Statement taking into account the Committee's concerns will be resubmitted shortly.