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

SCRUTINY REPORT 12

14 OCTOBER 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.

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BILLS

BILLS—NO COMMENT

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2013 (NO. 2)

This is a Bill for an Act to amend, for law revision purposes only, a number of Territory statutes and subordinate laws in relation to planning, building and the environment.

STATUTE LAW AMENDMENT BILL 2013 (NO. 2)

This is a Bill for an Act to amend, for law revision purposes only, a number of Territory statutes and subordinate laws.

BILLS—COMMENT

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

ANIMAL WELFARE (FACTORY FARMING) AMENDMENT BILL 2013

This is a Bill to amend the *Animal Welfare Act 1992* to create offences in relation to three types of "factory farming" practices, namely battery cages for egg production, sow stalls and farrowing crates for pork production and the debeaking of hens intended for laying eggs.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

THE RIGHTS TO PROPERTY, TO TRADE, AND TO LIVELIHOOD AND THE BAN ON THE KEEPING OF HENS IN A CAGE SYSTEM

The ban on the keeping of hens in a cage system is proposed by clause 5 of the Bill, which would insert a section 9A into the Animal Welfare Act.

It is possible that ban will have an adverse effect on the profitability of a business which produces eggs. It may restrict the uses the business may make of its property, and may lead to loss of employment in the current workforce. Taking into account the practical operation of the provisions, the question is whether there are any relevant rights to take into account.

It is enough for present purposes to say that it is generally accepted that a right to protection in respect of a person's property is a "personal right" as that term is used in paragraph (c)(i) of the Committee's terms of reference. (The Committee considered a substantially identical bill in *Scrutiny Report 51* of the *7th Assembly*, in relation to the Animal Welfare (Factory Farming) Amendment Bill 2012, and refers the Assembly to that report for more extensive consideration of the status of a right to protection to property under Territory law.)

There is nothing in the Bill that limits the ban to corporate bodies only and the Committee and, it is submitted, the Minister, should proceed on the basis that the ban might apply to an individual trader (or a partnership), at least so far as its future application is concerned.

The Committee considers that the Minister should provide a justification—which most usefully would proceed in the same way as a justification offered under section 28 of the Human Rights Act—for the limitation of the right to property constituted by proposed section 9A.

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

THE IMPOSITION OF STRICT LIABILITY AND THE PRESUMPTION OF INNOCENCE—HRA SUBSECTION 22(1)

Proposed sections 9A (the ban on battery cages for commercial egg production) (clause 5), 9B (the requirement to keep pigs in appropriate accommodation) (clause 6), and 9C (the ban on removal or trimming of the beak of fowl) (clause 7) would, in each case, create an offence of strict liability. It has been long accepted that the creation of such an offence engages the presumption of innocence stated in HRA subsection 22(1).

In relation to section 9A, the Explanatory Statement rejects the need for any consideration of subsection 22(1) on the basis that it is unlikely that any person other than a corporate body will be affected by the ban. This rejection is on the basis that section 6 of the Human Rights Act provides that only individuals have human rights. It is, however, not possible to assert that, at the present time, the ban could not result in the prosecution of an individual and a forecast that it could not cannot be projected into the future. The Explanatory Statement should address the application of HRA section 22(1) to proposed section 9A.

The justification for derogating from subsection 22(1) in relation to proposed sections 9B and 9C is too brief to constitute adequate compliance with HRA section 28. The Committee refers the Minister to paras 3.8 to 3.16 of its *Guide to writing an explanatory statement*.

The most obvious line of justification for section 9A lies in the fact that this is a regulatory offence of a kind where those who might be affected would be expected to be aware of the ban in section 9A. This line may not be applicable to the offences in sections 9B and 9C and justification will be more difficult.

The Committee notes that in each case the penalty of 50 penalty points is within the range considered acceptable for a strict liability offence.

The Explanatory Statement refers specifically to the defence of mistake of fact (*Criminal Code 2002* para 23(1)(b)) that may be raised as a defence to a prosecution for an offence of strict liability, but only generally to other defences. The Committee reiterates its view that given its potential as a partial defence of having taken reasonable case to avoid committing the offence, it is important to refer specifically to the defence of intervening conduct or event stated in section 39 of the Code.

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

MARRIAGE EQUALITY BILL 2013

This is a Bill for an Act to permit couples who are unable to marry under the *Marriage Act 1961* of the Commonwealth to enter into a marriage under Australian Capital Territory law. It states rules relating to eligibility of two persons to become married, a process for solemnisation of a marriage, and a process for its dissolution, as well as for the authorisation of marriage celebrants.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*

ENHANCEMENT OF THE RIGHT TO EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION

The nub of the argument in the Explanatory Statement is that this Bill engages the right stated in section 8 of the *Human Rights Act 2004* to recognition and equality before the law, in that the Bill promotes this right as it relates to marriage.

Section 8 provides:

> **8 Recognition and equality before the law**
>
> (1) Everyone has the right to recognition as a person before the law.
>
> (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
>
> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The effect of section 8 in this context is that there must be substantive equality in the way in which two persons married under the Marriage Act are treated and the way in which two persons who cannot so marry are similarly treated; such as, for example, in relation to their rights as against each other in the instance of the death of one party, or on the dissolution of the relationship, and the rights of others who are members of the same family. In such respects, given the effect of other Territory laws relating to maintenance and succession, currently there probably is substantive equality.

The argument of the Explanatory Statement is however that there remains an area of substantive inequality. Under existing Territory law, there is no means whereby two persons who cannot marry under the Marriage Act can have their marriage-like relationship recognised by law as a marriage (in contrast, for example, to a civil union). The Explanatory Statement adopts the position taken by the Australian Council of Human Rights Agencies (ACHRA). It states:

> There is clearly an emerging trend towards the full and equal recognition of same-sex relationships. The principles on which the ACT Government works to support and progress full and equal recognition of all people before the law have been succinctly summarised by the Australian Council of Human Rights Agencies (ACHRA). In its November 2009 communiqué, the ACHRA highlighted that the "absence of a right to civil marriage for samesex couples ... [continues to] reinforce the different value placed on relationships between opposite-sex and same-sex couples".[1] ACHRA goes on to say, "the principle of equality therefore requires that any formal relationship recognition available under federal law to opposite sex couples should also be available to same-sex couples. This includes civil marriage."

This Bill is not of course proposing a law to take effect as federal law. Its operation would be confined to the Territory. The argument is that the Bill promotes section 8 in so far as concerns only the Territory.

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[1] *Communique - Civil marriage for same-sex couples*, Australian Council of Human Rights Agencies (ACHRA), November 2009, accessed at http://www.hrc.act.gov.au/res/civil%20marraige.pdf, 05/09/13, p 1.

In assessing the weight of this argument for passing the Bill into law, it is for each Member of the Assembly to choose between an argument that, as Territory law now stands, there is substantive equality in the way in which two persons married under the Marriage Act are treated and the way in which two persons who cannot so marry are similarly treated, and the argument advanced in the Explanatory Statement that there remains an area of substantive inequality.

The Committee draws this matter to the attention of the Assembly.

ENDING A CIVIL UNION AND THE RIGHTS OF THE CHILD UNDER HRA SUBSECTION 11(2)

The Explanatory Statement does not address the question whether, in some particular respect, the provision of a legal status of marriage as defined in the Bill would be inconsistent with any other HRA provision. However, some may consider that the rights of children are engaged. The Human Rights Act states in subsection 11(2):

> Every child has the right to protection needed by the child because of being a child, without distinction or discrimination of any kind.

A party to a marriage under the *Marriage Act 1961* cannot obtain a divorce under the *Family Law Act 1975* unless certain conditions exist. In particular, where there are children aged under 18 of the marriage, the court can only grant a divorce if it is satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of those children or, alternatively, there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made (see section 55A of the *Family Law Act 1975*).

In contrast, there is no such provision for protection of the interests of children in this Bill. The Committee has drawn attention to this issue in earlier reports concerning similar bills.[2] No mention of it is made in the Explanatory Statement to this Bill. In relation to the Civil Unions Bill 2011, the Attorney-General argued that the absence of a provision such as section 55A of the *Family Law Act 1975* did not amount to a derogation of the rights of a child. He said:

> The Government does not intend that the Civil Unions Act should replicate Commonwealth relationship law. The ACT cannot make laws for marriage, and does not intend that the Civil Unions Act should make law for divorce. This is clearly within the Commonwealth's exclusive power and ambit of responsibility.

However, in relation to this Marriage Equality Bill, the position is different. It provides for a means whereby persons who cannot marry under the *Marriage Act 1961* may enter into a relationship styled as a marriage and for the dissolution of that marriage. In substance, dissolution is a divorce. In contrast to earlier civil union bills, the dissolution provisions of this Bill are clearly modelled on the provisions concerning divorce stated in the Family Law Act.[3] The marriage relationship that would be created by the Bill is, in substance, a marriage of the same kind as provided for in the Marriage Act, albeit that the former is a relationship that cannot be entered into by persons who have the capacity to marry under the Act.[4]

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[2] Most recently, in *Scrutiny Report 47* of the *7th Assembly* concerning the Civil Unions Bill 2011.

[3] The effect of the legal opinion obtained in relation to the 2006 Civil Unions Bill is that will not be an inconsistency (in terms of section 28 of the *Australian Capital Territory (Self-Government) Act 1988*) with the Marriage Act; see *Joint Opinion Re: Civil Partnerships Bill 2006 (ACT), ex parte Australian Capital Territory*, para 48ff https://cdn.justice.act.gov.au/resources/uploads/Marriage_Equality_Advice.pdf

[4] Compare Joint Opinion Re: Civil Partnerships Bill 2006 (ACT), ex parte Australian Capital Territory, para 53 https://cdn.justice.act.gov.au/resources/uploads/Marriage_Equality_Advice.pdf

If, from the viewpoint of providing children with the protection they need as children, the desirability of a provision such as section 55A of the Family Law Act is accepted, then its absence from this Bill raises a question whether, in this respect, it derogates from the right in HRA subsection 11(2).

If provision were to be made for consideration of the interests of the children to a marriage under the proposed Marriage Equality Act 2013, there would then arise an issue as to which person or body should undertake that process. The Committee's view is that this process would be better undertaken by a court or judicial officer in preference to an administrative office-holder.

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

SOME PARTICULAR ISSUES

There are a number of places where it appears to the Committee that there is a degree of uncertainty about how the scheme will operate such that it might be less effective than contemplated. In some instances, there may be a question whether some right stated in the HRA is engaged.

1. Why are notes 1 and 2 inserted immediately after the text of paragraph 7(1)(b)? The notes do not appear to have any relation to this text.
2. In paragraph 7(1)(c), would it make more sense to say "because it would be a marriage within the meaning of that Act"?
3. Why is it thought necessary or desirable to provide that "a minister of religion is not required to make a place (for example a church or other place of public worship) available for solemnising a marriage under this Act" (subclause 12(2))? Would not this be the case in any event? If so, does the specific reference to religious places give rise to an implication that any other kind of place must be made available? **The Committee recommends that this issue be clarified**.
4. Why is there a Note concerning the effect of an example appended to subclause 12(2)? There is no example stated anywhere in subclause 12.
5. By subclause 13(1), "[i]f a marriage under this Act is solemnised by an authorised celebrant who is a minister of religion of a religious body, it may be solemnised according to any form or ceremony recognised by the religious body". (A marriage not so solemnised must be solemnised in accordance with the formula stated in subclause 13(2)). Is it possible to provide guidance as to who is a minister of religion of a religious body?
6. On the face of it, the obligation in clause 14 is imposed on a celebrant who is a minister of religion as well as to one who is not. **The Committee recommends clarification as to whether this is the case.**
7. Why is subclause 41(2) included? Subclause 41(1) provides that it is an offence under the Act for a person who is not an authorised celebrant, and knows they are not an authorised celebrant, to solemnise a marriage. Subclause 41(2) then provides that a person does not commit an offence because the person performed a religious ceremony of marriage under clause 19. Clause 19 governs a later "religious ceremony of marriage under this Act". The Committee takes this to refer to a ceremony of marriage of the kind provided for in subclause 13(1), which must be "solemnised by an authorised celebrant who is a minister of religion of a religious body". If this is the case, there could be no question whether there had been a breach of subclause 41(1), and subclause 41(2) is unnecessary.

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

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

SUBCLAUSE 40(1)—IS THIS TOPIC APPROPRIATE FOR A SUBORDINATE LAW?

Subclause 40(1) provides that regulation can provide that a relationship under the law of another jurisdiction is a marriage under this Act. There is no explanation of why this clause is inserted.

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

The kind of relationship that can in this way be corresponding law is constrained by subclause 40(2), but it is noted that it need not be styled as a marriage in that other law. Given the possible significance of an exercise of this power, the Committee raises for consideration the question whether any such regulation must, in order to take effect, be positively approved by the Legislative Assembly.

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

SUBCLAUSE 101(2)—A HENRY VIII CLAUSE THAT IS NOT JUSTIFIED

Part 20 of the Bill relates to the topic of "transitional matters".

Subclause 101(2) would confer on the executive a power, stated in a form now commonly found in Territory Acts, to make transitional regulations that may modify a provision in part 20. As such, it has the character of a Henry VIII clause; (see generally *Scrutiny Report 45* of the *7th Assembly*, concerning the Business Names Registration (Transition to Commonwealth) Bill 2011).

The Committee's view is that whatever the scope of a power vested in the Executive to change by a regulation (or any kind of subordinate law) the terms of an Act that has been passed by the Assembly, a proposal by a bill to create such a power raises a matter of constitutional concern and calls for comment under its term of reference paragraph (3)(d). It also expects the relevant explanatory statement will identify the power and justify its use in the particular circumstances. Of course, such a power limited to modification of transitional provisions will usually be easily justifiable, but the issue of basic constitutional principle is such that a justification should always be offered.

The Explanatory Statement does not offer a justification for subclause 101(2).

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

SUBCLAUSE 101(3)—A MISLEADING PROVISION

Subclause 103(3) provides that "[a] regulation under subsection (2) has effect despite anything in another territory law".

On many occasions now, the Committee has pointed out that such a provision is misleading. Ordinarily, a provision of a Territory statute cannot limit the power of the Legislative Assembly to enact a later statute that would amend an earlier statute. The public should be able to rely on what a plain reading of a statute suggests, and this is clearly not the case with subclause 101(3); (see generally, *Scrutiny Report 46* of the *7th Assembly*, concerning the Retirement Villages Bill 2011).

The Government has made it clear that it will continue to insert such a provision in bills, but the Committee took it that it accepted that in such a case the explanatory statement would make it clear that the provision did not fetter the power of the Assembly to amend provisions of an Act to which it related.

The Committee draws this matter 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 DI2013-208 being the Dangerous Substances (Fees) Determination 2013 (No. 2) made under section 221 of the *Dangerous Substances Act 2004* **revokes DI2013-108 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-209 being the Public Place Names (Crace) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of three areas of urban open space in the Division of Crace.**

Disallowable Instrument DI2013-212 being the Public Place Names (Casey) 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 Casey.**

Disallowable Instrument DI2013-213 being the Health (Local Hospital Network Council—Member) Appointment 2013 (No. 2) made under section 16 of the *Health Act 1993* **re-appoints a specified person as a member of the ACT Local Hospital Network Council, with expertise in clinical matters.**

Disallowable Instrument DI2013-214 being the Health (Local Hospital Network Council—Member) Appointment 2013 (No. 3) made under section 16 of the *Health Act 1993* **re-appoints a specified person as a member of the ACT Local Hospital Network Council, with primary health care organisation and medical practitioner experience.**

Disallowable Instrument DI2013-215 being the Health (Local Hospital Network Council—Member) Appointment 2013 (No. 4) made under section 16 of the *Health Act 1993* **re-appoints a specified person as a member of the ACT Local Hospital Network Council, with academic, teaching and research experience in health services.**

Disallowable Instrument DI2013-216 being the Health (Local Hospital Network Council—Member) Appointment 2013 (No. 5) made under section 16 of the *Health Act 1993* **re-appoints a specified person as a member of the ACT Local Hospital Network Council, with expertise in clinical matters.**

Disallowable Instrument DI2013-217 being the Surveyors (Surveyor-General) Practice Directions 2013 (No. 1) made under section 55 of the *Surveyors Act 2007* **revokes DI2010-267 and issues the Surveyor-General Practice Directions 2013 (No. 1).**

Disallowable Instrument DI2013-218 being the Road Transport (General) (Public Passenger Services Licence and Accreditation Fees) Determination 2013 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2011-110 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-219 being the Civil Law (Wrongs) Professional Standards Council Appointment 2013 (No. 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints a specified person as a member of the Professional Standards Council, representing Western Australia.**

Disallowable Instrument DI2013-224 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2013 (No. 5) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2013-143 and determines the sub-agency located within The Page Tavern to be a sports bookmaking venue for the purposes of the Act.**

Disallowable Instrument DI2013-225 being the Long Service Leave (Portable Schemes) Building and Construction Industry Levy Determination 2013 made under subsection 51(1) of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by employers in the building and construction industry.**

Disallowable Instrument DI2013-226 being the Public Place Names (Deakin) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of a public park in the Division of Deakin.**

Disallowable Instrument DI2013-227 being the Taxation Administration (Amounts Payable—Eligibility—New and Substantially Renovated Homes and Land only—Home Buyer Concession Scheme) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2013-86 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 DI2013-228 being the Public Place Names (Lawson) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Lawson.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Minor drafting issue

Disallowable Instrument DI2013-210 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2013 (No. 1) made under section 29 of the *Cemeteries and Crematoria Act 2003* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints specified persons as chair, deputy chair and members of the ACT Public Cemeteries Authority governing board.**

This instrument appoints 7 specified persons to various positions on the governing board of the ACT Public Cemeteries Authority. Both the instrument and the explanatory statement for the instrument indicate that it is made under section 29 of the *Cemeteries and Crematoria Act 2003* and sections 78 and 79 of the *Financial Management Act 1996*. The Committee notes that (at least) the explanatory statement might have also referred to section 29A of the Cemeteries and Crematoria Act, which sets out the following requirements in relation to appointments to the governing board:

29A Governing board members

(1) The governing board has at least 4, and not more than 12, members.

Note 1 The chairperson and deputy chairperson of the governing board must be appointed under the *Financial Management Act 199*6, s 79.

Note 2 The chief executive officer is a member of the governing board (see *Financial Management Act 1996*, s 80 (4)).

(2) The governing board must include at least 4 members who, in the Minister's opinion, represent the general community and religious denominations.

In making this comment, the Committee notes that the explanatory statement indicates that the requirements of subsection 29A(2) have been met in this case.

This comment does not require a response from the Minister.

Minor drafting issue

Disallowable Instrument DI2013-220 being the Utilities (Electricity Service and Installation Rules Code) Determination 2013 made under section 65 of the *Utilities Act 2000* **revokes the Utilities (Electricity Service and Installation Rules Code) Determination 2000 and determines the Electricity Service and Installation Rules Code 2013.**

Disallowable Instrument DI2013-221 being the Utilities (Electricity Distribution Supply Standards Code) Determination 2013 made under section 65 of the *Utilities Act 2000* **revokes the Utilities (Electricity Distribution Supply Standards Code) Determination 2000 and determines the Electricity Distribution Supply Standards Code 2013.**

Disallowable Instrument DI2013-222 being the Utilities (Management of Electricity Network Assets Code) Determination 2013 made under section 65 of the *Utilities Act 2000* **revokes the Utilities (Management of Electricity Network Assets Code) Determination 2000 and determines the Electricity Network Assets Management Code 2013.**

The Committee notes that each of the instruments mentioned above determines a new "technical code", under section 65 of the *Utilities Act 2000*. In so doing, each of the instruments also revokes an existing technical code.

The Committee notes that section 65 of the Utilities Act gives the Minister the power to approve or determine a technical code, or a variation to a technical code, but there is no formal power to revoke a technical code. However, the Committee also notes that subsection 46(1) of the *Legislation Act 2001* provides that the power to make a statutory instrument includes the power to amend or the repeal the instrument.

This comment does not require a response from the Minister.

Minor drafting issue / Incorporation of material by reference

Disallowable Instrument DI2013-223 being the Animal Welfare (Mandatory Code of Practice) Approval 2013 (No. 1) made under section 23 of the *Animal Welfare Act 1992* **approves the Code of Practice for the Sale of Animals in the ACT (other than stock and commercial scale poultry).**

The Committee notes that this instrument approves a new mandatory code of practice, under section 23 of the *Animal Welfare Act 1992*. Section 23 provides:

23 Mandatory code of practice

(1) The Minister may approve a code of practice, or part of a code of practice, relating to animal welfare as mandatory.

(2) An approval must state to whom the mandatory code applies.

(3) Before approving a code under subsection (1) the Minister must be satisfied that adequate consultation has occurred.

(4) A mandatory code of practice is a disallowable instrument.

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

The Committee notes that, before approving a code, the Minister must be satisfied that adequate consultation has occurred. While the making of the code in this instance may be taken as evidence that the Minister is satisfied that adequate consultation has occurred in relation to this code, the Committee suggests that it would assist the Committee (and the Legislative Assembly) if the explanatory statement for the instrument, first, expressly indicated that the Minister was satisfied that adequate consultation had taken place and, second, gave details of the nature of the relevant consultation.

This comment does not require a response from the Minister.

The Committee notes that section 5.1 of Schedule A to the instrument provides:

5.1 Air

Transport by air should be in accordance with the *International Air Transportation Association Live Animal Regulations*.

The *International Air Transportation Association Live Animal Regulations* are published by the International Air Transport Association (IATA), trade association for the world's airlines (see http://www.iata.org/publications/pages/live-animals.aspx). The Committee notes that, by relying on those regulations in setting the standards in relation to the transport of animals by air, the instrument effectively incorporates those regulations by reference.

Incorporation of material by reference is governed by section 47 of the *Legislation Act 2001*, which provides:

47 Statutory instrument may make provision by applying law or instrument

(1) This section applies if an Act, subordinate law or disallowable instrument (the ***authorising law***) authorises or requires the making of a statutory instrument (the ***relevant instrument***) about a matter.

(2) The relevant instrument may make provision about the matter by applying an ACT law—

(a) as in force at a particular time; or

(b) as in force from time to time.

(3) The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.

Note For information on the operation of s (3), see the examples to s (9).

(4) If the relevant instrument makes provision about the matter by applying a law of another jurisdiction or an instrument, the following provisions apply:

(a) if subsection (3) is displaced by, or under authority given by, an Act or the authorising law—the law of the other jurisdiction or instrument is applied as in force from time to time; Note For the displacement of s (3), see s 6, examples 1 and 2.

(b) if subsection (3) is not so displaced and the relevant instrument does not provide that the law of the other jurisdiction or instrument is applied as in force at a particular time—the law or instrument is taken to be applied as in force when the relevant instrument is made.

Examples—s (4) (b)

1 The Locust Damage Compensation Determination 2003 (a hypothetical disallowable instrument) provides for the making of claims against a compensation fund. Section 43 states that disputes about claims must be decided in accordance with the *Commercial Arbitration Act 1984* (NSW) (the NSW Act) as in force from time to time. The determination is made on 1 August 2003. The Act under which the determination is made does not displace s (3). Therefore, even though s 43 purports to apply the NSW Act as in force from time to time, the NSW Act as in force on 1 August 2003 is applied by the determination.

2 The Locust Damage Compensation Determination 2003 (mentioned in example 1), s 43 states that disputes about claims must be decided in accordance with the *Commercial Arbitration Act 1984* (NSW) (the NSW Act), but does not state that the NSW Act is to be applied as in force from time to time or at a particular time. The determination is made on 1 August 2003. The Act under which the determination is made does not displace s (3). Therefore, the NSW Act as in force on 1 August 2003 is applied by the determination.

Note 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 s 126 and s 132).

(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.

(6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

(a) the law or instrument as in force at the time the relevant instrument is made;

(b) each subsequent amendment of the law or instrument;

(c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;

(d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

(7) The authorising law or, if the relevant instrument is a subordinate law or disallowable instrument, the relevant instrument may provide that—

(a) subsection (5) or (6) does not apply to the relevant instrument; or

(b subsection (5) or (6) applies with the modifications stated in the authorising law or relevant instrument.

(8) If a provision of an Act, subordinate law or disallowable instrument authorises or requires the application of a law or instrument, the provision authorises the making of changes or modifications to the law or instrument for that application.

(9) This section is a determinative provision.

Examples—s (3) and s (9)

Here are 2 examples about the operation of s (3) and (9): the first illustrates how s (3) might be displaced and the second illustrates how a law of another jurisdiction that applies as in force from time to time would operate—

1 The effect of s (3) and s (9), and s (10), def applying, is that if it is intended to apply, adopt or incorporate a law or instrument as in force from time to time, the authorising law would need to expressly displace s (3) (as illustrated in s 6, examples of different kinds of displacement, example 1) or indicate a manifest contrary intention (as illustrated in example 2 in those examples).

2 The *ABC Regulation 2001* (made under a provision like those illustrated in s 6, examples of different kinds of displacement, examples 1 and 2) provides that noise measurements are to be taken in accordance with the NSW noise control manual as in force from time to time. The effect of the *ABC Regulation 2001* is that whenever the NSW noise control manual is amended in future, the noise measurements must be taken in accordance with the manual as last amended.

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

(10) In this section:

ACT law means an Act, subordinate law or disallowable instrument.

Note A reference to an Act, subordinate law or disallowable instrument includes a reference to a provision of the Act, law or instrument (see s 7, s 8 and s 9).

applying includes adopting or incorporating.

Note See also s 157 (Defined terms–other parts of speech and grammatical forms).

disallowable instrument, for a Commonwealth Act, means an instrument that can be disallowed under the *Legislative Instruments Act 2003* (Cwlth), part 5 (Parliamentary scrutiny of legislative instruments), including that part, or provisions of that part, applied by another Commonwealth law.

instrument includes a provision of an instrument, but does not include an ACT law or a law of another jurisdiction.

law of another jurisdiction means—

(a) a Commonwealth Act or a disallowable instrument under a Commonwealth Act; or

(b) a State Act, or any regulation or rule under a State Act; or

(c) a New Zealand or Norfolk Island Act, or any regulation or rule under a New Zealand or Norfolk Island Act; or

(d) a provision of a law mentioned in paragraphs (a) to (c).

The Committee notes that the effect of section 47 does not appear to have been addressed in relation to section 5.1 of Schedule A. First, subsection 47(3) requires that the application of the *International Air Transportation Association Live Animal Regulations* must be as those regulations are in force "at a particular time". In this case (and noting that subsection 47(3) is not displaced), no time is specified.

Second, subsection 47(5) would appear to make the *International Air Transportation Association Live Animal Regulations* a "notifiable instrument" for the Legislation Act, requiring them to be published on the ACT Legislation Register. The Committee wonders whether this is intended.

In making this comment, the Committee notes that the possible application of section 47 of the Legislation Act is addressed elsewhere in the *Animal Welfare Act 1992*. Section 50 provides:

> **50 Animal ethics committees**
>
> (1) A regulation may make provision in relation to animal ethics committees, including provision relating to their establishment, constitution and functions.
>
> (2) A regulation made for subsection (1) may apply a law or instrument, or a provision of a law or instrument, as in force from time to time.
>
> (3) In this section:
>
> ***apply*** includes adopt and incorporate.

This provision deals with issues that would otherwise arise under section 47. However, there is no equivalent provision in relation to the making of codes of practice.

The Committee also notes that it may be intended that section 5.1 of Schedule A is merely "declaratory", in the sense that, in stating that "[t]ransport by air should be in accordance with the *International Air Transportation Association Live Animal Regulations*", section 5.1 is merely referring to obligations that apply, regardless of ACT law, to the live transport of animals by air. If that is the case, however, it would be preferable if that was made clear.

The Committee would appreciate the Minister's response to the issues set out above.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2013-22 being the Planning and Development (Exempt Lease Variation) Amendment Regulation 2013 (No. 1) made under the *Planning and Development Act 2007* **removes lease variations to add a secondary residence from the lease variation charge process.**

Subordinate Law SL2013-23 being the Road Transport (General) Amendment Regulation 2013 (No. 1) made under the *Road Transport (General) Act 1999* **amends the** *Road Transport (General) Regulation* **to implement new damage assessment criteria for the classification of statutory written-off motor vehicles.**

Subordinate Law SL2013-24 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2013 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **amends Schedule 3 of the Medicines, Poisons and Therapeutic Goods Regulation.**

Subordinate Law SL2013-25 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2013 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **prescribes an additional point to point camera location.**

SUBORDINATE LAW—COMMENT

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

Strict liability offences – Positive comment

Subordinate Law SL2013-21 being the Retirement Villages Amendment Regulation 2013 (No. 1) made under the *Retirement Villages Act 2012* **bring into the ACT regulatory requirements for the retirement village industry, based on the NSW requirements.**

The Committee notes with approval that sections 5 and 6 of this subordinate law omit 2 strict liability offences from the *Retirement Villages Regulation 2013*. Though it is not mentioned in the explanatory statement for the subordinate law, it is apparent that this omission is in the light of comments made in *Scrutiny Report 5* of the *8th Assembly* (at page 10), in relation to the *Retirement Villages Regulation 2013*.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for the Environment and Sustainable Development, dated 6 September 2013, in relation to comments made in Scrutiny Report 10 concerning disallowable instruments (attached)—
  - DI2013-148—Building (Fees) Determination 2013, and
  - DI2013-198—Water Resources (Fees) Determination 2013 (No. 3).
- The Attorney-General, dated 9 September 2013, in relation to comments made in Scrutiny Report 9 concerning the Crimes (Sentencing) Amendment Bill 2013 (attached).
- The Treasurer, dated 19 September 2013, in relation to comments made in Scrutiny Report 11 concerning the Land Rent Amendment Bill 2013 (attached).
- The Attorney-General, dated 18 September 2013, in relation to comments made in Scrutiny Report 10 concerning Disallowable Instrument DI2013-115—Land Titles (Fees) Determination 2013 (attached).
- The Minister for Territory and Municipal Services, dated 1 October 2013, in relation to comments made in Scrutiny Report 10 concerning Disallowable Instrument DI2013-163—Tree Protection (Advisory Panel) Appointment 2013 (No. 1) (attached).

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

EXECUTIVE MEMBER'S RESPONSES

The Committee has received the following responses from:

- Mr Rattenbury, dated 13 September 2013, in relation to comments made in Scrutiny Report 8 concerning the Administrative Decisions (Judicial Review) Amendment Bill 2013 (attached).

- Mr Rattenbury, dated 9 October 2013, in relation to comments made in Scrutiny Report 11 concerning the Officers of the Assembly Legislation Amendment Bill 2013 (attached).

The Committee wishes to thank Mr Rattenbury for his helpful responses.

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 Doszpot MLA
Chair

14 October 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 10, dated 12 August 2013

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

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

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 Steve Doszpot
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No.10 (the Report) on the Disallowable Instruments DI2013-148 – *Building (Fees) Determination 2013 (No. 1)* and DI2013-198 – *Water Resources (Fees) Determination 2013 (No. 3).*

I thank the Committee for its considered comments. I can confirm that the separate revocation of DI2004-192 was not required in DI2013-148. As the Report states, DI2004-192 was revoked previously by DI2012-172.

In relation to DI2013-198, I can confirm that the retrospective operation provided for in this instrument is not in breach of section 76 of the *Legislation Act 2001*. The retrospective operation of the instrument restores the fee payable to $0.51 per kilolitre. The fee was set incorrectly to $0.53 per kilolitre by DI2013-162. Therefore, as the fee has been decreased, it does not impose any liabilities on individuals.

Thank you for raising these matters with me. I trust that this information is of assistance.

Yours sincerely

Simon Corbell MLA
Minister for the Environment and Sustainable Development

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MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Dear Mr Doszpot

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No.9 (the Report) containing comments on the Crimes (Sentencing) Amendment Bill 2013 (the Bill). I offer the following response to those comments.

A separation of powers issue

The Committee noted that there may be a trespass on the separation of powers by the inclusion of section 35A(3) which states that "A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence".

It is my view that this is not an indication of a lack of confidence and is consistent with the protective clauses already contained elsewhere in the legislation, for example under section 35(6) in relation to entering pleas of guilty. Furthermore, the courts have discretion to impose a sentence and it is a further safeguard to include mention of proportionality to ensure appropriate mechanisms to allow for appeals.

Government Amendments to Bill

I **attach** proposed amendments to this Bill together with a Supplementary Explanatory Statement for your consideration. The minor technical amendment will omit section s33(1)(k) and replace it with s33(1)(ka) to ensure consistency and transparency in sentencing. The amendment will clarify the intention of the amendments in the Bill is to promote cooperation with the administration of justice.

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I thank the Committee for their consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR SPORT AND RECREATION
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

Scrutiny Report 11 – Land Rent Amendment Bill 2013

I am writing in response to comments in the Scrutiny Report 11 of 9 September 2013, in relation to the *Land Rent Amendment Bill 2013*.

I note that the Committee has queried the meaning of "eligible transferee" but was unable to locate a definition of this in the Bill. I refer the Committee to clause 41 of the Bill which does in fact add this definition to the *Land Rent Act 2008*.

I note as well that the Committee has queried the validity of proposed subsection 26A(4) in clause 28 of the Bill in the light of the High Court judgment in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 (*Kable*). The proposed subsection empowers a court to order the forced sale of the subject property by public auction following loss of lessee eligibility for land rent. The operation of the subsection is governed by the court's satisfaction as to certain matters set out in proposed subsection 26A(1), which includes that steps must have been taken under proposed section 16AA in clause 23 of the Bill.

I refer the Committee to the fact that the combined operation of these two proposed provisions means that proposed section 26A is conditional on the issue of a notice from the Commissioner for ACT Revenue following loss of eligibility for a post-1 October 2013 land rent lessee. Such a notice, issued if a non-eligible lessee fails to convert the land rent lease or sell the subject land, is subject to usual objection and appeal rights in the ACAT and courts, and it is highly unlikely that a court-ordered sale would (or properly could) be sought while the notice is under dispute.

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I suggest that the combined operation of proposed sections 16AA and 26A means that the proposed subsection 26A(4) would not substantially impair the institutional integrity of a court in the manner captured by the *Kable* doctrine.

I thank the Committee for its enquiry concerning the validity of the proposed provision. However, I am content that in the highly unlikely event of an action under proposed section 26A, a legal challenge concerning this or any other provision in the *Land Rent Act 2008*, will follow usual legal procedure.

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

Yours sincerely

Andrew Barr MLA
Treasurer
September 2013

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 Steve Doszpot MLA
Member for Molonglo
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
PO Box 1020
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Dear Mr Doszpot

On 12 August 2013 the Standing Committee on Justice and Community Safety (the Committee) released Scrutiny Report 10.

In that report the Committee requested further information in relation to the quantum of increase in Land Titles Fees.

The Justice and Community Safety Directorate undertook a review of Land titles fees as part of the 2013-2014 Budget process. The 10% increase is consistent with user pay principles and better reflects the processing costs of transactions under the *Land Titles Act 1925*.

I trust this information is of assistance.

Yours sincerely

Simon Corbell MLA
Attorney General

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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 Steve Doszpot MLA
Chair
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ACT Legislative Assembly
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Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee Report No. 10 on the Subordinate Legislation *Disallowable Instrument DI2013-163 Tree Protection (Advisory Panel) Appointment 2013 (No 1).*

The Advisory Panel is appointed by the Minister to advise the Conservator of Flora and Fauna on matters relating to tree protection in the built up urban areas of the ACT. Members must have extensive experience in forestry, arboriculture, horticulture, natural and cultural heritage and landscape architecture. The appointments ensure an independent review of the Conservator's first decision and as such are not public service appointments.

I thank the committee for its comments and hope this information is of assistance.

Yours sincerely

Shane Rattenbury MLA
Minister for Territory and Municipal Services

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Shane Rattenbury MLA
ACT Greens Member for Molonglo

Mr Steve Doszpot
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
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Dear Mr Doszpot,

I refer to the Committee's comments concerning the Administrative Decisions (Judicial Review) Amendment Bill 2013 in Scrutiny Report 8 (30 May 2013). The Committee raised two concerns about the impact on rights and made a comment on the explanatory statement; these matters are addressed in turn below.

The Right to Privacy

The intention of new section 4A(2)(b) is to protect the right to privacy and fairly balance the need for probity in government decision making with the need to protect individuals from unreasonable and unwarranted intrusions in their personal affairs.

In considering whether any limitation is proportionate it is important to remember that any limitation created by the Bill is indirect and what dictates the extent of the limitation is not so much what is in the Bill itself but rather what it may give rise to in the circumstances of a review of a decision made under an enactment. The circumstances of the review, rather than the simple capacity for review, will be what dictate the degree of any limitation on an individual's rights and this is a particularly complicating factor when attempting to assess the degree of any limitation on rights that may occur from the proposed reforms in the Bill.

It is also important to note that already the requirement for a person's interests to be affected to be able to maintain an application for review under the ADJR Act means that a person who is not the subject of the decision may still challenge that decision in the Supreme Court.

The committee has asked for further justification for the claim that if the right is engaged it is unlikely that the extent of the limitation will be significant. It is important to firstly clarify that the statement relates to circumstances where the test in 4A(2)(b) has not been satisfied and also that the statement relates only to the impact on individuals as only individuals enjoy the right to privacy (this issue is further discussed below). I acknowledge that the context in which the statement was made and the issue concern the nature of applications for review should have been more clearly expressed. Nevertheless it is reasonable to assert that it is unlikely that additional applications for review made possible by the reform in the Bill will involve a significant limitation on an individual's right to privacy for a number of reasons.

Firstly because when one considers the matters to which 4A(2)(b) would not apply and that may actually be of interest to 'public interest litigants' rather than what is simply possible given the range of decisions made under ACT Acts, the scope of what is likely to be the subject of review is considerably smaller than one may first anticipate. For example taxation matters (as well as number of other decisions that may relate to individuals) are excluded from the ADJR Act in schedule one.[1]

Secondly the reality is that the more contentious decisions and therefore those that are more likely to be the subject of an application for review will have required public consultation during the making of the decision. This adds to the unlikelihood that a significant additional limitation on an individual's right to privacy than what has already occurred during the decision making process would occur as a result of the ADJR application.

Some examples include:

- Planning and heritage decisions; in some circumstances these decisions may relate to what may be characterised as private matters. They also carry a significant public interest element and in the course of assessing the heritage value under the *Heritage Act 2004* or compliance with the *Planning and Development Act 2008* public notification of the proposed building or details of the residence's heritage values are already available for the public to consider. ADJR review of such decisions, while it may raise new elements to the proposal is unlikely to involve a significant additional limitation on the persons rights.
- Applications for licences under the *Liquor Act 2010*; where a person applies for a liquor licence the commissioner must make a decision about whether a person is a suitable person to hold a licence as part of that decision making process public consultation is required, it is therefore unlikely that a significant additional limitation on the person's right to privacy would occur should the matter be the subject of litigation.

Another reason why it is unlikely that the limitation will be significant is because the nature of the decision is such that what can be regarded as private matters are irrelevant to the decision. In these circumstances matters that might legitimately be considered as intrusions on a person's right to privacy are unlikely to be considered as part of the proceedings. For example:

- Applications for the use of public land under the *Public Unleased Land Act 2013*; firstly it is important to note that the activity itself is being conducted on public land and the relevant considerations about the use of that land do not extend to matters that are particularly private to the individual. Section 47 of the Act sets out the 4 relevant factors to the decision, subsection (d) does provide for any other matter relevant to the person's ability to safely and responsibly carry on an activity on public unleased land. Given the nature of the activities that may require a permit the scope of what may be relevant to consider in a decision to approve a permit would, most likely, not extend to particularly personal information or information that was not otherwise accessible to the community anyway (for example through searching court records).

[1] See Schedule 1 items 5, 14 and 19.

- Applications for licences under the *Dangerous Substances Act 2004*. The Act requires a person to be a suitable person to be licensed and section 49 sets out the criteria for what is relevant to that determination and none of those criteria are particularly personal in nature.

Having noted that there are many occasions where private information will be irrelevant to the decision it is important to acknowledge that there are also circumstances where the discretion given to decision makers is sufficiently broad that private information may be relevant to the determination and considered in the process of an application review.

It is also important to note that in circumstances where it would be unreasonable to make information publicly available the Supreme Court may make orders to prevent publication and further that a third party public interest litigant who obtains access to a discovered document is under a legal obligation not to use the document for any purpose other than the proper conduct of the proceeding in which they are produced.[2] Recognising that the disclosure of information to just one person may amount to a limitation on a person's right to privacy it is nevertheless relevant to note that the 'public interest litigant' is constrained in what they can do with the information.

Is a less restrictive test reasonably available?

The Committee raises the issue of whether it would be more appropriate to include a requirement in 4A(1) that the court must consider the privacy impact on an individual.

As set out in the explanatory statement the Bill is designed to give effect to the ALRC Report 78 and the new section 4A(2)(b) is the proposed mechanism through which report recommendation 2 of that report is to be achieved. The practical effect of the Bill is substantially the same as what is proposed by the ALRC; it has simply been broken down to assist the application of the test and try to move it away from a general public interest balancing test to a more clearly articulated process for determining when it is inappropriate for a person whose interests are not affected to be able to seek review.

4A(2)(b)(iii) requires the court to consider whether an order of review *may* prejudicially affect the individual. Prejudicially affect is defined to include two things, the definition is not exhaustive and it seems fairly clear that limiting a person's rights (either under the HRA or otherwise) would be a prejudicial affect on the person. The Committee asks whether it would be appropriate to require that the Court *must* consider the impact on privacy rights. The reality is that by the operation of subsection (3) if a party is concerned about their privacy rights they may make an application to the court to deny the other person standing to maintain the matter. If it is the case that an order of review may prejudicially affect the individual the court must then consider whether the matter raises a significant issue of public importance.

It is unclear exactly what the Committee is proposing as an alternative however I take it that what is anticipated is that the test instead be one that balances the level of

[2] *Hearne v Street* (2008) 235 CLR 125 Hayne, Heydon and Crennan JJ at [96] (Gleeson CJ and Kirby J agreeing).

restriction on an individual's rights with the broader public interest in hearing the matter rather than simply answering yes or no to the individual requirements. This appears in effect to be a similar type of structure (though not expressed in the context on rights protection) posited in ALRC recommendation 2:[3]

> ***Recommendation 2 - any person should be able to commence public law proceedings***
>
> Any person should be able to commence and maintain public law proceedings unless
>
> - the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
>
> - in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

The option of a more open balancing test was extensively considered (this was the model included in the exposure draft of the Bill put out for public comment earlier this year[4]) and decided against on the basis that making it in effect a more general public interest balancing test would create additional and unnecessary uncertainty. Also the structured test recognises that where there is a significant issue of public importance that should be able to be tested even where doing so may involve a limitation on a person's right to privacy. Further discussion on the application of the test in response to the Committee's comment on the explanatory statement is set out below.

Corporations

The Committee also raises a specific concern about the impact on corporations or other business entities. Many legislative changes will have an impact on costs for businesses and this may well be the case in the context of allowing the legality of decisions to be challenged in the Supreme Court.

In relation to corporations more generally I would ask the Committee for some additional guidance about its approach to issues concerning corporations. Previously where explanatory statements have stated that Bills did not engage Human Rights because they relate exclusively to corporations which do not enjoy any rights under the HRA the Committee has been critical and raised the undoubtedly true point that the Committee's terms of reference extend beyond simply those rights protected by the HRA.

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[3] Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report no 78 (1996).

[4] The exposure draft version of the Bill is available at http://www.legislation.act.gov.au/ed/db_47271/default.asp.

The Committee's terms of reference at (3)(a) refer to "personal rights and liberties" which notwithstanding the *Legislation Act 2001* definition of a "person" does not appear to be directed at corporations. It would be useful for the Committee to outline how it believes these matters should be approached and particularly how the potential imposition of an additional cost on a corporation could involve a trespass on personal rights and liberties? Related to this the Committee makes a point about the capacity of corporations to pay any additional costs that may arise, this appears to be a policy question about an impact of the Bill rather than a concern for the protection of rights; which by the intrinsic nature of a right should not be conditional on the size or capacity of any entity.

The substance of a review of an administrative decision brought by another party relating to a corporation will inevitably be a consideration of the lawfulness of a benefit granted by a public authority to a corporation in order for them to make a private gain. The policy distinction between corporations and individuals is made on the basis not simply that corporations have a greater capacity to pay but that the type of decisions and the nature of the review will be different than would be the case for individuals for whom their privacy rights are a legitimate issue; corporations do not enjoy a right to privacy. Where commercially sensitive information is legitimately at issue the Court Procedures Rules give the court sufficient flexibility to manage those issues. I would also emphasise that, as noted by the committee, a company will have the choice about whether or not it wants to be joined as a party and do so in the full knowledge of the risks that may entail.

<u>The right to a fair trial and third party intervention in applications for review</u>

The question of whether or not a party should be given the opportunity to appeal either a successful or failed application to intervene in a proceeding does have arguments both for and against. The Committee seems most concerned with the situation where are party is given leave to intervene and an existing party is dissatisfied with the decision. The Committee makes the assertion that such intervention 'could well result in increased legal expenses for other parties'. Indeed this is a possibility, although it is worth noting that the parties themselves and the course of action they choose to pursue will play a role in the incursion of legal costs and further that there are very broad mechanisms in the Court Procedures Rules 2006 for ensuring that a court can fairly apportion the costs of legal proceedings.

The observation that it may be useful for the Court of Appeal to consider the application of the provisions in different circumstances and provide additional guidance or resolve any inconsistency in application is certainly a valid argument that Members should consider. On balance I am of the view that given the nature of the particular decision, the three clearly articulated matters that the court must have regard to and the well established principles surrounding intervention generally, a decision on intervention by others is unlikely to create significant differences that warrant a consideration by the Court of Appeal. Also to allow the appeal of such a decision would create the risk of additional delays to the hearing of the matter.

<u>Comment on the explanatory statement</u>

The committee indicated that it found it difficult to appreciate the practical effect of proposed section 4A. The question of who does and does not have standing is covered

by the tests in proposed new section 4A, of which the more complicated elements are set out in subsection (2)(b). These tests set out in 4A(2)(b) largely adapt and apply existing tests from a range of contexts that are relatively well understood.

i) Whether or not the person's interests are adversely affected is the existing test in section 3B of the Act and whilst at times difficult to apply it is nevertheless the subject of a good deal of jurisprudence. (noting of course that the basis for the concern that gives rise to the Bill is that the test it too narrow)

ii) The second element of the test is whether the subject matter of the decision is about an individual. This should be a relatively straight forward concept to apply. Most administrative decisions, and particularly the more contentious ones require a person to apply for something (a permit for example) and the nature of the applicant is therefore obviously the starting point for assessing whether the decision is about an individual. For example a decision about whether or not a person is a suitable person to conduct a particular activity, or a decision to make a statutory compensation payment would be decisions about an individual.

However, the nature of the applicant for the decision is not determinative as it may be possible that an application by an individual may not be for a decision 'about an individual'. There may well be occasions where decisions involve matters that are not about the individual but give the individual permission to conduct a particular activity. For example a decision on a planning application that is made by an individual would not be a decision about an individual. It is important to note that whether or not a decision is about an individual will depend on the particular circumstances of the matter at hand; it has been cast as a relatively broad discretion to allow a court to consider the context of the decision and its impact. Generally speaking the more constrained the impact of the decision is to an individual the more likely the decision is to be about an individual, conversely the greater the level of public impact the less likely the decision is to be about an individual.

iii) The third element of the test is whether or not an order of review would prejudicially affect an individual. This is a broadly cast test that may include prejudicing the rights of an individual or imposing a liability on the individual. Again the use of a requirement to consider prejudicial effect is quite commonly used in a range of contexts from the Evidence to Copyright law and relatively well understood. Examples of judicial consideration of tests for prejudicial effects include:

- *Public Service Association of South Australia v Federated Clerks' Union of Australia (SA)* (1991) 173 CLR 132;
- *The Bell Group Ltd (n liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239;
- *Pfennig v R* (1995) 182 CLR 461.

iv) The requirement for the application to raise a significant matter of public importance is also a relatively common test, most notably used for the determination of special leave for matters to be heard by the High Court.

The Committee asks for examples of common situations where a person would and would not have standing under the proposed reforms in the Bill. As outlined in the explanatory statement and the presentation speech the intention of the Bill is to remove the current artificially constructed limitation on who can seek review of a government decision. However the Bill, through new subsection 4A(2) recognises that there will be circumstances where it is inappropriate for a person whose interests are not affected to be able to challenge a decision. For example where a person receives a statutory compensation payment for a relatively modest sum another disinterested person would typically not be able to challenge that decision. However if for example the decision was made on a particular basis and the basis for the decision had been applied to other decisions such that the review of the decision was a matter of public significance then the person may be able to challenge the decision. For example in *Commissioner of Taxation v Anstis* [2010] HCA 40, only $920 dollars was in dispute, ordinarily this would not be a matter of sufficient public importance to warrant that level of judicial consideration however because the basis on which the decision was made had an impact on thousands of others on the 'youth allowance' payment review of the matter was warranted.

Yours sincerely

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Member for Molonglo

13 September 2013

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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,

I refer to the Committee's comments concerning the Officers of the Assembly Legislation Amendment Bill 2013 in Scrutiny Report 11 (9 September 2013). The Committee seeks further clarification about the distinction between acting "on the advice of" and acting "in consultation with" named bodies and persons.

The two expressions create a distinction between the obligations being imposed on the decision maker, in this case the Speaker, in making the appointment. Statutory powers, including powers of appointment, are commonly conditioned on requirements to consult with certain people or groups or the community more generally.[1] A requirement for consultation means that a decision maker must give genuine and real consideration of the views of the person they have consulted with,[2] however they do not have to follow any recommendation or feedback received from the person they have consulted with. In requiring that the decision maker may only act on the advice of an entity, in this case the relevant committee, it means that the entity must agree with the appointment before it can be made by the decision maker. The decision maker is not required to appoint a person the committee nominates but the committee must agree with the decision maker's appointment.

A similar scenario and the impacts of a failure to observe the requirements were illustrated in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94 which concerned appointments made under the *Health Insurance Act 1973* (Cth). That Act similarly creates a distinction in appointments, in one case requiring that a particular body agrees with the appointment and in another requiring simply that the decision maker consult with the particular body.

It would not be appropriate to include this explanation in a note. Notes have a relatively constrained use in the ACT and are not used to add meaning to a provision. They are not part of an Act and the addition of this type of note would serve no greater interpretive usefulness than the material in an explanatory statement. If the Committee is referring to 'explanatory notes' used in Statute Law Amendment Bills

[1] See for example *Heritage Act 2004* sections 26 and 31; *Emergencies Act 2004* section 9; the existing appointment requirements in the *Electoral Act 1992* and the *Auditor-General Act 1996*.

[2] *SZEJF v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 724; *Williams v Minister for the Environment and Heritage* [2003] FCA 535.

as the suggested model, these notes are also limited in scope and essentially explain why the change proposed has come to be required rather than giving any additional information about the substance or operation of the proposed change. Again these notes are not part of an Act and are not included in the amendments made to the Acts. They therefore serve no greater usefulness than the material in the Explanatory Statement.

The Committee legitimately raises the concern that the ES could perhaps have been more clearly expressed to put beyond any doubt the way that the clause is intended to operate. Hopefully this additional material can satisfy the Committee's concern.

Yours sincerely

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9 October 2013

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