



2022

# **Parliament of Tasmania**

## **JOINT STANDING COMMITTEE SUBORDINATE LEGISLATION**

### **REPORT 19**

**SCRUTINY OF NOTICE ISSUED UNDER SECTION 17 OF THE  
*COVID-19 DISEASE EMERGENCY (MISCELLANEOUS PROVISIONS) ACT 2020*  
(MAGISTRATES COURT – ELECTRONIC SERVICE AND WITNESSING)**

**SCRUTINY OF NOTICE ISSUED UNDER SECTION 20 OF THE  
*COVID-19 DISEASE EMERGENCY (MISCELLANEOUS PROVISIONS) ACT 2020*  
(MAGISTRATES COURT – PROCEEDINGS)**

#### **Members of the Committee:**

**Ms Tania Rattray MLC (*Chair*)**  
**Ms Ruth Forrest MLC**  
**Ms Meg Webb MLC (*Deputy Chair*)**

**Mr Felix Ellis MP**  
**Ms Janie Finlay MP**  
**Ms Madeleine Ogilvie MP**

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## Introduction

The Committee was appointed under the provisions of Section 3 of the *Subordinate Legislation Committee Act 1969* (No. 44 of 1969). Section 8 of the Act outlines the functions of the Committee, as follows –

- (a) to examine the provisions of every regulation, with special reference to the question whether or not –
  - (i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made;
  - (ii) the form or purport of the regulation calls for elucidation;
  - (iii) the regulation unduly trespasses on personal rights and liberties;
  - (iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or
  - (v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation; and
- (b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.

## ***COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 — Scrutiny of Notices***

The Parliament of Tasmania passed the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (the Act) on 26 March 2020. The Act prescribes a role for the Joint Standing Committee on Subordinate Legislation in the scrutiny of certain notices under the Act.

In response to this new scrutiny role, the Committee has given extensive consideration to an appropriate mechanism for it to report upon its deliberations on all notices gazetted under the Act in the interest of public transparency. The Committee will:

- Publish a list of the notices to be discussed by the Committee, and documentation relating to notices to be examined by the Committee, to be published on the Committee website prior to each meeting; and
- Present regular reports to Parliament, which will contain further information in relation to the completed examinations of notice.

### **Notice under section 17 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Magistrates Court – Electronic Service and Witnessing)**

At its meeting on 1 February 2022, the Committee concluded its examination of the Notice and **RESOLVED** the Notice be examined, noting that it was consistent with the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*.

The supporting documentation relevant to the Notice is attached to this Report for completeness.

The Minutes of Proceedings related to this Notice are not attached to this Report due to the Committee not scheduled to meet again until 10 March 2022.

### **Notice under section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Magistrates Court – Proceedings)**

The Committee wrote to the Attorney-General seeking further information in relation to 'remote sentencing'. A copy of this letter is attached at Appendix 3.

At its meeting on 1 February 2022, the Committee concluded its examination of the Notice and **RESOLVED** the Notice be examined, noting that it was consistent with the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*.

The supporting documentation and all correspondence are attached to this Report for completeness.

The Minutes of Proceedings related to this Notice are not attached to this Report due to the Committee not scheduled to meet again until 10 March 2022.

A handwritten signature in black ink, reading "Tania Rattray". The signature is written in a cursive, flowing style.

Hon Tania Rattray MLC  
**CHAIR**

1 February 2022

Department of Justice  
STRATEGIC LEGISLATION AND POLICY

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29 September 2021

Secretary  
Parliamentary Standing Committee on  
Subordinate Legislation  
Parliament House  
HOBART

By email: [subleg@parliament.tas.gov.au](mailto:subleg@parliament.tas.gov.au)

**COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 – Notice under section 17 – Electronic Matters**

Please find enclosed a copy of a notice issued by the Attorney-General pursuant to section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*.

The notice under section 17 was signed on 4 September 2021 and published in the Gazette on Wednesday 22 September 2021.

I enclose a fact sheet to provide further information on the notices and the Advice provided by the Office of Parliamentary Counsel (OPC).

Yours sincerely

Bruce Paterson  
Assistant Director  
**Strategic Legislation and Policy**

**Attachments –**

- Signed Notices
- Fact Sheet
- CPC Advice

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**ADVICE OF CHIEF PARLIAMENTARY COUNSEL*****Notice under section 17 of the COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020***

I advise that this statutory rule –

- (a) appears to be within the powers conferred by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (b) does not appear, without clear and express authority being provided by any Act, to –
  - (i) have any retrospective effect; or
  - (ii) impose any tax, fee, fine, imprisonment or other penalty; or
  - (iii) sub-delegate powers delegated by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (c) appears to be within the general objectives of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (d) is expressed in as clear and unambiguous language as is reasonably possible.

Dated 3 August, 2021.



Robyn Webb  
**Chief Parliamentary Counsel**

TASMANIA

*COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*

**NOTICE UNDER SECTION 17**

I, PETER GUTWEIN, the Premier, in pursuance of section 17(1) of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*, being of the opinion that the relevant emergency circumstances exist in relation to this notice and with the approval of the emergency manager, declare that –

- (a) despite any of the provisions specified in Schedule 1 to this notice, service of a document that is required to be served under those provisions may be performed by the electronic means referred to in paragraph (b) if the intended recipient of the document has agreed, in accordance with paragraph (c), to receive service of the document by that means; and
- (b) the electronic means by which service may be performed under paragraph (a) is specified to be by email or facsimile; and
- (c) an intended recipient of a document referred to under paragraph (a) is taken to have agreed to service of the document by electronic means if the recipient has supplied an email address or telephone number for the purposes of receiving service of the document as specified under paragraph (b); and
- (d) despite any of the provisions specified in Schedule 2 to this notice, the physical action required, by virtue of those provisions, in making, taking or receiving, swearing, signing or witnessing the signing of an affidavit, declaration or other document, may be taken to be completed by the electronic means referred to in paragraph (e); and
- (e) the electronic means by which an action referred to in paragraph (d) may be taken is specified to be an audio-visual link, provided that the person, before whom the action is taken, complies with all of the following conditions:
  - (i) the person observes, in real time, the action being taken;
  - (ii) the person satisfies himself or herself that the document in relation to which the action is taken in accordance with subparagraph (i) is the same document, or a copy of the document, to which the person is to apply his or her signature in accordance with subparagraph (iii);

- (iii) the person attests to the observation made under subparagraph (ii) by signing the document, or a copy of the document and endorsing the document, or the copy of the document, with a statement specifying that the document was sworn, made or signed, respectively, and witnessed, in accordance with this notice.

Dated:.....

Signed:.....

Premier



## **SCHEDULE 1**

1. Section 65 of the *Children, Young Persons and Their Families Act 1997* in respect of sections 22(8), 26(4) and 50 of that Act
  2. Section 10B(6)(b) of the *Community Protection (Offender Reporting) Act 2005*
  3. Section 16(1) and (3) of the *Domestic Violence Orders (National Recognition) Act 2016*
  4. Sections 14(2) and 25(1)(b) of the *Family Violence Act 2004*
  5. Sections 106DA(12) and 106EA(b) of the *Justices Act 1959*
  6. Sections 35(3), 41(3), 42AH(2), 42AI(2), 42AU(2), 42AV(2), 57C(7), 57D(4) and 60(2) of the *Sentencing Act 1997*
  7. Sections 55(2), 56(2), 62(1), 67(2), 68(2), 76(2), 77(3), 93(2), 94(2), 99A(2) and 117(5) of the *Youth Justice Act 1997*
  8. Regulations 8(1) and 10(1)(b) of the *Bail Regulations 2014* in respect of section 20(a) of the *Bail Act 1994*
  9. Rules 6(2), (3), (5) and (10) and 9 (1) and (3) of the *Justices (Restraint Orders) Rules 2013*
  10. Rules 54N(1), 54O(b) and 54Q(1) and (2) of the *Justices Rules 2003*
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## **SCHEDULE 2**

1. Schedule 4 of the *Children, Young Persons and Their Families Act 1997* in respect of the making of an affidavit
2. Section 14 of the *Oaths Act 2001*
3. Section 18(3)(i) of the *Vehicle and Traffic Act 1999*
4. Regulation 10(2) of the *Bail Regulations 2014*
5. Rules 4 and 7 of the *Justices (Restraint Orders) Rules 2013*
6. Rules 38 and 54L(b) of the *Justices Rules 2003*
7. Rules 29 and 48 of the *Magistrates Court (Children's Division) Rules 2012*
8. Rule 43 of the *Magistrates Court (Civil Division) Rules 1998* in respect of the making of an affidavit in proof of service of a document, if that document is an application made under the *Residential Tenancy Act 1997*

**MINISTERIAL NOTICE - FACT SHEET**

***COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020***

The attached Ministerial Notice is issued pursuant to section 17 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (the COVID-19 Act) in relation to the Magistrates Court. The Premier has issued the Notice, being of the opinion it was necessary and desirable to do so due to the presence of emergency circumstances set out in section 5(2)(b) of the COVID-19 Act.

Approval of the emergency manager (the Director of Public Health) has been obtained in accordance with section 6 of the COVID-19 Act.

**Reason for Notice**

Section 17 of the COVID-19 Act allows the Premier to, by Notice, declare that, despite the provision of any relevant legislative instrument, any action that is required to be:

- (a) taken by means of physical action such as signature or personal service; or
- (b) to be evidenced in a document that is not an electronic document;

may be taken or evidenced by the electronic means specified in the notice, provided any relevant condition specified in the notice are complied with.

The Magistrates Court of Tasmania has implemented measures, such as working remotely from the court house, to reduce the potential risk of exposure to COVID-19. There is concern that the requirement to personally serve certain documents and the witnessing of documents by authorised people may increase the risk of exposure.

The Magistrates Court of Tasmania requested a Notice be issued under section 17 of the Covid-19 Act declaring that, in relation to the specified legislation:

- 1) Service of specific court documents can be carried out by electronic service; and
- 2) The witnessing of court documents, including affidavits, statutory declarations and prescribed forms can take place electronically subject to conditions.

The Notice will enable the Court to allow court processes to continue to be carried out in a way which reduces the risk of spread of COVID-19 in Tasmania.

A similar Notice issued by the Premier under section 17 of the Act took effect on its Gazettal on the 8 June 2020 and expired 12 months later in accordance with section 8 of the Act.

**Effect of Notice**

The Notice will allow:

- that any action required to be taken by means of a physical action such as service under the provisions outlined within the Notice, may be taken to be served by means of electronic communication, such as by email, subject to consent by the person who is being served; and
- the witnessing of a document required for the Magistrates Court, relevant to the provisions outlined within the Notice, to be carried out through an audio-visual link, provided the witness:
  - Observes the person signing the document sign in real time;
  - Is reasonably satisfied that the document the witness signs is the same document, or a copy of the document signed by the signatory; and
  - Attests to the observation by signing the document, or a copy of the document and endorsing the document, or copy, with a statement specifying that the document was sworn, made, signed and witnessed in accordance with this Notice.

The measures requested by the Magistrates Court are considered proportionate in the circumstances and provide adequate safeguards to protect the integrity of the legal processes to the greatest extent possible.

Department of Justice  
STRATEGIC LEGISLATION AND POLICY

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29 September 2021

Secretary  
Parliamentary Standing Committee on  
Subordinate Legislation  
Parliament House  
HOBART

By email: [subleg@parliament.tas.gov.au](mailto:subleg@parliament.tas.gov.au)

**COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 – Notice under section 20 – Magistrates Court**

Please find enclosed a copy of a notice issued by the Attorney-General pursuant to section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*.

The notice under section 20 was signed on 14 September 2021 and published in the Gazette on Wednesday 22 September 2021.

I enclose a fact sheet to provide further information on the notices and the Advice provided by the Office of Parliamentary Counsel (OPC).

Yours sincerely

Bruce Paterson  
Assistant Director  
**Strategic Legislation and Policy**

**Attachments –**

- Signed Notices
- Fact Sheet
- CPC Advice

TASMANIA

*COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*

**NOTICE UNDER SECTION 20**

I, ELISE NICOLE ARCHER, the Attorney-General, in pursuance of section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* ("the Act"), at the request of the Chief Magistrate, being of the opinion that the relevant emergency circumstances exist in relation to this notice and with the approval of the emergency manager, declare in relation to proceedings conducted by the Magistrates Court that, despite any of the provisions specified in Schedule 1 to this notice, any proceedings that are conducted by the court under those provisions may be held in the approved manner determined by the Chief Magistrate in accordance with section 20(2) of the Act.

Dated: 14 September 2021

Signed:  .....

Attorney-General

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## **SCHEDULE 1**

1. Section 56 of the *Coroners Act 1995*
  2. Section 31 of the *Family Violence Act 2004*
  3. Sections 37(1) and 106E of the *Justices Act 1959*
  4. Section 31AA of the *Magistrates Court (Civil Division) Act 1992*
  5. Sections 90(1) and 91(2) of the *Sentencing Act 1997*
-

## ADVICE OF CHIEF PARLIAMENTARY COUNSEL

**Notice under section 20 of the COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020**

I advise that this statutory rule –

- (a) appears to be within the powers conferred by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (b) does not appear, without clear and express authority being provided by any Act, to –
  - (i) have any retrospective effect; or
  - (ii) impose any tax, fee, fine, imprisonment or other penalty; or
  - (iii) sub-delegate powers delegated by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (c) appears to be within the general objectives of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (d) is expressed in as clear and unambiguous language as is reasonably possible.

Dated 2 September, 2021.



Robyn Webb  
**Chief Parliamentary Counsel**



**MINISTERIAL NOTICE - FACT SHEET**

***COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020***

The attached Ministerial Notice is issued pursuant to section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (the COVID-19 Act) in relation to the Magistrates Court. The Attorney-General has issued the Notice, being of the opinion it was necessary and desirable to do so due to the presence of emergency circumstances set out in section 5(2)(b) of the COVID-19 Act.

Approval of the emergency manager (the Director of Public Health) has been obtained in accordance with section 6 of the COVID-19 Act.

A similar notice took effect on Gazettal on the 17 April 2020 and expired 12 months later in accordance with section 8 of the COVID-19 Act. Some additional provisions relating to open court have been identified for this notice.

**Reason for Notice**

Section 20 of the COVID-19 Act allows the Attorney-General to, by Notice, authorise courts, tribunals and other entities to conduct proceedings in an 'approved manner', where requested by that court, tribunal or other entity, despite any legislative instrument to the contrary. Section 20(2)(a) provides that in this case the 'approved manner' means 'the manner determined from time to time by' the Chief Magistrate.

The Magistrates Court has implemented measures to reduce the potential risk of exposure to COVID-19 by persons being present at the court, consistent with current public health restrictions and directions. This includes, amongst other things, that court proceedings are now able to be conducted remotely, by way of telephone or audio visual link.

On 17 April 2020, the Magistrates Court was granted approval under section 20 of the Act to have hearings heard in an approved manner determined by the Chief Magistrate despite section 90(1) of the *Sentencing Act 1997* and section 37 of the *Justices Act 1959* requiring hearing and determining of matters in open and public court. This allowed court proceedings on these matters to continue remotely through use of telephone or audio-visual links. This notice expired 12 months after it took effect consistent with section 8 of the Act.

In response to the continuing COVID-19 situation, the Chief Magistrate, has requested in accordance with section 20(3)(a) of the COVID-19 Act, that a Notice be issued under section 20(1). The Notice provides for court proceedings to occur in an approved manner determined by the Chief Magistrate.

The Notice addresses the issue that alternative arrangements are potentially necessary or desirable in the emergency circumstances for the following provisions:

- Sections 90(1) and 91(2) of the *Sentencing Act 1997*, which provides that the sentence for an offence may be imposed in open court at any time and at any place in Tasmania;
- Section 31 of the *Family Violence Act 2004*, which provides that family violence order applications are to be heard and determined in open court;
- Section 106E of the *Justices Act 1959*, which provides that restraint order applications are to be heard and determined in open court;
- Section 56 of the *Coroners Act 1995*, which provides that inquests are to be conducted in open court; and
- Section 31AA of the *Magistrates Court (Civil Division) Act 1992*, which provides that proceedings in respect of a minor civil claim are to be heard in open court.

The principle objective of the Notice is to enable the Court to operate remotely and/or closed to public access to reduce the risk of spread of COVID-19 in Tasmania, but with regard to the principles of open justice. This is considered particularly important in the event of any future lockdown or restrictions on movement imposed in response to COVID-19.

The Chief Magistrate highlights in the letter, that wherever possible, access will continue to be given to the media to enter the virtual courtroom and listen to the proceedings as part of the audio-visual link.

### **Effect of Notice**

The Notice will enable the Magistrates Court to determine complaints and impose sentences remotely, in an approved manner determined from time to time by the Chief Magistrate. It is intended that this proceedings will, where necessary and appropriate, to be conducted by telephone or audio-visual link.

The measures requested by the Magistrates Court are considered proportionate in the circumstances and provide adequate safeguards to protect the integrity of the legal processes to the greatest extent possible.



## Joint Standing Committee Subordinate Legislation

29 October 2021

The Hon Elise Archer MP  
Attorney-General  
10<sup>th</sup> Floor  
15 Murray Street  
HOBART TAS 7000

Dear Attorney-General,

**Notice issued under section 20 of the  
*COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*  
(Magistrates Court - Proceedings)**

The Joint Standing Committee on Subordinate Legislation is currently considering the above Notice. At the Committee's meeting on 28 October 2021, the Committee resolved that I write seeking further information.

The Committee is interested to understand what information and data is available as to the use of 'remote sentencing' to date and whether there is a desire for 'remote sentencing' to become a permanent feature of the Magistrates Courts powers. The Committee would like to understand whether in a post-pandemic system how and under what circumstances remote sentencing may continue to be appropriate.

It would be appreciated if you would provide a response at your early convenience.

Yours sincerely,

A handwritten signature in black ink, reading 'Tania Rattray'.

TANIA RATTRAY MLC  
CHAIR

w. 03 6212 2320 m. 0488 060 687 e. [subleg@parliament.tas.gov.au](mailto:subleg@parliament.tas.gov.au)

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26 NOV 2021

Hon Tania Rattray MLC  
Chair  
Joint Standing Committee on Subordinate Legislation  
Parliament House  
HOBART TAS 7000

*Tania*

Dear Ms Rattray

### COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020

Thank you for your letter dated 29 October 2021 regarding the Notice issued under section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*. As the Committee would be aware, the COVID-19 pandemic created challenges for our justice system, including for the Magistrates Court. As Attorney-General and Minister for Justice, my Department and I have worked closely with the Chief Magistrate to ensure that Tasmanians continue to have access to justice.

You have asked for information as to the use of remote sentencing to date, and whether there is a desire for this to become a permanent feature of the Magistrates Court. This relates to the use of sentencing proceedings conducted by telephone or audio-visual link.

The Court advises that its data collection does not distinguish between sentencing that occurs in open court and sentencing by way of audio-visual link. However, overall data shows that sentencing rates fell during times of significant COVID restrictions, particularly the April to June 2020 quarter. This indicates the general logistical challenges of COVID-19 for the Court, and the preference as indicated by the Court's Practice Directions to defer non-urgent matters for sentence in open court, where possible.

The Chief Magistrate issued [Practice Direction 2 of 2020](#) (COVID-19 Variations to Practice Criminal and General Division), which commenced on 30 March 2020. This responded to the immediate issues presented by COVID-19 at that time. The main purpose of the Practice Direction was to re-list matters after 1 July 2020 unless they were urgent. This reflected the Court's view that the conduct of proceedings should, where possible, follow normal processes when circumstances permitted.

This was replaced by [Practice Direction 4 of 2020](#) (Resumption of Criminal and General Division Court Practices), which commenced on 29 June 2020. This Practice Direction allows appearances before the Court in person or by audio or audio-visual link at the direction of the particular Magistrate hearing the matter. This allows the hearing of contested matters in person where it is safe and consistent with Public Health guidelines.

During the three day Southern Tasmanian lockdown from 15 to 18 October 2021, a further Practice Direction reinstated many of the provisions from the first Practice Direction in relation to adjourning non-urgent matters.

Apart from sentencing, the temporary COVID-19 measures have enhanced and facilitated access to justice through the increased take-up of appearances by audio-visual link. However, the principle of the importance of sentencing proceedings being conducted in open court is a longstanding one.

Importantly, you may be aware that the Justice and Related Legislation (Miscellaneous Amendments) Bill 2021 recently passed in the House of Assembly. The Bill includes amendments to the *Evidence (Audio and Audio Visual Links) Act 1999*. This amendment would permanently allow for the Chief Justice and/or the Chief Magistrate to approve the use of audio or audio-visual links for any purpose they direct, extending the powers provided to them by the Notices issued under the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*. It is anticipated this Bill will be considered by the Legislative Council when Parliament resumes in March 2022.

The provision of judicial resources is also relevant to the Court's capacity to conduct sentencing proceedings expeditiously. Our appointment of an additional, permanent Magistrate in Hobart, Magistrate Jackie Hartnett, on 29 June 2020 has had a significant impact in reducing the adult criminal pending caseload, which pleasingly decreased by 15 per cent in 2020-21.

In addition, I recently announced Ms Marica Duvnjak as a Hobart-based Magistrate to replace Magistrate Glenn Hay (who recently retired) and I also called for expressions of interest for two further Magistrate positions in the North and the North-West of Tasmania. This will bring the total number of permanent Magistrates to 17, which is the most that the Court has ever had, and provide a balance of the number of Magistrates in the South and the North/North-West.

Thank you for writing to me about this important matter.

Yours sincerely



Hon Elise Archer MP  
**Attorney-General**  
**Minister for Justice**