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

SCRUTINY REPORT 3

25 FEBRUARY 2013

COMMITTEE MEMBERSHIP

Mr Jeremy Hanson CSC MLA (Chair)

Mr Mick Gentleman MLA (Deputy Chair)

Ms Yvette Berry MLA

Mrs Giulia Jones MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone	02 6205 0173
Facsimile	02 6205 3109
Post	GPO Box 1020, CANBERRA ACT 2601
Email	max.kiermaier@parliament.act.gov.au
Website	www.parliament.act.gov.au

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 the duties of a scrutiny of bills and subordinate legislation committee) 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*;

(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:

APPROPRIATION BILL 2012-2013 (NO. 2)

This is a Bill for an Act for the appropriation of additional monies for the 2012-2013 financial year.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to make minor amendments to a number of laws within the Justice and Community Safety portfolio that are consequential to the passage of the *Retirement Villages Act 2012*.

BILLS—COMMENT

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

GAMING MACHINE AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Gaming Machine Act 2004* to preclude the Gambling and Racing Commissioner from approving machines that have audio isolation devices.

Has there been a trespass on personal rights and liberties?

Report under section 38 of the *Human Rights Act 2004*

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

By subsection 69(1) of the *Gaming Machine Act 2004* (the Act), the Gambling and Racing Commission may approve a gaming machine and any peripheral equipment for the gaming machine. Clause 4 of the Bill proposes to insert a section (2A) into the Act in these terms:

> (2A) Also, the commission must not approve any of the following under subsection (1):
>
> (a) a gaming machine or peripheral equipment for a gaming machine that allows the use of an audio device if the use of the device is not designed or intended primarily to assist a person with a hearing impairment;
>
> (b) a gaming machine prescribed by regulation;
>
> (c) peripheral equipment for a gaming machine prescribed by regulation.

The Committee notes that while the Explanatory Statement states that the regulation making powers in paragraphs (b) and (c) are "to ensure that should new designs or other harmful attributes be added to machines or peripheral equipment in the future", the powers to be created by these paragraphs are not limited to dealing with "new designs or other harmful attributes". These powers might be used to preclude the commission from approving any kind of machine and any kind of peripheral equipment.

The issue for the Assembly is whether powers of this kind should be vested in the Executive, or, alternatively, whether it is appropriate that only the Assembly may make the kinds of laws stated in paragraphs (b) and (c).

Given that this is the first time the Committee has addressed this general issue, it is appropriate to re-state what the Committee said on an earlier occasion concerning this term of reference. In *Scrutiny Report 1* of the *7th Assembly*, concerning the Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008, the Committee said:

> This term of reference matches the term of reference applicable to scrutiny of subordinate laws. In the latter case, the issue for the Committee and the Assembly is whether the proposed law "contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly". This way of asking the question points to a yardstick by which the Assembly might assess whether a clause of a Bill empowering a person (usually a Minister) to make a subordinate law would, having regard to the subject matter of the law, inappropriately delegate legislative power to the repository of the power.
>
> The term of reference in relation to scrutiny of subordinate law is clearly based on the terms of reference stated in 1931 by the Senate in its resolution to establish the Senate Committee on Regulations and Ordinances. The thinking at that time in justification for this step – the force of which it might be argued has not diminished over time – was forcefully expressed by an English judge whose book had a considerable influence on the Senate. Lord Hewart, in The New Despotism, asserted that:
>
> > True, it is indeed the task of the Executive to govern the country. But it is the task of Parliament to make the laws, and the real business of the Executive is to govern the country in accordance with the laws which Parliament has made. Is it not precisely because it is the task of the Executive to govern the country that it is so dangerous to hand over to the Executive the power of making the laws as well, … .
>
> This may be seen as the constitutional justification for scrutiny of a clause that would empower a Minister to make subordinate law, but does not take one much further towards principles for assessing whether a particular delegation is inappropriate. Australian constitutional law provides little guidance. In some cases, the United States Supreme Court has taken as an appropriate yardstick the notion that the legislation should lay down "an intelligible principle to which the person or body authorized to [make the subordinate law] is directed to conform". Another way to put it is to adopt a distinction between a matter of substance – which is for the statute to regulate – and administrative detail to implement the substance – which might be the subject of a subordinate law.
>
> The Scrutiny Committee does not pick up every clause of a Bill that would authorise the making of subordinate law. It is clear that most such powers are designed to permit subordinate law to be the vehicle for enactment into law of administrative detail to implement the provisions of the statute. There will, however, be occasions on which the Committee will draw the attention of the Assembly to particular instances of a clause empowering the making of subordinate law with a view to raising the question of whether the particular delegation would be "inappropriate".
>
> Finally, it should be noted one response the Committee's raising this issue may be in terms that there is no ground for concern where the particular subordinate law may be disallowed by the Assembly. In response, the Committee has pointed out that until such time as the law is disallowed, the subordinate law will have legal effect; (unless special provision is made to the contrary – such as by requiring the Assembly to positively approve the subordinate law).

The Committee draws these matters to the attention of the Assembly and recommends that the proponent of the Bill respond.

A matter for clarification

The Committee notes that the Explanatory Statement addresses briefly the possibility that the change proposed might disadvantage persons with a hearing impairment. The Committee refers the Assembly to what is said concerning human rights matters.

Referring to the terms of paragraph (2A)(a), it notes that "there is an exemption for devices that are specifically designed for those with a hearing impairment". The terms of paragraph (a) are a bit wider, in that the commissioner is also not precluded from approving a machine or device designed "primarily" for such persons. It should also be noted that the commissioner is also not precluded from approving a machine or device that is "intended" primarily to assist such persons.

It appears that the commissioner is not obliged to consider whether such a machine or device will be used primarily (or at all) by those with a hearing impairment. It is enough that a machine or device is "designed or intended primarily to assist [such persons]". Is this result intended?

The Committee draws these matters to the attention of the Assembly and recommends that the proponent of the Bill respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2012-242 being the Road Transport (Safety and Traffic Management) Airservices Australia Emergency Worker Declaration 2012 made under paragraph 66(1)(g) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares that employees of Airservices Australia, who are members of the Aviation Rescue and Firefighting Services, are emergency workers for the purposes of the Regulation.**

Disallowable Instrument DI2012-243 being the Public Place Names (Amaroo) Determination 2012 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of six roads in the Division of Amaroo.**

Disallowable Instrument DI2012-244 being the Public Place Names (Casey) Determination 2012 (No. 5) made under section 3 of the *Public Place Names Act 1989* **determines the names of four new roads in the Division of Casey.**

Disallowable Instrument DI2012-245 being the Road Transport (General) Application of Road Transport Legislation Declaration 2012 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2012 Shannons Safari Rally.**

Disallowable Instrument DI2012-246 being the Road Transport (General) Withdrawal of Infringement Notices Guidelines 2012 (No. 1) made under subsection 38(1) of the *Road Transport (General) Act 1999* **repeals DI2001-243 and DI2011-33 and determines the guidelines that apply when considering applications for the withdrawal of an infringement notice issued under the road transport legislation.**

Disallowable Instrument DI2012-247 being the Betting (ACTTAB Limited) Rules of Betting Determination 2012 (No. 4) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* **revokes DI2012-197 and determines the Rules of Betting.**

Disallowable Instrument DI2012-249 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2011-311 and determines ACTTAB Limited sub-agencies as sports bookmaking venues.**

Disallowable Instrument DI2012-250 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-62 and approves two specific areas within Manuka Oval as sports bookmaking venues.**

Disallowable Instrument DI2012-251 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2006-52 and approves three specific locations within Canberra Stadium as sports bookmaking venues.**

Disallowable Instrument DI2012-252 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 5) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2001-271 and approves a specific area within the Canberra Harness Racing Club's premises at Exhibition Park in Canberra as a sports bookmaking venue.**

Disallowable Instrument DI2012-253 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2012 (No. 6) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **approves a specific area within the Canberra Greyhound Racing Club's premises at Narrabundah Lane, Symonston as a sports bookmaking venue.**

Disallowable Instrument DI2012-254 being the Road Transport (General) Application of Road Transport Legislation Declaration 2012 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2012 Rallye Des Femmes.**

Disallowable Instrument DI2012-255 being the Public Place Names (Lyneham) 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 Lyneham.**

Disallowable Instrument DI2012-256 being the Road Transport (General) (Pay Parking Area Fees) Determination 2012 made under section 96 of the *Road Transport (General) Act 1999* **repeals DI2011-307 and determines relevant parking fees for Territory-operated pay parking areas.**

Disallowable Instrument DI2012-258 being the Public Place Names (Harrison) 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 Harrison.**

Disallowable Instrument DI2012-259 being the Public Place Names (Franklin) Determination 2012 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the name of a road in the Division of Franklin.**

Disallowable Instrument DI2012-260 being the Road Transport (General) Application of Road Transport Legislation Declaration 2012 (No. 7) made under section 13 of the *Road Transport (General) Act 1999* **declares that the relevant provisions of the road transport legislation do not apply to the driver of a designated vehicle being driven for the purposes of attending and participating in the lighting of the Christmas Tree in Civic Square.**

Disallowable Instrument DI2012-261 being the Legislative Assembly Precincts (Licence Fees) Determination 2012 (No. 2) made under section 11A of the *Legislative Assembly Precincts Act 2001* **revokes DI2012-33 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-263 being the Health (Interest Charge) Determination 2012 (No. 2) made under section 193 of the *Health Act 1993* **revokes DI2012-180 and determines the interest charged on the aggregate amount of fees and charges unpaid after the due date.**

Disallowable Instrument DI2012-264 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2012 (No. 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **revokes DI2011-326 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-265 being the Radiation Protection (Fees) Determination 2012 (No. 2) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2012-12 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-266 being the Civil Law (Wrongs) Association of Taxation and Management Accountants (ATMA) Scheme 2012 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the Victorian Professional Standards Council's approval of the ATMA Scheme.**

Disallowable Instrument DI2012-267 being the Utilities Exemption 2012 (No. 3) made under section 22 of the *Utilities Act 2000* **revokes DI2009-144 and exempts TransGrid from the requirement for a licence in relation to the transmission of electricity through an electricity network and an electricity connection service.**

Disallowable Instrument DI2012-269 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2012 made under section 13 of the *Road Transport (General) Act 1999* **removes application of the Road Transport (Third-Party Insurance) Act to ACT registered entrant, promotional and uninsured vehicles participating in the Summernats 26 Car Festival, and exempts vehicles from the provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.**

Disallowable Instrument DI2012-270 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Revocation 2012 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2005-258, which determined an area located at Unit 3, 1st Floor, 11 McKay Lane, Turner as a sports bookmaking venue.**

Disallowable Instrument DI2012-271 being the Gaming Machine (Fees) Determination 2012 (No. 2) made under section 177 of the *Gaming Machine Act 2004* **revokes DI2012-117 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-274 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2012 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-104 and determines the property value thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2012-275 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2012 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-97 and determines the property value thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2012-276 being the Taxation Administration (Amounts payable—Utilities (Network Facilities Tax)) Determination 2012 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-39 and determines the rate for the calculation of Utilities (Network Facilities tax) payable under the *Utilities (Network Facilities) Tax Act 2006*.**

Disallowable Instrument DI2012-277 being the Taxation Administration (Ambulance Levy) Determination 2012 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2011-314 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2013.**

Disallowable Instrument DI2012-278 being the Taxation Administration (Amounts Payable—Eligibility—New and Substantially Renovated Homes and Land only—Home Buyer Concession Scheme) Determination 2012 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-98 and DI2012-100 and determines, for the purposes of the Scheme, the income test and thresholds, eligibility criteria, conditions, method of calculation of duty payable and time limit for applications.**

Disallowable Instrument DI2012-280 being the Food (Fees) Determination 2012 (No. 3) made under section 150 of the *Food Act 2001* **revokes DI2012-120 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2012-281 being the Civil Law (Wrongs) College of Investigative and Remedial Consulting Engineers Australia Scheme 2012 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the New South Wales Professional Standards Council's approval of the College of Investigative and Remedial Consulting Engineers Australia Scheme.**

Disallowable Instrument DI2013-1 being the Road Transport (General) MyWay Smart Card Fees Determination 2013 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **determines fees payable for a replacement MyWay Smart Card.**

Disallowable Instrument DI2013-2 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2013 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2012-10 and determines maximum fares payable on regular route services provided by ACTION.**

Disallowable Instrument DI2013-4 being the University of Canberra Council Appointment 2013 (No. 1) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2013-6 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2013 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-249 and determines the Hellenic Club in the City to be a sports bookmaking venue for the purposes of the Act.**

Disallowable Instrument DI2013-7 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2013 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2008-193 and approves specified ACTTAB Limited Agencies as bookmaking venues for the purposes of the Act.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Retrospectivity

Disallowable Instrument DI2012-238 being the Public Sector Management Amendment Standards 2012 (No. 3) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards.**

Section 2 of this instrument, which was notified on 30 October 2012, states that it is "taken to have commenced" on 1 July 2012. This means that the instrument has a retrospective operation. The Committee notes that the Explanatory Statement for the instrument does not in any way address the retrospective operation of the amendments of the *Public Management Standards 2006* that are made by this instrument. In particular, the Committee notes that the Explanatory Statement does not address the issue of the instrument's compliance with section 76 of the *Legislation Act 2001*.

Section 76 of the Legislation Act provides:

> **76 Non–prejudicial provision may commence retrospectively**
>
> (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
>
> (2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.
>
> **Example**
>
> The *Locust Damage Compensation Determination 2003* (a hypothetical disallowable instrument) sets out (among other things) the people who are eligible for compensation under a compensation fund. Previously, there was no restriction on who was eligible. The determination provides that it is taken to have commenced on 1 July 2003, but it is not notified until 15 August 2003. There is nothing in the Act under which the determination is made (or any other Act) that authorises the retrospective commencement.

The provision of the determination that limits who can apply for compensation is a prejudicial provision (ie it adversely affects some people's right to receive compensation) and cannot commence retrospectively. Instead, it would commence on the day after the determination's notification day (see s 73 (3)).

(3) This section is a determinative provision.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

(4) In this section:

non-prejudicial provision means a provision that is not a prejudicial provision.

prejudicial provision means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

(a) adversely affecting the person's rights; or

(b) imposing liabilities on the person.

The effect of section 76 is that only "non-prejudicial" provisions of a statutory instrument—defined in section 13 of the Legislation Act to include a disallowable instrument—can commence retrospectively. The Committee notes that there is nothing in the Explanatory Statement that indicates that the amendments made by this instrument are non-prejudicial. The Committee also notes that it has consistently maintained that, for an instrument that has retrospective operation, the Committee (and the Legislative Assembly) is assisted by an express statement in the Explanatory Statement that there is no *prejudicial* operation, contrary to section 76 (see also the Committee's statement *Subordinate Legislation—Technical and Stylistic Standards*, available at http://www.parliament.act.gov.au/committees/index1.asp?committee=119). The Committee does not consider this to be an onerous requirement.

The Committee seeks the Minister's assurance that this instrument does not involve any prejudicial operation. In addition, the Committee seeks the Minister's advice as to the likely effect of the amendments made by this instrument on any code of conduct matters that are currently in progress.

Drafting issue

Disallowable Instrument DI2012-246 being the Road Transport (General) Withdrawal of Infringement Notices Guidelines 2012 (No. 1) made under subsection 38(1) of the *Road Transport (General) Act 1999* **repeals DI2001-243 and DI2011-33 and determines the guidelines that apply when considering applications for the withdrawal of an infringement notice issued under the road transport legislation.**

This instrument sets out guidelines for the withdrawal of infringement notices, for section 38 of the *Road Transport (General) Act 2012*. Section 38 provides:

38 Infringement notice—guidelines for withdrawal

(1) The Minister may issue guidelines for the withdrawal of infringement notices.

(2) The administering authority for an infringement notice offence must comply with the guidelines.

(3) A guideline is a disallowable instrument.

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

Sections 3 and 4 of the instrument provide:

3 Issuing of guidelines

(1) I issue the guidelines in Schedule 1 for the withdrawal of infringement notices served under the road transport legislation.

(2) The guidelines in Schedule 1 set out the criteria for the withdrawal of an infringement notice to which the guidelines apply under clause 4 of this instrument.

4 Application of guidelines

A guideline contained in column 3 of the table in Schedule 1 applies to an infringement notice offence mentioned in column 2 of the table, subject to any limitations or conditions mentioned in column 4 of the table.

Note: under section 38 (2) of the *Road Transport (General) Act 1999,* the administering authority for an infringement notice offence must comply with the guidelines.

Item 1.8 of Schedule 1 of the instrument provides:

Item	**Offences to which circumstance applies**	**Circumstance**	**Comments, exceptions or other limitations**
1.8	All infringement notice offences under the road transport legislation	Section 53 (5) applies because the person has disputed liability and the administering authority has not laid an information for the offence within 60 days.	The administering authority should withdraw the infringement notice.

The reference to "section 53(5)" above is a reference to subsection 53(5) of the *Road Transport (General) Act 1999*. Section 53 deals with procedures for situations where a person disputes liability for an infringement notice offence. Subsection 53(5) provides:

(5) If the administering authority does not lay an information in the Magistrates Court against the person for the offence within 60 days after being given the notice, the administering authority must—

(a) tell the person, in writing, that no further action will be taken against the person for the offence; and

(b) take no further action against the person for the offence.

The Committee queries the drafting of item 1.8. First, there appears to be a logical issue. If subsection 53(5) applies (ie the "circumstance" for item 1.8), it is difficult to see how an infringement notice *can* be issued. Second, the Committee queries whether "the administering authority should withdraw the infringement notice" is properly a "comment, exception of other limitation" that applies to the circumstance. Rather, it seems to be an instruction. Third, the Committee queries the use of "should" in this situation. The effect of subsection 53(5) would appear to be that if an infringement notice *has* been issued in circumstances to which subsection 53(5) applies then, arguably, the instruction should be that the administering authority **must** withdraw the infringement notice.

The Committee would be grateful for any comments that the Minister has in relation to the above comments.

Retrospectivity/disapplication of subsection 47(5) of the Legislation Act 2001/minor drafting issue

Disallowable Instrument DI2012-248 being the Building (ACT Appendix to the Building Code) Determination 2012 made under subsection 136(2) of the *Building Act 2004* **revokes DI2011-86 and makes new appendices for the 2012 edition of the Building Code.**

This instrument makes the Australian Capital Territory Appendix to the Building Code of Australia. Section 136 of the *Building Act 2004* gives effect to the Building Code of Australia.

The Explanatory Statement for the instrument states:

> The building code applies throughout Australia and is divided into 2 volumes. Volume 1 deals with class 2 to class 9 buildings, as classified under the code, which includes apartments, commercial residential buildings such as motels, and non-residential buildings. Volume 2 deals with class 1 and class 10 buildings, which include standard houses and non-habitable buildings such as garages, sheds, swimming pools and structures. A third volume, the Plumbing Code of Australia, together with BCA volumes 1 and 2 comprise the National Construction Code.
>
> Each published volume of the building code consists of main text and a series of additions for each State and Territory and the Commonwealth. The building code, including the State and Territory additions, is published annually by the Australian Building Codes Board (the ABCB). The ACT is represented on the ABCB along with representatives from all States, the Northern Territory, the Commonwealth Government and building industry bodies.

Subsection 136(2) of the Building Act allows the Minister to determine ACT-specific requirements by way of this "Australian Capital Territory Appendix". The Australian Capital Territory Appendix provides a mechanism for the ACT to depart from, add to, or vary, the building code, from time to time. The Australian Capital Territory Appendix applies only to the ACT and Jervis Bay Territory.

The first thing to note about this instrument is that it has a retrospective operation. Section 2 of the instrument provides that it is taken to have commenced on 1 May 2012. The instrument was notified on 29 November 2012.

The Committee notes with approval that the retrospectivity issue is expressly dealt with in the Explanatory Statement for the instrument, which states:

Retrospectivity of commencement

The determination provides that it is taken to have commenced on 1 May 2012, which is before its notification day. That is necessary because—

> industry expects continuity of the provisions that prescribe how to make extensions to existing buildings comply with the building code's energy efficiency provisions, as was provided for in the predecessor of the determination, which ceases to be in force from the start of 1 May 2010. The predecessor only applies in respect of the 2011 edition of the building code, which automatically ceases to be adopted from the start of 1 May 2012. Therefore the determination needs to continue the relevant energy efficiency provisions with effect from 1 May 2012;
>
> and similarly, industry expects continuity of the provisions that prescribe the disability access concessions.

The retrospective commencement will not operate to the disadvantage of a person by adversely affecting the person's rights, or imposing liabilities on the person. Rather, the determination generally provides concessions on otherwise full regulatory compliance, which will reduce constriction costs and regulatory burdens.

Failure to have the provisions commence from 1 May 2012 will self-evidently adversely affect industry and property owners because of inability to make their building comply with the relevant energy efficiency provisions or disability access provisions. Commencement on 1 May 2012 is necessary to coincide with the adoption of [Building Code of Australia] 2012 on that date.

The Committee commends this approach to other agencies.

The Committee notes that section 5 of this instrument disapplies subsection 47(5) of the *Legislation Act 2001*. Section 47 of the Legislation Act deals with the incorporation, in a statutory instrument, of material external to the instrument. Subsection 47(5) provides:

> (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

A "notifiable instrument" must be published on the ACT Legislation Register. The disapplication of subsection 47(5) means that there is no obligation to publish on the ACT Legislation Register any material incorporated by reference by this instrument.

The Explanatory Statement for this instrument states:

> **Section 5** is intended to disapply the requirement of the *Legislation Act 2001*, section 47 (5), so as the published version of the ACT appendices that accompany the published version of the, and that are relied on by the determination, do not have to be notified on the ACT legislation register.
>
> The building code is subject to copyright, making it inappropriate to notify on the legislation register. The BCA including accompanying published indicative State and Territory appendices are available on the ABCB web site at www.abcb.gov.au.

The Committee notes that there appears to be a word (or words) missing from the first paragraph above.

That aside, the Committee notes with approval that an explanation is provided for the disapplication of subsection 47(5) of the Legislation Act and that information is provided about how the relevant material may be accessed.

Finally, the Committee notes that the Explanatory Statement for this instrument contains various minor typographical errors (eg "teh" instead of "the" on pages 9, 10 and 12, "the" unnecessarily repeated on page 10, "to" unnecessarily repeated on page 13 and "a" unnecessarily repeated on page 13).

The comments above do not require a response from the Minister.

Retrospectivity—Positive comment

Disallowable Instrument DI2012-257 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2012 (No. 2) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2012-129 and determines the conditions under which Members may employ staff and engage consultants or contractors, including annual salary allocations, for the 2012-2013 financial year.**

The Committee notes that, under section 2, this instrument, which was notified on 3 December 2012, is taken to have commenced on 6 November 2012, meaning that it has a retrospective operation. The Committee notes with approval that the Explanatory Statement for the instrument contains the following statement:

> The new allocation is expressed to operate retrospectively from the commencement of the eighth Assembly on 6 November 2012. The retrospective effect of the commencement provision contained in this instrument has a non-prejudicial effect on persons other than the Territory or a territory authority.

This comment does not require a response from the Minister.

Minor drafting issue

Disallowable Instrument DI2012-262 being the Health Records (Privacy and Access) (Fees) Determination 2012 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2011-308 and determines fees payable for the purposes of the Act.**

The Committee notes that there is an inconsistent use of "schedule" (sections 3 and 7 and the explanatory statement) and "Schedule" (section 5 and the Schedule itself) in this instrument.

This comment does not require a response from the Minister.

Disapplication of subsections 47(5) and (6) of the Legislation Act 2001 / Issue with regulatory impact statement

Disallowable Instrument DI2012-268 being the Energy Efficiency (Cost of Living) Improvement Record Keeping and Reporting Code of Practice 2012 (No. 1) made under section 25 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **notifies the Energy Efficiency (Costing of Living) Improvement Record Keeping and Reporting Code of Practice.**

Disallowable Instrument DI2012-279 being the Energy Efficiency (Cost of Living) Improvement Eligible Activities Code of Practice 2012 (No. 1) made under section 25 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **notifies the Energy Efficiency Improvement Eligible Activities Interim Code of Practice.**

The Committee notes that section 4 of the first of the instruments mentioned above—which makes a code of practice for the *Energy Efficiency (Cost of Living) Improvement Act 2012*—disapplies subsections 47(5) and (6) of the *Legislation Act 2001* for this instrument. As the explanatory statement for the instrument notes, this means that the various Australian Standards and Building Codes that are relied on by the instrument do not have to be published on the ACT Legislation Register. The Committee notes that the explanatory statement goes on to explain the reason for the disapplication of subsections 47(5) and (6):

> Documents referenced in the code include Australian Standards and the Building Code of Australia (BCA). These documents are subject to copyright, making it inappropriate to notify on the legislation register. Australian Standards are available at www.standards.org.au. The BCA, including published State and Territory appendices, are available on the ABCB web site at www.abcb.gov.au.

A similar provision (and a similar explanation) is provides in relation to the second of the instruments mentioned above, which also makes a code of practice for the *Energy Efficiency (Cost of Living) Improvement Act 2012*.

This comment does not require a response from the Minister.

The Committee notes that the explanatory statement for the instrument contains the following statement in relation to regulatory impact analysis:

> **Regulatory Impact Analysis**
>
> Section 34 of the Legislation Act provides that a Regulatory Impact Statement (RIS) must be prepared if a Disallowable Instrument is likely to impose appreciable costs on the community, or a part of the community.
>
> A comprehensive regulatory impact assessment, incorporating consultation with industry, community organisations and government stakeholders, was undertaken to inform the development of the Act.
>
> The regulatory impact analysis was based on the availability of a range of activities such as those allowed under the *Victorian Energy Efficiency Target Act 2007* (Victoria), and included a detailed analysis of the likely impacts of the Scheme, including a comprehensive analysis of the likely economic costs to retailers in complying with the energy savings obligation across the range of activities. The RIS anticipated that compliance with the activity would include compliance with

other regulatory requirements for carrying out activities safely and effectively and complying with record keeping and reporting requirements. The RIS is available at http://www.legislation.act.gov.au/b/db_44295/default.asp.

This instrument does not impose new obligations on a NERL retailer with an energy savings obligation under the Act, but rather clarifies the requirements on them. These requirements are consistent with the assumptions in the RIS and with those for similar schemes operating in other Australian states.

The Committee notes that 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. [emphasis added]

The Committee notes that neither the explanatory statement for this instrument nor the regulatory impact statement that is referred to in the explanatory statement address the requirement set out in paragraph 35(h) of the Legislation Act.

The same comment applies to the second of the instruments mentioned above.

The Committee seeks the Minister's advice in relation to the compliance of these instruments with the requirement in paragraph 35(h) of the *Legislation Act 2001*.

Minor drafting issue

Disallowable Instrument DI2012-273 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2012 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2011-312 and determines, for the purposes of the Scheme, the eligibility criteria, conditions, method of calculation of duty payable and time l**imit for applications.

The Committee notes that section 9 of this instrument states that it revokes DI2011-312 and that section 10 of the instrument states the transitional arrangements in relation to DI2011-312. However, the explanatory statement refers to "DI20**12**-312" as the instrument that is revoked. The reference in the explanatory statement is incorrect.

This comment does not require a response from the Minister.

Why is this instrument being re-made so soon after being made?

Disallowable Instrument DI2012-272 being the Health (Fees) Determination 2012 (No. 2) made under section 192 of the *Health Act 1993* **revokes DI2012-109 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-3 being the Health (Fees) Determination 2013 (No. 1) made under section 192 of the *Health Act 1993* **revokes DI2012-272 and determines fees payable for the purposes of the Act.**

The first instrument mentioned above was notified on the ACT Legislation Register on 20 December 2012. It set fees, for the purposes of the *Health Act 1993*, with effect from 1 January 2013.

The second instrument mentioned above was notified on the ACT Legislation Register on 17 January 2013. It revokes the first instrument and sets new fees, for the purposes of the Health Act, with effect from 18 January 2013.

The explanatory statement for the second instrument states:

> This Determination of Fees revokes and replaces the Determination of Fees DI2012-272, dated 17 December 2012.
>
> The Determination comes into effect on the day after notification and reproduces Determination DI2012-272 except for:
>
> - Pharmaceutical Co-payment for General non-inpatients has decreased at Section I;
> - Minor wording changes to the notes at Section I; and
> - the date of effect.

No further explanation is provided in relation to the changes to the first instrument, nor in relation to the need to replace the first instrument so soon after it was made.

The Committee would be grateful if the Minister could provide details in relation to the changes made to the first instrument and the reason why it was considered necessary to replace the first instrument so soon after it was made.

Interference with human rights? / Drafting issue

Disallowable Instrument DI2013-5 being the Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 1) made under section 75A of the *Road Transport (Third-Party Insurance) Act 2008* **provides guidance regarding the application of the early payment for medical expenses entitlement.**

This instrument, made under section 75A of the *Road Transport (Third-Party Insurance) Act 2008*, sets out guidelines that are to apply in relation to the early payment of expenses for medical treatment. In brief, Chapter 3 of the Road Transport (Third-Party Insurance) Act provides for insurers, without admission of liability, to pay the medical expenses of persons injured in motor vehicle accidents. As set out in the explanatory statement

> ... the payment is designed to encourage people injured in motor accidents to seek medical treatment and rehabilitation services early by minimising monetary barriers. The goal being to facilitate a faster return to health for injured people.

Clause 3 of the instrument states (in part):

> This entitlement to early payment for medical expenses aligns with the objects set out in section 5A of the Act. By minimising monetary barriers, the early payment scheme ought to provide earlier access to treatment and a greater focus on health outcomes and rehabilitation.
>
> Evidence suggests that the earlier injuries are treated, the more likely injured persons will be able to fully recover from their injuries. Accordingly, an injured person can commence rehabilitation and other related medical services soon after the injury occurs, regardless of whether they are pursuing a compensation claim.

Clause 6 provides:

> ## 6. LIABILITY
>
> Section 75 of the Act confirms that any payment made by an insurer in relation to Part 3.2 of the Act is not an admission of liability in relation to the motor accident and does not in any way prejudice or affect a claim or proceeding arising out of the motor accident.
>
> Consistent with the intention of the early payment scheme, the issue of liability is secondary to the early payment being made expeditiously.
>
> Guideline: An insurer may make an early payment for medical expenses in relation to a motor accident whether or not the insurer has accepted liability in relation to a motor accident claim arising from the accident and whether or not a motor accident claim has been made against an insured person in relation to the motor accident.

6.1 Fault

In considering the criteria that the accident 'was not caused wholly or mainly by the fault of the person' under section 72(1)(c) of the Act an insurer should consider the overarching objectives of the early payment scheme when making determinations on applications for early payment. Specifically, that the early payment is designed to provide earlier access to treatment and facilitate a faster return to health for injured people.

Guideline: As a guide, any person who is not charged with a *serious traffic offence* would be entitled to the early payment.

A *serious traffic offence* is an offence under the ACT road transport legislation that is punishable by imprisonment for six months or more. For the purposes of the early payment scheme the conduct amounting to the serious traffic offence must have contributed materially to the person's injury. Schedule 1 to these guidelines lists those offences characterised as serious traffic offences.

The following discussion of clause 6 (incorrectly referred to as clause 5) appears in the explanatory statement:

Clause 5

Clause 5 discusses issues relating to liability and makes it clear that the intention is that any payment made by an insurer in relation to the early payment provisions is not an admission of liability in relation to the motor accident and does not in any way prejudice or affect a claim or proceeding arising out of the motor accident.

Clause 5.1 is intended to give guidance in relation to the criteria under section 72(1)(c) of the Act that the accident 'was not caused wholly or mainly by the fault of the person'. The intention is that the payment be made available to the majority of injured people with the exception of those charged with a *serious traffic offence* that contributed materially to their injury.

The reference above to paragraph 72(1)(c) of the Road Transport (Third-Party Insurance) Act is significant. Section 72 provides:

72 Entitlement to early payment—injured person to give forms to insurer within 30 working days

(1) A person is entitled to payment for medical expenses under this chapter in relation to a motor accident if—

(a) the person is an injured person for the accident; and

(b) either—

(i) a police officer attended the motor accident; or

(ii) the motor accident was reported to a police officer by or for the injured person; and

(c) the following documents are given to the injured person's insurer not later than 30 working days after the motor accident:

(i) a motor accident notification form for the accident that includes a declaration by or for the person that the motor accident was not caused wholly or mainly by the fault of the person;

(ii) a police report about the findings of the police investigation of the motor accident, including a statement to the effect that the injured person was not the person at fault in the accident.

(2) However, the documents mentioned in subsection (1) (c) may be given to the insurer of a person identified in the police report mentioned in subsection (1) (c) (ii) as being at fault in the motor accident within 30 working days if the injured person—

(a) is not insured; and

(b) is not wholly or mainly at fault in the motor accident.

(3) However, if the person has applied for a police report but has not received it in time to comply with the time limit mentioned in subsection (1) (c), it is sufficient for subsection (1) (c) if—

(a) the motor accident notification form for the accident includes a statement about the date when the accident was reported and—

(i) if the accident was reported to a police officer—the name and rank of the police officer to whom the accident was reported; or

(ii) if the accident was reported at a data entry point—the submission number for the report; and

Examples—data entry points

- a data entry kiosk located at a police station
- website for reporting motor accidents

Note 1 A motor accident reporting website can be accessed through the Canberra Connect website (www.canberraconnect.act.gov.au) and through the website for police services in the ACT (www.police.act.gov.au).

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(b) the police report is given to the insurer within 14 days after the person receives it.

Section 72 of the Road Transport (Third-Party Insurance) Act is significant because (certainly by implication) it limits the availability of the early payment of medical expenses to persons who are not wholly or mainly at fault for the motor vehicle accident in which they were injured.

Clause 6 of the instrument gives effect to this implication.

On its face, this provision would appear to raise human rights issues, for section 38 of the *Human Rights Act 2004*. The particular human right that would appear to be engaged is the right to equality before the law, provided for in section 8 of the Human Rights Act. There might also be an argument that the effect of denying a person access to the early payment of medical expenses also amounts to the person being "punished" again in relation to the motor vehicle accident, for section 24 of the Human Rights Act.

The Committee notes that the explanatory statement for the instrument contains no discussion of possible issues under the Human Rights Act. In the circumstances, the Committee considers that such discussion would have been of assistance, both to the Committee and the Legislative Assembly.

In making this comment, the Committee notes that subsection 38 (1) of the Human Rights Act gives the Committee an express role in reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. The Committee is given no express role in relation to human rights issues arising under subordinate legislation. Despite this, it is not uncommon for explanatory statements for subordinate legislation to address human rights issues in subordinate legislation (see, for example, Subordinate Law SL2012-39, the *Crimes (Child Sex Offenders) Amendment Regulation 2012 (No. 1)*, discussed in the Committee's *Scrutiny Report 1* of the *8th Assembly*, at pages 15-6).

In addition, it is arguable that subordinate legislation that gives rise to human rights issues may be considered to contain material that should properly be dealt with in an Act of the Legislative Assembly, as contemplated by principle (1)(d) of the Committee's terms of reference. There may also be an argument that legislation that gives rise to human rights issues unduly trespasses on rights previously established by law, for principle (1)(b) of the Committee's terms of reference. Finally, it can be argued that the failure of the explanatory statement to address human rights issues arising from the subordinate law also engages principle (2) of the Committee's terms of reference, on the basis that this explanatory statement does not meet the technical or stylistic standards expected by the Committee (in the sense that the Committee would expect that the explanatory statement for an instrument that gives rise to human rights issues should address those issues, as is the case with other explanatory statements).

The Committee seeks from the Minister an explanation as to the consistency of this instrument with the *Human Rights Act 2004*. The Committee also requests that the Minister, in providing this explanation, addresses the issue of the appropriateness of the issues being addressed in guideline 6.1 being included in the subordinate legislation, rather than the primary legislation.

As indicated above, the Committee notes that, in the explanatory statement for this instrument, the explanation provided in relation to clauses 5 and 6 have been transposed. The discussion in relation to clause 5 appears under the heading relating to clause 6, and vice versa.

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 SL2012-43 being the Court Procedures Amendment Rules 2012 (No. 2) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules.**

Subordinate Law SL2012-44 being the Road Transport Legislation Amendment Regulation 2012 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999, Road Transport (General) Act 1994, Road Transport (Mass, Dimensions and Loading) Act 2009, Road Transport (Public Passenger Services) Act 2001, Road Transport (Safety and Traffic Management) Act 1994* **and** *Road Transport (Vehicle Registration) Act 1999* **prescribes tracked vehicles as vehicles for the purposes of the ACT road transport legislation.**

Subordinate Law SL2013-1 being the Medicines, Poisons and Therapeutic Goods (Kava Exemption) Amendment Regulation 2013 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **exempts the cultural use of kava at public events declared by the Minister by notifiable instrument.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 11 February 2013, in relation to comments made in Scrutiny Report 2 concerning the Health (National Health Funding Pool and Administration) Bill 2012.
- The Minister for Territory and Municipal Services, dated 11 February 2013, in relation to comments made in Scrutiny Report 2 concerning the Public Unleased Land Bill 2012.
- The Attorney-General, dated 22 February 2013, in relation to comments made in Scrutiny Report 2 concerning the Crimes Legislation Amendment Bill 2012 (No. 2).

The Committee wishes to thank the Minister for Health, the Minister for Territory and Municipal Services and the Attorney-General for their helpful responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee would like to comment on the response of the Minister for Health regarding the Health (National Health Funding Pool and Administration) Bill 2012.

In its fourth last paragraph, the Minister's response states that "[s]ubclause 39(3) gives a regulation under subclause 39(2) full effect according to its terms". This paragraph then states the effect of subclause 39(2) in terms that the Committee respectfully accepts as correct.

Subclause 39(3), however, does more than this. As stated in the third last paragraph of the Minister's response: "This type of provision is used to make it clear that it prevails over other Territory laws in the event of any inconsistency". (The word "it" presumably refers to a regulation made under in subclause 39(2)).

The problem is that subclause 39(3) cannot have this effect, as recognised in the second last paragraph of the Minister's response: "It is understood that this provision, and any regulation made under it, could itself in the future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary". (This sentence is a bit confused. The words "this provision" appear to relate to subclause 39(3), but the "it" in the phrase "made under it" must refer to subclause 39(2), for subclause 39(3) does not confer a power to make regulations. The rest of the sentence appears to relate to subclause 39(3)).

Perhaps the difference between the Committee and the view taken in government comes down to this. The Committee does not consider that what may be understood by lawyers to be the effect of a statutory provision is a sufficient answer to an objection that read according to its terms the provision appears clearly to have some other effect. Statutes and subordinate laws are not read only by lawyers skilled in the art of statutory interpretation. They are read by laypersons, and they should be able to rely on statutory words having the effect they purport to have according to ordinary understandings.

At a minimum, the Committee recommends that, where a provision such as subclause 39(3) is included in a bill, the explanatory statement in relation to the clause should have a paragraph identical in effect to the words of the second last paragraph of the response from the Minister for Health. This paragraph reads

> The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision, and any regulation made under it, could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.

Jeremy Hanson CSC MLA
Chair

25 February 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 1, dated 29 November 2012
Disallowable Instrument DI2012-232—Long Service Leave (Portable Schemes) Security Work Declaration 2012
Subordinate Law SL2012-36—Food (Nutritional Information) Amendment Regulation 2012 (No. 1)

Report 2, dated 4 February 2013
Children and Young People Amendment Bill 2012 (No. 2) Act citation:
Directors Liability Legislation Amendment Bill 2012 Act citation:

Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

Mr Jeremy Hanson CSC, MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Hanson

I am writing in response to the comments in the Scrutiny Report Number 2 of 4 February 2013 concerning clause 39 of the *Health (National Health Funding Pool and Administration) Bill 2012* (the Bill).

The Committee has suggested that subclause 39(3), among other effects, seeks to preclude the Assembly—at a time later than the date on which this Bill becomes law as an Act—from passing into law a provision that would qualify the regulation-making power of the Executive under subclause 39(2) of this Bill. Subclause 39(3) is therefore said to "entrench" a regulation made under subclause 39(2).

The Committee's concern is that (subject to one exception of entrenchment via a referendum) an Act passed by the Assembly cannot have the effect of limiting the legislative power of the Assembly to make a law for the "peace, order and good government" of the Territory.

As it has consistently done previously, the Government disagrees with the Committee's interpretation of these provisions. Clause 39 enables the Executive to make regulations dealing with transitional matters only. The clause contains two different regulation making powers. Subclause 39 (1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act, and not widen the Act's purpose.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030
Email: gallagher@act.gov.au Facebook: KatyGallagherMLA Twitter: @katyGMLA

Subclause 39(2) enables the making of a regulation that modifies the Act. A regulation under this clause may only modify part 6 of the Act (Transition), and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Subclause 39 (3) gives a regulation under subclause 39 (2) full effect according to its terms. A provision of part 6 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. Also, any modification by regulation of part 6 of the Act has no ongoing effect after the expiry of that part.

This type of provision is commonly used in legislative drafting and has an accepted and understood meaning. This type of provision is used to make it clear that it prevails over other Territory laws in the event of any inconsistency.

The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision, and any regulation made under it, could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.

Thank you for raising these issues with me.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

11 FEB 2013

Shane Rattenbury MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR CORRECTIONS
MINISTER FOR HOUSING
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR AGEING

MEMBER FOR MOLONGLO

Mr Jeremy Hanson CSC MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly of the ACT
GPO box 1020
CANBERRA ACT 2601

Dear Mr Hanson,

I am writing in response to the Committee's concerns regarding the Public Unleased Land Bill 2012 in Scrutiny Report number 2, of 4 February 2013. The Committee raised three concerns; each is addressed in turn below.

Uncertainty concerning the scope of the definition of 'use' of public land

The Government acknowledges that the definition of 'use' of land included in the Bill is very broad. This is necessary given the wide range of activities that may need to be captured in order to effectively manage and protect the amenity and natural value of the land.

The Government accepts the Committee's concern that in some cases it may not be possible to definitively say that something is or is not a 'use' as defined by the Bill. However, just as it is not possible to know definitively whether or not conduct is reasonable and sufficient to fulfil an obligation under the *Work Health and Safety Act 2011* for example, a reasonable person can be confident that they are complying with the law.

The Committee's example of parking a car on a nature strip is an example of using public land. The use is ongoing (carried on) and more than transient and other members of the public are excluded from the place. It is not possible for another member of the public to use the space while a car is parked on it. It is also worth noting that parking on nature strips is not currently permitted, either under the Australian Road Rules or the *Roads and Public Places Act 1937*.

As noted in the previous response to the Committee's concerns, guidelines will be developed as well as a web based tool, to provide functional assistance to the community in understanding their obligations.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0005 Fax (02) 6205 0007
Email: rattenbury@act.gov.au Facebook: shanerattenburymla Twitter: @ShaneRattenbury

These guidelines for the use of public land are currently under development and it is the Government's intention that where it is appropriate to do so, elements of the guidelines will be incorporated into a ministerial declaration to assist with the application of the definition.

Strict Liability

The Government agrees with the Committee's observation that it would be appropriate for an explanatory statement relating to a strict liability offence to also include the section 39 defence in that discussion. Section 39 of the *Criminal Code 2002* does apply to every strict liability offence provision in the Bill. A Supplementary Explanatory Statement will be tabled in the Assembly during debate on the Bill and a copy is attached to this letter.

The Right to Privacy

In relation to the comment on clause 107(1)(f) the Government also agrees that the issue of the derogation of the right to privacy should have been explicitly addressed in the Explanatory Statement notes on this clause. This issue will also be covered in the Supplementary Explanatory Statement referred to above.

Yours sincerely

Shane Rattenbury MLA
Minister for Territory and Municipal Services

11 FEB 2013

2013

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PUBLIC UNLEASED LAND BILL 2012

SUPPLEMENTARY EXPLANATORY STATEMENT

Presented by
Shane Rattenbury MLA
Minister for Territory and Municipal Services

Introduction

This supplementary explanatory statement relates to the *Public Unleased Land Bill 2012* as presented to the Legislative Assembly. It is intended to be read in addition to the Explanatory Statement tabled with the Bill.

This supplementary explanatory statement has been prepared in response to comments made by the Scrutiny of Bills Committee. The statement provides additional clarification about the defences available to the strict liability offences created by the Bill, and a justification for the limitation on the right to privacy created by enforcement powers in the Bill.

Strict liability offences – intervening events

The Explanatory Statement tabled with the Bill notes that mistake of fact is a defence to the strict liability offences in the Bill, under section 36 of the *Criminal Code 2002*.

The defence of an intervening conduct or event is also available in relation to the strict liability offences in the Bill. Under section 39 of the *Criminal Code 2002*, a person is not responsible for strict liability offences if:

- the physical element of the offence is brought about by someone else over whom the person has no control, or by a non-human act or event over which the person has no control; or
- the person could not reasonably have been expected to guard against the bringing about of the physical element.

Section 39 of the *Criminal Code 2002* applies to every strict liability offence provision in the Bill.

Enforcement – Human Rights Implications

Clause 107(1)(f) gives authorised people under the Act the power to enter premises without a warrant, but only if the authorised person reasonably believes that the circumstances are so serious and urgent that immediate entry is necessary.

This section engages the right to privacy under section 12(a) of the *Human Rights Act 2004*, because it gives authorised people a power to enter homes without a warrant in limited circumstances. Section 12(a) provides that everyone has a "right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily."

Clause 107(1)(f) is a reasonable limitation on the right privacy under section 28 of the Human Rights Act because of the limited circumstances in which it applies, and the important public purpose that it serves. The limitations on privacy created by clause 107(1)(f) apply only to situations that a reasonable person could believe are so serious and urgent that entry cannot be delayed. This limitation recognises that important public interests, such as preventing serious harm to people or property, sometimes require immediate action. Outside of situations of sufficient urgency or gravity, the normal restrictions on entry to premises apply.

Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Jeremy Hanson CSC MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Hanson

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.2, 4 February 2013 (the Report) containing comments on the *Crimes Legislation Amendment Bill 2012 (No 2)* (the Bill). I offer the following response to those comments.

I note that the previous Standing Committee on Justice and Community Safety provided comment in Report No. 53 of 2013 on the *Crimes Legislation Amendment Bill 2012*. That Bill provides the same amendments as the *Crimes Legislation Amendment Bill 2012 (No 2)*.

Lack of sufficient clarity in the statement of the offence

The Committee suggests at page 3 of the Report that reference to 'position of authority' rather than 'under the defendant's special care' in the explanatory statement is confusing. The Committee's comment is noted.

<u>The right to privacy</u>

The Committee suggests at page 4 of the Report that the right to privacy at section 12(a) of the *Human Rights Act 2004* (the HRA) is limited by the new sexual offences at clauses 9 and 10 of the Bill. That is, the right of a person 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'. The Committee further states that 'choice of sexual partner is generally accepted to be an aspect of a person's privacy'.

If the right to privacy is limited by clauses 9 and 10 of the Bill the limitation is justified and reasonable, in accordance with section 28 of the HRA.

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

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535
Email corbell@act.gov.au Twitter: @SimonCorbell Facebook: www.facebook.com/simon.corbell

and reputation. The comment notes that the term 'unlawful' means that no interference can take place except in cases envisaged by the law.[1]

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 International Covenant on Civil and Political Rights and should be reasonable in the particular circumstances.[2]

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances).

The purpose of these clauses is to protect young people who are under an adult's special care from harm. This purpose upholds the right to liberty and security of person and the right to protection of family and children at sections 18 and 11 of the HRA by putting in place measures to minimise the risk of physical and mental harm to young people.

The prevention of crime and the protection of the rights of others is a legitimate ground for placing restrictions on the right to privacy.[3]

Any limitation on the right to privacy is necessary and the least restrictive available to achieve these purposes as it only applies to the very specific circumstance of adults in a relationship of special care with young people aged 16-17 years and it only captures a very specific aspect of that relationship – namely, sexual conduct.

Non-exhaustive list

The Committee questions at pages 5-6 of the Report the decision of the Government to provide a non-exhaustive as opposed to an exhaustive list of 'special care' relationships for the new sexual offences at clauses 9 and 10 of the Bill.

The Government has carefully considered whether the list of relationships captured by the new offences provided by clauses 9 and 10 of the Bill should be exhaustive or non-exhaustive. The Government has decided to adopt a non-exhaustive list for a number of reasons, including the following:

a. an exhaustive list raises significant human rights issues (equality before the law) as outlined at page 5 of the explanatory statement to the Bill;
b. providing a non-exhaustive list avoids arbitrariness and allows for flexibility so that all *relevant* special care relationships are captured by the offence and those where there is not a relationship of special care are not captured; and
c. The fault element of recklessness for the physical element of 'the young person being in the adult's special care' affords fairness for a defendant as it requires proof beyond reasonable doubt of a 'substantial risk' that the young person was in the adult's special care.

Burden of proof

New subsection 55A(3)

The Committee suggests that new subsection 55A(3) at clause 9 of the Bill limits the right to be presumed innocent until proven guilty at section 22(1) of the HRA.

---

[1] Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1988 'General Comment No.16: the right to respect of privacy, family, home and correspondence, and protection of honour and reputation', para.3. Available: (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument)

[2] Ibid, para 4.

[3] Starmer, K, 1999, *European Human Rights Law: the Human Rights Act 1998 and the European Convention on Human Rights*, p. 416.

If the right is limited by clause 9 (and clause 10) of the Bill the limitation is justified and reasonable, in accordance with section 28 of the HRA.

New subsection 55A(3) places the least restrictive burden available on the defendant (that is, an evidential rather than a legal burden) to prove that they were married or not more than 2 years older than the young person. This information is appropriately raised by the defence rather than the prosecution in evidence as it is information that is within the knowledge of the defendant and to which the prosecution would not necessarily have access.

New subsection 55A(4)

The Committee suggests that new subsection 55A(4) at clause 9 of the Bill limits the right to be presumed innocent until proven guilty at section 22(1) of the HRA.

If the right is limited by clause 9 (and clause 10) of the Bill the limitation is justified and reasonable, in accordance with section 28 of the HRA.

The right may be limited by the creation of a defence where the defendant can prove on the balance of probabilities that they believed on reasonable grounds that the young person was at least 18 years old.

In *Salabiaku v France* (1988) 13 EHRR 379 the European Court of Human Rights accepted that parliament may reverse the burden of proof 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.

The purpose of this limitation is to require a defendant who raises the defence to satisfy a court on the balance of probabilities of their 'belief' on 'reasonable grounds' as to the young person's age.

The extent of the limitation is proportionate to this purpose. Before the burden is transferred to the defendant in such a situation the prosecution must prove all elements of the defence beyond reasonable doubt. The burden is transferred for the purpose of a separate defence, rather than for an element of the offence.

The limitation is necessary to achieve this purpose. Requiring the defence to prove on the balance of probabilities their 'belief' and 'belief on reasonable grounds' requires proof of facts that are particularly within the knowledge of the defendant and would not be readily ascertainable (if at all) by the prosecution. A belief held by the defendant and whether there were any 'reasonable grounds' for holding that belief may well be information within the exclusive knowledge of the defendant.[4]

As such, the burden is not overly onerous and the limitation is the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Clause 13 – error in the Explanatory Statement

I thank the Committee for identifying a minor error in the explanatory statement to the Bill. The explanatory statement states that 'clause 13 will omit the destroying or damaging property offence at section 116(3) and will remake the offence at section 116A'. This statement is incorrect and I intend on tabling a revised explanatory statement that corrects the error.

---

[4] In *R v Johnstone*, Lord Nicholls stated in relation to consideration of a reverse burden of proof and the reasons for such reversal: 'The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.'

Clause 23 of the Bill – reverse burden of proof

I refer the Committee to my response to the Standing Committee on Justice and Community Safety of the Seventh Assembly comment in Report No. 53 of 2012 on clause 23 of the *Crimes Legislation Amendment Bill 2012*. Clause 23 of that Bill is in identical terms to that proposed in the *Crimes Legislation Amendment Bill 2012* (No 2). My response to the Committee was published in Report No. 54 of 2012.

I also respond to the Committee's specific question about 'whether the less restrictive measure of placing on a defendant only an evidential burden of proof in relation to the third element of the offence in subsection 612(5) would not go at least some way to serve the purpose of proposed section 612A'.

The offence to which clause 23 of the Bill relates is the offence of possessing a controlled precursor with the intention of manufacturing a controlled drug and selling the controlled drug. At page 7 of the report the Committee has erroneously referred to the offence as carrying a maximum penalty of 1500 penalty units, imprisonment for 15 years or both . The offence, to which clause 23 relates, carries a maximum penalty of 700 penalty units, imprisonment for 7 years or both.

The purpose of the offence at section 612(5) and the maximum penalty of 700 penalty units, imprisonment for 7 years or both are important in an assessment of whether using a reverse legal burden option is 'no more than is necessary to accomplish the objective'[5].

The offence at section 612(5) is the least serious of three offences dealing with similar courses of conduct involving controlled precursor chemicals.

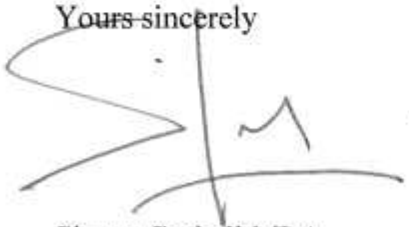
Evidence displacing the presumption about an intention about the sale of a controlled drug to be manufactured in the circumstances dealt with by section 612(5) is more likely to be in the knowledge of the accused.

An evidential burden in relation to an intention or belief about the sale of a manufactured controlled drug, 'means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (see the Criminal Code, section 58(7)). Placing this less restrictive burden of proof on the defendant in relation to the third element of the offence in subsection 612(5) of the Criminal Code would not satisfy the purpose of the amendment.

Applying a legal burden of proof calls on an accused to prove that they did not have the requisite intention in relation to the sale of any manufactured controlled drug. A person charged under section 612(5) would need to adduce evidence about the use of the drugs other than by sale. Most commonly this would be with respect to the personal use by the accused of the controlled drug.

I thank the Committee for their consideration of this Bill.

Yours sincerely



Simon Corbell MLA
Attorney-General

22.2.13

[5] *De Freitas v Minister for Agriculture, Fisheries, Lands and Housing* (1999) 1 A.C. 69