Legislative Assembly for the ACT

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

Scrutiny Report

27 MARCH 2006

Report 23

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—Comment

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

DUTIES AMENDMENT BILL 2006

This Bill would amend the *Duties Act 1999*. This Act imposes duty on certain transactions in the ACT, and the amendments would abolish certain existing duties in relation to transactions (concerning business assets and statutory licences and permissions) that take place after 1 July 2006. The Bill also contains anti-avoidance provisions.

Is the provision by proposed section 402 for amendment of Chapter 14 of the *Duties Act 1999* by regulation an inappropriate delegation of legislative power?

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

Under this term of reference, the Committee draws attention to proposed subsections 402(2) and 402(3) of the *Duties Act 1999* (see clause 15). These provisions would confer on the Executive an extensive power to amend the Act.

The Committee notes first the explanation provided in the Explanatory Statement:

> **Section 402 - Transitional regulations – ch 14.** This provision allows the executive to make transitional regulations where they consider any matter is not dealt with adequately or appropriately in this chapter. This power would usually be used to address any avoidance issues that may arise after the amendment is in place. To allow sufficient time to follow the transitional regulation with an amendment to the Act, such regulations expire 12 months after they commence.

This appears, however, to understate the extent of the power conferred on the Executive by proposed subsections 402(2) and 402(3), which provides:

> (2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.
>
> (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

Thus, the power in subsection 402(2) is not, as the Explanatory Statement states, tied to an assessment of whether "anything" is "not adequately or appropriately, dealt with in this chapter". Rather, subsection 402(2) confers power "to make provision in relation to anything that, in the Executive's opinion, is not … dealt with in this chapter".

A clause that authorises the Executive, by the making of a regulation (or of some other form of subsidiary law) to amend an Act is often referred to as a "Henry VIII" clause. Such clauses have long been the concern of scrutiny committees. As Pearce and Argument observe, "the basis for objection to such clauses is that they vest "an enormous amount of power in the executive government" and that "the power is capable of abuse": D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 15. But they also note that "the use of Henry VIIIth clauses in the Australian jurisdictions has become more, rather than less common" in the past 20 years.

Their common use in the face of constant criticism suggests that there are circumstances in which they may be useful. The paradigm case may be where there is a need to make transitional provisions and at the time the statute is drafted, all cases calling for accommodation in a transitional scheme cannot be anticipated.

In any particular case, the relevant questions are: (1) just what is the extent of the power conferred?; and (2) what measure of parliamentary control is retained?

So far as concerns the extent of this power, it is, on its face, a very wide power, and perhaps much wider than necessary given what is said in the Explanatory Statement. This aspect of the matter might be dealt with by omitting from proposed subsection 402(2) the words "is not, or" (and then removing some commas).

(The Committee draws attention to the more limited form of a Henry VIII clause in section 152 of the *Health Professionals Act 2004*, which is discussed later in this report in comments to Subordinate Law SL2006-1 being the Health Professionals Amendment Regulation 2006 (No. 1).

So far as concerns the measure of parliamentary control retained, the Committee notes that a regulation made under subsection 402 would be subject to disallowance in the usual way (*Legislation Act 2001*, section 8, and Chapter 7). On the other hand, a regulation takes effect as law up to the date of any disallowance. It is also noted that:

- by proposed subsection 402(4), "[a] regulation under subsection (2) expires 12 months after the day it commences" – although noting that this rule applies only to a particular regulation; and

- by proposed section 403, the Chapter in which section 402 is located will expire on 1 July 2011.

It is for the Assembly to assess whether this degree of Assembly supervision is adequate. The Committee further notes that the Assembly has a choice as to what it provides as to when a statutory instrument commences.

First, if the statutory instrument is merely notifiable, the result is that the law takes effect and cannot be disallowed by the Assembly.

Second, if the statutory instrument is disallowable, it will have legal effect until the time it is disallowed by the Assembly. All *subordinate laws* are disallowable (*Legislation Act 2001*, chapter 7), and this concept is defined to mean " a regulation, rule or by-law" (*Legislation Act 2001*, section 8).

Third, a particular statute may vary the default scheme of the *Legislation Act 2001.* It may provide in some way that the statutory instrument should not have any effect at all until by a positive resolution of approval the Assembly gives legal effect to the subordinate law. Another option is to delay commencement of the instrument until the Assembly has had time to consider whether to disallow. An example of the latter was noted in *Scrutiny Report No 50 of the Fifth Assembly*, in relation to the Gaming Machine Bill 2004, the Committee noted the strong provision made for parliamentary scrutiny in relation to determinations by the Commission of the contents of warning notices. Such a determination was disallowable, and by subclause 151(6) it was provided:

> (6) Unless the determination is disallowed by the Legislative Assembly, the determination commences—
>
> (a) 2 weeks after the last day when it could have been disallowed; or
>
> (b) if the determination provides for a later commencement—on that later commencement.

(See now subsection 151(6) of the *Gaming Machine Act 2004*.)

If proposed subsection 402(2) of the *Duties Act 1999* is retained in its present form, the Committee suggests that the Assembly consider the need for a positive resolution provision or to provide for a delay in commencement of a regulation made under this power.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2006-20 being the Road Transport (General) (Driver Licensing) Exemption 2006 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **exempts Australian Federal Police officers undertaking the Pursuit Motorcycle Course from specified provisions of the Road Transport (Driver Licensing) Regulation 2000.**

Disallowable Instrument DI2006-21 being the Road Transport (Public Passenger Services) (Minimum Service Standards—Taxi Network) Approval 2006 (No. 1) made under section 18B of the *Road Transport (Public Passenger Services) Regulation 2002* **approves the Minimum Services Standards for the operation of a taxi network.**

Disallowable Instrument DI2006-22 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 2) made under section 13 of the *Road Transport (General) Act 1999* **declares that road transport legislation does not apply to vehicles or drivers participating in special stage of the Subaru Rally of Canberra Launch and Sponsors Day.**

Disallowable Instrument DI2006-23 being the Electoral (Commission Chairperson and Member) Appointment 2006 (No. 1) made under section 12 of the *Electoral Act 1992* **appoints specified persons as chairperson and member of the ACT Electoral Commission.**

Disallowable Instrument DI2006-25 being the Public Place Names (Several Divisions) Determination 2006 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of various streets in the Divisions of Banks, Barton, Belconnen, City, Florey, Lyneham and Majura. It also revokes the name of a specified street in the Division of City and varies the description of specified streets in the Divisions of Kambah and Oxley.**

Disallowable Instrument DI2006-26 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2006 (No. 3) made under section 13 of the *Road Transport (General) Act 1999* **declares that parts of Australian Road Rule 268 do not apply to any person travelling as a passenger in or on any vehicle participating in the Harmony Parade.**

Disallowable Instrument DI2006-28 being the Rehabilitation of Offenders (Interim) (Sentence Administration Board) Appointment 2006 (No. 1) made under paragraph 68(1)(a) of the *Rehabilitation of Offenders (Interim) Act 2001* **appoints a specified person as chairperson of the Sentence Administration Board.**

Disallowable Instrument DI2006-29 being the Rehabilitation of Offenders (Interim) (Sentence Administration Board) Appointment 2006 (No. 2) made under paragraph 68(1)(c) of the *Rehabilitation of Offenders (Interim) Act 2001* **appoints a specified person as a member of the Sentence Administration Board.**

Disallowable Instrument DI2006-30 being the Rehabilitation of Offenders (Interim) (Sentence Administration Board) Appointment 2006 (No. 3) made under paragraph 68(1)(c) of the *Rehabilitation of Offenders (Interim) Act 2001* **appoints a specified person as a member of the Sentence Administration Board.**

Disallowable Instrument DI2006-31 being the Public Sector Management Amendment Standard 2006 (No. 4) made under section 251 of the *Public Sector Management Act 1994* **amends the Management Standards.**

Disallowable Instrument DI2006-33 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2001-272 and DI2002-228 and determines specified ACTTAB agencies to be sports bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2006-34 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2006 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-35 and determines specified locations to be sports bookmaking venues.**

Disallowable Instruments—Comment

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

Response to concerns previously expressed by the Committee

Disallowable Instrument DI2006-9 being the Domestic Animals (Fees) Determination 2006 (No. 1) made under section 144 of the *Domestic Animals Act 2000* **revokes DI2005-99 and determines the fees payable for the purposes of the Act.**

The Committee notes (with approval) that this instrument addresses concerns expressed by the Committee in its *Report No 13 of the Sixth Assembly* and that the Explanatory Statement expressly acknowledges that this is the case. The Committee also notes that (as previously noted in its *Report No 22 of the Sixth Assembly*) the Domestic Animals (Validation of Fees) Bill 2006 was introduced as a result of the concerns expressed by the Committee in Report No 13.

Drafting issue/Is this a disallowable instrument?

Disallowable Instrument DI2006-11 being the Health Professionals (ACT Nursing and Midwifery Board) Appointment 2006 (No. 1) made under section 3.9 Schedule 3 and section 4.7 Schedule 4 of the *Health Professionals Regulation 2004* **appoints specified persons as the President and members of the ACT Midwifery Board.**

The Committee notes that this instrument appoints five individuals to the ACT Nursing and Midwifery Board. Two individuals are identified as being "community members" and three are identified as "professional members".

The appointments are made under clause 3.9 of Schedule 3 of the *Health Professional Regulation 2004*, which provides:

3.9 Board membership—Act, s 24

(1) The board is made up of the president and the following people:

(a) 4 elected members;

(b) 4 appointed members.

(2) The elected members must be—

(a) 3 nurses elected by nurses; and

(b) a midwife elected under schedule 4.

(3) The Minister must ensure that the board members appointed (including the president) include the following people:

(a) a registered nurse;

(b) a midwife;

(c) an enrolled nurse;

(d) 2 community representatives who are not entitled to be registered or enrolled.

The Committee assumes that the two community members are appointed under paragraph 3.9(3)(d) above. Though it is not stated in the Explanatory Statement, the Committee assumes that each of the community representatives is not entitled to be registered or enrolled.

As to the "professional members" the Committee notes that there is no power to appoint "professional members", as such. Rather, there is a *requirement* to appoint three members who represent three nominated elements of the nursing profession, ie a registered nurse, a midwife and an enrolled nurse. Though it is not stated in the instrument, the Committee assumes that the three individuals in question, in fact, represent each of the three elements of the nursing profession required by paragraph 3.39(d).

It would, of course, assist the Committee (and the Assembly) if the Explanatory Statement expressly dealt with the fact that all relevant requirements are met by the appointments (as does the Explanatory Statement to the *Electoral (Commission Chairperson and Member) Appointment 2006 No 1* DI2006-23, which the Committee has also considered in this Report).

The Committee notes that the Explanatory Statement states that the instrument is a disallowable instrument, referring to the *Legislation Act 2001*. While it is correct that Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument, the Committee notes that this requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no indication as to whether or not any of the appointees are public servants.

Minor drafting issue/Is this a disallowable instrument?

Disallowable Instrument DI2006-12 being the Health Professionals (Medical Board) Appointment 2006 (No. 1) made under section 2.6 Schedule 2 of the *Health Professionals Regulation 2004* **appoints specified persons as members of the Medical Board.**

The Committee notes that this instrument appoints two individuals to the Medical Board. One individual is identified as being a "community member" and the other is identified as a "community member (legal)".

The appointments are made under clause 2.6 of Schedule 2 of the *Health Professional Regulation 2004*, which provides:

2.6 Medical board membership—Act, s 24

(1) The medical board is made up of the president and the following people:

(a) 3 elected members;

(b) 5 appointed members, 2 of whom are community representatives.

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

It would assist the Committee (and the Assembly) if the Explanatory Statement to this instrument indicated that the person appointed as a "community member (legal)" fulfilled the requirement that such a person have been a lawyer for a continuous period of five years before the day of appointment. While this may be assumed, the Committee suggests that it would do no harm if the instrument addressed the issue explicitly.

The Committee notes that the Explanatory Statement states that the instrument is a disallowable instrument, referring to the *Legislation Act 2001*. While it is correct that Division 19.3.3 of the *Legislation Act 2001* imposes certain requirements on the making of statutory appointments, including a requirement that such appointments be by disallowable instrument, the Committee notes that this requirement generally does not apply to instruments appointing public servants to statutory positions (see paragraph 227(2)(a)). It is for that reason that the Explanatory Statement to an instrument of appointment generally includes a statement indicating that the appointments contained in it are not public servant appointments. The Committee notes that the Explanatory Statement to this instrument contains no indication as to whether or not any of the appointees are public servants.

No Explanatory Statement

Disallowable Instrument DI2006-14 being the Land (Planning and Environment) Territory Plan Amendment 2006 (No. 1) made under section 294 of the *Land (Planning and Environment) Act 1991* **amends the Territory Plan Written Statement.**

The Committee notes that there is no Explanatory Statement for this instrument. While the Committee acknowledges that there is no statutory requirement that an Explanatory Statement be produced in every case, the Committee notes that it greatly assists the Committee (and the Assembly) in its scrutiny and consideration of an instrument if an Explanatory Statement is available to provide any relevant background and detail on the instrument.

In making this comment, the Committee also acknowledges that this instrument contains, in Annexe A, a certain amount of detail about the effect of the amendments to the Territory Plan Written Statement that are made by the instrument. Nevertheless, the Committee would prefer to see this sort of information set out in an Explanatory Statement, if at all possible.

Instruments with retrospective operation

Disallowable Instrument DI2006-15 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 1) made under section 30 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as the representative of the Student Body on the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2006-18 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 4) made under section 30 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as a member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2006-19 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 5) made under section 30 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as the representative of Industry and Commerce on the Canberra Institute of Technology Advisory Council.**

The Committee notes that each of these instruments appoint a named individual to the Canberra Institute of Technology Advisory Council. In each case, the appointment is expressed to take effect from 1 January 2006.

The Explanatory Statement to each of the instruments states:

> With reference to Section 76 of the *Legislation Act 2001,* 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.

Section 76 of the *Legislation Act 2001* provides that non-prejudicial provisions in an instrument can commence retrospectively, contrary to the general rule against retrospective commencement of legislation.

The Committee notes with approval the inclusion in the Explanatory Statements of the statement about the non-prejudicial retrospective operation of the appointment. The Committee suggests that the inclusion of such statements avoids the need for the Committee to draw attention to provisions because it is not sufficiently clear whether or not the provisions might contravene the Committee's terms of reference.

Instruments with retrospective operation

Disallowable Instrument DI2006-16 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 2) made under section 30 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as Chairperson of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2006-17 being the Canberra Institute of Technology (Advisory Council) Appointment 2006 (No. 3) made under section 30 of the *Canberra Institute of Technology Act 1987* **reappoints a specified person as Deputy Chairperson of the Canberra Institute of Technology Advisory Council.**

The Committee notes that these instruments re-appoint named individuals as Chairperson and Deputy Chairperson of the Canberra Institute of Technology Advisory Council. In each case, the appointment is expressed to take effect from 1 January 2006.

The Committee notes with approval that, as with DI2006-15, the Explanatory Statement to each of the instruments expressly addresses the issue of the instrument's retrospective operation and also the issues that arise from that retrospective operation, as a result of section 76 of the *Legislation Act 2001*.

Drafting issue

Disallowable Instrument DI2006-24 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2006 (No. 1) made under section 121 of the *Mental Health (Treatment and Care) Act 1994* **appoints specified persons as Principal Official Visitor and Official Visitor.**

This instrument appoints two named persons as "Principal Official Visitor" and "Official Visitor", respectively, under section 121 of the *Mental Health (Treatment and Care) Act 1994*. Section 121 provides:

> **121 Appointment etc**
>
> (1) For this Act, the Minister may appoint 1 or more official visitors for an approved mental health facility.
>
> (2) A person is eligible for appointment as an official visitor if the person—
>
> (a) is a legal practitioner who has not less than 5 years practising experience; or
>
> (b) is a medical practitioner; or
>
> (c) has been nominated by a body representing consumers of mental health services; or
>
> (d) has experience and skill in the care of persons with a mental dysfunction or mental illness.
>
> (3) A person shall not be appointed an official visitor if the person—
>
> (a) is a public servant; or
>
> (b) has a direct interest in a contract with an approved mental health facility or a mental health care provider; or
>
> (c) has a financial interest in a private hospital.

The first thing to note is that the Committee can identify no power to appoint a "Principal Official Visitor" and can only identify the power to appoint official visitors (though clearly more than one official visitor can be appointed). 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.

Subsection 121(2) sets out eligibility requirements for persons appointed as an official visitor. Subsection 121(3) sets out **in**eligibility requirements. The Committee notes that there is no indication in the Explanatory Statement that, in fact, the persons in question meet the eligibility requirements. Though this may be assumed, it would assist the Committee (and the Assembly) if this was expressly stated (as is the case, for example, in the Explanatory Statement to the *Electoral (Commission Chairperson and Member) Appointment 2006 No 1* DI2006-23, which the Committee has also considered in this Report).

As to the requirements set out in subsection 121(3), the Committee notes that the Explanatory Statement states that the persons in question are not public servants. This is particularly relevant to the Committee's consideration of the instrument in the context of the requirements of Division 19.3.3 of the *Legislation Act 2001*. As to the other issues that make a person ineligible for appointment as an official visitor, however, the Explanatory Statement gives no

indication as to whether or not the relevant circumstances exist. Again, while the Committee may be entitled to assume that the persons in question are not, in fact, ineligible for appointment (ie because they do not, in fact, have the relevant interests), it would assist the Committee (and the Assembly) if the Explanatory Statement made this clear. In making this comment, the Committee suggests that it would do no harm to include such a statement, as is the case with the statement about the persons in question not being public servants.

Minor comment

Disallowable Instrument DI2006-27 being the Road Transport (Public Passenger Services) (Minimum Service Standards—Taxi Network) Approval 2006 (No. 2) made under section 18B of the *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2006-21 and amends the Minimum Service Standards to provide for a dedicated wheelchair accessible taxi manager to be available on Christmas Day.**

The Committee notes that this instrument revokes (and re-makes) DI2006-27, which was notified only five days prior to the date on this instrument, meaning that DI2006-21 had a very short life. The Committee also notes, however, that the Explanatory Statement to the instrument makes clear the need to revoke and re-make the earlier instrument (ie correction of a significant error in the earlier instrument).

Inadequate Explanatory Statement

Disallowable Instrument DI2006-32 being the Health Professionals (Fees) Determination 2006 (No. 1) made under section 132 of the *Health Professionals Act 2004* **determines fees payable for the purposes of the Act.**

The Committee notes that, in this instrument, the ACT Nursing and Midwifery Board determines fees for the purposes of the *Health Professionals Act 2004*. The Committee has previously indicated that, when instruments set fees, it would prefer to have an indication, either in the body of the instrument or in the Explanatory Statement, as to the level of (and the justification for) any increases in fees that are imposed by the instrument. This is often done by the inclusion of the previous fee, as well as the new fee. The Committee notes that there is no such indication either in this instrument or in its Explanatory Statement. The Committee also notes, however, that this appears to be the first occasion on which the relevant fees have been set. On that basis, the Committee makes no further comment on the instrument.

Subordinate Laws—No comment

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

Subordinate Law SL2006-3 being the Health Professionals Amendment Regulation 2006 (No. 3) made under section 134 of the *Health Professionals Act 2004* **provides for a reference to "nurse" in certain other Acts and Regulations to include a person registered as a midwife.**

Subordinate Law SL2006-4 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2006 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **determines an additional 22 specified sites as being sites at which certain traffic camera detection devices may be operated.**

Subordinate Laws—Comment

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

Explanatory Statement - Minor drafting issue

Subordinate Law SL2006-1 being the Health Professionals Amendment Regulation 2006 (No. 1) made under section 134 of the *Health Professionals Act 2004* **provides for the transfer of the nursing and midwifery professions provisions to the Act.**

The Committee notes that the Explanatory Statement to this subordinate law states (on page 1):

> The amendments proposed in this Regulation are to provide for the transfer of the nursing and midwifery professions to the *Health Professionals Act 2004*. The Regulation contains the Nursing and Midwifery Schedules, which provide the profession specific registration requirements for the Nursing and Midwifery professions in the ACT. The Schedules are the result of extensive consultation with members of the nursing and midwifery professions and key stakeholders. The Regulation will apply from the commencement date the provisions of the *Health Professional Act 2004* to the nursing and midwifery professions in the ACT.

The Committee notes that there appears be a word (or words) missing from the last sentence set out above.

Inadequate Explanatory Statement

Subordinate Law SL2006-2 being the Health Professionals Amendment Regulation 2006 (No. 2) made under section 134 of the *Health Professionals Act 2004* **provides authority for Parliamentary Counsel to remove four notifiable instruments from the Legislation Register.**

The Committee notes that the effect of this subordinate law is to amend the *Health Professionals Act 2004* (**HP Act**). That being so, the subordinate law must involve, in some way, the use of a "Henry VIII" clause. As the Committee has previously noted, the term is derived from the fact that this kind of law-making was favoured by King Henry VIII (see Pearce and Argument, *Delegated Legislation in Australia*, 3rd edition, [1.8] and [1.20]). The term refers to instances where a subordinate law amends a piece of primary legislation. While such law-making is generally not allowed, it can occur if a legislature specifically authorises such an exercise.

In the case of this subordinate law, however, the situation is complicated. Section 4 of the subordinate law inserts into *Health Professionals Regulation 2004* (**HP Regulation**) a new section 159. The new section 159 provides that the HP Act is modified by Schedule 16. Schedule 16 is, in turn, inserted into the HP Regulation by section 5 of this subordinate law. The Committee discusses the substance of Schedule 16 further below.

The heading to the new section 159 of the HP regulations refers to section 152 of the HP Act as its authority. Section 152 of the HP Act provides:

152 Modification of pt 15's operation

A regulation may modify the operation of this part (including in its operation in relation to another territory law) to make provision with respect to any matter that is not already, or is not (in the Executive's opinion) adequately, dealt with in this part.

The Committee notes that section 152 is in Part 15 of the HP Act, which contains "transitional" provisions.

It is relevant here to turn to the Explanatory Statement to the subordinate law. It begins by stating that the subordinate law is authorised by section 134 of the HP Act. Section 134 provides:

134 Regulation-making power

(1) The Executive may make regulations for this Act.

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

(2) A regulation may impose conditions, including restrictions, on the practice of a health profession to protect the public or the public interest.

(3) A regulation may prescribe offences for contraventions of a regulation and prescribe maximum penalties of not more than 30 penalty units for offences against a regulation.

(4) Also, a regulation may apply, adopt or incorporate (with or without change) an instrument as in force at a particular time or from time to time.

This is a curious device, in the sense that what the Explanatory Statement identifies as the source of the authority to make this subordinate law (ie this subordinate law that amends the HP Act) is the "normal" regulation-making power in the HP Act, while the provision in the subordinate law that makes the substantive amendment to the HP Act refers to section 152 of the HP Act as its source of authority. While the Committee appreciates that there may be a logic to this approach, the exercise is (to say the least) quite difficult to follow.

By way of explanation of the relevant provisions, the Explanatory Statement to this subordinate law states (relevantly):

Outline

The amendments proposed in this Regulation are to provide a modification to the *Health Professionals Act 2004*, which provides authority to the parliamentary counsel to remove four notifiable instruments from the legislation register. The instruments relate to decisions and findings of fact in regards to disciplinary proceedings brought against nurses, which were placed on the legislation register in accordance with section 82 of the *Nurses Act 1988*.

…….

Clause 5 – New Schedule 16 – inserts a new Schedule 16. Schedule 16 inserts a new section 150L, which provides that the *Legislation Act 2001*, section 19 does not apply to the notifiable instruments listed. Subsection (2) of the new section provides authority to the parliamentary counsel to remove each of the instruments listed and subsection (3) provides that the modification expires on 9 July 2006.

While the Committee appreciates the difficulty of explaining complicated legislative procedures, the Committee notes that it did not find this explanation particularly helpful in assisting it in understanding what was, clearly, a significant legislative exercise, in that it involves the amendment of a primary law by a subordinate law.

The Committee notes that no explanation is provided as to what makes the amendments made by this subordinate law "transitional" issues, in the sense contemplated by Part 15 of the HP Act (and section 125 of the 152 Act, in particular), so as to demonstrate that they are within the powers provided by Part 15 of the HP Act. Nor is there any explanation as to how the amendments are authorised by section 152 of the HP Act, which authorises the making of regulations "with respect to any matter that is not already, or is not (in the Executive's opinion) adequately, dealt with in this part". The Committee considers that such explanation would have been helpful.

A further issue is the substantive effect of the amendments. The new section 150L of the HP Regulation (which is contained in the new Schedule 16) has the effect of removing four specified notifiable instruments from the Legislation Register. The instruments in question appear to be decisions of the Nurses Board. Subsection 83(3) of the (now repealed) *Nurses Act 1988* made certain decisions of the Nurses Board notifiable instruments, which required them to be placed on the Legislation Register.

It is not possible for the Committee to consider the effect of the removal of the notifiable instruments, since this subordinate law has taken effect and the four notifiable instruments have, in fact, been removed from the Legislation Register.

Clearly (as the Committee has already noted), this is a complicated and confusing exercise in law-making. The Committee notes, however, that its understanding of the effect of the subordinate law (and, therefore, the Committee's capacity to advise the Assembly in relation to the subordinate law) is significantly hampered by the fact that the Committee simply cannot discern, from the Explanatory Statement, what is the substantive effect of the amendments made by the subordinate law. The Explanatory Statement offers little illumination on the subject.

The Committee considers that this is a matter that is appropriate to raise under paragraph (b) of the Committee's terms of reference, which allows the Committee to:

> Consider whether any explanatory statement …. associated with legislation …. meets the technical or stylistic standards expected by the Committee.

REGULATORY IMPACT STATEMENTS:

There is no matter for comment in this report.

GOVERNMENT RESPONSES:

The Committee has received responses from:

- The Minister for Health, dated 6 March 2006, in relation to comment made in Scrutiny Report 21 concerning DI20065-245, being the Nurses (Fees) Determination 2005 (No. 1).
- The Minister for Children, Youth and Family Support, dated 6 March 2006, in relation to comments made in Scrutiny Report 21 concerning the Children and Young People Amendment Bill 2005 (No. 2).
- The Minister for Environment, dated 7 March 2006, in relation to comments made in Scrutiny Report 21 concerning:
  - DI2005-255, being the Pest Plants and Animals (Pest Animals) Declaration 2005 (No. 1); and
  - SL2005-38, being the Environment Protection Regulation 2005.
- The Minister for Planning, dated 7 March 2006, in relation to comments made in Scrutiny Report 20 concerning:
  - DI2005-241, being the Public Place Names (Phillip) Amendment 2005 (No. 1); and
  - DI2005-242, being the Public Place Names (Bonython) Amendment 2005 (No. 1).
- The Chief Minister, dated 9 March 2006, in relation to previous correspondence with the Committee concerning access to the Public Sector Management Standards.
- The Treasurer, dated 9 March 2006, in relation to comments made in Scrutiny Report 22 concerning the Motor Sport (Public Safety) Bill 2006.
- The Minister for Racing and Gaming, dated 13 March 2006, in relation to comments made in Scrutiny Report 21 concerning DI2005-263, being the Gambling and Racing Commission Appointment 2005 (No. 2).
- The Minister for Health, dated 23 March 2006, in relation to comments made in Scrutiny Report 22 concerning DI2005-267, being the Podiatrists (Fees) Determination 2005 (No. 1).

The Committee wishes to thank the Minister for Health, the Minister for Children, Youth and Family Support, the Minister for Environment, the Minister for Planning, the Chief Minister, the Treasurer and the Minister for Racing and Gaming for their helpful responses.

Bill Stefaniak, MLA
Chair

March 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 3, dated 17 February 2005

Health Records (Privacy and Access) Amendment Bill 2005. **(Passed 17.02.05)**

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-260 – Health (Interest Charge) Determination 2004 (No. 1)
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 SL2004-52 – Health Professionals Amendment Regulation 2004 (No. 1)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 5, dated 14 March 2005

Disallowable Instrument DI2005-12 – Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1)
Disallowable Instrument DI2005-8 – Community and Health Services Complaints Appointment 2005 (No. 1)

Bills/Subordinate Legislation

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)**
Disallowable Instrument DI2005-34 – Health (Nurse Practitioner Criteria for Approval) Determination 2005 (No. 1)

Report 11, dated 20 June 2005

Disallowable Instrument DI2005-33 – Health Records (Privacy and Access) (Fees) Determination 2005 (No. 1)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-61 – Radiation (Fees) Determination 2005 (No. 1)
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)

Bills/Subordinate Legislation

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

Disallowable Instrument DI2005-209 – Health (Fees) Determination 2005 (No. 3)
Disallowable Instrument DI2005-212 – Mental Health (Treatment and Care) Official Visitor Appointment 2005 (No. 1)
Guardianship and Management of Property Amendment Bill 2005 **(PMB)**

Report 19, dated 21 November 2005

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

Report 22, dated 6 March 2006

Construction Occupations Legislation Amendment Bill 2006.....
Disallowable Instrument DI2005-277 - Public Sector Management Amendment Standard 2005 (No. 10).....
Disallowable Instrument DI2005-282 - University of Canberra (Academic Board) Amendment Statute 2005.....
Disallowable Instrument DI2005-291 - Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment of Members' Staff 2005...
Disallowable Instrument DI2005-292 - Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment of Office-holders' Staff 2005
Disallowable Instrument DI2005-298 - Health (Fees) Determination 2005 (No. 6)
Disallowable Instrument DI2005-302 - Public Health (Risk Activities) Declaration 2005 (No. 1).....
Disallowable Instrument DI2005-303 - Public Health (Infection Control) Code of Practice 2005.....
Domestic Animals (Validation of Fees) Bill 2006 *Act citation:* ....
Subordinate Law SL2005-39 - Road Transport Legislation Amendment Regulation 2005 (No. 1).....
Subordinate Law SL2005-42 - Financial Management Regulation 2005

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

I refer to your Committee's comments in the Scrutiny of Bills and Subordinate Legislation Committee Report No 21 of 6 February 2006 relating to the Disallowable Instrument DI2005-245 being the Nurses Fees Determination 2005 (No 1).

I note the Committee's comments in respect to the fees, that neither the instrument itself or the Explanatory Statement indicate the magnitude of the change in fees, however, the instrument does fulfil the requirements of Part 6.3 of the *Legislation Act 2001*.

I wish to advise that any future Explanatory Statements relating to Health Professionals Board registration fees will highlight the magnitude of any changes in fees.

Yours sincerely

Simon Corbell MLA
Minister for Health

6 March 2006

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

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

Thank you for your Scrutiny of Bills Report No. 21 dated 6 February 2006. I offer the following response in relation to the matters raised by your Committee.

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2005 (NO 2)

1. **The Committee has asked whether the change in the test for assessment of whether a child or young person is in need of care and protection diminishes the extent of the protection to the child – or, contrawise, does the change have the effect of better preserving the family as the natural and basic group unit of society.**

In our view, the proposal to redefine abuse and neglect to replace 'likelihood' with the concept of 'at risk' will not have the effect of diminishing the extent of protection to children and young people under subsection 11(2) of the Human Rights Act.

Currently a child or young person is in need of care and protection if the child or young person has been, is being or is likely to be abused or neglected and no-one with parental responsibility is willing and able to protect them from suffering the abuse or neglect. The Bill replaces the test of likelihood of abuse or neglect with a test of risk. This direction is proposed to bring the legislation into line with contemporary research in the area of child protection which provides empirical tools to predict risk of abuse or neglect of children. It is also intended to achieve greater consistency between the *Children and Young People Act 1999* and the standard adopted in other Australian jurisdictions, in particular matters proceeding under the *Family Law Act 1975*.

The change is not intended to result in a narrowing or widening of the scope of children and young people in need of care and protection. Likelihood of abuse or neglect is currently determined by an assessment of risk of abuse or neglect to a child or young person. This assessment involves consideration and balancing of factors relating to the vulnerability of the child and the behaviour and attitudes of the child's caregivers. It also involves consideration of protective factors which may operate to mitigate risk.

As you note, there is a tension between subsections 11(1) and (2) of the HRA and it is our view that any test of risk in the context of assessing abuse and neglect should also include a test of significance. It is our view that without this test of significance, the threshold for intervention in a

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family could not be justified under subsection 11(1). It also reflects that children and young people at greater risk are the primary concern of statutory child protection services.

2. **The Committee has asked whether a scheme for decision-making concerning indigenous children and young people compatible with HRA subsection 8(3), and, if not, is it justifiable under section 28.**

The introduction of cultural plans is not compatible with HRA subsection 8(3), however I consider it is justifiable under section 28, because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in child protection (17.5% of all ACT children in out of home care are Indigenous) (AIHW).

The right to culture is recognised by the Human Rights Act (s 27). *The HRA Guideline for ACT Departments* notes that effective protection of these rights may include an obligation to consult with minority communities in relation to decisions that affect them. Care for indigenous children and young people are predominately provided by kinship members of the aboriginal community. The proposed cultural plans are intended to facilitate consultation with indigenous communities in relation to decisions that affect them.

Consultations on the review of the Act supported legislative amendments to include strategies to prevent Aboriginal and Torres Strait Islander children and young people entering the care system by:

- Strengthening requirements of decision makers to consult with members of the Aboriginal and Torres Strait Islander community, including monitoring of these requirements by the Children and Young People Commissioner; and
- Providing early intervention in a culturally acceptable manner.

The proposed amendment gives effect to a current principle of placing indigenous children and young people in the most culturally appropriate placement and planning to ensure their holistic needs are met, including connection with community and family.

3. **The Committee has asked whether proposed subsections 405G(3) and (4) conflict with the principle that on a trial all relevant evidence is admissible. This is an element of a fair trial (HRA subsection 21(1)), which may, however, be displaced under HRA section 28 to avoid an incompatibility with the HRA. The principle is, however, also stated in subsection 56(1) of the Evidence Act 1995 (Commonwealth).**

We agree that clauses 405G(3) and (4) may be a limitation on the right to a fair trial regarding the principle that all relevant evidence is admissible however we argue that the provisions can be justified under s 28 HRA.

The Bill establishes a two-tier framework for the protection and release of information acquired under the Act. The information that the provisions seek to protect relates to child abuse reports and appraisals, interstate child abuse reports and family group conference information. This information is classified as sensitive and represents the higher tier of the framework. The framework is intended to reflect that some information relating to abuse and neglect of children has a special character and should be afforded different protection. I will outline why we consider this so.

The provisions serve an important and significant objective in protecting and promoting the community's confidence in voluntarily reporting child abuse and neglect to statutory authorities. There is an overriding public interest that children at risk of abuse and neglect require community members to report concerns to authorities with confidence that their identity and concerns will be adequately protected. The consequences of not establishing such a framework for protection of this information would be diminished confidence by community members to report abuse and neglect of children and fewer reports being made voluntarily. This in turn could lead to diminished protection for children at risk.

We also note that some sensitive information has a special character because it is compulsorily acquired through mandatory reporting provisions under the Act. This includes information characterised as interstate child abuse reports which may have been obtained through equivalent mandatory reporting provisions in other Australian jurisdictions. Similarities can be drawn with information obtained under compulsion by a royal commission. In such cases, information is generally not admissible in subsequent legal proceedings. There is a need to ensure that persons who are required at law to report abuse, either under the *Children and Young People Act 1999* or a law of another State or Territory, will be adequately protected.

We think it is important to draw to your attention that these provisions do not only relate to the Chief Executive's management of sensitive information. The information may be held by information holders who include statutory office holders (public advocate, official visitor), persons exercising a function under the Act, persons engaged in the administration of the Act or anyone else who has been given information by one of these people.

We consider the provisions are the least restrictive in order to achieve adequate protection of sensitive information. We note however that the Bill provides for the Chief Executive to release such information if it is in the best interests of a child or young person. This will allow for the Chief Executive to exercise discretion regarding the release of the information on an individual case basis where it is demonstrably in the best interests of the child.

We consider the provisions will not have a disproportionately severe effect on parties to proceedings. While the provisions may affect some legal proceedings, in most cases, the sensitive information will only be relevant in proceedings arising under the Act in relation to care and protection applications to the Children's Court. Should the Chief Executive consider that the sensitive information would have a high probative value, then the Chief Executive would adduce it and other parties would have full access to the information.

I trust that the above comments clarify the provisions and the issues raised and I thank the Committee for its comments.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Children, Youth and Family Support
6 March 2006

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

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

Dear Mr Stefaniak

I refer to the Committee's comments on Disallowable Instrument DI2005-255 being the Pest Plants and Animals (Pest Animals) Declaration 2005 (No. 1) and Subordinate Law SL 2005-38 the *Environment Protection Regulation 2005* in Scrutiny Report No 21 of 6 February 2006. I write in reply to these comments.

Disallowable Instrument DI2005-255 – Pest Plants and Animals Declaration

The Standing Committee on Legal Affairs made comment on the Disallowable Instrument DI2005-255 being the Pest Plants and Animals (Pest Animals) Declaration 2005 (No. 1) made under section 16 of the *Pest Plant and Animals Act 2005* which declares specified animals to be pest animals for the purposes of the Act.

The comment is that the Explanatory Statement to the instrument states that if a pest animal is a prohibited pest animal "it is an offence to supply or propagate the plant". The Committee notes that this is a mistake. In the case of pest animals, the prohibition (in section 16 of the *Pest Plants and Animals Act 2005)* is to supply or keep the animal. The prohibition on supply and propagation relates to pest *plants*.

While the Committee raised these matters for the attention of the Assembly without concluding that there was a necessity to amend the Declaration, I have come to the conclusion that there is a way forward which satisfies the Committee's concerns and still meets the intention of the legislation.

The Disallowable Instrument is currently in the process of being revoked to provide for additional changes relating to pest animals.

Environment Protection Regulation 2005

The Standing Committee also made comment on Subordinate Law SL 2005-38 being the *Environment Protection Regulation 2005* made under the *Environment Protection Act 1997,* updates the *Environment Protection Regulation 1997* with particular regard to air noise water and water standards.

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Strict Liability

In relation to the comments on strict liability offences on page 23, the Committee notes that the following subsections of this subordinate law expressly create strict liability offences: subsection 9(4), 10(5), 11(8), 12(3), 15(3), 16(2), 40(3), 44(3), 45(2), 46(2), 47(3), 48(3), 49(3), 50(2), 55(3), 59(3), 60(3) and 61(2).

The Committee notes that the use of strict liability offences is a reoccurring issue for the Committee. It notes that in Report No 38 of the Assembly it proposed that where a provision of a Bill (or subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability) The Explanatory Statement should address the issues of:

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

The Committee notes that whilst the Explanatory Statement addresses point 2 of this requirement point 1 has not been adequately addressed.

The Committee's comments have been noted. In response to these comments it may have been appropriate to include a paragraph discussing the offences where strict liability applies to a specific element of the offence or to the offence. Section 23 of the *Criminal Code* provides that if the law that creates an offence provides for strict liability there are no fault elements for the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable.

Offences incorporating strict liability offence elements are carefully considered when developing legislation. They generally arise in a regulatory context aimed at protecting the public interest, for reasons such as public safety, protection of the public revenue or as in this case for the protection of the environment.

Legislation Act

In relation to the issue raised on page 25 regarding the disapplication of subsections 47(5) and 47(6) of the *Legislation Act* and whether that limits their accessibility, the Committee is unsure as to the accessibility of the following instruments under section 67(2) of the *Environment Protection Regulation 2005*

- National capital plan (paragraph f)
- A national environment protection measure (paragraph k)
- A national environment protection protocol made under the national law schemes. (Paragraph l)

The Committee's comments have been noted. In relation to the comments on the displacement of the Legislation Act 47(5) and (6) and the issue accessibility, guidance

from Parliamentary Counsels Office (PCO) has been taken. In relation to the use of incorporated documents provision, this is a developing area in relation to drafting practices and it is understood that advice was taken from PCO on this.

In relation to the specific instruments mentioned above:

- The accessibility of the national capital plan (paragraph f)

It would have been appropriate to have listed the appropriate website, it was an oversight to expect that most members of the public would know where to access the national capital plan.

- The accessibility of a national environment protection measure (paragraph k)

Whilst Section 67(2) of the *Environment Protection Regulation 2005* does not cite the details of the website for the Environment Protection and Heritage Council (EPHC), which makes these procedures and protocols, the national environment protection measures and national environmental protection protocols could be viewed or downloaded in pdf file, from the then NEPC (now EPHC) website that is detailed in Section 65 of the Environment Protection Regulation 2005 dealing with Procedures and Protocols. It is this section that notes that these measures and protocols can be accessed at www.ephc.gov.au. It is fair to say that a similar note could or should have been added to Section 67(2). However given that a regulation is usually read as a whole or in specific subject matter parts or divisions, then it is more than likely that any person interested in the NEPC would have read section 65 prior to section 67(2) and noted the information, making it unlikely to be regarded as inaccessible.

- The accessibility of a national environment protection protocol made under the national law schemes (l)

Exactly the same comments are applicable to paragraph (l) dealing with the protocol.

Thank you for raising these matters with me.

Yours sincerely

Jon Stanhope MLA
Minister for the Environment

7 MAR 2006

Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Bill Stefaniak

Thank you for Scrutiny Report Number 20 of 12 December 2005.

The Report included comment on the wording used in disallowable instruments DI2005-241 and DI2005-242 prepared by the ACT Planning and Land Authority. The instruments were revoking the names of certain streets roads. The Committee's comment concerning the use of the word 'omitting' rather than 'revoking' is noted.

Thank you for raising this matter with me.

Yours sincerely

Simon Corbell MLA
Minister for Planning
7.3.06

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

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Stefaniak

I refer to earlier correspondence about the translation of the Public Sector Management Standards (the Standards) to the ACT Legislation Register (the Register). I am writing to advise you that my department is about to commence the process of translating the Standards to the Register. My department has been undertaking extensive preliminary work to prepare the Standards for translation to the Register.

As you are aware there are currently seven Standards, which are divided into Parts, Rules and sub-Rules to outline employment and administrative arrangements. The current version of the Standards are maintained on the PSM website (www.psm.act.gov.au).

In order to translate the Standards to the Register, the Standards will need to be re-made in a format compatible for legislation on the Register. This will involve a number of changes to the formatting and numbering of the Standards. However, it should be noted that in the re-making of the Standards, there would be no changes to any substantive provisions of the Standards. This means there are no changes to conditions or arrangements that exist currently in the Standards.

I am advised that the main formatting/technical changes include:

- The existing seven Standards will become one Standard divided into Chapters, Parts, Sections, and where necessary Divisions and Sub-divisions. In this Standard, numbering is continuous and does not re-commence with each Part (like the existing Standards);
- As a result of the changes, some existing Standard Rules may be divided into two different sections. Some minor and technical additions will also be necessary to ensure the Rules continue to operate in the same manner (i.e. as they do currently);
- Changes in reference terminology, for example, as Rules will now be called sections; references to existing Rules will need to change to reference the new sections and so forth;

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- The definition section found in the Introduction Standard will be relocated to the dictionary section found at the end of the Standards; and
- There will also be a number of minor and technical changes.

These changes will mean that the Standards are more closely aligned to the presentation of other ACT legislation.

My department advises that the translation of the Standards to the Register should be complete by early May 2006. I am advised that the earlier estimated timeframe of March 2006 is unlikely to be possible due to staffing changes and technical difficulties in preliminary work to translate the Standards.

Once the Standards are available on the Register, the Register will include historical versions of the Standards (following future amendments to the Standards), which will address concerns the Committee has previously raised.

I will advise you once the Standards are available on the Register.

Yours sincerely

Jon Stanhope MLA
Chief Minister

- 9 MAR 2006

Ted Quinlan MLA
DEPUTY CHIEF MINISTER
TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM
MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING
MEMBER FOR MOLONGLO

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

Dear Mr. Stefaniak Bill

I am writing in response to comments on the Motor Sport (Public Safety) Bill 2006 (the Bill) by the Standing Committee on Legal Affairs (Scrutiny Report No 22 of 6 March 2006 refers).

While the Committee has identified a number of issues relating to the Bill, it has done so without taking into account the precedent on which the Bill is based, namely, NSW legislation that has operated successfully for more than 20 years. Similar arrangements exist in other jurisdictions for a legislative platform for the regulation of motor sports at dedicated motor sport facilities. All such arrangements provide for discretionary decision-making as to enable decisions to be taken with due regard for developments in motor sports safety in the light of the circumstances confronting the decision-maker at the relevant time.

In this regard, the regulation of motor sports is subject to rules developed by international bodies. These rules are promulgated across all jurisdictions through representative motor sport organisations. The Confederation of Australian Motor Sport is the representative body in Australia. The Bill allows for these rules to be recognised by providing an appropriate discretion in clause 9 in relation to decisions about motor vehicle racing licence applications.

However, I accept the Committee's view that the breadth of discretions exercisable in both clauses 7 and 9, while necessarily broad, would be better exercised by a member of the Executive. Consequently, I have decided to elevate the exercise of power under the discretions in these provisions to the responsible Minister. Accordingly, I will introduce technical amendments that give effect to that intention.

The Committee also asked if a regulation made under clause 38 should be permitted as would allow the adoption of another document.

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The powers provided in clause 38 of the Bill are both necessary and appropriate. They enable the standards promulgated by the specified publications to be adopted by motor sport regulators worldwide. In this respect, the regulation of motor sport in the Territory must have due regard to international developments in the promulgation of rules applying to motor sports as to ensure public safety. The accreditation and insurance coverage of motor sports participants is also protected, as well as ensuring the adoption of any changed rule as to preclude a hiatus.

The Bill accordingly provides for documents to be incorporated by reference, as is enabled by the other states in Australia, as well by other countries, and the arrangement proposed in clause 38(3) of the Bill therefore necessarily overrides publication in the legislation register.

In my view, this too is necessary and appropriate. The incorporated documents contain a large amount of technical detail, are of very limited interest to anyone outside the motor sport industry, and are readily available to the people who are affected by them. Accordingly, it is very unlikely that the rights of members of the public at large would be detrimentally affected.

The Bill is an innovative measure by the Government that is designed to address presently unregulated circumstances. To the extent that it may be said to depart from conventions regarding delegated legislative powers or the incorporation of documents outside of a legislative scheme, it is necessary and appropriate that it do so for the reasons I have outlined above.

With regard to the Committee's comments on the Explanatory Statement, I consider the Statement to be adequate. Given the novel circumstances in which motor sports are regulated, the Bill should not be compared with legislation such as the *Tree Protection Act 2005* because each has a fundamentally different purpose and addresses fundamentally different circumstances. As a matter of fact, the Bill has no parallel in current Territory law. However, I note the Committee's views in this regard and will take them into account in preparing future legislation.

Yours sincerely

9.3.06

Ted Quinlan MLA
Treasurer

Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM

MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
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CANBERRA ACT 2601

Dear Mr Stefaniak Bill

On 14 February 2006, the Standing Committee on Legal Affairs tabled Scrutiny Report No. 21, which included comment on Disallowable Instrument DI2005-263: the appointment of a deputy chairperson to the Racing and Gaming Commission.

Specifically, the report noted that there exists no power in the *Gambling and Racing Control Act 1999* to appoint a deputy chairperson to the Commission, nor is there any reference to the title, *deputy chairperson*.

My previous correspondence of 22 February 2006 to the Committee on this matter was based on advice I had received that the appointment was captured by *Republication 8* of the *Gambling and Racing Control Act 1999* whereby appointments made to a governing body immediately before 1 January 2006 had force and effect. However, further discussion between the Government Solicitor and the Office of Parliamentary Counsel has since showed that the appointment is, indeed, invalid.

Accordingly, the original appointment has been revoked and I have signed a new Instrument of Appointment under the correct legislation.

I apologise for any inconvenience.

Yours sincerely

14.3.06

Ted Quinlan MLA
Minister for Racing and Gaming

ACT LEGISLATIVE ASSEMBLY

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Simon Corbell MLA

MINISTER FOR HEALTH MINISTER FOR PLANNING

MEMBER FOR MOLONGLO

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

Dear Mr Stefaniak

The Standing Committee on Legal Affairs, in Scrutiny Report No.22 of 6 March 2006, commented on the Disallowable Instrument DI2005-267.

I have noted the findings of the Committee for this Disallowable Instrument and will ensure that future instruments do not contain typographical errors and that explanatory statements will address all fees included in the Schedules to the Disallowable Instruments.

Yours sincerely

Simon Corbell MLA
Minister for Health

23.3.06

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