STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE)

SCRUTINY REPORT 1

29 NOVEMBER 2012

COMMITTEE MEMBERSHIP

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ROLE OF 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.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety. when performing its legislative scrutiny role, shall:

(1) 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):

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

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

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

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

(2) 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;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and

(5) 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.

TABLE OF CONTENTS

BILLS

BILLS—NO COMMENT

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

GAMING MACHINE AMENDMENT BILL 2012

This is a bill to amend the *Gaming Machine Act 2004* to correct an error arising from an incorrect reference to a section of the Act in an amending bill.

ROAD TRANSPORT (THIRD-PARTY INSURANCE) AMENDMENT BILL 2012

This is a bill to amend the *Road Transport (Third-party Insurance) Amendment Act 2012* to resolve two minor issues arising out of the Legislative Assembly debate of the Road Transport (Third-Party Insurance) Amendment Act 2012. This Bill is necessary to allow the amending Act to come into full force upon its 1 January 2013 commencement.

BILL—COMMENT

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

HEALTH (NATIONAL HEALTH FUNDING POOL AND ADMINISTRATION) BILL 2012 (NO. 2)

This is a Bill for an Act to give effect to the funding arrangements set out in the National Health Reform Agreement (NHRA) as agreed to by the Council of Australian Governments (COAG) in August 2011.

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

In *Scrutiny Report No 54* of the *7th Assembly* (6 August 2012) the Committee considered a bill in very similar terms to this Bill, and drew attention to two matters:

(1) the omission to provide for natural justice (or procedural fairness) in relation to the the suspending and ending of the appointment of the administrator of the national health funding pool (see clauses 9 and 10 of the Bill); and

(2) the limitation on the presumption of innocence (HRA subsection 22(2)) and the right to reputation (HRA section 12) that arises where a suspension may be based merely on the fact that the administrator has been accused of an offence (see paragraph 9(2)(c)) of the Bill.

The Committee notes that the Minister responded to the Committee's report in a letter of 13 August 2012 (appended to *Scrutiny Report No 55* of the *7th Assembly* (20 August 2012) http://www.parliament.act.gov.au/downloads/reports/7scrutiny55.pdf).

The Committee draws these matters to the attention of the Assembly.

Does a clause of the Bill inappropriately delegate legislative powers? Committee term of reference (3)(d)

Clause 39 of the Bill makes provision for transitional regulations in a form commonly found in Territory statutes. In the last Assembly, (for example, in *Scrutiny Report No 40* of the *7th Assembly* (11 August 2011), concerning the Law Officers Bill 2011), the Committee noted (a) that there should in every case be a justification offered for provision for the Executive to modify a statute by regulation, and (b) that a provision that such a regulation "has effect despite anything elsewhere in this Act or another territory law" (as found in subclause 39(2) of this Bill) was misleading in that a regulation could not have this effect.

The Committee draws these matters to the attention of the Assembly.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2012-191 being the Cultural Facilities Corporation (Governing Board) Appointment 2012 (No. 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **appoints specified persons as members of the Cultural Facilities Corporation governing board.**

Disallowable Instrument DI2012-192 being the Food (Nutritional Information Displays) Exemption 2012 (No. 1) made under section 114 of the *Food Act 2001* **exempts specified businesses from displaying nutritional information about their standard food items.**

Disallowable Instrument DI2012-193 being the Planning and Development (Tidbinbilla) Plan of Management 2012 made under section 330 of the *Planning and Development Act 2007* **approves the Tidbinbilla Plan of Management 2012.**

Disallowable Instrument DI2012-194 being the Legal Aid (Commissioner—Law Society Nominee) Appointment 2012 made under subsection 16(2) of the *Legal Aid Act 1977* **appoints a specified person, a nominee of the Council of the ACT Law Society, as a part-time member of the Legal Aid Commission.**

Disallowable Instrument DI2012-195 being the Public Place Names (Canberra Central and Gungahlin Districts) Amendment Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends the notice published in Commonwealth Gazette No. 74, which extended Northbourne Avenue in a north-easterly direction from Dunsmore Street, Lyneham to Stirling Avenue, Watson.**

Disallowable Instrument DI2012-196 being the Public Place Names (Ngunnawal) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a road in the Division of Ngunnawal, District of Gungahlin.**

Disallowable Instrument DI2012-197 being the Betting (ACTTAB Limited) Rules of Betting Determination 2012 (No. 3) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2012-44 and determines the Rules of Betting.**

Disallowable Instrument DI2012-198 being the Education (Government Schools Education Council) Appointment 2012 (No. 2) made under section 57 of the *Education Act 2004* **appoints a specified person as a community member of the Government Schools Education Council.**

Disallowable Instrument DI2012-199 being the Education (Government Schools Education Council) Appointment 2012 (No. 3) made under section 57 of the *Education Act 2004* **appoints a specified person as a community member of the Government Schools Education Council.**

Disallowable Instrument DI2012-200 being the Education (Non-Government Schools Education Council) Appointment 2012 (No. 2) made under section 109 of the *Education Act 2004* **appoints a specified person as an education member of the Non-government Schools Education Council, representing the NSW/ACT Independent Education Union.**

Disallowable Instrument DI2012-201 being the Education (Non-Government Schools Education Council) Appointment 2012 (No. 3) made under section 109 of the *Education Act 2004* **appoints a specified person as a community member of the Non-government Schools Education Council.**

Disallowable Instrument DI2012-202 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2012 (No. 1) made under section 20 of the *Remuneration Tribunal Act 1995* **determines fees and allowances for members of the Remuneration Tribunal.**

Disallowable Instrument DI2012-203 being the Health (Local Hospital Network Council—Member) Appointment 2012 (No. 1) made under section 16 of the *Health Act 1993* **appoints a specified person, with health management experience, as a member of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-204 being the Health (Local Hospital Network Council—Member) Appointment 2012 (No. 2) made under section 16 of the *Health Act 1993* **appoints a specified person, with consumer of health services experience, as a member of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-205 being the Health (Local Hospital Network Council—Member) Appointment 2012 (No. 3) made under section 16 of the *Health Act 1993* **appoints a specified person, with expertise in clinical matters, as a member of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-206 being the Health (Local Hospital Network Council—Deputy Chair) Appointment 2012 (No. 1) made under section 18 of the *Health Act 1993* **appoints a specified person as deputy chair of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-207 being the Health (Local Hospital Network Council—Acting Chair) Appointment 2012 (No. 1) made under section 18 of the *Health Act 1993* **appoints a specified person as acting chair of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-208 being the Financial Management (Credit Facility) Approval 2012 (No. 1) made under subsection 59(5) of the *Financial Management Act 1996* **approves a credit facility for the University of Canberra from the Territory banking account.**

Disallowable Instrument DI2012-209 being the Health Professionals (Veterinary Surgeons Board) Appointment 2012 (No. 1) made under the *Health Professionals Act 2004* **and section 10 of the** ***Health Professionals Regulations 2004*** **appoints a specified person, a registered veterinary surgeon in the ACT, to be a member of the ACT Veterinary Surgeons Board.**

Disallowable Instrument DI2012-210 being the Public Health (Community Pharmacy) Risk Activity Declaration 2012 (No. 1) made under section 18 of the *Public Health Act 1997* **declares the operation of a community pharmacy to be a licensable public health risk activity under the Act.**

Disallowable Instrument DI2012-211 being the Public Health (Community Pharmacy) Code of Practice 2012 (No. 1) made under section 133 of the *Public Health Act 1997* **determines the Community Pharmacy Code of Practice 2012 to be a code of practice under the Act.**

Disallowable Instrument DI2012-212 being the Public Health (Fees) Determination 2012 (No. 1) made under section 137 of the *Public Health Act 1997* **revokes DI2011-242 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-213 being the Road Transport (General) Application of Road Transport Legislation Declaration 2012 (No. 4) made under section 13 of the *Road Transport (General) Act 1999* **declares that certain provisions of the road transport legislation do not apply to the drivers of rally vehicles attending and participating in the launch of the National Capital Rally.**

Disallowable Instrument DI2012-214 being the Public Trustee (Investment Board) Appointment 2012 (No. 1) made under section 48 of the *Public Trustee Act 1985* **appoints a specified person as a member of the Public Trustee Investment Board.**

Disallowable Instrument DI2012-215 being the Attorney General (Fees) Amendment Determination 2012 (No. 4) made under section 27 of the *Civil Unions Act 2012* **amends DI2012-110 by substituting references to Civil Partnerships Act 2008 with Civil Unions Act 2012 and amending Schedule 2.**

Disallowable Instrument DI2012-216 being the Civil Law (Wrongs) Professional Standards Council Appointment 2012 (No. 6) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints specified persons as a member of the Professional Standards Council, representing Tasmania, and as deputy to the member.**

Disallowable Instrument DI2012-217 being the Emergencies (Bushfire Council Members) Appointment 2012 (No. 1) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2012-218 being the Emergencies (Bushfire Council Members) Appointment 2012 (No. 2) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2012-219 being the Emergencies (Bushfire Council Members) Appointment 2012 (No. 3) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2012-220 being the Taxation Administration (Amounts Payable—Duty) Determination 2012 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-95 and determines the amount of duty payable under various provisions of the Duties Act 1999.**

Disallowable Instrument DI2012-221 being the Board of Senior Secondary Studies Appointment 2012 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the ACT and Region Chamber of Commerce and Industry as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2012-222 being the Board of Senior Secondary Studies Appointment 2012 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the University of Canberra as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2012-223 being the Board of Senior Secondary Studies Appointment 2012 (No. 3) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the Australian National University as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2012-224 being the Board of Senior Secondary Studies Appointment 2012 (No. 4) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the ACT Council of Parents and Citizens Associations as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2012-225 being the Board of Senior Secondary Studies Appointment 2012 (No. 5) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the Catholic Education Commission as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2012-226 being the Education (Government Schools Education Council) Appointment 2012 (No. 4) made under section 57 of the *Education Act 2004* appoints a specified person as a community member of the Government Schools Education Council.

Disallowable Instrument DI2012-227 being the Canberra Institute of Technology (Advisory Council) Appointment 2012 (No. 2) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person, representing the interests of industry and commerce, as a member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2012-228 being the Canberra Institute of Technology (Advisory Council) Appointment 2012 (No. 3) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, with experience and knowledge relevant to the functions of the Council.**

Disallowable Instrument DI2012-229 being the Canberra Institute of Technology (Advisory Council) Appointment 2012 (No. 4) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person, representing the student body, as a member of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2012-230 being the Gambling and Racing Control (Governing Board) Appointment 2012 (No. 4) made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person as a member and chair of the ACT Gambling and Racing Commission governing board.**

Disallowable Instrument DI2012-231 being the Exhibition Park Corporation (Governing Board) Appointment 2012 (No. 3) made under section 8 of the *Exhibition Park Corporation Act 1976* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person as deputy chair of the governing board of the Exhibition Park Corporation.**

Disallowable Instrument DI2012-233 being the Long Service Leave (Portable Schemes) Security Industry Levy Determination 2012 made under section 51 of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by employers in the security industry for each quarter.**

Disallowable Instrument DI2012-234 being the Health (Local Hospital Network Council—Member) Appointment 2012 (No. 4) made under section 16 of the *Health Act 1993* **appoints a specified person, with financial management experience, as a member of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2012-235 being the Public Health (Fees) Determination 2012 (No. 2) made under section 137 of the *Public Health Act 1997* **revokes DI2012-212 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-236 being the Cultural Facilities Corporation (Governing Board) Appointment 2012 (No. 3) made under sections 9 and 10 of the *Cultural Facilities Corporation Act 1997* **and section 79 of the** *Financial Management Act 1996* **revokes DI2011-17 and appoints a specified person as deputy chair of the Cultural Facilities Corporation governing board.**

Disallowable Instrument DI2012-237 being the Dangerous Substances (Code of Practice for the Management and Control of Asbestos in Workplaces) Approval 2012 made under section 219 of the *Dangerous Substances Act 2004* **approves the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC: 2018 (2005)].**

Disallowable Instrument DI2012-239 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2012 (No. 1) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-261 and determines the rules for sports bookmaking for record keeping and audit requirements.**

Disallowable Instrument DI2012-241 being the Public Place Names (Casey) Determination 2012 (No. 4) made under section 3 of the *Public Place Names Act 1989* **amends DI2012-47 by reassigning a road name and determines the names of eight roads in the Division of Casey.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Minor drafting issues

Disallowable Instrument DI2012-110 being the Attorney General (Fees) Determination 2012 made under the *Agents Act 2003, Associations Incorporation Act 1991, Births, Deaths and Marriages Registration Act 1997, Business Names Registration (Transition to Commonwealth) Act 2012, Civil Law (Wrongs) Act 2002, Civil Partnerships Act 2008, Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, Cooperatives Act 2002, Court Procedures Act 2004, Dangerous Substances Act 2004, Emergencies Act 2004, Fair Trading (Motor Vehicle Repair Industry) Act 2010, Firearms Act 1996, Freedom of Information Act 1989, Guardianship and Management of Property Act 1991, Hawkers Act 2003, Land Titles Act 1925, Liquor Act 2010, Machinery Act 1949, Partnership Act 1963, Pawnbrokers Act 1902, Prostitution Act 1992, Public Trustee Act 1985, Registration of Deeds Act 1957, Sale of Motor Vehicles Act 1977, Scaffolding and Lifts Act 1912, Second-hand Dealers Act 1906, Security Industry Act 2003, Unit Titles (Management) Act 2011, Workers Compensation Act 1951, Work Health and Safety Act 2011* **revokes DI2011-115 and determines fees payable for the purposes of the Acts.**

The Committee notes the following typographical errors (and possible typographical errors) in this instrument:

- Schedule 2, item 49 - "license" should be "licen**c**e";
- Schedule 2, item 54 - "license" should be "licen**c**e";
- Schedule 2, subitem 318.1, note - "Consumer fireworks licenses" should be "Consumer fireworks licen**c**es";
- Schedule 2, item 231 - "sub-licene" should be "sub-licen**c**e";
- Schedule 2, item 231 - "Employee Temporary Visitor Licene" should be "Employee Temporary Visitor Licen**c**e";
- Schedule 2, subitem 238.2, explanatory note - "existing licencees" should be "existing licen**s**ees";
- Schedule 2, item 267 - should "Drager Acute Pack 2000" refer to the "Draeger" or "Dräger" Acute Pack?

This comment does not require a response from the Minister.

No Explanatory Statement

Disallowable Instrument DI2012-126 being the Attorney General (Fees) Amendment Determination 2012 (No. 3) made under section 13 of the *Court Procedures Act 2004* **amends DI2012-110 by inserting a new clause 3A.**

This instrument amends the Attorney General (Fees) Determination 2012 (DI2012-110), which the Committee has commented on above. The earlier instrument is dated 5 June 2012. This instrument is dated 20 June 2012. Given that the earlier instrument is being amended so soon after being made, the Committee would generally prefer to see an explanation as to why this has been necessary. No explanation is provided in this case, not the least because a policy has been adopted in relation to Attorney-General's fees determinations that explanatory notes are provided in the body of the instrument rather than as a separate Explanatory Statement.

The Committee has consistently noted that, while there is no formal requirement to provide an Explanatory Statement with a piece of subordinate legislation, it is preferable - for the Legislative Assembly and the Committee - if an Explanatory Statement is provided. Apart from anything else, an Explanatory Statement can provide the Committee with information and assurances that it must otherwise seek from the relevant Minister. To date, the Committee has, with a certain amount of reluctance, accepted the approach adopted in relation to Attorney-General's fees determinations. However, this case provides an example of where the "no Explanatory Statement" approach is unhelpful, to the Committee, at least.

The Committee seeks the Attorney-General's advice as to why it has been necessary to amend the Attorney General (Fees) Determination 2012 so soon after it was made.

Adequacy of explanatory material

Disallowable Instrument DI2012-232 being the Long Service Leave (Portable Schemes) Security Work Declaration 2012 made under section 11 of the *Long Service Leave (Portable Schemes) Act 2009* **declares that work carried out in the ACT in the security industry for the period 23 November to 31 December 2012 is not work in the security industry for the purpose of the Act.**

This instrument declares that work carried out in the ACT, in the security industry, is not work in the security industry, for the purposes of the *Long Service Leave (Portable Schemes) Act 2009*, for the period 23 November 2012 to 31 December 2012. The instrument is made under section 11 of the Long Service Leave (Portable Schemes) Act, which provides:

11 Declarations by Minister—coverage of Act

(1) The Minister may declare, for this Act—

(a) a person to be an employer for a covered industry; or

(b) an individual to be a contractor for a covered industry; or

(c) an individual to be an employee, or an employee of a stated employer, for a covered industry; or

(d) work, or an activity, to be work in a covered industry.

(2) The Minister may also declare, for this Act—

(a) a person not to be an employer for a covered industry; or

(b) an individual not to be a contractor for a covered industry; or

(c) an individual not to be an employee, or an employee of a stated employer, for a covered industry; or

(d) work, or an activity, not to be work in a covered industry.

(3) An individual declared to be an employee of a stated employer is taken to be employed by the employer.

(4) A declaration is a disallowable instrument.

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

The Explanatory Statement for the instrument states:

> The *Long Service Leave (Portable Schemes) Act 2009* establishes the portable long service leave scheme for workers in a covered industry, namely, building and construction, security, contract cleaning and the community sector.
>
> Under section 11 (2) (d) of the Act the Minister may declare that work, or an activity, not to be work in a covered industry.
>
> This Disallowable Instrument relates to the security industry and declares that work in the security industry is not work in the security industry for the purpose of this Act between 23 November 2012 and 31 December 2012.
>
> The instrument takes effect from the day after notification.

No explanation is provided as to *why* work in the security industry, in the period stated, is *not* work in the security industry, for the purposes of the Long Service Leave (Portable Schemes) Act. Taking work outside of the relevant Act, during the stated period, would presumably have a significant effect on those affected. That being so, the Committee considers that an explanation should be provided to the Legislative Assembly.

The Committee draws attention to this instrument, under principle (b) of the Committee's terms of reference, which requires the Committee to consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister's advice as to the reasons for this instrument being made and as to the effect on persons in the security industry.

Minor drafting issue

Disallowable Instrument DI2012-240 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2012 (No. 2) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2008-250 and determines the rules for sports bookmaking for methods of betting, including telecommunications equipment.**

The Committee notes there seems to be an inconsistent use of "Telecommunication Equipment" and "Telecommunication**s** Equipment" in the headings to clauses 2, 3 and 4 of this instrument.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2012-35 being the Road Transport (Alcohol and Drugs) Amendment Regulation 2012 (No. 1) made under section 51 of the *Road Transport (Alcohol and Drugs) Act 1977* **prescribes certain places and vehicles that may be used as sampling facilities for the purposes of the Act.**

Subordinate Law SL2012-41 being the Victims of Crime (Financial Assistance) Amendment Regulation 2012 (No. 1) made under the *Victims of Crime (Financial Assistance) Act 1983* **adjusts the cap on legal fees in line with the Wage Price Index.**

SUBORDINATE LAWS—COMMENT

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

Incorporation of material by reference

Subordinate Law SL2012-36 being the Food (Nutritional Information) Amendment Regulation 2012 (No. 1) made under section 152 of the *Food Act 2001* **amends the** *Food Regulation 2002* **concerning the way supermarkets may display kilojoule information.**

This subordinate law amends the Food Regulation 2002, to modify the way that (under the Regulation) supermarkets may display kilojoule information. The Explanatory Statement for the subordinate law states:

> The proposed changes will ensure consistency with the equivalent NSW legislation and will allow the laws to achieve their purpose.

The Committee notes that the subordinate law relies heavily on the contents of "the food standards code". For example, new section 15A, which is inserted by section 7 of this subordinate law, provides:

15A Prescribed requirements for working out nutritional information—Act, s 110 (3) (b) and s 111 (2) (a)

(1) The average energy content of a standard food item must be worked out in accordance with the food standards code, standard 1.2.8 making any necessary adjustment to ensure that the calculation is done in relation to the whole of the food item, rather than per 100g.

(2) The number of kilojoules worked out may be rounded to the nearest 10kJ.

The Explanatory Statement contains the following explanation in relation to the new section 15A:

Clause 7 inserts a new section 15A that prescribes the requirements for working out nutritional information to be displayed. This information was previously found at section 14 (2) and (3).

Subsection (1) provides the requirements for working out the average energy content of a standard food item, which are found at Division 1, clauses 1 and 2 of Standard 1.2.8 - *Nutrition Information Requirements* of the Food Standards Code (the Code). The Code can be found at the Food Standards Australia New Zealand website http://www.foodstandards.gov.au/foodstandards/foodstandardscode.cfm . Standard 1.2.8 sets out nutrition information requirements in relation to food that is required to be labelled under the Code and prescribes when nutritional information must be provided, and the manner in which such information is provided.

Subsection (2) allows the number of kilojoules to be rounded to the nearest 10kJ to account for a margin of error and to simplify interpretation/calculation of kilojoule information.

This means that the operation of section 15A relies on an external document - the food standards code - for its operation. This also means that those who need to work out what section 15A requires of them must consult that external document in order to work out what is required.

The Dictionary to the *Food Act 2001* defines "food standards code" as follows:

food standards code means the Australia New Zealand Food Standards Code as defined in the Commonwealth Act, section 3 (1), as that code is applied, adopted or incorporated under the regulations.

Subsection 152(3) of the Food Act is the regulation-making power for that Act. It provides:

(3) A regulation may—

(a) apply, adopt or incorporate the food standards code (but only in whole) without change and as in force from time to time; and

(b) apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

Section 7 of the Food Regulation provides:

7 Food standards code—incorporation

The food standards code, as in force from time to time, is incorporated in this regulation.

Under paragraph 19(1)(e) of the Legislation Act, notifiable instruments must be published on the ACT Legislation Register.

The Committee can find no evidence of subsections 47(5) or (6) being disapplied in relation to the food standards code. However, the Committee cannot find the food standards code in the "notifiable instruments" part of the ACT Legislation Register.

The Committee seeks the Minister's advice in relation to the status of the food standards code as a notifiable instrument and, assuming that it is a notifiable instrument, the Minister's advice as to where, on the ACT Legislation Register, the food standards code can be found.

Strict liability offences

Subordinate Law SL2012-37 being the Road Transport (Public Passenger Services) Amendment Regulation 2012 (No. 2) made under the *Road Transport (Public Passenger Services) Act 2001* **and** *Road Transport (General) Act 1999* **establishes a Wheelchair-Accessible Taxi Centralised Booking Service.**

The Committee notes that this subordinate law provides for numerous strict liability offences. In its publication titled "Subordinate Legislation—Technical and Stylistic Standards: Tips/Traps" (available at http://www.parliament.act.gov.au/downloads/committee-business/Subordinate-legislation-stylistic-standards-updated.pdf), the Committee stated:

> As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the Explanatory Statement for a subordinate law that involves strict or absolute liability expressly identify:
>
> - the reasons a particular offence needs to be one of strict liability; and
> - the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes that the Explanatory Statement for this subordinate law states:

> New section 74 provides that an accredited taxi network provider's taxi booking service commits an offence if it fails, without delay, to direct a WAT [wheelchair-accessible taxi] booking request to a WCBS [Wheelchair-Accessible Taxi Centralised Booking Service] operating in the Territory. The offence is one of strict liability.

Strict liability is applied to the offence in section 74 and other offences relating to the delivery of WAT services. While strict liability offences are seen as a limitation of the right in section 22 (1) of the *Human Rights Act 2004* (the HRA) relating to the presumption of innocence, it is recognised that this right may be subject to reasonable limitations for the purposes of section 28 of that Act. Strict liability has traditionally been an element of offences (whether created before or after the enactment of the HRA) that are part of regulatory or occupational licensing schemes, where the offence concerned involves a failure to comply with a statutory duty or a licensing condition, or a failure to undertake some action that is necessary to achieve a public benefit or protect public safety.

In the context of the strict liability offences relating to the WCBS scheme, the use of strict liability offence is considered to be a reasonable limitation of the right in section 22 (1) of the HRA, for the purpose of section 28 of the HRA, because of the public importance in ensuring that people with a disability who rely on WAT vehicles as their principle transport mode have access to a safe, reliable, efficient taxi service.

There are defences available in relation to strict liability offences, which include (but are not limited to) the defences of mistake of fact and intervening conduct or event.

The Committee draws this explanation to the attention of the Legislative Assembly.

This comment does not require a response from the Minister.

Human rights issues

Subordinate Law SL2012-39 being the Crimes (Child Sex Offenders) Amendment Regulation 2012 (No. 1) made under the *Crimes (Child Sex Offenders) Act 2005* **amends the Crimes (Child Sex Offenders) Regulation to support the operation of the child sex offender monitoring scheme and the prohibition order scheme.**

This subordinate law amends the *Crimes (Child Sex Offenders) Regulation 2005*, making amendments in relation to the provision of information, under the legislation. The Explanatory Statement contains the following statements in relation to human rights issues raised by the subordinate law:

Human Rights Considerations

Amendments to reporting details for registrable offenders engage and support the right to liberty and security of the person (section 18, *Human Rights Act 2004*). It does this by providing clear guidance on how registrable offenders are to report to police including reporting personal and travel details.

Clause 7 engages and limits the right to privacy and reputation (section 12 *Human Rights Act 2004*). The human rights analysis for this provision appears under the summary of clause 7 below.

The Explanatory Statement goes on to state:

Clause 7- Section 16A (1) (o) - this clause inserts section 16A (1) (o). This amendment to the regulation is made under section 118 of the *Crimes (Child Sex Offenders) Act 2005* (Access to child sex offenders register restricted). The section will include the Commissioner for Fair Trading exercising functions under the *Working with Vulnerable People (Background Checking) Act 2011* as an entity that is prescribed to receive personal information on the child sex offenders register under section 118 (1) (b) (i) of the *Crimes (Child Sex Offenders) Act 2005*.

Human Rights Considerations

The nature of the right affected (section 28 (2) (a))

Section 12 of the *Human Rights Act 2004* provides:
everyone has the right-

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
(b) not to have his or her reputation unlawfully attacked.

As noted in the explanatory statement for the *Crimes (Child Sex Offenders) Amendment Act 2012*, the right to privacy and reputation has been described as protecting a broad range of personal interests that include physical or bodily integrity, personal identity and lifestyle (including sexuality and sexual orientation), reputation, family life, the home and home environment and correspondence (which encompasses all forms of communication).

General comment 16 from the Office of the High Commissioner for Human Rights describes this right as the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence as well as unlawful attacks against a person's honour and reputation. The comment notes that the term 'unlawful' means that no interference can take place except in cases envisaged by the law.

The term 'arbitrary interference' is described by General comment 16 as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided that the interference is provided by law and is reasonable in the circumstances.

The importance of the purpose of the limitation (section 28 (2) (b))
The purpose of this provision is to allow the Chief Police Officer to disclose information on the child sex offenders register to the Commissioner for Fair Trading for the purposes of assessing the registered offender's suitability for registration under the *Working with Vulnerable People (Background Checking) Act 2011*.

Nature and extent of the limitation (section 28 (2) (c))
This amendment will limit a registrable offender's right to privacy because it will allow the CPO to disclose information on the child sex offenders register, including the existence of a prohibition order and the contents of the prohibition order, to the Commissioner for Fair Trading.

Relationship between the limitation and its purpose (section 28 (2) (d))
The purpose of this amendment is to ensure that the Commissioner for Fair Trading considers the existence of a prohibition order or other relevant information on the child sex offenders register when assessing an application of a registered offender for registration under the *Working with Vulnerable People (Background Checking) Act 2011*.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))
This provision will ensure that the Commissioner for Fair Trading is provided with information that is critical for an assessment of a registered offender under the *Working with Vulnerable People (Background Checking) Act 2011*. There is no less restrictive means of achieving this purpose. [footnotes omitted]

The Committee draws this explanation to the attention of the Legislative Assembly.

This comment does not require a response from the Minister.

Retrospectivity—Positive comment

Subordinate Law SL2012-40 being the Planning and Development Amendment Regulation 2012 (No. 4) made under the *Planning and Development Act 2007* **prescribes new amounts for prescribed figure "A" used in the formula for the calculation of an extension fee.**

The Committee notes that this subordinate law has retrospective effect, in that, while it was notified on 13 September 2012, the new fees provided for by the subordinate law apply to applications for extension of time to commence or complete works required under a lease in respect to extensions of time from 22 June 2012. The Committee notes that the following explanation is provided, in the Explanatory Statement for the subordinate law:

> **Retrospective effect**
>
> The amending regulation does have retrospective effect. The new fees apply to applications for extension of time to commence or complete works required under a lease in respect to extensions of time from 22 June 2012 onwards. This retrospective effect does not affect the validity of the regulation because the provision is not a prejudicial provision and as such is permitted under section 76 of the Legislation Act. This is because the new fees are lower than the existing fees and as such the new fees do not operate to the disadvantage of any member of the public as they do not adversely affect anyone's rights and do not impose any new liabilities.

The Committee notes with approval that the retrospectivity issue has been dealt with in the Explanatory Statement and notes, in particular, that there is no issue with section 76 of the *Legislation Act 2001*.

This comment does not require a response from the Minister.

Removal of exemption of certain developments from the Development Application process

Subordinate Law SL2012-42 being the Planning and Development Amendment Regulation 2012 (No. 5), including a regulatory impact statement, made under the *Planning and Development Act 2007* **amends the Planning and Development Regulation by inserting a new subsection 1.110(1A) which ensures that rebuilds of buildings damaged by fire or other event in industrial areas will require application for development approval.**

This subordinate law amends the *Planning and Development Regulation 2008*, by inserting a new subsection 1.110 (1A) into Schedule 1 to that regulation. Prior to the amendment, the effect of section 1.110 was to allow the rebuilding of any building or structure that was damaged in an act or event (ie natural disaster) without the need for a Development Approval. As is helpfully explained in the Explanatory Statement for this subordinate law:

> Development, as defined under section 7 of the [Planning and Development] Act, requires a development approval from the planning and land authority unless exempt under schedule 1 of the Regulation. A development approval is obtained by lodging a development application to the planning and land authority. Under Part 7.2 of the Act development applications are split up into three different assessment tracks: Code, Merit and Impact. The majority of applications fall into the Merit track and are assessed primarily against the provisions of sections 119 to 122 of the Act and *Territory Plan 2008*.

> A development application requires: plans to be submitted to the planning and land authority, public notification of the application (under s152 of the Act) and referrals and comments from relevant agencies (under s148). In some instances, decisions on merit track applications are subject to third party ACAT [ACT Civil and Administrative Tribunal] review. A merit track development application must be decided within 30 to 45 working days from lodgement and fees must be paid. The planning and land authority must undertake an assessment of an application prior to making a decision on an application.
>
> A decision under section 162 of the Act may be either approved (in which it is deemed not inconsistent with planning policy and legislation), approved with conditions (in which it is deemed not inconsistent with planning policy and legislation subject to the conditions being satisfied) or refused (deemed inconsistent with the planning policy and legislation).
>
> The assessment of a development application must be made against the requirements of the Territory Plan, the Act and Regulation. In particular, the decisionmaker must take into consideration section 120 of the Act which includes considerations regarding the environmental impact of the development under section 120(f).
>
> Under section 121 of the Act, all development applications in the merit track must be notified to the public in accordance with division 7.3.4 of the Act. Comments received during the prescribed notification period are taken into consideration by the decision maker prior to a decision being made.
>
> In some cases, development applications must be referred to relevant agencies for comment. Under section 120(d) of the Act, the planning and land authority must consider these comments when making a decision on a development application.
>
> Decisions to grant approval are subject to third party ACAT merit review under chapter 13 of the Act unless exempted by regulation (Schedule 1 of the Act). Third party ACAT review gives rights of appeal to members of the public who have made a representation during the notification period.

Clearly, the requirements of the Development Approval process are quite onerous. Exemption from them is, therefore, an advantage. The new subsection 1.110 (1A) removes the exemption in relation to the following zones identified in the Territory Plan:

(a) IZ1 General Industrial Zone;

(b) IZ2 Mixed Use Industrial Zone; and

(c) Harman Industrial Area, in NUZ1 Non Urban Zone 1 Broadacre Zone (as indicated in the map included in the new provision).

This means that the section 1.110 exemption does not apply to rebuilding a damaged building or structure in an industrial area.

The taking away of that exemption has an impact on (arguably) existing "rights", within the Committee's terms of reference. This issue is dealt with at length in the Explanatory Statement for the subordinate law, which states:

Possible impacts on existing rights

The numbers likely to be impacted on by this change are relatively few. While relevant approvals and records do not explicitly capture instances of DA [Development Application] exempt rebuilds, indirect, approximate measures are as follows. In the period 1 July 2008 to 17 February 2012 in industrial areas there were 13 projects subject to building approval that had a demolition or removal component. This suggests there were 13 or fewer projects in this period that involved rebuilds, as rebuilds will typically be associated with or follow on from demolition or removal. Of these 13 projects ten involved development approvals for new building work, ie building work that was not DA exempt because it involved more than the rebuilding of the original structure. This suggests that of these 13 projects from 2008 to 2012 only the remaining three projects were possibly associated with or might be associated with in future DA exempt rebuilds. This number is small compared to the total number of development approvals (326) and building approvals (1684) in industrial areas for the same period. The numbers in this analysis are approximate only, given that they rely on manually recorded information and free text descriptions supplied from a large number of people over a considerable period.

While the amending regulation is an added requirement for lessees seeking to rebuild damaged buildings in industrial areas, it is not one that unduly trespasses on existing rights. This is because the amending regulation:

a. does not of itself prevent the rebuilding of damaged buildings from proceeding it only requires that it be subject to the development assessment process;
b. is justified on the basis that rebuilds in industrial areas are significant developments which need to be assessed through the development application and approval process;
c. require development approval but will also permit the proponent to seek review of the development approval decision by internal reconsideration by the planning and land authority and/or application to ACAT for merit review;
d. does not impose an unusual or unprecedented process. On the contrary, it simply returns these rebuild development proposals to the default position of the existing law. The default position is that all development requires development approval subject to an exemption regulation; and
e. does not have retrospective effect. Any development that is commenced under the existing exemption provision in s1.110 of schedule 1 of the Regulation will be able to be completed without development approval (refer below).

The amending regulation also does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The amendment does the opposite, that is, it makes the rebuilds of damaged buildings in an industrial area subject to a development assessment decision which decision is subject to review by the planning and land authority through internal reconsideration and, subject to exemptions in the Regulation, by application to ACAT for merit review. Subject to exemptions in the Regulation, ACAT merit review is available for both the proponent and third parties.

The amending regulation does not contain matter that might be considered to be more properly dealt with in an Act. The ability to make and amend regulations exempting development proposals from the need to obtain development approval is explicitly provided for in the Act. As noted above this amendment returns the rebuild development proposals to the default position of the Act which is that all development requires development approval.

> The amending regulation will not have retrospective effect. Any development commenced under the existing exemption provision in s1.110 of schedule 1 of the Regulation prior to this amendment will remain exempt from development approval and so will be able to be completed without the need to obtain development approval. This is the effect of section 203 of the Act. This position is also consistent with s76 of the Legislation Act that prohibits statutory instruments from having retrospective effect that would be to anyone's disadvantage.
>
> The amending regulation will not affect the operation of leases. Uses authorised by existing leases will remain authorised.

It is also important to note that the Explanatory Statement states that this subordinate law has the following objective:

> The objective is to address the following scenario. For example, the rebuild may be of a chemical warehouse facility that was acceptable at the time of original construction. The rebuild of the facility may possibly be no longer acceptable because of changes as a result of the passage of time. The facility may be contrary to the current Territory Plan because of the risks or perceived risks that such a facility presents to nearby residents. Nearby residents may be concerned that the facility may result in pollution or other impacts if the facility were to be damaged by an emergency event. Alternatively, the rebuild of the facility may be acceptable as consistent with the Territory Plan and other Government policies provided the rebuild met certain conditions.

On its face, this subordinate law takes away rights that previously existed, under the Planning and Development Regulation. As is explained in the Explanatory Statement, however, those rights were given (in 2009) by another subordinate law, that inserted section 1.110 into Schedule 1 to the Planning and Development Regulation. The question is whether this removal of those rights is an undue trespass on rights previously established by law, contrary to principle (a)(ii) of the Committee's terms of reference.

The Committee notes that the Explanatory Statement for this subordinate law sets out, in some detail, the justification for the removal of the exemption from the Development Approval process for the rebuilding of a damaged building or structure in an industrial area. It is a matter for the Legislative Assembly as to whether or not, in all the circumstances, this amounts to an undue trespass on rights previously established by law.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT

The Committee has examined the regulatory impact statement for the following subordinate law and offers these comments on it:

Subordinate Law SL2012-42 being the Planning and Development Amendment Regulation 2012 (No. 5)

Section 35 of the *Legislation Act 2001* sets out requirements for the content of regulatory impact statements. It provides:

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the ***proposed law***) must include the following information about the proposed law in clear and precise language:

(a) the authorising law;

(b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

(i) a brief explanation of the relationship with the other law; and

(ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs; and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

The Committee notes that the regulatory impact statement for this subordinate law acknowledges these requirements and then states:

The proposed amendment of the [Planning and Development regulation] is consistent with the above principles. In particular, the amendment:

(a) is in accord with the general objects of the Act under which it is made. The requirement that all rebuilds in industrial zones be subject to the development application and assessment process is consistent with the objects of the Act as stated in section 6 of the Act;

(b) does not unduly trespass on rights previously established by law. The amendment will require certain development proposals that can currently proceed without a development application to go through the development application and assessment process. While this is an added requirement for lessees seeking to rebuild damaged

buildings in industrial zones, it is not one that unduly trespasses on existing rights. This is because the amending regulation:

a. does not of itself prevent the rebuilding of damaged buildings from proceeding it only requires that it be subject to the development assessment process;

b. is justified on the basis that rebuilds in industrial areas are significant developments which need to be assessed through the development application and approval process;

c. require development approval but will also permit the proponent to seek review of the development approval decision by internal reconsideration by the planning and land authority and/or application to ACAT [ACT Civil and Administrative Tribunal] for merit review;

d. does not impose an unusual or unprecedented process. On the contrary, it simply returns these rebuild development proposals to the default position of the existing law. The default position is that all development requires development approval subject to an exemption regulation; and

e. does not have retrospective effect. Any development that is commenced under the existing exemption provision in s1.110 of schedule 1 of the Regulation will be able to be completed without development approval (refer below).

(c) does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The amendment does the opposite, that is, it makes the rebuilds of damaged buildings in an industrial zone subject to a development assessment decision. The decision is able to be reviewed by internal reconsideration by the planning and land authority and, subject to exemptions in the regulation, by ACAT in an application for merit review.

(d) does not contain matter that might be considered to be more properly dealt with in an Act. The ability to make and amend regulations exempting development proposals from the need to obtain development approval is explicitly provided for in the Act. As noted above this amendment returns the rebuild development proposals to the default position of the Act which is that all development requires development approval.

The Committee notes that the regulatory impact statement also addresses the other requirements of section 35 of the Legislation Act (albeit in a slightly confusing way - the paragraphing of the headings in the regulatory impact statement do not correspond with the relevant paragraphs of section 35).

The Committee makes no further comment on this regulatory impact statement.

This comment does not require a response from the Minister.

Jeremy Hanson, CSC, MLA
Chair

November 2012