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

SCRUTINY REPORT 5

4 APRIL 2013

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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 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.

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BILLS

BILLS—COMMENT

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

MONITORING OF PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE) BILL 2013

This is a Bill for an Act to create arrangements for the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to conduct periodic visits to places of detention.

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

Introduction

The Australian Human Rights Commission explains that:

- [t]he Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment. It was adopted in 2002 and entered into force in 2006. ... The key aim of the OPCAT is to prevent the mistreatment of people in detention.
- Under the OPCAT, state parties agree to international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (SPT). State parties are also are required to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention.

The Dictionary in the Bill employs the term "subcommittee" to refer to SPT. Currently, the subcommittee is comprised of 25 members who are elected by the state parties to the OPCAT. The chairperson is from the UK, and the four vice-chairpersons are from Lebanon, the Maldives, Uruguay, and Burkina Faso.

This Bill is directed only towards facilitating international inspections of places of detention by the subcommittee. The Explanatory Statement (at page 10) summarises its provisions.

Human rights issues: general

The Committee refers members of the Assembly to the discussion at pages 2 and 3 of the Explanatory Statement, and it agrees that the Bill promotes the protection from torture, etc stated in HRA section 10, and the right of a person deprived of their liberty to be treated with humanity and dignity stated in section 19.

The Explanatory Statement accepts that clauses 11 to 13 "may limit the right to privacy" stated in HRA section 12. The Committee agrees that on their face these clauses would authorise action that would derogate from these rights. It also considers that clause 14 may be seen to provide insufficient protection for the common law and statutory right now expressed in the *Evidence Act 2011* as client legal privilege. There is more consideration below of clauses 12 to 14.

After recognising clauses 11 to 13 may limit the right to privacy, the Explanatory Statement provides a justification for the limitations. It does not, however, refer to HRA section 28, or in substance employ the framework for justification that section 28 states. As the Committee emphasised in its *Guide to writing an explanatory statement*, it is generally necessary that the Explanatory Statement refer to section 28 and employ its framework.

A particular issue is whether the Bill's limitations on the right to privacy are the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. A mere assertion that they are (as at page 4 of the Explanatory Statement) does not demonstrate that this is so. There should be some indication as to whether less restrictive alternative means were considered and why they were rejected.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister amend the Explanatory Statement to provide a section 28 justification for the limitations to the right to privacy.

Human rights issues: particular matters concerning the right to privacy (HRA section 12)

The investigative powers of the subcommittee are spread over clauses 11 to 15.

Access to places of detention: clauses 11 and 12

Subclause 11(2) provides that the responsible Minister and detaining authority for the place of detention must ensure that the subcommittee and any accompanying expert or assistant are given access to, and are able to exercise their functions in accordance with the Optional Protocol in, the place of detention. For this clause (and clause 12), "assistant" means "a person appointed under the Ministerial arrangements to assist the subcommittee". In this clause, and other clauses that speak of an expert, there is no limit in respect of what range and number of persons may be designated (presumably by the subcommittee) as experts. There is no statement as what may be the relevant fields of expertise, and apparently no control by the government as to the subcommittee's designations.

The Committee recommends that the Minister clarify how and by whom it would be determined whether a person was an "expert".

Subclause 12(2) (perhaps) elaborates a little by providing that Minister and detaining authority for the place of detention must ensure that the subcommittee and any accompanying expert or assistant are given unrestricted access to every part of the place.

Subclause 12(3) (elaborated in subclause 12(4)) permits the detaining authority to take action to cause the Commonwealth Attorney-General to prohibit or restrict the access of the subcommittee to a place of detention, on grounds mentioned in article 14(2) of the Optional Protocol.

Access to information: clauses 13 and 14

Subclause 13(2) provides that the responsible Minister and detaining authority for the place of detention must ensure that the subcommittee and any accompanying expert are given "all relevant information that is requested by the subcommittee for evaluating the needs and measures that should be adopted to strengthen, if necessary, the protection of people deprived of their liberty".

Ascertainment of the extent of this obligation is confused by the more specific provision in subclause 13(3), which confers only on the subcommittee (and not on an expert) a right to "unrestricted" access to certain specific information.

The Committee recommends that the Minister explain why subclause 13(3) (i) does not permit an expert access to the specified information, and (ii) why the word "unrestricted" is employed in this subclause but not in subclause 13(2).

Subclause 14(1) states circumstances in which the subcommittee is not entitled, under clause 13, to certain kinds of records. In general, these are records held by professionals who dealt with a particular person. The problematic category is stated in paragraph 14(1)(b):

> a record held by an Australian lawyer within the meaning of the *Legal Profession Act 2006* or other lawyer concerning legal advice given to a client who is or was a detainee.

The Committee draws attention to two matters.

The first is that the category in paragraph (b) is much narrower than the category of records that would be embraced by the common law right to legal professional privilege (or, if it be relevant, to the category of client legal privilege stated in the Evidence Act). In paragraph (b) there is a substantial diminution on a significant right now often seen as a component of the right to privacy.

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

The second is that with respect to all the categories of exempt information, there is a problem with specifying that the record must be "held by" the professional. Clause 13 imposes obligations on the detaining authority to hand over records it holds, and it may well be that these include records created by a professional but no longer held by that person. In this kind of case, clause 14 could not operate.

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

Interviews with a detainee or other person at a place of detention: clause 15

Subclause 15(2) provides that the responsible Minister and detaining authority for the place of detention must ensure that the subcommittee and any accompanying expert are given reasonable assistance to interview, without witnesses, either personally or through an interpreter, any detainee or other person at the place who the subcommittee chooses to interview.

Ascertainment of the extent of this obligation is confused by the more specific provision in subclause 15(3), which confers only on the subcommittee (and not on an expert) a right to interview about certain specified matters.

The Committee recommends that the Minister explain why subclause 15(3) does not permit an expert to interview in relation to the specified information.

Subclause 15(4) provides that nothing in the clause "requires a person who objects or does not consent to being interviewed by the subcommittee to participate in an interview". This is commendable from a privacy perspective, but it leaves open the question of what is to occur if the objection is made at some point during the interview. In particular, what, if anything, might the interviewee do to prohibit the use of the information obtained from being used in any way?

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

General points about the investigative powers

The Explanatory Statement states correctly at page 4 that the subcommittee "has no coercive powers to enforce compliance with any of its requests", and points to this as a factor in justification of the conferment of these powers on the subcommittee. It may, however, be asked whether there might be some persons (including even Ministers) who will not feel free to ignore a request from the subcommittee.

On the other hand, there appears to be no restriction on what the subcommittee (or an expert) may or may not do with information concerning an individual it acquires. The usual practice in Territory laws that empower officials to acquire personal information is to closely state the circumstances under which it may be used, and to whom it may be disclosed, and to penalise its misuse. The subcommittee's Guidelines would not operate as a legal restriction on what the subcommittee or its experts could do. The absence of these protections is a significant factor pointing against the compatibility of these provisions with the right to privacy in HRA section 12.

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

Purported restriction of the power of the legislative power of the Legislative Assembly

There are three provisions in the Bill which raise an issue raised frequently by the Committee, and responded to by Ministers. The issue is of critical importance in that these provisions purport—in the Committee's view without any legal foundation—to restrict the legislative power of the Legislative Assembly. The provisions are also apt to at least potentially mislead members of the public as to just what is the law of the Territory.

The three provisions are:

- clause 8: "A provision of any other territory law that prevents, or limits, the exercise of any function by the subcommittee in relation to a detainee or place of detention under this Act has no effect to the extent of any inconsistency with this Act";
- subclause 13(5): "A provision of any Act or other law that restricts or denies access to records does not prevent the responsible Minister or detaining authority from complying with this section"; and
- subclause 16(2): "This section has effect despite any duty of secrecy or confidentiality or any other restriction on the giving or disclosure of information (whether or not imposed by or under an Act) applicable to the person.

The Committee has stated its concern with such provisions in each of *Scrutiny Reports 1, 2 and 3* of this Assembly. In essence, its view is that at least so far as concerns an Act passed by the Assembly after the date this Bill becomes law as an Act (assuming that occurs), that first-mentioned later Act will prevail over any inconsistent and irreconcilable provision of the latter Act.[1]

[1] The Committee's reasoning is stated in *Scrutiny Report 3*, at 14-15.

It appears that the government does not disagree with this proposition. Rather, it seems to say that it is "understood" that clauses such as those above would be read down and not have effect according to their terms. In *Scrutiny Report 3* (at page 21), the Committee pointed out that "[s]tatutes 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". It went on to say (in words now adapted to deal with a provision that does not confer a power to make subordinate law):

> where a provision [of this kind] 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 [limit] 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 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.

The Explanatory Statement to this Bill makes no concession to the view of the Committee. It comments only on clause 8, stating that "[t]he purpose of this clause is to ensure that the subcommittee's mandate under OPCAT is not limited by Territory laws that are inconsistent with this Act". So far as concerns laws made subsequent to the Act, this is plainly wrong and misleading.

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

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to amend the scheme in the road transport legislation, and in particular, provisions in the *Road Transport (General) Act 1999* for paying infringement notice penalties for traffic and parking offences.

The Bill builds on amendments made in May 2012 that introduced new payment options for people in financial hardship.

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

The Committee refers the Assembly to the comments at pages 2 to 3 of the Explanatory Statement, where it is argued that the Bill is at least consistent with human rights in that it ameliorates the difficulties some offenders have in paying their infringement penalties. It is not clear just what rights stated in the Human Rights Act are promoted, but the general point has substance. The Committee also accepts that, in this context, giving greater sentencing flexibility to the courts "is consistent with general sentencing principles and human rights relating to fairness in criminal proceedings".

The Committee notes that there is perhaps a countervailing consideration. A law prescribing penalties for road traffic offences may be seen to promote the right to "security of the person" stated in HRA subsection 18(1), and/or the right to life in subsection 9(1). It is for a Member of the Assembly to assess whether the Bill's scheme for permitting persons who have difficulty paying a penalty to substitute this obligation with participation in an infringement notice management plan

pays sufficient attention to these rights. Such a plan is an arrangement with the authority for discharge of the penalty for the offence by payment by instalment or by participating in an approved community work or social development program; see clause 10, proposed subsection 31A(2) of the Road Transport (General) Act.

The Committee does not express a view on this issue.

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)

Under this term of reference, the Committee points to some aspects of the scheme of the Bill in relation to infringement notice management plans:

1. An application by a person to the authority to enter into an arrangement for a an infringement notice management plan, must include "if the person is the holder of a card prescribed by regulation that is current—that information" (proposed paragraph 31A(4)(b)). It will thus be necessary for the Executive to make a regulation having this effect. No particular kind of card is specified, but the Explanatory Statement contemplates some kind of "concession card" (see at page 8). This is a relatively minor point, but given that a power confers legislative power on the Executive, ***might the word "concession" be inserted in paragraph 31A(4)(b)?***

2. Proposed subsection 31A(4) specifies matters to be included by an applicant in an application for an arrangement. In addition to the matter just noted, paragraph 31A(4)(a) specifies "information about the person's financial circumstances", and, "if the application is to participate in an approved community work or social development program", paragraph 31A(4)(c) specifies "information about any relevant circumstances of the person". (What may be "relevant circumstances" is specified in clause 6 of the Bill.) Paragraph 31A(4)(d) specifies "anything else prescribed by regulation". This is a very wide power and while a court would read it down so that a regulation to be valid must relate to the purpose of an arrangement, it is as a matter of principle desirable that such a limit be made explicit. ***The issue is whether a form of words could be inserted into this power to limit its scope.***

3. The administering authority must decide whether to allow an arrangement. Proposed sections 31B and 31C (see clause 10) do indicate a range of relevant factors to be taken into account by that authority, and, where the application is for participation in an approved community work or social development program, also by the "relevant director-general", which officer must agree to allowing the application. In relation to the latter, proposed subsection 31C(4) is applicable, and it directs that the director-general must be satisfied on reasonable grounds that participation is justified because of either or both of the financial circumstances of the applicant, and any relevant circumstances of the applicant; and so satisfied that the applicant is suitable to participate in the program. Proposed subsection 31C(5) then provides that the director-general may make guidelines about the exercise of the director-general's functions under subsection (4), and subsection 31C(6) provides that a guideline is a notifiable instrument. In this context, these guidelines could critically determine how this scheme works, and ***the issue is whether they should be disallowable instruments, and not merely notifiable***.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-11 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (No. 2) 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 Qirx 2013 Promotional Rally Day.**

Disallowable Instrument DI2013-12 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (No. 3) 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 National Capital Rally, Test Events, Corporate Events and Media Events.**

Disallowable Instrument DI2013-13 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2013 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2006-246 and approves specified areas within the Canberra Racing Club, Thoroughbred Park, Randwick Road, Lyneham, as approved sports bookmaking venues.**

Disallowable Instrument DI2013-14 being the Health (Local Hospital Network Council—Member) Appointment 2013 (No. 1) made under section 16 of the *Health Act 1993* **appoints a specified person as a member of the ACT Local Hospital Network Council, with expertise in clinical matters.**

Disallowable Instrument DI2013-15 being the Health (Local Hospital Network Council—Chair) Appointment 2013 (No. 1) made under section 18 of the *Health Act 1993* **appoints a specified person as chair of the ACT Local Hospital Network Council.**

Disallowable Instrument DI2013-17 being the Road Transport (General) CTP Regulator Levy Determination 2013 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **determines the CTP Regulator Levy.**

Disallowable Instrument DI2013-18 being the Land Rent (Discount—Registered Affordable Housing Providers) Determination 2013 (No. 1) made under section 16B of the *Land Rent Act 2008* **determines that a specified entity is entitled to pay discounted land rent for a land rent lease.**

Disallowable Instrument DI2013-19 being the Canberra Institute of Technology (Advisory Council) Appointment 2013 (No. 1) made under section 32 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as chair of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2013-20 being the Canberra Institute of Technology (Advisory Council) Appointment 2013 (No. 2) made under section 32 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as deputy chair of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2013-21 being the Canberra Institute of Technology (Advisory Council) Appointment 2013 (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, representing the interests of industry and commerce.**

Disallowable Instrument DI2013-22 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (No. 4) made under section 12 of the *Road Transport (General) Act 1999* **declares that Australian Road Rule 205 does not apply to a road or road related area that is controlled by non-pay time limited parking signs around Manuka Oval, in relation to AFL events on 8 March, 27 April and 6 July 2013.**

Disallowable Instrument DI2013-23 being the Education (Non-Government Schools Education Council) Appointment 2013 (No. 1) 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 Catholic independent schools.**

Disallowable Instrument DI2013-24 being the Education (Non-Government Schools Education Council) Appointment 2013 (No. 2) 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 DI2013-25 being the Education (Non-Government Schools Education Council) Appointment 2013 (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 DI2013-26 being the Education (Government Schools Education Council) Appointment 2013 (No. 1) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member of the Government Schools Education Council.**

Disallowable Instrument DI2013-27 being the Road Transport (General) (Vehicle Registration) Exemption 2013 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2007-50 and exempts hybrid vehicles with a wheelbase of less than 2800mm from the provisions of section 32C(1) of the Road Transport (Vehicle Registration) Regulation.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

No explanatory statement

Disallowable Instrument DI2013-10 being the Auditor-General Standing Acting Appointment 2013 made under Schedule 1 of the *Auditor-General Act 1996* **and Division 19.3.2A of the** *Legislation Act 2001* **appoints a specified person to act as Auditor-General when the Auditor-General is unable to perform the functions of the office or the office is vacant.**

The Committee notes that there is no explanatory statement for this instrument. While the Committee also notes that there is no formal requirement that explanatory statements be provided for instruments, the Committee expects that an explanatory statement will be provided for all instruments. This expectation is based on the fact that explanatory statements can provide the Committee (and the Legislative Assembly) with valuable information about the purpose, etc of an instrument. This information allows the Committee (and the Legislative Assembly) to carry out its scrutiny role, in relation to instruments.

The Committee draws the Legislative Assembly's attention to this instrument, under principle (2) of the Committee's terms of reference, as the (non-existent) explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

Positive comment

Disallowable Instrument DI2013-16 being the Water Resources (Fees) Determination 2013 (No. 1) made under section 107 of the *Water Resources Act 2007* **revokes DI2012-158 and determines fees payable for the purposes of the Act.**

The Committee notes with approval that this instrument has been made in order to address concerns expressed by the Committee in relation to the instrument that this instrument replaces. The explanatory statement for this instrument states:

> Disallowable Instrument 2012-158 was the subject of scrutiny by the Standing Committee on Justice and Community Safety of the ACT Legislative Assembly in its Report No.55 of 20 August 2012. The Committee noted that in various places in Schedule 1 of the Determination, it was stated that the Environment Protection Authority (EPA) sets the date on which the fee must be paid and asked whether the Determination therefore involves a sub delegation of a legislative power.
>
> There was no intention to sub delegate a legislative power in DI 2012-158 but to remove any ambiguity a new Determination has been made in which the reference to the EPA setting the date for payment of the fees has been removed. Instead, the fees are stated to be payable in accordance with the entitlement or licence as appropriate.
>
> In all other respects, the Determination is in the same terms as DI 2012-158. There has been no change in the fee structure or amount.

This comment does not require a response from the Minister.

SUBORDINATE LAW—NO COMMENT

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

Subordinate Law SL2013-4 being the Public Health (Community Pharmacy Ownership) Amendment Regulation 2013 (No. 1) made under the *Public Health Act 1997* **allows pharmacy corporations that owned a community pharmacy and operated a pharmacy business prior to 1 July 2010 to be able to continue to do so.**

SUBORDINATE LAWS—COMMENT

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

Subordinate law made under "Henry VIII" clause

Subordinate Law SL2013-3 being the Racing (Race Field Information) Amendment Regulation 2013 (No. 1) made under the *Racing Act 1999* **determines the methodology to apply to the calculation of the race field information charge for a transitional period.**

This subordinate law amends the *Racing (Race Field Information) Regulation 2010*, by inserting into that regulation a new Schedule 1. The new Schedule 1, in turn, modifies the *Racing Act 1999*. Schedule 1 is made under section 104 of the Racing Act, which provides:

> **104 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Racing Amendment Act 2013*.

(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

Section 104 of the Racing Act is a "Henry VIII" clause, in that it allows the modification of primary legislation by subordinate legislation (see the Committee's fact sheet on "Henry VIII" clauses, available at http://www.parliament.act.gov.au/committees/index1.asp?committee=119).

The explanatory statement for this subordinate law states:

> Under section 104, the Act provides that transitional regulations may be developed to ensure that any other matters arising from the enactment of the Act may be addressed. Subsection 104 (2) specifically provides that the regulation may modify Part 10 of the Act for transitional matters.
>
> The Racing (Race Field Information) Amendment Regulation 2013 (No 1) provides for these transitional matters to ensure that the handover of responsibility for the race field information charge to the racing industry operates smoothly.
>
> The Regulation provides for the methodology to apply to the calculation of the race field information charge for the transitional period, which is from commencement of the Act until 30 June 2013. To do so, the Regulation modifies the Act by adding new sections 100 and 101A to 101F which provide for different situations applicable to existing approval holders in relation to charges pre- and post-amendment of the Act.
>
> The Regulation also provides a number of provisions to clarify existing transitional provisions of the Act or which are consequential on the above.
>
> The Regulation and Part 10 of the Act will expire one year after its commencement, which will ensure that all matters relating to transactions during the transitional period can be finalised by the ACT Gambling and Racing Commission (the Commission) acting as an agent for the controlling bodies during that period.
>
> It is considered that the Regulation does not raise any human rights issues.

The Committee notes that this subordinate law is within the power given by section 104 of the Racing Act.

This comment does not require a response from the Minister.

Strict liability offences / Subordinate law made under "Henry VIII" clause

Subordinate Law SL2013-5 being the Retirement Villages Regulation 2013 made under the *Retirement Villages Act 2012* **brings the ACT scheme into line with the requirements in New South Wales.**

The Committee notes that this subordinate law provides for 2 strict liability offences. Section 50 of this subordinate law provides (in part):

50 Storage of other uncollected goods

(1) The operator of a retirement village commits an offence if the operator fails to deal with uncollected goods of a former occupant of the village (other than goods mentioned in section 49 (1)) in accordance with this section.

Maximum penalty: 20 penalty units.

(2) An offence against subsection (1) is a strict liability offence.

……..

Section 52 provides (in part):

52 Disposal of uncollected goods after storage

(1) This section applies to uncollected goods mentioned in section 50.

(2) The operator of a retirement village commits an offence if, at the end of the 30-day period mentioned in section 50 (3), the operator fails to deal with the uncollected goods in accordance with this section.

Maximum penalty: 20 penalty units.

(3) An offence against subsection (2) is a strict liability offence.

……..

As the Committee stated in its document titled *Subordinate Legislation: technical and stylistic standards* (available at http://www.parliament.act.gov.au/committees/index1.asp?committee=119), 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, however, is that the explanatory statement for a subordinate law that includes an offence 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 does not address the strict liability offences identified above, other than to note that that they are offences of strict liability.

The Committee draws the Legislative Assembly's attention to this subordinate law, under principle (1)(b) of the Committee's terms of reference, on the basis that it contains provisions that it contains provisions that may unduly trespass on rights previously established by law, contrary to and, under principle (2) of the Committee's terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

Schedule 5 of this subordinate law contains modifications of the *Retirement Villages Act 2012*. In particular, Schedule 5 inserts new sections 503A to 503ZU into the Retirement Villages Act. Schedule 5 is made under section 504 of the Retirement Villages Act, which provides:

> **504 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
>
> (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
>
> (3) A regulation under subsection (2) has effect despite anything else in this Act or another territory law.

Section 504 of the Retirement Villages Act is a "Henry VIII" clause, in that it allows the modification of primary legislation by subordinate legislation (see the Committee's fact sheet on "Henry VIII" clauses, available at http://www.parliament.act.gov.au/committees/index1.asp?committee=119).

The explanatory statement for this subordinate law states, in relation to Schedule 5:

> The provisions in this schedule modify part 20 of the Act under section 504(2) of the Act.
>
> These provisions relate to the effect of the provisions in the Act on arrangements entered into before commencement of the Act.

This would tend to indicate that the amendments made by Schedule 5 are properly "transitional" and so are within the power provided for in section 504 of the Retirement Villages Act (though there is no explanation provided as to why such arrangements could not have been considered in the drafting of the Act itself). In any event, the Committee notes that section 505 of the Retirement Villages Act provides:

> **505 Expiry—pt 20**
>
> This part expires 5 years after the commencement day.
>
> *Note* Transitional provisions are kept in the Act for a limited time. A transitional provision is repealed on its expiry but continues to have effect after its repeal (see Legislation Act, s 88).

This means that the "Henry VIII" clause has a relatively limited life.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 26 March 2013, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instruments—
  - DI2012-273 being the Health (Fees) Determination 2012 (No. 2); and

- DI2013-3 being the Health (Fees) Determination 2013 (No. 1).

- The Minister for Health, undated, in relation to comments made in Scrutiny Report 1 concerning Subordinate Law SL2012-36, being the Food (Nutritional Information) Amendment Regulation 2012 (No. 1).

- The Minister for the Environment and Sustainable Development, dated 27 March 2013, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instrument DI2012-268, being the Energy Efficiency (Cost of Living) Improvement Eligible Activities Code of Practice 2012 (No. 1).

The Committee wishes to thank the Minister for Health and the Minister for the Environment and Sustainable Development for their helpful responses.

EXECUTIVE MEMBER'S RESPONSE

The Committee has received a response from Mr Rattenbury, dated 18 March 2013, in relation to comments made in Scrutiny Report 3 concerning the Gaming Machine Amendment Bill 2013.

The Committee wish to thank Mr Rattenbury for his helpful response.

Steve Doszpot MLA
Chair

April 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

Report 2, dated 4 February 2013

Directors Liability Legislation Amendment Bill 2012

Report 3, dated 25 February 2013

Disallowable Instrument DI2012-238 - Public Sector Management Amendment Standards 2012 (No. 3)

Disallowable Instrument DI2012-246 - Road Transport (General) Withdrawal of Infringement Notices Guidelines 2012 (No. 1)

Disallowable Instrument DI2012-279 - Energy Efficiency (Cost of Living) Improvement Eligible Activities Code of Practice 2012 (No. 1)

Disallowable Instrument DI2013-5 - Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 1)

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
London Circuit
CANBERRA ACT 2601

Dear Mr Hanson

I refer to the Scrutiny Report No 3 dated 25 February 2013 in which the Committee raised a question in regard to the replacement of a Disallowable Instrument within a short timeframe.

Pharmaceutical co-payment fees are set annually by the National Highly Specialised Drugs (NHSD) working party (which comprises membership from the Commonwealth and States and Territories). The NHSD working party sets the general co-payment fee for drugs dispensed at community pharmacies as well as at public hospitals (which is set at 80% of the general rate).

As part of the National reforms to Commonwealth reimbursements for Highly Specialised Drugs, all States and Territories were planning to transition to online claiming directly from Medicare for PBS Section 100 Highly Specialised Drugs (HSD) by 31st December 2012. As part of the move to online claiming, the 80% discounted public hospital rate was to be abolished. This would have meant that the full general patient co-payment amount of $36.10 would be charged from 1 January 2013.

Following a change in the deadline for the transition to March 2013, advice from the Commonwealth was that States and Territories could determine whether they charged the general patient co-payment in public hospitals ($28.90) or the full general co-payment amount ($36.10) until they transitioned to online claiming.

Disallowable Instrument DI2012-272, among other fee additions and deletions, increased the general patient co-payment fees for pharmaceuticals dispensed at public hospitals at Section I to the higher amount of $36.10.

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On 21 December 2012, after the Disallowable Instrument DI2012-272 was notified, contrary advice from the NHSD working party was provided that States and Territories should charge the lower fee of $28.90 until they had commenced online claiming from Medicare.

Therefore, Disallowable Instrument DI2013-3 was put through as soon as possible in January to amend the fee from the full $36.10 to the lower rate of $28.90.

I thank the Committee for bringing this matter to the Government's attention.

Yours sincerely

Katy Gallagher MLA
Minister for Health

26 MAR 2013

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
London Circuit
CANBERRA ACT 2602

Dear Mr Hanson

I am writing in response to the comments in the Scrutiny Report Number 1 of 29 November 2013 and the Standing Committee on Justice and Community Safety's comments on the Food (Nutritional Information) Amendment Regulation 2012 (No.1).

The Committee has raised concerns regarding the incorporation of the Food Standards Code (the Code) in the *Food Act 2001* and the Code's adoption under the Food Regulation 2002.

The Committee has noted that a notifiable instrument is required by section 47 of the *Legislation Act 2001* unless not applied. The relevant notifiable instrument was repealed in 2010 as it referenced a previous version of the Code. A new instrument was not notified.

The Code is regularly amended, making it impracticable for it to be a notifiable instrument. I am advised that the Code is available from the Commonwealth Legislation Register and the Food Standards Australia New Zealand website. Therefore, I propose to amend the Regulation to expressly displace the requirement in section 47 of the *Legislation Act 2001* for the Code to be a notifiable instrument.

I thank the Committee for bringing this matter to the Government's attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Minister for Health

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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 MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Hanson

I write concerning the comments in the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) Scrutiny Report 3 in relation to the compliance of the Disallowable Instrument DI2012-268, the *Energy Efficiency (Cost of Living) Improvement Record Keeping and Reporting Code of Practice 2012 (No. 1)*, and Disallowable Instrument DI2012-279, 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* (the Act).

I acknowledge that the original regulatory impact statement for the Act, and the explanatory statement for the instruments noted above, do not contain information specifically addressing the Scrutiny of Bills Committee principles as required under subsection 35(h) of the *Legislation Act 2001*. I provide the following advice to address this oversight.

The laws are entirely consistent Scrutiny of Bills Committee principles, in that they:

- accord with the general objects of the Act under which they are made, as discussed in the explanatory statements;
- do not unduly trespass on rights previously established by law, as they merely outline the expected requirements for record keeping and carrying out eligible activities as anticipated by the Act;
- do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions, in that a decision by the Administrator to determine the retailer energy savings result based on the requirements in the codes is a reviewable decision; and

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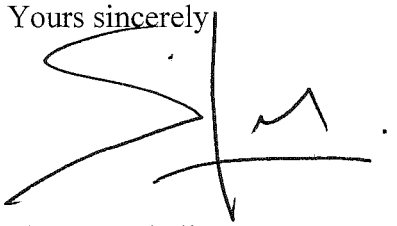
- do not contain matters which should properly be dealt with in an Act of the Legislative Assembly, in that the Assembly passed the Act, which includes defined functions for the Administrator in section 24 and an explicit power at section 25 for the Administrator to make codes of practice for record keeping and reporting requirements, consumer protection obligations and quality, health, safety and environmental requirements applying to eligible activities by disallowable instrument. Therefore, the making of these instruments are consistent with the intended operation of the Act.

I consider the explanatory statements associated with the legislation, and the regulatory impact statement, meet the technical and stylistic standards expected by the Committee.

I trust that I have adequately addressed the Standing Committee's concerns.

Yours sincerely



Simon Corbell MLA
Minister for the Environment and Sustainable Development

27.3.13

Shane Rattenbury MLA
ACT Greens Member for Molonglo

Mr Steve Doszpot
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2602

Dear ~~Mr Doszpot~~ Steve,

I refer to the Committee's comments concerning the Gaming Machine Amendment Bill 2013 in Scrutiny Report 3 (25 February 2013). The Committee raised two concerns; these are addressed in turn below.

Inappropriate delegation of power

The Committee observed that there was an inconsistency in terms of the scope of the power provided in the Bill and the notes in the Explanatory Statement. The Committee correctly observes that in theory a regulation could be made for any element of a gaming machine or peripheral equipment although it should be noted that this will inevitably be limited by other sections of the Act which provide for the operation of gaming machines and the broader policy set out in the Act to create a cap on gaming machine numbers in the Territory.

Whilst I recognise that the explanatory statement gives a narrower indication of the operation of the clause than is technically possible the practical reality is that the only change in the functions of new machines which people will apply for permits to operate, will be to make them more profitable for operators and therefore more harmful to problem gamblers. It is inconceivable that a gaming machine company would produce a gaming machine that encourages gamblers to spend less. The practical reality is that for dealing with new licences any limitations will be to reduce harmful attributes. It is with this reality in mind that the ES was written.

Additionally, while the fact that a delegated power may be disallowed if exercised inconsistently with the view of the Assembly does not make the delegation of the power appropriate, it is worth noting that any regulation made is subject to the disallowance provisions set out in the Legislation Act 2001.

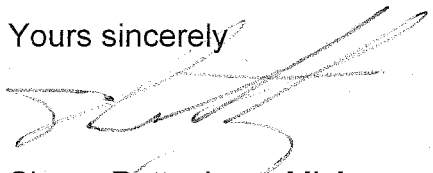
It is appropriate that this power be delegated to the Minister as changes in technology may occur quickly and potentially may be quite technical. Already the Gaming Machine Regulation 2004 plays a significant role in the operation of gaming machines in the ACT. The power that is proposed to be delegated

is consistent with what is currently controlled in the regulations. For example regulation 75 prohibits the use of note acceptors that accept $50 or $100 notes.

A matter of clarification

The Committee posed a question about the intended operation of the exception to accommodate devices for those with a hearing impairment. As indicated in the explanatory statement the provision was modelled on the Victorian regulations. The exception was cast in those terms to avoid imposing a requirement on the Commissioner to consider the efficacy of the device or the likelihood that people with a hearing impairment would actually use it. It is sufficient for the purpose of the Bill if the Commissioner considers the intended function of the device as a device designed to assist a person with a hearing impairment and one to further focus a person's attention solely on a gaming machine is likely to be very clear.

Yours sincerely



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18 March 2013

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