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

SCRUTINY REPORT 26

21 NOVEMBER 2014

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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 comments on them:

DANGEROUS SUBSTANCES (ASBESTOS SAFETY REFORM) LEGISLATION AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Dangerous Substances Act 2004* and D*angerous Substances (General) Regulation 2004* to adopt Chapter 8 of the national model Work Health and Safety Regulation to govern the management, control and removal of asbestos in workplaces.

GAMING MACHINE (RED TAPE REDUCTION) AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Gaming Machine Act 2004* to minimise administrative and regulatory burdens imposed on licensed gaming machine operators.

BILLS—COMMENT

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

CANBERRA INSTITUTE OF TECHNOLOGY AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Canberra Institute of Technology Act 1987* to provide for the governance of the Canberra Institute of Technology (CIT), and in particular to establish a governing board to replace the CIT Advisory Council, to create the position of Chief Executive Officer, and to empower the Minister to issue guidelines on fee setting for government subsidised services with which the governing board must comply.

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 POSSIBLE RESTRICTION OF THE ABILITY OF A COURT TO RECEIVE ALL RELEVANT EVIDENCE AND THE RIGHT TO A FAIR TRIAL—HUMAN RIGHTS ACT 2004 (HRA), SUBSECTION 21(1))

The Explanatory Statement deals with proposed new section 64 of the C*anberra Institute of Technology Act 1987* (see clause 19) in two short statements:

> This provision establishes offences and prescribes penalties for divulging protected information, prescribes how fees are to be determined and enables the institute to determine rules and procedures.
>
> Section 64 is unremarkable in that it is a common legislative provision which enables action to be taken where a person has inappropriately divulged protected information. It establishes offences and prescribes penalties where necessary.

The Committee agrees that a provision in this form is commonly found in Territory laws. There is however one aspect of it in respect of which the Committee seeks clarification.

Proposed subsection 64(2) creates an offence where a person divulges "protected information",[1] and subsection 64(3) states circumstances in which subsection (2) "does not apply", including "in a court proceeding" (paragraph 64(3)(c)).[2] This exception is desirable in that it preserves the ability of a court to receive—subject to explicit exceptions—all evidence relevant to making determinations of matters of fact and opinion necessary to determine the issues on the trial. This principle is stated in subsection 56(1) of the Evidence Act 2011—"[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding". (Most of the Evidence Act states exceptions to this principle.) The principle is an aspect of the right to fair trial stated in HRA subsection 21(1).

The position is however complicated by proposed subsection 64(5), which states:

> (5) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another law applying in the territory.

The first question is whether this provision is necessary, given subsection 64(3). If it is seen as a more limited statement of the circumstances in which the prohibitions in subsections 64(1) and (2) do not apply, then the second question is whether the words "unless it is necessary to do so for this Act or another law applying in the Territory" have the effect that a court governed by the Evidence Act would necessarily admit evidence of the protected information if it is relevant on the particular trial.

Another problem arises from the broad definition of a "court" in subsection 64(6), which includes "a tribunal, authority or person having power to require the production of documents or the answering of questions". The reception of evidence by such bodies is not governed by the Evidence Act (*see* section 4), and thus the first question posed above is of particular importance.

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

Comment on the Explanatory Statement

It is true that a provision such as proposed section 64 is commonly found in Territory laws, but this does not relieve the drafters of an explanatory statement from explaining its provisions. A person who consults the explanatory statement will not necessarily be familiar with other legislation and their explanatory statements. The approach taken here could be taken with respect to many commonly found provisions, and while this would shorten the explanatory statements, it would deprive them of much of their value. This approach also risks failing to address human rights issues, as occurred in this instance (see above).

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[1] This is "information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else" (subsection 64(6)).

[2] A defendant who wishes to rely on the exception in paragraph 64(3)(c) has an evidential burden to establish that the information was used or divulged in a court proceeding. Once discharged, the prosecution would need to prove beyond reasonable doubt that this was not the case: see *Criminal Code 2002* sections 56 and 58. This provision derogates from the presumption of innocence in HRA subsection 22(1), and while it is relatively easy to justify, it should have been noted.

The Committee recommends that a practice of simply describing a proposed provision as "in common form" not be adopted.

EXHIBITION PARK CORPORATION REPEAL BILL 2014

This is a Bill for an Act to repeal the *Exhibition Park Corporation Act 1976*, and for other purposes, including the insertion of a new part 30, dealing with transitional matters, into the *Financial Management Act 1996*.

Do any provisions of the Bill inappropriately delegate legislative power?—paragraph (3)(d) of the terms of reference

A HENRY VIII CLAUSE PART 1.1 OF THE SCHEDULE 1 TO THE BILL

Clause 1.1 of Schedule 1 to the Bill proposes the insertion of a new part 30 into the *Financial Management Act 1996*. This part contains provisions dealing with transitional matters arising from the repeal of the *Exhibition Park Corporation Act 1976*. Proposed subsection 304(2) provides that a regulation may prescribe transitional matters, and may "modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part".

The Explanatory Statement offers a justification for empowering the Executive to modify an Act:

> The capacity to modify an Act through subordinate legislation is referred to as a 'Henry VIII' clause. It is acknowledged that these clauses are generally not preferable. In developing the Bill, every attempt has been made to foresee issues arising in the transition. However, it is considered that this provision is necessary in this Bill as there is no practical alternative available to ensure that any unforeseen matters which might arise during the repeal and integration can be addressed expediently. The provision is not modifying the primary legislation, but allowing for the principles of the provision to be enhanced where a transitional matter is necessary because of the enactment of the Repeal Bill, and therefore narrowly confined to this purpose only.
>
> As a further limitation on this power to make transitional regulations, clause 304 (along with all of Part 30), expires two years after commencement (note clause 305).

On this basis, the Committee sees no objection to this clause. It is limited by time and its subject matter is narrowly stated. The Committee recommends the attention given in the Explanatory Statement to this issue.

The Committee draws this matter to the attention of the Assembly and does not call on the Minister to respond.

CRIMES (SENTENCING) AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Crimes (Sentencing) Act 2005* to provide that from the commencement of the proposed amendments, (1) a sentencing court may not make an order sentencing the offender to imprisonment as full-time detention, periodic detention or a combination of these kinds of imprisonment, but rather may only make an order of imprisonment as full-time detention or periodic detention, and (2) a sentence of imprisonment by periodic detention must be for a period of at least 3 months and must end before 1 July 2016.

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*

RETROSPECTIVE APPLICATION OF A CHANGE TO THE POWER OF A SENTENCING COURT AND THE PROHIBITION ON IMPOSITION OF A PENALTY THAT IS HEAVIER THAN THE PENALTY THAT APPLIED TO THE OFFENCE WHEN IT WAS COMMITTED— HRA SUBSECTION 25(2)

Currently, paragraph 29(1)(a) of the Crimes (Sentencing) Act provides:

> (1) If the offence is punishable by imprisonment, the court sentencing the offender may impose a sentence (a combination sentence) consisting of 2 or more of the following orders:
>
> (a) an order sentencing the offender to imprisonment (whether as full-time detention, periodic detention or a combination of these kinds of imprisonment); ... .

Clause 6 of the Bill proposes to substitute paragraph (a) with the following:

> (a) an order sentencing the offender to imprisonment (as full-time detention or periodic detention, but not a combination of these kinds of imprisonment); ... .

The human rights issue is whether the amendment would derogate from HRA subsection 25(2), which so far as material provides:

> (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed.

At pages 2 to 10, the Explanatory Statement provides a perspective on this issue. The Committee refers Members to this statement, and in the comments following offer a different perspective.

HRA subsection 25(2) may be engaged because the new rule in proposed paragraph 29(1)(a) will apply at the time an offender is sentenced, rather than at the time the offence was committed, and this latter time will in many cases be prior to the commencement of the new rule.

The Explanatory Statement argues that the new rule does not derogate from HRA subsection 25(2). The starting point of the argument is that the right is relevant only where a sentence imposed on an offender exceeded the maximum penalty which could have been imposed under the law in force at the time the offence was committed. The Explanatory Statement cites an English judge for the proposition that "[s]o long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate". The point

made is that the new rule will not have the effect of punishing an offender more heavily than the penalty that applied to the offence when it was committed because at that time the (old) rule permitted the imposition of a sentence of imprisonment by full-time detention alone.

The Explanatory Statement cites cases from the United Kingdom and other jurisdictions in support of this principle. This is presumably to afford comfort to the Legislative Assembly that if it passes the proposed new rule into law, the Territory Supreme Court, or at least the High Court, will find that the rule does not derogate from HRA subsection 25(2). Whether this standpoint is relevant is addressed below. At this point, the Committee observes that some courts, in particular in the United States, and some judges in other courts, have rejected the starting point of the Explanatory Statement analysis.[3]

The dissenting judgment of Elias CJ in the New Zealand case of *Morgan v The Superintendent, Rimutaka Prison* [2005] NZSC 26 illustrates another approach.[4] His Honour noted of the NZ equivalent to HRA subsection 25(2) that the natural meaning of "penalty" is not limited to a situation where only the maximum of the sentence is extended. Elias CJ noted that the word "penalty" is not defined in the NZ human rights law (nor is it in HRA subsection 25(2)) by reference to the maximum sentence prescribed for an offence by statute. What is required is a realistic assessment of whether the new rule increases the punishment to which the offender is liable. In other words, the application of a provision such as HRA subsection 25(2) involves looking to the substance of the burden imposed by the new rule, and determining whether that is heavier than the burden imposed by the old rule.

On this basis, it might be argued that while under the old paragraph 29(1)(a) an offender might benefit from a sentence that combined full-time and periodic detention, under the new rule the sentence is heavier owing to the removal of the possibility of a period of periodic detention. This rests on a common sense assumption that, given the opportunities it presents for employment, recreation and participation in family, some offenders would regard periodic detention as more lenient than full-time detention.

This argument applies as much to the proposal in clause 5 for new subsections 11(2) and (3) of the Act. Their effect is that a sentence of imprisonment by periodic detention must be for a period of at least three months and must end before 1 July 2016. These provisions have retrospective application where the offence was committed prior to the commencement of these new rules.

The Explanatory Statement recognises the force of this alternative way of looking at the issue of whether the new rules would derogate from HRA subsection 25(2), and in conclusion argues as follows:

> Currently a person sentenced to 'a sentence of imprisonment' may be ordered by the court to serve that sentence by way of both full-time imprisonment and periodic detention combined or a sentence of periodic detention beyond 30 June 2016. These particular options will be removed by the Bill. However, it is to engage in a process of speculation to suggest that a court would necessarily have ordered the sentence of imprisonment to be served in one of these ways and that the sentence of imprisonment would therefore have been more lenient as a result.

[3] Indeed, as the Explanatory Statement recognises, some of the judges of the majority of the House of Lords in *R v Secretary of State for the Home Department ex parte Uttley* [2004] UKHL 38, the case relied on by the Explanatory Statement, took a more limited view of the starting point principle than is initially stated in the Explanatory Statement analysis; see further the discussion in the judgment of Elias CJ in *Morgan v The Superintendent, Rimutaka Prison* [2005] NZSC 26.

[4] See at paragraphs [22]–[25] where case-law from various jurisdictions is cited.

This may ask the wrong question. It is not a question of what, under the current law if it remained, a court would necessarily have done, but of what it might have done. We are dealing here with the case of a person convicted after the commencement of the amendments, in respect of an offence that was committed prior to this time. If the amendment proposed to paragraph 29(1)(a) was not passed, the sentencing court might take one or other of the two options noted in the Explanatory Statement. Given that it is reasonable to think that a convicted person might see some benefit in the court doing so, he or she might urge the court to do so. From that person's perspective, such a sentence would be lighter than the heavier penalty a court would be required to administer under the new paragraph 29(1)(a), should it be passed into law.

The Committee proposes that there is a case to think that the new rules engage, in the sense of derogating from, HRA subsection 25(2). The Committee notes that the question for the Assembly Member is not whether a court might find the new rules incompatible with the HRA, but whether the Member should vote to create the new rules. What courts have had to say about the compatibility question offers guidance and provokes thought, but they are not binding.[5]

Notwithstanding that it takes a contrary view, the Explanatory Statement goes on to offer a justification for the new rules in terms of HRA section 28. The Committee refers the Assembly to pages 7 to 10 of the Explanatory Statement.

In the end, the critical question is whether the purpose of the new rules, which is to remove the sentencing option of periodic detention, could be achieved in a way that is less restrictive of the HRA right in subsection 25(2). This is addressed very briefly in the Explanatory Statement.

> The obvious less restrictive approach would be to only apply the amendments to offenders *from the date of the commission of the offence*. However, this would not achieve the purpose of the Bill which requires periodic detention to cease operation by 30 June 2016 to allow for resources to be dedicated to a more effective sentencing option.

The Committee finds this statement somewhat obscure. It assumes that what is meant is that the new rule would apply only to an offender who committed the offence after the commencement of the new rule.

There is a lack of clarity and detail in this line of argument. Is the number of persons who could benefit from this less restrictive approach so great that there would be a resources problem? What are the relevant resources? If the new rules derogate from HRA subsection 25(2), then the value of adhering to the HRA must be placed in the balance.

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

[5] Of course, a Member might hesitate where there was a clear legal view point to the effect that there was an incompatibility. Even in such a case, the Assembly might lawfully pass the relevant parts of the Bill into law. The HRA does not limit the legislative power of the Legislative Assembly.

FOOD AMENDMENT BILL 2014

This is a Bill to amend the *Food Act 2001* and the *Food Regulation 2002* to reduce the compliance burden on some food businesses and non-profit community organisations.

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?—paragraph (3)(c) of the terms of reference

Do any provisions of the Bill inappropriately delegate legislative power?—paragraph (3)(d) of the terms of reference

A WIDELY EXPRESSED POWER IN THE MINISTER, BY DECLARATION, TO DISPENSE WITH THE OPERATION OF A PROVISION OF THE LAW

Clause 6 of the Bill proposes to insert a new section 7A into the Food Act. The Explanatory Statement provides a general description:

> Clause 6 inserts a new section 7A to provide for the application of the Food Act to certain food businesses. It provides an exemption from the application of the Food Act for the handling or sale of food by non-profit community organisations for the purposes of fundraising, except when operating at a regulated event. Regulated events are provided for in the new section 91. Regulated events are discussed at clause 11.

The food businesses that may benefit from this exemption are stated in proposed subsection 7A(1). They are businesses conducted by a volunteer for a community organisation to raise funds for one or more of a number of purposes (such as a religious, educational, charitable or benevolent purpose). Subsection 7A(2) then provides however that "this Act does apply to a food business mentioned in subsection (1) that is – (a) declared by the Minister to be a food business to which this Act applies ...". Such a declaration is a disallowable instrument (subsection 7A(4)(a)).

The first issue arising is the very broad scope of the discretion to make a declaration. Subsection 7A(2) states no criteria according to which this power might be exercised. A court might find that a Ministerial declaration was beyond the power, but could do so on only a very limited basis.[6] A statement of the criteria according to which the power might be exercised, even if non-exhaustive, would facilitate closer judicial review, and, more importantly, would provide guidance to those who might be affected by an exercise of the power. The Committee notes that the Explanatory Statement states that the power might be exercised where the operation of subsection 7A(1) "is not desirable from a public health perspective". The question is whether some such criteria might be stated in paragraph 7A(2)(a).

[6] In relation to a power vested in terms that "the Minister thinks that it is in the public interest to [exercise the power]", French CJ, Crennan and Bell JJ cited earlier authority that held that that involves "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'": *Plaintiff M79-2012 v Minister for Immigration and Citizenship* [2013] HCA 24 (29 May 2013) [39].per French CJ, Crennan and Bell JJ.

The second issue arises out of the nature of the power as one that would permit a Minister to dispense with the operation of a provision of the statute; (that is, of subsection 7A(1)). Such a power undermines a fundamental of our constitutional system. In O'Donoghue v Ireland [2008] HCA 14 (23 April 2008) at [179], Gummow, Hayne, Heydon, Crennan and Kiefel JJ said:

> Since [the original Bill of Rights of 1689] it has been clear doctrine in countries of our constitutional tradition that the executive may not, without authority of Parliament, revoke, ignore or purport to vary an enactment of Parliament. This rule has a textual foundation in the Australian Constitution, being its provisions establishing the Federal and State Parliaments which, by the language and postulates of the Constitution, are accountable to the electors.

Of course, subsection 7A(2)(a) would operate to displace this principle, but such displacement should be justified in the Explanatory Statement. This would be more easily done were the discretion to be more limited. Also in this regard, the Committee notes that the Assembly may disallow any declaration.

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

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*

PLACEMENT OF A LEGAL BURDEN OF PROOF ON A DEFENDANT TO ESTABLISH A DEFENCE TO AN OFFENCE PROVISION AND THE PRESUMPTION OF INNOCENCE—HRA SUBSECTION 22(1)

Clause 9 of the Bill proposes to substitute a new section 84C of the Act with a new provision. The Explanatory Statement explains:

> Clause 9 amends the current offence of interference with a closure notice (section 84C). Closure notices are placed at the public entrance of a food business premises when the proprietor has been served with a prohibition order. The closure notice is affixed, where possible and appropriate, inside the premises, placing the closure notice under the control of the proprietor. This provision is being amended to place responsibility on the proprietor to maintain a closure notice at their premises, and ensure the closure notice is not moved, obscured or defaced.
>
> It is a defence for the proprietor to show they took reasonable steps to ensure the closure notice was not moved from where it was placed and no part of the closure notice was obscured or defaced.

The Explanatory Statement addresses the question of compatibility with HRA subsection 22(1) as follows:

> The need for the defendant to demonstrate that reasonable steps were taken places an evidential burden on the defendant. Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the HRA. It therefore needs to be considered whether imposing the burden on the defendant is permissible as a reasonable limitation under section 28 of the HRA.

...

Although the burden of proof is evidential, it raises an issue because the defendant may have to raise a defence to prove their innocence. The general principle is that a defendant is not obligated to offer a defence. The defendant, however, need only show that they took reasonable steps to prevent the interference with the notice, something that would only be within their knowledge and not that of the prosecution. As such, the reverse burden is appropriate in the circumstances and is a reasonable limitation under section 28 of the HRA.

Although brief, this would be an adequate statement in justification, (although it remains for the Assembly to accept it or not), but for the fact that the burden imposed on a defendant is the heavier legal burden of proof. This should be acknowledged in the Explanatory Statement.

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

Comment on the Explanatory Statement

The Committee notes a minor error at Explanatory Statement page 4, where the reference in the fourth paragraph to "31" should be to "32". As noted above, and with reference to the Explanatory Statement at page 5, the analysis of proposed subsection 84C(2) of the Food Act should be on the basis that it would impose a legal burden of proof on a defendant.

WATER EFFICIENCY LABELLING AND STANDARDS (ACT) BILL 2014

This is a Bill for an Act to apply as a law of the Territory a national law relating to water efficiency labelling and standards, and for other purposes.

BACKGROUND

The *Water Efficiency Labelling and Standards Act 2005* (the ACT WELS Act) was close to a mirror image of a Commonwealth *Water Efficiency Labelling and Standards Act 2005* (the Commonwealth WELS Act). In this way, together with similar State legislation, the object was to create a national uniform scheme of regulation. The Explanatory Statement to this Bill explains that "[s]ince 2005, the Commonwealth has made a number of reforms and amendments (particularly in 2012 and including legislative determinations) to the Commonwealth WELS Act, resulting in inconsistencies between the Acts".

Rather than copy these reforms in amendments to the ACT WELS Act, this Bill would repeal that Act and enact a new Act (the new ACT WELS Act) that simply adopts the Commonwealth WELS Act as it has been amended, and as it may be amended from time to time. This would be achieved by clause 9 of the Bill.

At no point does the Explanatory Statement identify which of the provisions of the Commonwealth WELS Act are new, in the sense that they did not form part of the original Commonwealth WELS Act. This Committee reported on the provisions of the ACT WELS Bill 2005, and it would have assisted its task in relation to this Bill had the new provisions of the Commonwealth WELS Act been identified.

The material bits of the Explanatory Statement are as follows.

> On 23 July 2012, new compliance provisions in the Commonwealth WELS Act came into effect. These include new civil penalties and criminal offences as well as a range of new enforcement options in response to non- compliance matters. Civil penalties attract either 30 or 60 penalty units. Criminal offences attract either 30 or 60 penalty units or imprisonment. The offences apply both to corporations and individuals (e.g. sole traders and partnerships). A penalty unit is defined in the Commonwealth Crimes Act 1914 and is currently $110 for an individual or $500 for a corporation. For the purposes of the Bill, the Commonwealth remains the WELS regulator and has a WELS inspectorate.
>
> Sections 61 (Failure to give WELS information to WELS inspectors) and 62 (Failure to appear before a WELS inspector and failure to answer questions or provide material) of the Cth WELS Act have penalties of 6 months imprisonment. As noted above, these penalties have not been embedded within the Bill.

STRICT LIABILITY OFFENCES AND THE PRESUMPTION OF INNOCENCE IN HRA SUBSECTION 22(1)

The Explanatory Statement focuses on a number of strict liability offences that were introduced by the 2012 amendments to the Commonwealth Act, but does not identify them by number. This should have been straightforward, given that they are identified in the Explanatory Statement to the Commonwealth Bill.[7] The Explanatory Statement to the Bill before the Assembly copied elements of the Commonwealth Explanatory Statement. On the basis that the Territory Bill deals with the offences introduced by the 2012 Commonwealth Bill, the relevant provisions of the current Commonwealth Act are sections 32A, 33, 34, 35, 36, 37, 37A, 38, 43A and 43B. If this is not so, the Committee recommends that the Minister advise the Assembly as to what sections of the Commonwealth Act are addressed in the Explanatory Statement.

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

At page 3, the Explanatory Statement offers a justification for the relevant strict liability offences. Argument that strict liability facilitates proof of a crime carries little weight, for they would be applicable to all manner of crimes. The statement that these offences "crafted to address unlawful behaviour in the context where the person knows, or ought to know, their legal obligations" carries more weight. In essence, it is the argument that a strict liability offence is justified in relation to "regulatory" offences: see *Scrutiny Report 24* of the *8th Assembly*, in relation to the Nature Conservation Bill.

The Committee accepts the assurance in the Explanatory Statement that "[a]pplication of strict liability to the offences penalties within the Bill are within the scope of Justice and Community Safety Directorate's 'Guide for Framing Offences' (April 2010).

The Committee draws these matters to the attention of the Assembly and does not call on the Minister to respond.

[7] http://www.austlii.edu.au/au/legis/cth/bill_em/welasaeb2012576/memo_0.html

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2014-252 being the Emergencies (Bushfire Council Members) Appointment 2014 (No. 1) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council, representing the community's interest in the environment and the community's interests generally.**

Disallowable Instrument DI2014-253 being the Road Transport (General) (Pay Parking Area Fees) Determination 2014 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **repeals DI2014-142 and determines relevant parking fees for Territory-operated pay parking areas.**

Disallowable Instrument DI2014-254 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2014 (No. 3) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints the Superintendent of the Prosecution and Judicial Support area of ACT Policing as a non-judicial member of the Sentence Administration Board. During periods when the office of the Superintendent is vacant or when the Superintendent cannot exercise the functions of the position, the instrument appoints the Officer in Charge of the Prosecution and Judicial Support area of ACT Policing as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2014-255 being the Emergencies (Bushfire Council Members) Appointment 2014 (No. 2) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2014-256 being the Cultural Facilities Corporation (Governing Board) Appointment 2014 (No. 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Cultural Facilities Corporation governing board.**

Disallowable Instrument DI2014-257 being the Cultural Facilities Corporation (Governing Board) Appointment 2014 (No. 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Cultural Facilities Corporation governing board.**

Disallowable Instrument DI2014-258 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 9) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2013-7 and approves specified Tabcorp ACT Pty Ltd agencies as sports bookmaking venues.**

Disallowable Instrument DI2014-259 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2014-15 and determines that the area within one metre of any terminal owned and operated by Tabcorp ACT Pty Ltd, and located within specified sub-agencies, as sports bookmaking venues.**

Disallowable Instrument DI2014-260 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2013-13 and approves specified areas within the Canberra Racing Club, Thoroughbred Park, Randwick Road, Lyneham, as approved sports bookmaking venues.**

Disallowable Instrument DI2014-261 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-253 and approves a specific area within the Canberra Greyhound Racing Club's premises at Narrabundah Lane, Symonston as a sports bookmaking venue.**

Disallowable Instrument DI2014-262 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 5) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-252 and approves a specific area within the Canberra Harness Racing Club's premises at Exhibition Park in Canberra as a sports bookmaking venue.**

Disallowable Instrument DI2014-263 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 6) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2017-115 and approves the Tabcorp ACT Pty Ltd Account Betting Call Centre, located at the Gungahlin Marketplace, Gungahlin as a sports bookmaking venue for the purposes of the Act.**

Disallowable Instrument DI2014-264 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 7) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-251 and approves the areas within one metre of any selling terminal owned and operated by Tabcorp ACT Pty Ltd, and located within the places specified at the Canberra Stadium as sports bookmaking venues.**

Disallowable Instrument DI2014-265 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 8) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2012-250 and approves the areas within one metre of any selling terminal owned and operated by Tabcorp ACT Pty Ltd, and located within the places specified at Manuka Oval as sports bookmaking venues.**

Disallowable Instrument DI2014-266 being the Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2014 (No. 1) made under section 22 of the *Race and Sports Bookmaking Act 2001* **revokes DI208-249 and determines the directions for the operation of sports bookmaking venues.**

Disallowable Instrument DI2014-267 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2014 (No. 3) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares Units Plan 1703 to be a Parking Authority for the area of Block 24, Section 32, Dickson.**

Disallowable Instrument DI2014-268 being the Totalisator (Commission on Totalisator Betting) Determination 2014 (No. 1) made under subsection 32(1) of the *Totalisator Act 2014* **determines that the amount of commission to be deducted by a totalisator licensee shall be 25% of the total amount bet on each totalisator conducted by the licensee.**

Disallowable Instrument DI2014-269 being the Totalisator (Licence Fee) Determination 2014 (No. 1) made under subsection 75 of the *Totalisator Act 2014* **determines the annual totalisator licence fee.**

Disallowable Instrument DI2014-270 being the Official Visitor (Mental Health) Appointment 2014 (No. 1) made under paragraph 10(1)(e) of the *Official Visitor Act 2012* **appoints a specified person as an Official Visitor for the purposes of the Mental Health (Treatment and Care) Act.**

Disallowable Instrument DI2014-271 being the Official Visitor (Mental Health) Appointment 2014 (No. 2) made under paragraph 10(1)(e) of the *Official Visitor Act 2012* **appoints a specified person as an Official Visitor for the purposes of the Mental Health (Treatment and Care) Act.**

Disallowable Instrument DI2014-273 being the Road Transport (General) Application of Road Transport Legislation Declaration 2014 (No. 2) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is controlled by non-pay time limited permissive parking signs around Manuka Oval for the One-Day International Series cricket match, the Prime Minister's XI cricket match, the Big Bash League match and the Cricket World Cup matches.**

Disallowable Instrument DI2014-274 being the Gene Technology (GM Crop Moratorium) Moratorium Order 2014 (No. 1) made under section 7 of the *Gene Technology (GM Crop Moratorium) Act 2004* **prohibits the cultivation in the open environment of the class of a specified genetically modified (GM) food plant.**

Disallowable Instrument DI2014-275 being the Public Place Names (Nicholls) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of one road in the Division of Nicholls.**

Disallowable Instrument DI2014-281 being the Major Events (One Day Cricket International) Notice 2014 (No. 1) made under section 9 of the *Major Events Act 2014* **applies the provisions of the Act to the One Day International cricket match between Australia and South Africa being held at Manuka Oval on 19 November 2014.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

RETROSPECTIVITY

Disallowable Instrument DI2014-272 being the Public Sector Management (Executive Vehicle Entitlement) Amendment Standards 2014 (No. 1) made under section 251 of the *Public Sector Management Act 1994* **increases the payment in lieu of executive vehicle entitlement.**

This instrument increases the payment that executives in the ACT Public Service can receive in lieu of their entitlement to an executive vehicle. Section 2 of the instrument provides that it "commences, or is taken to have commenced, on 3 July 2014". This means that the instrument has a retrospective operation.

The Explanatory Statement for the instrument states:

> The instrument is taken to have commenced on 3 July 2014 to coincide with the commencement of the Members of the Legislative Assembly vehicle allowance increase commencing on 1 July 2014.

The Explanatory Statement also states that the effect of the instrument is that "the rates will increase by $4000". On that basis, it might be assumed that there are no issues with section 76 of the *Legislation Act 2001*, which provides that only "non-prejudicial" provisions can commence retrospectively. However, it would be preferable if this issue was expressly dealt with in the Explanatory Statement. In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps (available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), the Committee stated:

> The Committee would generally prefer that subordinate legislation not have a retrospective operation. The Committee accepts, however, that retrospective application is occasionally required. Section 76 of the *Legislation Act 2001* provides (in simple terms) that only "non-prejudicial" retrospectivity is permissible. Subsection 76(4) provides that a provision is "prejudicial" if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Retrospectivity that is prejudicial to the Territory or to a territory authority, etc is permitted.

While the Committee may be entitled to assume that any provision that has a retrospective operation must not have a prejudicial operation (ie on the basis that the Committee is entitled to assume that legislation would not be drafted in breach of section 76), it assists the Committee (and the Legislative Assembly) if that issue is expressly dealt with in the Explanatory Statement. That is, it assists the Committee if there is a statement to the affect that "this legislation does not have a prejudicial operation".

This comment does not require a response from the Minister.

MINOR DRAFTING ISSUE

Disallowable Instrument DI2014-276 being the Civil Law (Wrongs) Professional Standards Council Appointment 2014 (No. 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* **appoints a specified person as a member, representing Victoria, and as deputy chair, of the Professional Standards Council.**

This instrument appoints a specified person as a member and as deputy chair of the Professional Standards Council. The formal part of the instrument states that it is made under section 4.38 of Schedule 4 to the *Civil Law (Wrongs) Act 2002*. The Committee notes that that provision deals only with the appointment of members of the Council. Section 4.39 of Schedule 4 deals with the appointment of the chair and the deputy chair of the Council. As a result, the instrument might also have identified section 4.39 as its source of authority.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2014-24 being the Heritage Amendment Regulation 2014 (No. 1) made under the *Heritage Act 2004* **clarifies provisions contained in the *Heritage Regulation 2006* to ensure efficient and effective procedures of the Heritage Council.**

Subordinate Law SL2014-25 being the Information Privacy Regulation 2014 made under the *Information Privacy Act 2014* **prescribes public sector agencies that are exempted from the application of the Act in relation to the disclosure of information about whether residential premises contain, or have contained, loose-fill asbestos insulation.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Education and Training, dated 21 October 2014, in relation to comments made in Scrutiny Report 23 concerning Disallowable Instruments (attached):
  - DI2014-230—Education (Government Schools Education Council) Appointment 2014 (No. 3); and
  - DI2014-231—Education (Government Schools Education Council) Appointment 2014 (No. 4).
- The Minister for the Environment, dated 29 October 2014, in relation to comments made in Scrutiny Report 24 concerning the Nature Conservation Bill 2014 (attached).

- The Minister for the Environment, dated 17 November 2014, in relation to comments made in Scrutiny Report 20 concerning the Utilities (Technical Regulation) Bill 2014 (attached).

The Committee wishes to thank the Minister for Education and Training and the Minister for the Environment for their helpful responses.

Steve Doszpot MLA
Chair

21 November 2014

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 20, dated 31 July 2014

Red Tape Reduction Legislation Amendment Bill 2014

Report 25, dated 27 October 2014

Disallowable Instrument DI2014-249 - Health (Local Hospital Network Council—Deputy Chair) Appointment 2014 (No. 1)

Joy Burch MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR DISABILITY
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR RACING AND GAMING
MINISTER FOR WOMEN
MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

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

Dear Mr Doszpot

I write in relation to your Committee's Scrutiny Report 23 of 22 September 2014 which commented on Disallowable Instruments DI2014-230 and DI2014-231 appointments to the Government Schools Education Council.

The Committee is correct that these appointments are made under paragraph 57(2)(d) of the Education Act.

I selected the students from nominations I received from the Student Congress (Congress), which is the peak organisation representing students.

The Congress was established in 2012 to support student leadership activities in ACT public schools. The Congress provides an avenue for the students to provide me their views on matters related to their education and schooling and to support student leadership activities in ACT Public Schools.

In response to the Committee's feedback I have taken steps to ensure that future appointment instruments will clearly advise how the nominee was chosen.

Yours sincerely

Joy Burch MLA
Minister for Education and Training
October 2014

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Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR CAPITAL METRO

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)
GPO Box 1020
CANBERRA ACT 2601

Dear Chair

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Report No. 24 (the Report) containing comments on the Nature Conservation Bill 2014 (the Bill). I offer the following response to those comments.

In summary, the Bill proposes to repeal the *Nature Conservation Act 1980* and create a scheme for the protection and management of native plants and animals; the identification and protection of threatened species and ecological communities; the management of national parks, nature reserve and wilderness areas; and the conservation of the ACT's natural resources.

The Bill contains many offences for breaches of the proposed law. In this context, the Committee has requested responses about a number of offences which the Bill deems to be strict liability offences – where there is no mental or fault element to the offence.

In response to the Committee's comments I will detail the offences that the Government will propose amendments to – removing strict liability – and the offences that the Government will propose amendments to – inserting specific defences. Finally, I will provide justifications in relation to the provisions where no Government amendments are proposed as it is believed that strict liability offences, particularly in national parks and nature reserves, are justified.

Removing strict liability offences from the Bill

On page 10 of the Report, the Committee has recorded a number of offences, including some in divisions 6.1.2, 6.1.3 and 13.1 of the Bill, as 'category four offences' – those offences that may not be justified as regulatory offences.

In relation to division 6.1.2 of the Bill, dealing with offences in relation to native animals, the Government will propose amendments to clause 126 of the Bill to remove the strict liability nature of these offences. Clause 126 makes offences for interfering with a nest of a native animal, and interfering with a nest of a native animal with special protection status. The original intent of these provisions is to protect nests, particular for returning individuals which use the same nest seasonally. Upon closer consideration, some nests can be difficult to identify. Although nests are

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most closely associated with birds in trees, members of all classes of vertebrates construct nests. Nests may be a simple depression in the ground, or a hole in a rock, tree or building and can be found in all types of habitat. Given the complexity in identifying nests the provision may capture the public at large. An example is the masked lapwing (*Vanellus miles*) which nests on the ground. A person using a lawn mower, without knowledge of the fact that a lapwing had used that area of ground as a nest would be caught by this provision.

I inform the Committee that the Government proposes to make an amendment to clause 129 of the Bill – causing injury to a native animal. This proposed change reflects that although the Bill includes an exception for vehicle collision, there may be other factors outside a person's control that significantly contributes to the injury of a native animal.

Division 6.1.3 of the Bill is concerned with native plants. It is recognised that a person taking a native plant may not have the knowledge that it is a native plant for the purposes of the Act. It may be difficult to distinguish between native grasses and weed species, particularly as these offences apply to all public land. Therefore, I inform the Committee that the Government will propose an amendment to clauses 138, 140 and 144 to remove the strict liability nature of the offences.

Division 13.1 of the Bill deals with formal directions by statutory office holders and appointed conservation officers for a person to do a specific act. Clauses 326 and 328 create offences for failing to comply with a direction. As the directions may include a direction to perform or cease and desist performing an act, the Government sees that it would be more appropriate to remove the strict liability nature of these offences. Therefore, Government amendments will be proposed.

Inserting specific defences

The Report at page 9 noted that it is much easier to justify creation of a strict liability offence where the defendant may advance as a defence that they took reasonable steps in an attempt to avoid engaging in the proscribed conduct. The Government notes the Committee's recommendation and will propose amendments ensuring that reasonable steps defences are available for offences contained in part 10.2, including specifically clauses 228, 255, 256 and 258, which were raised by the Committee.

As noted by the Committee many of the other clauses contained in division 10.2 currently include reasonable step defences. The defences should have applied to the entire part, rather than individual section. The Government appreciates the Committee identifying this drafting error. The Government's proposed amendments will ensure consistency within division 10.2, so that a person may bring a defence that they took reasonable steps to comply with an activities declaration in force. The Government will also add a similar defence to the offence identified at 136 releasing an animal from captivity, as the person may have taken reasonable steps to stop an animal escaping from captivity, and therefore should be able to rely on this defence.

Justifications for maintaining strict liability offences

The Committee referred at page 8 of its Report to the common sense rule of thumb and that strict liability offences should not be framed to catch the general public for inadvertent breaches of the law – the 'regulatory' offences, as described in the *Guide to Framing Offences*.

The Committee's report notes that '[t]he most acceptable justification for the creation of a strict liability offence is that it aids the objectives of a scheme of regulation of some activity by encouraging those who engage in the scheme, such as licensees, to take care not to engage in the conduct that is penalised by the offence.'

The Bill creates offences specific to certain licensees. For example, clauses 133(1) and 145(1) make it an offence to offer to sell an animal or a plant, respectively, without disclosing a licence. Further, clauses 147(1) and (2), and 150(1) and (2) require licensees to attach plant tags to protected plants when sold or exported.

In these situations, offences are justified as being strict liability offences, as the licensees know or should know their legal obligations. They are further justifiable as strict liability offences because doing those particular actions (disclosing a license or attaching a tag) would be a condition of the relevant licenses. Therefore, it is the Government's view that these provisions should remain as strict liability offences.

Further, the Committee raised at page 11 the issue of providing for a defence in respect of actions taken in an emergency. It should be noted that section 41(2) of the *Criminal Code 2002* provides that a person is not criminally responsible for an offence if the person carries out the conduct required for the offence in response to circumstances of sudden or extraordinary emergency.

Clause 336(7) reflects standard provisions in other ACT laws for processes during search and seizure. Similar provisions are included in *Animal Diseases Act 2005* (s71), *Tree Protection Act 2005* (s92) and *Public Unleased Land Act 2013* (s111). Therefore, no change to strict liability is proposed.

The special status of nature reserves

The Bill also contains offences relating to conduct within a nature reserve or a wilderness area (divisions 9.1 and 9.2). Nature reserves and wilderness areas are areas of high biodiversity or ecological importance that the community and governments have identified that they are of such value that they should be afforded protection. Protecting areas that are protected as nature reserves and national parks is an international practice and the implications of such protection is widely understood within the community.

Many millions of people enjoy nature reserves across Australia. Nature reserves in the ACT are accessed and enjoyed by many Canberrans everyday. The ACT's own Namadgi National Park was established in 1984 and is one of the 11 areas constituting the Australian Alps National Parks and Reserves. The Murrumbidgee River Corridor and a string of reserves along the Molonglo River protect the major river corridors in the ACT. The areas of the inner-hills that now form Canberra Nature Park create the backdrop to the city of Canberra and contribute to the significance of the biodiversity within our region.

The offences contained in divisions 9.1and 9.2 of the Bill have been described by the Committee on page 10 of the Report as being 'framed to catch the general public for inadvertent breaches of the law.'

Visitors entering nature reserves have a higher duty not to undertake activities which may cause environmental harm or damage, including to the individual animals, plants and ecosystems contained within. The Government considers that reasonable people in the community are aware of this higher duty of care due to the community's general understanding of nature reserves. This is, in part, supported by the efforts of the Government to educate the community about the importance of conserving the natural environment in a manner ensuring that disturbance to that environment is minimal.

Visitors are often on notice about this higher duty of care due to signage provided by the ACT Government, as the manager of the ACT's nature reserves alerting visitors to the fact that they are entering a reserve and that certain conduct is prohibited. Information is also available on national and nature park websites and pamphlets.

The penalties for these offences are proportionate to the fact that they are strict liability offences and none contain a penalty of imprisonment.

For these reasons the Government will not be amending the strict liability offences in division 9.1 and 9.2 as they are an appropriate measure to aid the objects of the Bill and ensure the integrity of the ACT environment.

I thank the Committee for its consideration of the Bill.

Yours sincerely

Simon Corbell MLA
Minister for the Environment
October 2014

Simon Corbell MLA

ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR CAPITAL METRO

MEMBER FOR MOLONGLO

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

I apologise for my late response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No.20 (the Report) on the Utilities (Technical Regulation) Bill 2014 (the Bill).

The following is my response to the Committee's comments on the Bill. I am also providing a copy of a revised explanatory statement to provide more clarity to provisions of the Bill (Attachment A).

Clause 14 Technical codes—approval

The Committee requested a detailed explanation of subclause 14 (3) of the Bill. This subclause provides that subsection 47 (6) of the *Legislation Act 2001* does not apply to Australian Standards (AS) or Australian/New Zealand Standards (AS/NZS) adopted under a technical code. Clauses 73 and 74 have similar provisions.

AS and AS/NZS are national technical standards that are not accessible on the ACT Legislation Register. They are created by the specialised committees and hold their own copy right. They can be inspected at the National Library of Australia or purchased from a private company, Standard Australia or SAI Global. Since the Commonwealth Governments decided to privatise the national standard certifier in 1980s, it has been a common practice for utilities and utility contractors in all the States and Territories to purchase technical standards. Subsection 47 (6) does not apply to AS and AS/NZS due to the Commonwealth's Government's decision to privatise the national standard certifier and to protect its copy right.

The displacement of subsection 47 (6) is also justified by the nature of technical standards. AS and AS/NZS are generally designed for people who are specialised in each area of work. Unless people are trained and/or licensed, they are not expected to have constant access to AS and AS/NZS or a good understanding of AS and AS/NZS. Electricians, gas fitters and plumbers are trained and licensed specialists that have constant access to AS and AS/NZS.

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AS and AS/NZS are incorporated into technical codes made under this Bill and gain legal effect under the technical codes. Just as AS and AS/NZS are applicable to specialised workers, technical codes are also applicable to regulated utilities that are operated by highly specialised and/or licensed entities or people. The nature of AS and AS/NZS requires people to be specialised or trained/licensed to utilise AS and AS/NZS. The lack of access to AS and AS/NZS through the Legislation Register has been consistently applied since the decision was made to privatise AS and AS/NZS. The Bill provides a hyperlink to Standards Australia to facilitate organisation's and individual's access to referenced standards.

Clause 17 Technical regulator's warning notice

Subclause 17 (2) of the Bill requires the technical regulator to give a regulated utility a show cause notice before a warning notice is issued. Clauses 18, 54, 55 and 79 have similar provisions. The Committee is concerned that the show cause notice in subclause 17 (2) may not be required to state 'a reason' for making the show cause notice.

The Bill allows for a four stage process which starts with a show cause notice for a warning notice, followed by a warning notice, then a show cause notice for a direction and finally a direction to the regulated utility.

The reason for making a show cause notice for a warning notice is to give the details of the proposed warning notice. Subclause 17 (2) requires a show cause notice to state 'the details' of the proposed warning notice including the reason for the proposed warning notice. Subclause 17 (3) requires the warning notice to state 'the reasons' for the warning notice.

These prevent duplication of provisions but create a process that ensures people are aware of the grounds. For subclause 17 (2), the term 'details' is deliberately chosen instead of the 'reason' to require the show cause notice to include the content of the proposed warning notice. The 'reason' is inherent in the "details" in this subclause. If the show cause notice only included the reason for the show cause notice as suggested, the content of the proposed warning notice may not be included in the show cause notice.

Clauses 17, 18, 54, 55 and 79 are consistent with section 38 of the *Human Rights Act 2004*. Natural justice for a regulated utility is well preserved under these clauses. For instance, as for the technical regulator's direction, the regulated utility may receive at least three advance notices before a direction is issued:

- a show cause notice for the warning notice;
- the warning notice;
- a show cause notice for the direction; and finally
- the direction.

There is no offence for contravening the warning notice. For each notice, the regulated utility has 20 days to respond. If the regulated utility is found to be non-compliant with the direction, the regulated utility has a right of review against the direction which has resulted from the notices.

Clause 22 Technical regulator—obtaining information and documents

Clause 22 enables the technical regulator to require a person to give information and documents if the technical regulator is satisfied that a person is capable of providing information or producing the documents. The technical regulator is only able to exercise the power and functions given under the Act. In other words, when the technical regulator requires a person to supply information or documents, the information or documents must be for use in relation to the technical regulator's power and functions under the Act. If the technical regulator requires the information or documents with intentions that are not consistent with the terms of the Act, the technical regulator would be in breach of the powers provided by the Act. Clause 22 preserves client legal privilege in common law as there is no specific provision that would set the right aside.

Clause 22 applies to either a regulated utility or a person who is engaged with the work of the regulated utility. When it applies to a regulated utility as a corporate entity, section 12 of the *Human Rights Act 2004* does not apply as in accordance with section 6 only an individual has human rights. If the information or documents provided by the individual who is engaged with the work of the regulated utility contains either directly or indirectly information or documents not related to the regulated utilities services, in these circumstances, the individual retains the right against self-incrimination in clause 24. The explanation of clause 24 is provided below.

Clause 24 Self-incrimination etc

Under subclause 24 (2) (a), information, documents or things obtained are admissible in evidence against the person in criminal proceedings for an offence against the foreshadowed Act. The Committee questions if this subclause is compatible with subsection 22 (2) (i) of the *Human Rights Act 2004*.

This provision only applies to the matter in part 3 of the Bill. The offences in part 3 only apply to regulated utilities and the information can only be gathered in relation to the offences in part 3. Consequently, the information applies to a regulated utility that provides a regulated utility service such as energy or water. The foreshadowed Act applies to entities that voluntarily enter into the scheme, either through licence or operating certificate. The individuals who form part of the entity covered by the law are expected to understand their legal obligations under the governing law. The nature of this type of law is one that is protective: protective of life, health and environment.

The displacement of the privilege against self-incrimination in this subclause is proportionate given: the protective nature of the law; the expectation that those who enter into this regulatory context do so with notice of their obligations under the law; and the abrogation is limited to specific regulatory offences.

Clause 32 Network protection notices

Subclauses 32 (1) and (2) enable a responsible regulated utility to give a landholder written notice to take whatever action is necessary to stop the interference with the regulated utility network. The Committee stated,

> 'in conformity with what is becoming accepted practice, the registrar should be required to be satisfied on reasonable grounds. There are several examples of this practice in this Bill, including an instance where the power is vested in a Minister (see clause 29)'.

As the Bill has no reference to a 'registrar' it is assumed that the 'registrar' means either the technical regulator or the Minister, and it is also assumed that since clause 29 is Offence—reporting of notifiable incidents by regulated utility and not related to the protection of a network, the Committee has erred in its reference clause 29. However, as other clauses do vest the Minister with a power to approve certain activity it is presumed that the Committee is suggesting the Minister should be satisfied with stopping the interference before the responsible utility take the action.

The Minister or the technical regulator's approval system is not designed to operate with respect to interference with a regulated utility network. The Bill restates the existing long-standing provisions that give statutory authority to networks to operate with minimum interruptions and without significant interferences to enable the regulated utilities to consistently provide energy and water to the community.

It is not for the Minister or for the technical regulator to assess the likelihood that interference or the likely-interference to the network will occur. The Bill places the responsibility on the regulated utility network operator to protect and maintain the network. If the Bill ceded the power to the Minister or the technical regulator to approve the action taken to stop the interference or the likely-interference, the Bill would shift the responsible authority of the protection and maintenance of the network from the regulated utility to the Minister or the technical regulator.

The responsibility for protection and maintenance of the network rests with the regulated utility. That is why the responsible utility is given a power to stop the interference after giving a notice to the landlord. The landlord is given 14 days to respond. The actions taken by each responsible utility in these subclauses are reported to the technical regulator every year and regularly audited by the technical regulator.

Clause 109 Evidentiary certificates

Subclause 109 (2) provides that an evidentiary certificate under clause 109 is evidence of the matters stated in it. This subclause is consistent with subsection 22 (1) of the *Human Rights Act 2004* 'everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'.

Subclause 109 (1) enables the technical regulator to issue a certificate on the official record held by the technical regulator. The certificate does not contain the technical regulator's view regarding the fact. For example, under subclause 109 (1) (e), the technical regulator may issue an evidentiary certificate stating that a named person did, or did not, have an operating certificate for a stated regulated utility service at the time of issuing the certificate.

However, this certificate does not indicate the technical regulator's view that the named person is, or is not, required to hold an operating certificate. The certificate indicates the fact that the person holds, or does not hold the operating certificate. Evidentiary certificates simply provide the objective fact and do not imply subjective judgement or legal determination by the technical regulator about the fact.

Evidentiary certificates do not oust evidence that would prove a fact different to that stated in the certificate. Any dispute on evidence of a fact would be tested by the Court or Tribunal in the normal way.

Part 9 Enforcement

The Committee points out that the Explanatory Statement of the Bill does not mention section 28 (Human rights may be limited) of the *Human Rights Act 2004*. A supplementary Explanatory Statement will be provided to address section 28.

According to sections 40 and 40A of the *Human Rights Act 2004*, gas, electricity and water supply are of a public nature and would be a public authority. Section 40 states that it is unlawful for a public authority to act in a way that is incompatible with a human right. Under these provisions, any regulated utility is a public authority that must act consistently with rights enlivened by the *Human Rights Act 2004*.

This Bill deals with specialised services such as providing energy and water to the community. The Bill is designed to ensure the safe and reliable supply of energy and water. The supply of energy and water is essential to daily life and are organised in a way to ensure supply and to limit or avoid failure of supply. The failure of safe and reliable supply of energy and is a risk to life, health and safety.

Human rights may be limited only under the circumstance that the failure of the regulated utility network would pose a risk the ACT community. Any person providing or engaged with a regulated utility service is required to have specialised knowledge and skills and is obliged to understand the significance of the service the person provides, or is engaged with. To prevent any urgent risk to the community, an urgent action might be required in relation to the regulated utility network and might limit particular rights of a person who has obligations within the regulated utility.

For instance, part 3 requires a person to provide information and documentation in relation to the regulated utility service and networks and limits the privilege of self-incrimination. A person who interferes with a regulated utility network must remove the interference with a given notice by the responsible utility or the technical regulator under part 5 of the Bill. Under part 9 of the Bill, a person might be required to act, with a given notice by the technical regulator, to ensure the safety of the regulated utility networks. The Bill is consistent with human rights, noting that the limit of particular rights is a result of protecting the overall rights and needs of the community.

The purpose of the Bill and the reason to limit some privileges are to protect human rights under section 9 (1) of the *Human Rights Act 2004*, article 6 (1) of the International Covenant on Civic and Political Rights, and articles 11 and 12 of International Covenant on Economic, Social and Cultural Rights by ensuring the safe supply of energy and water to the community. In relation to these Covenants, the General Assembly of the United Nations adopted the resolution on the human right to water and sanitation (A/RES/64/292) in August 2010. The Human Rights Commission of the ACT Government also issued a background paper called Economic, Social and Cultural Rights: Implications for the Environment, Energy and Water in 2010, emphasising the right to access energy and water.

Government Amendments

Since the introduction of the Bill, my Directorate has received comment in relation to minor and technical matters contemplated by the Bill. Consequently, I intend to introduce Government Amendments that would address these issues.

I have included a copy of the amendments I intend to make at Attachment B.

Details of Government Amendments are as follows.

- Clause 6 (c) ‘Promote design compliant, high performing and responsive regulated utility networks’ is proposed to be amended to ‘promote design integrity and functionality of regulated utility networks’ to better describe the objects of technical regulation.

- Clause 57 ‘Definition of dam’ is proposed to be amended to use more accurate technical terms of dam infrastructure but does not change the type of dams regulated under the foreshadowed Act.

- Clause 79 ‘Technical regulator may impose conditions on licence’ is proposed to be amended to ‘technical regulator may recommend conditions on licence’ considering the licensing authority who imposes conditions is the ICRC.

- Schedule 2, part 2.4 Consequential amendments to the *Utilities Act 2000* (the Act) would not include amendments to sections 45 and 54F of the Act any longer. Amendments to sections 45 and 54F in the Bill are omitted on the basis that there may be unintended consequences upon the operation of these chapters in the Act.

- Schedule 2, part 2.4 Consequential amendments to section 9 of the Act would be amended to raise the threshold of licensed generation from 5 megawatts to 30 megawatts as a result of consultation with generators and consideration of national technical and market standards. Small or medium generators from 30 kilowatts to 30 megawatts are required to have an operating certificate and large generators of 30 megawatts and above are required to have a licence.

- Schedule 2, part 2.4 Consequential amendments to sections 45 and 54F in the Act regarding the energy levy and licence fee determination would be omitted on the basis that there may be unintended consequences upon the operation of these chapters in the Act. The current determination process in the Act would remain.

- A cross referencing definition of ‘Network protection notice’ would be introduced to ensure continuity between the operation of the Act and the Bill on advice from the ACT Civil and Administrative Tribunal.

- A six months transitional period for licensing generation and transmission operators would be introduced to enable the ICRC a time to process licensing applications.

I trust that I have adequately addressed the Committee’s concerns.

Yours sincerely

Simon Corbell MLA
Minister for the Environment