

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

SCRUTINY REPORT 10

12 AUGUST 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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## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

**Disallowable Instrument DI2013-64 being the Animal Welfare (Fees) Determination 2013 (No. 1) made under section 110 of the *Animal Welfare Act 1992* revokes DI2012-140 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-65 being the Domestic Animals (Fees) Determination 2013 (No. 1) made under section 144 of the *Domestic Animals Act 2000* revokes DI2012-141 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-66 being the Waste Minimisation (Landfill Fees) Determination 2013 (No 1) made under section 45 of the *Waste Minimisation Act 2001* revokes DI2012-69 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-67 being the Stock (Fees) Determination 2013 (No. 1) made under section 68 of the *Stock Act 2005* revokes DI2012-144 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-68 being the Stock (Levy) Determination 2013 (No. 1) made under section 6 of the *Stock Act 2005* revokes DI2012-143 and determines the number of animals making up a stock unit and the levy amount per stock unit.**

**Disallowable Instrument DI2013-69 being the Tree Protection (Fees) Determination 2013 (No. 1) made under section 109 of the *Tree Protection Act 2005* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-71 being the Utilities (Electricity Network Boundary Code) Determination 2013 made under sections 59 and 63 of the *Utilities Act 2000* revokes DI2012-159 and determines the Electricity Network Boundary Code—May 2013.**

**Disallowable Instrument DI2013-72 being the Utilities (Gas Network Boundary Code) Determination 2013 made under sections 59 and 63 of the *Utilities Act 2000* revokes DI2012-168 and determines the Gas Network Boundary Code—May 2013.**

**Disallowable Instrument DI2013-73 being the Utilities (Water and Sewerage Network Boundary Code) Determination 2013 made under sections 59 and 63 of the *Utilities Act 2000* revoke DI2012-170 and determines the Water and Sewerage Network Boundary Code—May 2013.**

**Disallowable Instrument DI2013-74 being the Exhibition Park Corporation (Governing Board) Appointment 2013 (No. 1) made under sections 8 and 9 of the *Exhibition Park Corporation Act 1976* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as chair of the governing board of the Exhibition Park Corporation.**

**Disallowable Instrument DI2013-75 being the Animal Diseases (Fees) Determination 2013 (No. 1) made under section 88 of the *Animal Diseases Act 2005* revokes DI2012-139 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-77 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2013 made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2012-137 and determines the maximum fares relating to the hiring or use of a taxi.**

**Disallowable Instrument DI2013-78 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2013 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares DEMAC Property Pty Ltd to be a Parking Authority for the area Block 16 Section 3 in the suburb of Phillip.**

**Disallowable Instrument DI2013-79 being the Public Place Names (Weston) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends the notice published in Commonwealth of Australia Gazette No. S24 and determines the names of eight roads in the Division of Weston.**

**Disallowable Instrument DI2013-80 being the Civil Law (Wrongs) Professional Standards Council Appointment 2013 (No. 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council, representing the Commonwealth.**

**Disallowable Instrument DI2013-81 being the ACT Teacher Quality Institute (Certification Fee) Determination 2013 (No. 1) made under section 95 of the *ACT Teacher Quality Institute Act 2010* determines the fee payable in respect of an application for certification under the Australian Professional Standards for Teachers.**

**Disallowable Instrument DI2013-83 being the Road Transport (Public Passenger Services) (Minimum Service Standards for Hire Car Services (other than Restricted Hire Car Services)) Approval 2013 made under section 18B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2006-42 and approves the Minimum Services Standards for the operation of hire car services (other than restricted hire car services).**

**Disallowable Instrument DI2013-84 being the Mental Health (Treatment and Care) (Official Visitors) Appointment 2013 (No. 1) made under subsection 121(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as an Official Visitor, with the endorsement of the ACT Mental Health Consumer Network.**

**Disallowable Instrument DI2013-85 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-275 and determines the property value thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.**

**Disallowable Instrument DI2013-86 being the Taxation Administration (Amounts Payable—Eligibility—New and Substantially Renovated Homes and Land only—Home Buyer Concession Scheme) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-278 and determines, for the purposes of the Scheme, the income test and thresholds, eligibility criteria, conditions, method of calculation of duty payable and time limit for applications.**

**Disallowable Instrument DI2013-87 being the Taxation Administration (Amounts Payable—Duty) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-220 and determines the amount of duty payable under various provisions of the Duties Act 1999.**



**Disallowable Instrument DI2013-89 being the Planning and Development (Land Agency Board) Appointment 2013 (No. 1) made under section 42 of the *Planning and Development Act 2007* and section 79 of the *Financial Management Act 1996* appoints a specified person as chair of the Land Agency Board.**

**Disallowable Instrument DI2013-90 being the Planning and Development (Land Agency Board) Appointment 2013 (No. 2) made under section 42 of the *Planning and Development Act 2007* and section 79 of the *Financial Management Act 1996* appoints a specified person as deputy chair of the Land Agency Board.**

**Disallowable Instrument DI2013-91 being the Planning and Development (Land Agency Board) Appointment 2013 (No. 3) made under section 42 of the *Planning and Development Act 2007* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Land Agency Board.**

**Disallowable Instrument DI2013-92 being the Planning and Development (Land Agency Board) Appointment 2013 (No. 4) made under section 42 of the *Planning and Development Act 2007* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Land Agency Board.**

**Disallowable Instrument DI2013-93 being the Health (Fees) Determination 2013 (No. 3) made under section 192 of the *Health Act 1993* revokes DI2013-46 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-94 being the Children and Young People (Death Review Committee) Appointment 2013 (No. 1) made under section 727E of the *Children and Young People Act 2008* revokes DI2012-7 and appoints a specified person as chair of the Children and Young People Death Review Committee.**

**Disallowable Instrument DI2013-95 being the Animal Welfare (Humane Shooting of Kangaroos and Wallabies) Code of Practice 2013 made under section 22 of the *Animal Welfare Act 1992* revokes all previous codes associated with the culling of kangaroos and adopts the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-Commercial Purposes as the Code for the ACT.**

**Disallowable Instrument DI2013-96 being the Heritage (Council Member) Appointment 2013 (No. 1) made under paragraph 17(3)(a) of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council, representing the community.**

**Disallowable Instrument DI2013-97 being the Heritage (Council Member) Appointment 2013 (No. 2) made under paragraph 17(4)(c) of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council, representing the discipline of archaeology.**

**Disallowable Instrument DI2013-98 being the Heritage (Council Member) Appointment 2013 (No. 3) made under paragraph 17(4)(f) of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council, representing the discipline of history.**

**Disallowable Instrument DI2013-99 being the Heritage (Council Member) Appointment 2013 (No. 4) made under paragraph 17(3)(b) of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council, representing the Aboriginal community.**

**Disallowable Instrument DI2013-133 being the Electoral (Fees) Determination 2013 made under section 8 of the *Electoral Act 1992* revokes earlier determinations and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-134 being the Independent Competition and Regulatory Commission (Regulated Water and Sewerage Services) Terms of Reference Amendment Determination 2013 (No. 2) made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* amends the Terms of Reference contained in DI2011-287 by changing the final reporting date to 30 June 2013.**

**Disallowable Instrument DI2013-136 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2013 (No. 1) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 79 of the *Financial Management Act 1996* appoints a specified person as chair of the Building and Construction Industry Training Fund Board.**

**Disallowable Instrument DI2013-137 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2013 (No. 2) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Board, representing the interests of employers in the building and construction industry.**

**Disallowable Instrument DI2013-138 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2013 (No. 3) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Board, representing the interests of employers in the building and construction industry.**

**Disallowable Instrument DI2013-139 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2013 (No. 4) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Board, representing the interests of employees in the building and construction industry.**

**Disallowable Instrument DI2013-140 being the Casino Control (Fees) Determination 2013 (No. 1) made under section 143 of the *Casino Control Act 2006* revokes DI2012-118 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-141 being the Gaming Machine (Fees) Determination 2013 (No. 1) made under section 177 of the *Gaming Machine Act 2004* revokes DI2012-271 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-142 being the Race and Sports Bookmaking (Fees) Determination 2013 (No. 1) made under section 97 of the *Race and Sports Bookmaking Act 2001* revokes DI2012-116 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-143 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2013 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2013-6 and determines the sub-agency located within The Duxton to be a sports bookmaking venue for the purposes of the Act.**

**Disallowable Instrument DI2013-144 being the Public Unleased Land (Movable Signs) Code of Practice 2013 (No. 1) made under section 27 of the *Public Unleased Land Act 2013* approves the Code of Practice for the Placement of Movable Signs in Public Places.**

**Disallowable Instrument DI2013-145 being the Public Unleased Land (Fees) Determination 2013 (No. 1) made under section 130 of the *Public Unleased Land Act 2013* replaces repealed instrument DI2012-142 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-146 being the Civil Law (Wrongs) Bar Association of Queensland Scheme 2013 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of Queensland's approval of the Bar Association of Queensland Scheme.**

**Disallowable Instrument DI2013-147 being the Architects (Fees) Determination 2013 (No. 1) made under section 91 of the *Architects Act 2004* revokes DI2012-163 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-149 being the Clinical Waste (Fees) Determination 2013 (No. 1) made under section 40 of the *Clinical Waste Act 1990* revokes DI2012-155 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-150 being the Community Title (Fees) Determination 2013 (No. 1) made under section 96 of the *Community Title Act 2001* revokes DI2012-148 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-151 being the Construction Occupations Licensing (Fees) Determination 2013 (No. 1) made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2012-157 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-152 being the Electricity Safety (Fees) Determination 2013 (No. 1) made under section 64 of the *Electricity Safety Act 1971* revokes DI2012-166 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-153 being the Environment Protection (Fees) Determination 2013 (No. 1) made under section 165 of the *Environment Protection Act 1997* revokes DI2012-173 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-154 being the Fisheries (Fees) Determination 2013 (No. 1) made under section 114 of the *Fisheries Act 2000* revokes DI2012-161 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-155 being the Gas Safety (Fees) Determination 2013 (No. 1) made under section 67 of the *Gas Safety Act 2000* revokes DI2012-152 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-156 being the Heritage (Register Fees) Determination 2013 (No. 1) made under section 120 of the *Heritage Act 2004* revokes DI2012-156 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-157 being the Nature Conservation (Fees) Determination 2013 (No. 1) made under section 139 of the *Nature Conservation Act 1980* revokes DI2012-150 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-158 being the Planning and Development (Fees) Determination 2013 (No. 1) made under section 424 of the *Planning and Development Act 2007* revokes DI2012-160 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-159 being the Surveyors (Fees) Determination 2013 (No. 1) made under section 80 of the *Surveyors Act 2007* revokes DI2012-153 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-160 being the Unit Titles (Fees) Determination 2013 (No. 1) made under section 179 of the *Unit Titles Act 2001* revokes DI2012-164 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-161 being the Water and Sewerage (Fees) Determination 2013 (No. 1) made under section 45 of the *Water and Sewerage Act 2000* revokes DI2012-147 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-162 being the Water Resources (Fees) Determination 2013 (No. 2) made under section 107 of the *Water Resources Act 2007* revokes DI2013-16 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-164 being the Lotteries (Fees) Determination 2013 (No. 1) made under section 18A of the *Lotteries Act 1964* revokes DI2012-124 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-165 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2013 (No. 1) made under section 49 of the *Cemeteries and Crematoria Act 2003* revokes DI2012-134 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-166 being the Health (Fees) Determination 2013 (No. 4) made under section 192 of the *Health Act 1993* revokes DI2013-93 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-168 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2013 (No. 2) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2013-2 and determines maximum fares payable on regular route services provided by ACTION.**

**Disallowable Instrument DI2013-169 being the Road Transport (General) Concession Determination 2013 made under section 96 of the *Road Transport (General) Act 1999* revokes DI2010-264 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.**

**Disallowable Instrument DI2013-170 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2013 (No. 2) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2013-77 and determines the maximum fares relating to the hiring or use of a taxi.**

**Disallowable Instrument DI2013-171 being the Juries (Payment) Determination 2013 made under section 51 of the *Juries Act 1967* revokes DI2012-12 and determines payments made to jurors for the purposes of the Act.**

**Disallowable Instrument DI2013-172 being the Utilities (Gas Service and Installation Rules Code) Determination 2013 made under section 65 of the *Utilities Act 2000* determines the Gas Service and Installation Rules Code, July 2013.**

**Disallowable Instrument DI2013-173 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-274 and determines the property value thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.**

**Disallowable Instrument DI2013-174 being the Taxation Administration (Amounts Payable—Duty) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2013-87 and determines the amount of duty payable under various provisions of the *Duties Act 1999*.**

**Disallowable Instrument DI2013-175 being the Taxation Administration (Rates) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-96 and determines variable rating factors for the calculation of rates payable for the purposes of the *Rates Act 2004*.**

**Disallowable Instrument DI2013-176 being the Taxation Administration (Rates—Rebate Cap) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-105 and determines the rebate cap for the purposes of the *Rates Act 2004*.**

**Disallowable Instrument DI2013-177 being the Taxation Administration (Rates—Fire and Emergency Services Levy) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-106 and determines new amounts for the calculation of the fire and emergency services levy for the purposes of the *Rates Act 2004*.**

**Disallowable Instrument DI2013-178 being the Taxation Administration (Land Tax) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-102 and determines the rates for the calculation of land tax for residential land for the purposes of the *Land Tax Act 2004*.**

**Disallowable Instrument DI2013-179 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2012-175 and determines the standard percentage, discount percentage, relevant percentage and income threshold amount for the purposes of the *Land Rent Act 2008*.**

**Disallowable Instrument DI2013-183 being the Duties (Stock Exchanges) Declaration 2013 made under section 252A of the *Duties Act 1999* revokes DI2008-223 and determines specified financial markets to be recognised stock exchanges.**

**Disallowable Instrument DI2013-184 being the Public Place Names (Gungahlin District) Amendment 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends DI1991-96 by revoking the divisional name Mulanggari.**

**Disallowable Instrument DI2013-185 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2013 (No. 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2012-257 and determines the conditions under which Members may employ staff and engage consultants or contractors, including interim annual salary allocations, for the 2013-2014 financial year.**

**Disallowable Instrument DI2013-186 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2013 (No. 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2012-130 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors, including the interim annual salary allocation, for the 2013-2014 financial year.**

**Disallowable Instrument DI2013-187 being the Public Sector Management (Executive Employee Conditions of Employment) Amendment Standards 2013 (No. 1) made under section 251 of the *Public Sector Management Act 1994* amends the Public Sector Management Standards with regard to the appointment and conditions of executive employees.**

**Disallowable Instrument DI2013-188 being the Education (Government Schools Education Council) Appointment 2013 (No. 3) made under section 57 of the *Education Act 2004* appoints a specified person as chairperson of the Government Schools Education Council.**

**Disallowable Instrument DI2013-189 being the Education (Government Schools Education Council) Appointment 2013 (No. 4) made under section 57 of the *Education Act 2004* appoints a specified person as the community member of the Government Schools Education Council.**

**Disallowable Instrument DI2013-190 being the Education (Government Schools Education Council) Appointment 2013 (No. 5) made under section 57 of the *Education Act 2004* appoints a specified person as an education member of the Government Schools Education Council, representing students.**

**Disallowable Instrument DI2013-191 being the Education (Government Schools Education Council) Appointment 2013 (No. 6) made under section 57 of the *Education Act 2004* appoints a specified person as an education member of the Government Schools Education Council, representing students.**

**Disallowable Instrument DI2013-195 being the Government Procurement (Non-public Employee Member) Appointment 2013 (No. 1) made under section 12 of the *Government Procurement Act 2001* appoints specified persons as a non-public employee members of the Government Procurement Board.**

**Disallowable Instrument DI2013-196 being the Public Place Names (Molonglo Valley and Stromlo Districts) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends DI2011-85 and DI2011-183 by renaming the part of Uriarra Road linking John Gorton Drive to Cotter Road and determines the names of two roads in the Molonglo Valley District (Division of Wright) and Stromlo District.**

**Disallowable Instrument DI2013-197 being the Road Transport (General) (Demerit Point Suspension Notice) Exemption Declaration 2013 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* provides that where a person enters into an infringement management plan, or is granted a waiver, and becomes liable for a demerit points suspension more than one year prior to entering into the plan, their driver licence will not be disqualified.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

*Minor drafting issue*

**Disallowable Instrument DI2013-76 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2013 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2011-257 and determines the method of measuring greenhouse gas emissions.**

The Committee notes that the formal part of this instrument states that it is made under section 11 of the *Climate Change and Greenhouse Gas Reductions Act 2010*. In fact, the Act is the *Climate Change and Greenhouse Gas Reduction Act 2010*.

**This comment does not require a response from the Minister.**

*Minor drafting issue*

**Disallowable Instrument DI2013-82 being the Rates (Deferral) Determination 2013 (No. 1) made under section 139 of the *Rates Act 2004* determines the income, asset and equity requirements that form the eligibility criteria for the rates deferral scheme.**

The Committee, notes that section 3 of this instrument states that it determines various matters “for the purposes of section 46(2) (f), **parts** (ii) to (iv) of the *Rates Act 2004*”. “Parts” should, presumably, be “paragraphs”, or “paras”.

**This comment does not require a response from the Minister.**

*Human rights issues?*

**Disallowable Instrument DI2013-88 being the Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2) made under section 75A of the *Road Transport (Third-Party Insurance) Act 2008* revokes DI2013-5 and provides guidance regarding the application of the early payment for medical expenses entitlement.**

The Committee notes that this instrument revokes and replaces the *Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2)* (DI2013-5). On the revocation issue, the explanatory statement for this instrument states:

The guidelines [ie this instrument] replace the Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No 1). The only change to those guidelines is section 4.1 which has been amended to take account of minor amendments to section 72 of the CTP Act by the *Statute Law Amendment Act 2013*. The minor amendments have the effect of excluding a person entitled to the early payment under Chapter 3 of the CTP Act from the requirement to comply with the time limit under section 72 while the claimant is under a legal disability. This amendment brings Chapter 3 into line with Chapter 4 of the CTP Act.

The Committee commented on the earlier instrument in *Scrutiny Report 3* of the 8<sup>th</sup> Assembly (25 February 2013), where the Committee commented (in part) as follows:

This instrument, made under section 75A of the *Road Transport (Third-Party Insurance) Act 2008*, sets out guidelines that are to apply in relation to the early payment of expenses for medical treatment. In brief, Chapter 3 of the Road Transport (Third-Party Insurance) Act provides for insurers, without admission of liability, to pay the medical expenses of persons injured in motor vehicle accidents. As set out in the explanatory statement

... the payment is designed to encourage people injured in motor accidents to seek medical treatment and rehabilitation services early by minimising monetary barriers. The goal being to facilitate a faster return to health for injured people.

Clause 3 of the instrument states (in part):

This entitlement to early payment for medical expenses aligns with the objects set out in section 5A of the Act. By minimising monetary barriers, the early payment scheme ought to provide earlier access to treatment and a greater focus on health outcomes and rehabilitation.

Evidence suggests that the earlier injuries are treated, the more likely injured persons will be able to fully recover from their injuries. Accordingly, an injured person can commence rehabilitation and other related medical services soon after the injury occurs, regardless of whether they are pursuing a compensation claim.

Clause 6 provides:

## **6. LIABILITY**

Section 75 of the Act confirms that any payment made by an insurer in relation to Part 3.2 of the Act is not an admission of liability in relation to the motor accident and does not in any way prejudice or affect a claim or proceeding arising out of the motor accident.

Consistent with the intention of the early payment scheme, the issue of liability is secondary to the early payment being made expeditiously.

Guideline: An insurer may make an early payment for medical expenses in relation to a motor accident whether or not the insurer has accepted liability in relation to a motor accident claim arising from the accident and whether or not a motor accident claim has been made against an insured person in relation to the motor accident.

### **6.1 Fault**

In considering the criteria that the accident 'was not caused wholly or mainly by the fault of the person' under section 72(1)(c) of the Act an insurer should consider the overarching objectives of the early payment scheme when making determinations on applications for early payment. Specifically, that the early payment is designed to provide earlier access to treatment and facilitate a faster return to health for injured people.

Guideline: As a guide, any person who is not charged with a *serious traffic offence* would be entitled to the early payment.



A *serious traffic offence* is an offence under the ACT road transport legislation that is punishable by imprisonment for six months or more. For the purposes of the early payment scheme the conduct amounting to the serious traffic offence must have contributed materially to the person's injury. Schedule 1 to these guidelines lists those offences characterised as serious traffic offences.

The following discussion of clause 6 (incorrectly referred to as clause 5) appears in the explanatory statement:

#### **Clause 5**

Clause 5 discusses issues relating to liability and makes it clear that the intention is that any payment made by an insurer in relation to the early payment provisions is not an admission of liability in relation to the motor accident and does not in any way prejudice or affect a claim or proceeding arising out of the motor accident.

Clause 5.1 is intended to give guidance in relation to the criteria under section 72(1)(c) of the Act that the accident 'was not caused wholly or mainly by the fault of the person'. The intention is that the payment be made available to the majority of injured people with the exception of those charged with a *serious traffic offence* that contributed materially to their injury.

The reference above to paragraph 72(1)(c) of the Road Transport (Third-Party Insurance) Act is significant. Section 72 provides:

#### **72 Entitlement to early payment—injured person to give forms to insurer within 30 working days**

- (1) A person is entitled to payment for medical expenses under this chapter in relation to a motor accident if—
- (a) the person is an injured person for the accident; and
  - (b) either—
    - (i) a police officer attended the motor accident; or
    - (ii) the motor accident was reported to a police officer by or for the injured person; and
  - (c) the following documents are given to the injured person's insurer not later than 30 working days after the motor accident:
    - (i) a motor accident notification form for the accident that includes a declaration by or for the person that the motor accident was not caused wholly or mainly by the fault of the person;
    - (ii) a police report about the findings of the police investigation of the motor accident, including a statement to the effect that the injured person was not the person at fault in the accident.

- (2) However, the documents mentioned in subsection (1) (c) may be given to the insurer of a person identified in the police report mentioned in subsection (1) (c) (ii) as being at fault in the motor accident within 30 working days if the injured person—
- (a) is not insured; and
  - (b) is not wholly or mainly at fault in the motor accident.
- (3) However, if the person has applied for a police report but has not received it in time to comply with the time limit mentioned in subsection (1) (c), it is sufficient for subsection (1) (c) if—
- (a) the motor accident notification form for the accident includes a statement about the date when the accident was reported and—
    - (i) if the accident was reported to a police officer—the name and rank of the police officer to whom the accident was reported; or
    - (ii) if the accident was reported at a data entry point—the submission number for the report; and

**Examples—data entry points**

- a data entry kiosk located at a police station
- website for reporting motor accidents

*Note 1* A motor accident reporting website can be accessed through the Canberra Connect website ([www.canberraconnect.act.gov.au](http://www.canberraconnect.act.gov.au)) and through the website for police services in the ACT ([www.police.act.gov.au](http://www.police.act.gov.au)).

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (b) the police report is given to the insurer within 14 days after the person receives it.

Section 72 of the Road Transport (Third-Party Insurance) Act is significant because (certainly by implication) it limits the availability of the early payment of medical expenses to persons who are not wholly or mainly at fault for the motor vehicle accident in which they were injured.

Clause 6 of the instrument gives effect to this implication.

On its face, this provision would appear to raise human rights issues, for section 38 of the *Human Rights Act 2004*. The particular human right that would appear to be engaged is the right to equality before the law, provided for in section 8 of the Human Rights Act. There might also be an argument that the effect of denying a person access to the early payment of medical expenses also amounts to the person being “punished” again in relation to the motor vehicle accident, for section 24 of the Human Rights Act.

The Committee notes that the explanatory statement for the instrument contains no discussion of possible issues under the Human Rights Act. In the circumstances, the Committee considers that such discussion would have been of assistance, both to the Committee and the Legislative Assembly.

In making this comment, the Committee notes that subsection 38 (1) of the Human Rights Act gives the Committee an express role in reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. The Committee is given no express role in relation to human rights issues arising under subordinate legislation. Despite this, it is not uncommon for explanatory statements for subordinate legislation to address human rights issues in subordinate legislation (see, for example, Subordinate Law SL2012-39, the *Crimes (Child Sex Offenders) Amendment Regulation 2012 (No. 1)*, discussed in the Committee's *Scrutiny Report 1* of the 8<sup>th</sup> Assembly, at pages 15-6).

In addition, it is arguable that subordinate legislation that gives rise to human rights issues may be considered to contain material that should properly be dealt with in an Act of the Legislative Assembly, as contemplated by principle (1)(d) of the Committee's terms of reference. There may also be an argument that legislation that gives rise to human rights issues unduly trespasses on rights previously established by law, for principle (1)(b) of the Committee's terms of reference. Finally, it can be argued that the failure of the explanatory statement to address human rights issues arising from the subordinate law also engages principle (2) of the Committee's terms of reference, on the basis that this explanatory statement does not meet the technical or stylistic standards expected by the Committee (in the sense that the Committee would expect that the explanatory statement for an instrument that gives rise to human rights issues should address those issues, as is the case with other explanatory statements).

**The Committee seeks from the Minister an explanation as to the consistency of this instrument with the *Human Rights Act 2004*. The Committee also requests that the Minister, in providing this explanation, addresses the issue of the appropriateness of the issues being addressed in guideline 6.1 being included in the subordinate legislation, rather than the primary legislation.**

The Committee has not received a response from the Minister in relation to the comments on the earlier instrument.

Clause 6 of this instrument is in similar (if not identical) terms to the earlier instrument.

The error in the explanatory statement for the earlier instrument – ie the explanatory discussion in relation to clause 6 appears in the explanatory statement under the heading of "Clause 5" – is replicated in this instrument.

Despite the Committee's earlier comments, the explanatory statement for this instrument contains no discussion of possible human rights issues arising from the instrument.

As a result, the Committee reiterates its comments on the earlier instrument.

**The Committee seeks from the Minister an explanation as to the consistency of this instrument with the *Human Rights Act 2004*. The Committee also requests that the Minister, in providing this explanation, addresses the issue of the appropriateness of the issues being addressed in guideline 6.1 being included in the subordinate legislation, rather than the primary legislation.**

*Positive comment/Query in relation to fees increases*

**Disallowable Instrument DI2013-100 being the Agents (Fees) Determination 2013 made under section 176 of the *Agents Act 2003* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-101 being the Associations Incorporation (Fees) Determination 2013 made under section 125 of the *Associations Incorporation Act 1991* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-102 being the Births, Deaths and Marriages Registration (Fees) Determination 2013 made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-103 being the Civil Law (Wrongs) (Fees) Determination 2013 made under section 222A of the *Civil Law (Wrongs) Act 2002* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-104 being the Civil Unions (Fees) Determination 2013 made under section 28 of the *Civil Unions Act 2012* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-105 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2013 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-106 being the Cooperatives (Fees) Determination 2013 made under section 465 of the *Cooperatives Act 2002* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-107 being the Court Procedures (Fees) Determination 2013 made under section 13 of the *Court Procedures Act 2004* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-108 being the Dangerous Substances (Fees) Determination 2013 made under section 221 of the *Dangerous Substances Act 2004* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-109 being the Emergencies (Fees) Determination 2013 made under section 201 of the *Emergencies Act 2004* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-110 being the Fair Trading (Motor Vehicle Repair Industry) (Fees) Determination 2013 made under section 55 of the *Fair Trading (Motor Vehicle Repair Industry) Act 2010* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-111 being the Firearms (Fees) Determination 2013 made under section 270 of the *Firearms Act 1996* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-112 being the Freedom of Information (Fees) Determination 2013 made under section 80 of the *Freedom of Information Act 1989* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-113 being the Guardianship and Management of Property (Fees) Determination 2013 made under section 75 of the *Guardianship and Management of Property Act 1991* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-114 being the Hawkers (Fees) Determination 2013 made under section 45 of the *Hawkers Act 2003* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-115 being the Land Titles (Fees) Determination 2013 made under section 139 of the *Land Titles Act 1925* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-116 being the Liquor (Fees) Determination 2013 made under section 227 of the *Liquor Act 2010* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-117 being the Scaffolding and Lifts (Fees) Determination 2013 made under section 21 of the *Scaffolding and Lifts Act 1912* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-118 being the Machinery (Fees) Determination 2013 made under section 5 of the *Machinery Act 1949* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-119 being the Partnership (Fees) Determination 2013 made under section 99 of the *Partnership Act 1963* determines the fee payable for an application for registration as an incorporated limited partnership.**

**Disallowable Instrument DI2013-120 being the Pawnbrokers (Fees) Determination 2013 made under section 27 of the *Pawnbrokers Act 1902* determines the fee payable for an annual licence.**

**Disallowable Instrument DI2013-121 being the Prostitution (Fees) Determination 2013 made under section 29 of the *Prostitution Act 1992* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-122 being the Public Trustee (Fees) Determination 2013 made under section 75 of the *Public Trustee Act 1985* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-123 being the Registration of Deeds (Fees) Determination 2013 made under section 8 of the *Registration of Deeds Act 1957* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-124 being the Retirement Villages (Fees) Determination 2013 made under section 262 of the *Retirement Villages Act 2012* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-125 being the Sale of Motor Vehicles (Fees) Determination 2013 made under section 91 of the *Sale of Motor Vehicles Act 1977* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-126 being the Second-hand Dealers (Fees) Determination 2013 made under section 17 of the *Second-hand Dealers Act 1906* determines the fee payable for an annual licence.**

**Disallowable Instrument DI2013-127 being the Security Industry (Fees) Determination 2013 made under section 50 of the *Security Industry Act 2003* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-128 being the Unit Titles (Management) (Fees) Determination 2013 made under section 119 of the *Unit Titles (Management) Act 2011* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-129 being the Work Health and Safety (Fees) Determination 2013 made under section 278 of the *Work Health and Safety Act 2011* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-130 being the Workers Compensation (Fees) Determination 2013 made under section 221 of the *Workers Compensation Act 1951* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-131 being the Business Names Registration (Transition to Commonwealth) (Fees) Determination 2013 made under section 14 of the *Business Names Registration (Transition to Commonwealth) Act 2013* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-132 being the Attorney General (Fees) Revocation 2013 made under the *Agents Act 2003, Associations Incorporation Act 1991, Births, Deaths and Marriages Registration Act 1997, Business Names Registration (Transition to Commonwealth) Act 2012, Civil Law (Wrongs) Act 2002, Civil Unions Act 2012, Classification (Publications, Films and Computer Games) (Enforcement) Act 1995, Cooperatives Act 2002, Court Procedures Act 2004, Dangerous Substances Act 2004, Emergencies Act 2004, Fair Trading (Motor Vehicle Repair Industry) Act 2010, Firearms Act 1996, Freedom of Information Act 1989, Guardianship and Management of Property Act 1991, Hawkers Act 2003, Land Titles Act 1925, Liquor Act 2010, Machinery Act 1949, Partnership Act 1963, Pawnbrokers Act 1902, Prostitution Act 1992, Public Trustee Act 1985, Registration of Deeds Act 1957, Sale of Motor Vehicles Act 1977, Scaffolding and Lifts Act 1912, Second-hand Dealers Act 1906, Security Industry Act 2003, Unit Titles (Management) Act 2011, Workers Compensation Act 1951, Work Health and Safety Act 2011* repeals DI2012-110 and will be replaced by instruments under specific laws.**

The Committee notes that the last-mentioned instrument above revokes a previous “omnibus” fees determination, made under the various Acts listed. In its place, the other instruments mentioned above, determine fees on an Act-by-Act basis. For most of the various individual determinations, the explanatory statement for determination includes a statement in the following terms:

Fees in the 2013-14 Financial Year have been generally increased from fees in the previous Financial Year by a Wage Price Index (WPI) forecast of 3% and rounded to an appropriate value.

While determining fees under the Act, the purpose of this determination is to give better access to users. The fees for the 2013-14 Financial Year were originally set by an omnibus instrument (DI 2012-110). That instrument has been replaced to provide users with better access to fee information within the structure of the Legislation Register. Item numbers, included in the schedule, column 2, enable the comparison of past fees set under the Act with those set by this instrument.

The instrument contains further explanatory notes about the fee for various items in the past Financial Year.

The Committee notes with approval the attempt, in this new approach to setting fees for which the Attorney-General is responsible, to provide better access to users. The Committee also notes with approval that, contrary to the previous practice with Attorney-General (Fees) Determinations, separate explanatory statements are provided in relation to each fees determination, providing an opportunity to explain new fees and fees that are increased other than in accordance with the Wage Price Increase (eg the Public Trustee (Fees) Determination 2013).

**This comment does not require a response from the Attorney-General.**

Despite what the Committee has said above, the Committee notes that the Land Titles (Fees) Determination 2013 (DI2013-115) is an exception to the rule. The explanatory statement for that instrument states:

Fees in the 2013-14 Financial Year have been increased by 10% from fees in the previous Financial Year and rounded to an appropriate value.

No other explanation is provided in relation to the fees increase.

**The Committee would be grateful if the Attorney-General could provide further explanation in relation to the fees increases provided for by this instrument.**

*Minor drafting issue*

**Disallowable Instrument DI2013-135 being the Architects Board Appointment 2013 (No. 1) made under subsection 70(2) of the *Architects Act 2004* appoints a specified person, who is, or has recently been, an academic architect, as a member of the Australian Capital Territory Architects Board.**

The Committee notes that the explanatory statement for this instrument states that the instrument “appoints members to the Australian Capital Territory Architects Board”. In fact, the instrument only appoints one member. The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

**ISSUES ARISING FROM THE USE OF TEMPLATES AND PRECEDENTS**

The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only 1 person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the Explanatory Statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or Explanatory Statement is adapted to fit the new situation. The Committee accepts that instruments and Explanatory Statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

**This comment does not require a response from the Minister.**

*Drafting issue*

**Disallowable Instrument DI2013-148 being the Building (Fees) Determination 2013 (No. 1) made under section 150 of the *Building Act 2004* revokes DI2012-172 and determines fees payable for the purposes of the Act.**

Section 5 of this instrument states that it revokes DI2012-172 and DI2004-192. The Committee notes that DI2004-192 was revoked by DI2012-172. That being so, the Committee cannot see the point of this instrument (again) revoking DI2004-192.

**The Committee would be grateful for the Minister's confirmation that the purported revocation of DI2004-192 (or, if this is not the case, an explanation as to why it was necessary to revoke DI2004-192 in this instrument).**

*Is this a disallowable instrument?*

**Disallowable Instrument DI2013-163 being the Tree Protection (Advisory Panel) Appointment 2013 (No. 1) made under section 69 of the *Tree Protection Act 2005* appoints a specified person as a member of the Tree Advisory Panel, with experience in forestry, arboriculture, natural and cultural heritage planning and management and landscape architecture.**

This instrument appoints a specified person as a member of the Tree Advisory Panel. The Committee notes that there is no indication in the Explanatory Statement for the instrument as to whether or not the person appointed is a public servant. This issue is relevant in determining whether or not the appointment, in fact, must be by disallowable instrument (and, as a result, whether or not, in fact, the instrument is subject to the Committee's legislative scrutiny jurisdiction).

The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

**INSTRUMENTS OF APPOINTMENT**

Various issues regularly arise in relation to appointments. The most obvious is the absence of a statement that "this is not a public service appointment". Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the Explanatory Statement for an instrument of appointment contains a statement to the effect that "the person appointed is not a public servant".

**The Committee seeks the Minister's confirmation that this is not a public servant appointment.**

*No explanatory statement*

**Disallowable Instrument DI2013-167 being the Training and Tertiary Education (National Code of Good Practice for Australian Apprenticeships) Approval 2013 made under section 55F of the *Training and Tertiary Education Act 2003* approves the National Code of Good Practice for Australian Apprenticeships.**



The Committee notes that there is no explanatory statement for this instrument. While the Committee has always accepted that there is no formal, legal requirement that an explanatory statement be provided in relation to subordinate legislation, the Committee has always maintained that it is important that an explanatory statement nevertheless be provided.

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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

Principle (b) of the Committee’s terms of reference [now principle (2)] requires it to “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”. Many of the issues identified below involve things that the Committee considers ought to be addressed in the Explanatory Statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

A further point is that addressing potential issues expressly in Explanatory Statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee’s comments. Often, the explanation is something that could have been included in the Explanatory Statement for a piece of subordinate legislation. It may involve no more than a sentence (eg “this is not a public servant appointment”, this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee’s comments.

**The Committee draws the Legislative Assembly’s attention to this instrument, under principle (2) of the Committee’s terms of reference, on the basis that (in this case) the absence of an explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.**

*Fees instruments—Various issues*

**Disallowable Instrument DI2013-180 being the Rates (Certificate and Statement Fees) Determination 2013 (No. 1) made under section 78 of the *Rates Act 2004* revokes DI2006-104 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-181 being the Land Tax (Certificate and Statement Fees) Determination 2013 (No. 1) made under section 43 of the *Land Tax Act 2004* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2013-182 being the Land Rent (Certificate Fees) Determination 2013 (No. 1) made under section 32 of the *Land Rent Act 2008* revokes DI2008-139 and determines the fee payable for an application to the Commissioner for a certificate of land rent and other charges.**

The first instrument mentioned above determines fees under subsections 76(1) and 77(1) of the *Rates Act 2004*. The explanatory statement for the instrument states:

1. These fees have been increased with this instrument for the first time since 2006, and the fee aligns with charges for similar applications in other jurisdictions. The ACT Revenue Office is in the unique position of providing information on all charges concerning a parcel of land, including outstanding rates, land tax, land rent and any deferred amounts.
2. This instrument determines the fees to accompany an application for:
  - a certificate of rates, land tax and other charges at \$95; and
  - a statement of amounts payable and payments made at \$95.

There is no indication of the magnitude of the fees that are replaced.

The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

#### **FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee notes that, in this case, the fees that are replaced (which are set by DI2006-104, which is repealed by this instrument) are \$38 and \$26, respectively.

The same issue arises in relation to the third instrument mentioned above, which determines a fee for the *Land Rent Act 2008*. The fee determined is \$95. The explanatory statement for the instrument explains that the fee has not been increased since 2008 and that the new fee aligns the relevant fee with fees for similar applications in other jurisdictions. The explanatory statement does not otherwise address the magnitude of the fees increase.

The Committee notes that, in this case, the fee that is replaced (which are set by DI2008-139, which is repealed by this instrument) is \$38.

**These comments do not require a response from the Minister. However, the Committee reminds the Minister of what it has previously stated in relation to instruments that determine fees.**

The second instrument mentioned above sets fees under sections 41 and 42 of the *Land Tax Act 2004*. The explanatory statement for the instrument states:

5. This fee has been increased with this instrument for the first time since 2006, and the fee aligns with charges for similar applications in other jurisdictions. The ACT Revenue Office is in the unique position of providing information on all charges concerning a parcel of land, including outstanding rates, land tax, land rent and any deferred amounts.

6. This instrument determines the fees to accompany an application for a certificate of land tax, rates and other charges at \$95, and a statement of amounts payable and payments made at \$95.

There is otherwise no discussion of the magnitude of any fees increase.

However, the Committee also notes that, unlike the first and third instruments mentioned above, this instrument does not revoke an existing instrument, so it is not possible to determine the magnitude of the fees increase by reference to the previous instrument. Indeed, the Committee has been unable to identify the legislation that previously determined the relevant fees.

**The Committee would be grateful if the Minister could assist the Committee in identifying the instrument that set the fees that are increased by this instrument.**

*Fees increases*

**Disallowable Instrument DI2013-192 being the Training and Tertiary Education (Fees) Determination 2013 made under section 111 of the *Training and Tertiary Education Act 2003* revokes DI2012-127 and determines fees payable for the purposes of the Act.**

This instrument determines fees for the *Training and Tertiary Education Act 2003*. The explanatory statement for the instrument indicates that there is an increase in the fees for 2013-14, compared to 2012-13. However, no explanation is provided for the increase.

The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

#### **FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

**The Committee would be grateful if the Minister could provide the reasons for the fees increases provided for by this instrument.**

*Fees increases*

**Disallowable Instrument DI2013-193 being the Public Baths and Public Bathing (Active Leisure Centre Fees) Determination 2013 made under section 37 of the *Public Baths and Public Bathing Act 1956* revokes DI2012-128 and determines fees payable for the purposes of the Act.**

This instrument determines fees for the *Public Baths and Public Bathing Act 1956*. The explanatory statement for the instrument indicates that there is an increase in the fees for 2013-14, compared to 2012-13. However, no explanation is provided for the increase.

The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

### **FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

**The Committee would be grateful if the Minister could provide the reasons for the fees increases provided for by this instrument.**

#### *Retrospectivity*

**Disallowable Instrument DI2013-198 being the Water Resources (Fees) Determination 2013 (No. 3) made under section 107 of the *Water Resources Act 2007* revokes DI2013-162 and determines fees payable for the purposes of the Act.**

This instrument (which was notified on 11 July 2013) determines fees for the *Water Resources Act 2007*. As the explanatory statement for the instrument notes, it also revokes DI2013-162, the *Water Resources (Fees) Determination 2013 (No. 2)*. DI2013-162 (which the Committee has also considered for this report) was notified on 27 June 2013. The Committee ordinarily takes a special interest in instruments that revoke and re-make instruments soon after they are made. The Committee notes with approval that, in this case, an explanation is provided, in the explanatory statement, which states:

The determination has been amended to correct an error for licence to take water abstraction fee.

The error corrected appears to be that a fee previously set at 0.51, and left at 0.51 by the previous instrument, is now set at 0.53.

The Committee notes, however, that section 2 of this instrument states that it commences on 1 July 2013. This means that the instrument has a (slight) retrospective commencement.

The Committee notes that, 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](http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role)), the Committee stated:

### **RETROSPECTIVITY**

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 effect that “this legislation does not have a prejudicial operation”.

**The Committee would be grateful if the Minister could provide an assurance that the retrospective operation provided for in this instrument is not in breach of section 76 of the *Legislation Act 2001*.**

## SUBORDINATE LAWS—NO COMMENT

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

**Subordinate Law SL2013-11 being the Road Transport Legislation Amendment Regulation 2013 (No. 1) made under the *Road Transport (Driver Licensing) Act 1999* and *Road Transport (General) Act 1999* provides for a number of administrative matters required to support the implementation of flexible options for paying or discharging traffic and parking infringement notice penalties.**

**Subordinate Law SL2013-12 being the Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2013 (No. 1) made under the *Magistrates Court Act 1930* amends the Magistrates Court (Work Health and Safety Infringement Notices) Regulation by introducing 10 additional offences for which infringement notices can be issued.**

**Subordinate Law SL2013-13 being the Electoral Amendment Regulation 2013 (No 1) made under the *Electoral Act 1992* amends the Electoral Regulation to allow the Electoral Commissioner to provide electoral roll information to the Health Directorate and the Public Trustee for the ACT.**

**Subordinate Law SL2013-14 being the Road Transport Legislation Amendment Regulation 2013 (No. 2) made under the *Road Transport (General) Act 1999*, *Road Transport (Public Passenger Services) Act 2001* and *Road Transport (Vehicle Registration) Act 1999* makes miscellaneous amendments to the Road Transport (Offences) Regulation, Road Transport (Public Passenger Services) Regulation and Road Transport (Vehicle Registration) Regulation.**

**Subordinate Law SL2013-15 being the Associations Incorporation Amendment Regulation 2013 (No. 1) made under the *Associations Incorporation Act 1991* raises the audit thresholds for incorporated associations.**

**Subordinate Law SL2013-16 being the Crimes (Sentencing) Amendment Regulation 2013 (No. 1) made under the *Crimes (Sentencing) Act 2005* prescribes the Judicial Commission of New South Wales as a criminal justice entity pursuant to the Act.**

**Subordinate Law SL2013-18 being the Court Procedures Amendment Rules 2013 (No. 1) made under section 7 of the *Court Procedures Act 2004* amends the Court Procedures Rules.**

**Subordinate Law SL2013-19 being the Road Transport (Offences) Amendment Regulation 2013 (No. 1) made under section 23 of the *Road Transport (General) Act 1999* increases the prescribed infringement notice penalties for road transport offences and to increase certain traffic-related infringement notice penalties to fund services for victims of crime.**

## SUBORDINATE LAWS—COMMENT

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

*Minor drafting issue*

**Subordinate Law SL2013-17 being the Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013 made under the *Magistrates Court Act 1930* enables infringement notices to be issued for offences against the *Public Unleased Land Act 2013*.**

The Committee notes that the explanatory statement for this instrument states:

### **Overview**

The *Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013* is being made under part 3.8 of the *Magistrates Court Act 1930* and will enable infringement notices to be issued for offences against the ***Public Unleased Act 2013***. Infringement notices are intended to provide an alternative to prosecution. [emphasis added]

The Committee notes that the reference should be to the *Public Unleased Land Act 2013*. The Committee also notes that the relevant Act is otherwise correctly referred to in the explanatory statement.

**This comment does not require a response from the Minister.**

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Education and Training, dated 14 June 2013, in relation to comments made in Scrutiny Report 7 concerning Disallowable Instrument DI2013-45, being the Education (Government Schools Education Council) Appointment 2013 (No. 2) ([attached](#)).
- The Minister for the Environment and Sustainable Development, dated 5 August 2013, in relation to comments made in Scrutiny Report 9 concerning the Water Resources Amendment Bill 2013 ([attached](#)).
- The Minister for the Environment and Sustainable Development, dated 7 August 2013, in relation to comments made in Scrutiny Report 8 concerning the Heritage Legislation Amendment Bill 2013 ([attached](#)).
- The Minister for the Environment and Sustainable Development, dated 7 August 2013, in relation to comments made in Scrutiny Report 9 concerning the Construction and Energy Efficiency Legislation Amendment Bill 2013 ([attached](#)).

The Committee wishes to thank the Minister for Education and Training and the Minister for the Environment and Sustainable Development 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 Dospot MLA  
Chair

12 August 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 8, dated 30 May 2013**

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

#### **Report 9, dated 29 July 2013**

Crimes (Sentencing) Amendment Bill 2013 Act citation:





## Joy Burch MLA

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

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MEMBER FOR BRINDABELLA

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

Dear Mr Doszpot

I refer to Scrutiny Report 7 in which the Standing Committee on Justice and Community Safety requested additional information about Disallowable Instrument D12013-45 concerning the appointment of a person to the Government Schools Education Council (GSEC).

As per your request, further details regarding the appointment are as follows:

D12013-45 revokes the appointment of Mr Hugh Boulter, representing the ACT Council of Parents and Citizens Associations, whose appointment was progressed in error. The revocation needed to occur because Mrs Jane Tullis, previous representative of the ACT Council of Parents and Citizens Associations, had not addressed her notice of resignation to the appointer, as required by Section 210 of the *Legislation Act 2001*. The deviation from the Act meant that the position was not technically vacant.

The Directorate will closely monitor Council appointees' compliance with the *Legislation Act 2001*.

Yours sincerely

Joy Burch MLA  
Minister for Education and Training  
June 2013

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## Simon Corbell MLA

ATTORNEY-GENERAL  
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT  
MINISTER FOR POLICE AND EMERGENCY SERVICES  
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS

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MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No.9 (the Report) on the *Water Resources Amendment Bill 2013*.

I thank the Committee for its considered comments, and for the matters raised for the attention of the Assembly.

The explanatory statement for the Water Resources Amendment Bill 2013 has been amended in response to the Committee's comments. I note that the explanatory statement already provided clear examples of reasonable defences under the *Criminal Code 2002*. However, as per the Committee's request, the explanatory statement has been amended and now draws clear reference to sections 36 and 39 of the *Criminal Code 2002*, for strict liability offences.

A copy of the revised statement is attached for your further reference.

Yours sincerely

Simon Corbell MLA  
Minister for the Environment and Sustainable Development

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MINISTER FOR POLICE AND EMERGENCY SERVICES  
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS

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MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No.8 (the Report) on the *Heritage Legislation Amendment Bill 2013*.

I thank the Committee for its considered comments, and for the matters raised for the attention of the Assembly. I will respond to each of these matters separately.

***The right to a fair trial (HRA subsection 21(1)) and the removal of rights to seek review of administrative decisions***

- No appeal provision on a decision called-in by the Minister

Where a registration decision is made by the Minister using call-in powers, an interested person will not be able to request a merits review of that decision. This limitation affects the right to a fair trial (HRA section 21(1)). The purpose of the limitation is to ensure that a registration decision made by the Minister is final for reasons of clarity and certainty.

Where the Minister calls-in a registration decision, his or her decision will be based on their assessment of public benefit, amongst other matters related to the interests of the Territory Plan. The decision will be a political one. There is typically no right of merit review of such call-in decisions because Tribunals and courts are simply not equipped and are not appropriate avenues for reviewing such political decisions.

I believe the lack of this review provision is reasonable because:

- it is the only means for achieving the outcome sought;
- other rights of review will remain for a decision called-in by the Minister including through the *Administrative Decisions (Judicial Review) Act 1989* to the Supreme Court;

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- appeal provisions to ACAT will remain for decisions by the Council to register a place or object;
- a decision called-in by the Minister will be tabled in the Legislative Assembly, ensuring openness and transparency;
- the Minister is publicly accountable; and
- the lack of review right is consistent with other jurisdictions and comparable legislation regarding call-in decisions in the ACT.

In light of these factors I consider that the lack of review provision is necessary, justified and reasonable taking into account the factors identified in s28 of the HRA.

- Removal of provision to request review of decision not to provisionally register a place or object.

An interested person will no longer be able to apply to the ACT Civil and Administrative Tribunal for request to review a decision of the ACT Heritage Council not to provisionally register a place or object. This affects the right to a fair trial (HRA section 21(1)).

The decisions that may be appealed and the range of interested parties who may appeal a decision under the Heritage Act is far wider reaching than any heritage legislation in other jurisdictions, or comparable legislation in the ACT, such as the *Planning and Development Act 2007*, the *Nature Conservation Act 1980* and the *Tree Protection Act 2005*. The *Heritage Act 2004* is the only legislation in Australia that contains a provision to appeal a decision not to provisionally register a place or object.

The limitation seeks to bring ACT heritage legislation in line with all other jurisdictions and other comparable legislation in the ACT and ensure an efficient and appropriate use of ACT Government and Heritage Council resources.

No particular rights are affected by a decision not to provisionally register a place or object. By contrast, a decision of the Council to register a place or object affects rights in so much as future works and development are subject to certain constraints. Importantly, an interested person will continue to be able to apply to ACAT to request review of a decision to register a place or object.

The committee has asked that I give particular consideration to the situation where a decision not to provisionally register a place or object affects a group of people. I do not believe there are situations where a decision not to provisionally register a place or object affects a group of people. I will assume that the Committee might be referring to a situation where a decision of the Council might have a perceived bearing on the future use of a place by a group of people. However, a decision by the Council to or not to register or provisionally register a place does not have any consequence for the future use of a place, which is a management decision for the owner and/or occupier of a place.

A decision of the Council to register a place may be perceived as retaining the physical fabric of a place for future use purposes. Conversely, it may be perceived that a decision of the Council not to provisionally register a place inadvertently denies a group of people the right to access or use that place if a further consequence of the Council's decision is to demolish the place.

However, the Council cannot and do not make decisions about provisional registration based on considerations of the future use of a place. The Heritage Council makes a registration decision based solely on whether or not a place or object has heritage significance.

A decision about registration does not affect future use of or access to a place.

The removal of the review provision is reasonable because:

- it is the only means for achieving the outcome sought;
- the existing provision has only been utilised three times in the eight years of the Act's operation (two of these cases proceeded to a Tribunal hearing. In both hearings, the Tribunal ruled in favour of the Council's decision not to provisionally register);
- arguably, no rights are affected by a decision not to provisionally register;
- there are other avenues available for a person to request a new decision on provisional registration by the Council, through renomination; and
- the removal is consistent with heritage legislation in other jurisdictions and comparable legislation in the ACT.

In light of these factors I consider that the removal of the appeal provision is necessary, justified and reasonable taking into account the factors identified in s28 of the HRA.

- Removal of provision to request review of a decision to or not to extend the period of provisional registration

An interested person will no longer be able to apply to the ACT Civil and Administrative Tribunal for request to review a decision of the Heritage Council to or not to extend the period of provisional registration for a place or object. This affects the right to a fair trial (HRA section 21(1)). The purpose of the limitation is to remove an impractical and unworkable provision.

This is a minor appeal provision which has never been tested. The need for it is therefore questionable, and the limitation its removal will impose is marginal.

The provision presents practical difficulties as it is likely that a period of extension (3 months), or the provisional registration period where an extension was not granted, would end before an appeal was determined by the Tribunal.

The removal of the review provision is reasonable because:

- it is the only means for achieving the outcome sought;
- the rights that are being affected are of a limited nature; and
- the removal is consistent with heritage legislation in other jurisdictions and comparable legislation in the ACT.

In light of these factors I consider that the removal of the appeal provision is necessary, justified and reasonable taking into account the factors identified in s28 of the HRA.

### **Rights of minorities and additional recognition and protection of Aboriginal places and objects**

Under heritage legislation in the ACT, Aboriginal heritage is afforded greater recognition, protection and conservation than other types of heritage such as natural and historic, therefore creating inequality. This inequality already exists in the ACT's heritage legislation and the nature and extent will not be altered through the Amendment Bill.

The Aboriginal community considers all objects and places of their past to be significant. Much of the Aboriginal heritage in the ACT has already been lost. It is important that the comparatively

small number of Aboriginal places and objects remaining in the ACT be recognised and protected for future generations. Further, Aboriginal heritage places and objects are often located subsurface. This creates an increased risk of unintentional disturbance and damage at the time of any ground works. The heritage legislation seeks to limit this risk through protection provided for Aboriginal heritage.

Inequality is created whereby *all* Aboriginal places and objects in the ACT are protected, but not all places and objects of historic built form, nor every natural place, are protected under the Act. Places and objects of historic or natural heritage must meet certain criteria and thresholds in order to be protected under the Act.

This matter positively affects rights of minorities (HRA section 27) and also affects matters of recognition and equality before the law (HRA Subsection 8(3)).

The importance of the purpose of the limitation is to ensure that Aboriginal places and objects are afforded appropriate recognition, protection and conservation under heritage legislation in the ACT.

The inequality created by greater recognition and protection for Aboriginal places and objects is considered reasonable because:

- protection exists through the heritage legislation for all types of heritage places and objects;
- arguably, the majority group of Anglo-Saxon Australians in the ACT does not wish to have all places and objects of built form, nor all natural places protected under heritage legislation in the same way that all Aboriginal places and objects are; and
- no concerns have been raised about the inequality created by this provision in the existing heritage legislation.

In light of these factors I consider that the inequality is necessary, justified and reasonable taking into account the factors identified in s28 of the HRA.

***The right to privacy (HRA paragraph 12(a)) and the provision of personal information to be provided by the commissioner for revenue to the Council or the Minister***

HRA Subsection 12(a) makes provision that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

New provisions in the Amendment Bill will enable the Heritage Council to obtain property owner contact details from the Commissioner for Revenue, for purposes of notifying property owners of important decisions that affect them.

Currently, the Heritage Council is prevented from obtaining these details by privacy provisions of other legislation, rendering them incapable of notifying property owners about matters affecting their property rights.

I note that the Committee wishes only to draw this matter to the attention of the Assembly and has not requested changes to the Explanatory Statement or a HRA Section 28 justification.

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

The Committee has asked that a justification be provided in the Explanatory Statement for the transitional provision which enables that a regulation may be made to cover transitional matters necessary or convenient to prescribe and which are not already include in the Amendment Bill. This is not an uncommon provision in amended legislation.

In response to the Committee's request, the following has been included at section 203 of the Explanatory Statement:

'The section is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary'.

Further amendments have been made to the Explanatory Statement to address the matters discussed above, and a copy of the revised statement is attached for your further reference.

Yours sincerely

Simon Corbell MLA  
Minister for the Environment and Sustainable Development







## 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

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MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in relation to the comments on the Construction and Energy Efficiency Legislation Amendment Bill 2013 in the Scrutiny Report 9 of 29 July 2013 published by the Standing Committee on Justice and Community Safety (the Committee) in its Legislative Scrutiny role.

I appreciate the detailed and considered comments provided by the Committee and provide the following response.

### **Delegation of legislative power**

The Committee has raised a number of instances where it poses questions for the Assembly about the appropriateness of delegation of legislative power. In considering whether the delegation of powers is appropriate, it is useful to consider the context in which these provisions are proposed.

#### *Building Act 2004*

At present section 136 of the Building Act provides that the building code means —

- (a) the Building Code of Australia (BCA) prepared and published by the Australian Building Codes Board as amended from time to time by—
  - (i) the Australian Building Codes Board; and
  - (ii) the Australian Capital Territory Appendix to the Building Code of Australia; and
- (b) a document prescribed by regulation.

The building code is a technical standard. Unless an exemption exists, people must comply with the building code when undertaking regulated building work. It is used predominantly by licensed building surveyors and builders and not members of the public. The BCA references a number of technical documents, most often Australian Standards. The vast majority of these technical documents are not prepared or owned by the Territory and it is expected that they will be subject to some form of copyright.

It would be expected that any part of the building code made by regulation would provide for evolving standards of work, materials and equipment as practices and performance requirements shift over time. This may be by applying or adopting an external technical document.

In recognition of this, the proposed section 136A of the Act (clause 18), provides that a regulation “may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time”. Further, that if it does subsection 47(6) of the Legislation Act is disapplied. Therefore, any such applied document need not be notified on the Legislation Register.

The Assembly may disallow regulations made under this part if it feels that the application, adoption or incorporation of a particular document is not appropriate. The control of the Assembly does not end once the regulation has been made. If a member of the Assembly is concerned about a new version of an instrument, the member may present their own regulation for consideration by the Assembly.

The current method of adopting documents as in force from time to time means industry members are aware that the document will be used on an ongoing basis and it is less likely that different documents will be used from one period to the next. A minor amendment to one of the many standards used by the industry should not require the making of a new instrument each time. This is not only unwieldy but impractical as it would result in an extensive number of instruments each year. In making the existing provisions, the Assembly has indicated that it does not necessarily wish to determine each individual technical standard or adopted document in construction legislation; rather it has given the responsible Minister the capacity to amend the primary standard and add to it as required.

#### *Water and Sewerage Act 2000*

The proposed provisions for making the plumbing code for the purposes of the Water and Sewerage Act mirror the provisions for the building code in the Building Act. The Committee raises a question about the level of control that the Assembly has over the contents of the plumbing code.

While the Assembly may not have direct control over the contents of the Plumbing Code of Australia (PCA), as it exists from time to time, the Territory is involved in its development and shares in the intellectual property for the code. The PCA is developed and published in the same way as the BCA. The documents are revised annually and there are no interim amendments to the codes. The BCA was first adopted in the early 1990s. The operation of the Building Act since this time has shown that it provides a successful and effective model for prescribing building standards.

In recognition that a national standard may need to be modified for an individual jurisdiction, each jurisdiction, including the ACT, contributes its own variations and additional information in the body of the code or in specified appendices to the code. These are agreed to by the responsible Minister. The Minister may also make a separate ACT Appendix by disallowable instrument. I note the Committee has not raised any issues with the ACT Appendix, although section 47(6) of the Legislation Act could also be disapplied by such an instrument.

Further, there is capacity for the plumbing code to include a document prescribed by regulation. As for the building code, the proposed legislation provides that a regulation “may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time”. Further, that if it does subsection 47(6) of the Legislation Act is disapplied. Therefore, any such applied document need not be notified on the Legislation Register.

The Assembly may disallow regulations made under this part if it feels that the application, adoption or incorporation of a particular document is not appropriate. The control of the Assembly does not end once the regulation has been made. If a member of the Assembly is concerned about a new version of an instrument, the member may present their own regulation for consideration by the Assembly.

In considering whether this is inappropriate, it must also be considered to what extent the Assembly may wish to determine each individual technical standard or adopted document in construction legislation, as opposed to giving the responsible Minister the capacity to amend the primary standard and add to it as required.

It is prudent to consider what powers should be, in effect, delegated and whether instruments should be called up in force from time to time. The Committee has suggested that in adopting standards and other documents from time to time that the Assembly is delegating power “to whoever it makes and amends an identified law of another jurisdiction, or makes or amends some identified instrument”. Taking the provisions as a whole, the Minister, and not whoever makes an adopted document remains responsible for the contents of the plumbing code, including the ongoing use of external documents and ensuring their continuing relevance and appropriateness.

Adoption of the plumbing code would replace Australian and New Zealand Standard 3500, which is not controlled by the Assembly and is adopted from time to time, as the primary technical standard for plumbing. Section 46 of the Act also provides that the Minister may declare a document to be the ACT plumbing code for the Water and Sewerage Act by notifiable instrument. To date, the plumbing code has consisted of sections A, B, C and G of the Plumbing Code of Australia adopted from year to year. Despite neither document being disallowable, there has been no concern about the appropriateness of the delegation of powers. It could be considered that the proposed provisions improve the Assembly’s control over the content of technical plumbing standards.

#### *Architects Act 2004*

The Architects Act creates the Architects Board. Section 65 of the Architects Act provides that the Board’s functions are;

- (a) to register architects;
- (b) to investigate complaints given to the board about registered people and people who have been registered;
- (c) to consider whether it is necessary for occupational discipline to be used against registered architects, including former registered architects, and, if it is, to apply to the ACAT for occupational discipline orders;
- (d) to consider and report to the Minister about issues referred to the board by the Minister for advice;
- (e) to advise the Minister in relation to the practice of architecture, for example, about codes of professional conduct;
- (f) to further a common and harmonious approach to the administration of legislation about architects by cooperation with local jurisdictions;
- (g) to accredit courses of study in architecture; and
- (h) to provide general advice to consumers about the professional conduct and standards of competence expected of registered architects.

Section 66 (1) charges the Board to exercise its functions independently, impartially and in the public interest.

The Act also creates a statutory office of the Architects Registrar. The registrar is responsible for managing the administration of the Architects Board and maintaining the register of architects. Amendments to section 8 of the Architects Act would allow the Registrar to declare qualifications for architects after consultation with the Architects Board.

In granting a registration, it is the Architects Board that must be satisfied the person has the relevant expertise and experience to be eligible. In addition, the Board is required to further a common and harmonious approach to the administration of legislation, which may involve using a common document that prescribes qualifications acceptable in all jurisdictions. Therefore, I consider it appropriate to allow the Board and the Registrar to adopt, apply or incorporate other instruments to accredit courses.

In relation to whether it is appropriate that the Board can adopt any such instruments from time to time, it should be considered that the most up to date course or qualification list is desirable. New courses and accreditations may change regularly. If a new instrument must be made each time a change is made, this may affect the eligibility of candidates with qualifications or who have attended courses that are not automatically updated. This is the main reason the requirement to make a regulation is replaced with an instrument each time the qualifications change is proposed. The Board need not adopt etc any instruments if it does not consider it in the public interest.

#### *Construction Occupations (Licensing) Act 2004*

The Construction Occupations Registrar (the Registrar) holds a number of statutory functions under the Construction Occupations (Licensing) Act including to make decisions on licence applications. Subsection 13(1) of the *Construction Occupations (Licensing) Regulation 2004*, provides that the Registrar “may declare the qualifications necessary for an individual to be eligible to be licensed in a construction occupation or occupation class”. A declaration is a notifiable instrument. Eleven different occupations, and approximately 50 occupation classes, are regulated under the Act.

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. In general, qualifications are specifically mentioned in the declaration, but there are numerous providers of training across Australia and therefore it is customary to refer to registers held by training authorities. This is preferable to the Registrar having to individually list all of the potential providers, maintain the list and remake the instrument each time a provider is added or removed from the list across each of the occupation classes.

Similar to the obligations of the Architects Board, the Registrar is the statutory office holder responsible for deciding on applications for licenses and for declaring qualifications. To maintain the currency of some parts of the qualifications declaration it will be necessary to rely on external document update processes. In the majority of cases, these documents will be part of agreed national training regulations or methods of recognising qualifications. The Registrar need not adopt etc any instruments if it is not appropriate.

#### *Energy Efficiency (Cost of Living) Improvement Act 2012*

Under section 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. This is already a power agreed to by the Assembly.

A determination of an eligible activity must include the following:

- (a) a description of the activity;
- (b) the minimum specifications for the performance of the activity;
- (c) the abatement factor for the activity; and
- (d) the time at which the activity is taken to be completed.

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.

This is necessary because minimum specifications for the performance of an activity will include product specifications, installation standards and other technical requirements. Activity descriptions and calculations for abatement factors may also incorporate external standards and methods of calculation.

Activities for the scheme included a large number of activities that involve, or are associated with, building, plumbing, gasfitting, or electrical work. The primary source for technical and product specifications are Australian and International Standards and other copyrighted documents such as the National Construction Code, which includes the BCA and the PCA. While the majority of the current determination is published, there are currently around 20 adopted documents that are required to fully prescribe eligible activities. If instruments cannot be adopted from time to time, a change, even a minor amendment, to any one of these documents would require a new instrument to be made.

The Minister is able to exercise discretion on whether it is appropriate to enforce a standard at a point in time or from time to time. If the nature of the standard means that ongoing adoption is desirable, say for a document that prescribes safe and competent installation practices, it is not an unreasonable extension of the existing powers of the Minister to allow the adoption of external documents from time to time. At any time the Minister can revoke an instrument if a new version of a standard is not appropriate, or can build in transition periods as part of a determination. However, for practicality it is considered that this would be done on a case-by-case basis.

In consideration of the above, I do not consider that any of the proposed amendments represent an inappropriate delegation of legislative power.

### **Accessibility to standards**

The Committee has raised a concern that if the content of a law or instrument applied, adopted or incorporated changes from time to time changes that it may not be readily accessible, particularly where a provision 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 the relevant law or instrument that has been adopted as law of the Territory can be found.

While the principle of access to law is fully supported, any law must be practical and enforceable. Full access to law would require that the Territory could only use its own legislation and external documents that were not subject to copyright. Clearly this is not possible.

The Legislation Act clearly contemplates that external laws and documents would play a role in ACT legislation and that there would be times that republication of adopted documents would not be possible. Section 47 was included in recognition of this. Further, section 164 provides for how Australian Standards are to be referenced in ACT legislation, indicating the expectation of relatively widespread adoption of such documents.

In relation to enforceability, if a document can't be published than it is not enforceable. Given that adoption of external documents is a vital part of construction legislation, it would be unlikely that the Assembly would intend that instruments adopting Australian Standards and the like would be unenforceable. Therefore, concession has to be made that the documents need not be published. It should be noted that due to the specialised nature of most technical documents, they are usually only accessed by practitioners that require them in the course of their work. Access from members of the public is rarely requested and the content of technical standards may be difficult to decipher even if it is.

In general, it is the practice to provide notes and other information in the text of the instrument or in explanatory information highlighting where adopted instruments can be found. Although in the vast majority of cases involving technical standards publication will not be possible due to copyright reasons, where publication is possible this is not precluded by the proposed provisions and will be standard practice. This practice need not be provided for in legislation.

I consider that the process I have described provides an adequate alternative to publication on the Legislation Register.

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

The Committee posits that the proposed addition of the words “(including provide written information)” after the words “stated action” in subsection 38(1)(a) provides no limitation to what “written information” could be required. Stated actions can only be related to the rectification of work. The provision of written information is clearly a subset of stated actions i.e. that it would be related to the rectification of work as described in the explanatory statement.

However, as the Committee has raised doubts about the limitation inherent in the provision I will be proposing an amendment to the Bill to clarify to any person reading the Act that the written information relates to the content of the rectification order.

A process for a notice of intention to make a rectification order (other than emergency rectification orders) is outlined in section 34 of the Construction Occupations (Licensing) Act. Making a rectification order is a reviewable decision. These processes would likely remove any requests for information that fell outside this purpose.

The Committee asks whether a note should be inserted at the end of subsection 38(1) drawing attention to sections 170 and 171 of the Legislation Act. Those sections of the Legislation Act provide for common law rights, which may or may not apply to the entity that is carrying out the order or to a person that must provide a report or other written information. The note suggested in this section is likely to confuse rights to self-incrimination with a right to refuse to undertake rectification work or provide information because it indicates what has already been established i.e. that the person has not complied with relevant legislation.

The Committee also asks whether to permit a person to advance a “reasonable excuse” defence for failing to provide the specified written information. The offence provided at section 40 is not for any failure of a person to comply with a rectification order, it is for a person that intentionally fails to comply with a rectification order. Although the Committee makes no reference to the existing provisions, it should be noted that there is no defence for failing to take any of the stated actions that may already be included in a rectification order and so it would seem incongruous that a defence would be extended only for providing written information, when provision of such information could be critical in determining whether the order had actually been complied with.

I will be providing a revised Explanatory Statement to include this information.

*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)*

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) of the Construction Occupations (Licensing) Act. As the Committee recognises, a note of this nature is already present at proposed subsection 80B(1). I am advised that it is Parliamentary Counsel's drafting practice to place a particular note only once in each section and under the first provision where the note is appropriate – in this case at proposed subsection 80B(1).

*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 to provide information given to the partnership under section 80B. Proposed subsection 80C(3) includes a defence to a prosecution under subsection 80C(2) if a partner proves the existence of certain facts. The partner would carry a legal burden of proof; that is, would need to prove that these facts existed on the balance of probabilities.

The Committee has identified that the burden of proof engages the right to be presumed innocent stated in paragraph 22(1) of the Human Rights Act. It further asks whether it would be sufficient to provide only that the defendant must prove the facts according to an evidential burden of proof.

These provisions relate to documents that relate to a licensee's activities. For a licence issued to a partnership, the partners are individually and collectively responsible for the work carried out under the licence and keeping any required documents.

As stated in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 “The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility... Foremost among these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.”

As such, it is reasonable that a higher burden of proof should apply to partners included in the licence if they wish to claim that they did not know about any notices issued to the partnership and were not in a position to influence the partnership as a licensed entity.

This issue will be addressed in a revised Explanatory Statement.

**Information requests**

The Committee asks 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 before requesting it as this would offer some degree of protection for the privacy interests of persons whose affairs would thereby be revealed to the registrar.

Identical provisions to those proposed have been in operation under the *Planning and Development Act 2007* since its commencement. The offence in the Planning and Development Act carries a higher maximum penalty of 100 penalty points. In the exercise of these provisions there has been minimal concern about unreasonable imposition on the privacy of individuals. Any personal information requested under the new provisions would also need to be directly related to the person's interaction with a construction service.

The Registrar and his/her delegates are bound by privacy legislation and cannot simply disclose personal information to any party for any reason. I note the need to consider the difference between information provided in such a manner that is protected by common law privileges and information that may have been provided as part of a personal conversation or correspondence, which is not considered to be 'in confidence' to the same degree.

### **Obtaining information**

The Committee has asked how information would be obtained from a person under an information request if that information is not contained in a document.

In relation to an interview, there is a marked difference between a formal interview that may produce say a witness statement and recording information provided under an information request. Information can be recorded in a variety of ways, not necessarily by an interview. The primary consideration is that the information as provided is recorded accurately and agreed by the provider of the information. The corresponding provisions in the Planning and Development Act are generally exercised so that a person providing information is requested to also provide that information in writing. No such requests have been refused.

However, if the Registrar was to record the information, the provisions do not interfere with a person's ability to seek legal counsel or the privilege against self-incrimination.

In relation to protection of the interests of a third party, such consideration would need to consider the practical application of the legislation and the reasons disclosure is required. The protection of some private information would necessarily need to be balanced with the reason the information is requested, which is to administer and enforce legislation, much of which is concerned with health and safety of installations.

The Committee's suggestion of uniform processes raised an equal number of questions. For example, how can a person be given an opportunity by the Registrar to object to a disclosure without the Registrar first knowing what that disclosure is and all the parties that may possibly be affected by it? How does a person who is not a legal practitioner but holds information also held by a third party's legal counsel be restricted from providing that information if the third party wished to claim client legal privilege? What if, by requiring a person to inform a third party, a person compromises an investigation? How far can a person object to limited personal information being revealed if the matter under investigation is related to the fundamental safety of a structure? How long would the Registrar need to wait for all parties to object before the information request could be enforced? What formal mechanism would be in place to object to disclosure and who would resolve any dispute between parties about disclosure?



The Committee also recommends that I address the issue of whether a reasonable excuse defence be provided in relation to section 80G. The corresponding provisions in the *Planning and Development Act 2007* do not contain that defence and carry a higher penalty. Those provisions have been operating well since the commencement of that Act. It is also preferable that there be consistency in like provisions that may deal with information that is relevant to both planning and construction legislation.

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

Yours sincerely

Simon Corbell MLA  
Minister for the Environment and Sustainable Development