

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

SCRUTINY REPORT 11

9 SEPTEMBER 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 its legislative scrutiny role shall:

- (1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (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 | 1 |
| BILLS—NO COMMENT | 1 |
| Duties (Duty Deferral) Amendment Bill 2013 | 1 |
| Justice and Community Safety Legislation Amendment Bill 2013 (No. 4) | 1 |
| Magistrates Court (Industrial Proceedings) Amendment Bill 2013 | 1 |
| Workers Compensation Amendment Bill 2013 | 1 |
| BILLS—COMMENT | 1 |
| Land Rent Amendment Bill 2013 | 1 |
| Officers of the Assembly Legislation Amendment Bill 2013 | 4 |
| SUBORDINATE LEGISLATION | 5 |
| DISALLOWABLE INSTRUMENTS—NO COMMENT | 5 |
| SUBORDINATE LAW—NO COMMENT | 6 |
| GOVERNMENT RESPONSE | 7 |
| OUTSTANDING RESPONSES | 8 |

BILLS

BILLS—NO COMMENT

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

DUTIES (DUTY DEFERRAL) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Duties Act 1999* to ensure that applicants who would have otherwise been eligible for duty deferral on the purchase of an established property, via the first home owner grant scheme, retain access to the deferral scheme.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2013 (No. 4)

This is a Bill for an Act to amend a number of laws administered by the Justice and Community Safety Directorate.

MAGISTRATES COURT (INDUSTRIAL PROCEEDINGS) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Magistrates Court Act 1930* to establish an Industrial Court jurisdiction when the Magistrates Court is constituted by the Industrial Court Magistrate and in other specific circumstances.

WORKERS COMPENSATION AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Workers Compensation Act 1951* to allow for the costs of administering the *Work Health and Safety Act 2011* to be apportioned between workers' compensation insurers and self insurers.

BILLS—COMMENT

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

LAND RENT AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Land Rent Act 2008* with respect to the land rent scheme.

Has there been a trespass on personal rights and liberties?

A separation of powers issue: Does clause 28 of the Bill propose to vest in a court of the Territory a function that would substantially impair its institutional integrity?

The Explanatory Statement states the policy objective of the Bill and a summary of its main provisions and the Committee refers members to this statement. The comment below is not concerned with the changed conditions for eligibility to apply for a land rent lease that will apply to leases granted on or after 1 October 2013. The Committee's comments are also restricted to such leases.

Proposed section 16AA of the Act (see clause 23) states the circumstances under which a lessee will lose eligibility to pay land lease rent. Any one of the following circumstances will have this result (paragraph 16AA(1)(b)):

- (i) the total income of the lessee under the lease, or the sum of all the total incomes of all of the lessees, is more than the income threshold amount for 2 consecutive years;
- (ii) the lessee, or any of the lessees, becomes the owner of other real property;
- (iii) if a certificate of occupancy is issued for the lease—all the lessees stop living on the parcel of land under the lease.

In any such circumstance, the commissioner must give each lessee under the lease written notice that the lessee is not eligible to pay land rent (section 16AA(2)), and upon receipt of the notice the lessee “must

within 2 years after the day the notice is given—

- (a) vary the lease to reduce the land rent payable to a nominal rent¹; or
- (b) transfer the lease to an eligible transferee (subsection 16AA(3)).

Proposed subsection 16C(2) (see clause 24) permits the transfer of a lease to only two categories of persons, being

- (a) an eligible transferee; or
- (b) if, on application of a lessee under the lease, the commissioner decides it is appropriate that paragraph (a) should not apply—someone other than an eligible transferee.

There is no explanation in the Explanatory Statement as to the purpose of vesting in the commissioner such a wide discretion to permit transfer to a person other than an eligible transferee. Presumably, it is to mitigate the potential harshness of the application of paragraph 16C(2)(a) in every case. The Minister may issue determinations to guide the exercise of this discretion in paragraph 16C(2)(b).

Proposed subsection 26A (see clause 28) applies where (a) the lease is held for a term of years, (b) the commissioner has given the lessee a notice under proposed subsection 16AA(2), and (c) the lessee has not, upon receipt of a notice varied the lessee or transferred the lease to an eligible transferee.

Drafting point—Paragraph 16AA(3)(b) requires the lessee to transfer to “an eligible transferee”, and paragraph 26A(1)(c) applies where the lessee has not transferred the lease to “an eligible transferee”. Does the latter apply even where the lease has been transferred to a person other than an eligible transferee as may be permitted by the commissioner? The comment below assumes that this is intended. The answer might lie in a definition of “eligible transferee”, but the Committee cannot find one in the Bill.

Where subsection 26A applies, the commissioner may apply to a Territory court of competent jurisdiction for the sale of the lease. The function of the court is then described in subsection 26A(4):

- (4) If the court is satisfied that this section applies to the land rent lease, the court must—
 - (a) order the sale by public auction of the land rent lease,

¹ A Note to this provision explains that “The lessee must apply under the Planning and Development Act 2007, s 272A (Application for rent payout lease variation) for a variation of the lease to reduce the rent payable to a nominal rent”.

- (b) order that the proceeds be paid into court; and
- (c) order that the title to the lease be transferred to the purchaser free from mortgages and other encumbrances.

The court must examine only whether the three circumstances stated in subsection 26A(1) exist. It has no discretion to explore and to determine whether there are circumstances where an enforced sale would be inappropriate. For example, it cannot take into account any hardship that the lessee might suffer, such as might be considered by the commissioner when he or she decides whether to permit transfer to a person other than an eligible transferee.

In this circumstance, there is a question whether subsection 26A(4) might be taken by a court to be an attempt to vest in a court of the Territory a function that would substantially impair its institutional integrity, and, on this basis, to be invalid.

This possibility alludes to a complex constitutional principle, often known as the *Kable* doctrine.² Adapting these words to the ACT, the main elements of the doctrine were stated by French CJ in *South Australia v Totani* [2010] HCA 39 [69]:

1. [The Legislative Assembly] cannot confer upon a court ... a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.
2. [Territory] legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.
3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.
4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation because: "the critical notions of repugnancy and incompatibility are unsusceptible of further definition in terms which necessarily dictate future outcomes". [Footnotes omitted]

The possibility (and the Committee puts it no higher) that subsection 26A(4) is invalid arises from the fact that must order the sale of the lease if it is satisfied of the existence of the three conditions stated in subsection 26A(1).

The primary argument might be that the section is structured so that the court appears to be enlisted as an instrument for the administrative enforcement of a substantive decision made by the executive (the commissioner).³ Prediction as to what a court might find is very difficult, as may be seen in this contrast noted by French CJ:

² After *Kable v Director of Public Prosecutions* (1996) 189 CLR 51,

³ *Ibid*, at [81] French CJ; [149] Gummow J; [436] Crennan and Bell JJ; and [481] Kiefel J.

It has been accepted by this Court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities. ... But these powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions. [Footnote omitted].

The court must of course make findings of fact to be so satisfied, but these findings cannot take into account the effect on the lessee of the forced sale of the lessee's property. Only the commissioner may take this matter into account. The fact that the order of the court will impact on the common law right to property – and yet the court has no power to take this into account - is a factor that might influence a court to find that its function "substantially impairs its institutional integrity".⁴

The Committee considers however that the issue is sufficiently significant to warrant raising it, and recommends that the Minister respond.

The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.

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| OFFICERS OF THE ASSEMBLY LEGISLATION AMENDMENT BILL 2013 |
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This is a bill for an Act to amend the *Auditor-General Act 1996*, the *Electoral Act 1992* and the *Ombudsman Act 1989* to formally recognise the auditor-general, the ombudsman and the three Electoral Commission members as officers of the Assembly, and in particular to make provision for their appointment, suspension and dismissal.

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

The Explanatory Statement has an extensive and balanced discussion of the ways in which the Bill's provision engage human rights. The Committee refers this discussion to Members of the Legislative Assembly.

The Explanatory Statement also notes that:

[t]he Bill adopts the same provisions as exist for the clerk in relation to the suspension and termination of appointment as set out in the *Legislative Assembly (Office of the Legislative Assembly) Act 2012*. These provisions were amended during debate on the Legislative Assembly (Office of the Legislative Assembly) Bill 2012 to respond to the concerns of the Scrutiny Committee in [*Scrutiny Report 49 of the 7th Assembly*].

In that report, the Committee made extensive comment on the provisions of the Bill, and identified respects in which some human rights may not have been adequately protected. The amended Bill, which is the model for this Bill, accepted the Committee's comments.

MATTER FOR CLARIFICATION

Proposed subsection 8(2) of the *Auditor-General Act 1996* (see clause 5) provides that the appointment by the Speaker of the auditor-general "must be made

⁴ See *South Australia v Totani* (above) at [31] per French CJ.

- (a) on the advice of the public accounts committee; and
- (b) in consultation with the Chief Minister;

The Committee does not find it easy to appreciate the difference between, on the one hand, the Speaker acting “on the advice of”, and on the other acting “in consultation with” the named bodies and persons.

The Explanatory Statement offers an explanation of the notion of acting “on the advice of” as used in clause 5. It states:

The speaker is not obliged to follow the advice of the PAC however the appointment may not be made unless the committee has recommended the appointment to the Speaker. Essentially the Speaker and the PAC must agree on the appointment.

This is somewhat akin to the veto power currently provided to the PAC in section 8 of the Act however instead of the committee being involved post the proposal of a person for the position they have an earlier role in the recommendation of the person.

The Committee suggests that a **Note** be appended to proposed subsection 8(2) to the effect of what is stated in the first of these two paragraphs. A similar Note would be required in two other places: at proposed section 12(2) of the *Electoral Act 1992* (clause 24), and at proposed subsection 22(2) of the *Ombudsman Act 1989* (clause 55).

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

MINOR ERRORS IN THE EXPLANATORY STATEMENT

1. In relation to clause 5, the Explanatory Statement notes that the appointment of the auditor-general is a disallowable instrument, and comments that this ensures “that the appointment reflects the view of and is approved by, the Assembly”.

This overstates the matter. Being disallowable, the instrument of appointment can be rendered null if the Assembly passes, or is deemed to have passed, a motion to disallow it. It is not necessary for the Assembly to positively approve the instrument.

2. The reference in the penultimate paragraph of page 17 of the Explanatory Statement to “1.17” should be to “1.7”.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-194 being the Public Unleased Land (Fees) Determination 2013 (No. 2) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2013-145 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2013-199 being the Corrections Management (Official visitor) Appointment 2013 made under subsection 57(1) of the *Corrections Management Act 2007* appoints a specified person as an Official Visitor.

Disallowable Instrument DI2013-200 being the Adoption (Fees) Determination 2013 (No. 1) made under section 118 of the *Adoption Act 1993* revokes DI2012-135 and determines the maximum fees payable for services provided by the ACT Adoptions Unit.

Disallowable Instrument DI2013-201 being the Public Place Names (Weston) Determination 2013 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the name of one road in the Division of Weston.

Disallowable Instrument DI2013-202 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 1) made under paragraph 174(1)(a) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as chair of the Sentence Administration Board.

Disallowable Instrument DI2013-203 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 2) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2013-204 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 3) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2013-205 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 1) made under section 129 of the *Emergencies Act 2004* appoints a specified person as deputy chairperson of the Bushfire Council.

Disallowable Instrument DI2013-206 being the ACT Teacher Quality Institute Board Appointment 2013 (No. 1) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board, nominated by the Archdiocese of Canberra and Goulburn Catholic Education Office.

Disallowable Instrument DI2013-207 being the ACT Teacher Quality Institute Board Appointment 2013 (No. 2) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board, nominated by the Australian Education Union.

Disallowable Instrument DI2013-211 being the Nature Conservation (Draft Strategy) Approval 2013 made under subsection 30(1) of the *Nature Conservation Act 1980* approves the draft Nature Strategy.

SUBORDINATE LAW—NO COMMENT

The Committee has examined the following subordinate law and offers no comment on it:

Subordinate Law SL2013-20 being the Road Transport Legislation Amendment Regulation 2013 (No. 3) made under the *Road Transport (General) Act 1999* and *Road Transport (Safety and Traffic Management) Act 1999* adopts the latest version of the Australian Road Rules.

GOVERNMENT RESPONSE

The Committee has received a response from the Minister for Education and Training, dated 28 August 2013, in relation to comments made in Scrutiny Report 10 concerning Disallowable Instruments ([attached](#)):

- DI2013-192—Training and Tertiary Education (Fees) Determination 2013, and
- DI2013-193—Public Baths and Public Bathing (Active Leisure Centre Fees) Determination 2013.

The Committee wishes to thank the Minister for Education and Training for her helpful response.

Those responses provided to the Committee in a format which meets Web Content Accessibility Guidelines 2.0 (WCAG 2.0), and indicated as “attached”, are reproduced at the end of this report.

Steve Dospot MLA
Chair

9 September 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 7, dated 13 May 2013

Disallowable Instrument DI2013-45—Education (Government Schools Education Council) Appointment 2013 (No. 2)

Report 8, dated 30 May 2013

Administrative Decisions (Judicial Review) Amendment Bill 2013 (PMB)
Heritage Legislation Amendment Bill 2013

Report 9, dated 29 July 2013

Crimes (Sentencing) Amendment Bill 2013

Report 10, dated 12 August 2013

Disallowable Instrument DI2013-88—Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2)

Disallowable Instrument DI2013-115—Land Titles (Fees) Determination 2013

Disallowable Instrument DI2013-148—Building (Fees) Determination 2013 (No. 1)

Disallowable Instrument DI2013-163—Tree Protection (Advisory Panel) Appointment 2013 (No. 1)

Disallowable Instrument DI2013-181—Land Tax (Certificate and Statement Fees) Determination 2013 (No. 1)

Disallowable Instrument DI2013-198—Water Resources (Fees) Determination 2013 (No. 3)



Joy Burch MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR DISABILITY, CHILDREN AND YOUNG PEOPLE
MINISTER FOR THE ARTS
MINISTER FOR WOMEN
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR GAMING AND RACING

MEMBER FOR BRINDABELLA

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

I write in relation to the comments in the Scrutiny Report 10 of 12 August 2013 published by the Standing Committee on Justice and Community Safety in its Legislative Scrutiny role.

These comments relate to the fee increases in Disallowable Instrument:

- D12013-192 being the Training and Tertiary Education (Fees) Determination 2013 made under section 111 of the *Training and Tertiary Education Act 2003*, and
- D12013-193 being the Public Baths and Public Bathing (Active Leisure Centre Fees) Determination 2013 made under section 37 of the *Public Baths and Public Bathing Act 1956*.

These Instruments determine fees payable for the purposes of the Acts.

The Education and Training Directorate reviewed its fees and charges in line with the Treasury Directorate's estimate of the wage price index of three per cent.

The *Fees and Charges Policy and Guidelines*, issued by the Chief Minister and Treasury Directorate in February 2013, states 'as far as practical, fees and charges should be indexed annually using the Wages Price Index'.

Specifically the increases relating to the Disallowable Instruments set out above are in line with or less than the wage price index, rounded down to the nearest ten cents.

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I trust that this adequately addresses the Committee's requests.

Yours sincerely

Joy Burch MLA
Minister for Education and Training
August 2013

