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

SCRUTINY REPORT 9

29 JULY 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:

APPROPRIATION BILL 2013-2014

This is a Bill for an Act to appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2013.

APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2013-2014

This is a Bill for an Act to appropriate money for expenditure in relation to the Office of the Legislative Assembly for the financial year beginning on 1 July 2013.

CRIMINAL CODE (CHEATING AT GAMBLING) AMENDMENT BILL 2013

This is a Bill for an Act to amend the Criminal Code 2002 to prohibit certain conduct that can corrupt the betting outcomes of events on which it is lawful to place bets.

FIRST HOME OWNER GRANT AMENDMENT BILL 2013

This is a Bill for an Act to amend the *First Home Owner Grant Act 2000* to provide that the grant be available only in respect of new and substantially renovated properties, that its value be increased to $12,500 per eligible transaction, and to extend the residency period from six months to one year.

GAMING MACHINE AMENDMENT BILL 2013 (NO 2)

This is a Bill for an Act to amend the *Gaming Machine Amendment Act 2012* to delay the commencement of sections 28 and 29 of the Act until 1 February 2014.

JUSTICE AND COMMUNITY SAFETY LEGISLATION (RED TAPE REDUCTION NO 1—LICENCE PERIODS) AMENDMENT BILL 2013

This is a Bill for an Act to make minor amendments to a number of laws within the Justice and Community Safety portfolio.

LEGISLATION (PENALTY UNITS) AMENDMENT BILL 2013

This is a Bill for an Act to amend section 133 of the *Legislation Act 2001* to increase the value of penalty units that provide the basis for determining statutory fines, in the case of an individual from $110 to $140 per unit, and in the case of a corporation from $550 to $700.

PAYROLL TAX AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Payroll Tax Act 2011* to bring the operation of the Act into greater harmonization with other jurisdictions.

TERRITORY AND MUNICIPAL SERVICES LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to make minor and technical amendments to a number of laws within the Territory and Municipal Services portfolio.

BILLS—COMMENT

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

CONSTRUCTION AND ENERGY EFFICIENCY LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to amend a number of laws administered by the Environment and Sustainable Development Directorate.

Has there been a trespass on personal rights and liberties?
Report under section 38 of the *Human Rights Act 2004*
Has there been an inappropriate delegation of legislative power?—term of reference (3)(d)

ACCESS TO LAW

In this Bill there are several examples of the technique whereby an act, a regulation, or a statutory instrument of some kind, may in effect enact a law of the Territory by simply adopting the text of some document. This document is usually a law of some other Australian jurisdiction. It may however be simply some "instrument". By subsection 14(1) of the *Legislation Act 2000*, "[a]n *instrument* is any writing or other document" and, thus, might be a document prepared by some person or body with no connection to any Australian government or legislature.

CLAUSE 83

A good example of this technique is found in clause 83 of the Bill, which proposes that section 44C be inserted in the *Water and Sewerage Act 2000*. There are two parts to the definition of the term "plumbing code" in subsection 44C(1). The first part (paragraph 44C(1)(a)) in effect adopts

(a) the Plumbing Code of Australia prepared and published by the Australian Building Codes Board as amended from time to time by –

(i) the Australian Building Codes Board;[1] and

(ii) the Australian Capital Territory Appendix to the Plumbing Code of Australia.

It is to be noted that the Assembly has no control over the contents of the ***Plumbing Code of Australia***, as it exists from time to time.

[1] The Australian Building Codes Board (ABCB) is a Council of Australian Government (COAG) standards writing body that is responsible for the National Construction Code (NCC) which comprises the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA). It is a joint initiative of all three levels of government in Australia and was established by an Intergovernment agreement (IGA) signed by the Commonwealth, States and Territories on 1 March 1994. A new IGA was signed by Ministers, with effect from 30 April 2012.

The **Appendix** is a statutory instrument made by the responsible Minister (subsection 44C(3)). It is disallowable by the Assembly (subsection 44C(4)), thus giving it control over the content of this part of the law of the Territory. The Minister cannot make or amend the **Appendix** by adopting another law or some instrument.

The second part of the definition (paragraph 44C(1)(b)) provides that the "plumbing code" also includes **a document prescribed by regulation**. (All regulations are disallowable by the Assembly.) By subsection 44D(2), any such regulation "may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time".

Subsection 44C(1) thus provides for three kinds of subordinate law: (1) the ***Plumbing Code of Australia***, as it exists from time to time; (2) the Australian Capital Territory **Appendix** to the *Plumbing Code of Australia*; and (3) **a document prescribed by regulation**.

In relation to each, it is pertinent to ask: what control does the Assembly have over the content of the subordinate law?, and how may a person access the law, or, more simply, find out what the law provides? The three kinds identified will be taken in turn.

Category (1)—As noted, the Assembly has no control over the **contents** of the ***Plumbing Code of Australia***, as it exists from time to time.

In relation to **access** to the Code, subsection 47(6) of the Legislation Act is not relevant because this is not a case where a statutory instrument has made provision about a matter by applying, etc another law or an instrument on "from time to time" basis. Rather, it a case where an Act itself (in particular, by proposed paragraph 44C(1)(a)) authorises such a provision.[2]

However, proposed section 44F of the Act provides that the construction occupations registrar must keep a copy of the plumbing code at his or her office, and that a person may, on request, inspect the code.

The questions for the Assembly to consider are (a) whether it is appropriate for the proposed amendments to in effect delegate legislative power in these ways, and (b) whether any applied, etc provisions should, notwithstanding proposed section 44F, be notified on the Legislation Register.

Category (2)—The **Appendix** (and any amendment of it) made by the Minister is a disallowable instrument and must also be notified on the Legislation Register. The Committee does not raise any issue about the Appendix.

Category (3)—The plumbing code also includes **a document prescribed by regulation** under paragraph 44C(1)(b). Any such regulation would be disallowable, and a basis for disallowance might be an objection to the content of a law of another jurisdiction, or some instrument, as it existed at the time the disallowance motion was passed. However, once the period for disallowance had passed, the Assembly would (apart from amendment by an Act) have no power to disallow the content of a law of another jurisdiction, or some instrument, that came into existence after this period.

In relation to category (3), the first issue for the Assembly to consider is whether it is appropriate for a regulation made by the Executive to delegate power to make law for the Territory to whoever it is makes and amends an identified law of another jurisdiction, or makes or amends some identified instrument.

[2] The Committee is grateful for advice from the ACT Parliamentary Counsel's Office in this respect.

The effect of subsection 44D(3), which disapplies subsection 47(6) of the Legislation Act, is that while a regulation made under paragraph 44C(1)(b) must be published on the Legislation Register, any identified law of another jurisdiction, or some identified instrument, as these documents exist from time to time, need not be so published.

On the other hand, given that these other identified documents are part of the plumbing code, proposed section 44F of the Water and Sewerage Act provides a means of access to the documents that may be viewed as an alternative to publication on the Legislation Register. That is, a person may inspect and purchase the code at the Office of the Construction Occupations Registrar.

In relation to category (3), the second issue for the Assembly to consider is whether section 44F the Water and Sewerage Act provides an adequate alternative to publication on the Legislation Register.

OTHER RELEVANT CLAUSES

1. Under the amendments proposed to section 8 of the *Architects Act 2004* (clause 5) the registrar can "declare" a qualification, and the architects board[3] may "accredit" a course. Under proposed section 90A (clause 6), a "declaration or accreditation may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time" and, given the disapplication of subsection 47(6) of the Legislation Act (*see* proposed subsection 90A(3)), any such applied, etc provision need not be notified on the Legislation Register. There is no provision of alternative means for access to applied, etc provisions.

   The questions for the Assembly to consider are (a) whether it is appropriate for the proposed amendments to in effect delegate legislative power in these ways, and (b) whether any applied, etc provisions should be notified on the Legislation Register.

2. Subsection 136(1) of the *Building Act 2004* defines "building code" in a way identical to the approach proposed by clause 83 to be taken in respect of a plumbing code. Paragraph 136(1)(b) of this Act provides that "a document prescribed by regulation" may be part of the building code. By proposed section 136A of the Act (see clause 18), a regulation "may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time", and subsection 47(6) of the Legislation Act is disapplied. The result is that any such applied document need not be notified on the Legislation Register. Proposed section 137 of the Act provides an alternative means whereby a person might access the contents of the code (*see* clause 19). That is, the Construction Occupations Registrar must notify the public of a place where the code may be inspected and purchased.

   The questions for the Assembly to consider are (a) whether it is appropriate for the proposed amendments to, in effect, delegate legislative power in these ways, and (b) whether any applied, etc provisions should, notwithstanding proposed section 137, be notified on the Legislation Register.

3. By section 104A(1) of the *Construction Occupations (Licensing) Act 2004*, the registrar may, in writing, approve a code of practice for a construction occupation, a class of construction occupation, or a construction service. By subsection 136(2), "[A]n approved code of practice may ... apply, adopt or incorporate a law or instrument, or a provision of a law or instrument,

[3] The Australian Capital Territory Architects Board is established under the *Architects Act 2004* and its members are appointed by the responsible Minister.

as in force from time to time". By proposed subsection 104A(4) (*see* clause 47), section 47(6) of the Legislation Act is disapplied, with the result that the instruments applied, etc under subsection 136(2) need not be notified on the Legislation Register. The Bill does not proposed an alternative means whereby a person might access the contents of a code of practice.

The question for the Assembly is whether any applied, etc provisions should be notified on the Legislation Register.

4. By subsection 13(1) of the *Construction Occupations (Licensing) Regulation 2004*, the registrar may "may declare the qualifications necessary for an individual to be eligible to be licensed in a construction occupation or occupation class", and by subsection 13(3) a declaration is a notifiable instrument.

   Clause 63 of the Bill proposes to add a subsection 13(4) to permit a declaration to apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time, and a subsection 13(5) to disapply section 47(6) of the Legislation Act. The Bill does not propose an alternative means whereby a person might access the contents of a declaration.

   The questions for the Assembly to consider are (a) whether it is appropriate for the proposed amendments to in effect delegate legislative power in these ways, and (b) whether any applied, etc provisions should be notified on the Legislation Register.

5. By subsection 10(1) of the *Energy Efficiency (Cost of Living) Improvement Act 2012* the Minister "may determine an activity (an ***eligible activity***) that is intended to reduce the consumption of energy", and by subsection 10(5), a determination is a notifiable instrument.

   Clause 77 of the Bill proposes to add a subsection 10(6) to permit a determination to apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time, and to add a subsection 10(7) to disapply section 47(6) of the Legislation Act. The Bill does not propose an alternative means whereby a person might access the contents of a declaration.

   The questions for the Assembly to consider are (a) whether it is appropriate for the proposed amendments to in effect delegate legislative power in these ways, and (b) whether any applied, etc provisions should be notified on the Legislation Register.

GENERAL COMMENT

The Committee acknowledges that the Explanatory Statement advances reasons for the disapplication of subsection 47(6) of the Legislation Act; *see* at pages 4-5, 13-14, 17 and 19. Given, however, the importance from a rights perspective of persons being able to readily access the content of Territory law, the Committee remains concerned that this law may change, from time to time, and not be readily accessible. This concern arises, in particular, where an act which authorises the adoption of some law or instrument does not create any alternative means for access.

The Committee recommends that the Government consider whether it would be possible for some provision to be made for a publicly available document to provide a link to a site where might be found relevant law or instrument that has been adopted as law of the Territory.

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

THE RIGHT TO PRIVACY (HRA PARAGRAPH 12(A)) AND A REQUIREMENT THAT AN ENTITY PROVIDE WRITTEN INFORMATION AS PART OF A RECTIFICATION ORDER

Currently, paragraph 38(1) of the Construction Occupations (Licensing) Act empowers the registrar to "make an order (a ***rectification order***) in relation to an entity requiring the entity— (a) to take stated action to rectify work done as part of a construction service ...".

Clause 31 of the Bill proposes to add the words "(including provide written information)" after the words "stated action". By clause 32, examples of what might constitute "written information" would be appended to the text of subsection 38(1).

These examples and the text of the Explanatory Statement at page 32, indicate that it is intended that the written information relate to assessing whether the rectification work has been carried out adequately. There is, however, no limitation in the amendment proposed by subsection 38(1), and it is generally undesirable to express a requirement to provide information in wide terms. **The question arises as to whether a limitation reflecting the purpose of the amendment could be inserted**. (Compare to the qualified power in relation to an analogous provision in proposed subsection 80B(1)—see clause 44.)

The significance of this issue is underlined by the fact that it is an offence to fail to comply with a rectification order (subsection 40(1)). The proposed amendment does not recognise or allow for any qualification to the obligation to provide written information. Two points arise in this respect. **The first is** whether a note should be inserted at the end of subsection 38(1) drawing attention to sections 170 and 171 of the Legislation Act (as, for example, in relation to proposed subsection 80B(1)—*see* clause 44). **The second is** whether to permit a person to advance a reasonable excuse for failing to provide the specified written information by amendment of paragraph 38(1), or perhaps of subsection 40(1). In this respect, the Committee refers to its comments below on clauses 7 and 8 of the Water Resources Amendment Bill 2013.

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

THE RIGHT TO PRIVACY (HRA PARAGRAPH 12(A)) AND THE POWER OF A COMPLIANCE AUDITOR TO REQUIRE A LICENSEE TO GIVE INFORMATION ABOUT A DOCUMENT PRODUCED TO THE AUDITOR—SEE CLAUSE 44 AND PROPOSED SUBSECTION 80B(1) AND PARAGRAPH 80B(3)(C)

Proposed subsection 80B(1) of Construction Occupations (Licensing) Act would empower a compliance auditor to ask a licensee to produce to the compliance auditor a document that relates to the licensee's activities. A note to this subsection draws attention to sections 170 and 171 of the Legislation Act. Proposed paragraph 80B(3)(c) would empower the auditor to "require the licensee to give the compliance auditor information about the document".

The Committee suggests that a note drawing attention to sections 170 and 171 of the Legislation Act be added at the foot of paragraph 80B(3)(c).

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

THE RIGHT TO BE PRESUMED INNOCENT (HRA PARAGRAPH 22(1)) AND THE IMPOSITION ON A DEFENDANT OF A LEGAL BURDEN OF PROOF TO ESTABLISH A DEFENCE TO A CHARGE UNDER SUBSECTION PROPOSED 80C(2)—SEE CLAUSE 44.

By proposed subsection 80C(2), each partner in a partnership commits an offence if the partnership is a licensee, and the partners, or any of them, fail to comply with a notice given to the partnership under section 80B. By proposed subsection 80C(3), it is a defence to a prosecution under subsection 80C(2) if a partner proves the existence of certain facts. As a note to the subsection indicates, the partner would carry a legal burden of proof; that is, would need to prove that these facts existed on the balance of probabilities.

This provision concerning the burden of proof engages the right to be presumed innocent stated in HRA paragraph 22(1). The question arises as to whether it would be sufficient to provide only that the defendant must prove the facts according to an evidential burden of proof; that is, to prove only that it was reasonably open to the court to find the facts established, in which case the prosecution would need to prove beyond reasonable doubt that these facts did not exist.

The Committee notes that this issue was not identified in the Explanatory Statement. A provision of this kind should be identified and a justification (according to the framework in HRA section 28) for limiting HRA subsection 22(2) should be provided.

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

THE RIGHT TO PRIVACY (HRA PARAGRAPH 12(A)) AND THE POWER OF THE REGISTRAR TO REQUIRE A PERSON TO PROVIDE INFORMATION TO THE REGISTRAR

By clause 45 of the Bill, it is proposed to insert a new part 6A into the Construction Occupations (Licensing) Act. The critical element is section 80E, which in part reads:

> (1) This section applies if the registrar suspects on reasonable grounds that a person—
>
> (a) has information (the required information) reasonably required by the registrar for the administration or enforcement of this Act; or
>
> (b) has possession or control of a document containing the required information.
>
> (2) The registrar may give the person a notice (an information requirement) requiring the person to give the information, or produce the document, to the registrar.
>
> ...
>
> (4) A person does not incur any civil or criminal liability only because the person gives information, or produces a document, to the registrar in accordance with an information requirement.

A person commits an offence if the person contravenes an information requirement; proposed section 80G. A note to this provision draws attention to sections 170 and 171 of the Legislation Act.

The registrar would be vested with an extensive power and the provisions raise significant privacy issues. It is a power to require any person to provide "information" in respect of a very wide range of matters—that is, in relation to the administration or enforcement of the Act—limited only by the registrar having formed (a) a suspicion on reasonable grounds that the person has the information, and (b) an opinion that the information is reasonably required administration or enforcement of the Act. In practice, it will be very difficult for a person to claim that the registrar has not made a valid request.

It is clear that the provision of the information to the registrar in accordance with a demand might affect the privacy interests of persons whose affairs would thereby be revealed to the registrar. Apart from personal information across a wide range, the information might well amount to a disclosure of information that has the quality of having been communicated in confidence.

The first issue raised is whether the registrar should be required to form on reasonable grounds a belief, rather than only a suspicion, that the person has the relevant information. This would set a somewhat higher standard and offer some degree of protection for the privacy interests of persons whose affairs would be revealed by the provision of the information to the registrar.

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

There is nothing said as to how the registrar is to obtain information from the person where that information is not contained in a document. Presumably, some sort of interview will be necessary, and some means used to record the oral statements by the person. A range of questions arise, such as: is the person entitled to bring along a lawyer to the interview? should the registrar be obliged to make a video of the interview? can the person make their own recording of the interview? should the registrar be required to inform the person of their right to remain silent, or to claim client legal privilege? (It is to be noted that a person commits an offence if he or she contravenes an information requirement.)

There are also questions about the interests of a third party, such as a person whose personal affairs would be revealed by disclosure to the registrar: should the person to whom the demand is made be obliged to inform the third party? should the registrar be so required? should the third party be given an opportunity to object to disclosure, such as on the ground of client legal privilege? The protection from civil liability given to the person who produces the information or the document—such as, in particular, from actions for breach of confidence or defamation—underlines the importance of some statutory protection to a third party. There then arise questions as to what process could be employed to protect these third party interests.

These are but some of the questions that might arise in respect of a demand for information, and some of them arise where the registrar demands the production of a document.

The Committee recommends that the Minister address these questions and more generally explain how it is envisaged that this process would work in practice.

A person charged with the offence of contravening an information requirement cannot raise any defence (he or she may of course deny that they failed to meet the requirement). Given that sections 170 and 171 of the Legislation Act have not been displaced, a court would find that the defendant could refuse to comply with a demand on the basis that proposed section 80G did not apply where the refusal was based on a valid claim that to comply would involve self-incrimination, or exposure to a civil penalty (section 170), or did not apply on a valid claim that compliance would involve a breach of client legal privilege of that person or a third party (section 171).

In analogous provisions in some other statutes, a person such as a defendant to a charge under section 80G may advance a defence of “reasonable excuse”. This defence would give some protection to a third party, in particular where the information was of a confidential nature.

The Committee recommends that the Minister address the issue of whether a reasonable excuse defence be provided in relation to section 80G.

CRIMES (SENTENCING) AMENDMENT BILL 2013

This is a Bill to amend the *Crimes (Sentencing) Act 2005* to permit a reduced sentence to be imposed where an offender has facilitated the administration of justice.

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

A SEPARATION OF POWERS ISSUE

The central provision in this scheme is proposed subsection 35A(2) of the Crimes (Sentencing) Act, which provides that "[a] court may impose a lesser penalty ... than it would otherwise have imposed having regard to the degree of assistance provided in the administration of justice".

Then follows subsection 35A(3):

> (3) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.

Inclusion of subsection 35A(3) might be taken to indicate a lack of confidence by the Assembly in the courts of the Territory, and thus undermine public confidence in the judiciary.

The insertion of this provision might be taken to be based on an apprehension that a court would, in some circumstances, impose an "unreasonably disproportionate" sentence. On the other hand, it might be assumed that this is a result that a court would strive to avoid. Were it to fail to do so, an appeal court could correct the error. The insertion of 35A(3) is not necessary to ensure that sentences are proportionate.

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

WATER RESOURCES AMENDMENT BILL 2013

This is a Bill to amend, in a number of respects, both the *Water Resources Act 2007* and *Water Resources Regulation 2007* to ensure consistency and harmonise water resource offences across States and Territories.

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

THE PRESUMPTION OF INNOCENCE (HRA SUBSECTION 22(1)) AND STRICT LIABILITY OFFENCES—CLAUSES 7 AND 8

The Explanatory Statement notes that clause 7 would insert subsection 77C (1A) into the Act, and thereby create a strict liability offence where a person does waterway work without a waterway work licence. The maximum penalty is 50 penalty units as an infringement notice in the *Magistrates Court (Water Resources Infringement Notices) Regulation 2007*—see "Schedule 1 Other amendments".

Similar provision is made by clause 8, which would insert subsection 77F(2), and thereby create a strict liability offence where the holder of a bore work licence or driller's licence, subject to a condition requiring the holder to give the relevant authority a bore completion report, does not provide the report.

The Committee notes the range of justifications stated in the Explanatory Statement for the limitation of the presumption of innocence involved in the creation of a strict liability offence. The Committee considers that the primary justification lies in the offence being one that is part of a scheme to regulate a sector of activity, where those in the sector should be aware of their obligation to avoid the commission of the acts or omissions that form the elements of the offence. For example, it is reasonable to assume that a person selling food is aware that the food they sell should not adulterated, so that a strict liability offence of selling adulterated food is justifiable. Of course, the seller commits the offence even if they took reasonable steps to avoid selling food that was adulterated, but the justification lies in reasoning that creation of strict liability will encourage the seller to be very careful.

There is an injustice involved (and a limitation of the presumption of innocence) where the seller could prove that reasonable steps were taken, but the view is taken that the limitation is necessary to protect the public interest. That is, the scheme of regulation might be ineffective if the defendant could raise as a defence that he or she took reasonable care. Whether this is a sufficient justification will also depend on the penalty provided. The Committee's view is that this should not generally be more than 50 penalty points. In relation to the two offences in focus here, the fact that prosecution is by way of an infringement notice (see Explanatory Statement at page 6) further lessens the degree of the penalty.

The creation of strict liability offences as proposed in clauses 7 and 8 is justifiable, but on the basis stated by the Committee above.

The Committee does not raise a matter of concern in relation to the creation of the strict liability offences proposed in clauses 7 and 8.

It does however point again to the need for the Explanatory Statement to "refer specifically to at least two of the defences available under the *Criminal Code 2000* to a person charged with a strict liability offence. These are the mistake of fact defence (Code section 36), and the defence of intervening conduct or event (Code section 39). The latter is important in that it permits a limited defence that the defendant took care to avoid committing the physical elements of the offence. The Committee understands that the Government accepts that there should be mention of these defences" (*Scrutiny Report No 8* of the *8th Assembly*, in relation to the Road Transport Legislation Amendment Bill 2013(No 3), at page 12).

The Committee recommends that the Explanatory Statement be amended to refer specifically to the mistake of fact defence (Code section 36), and the defence of intervening conduct or event (Code section 39).

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-53 being the Health Professionals (Veterinary Surgeons Fees) Determination 2013 (No. 1) made under section 132 of the *Health Professionals Act 2004* **revokes DI2012-45 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-55 being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2013 made under section 84 of the *Legal Profession Act 2006* **revokes DI2012-77 and determines fees payable for the grant or renewal of a restricted or unrestricted practising certificate.**

Disallowable Instrument DI2013-56 being the Public Place Names (Coombs) Amendment Determination 2013 (No. 2) made under section 3 of the *Public Place Names Act 1989* **determines the names of 10 roads in the Division of Coombs.**

Disallowable Instrument DI2013-57 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-82 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-58 being the Road Transport (General) Driver Licence and Related Fees Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-83 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-59 being the Road Transport (General) Numberplate Fees Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-84 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-60 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-88 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-61 being the Road Transport (General) Parking Permit Fees Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-85 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-62 being the Road Transport (General) Fees For Publications Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2012-86 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-63 being the Dangerous Goods (Road Transport) Fees and Charges Determination 2013 made under section 194 of the *Dangerous Goods (Road Transport) Act 2009* **revokes DI2012-87 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-70 being the Legal Aid (Commissioner—Financial Management) Appointment 2013 made under paragraph 16(1)(c)(v) of the *Legal Aid Act 1977* **appoints a specified person, with expertise in financial management, as a commissioner of the Legal Aid Commission.**

DISALLOWABLE INSTRUMENT—COMMENT

The Committee has examined the following disallowable instrument and offers these comments on it:

Subdelegation of legislative power

Disallowable Instrument DI2013-52 being the Housing Assistance Public Rental Housing Assistance Program 2013 (No. 1) made under subsection 19(1) of the *Housing Assistance Act 2007* **repeals DI2010-189 and approves the Housing Assistance Public Rental Housing Assistance Program 2013 (No. 1).**

This instrument is made under subsection 19(1) of the *Housing Assistance Act 2007*, which provides:

> **19 Approved housing assistance programs**
>
> (1) The Minister may approve a housing assistance program.
>
> (2) An approved housing assistance program is a disallowable instrument.
>
> Note 1 Power given under an Act to make a statutory instrument (including a program) includes power to amend or repeal the instrument (see Legislation Act, s 46 (1)).
>
> Note 2 A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The effect of section 19 is that the Legislative Assembly has delegated to the Minister the power to approve a housing assistance program. Under the instrument, the Minister subdelegates some of the relevant power, by authorising the housing commissioner to determine:

- an asset eligibility limit, for the definition of ***asset eligibility limit*** in clause 4 of the instrument;
- kinds of assets that are not assets for the purpose of the definition of ***assets*** in clause 4 of the instrument;
- that particular eligibility criteria specified in clause 9(1) of the instrument do not apply to community applicants (subclause 9(1B));
- eligibility criteria for community applicants that are different from those specified in clause 9(1) (subclause 9(1B));
- that income a person receives is not income for the person for the purposes of the housing assistance program (paragraph 11(2)(a));
- a purpose in relation to which an amount expended by a person is not income for the purposes of the housing assistance program (paragraph 11(2)(c));
- "needs categories" and the criteria for allocating needs categories to eligible applicants (subclause 13(1));
- an alternative way of assessing applications against needs categories (subclause 18(3)); and
- that the rent rebate has increased (paragraph 25(8)(c)).

As a general rule, legislative power cannot be subdelegated. Pearce and Argument state:

> A proposition frequently cited is that a person to whom power to do an act has been delegated is not in turn permitted to delegate the performance of that act. The maxim *delegatus non potest delegare* encapsulates this notion. (*Delegated Legislation in Australia*, 4th edition, at paragraph 23.1)

However, an exception to this general rule is if the primary legislation authorises the subdelegation of the power (see Pearce and Argument, at paragraph 23.6). In this particular case, it should be noted that section 20 of the Housing Assistance Act provides:

> **20 Approved housing assistance programs—determinations**
>
> (1) An approved housing assistance program may provide for the housing commissioner to make determinations for the program.
>
> (2) A determination under subsection (1), and each amendment (if any) of a determination, is a notifiable instrument.
>
> Note A notifiable instrument must be notified under the Legislation Act.

This means that any subdelegation of legislative power here has been properly authorised by the Legislative Assembly.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 5 June 2013, in relation to comments made in Scrutiny Report 8 concerning the Road Transport Legislation Amendment Bill 2013 (No. 2) (attached).
- The Minister for Health, dated 17 June 2013, in relation to comments made in Scrutiny Report 8 concerning Disallowance Instrument DI2013-46, being the Health (Fees) Determination 2013 (No. 2) (attached).
- The Chief Minister, dated 1 July 2013, in relation to comments made in Scrutiny Report 8 concerning the Auditor-General Amendment Bill 2013.

The Committee wishes to thank the Chief Minister, the Minister for Health and the Attorney-General for their 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

29 July 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 7, dated 13 May 2013

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

Report 8, dated 30 May 2013

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

Heritage Legislation Amendment Bill 2013

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 comments contained in the *Report Number 8 of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)* in relation to the Road Transport Legislation Amendment Bill 2013 (No. 2).

I thank the Committee for its comments. I note that while the Committee drew a number of matters to the attention of the Assembly, it requested a response from me only in relation to the matter of strict liability offences and my response is therefore confined to that issue.

The Committee indicated that Explanatory Statements should refer specifically to at least two of the defences available under the Criminal Code 2000 to a person who has been charged with a strict liability offence. These defences may include mistake of fact and intervening conduct.

While I accept the Committee's comments, I would draw the Committee's attention to the bottom of page 2 of the Explanatory Statement, where there was a specific reference to the availability of defence of mistake of fact and other defences in the context of the discussion of strict liability offences.

On page 2, the Explanatory Statement included the following statement:

> *"While the inclusion of strict liability limits the range of defences that may be available for person accused of an offence to which it applies, a number of defences including mistake of fact remain open to the accused, depending on the particular facts of each case....[footnote 1]"*

The footnote directed the reader to relevant part of the Criminal Code that contains other defences that may apply to strict liability offences, as well as other offences more generally.

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I thank the Committee for its comments and will ask my directorate to prepare explanatory statements so that they address defences for strict liability in appropriate detail.

Yours sincerely

Simon Corbell
Attorney General

Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I refer to the Scrutiny Report No 8 dated 30 May 2013 in which the Committee raised two questions in regard to Disallowable Instrument DI2013-46. I offer the following in response to the matters raised by the Committee.

Hospital Accommodation Single Room Fee

The fee for single room accommodation is worded as follows:

> "$550.00 or a fee as specified in agreement between the relevant health fund and the ACT Public Hospital".

A number of Health funds are in the process of negotiating with public hospitals across Australia a lower daily fee for single room accommodation. These fees differ from health fund to health fund. The intention of the newly worded fee is that where a private patient who is covered by a health fund that has an agreement in place, that the negotiated fee will be paid. In all other instances the $550 fee will be applicable.

Driver Rehabilitation Service Fees

The changes to the driver rehabilitation fees reflect the current way in which fees are charged. There are no new fees nor any increases to fees. For instances, item 5e (initial assessment and report by occupational therapist - $720) is a consolidation of the old fees for 'initial allied health assessment' ($407) and 'initial assessment report and driving instruction' ($313). As there were no instances where the old fees were charged in isolation, it was logical to combine them into a single fee.

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In respect of the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, the *Health Act 1993* disallowable instrument contains the following statement in section 10:

> "Fees are payable to the provider, by the individual or organisation in receipt of the goods and/or services listed in the schedule."

I hope these responses address your concerns and thank you for raising this issue with me.

Yours sincerely

Katy Gallagher MLA
Minister for Health