



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

10 NOVEMBER 2011

Report 45

TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) 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):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) 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;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) 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*;
- (e) 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.

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne , MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE 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.

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BILLS

Bills—No comment

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

EDUCATION AMENDMENT BILL 2011

This Bill proposes the amendment of the *Education Act 2004* to accommodate the amalgamation of preschool units into public schools and the introduction of the *Education and Care Services National Law Act 2011*.

EVIDENCE (CONSEQUENTIAL AMENDMENTS) BILL 2011

This Bill proposes the amendment of several Territory laws consequent upon the enactment of the *Evidence Act 2011*, including amendments to update, consolidate and reorganise the existing evidence laws in the ACT.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2011 (NO. 3)

This Bill proposes the amendment of a number of laws administered by the Justice and Community Safety Directorate.

STATUTE LAW AMENDMENT BILL 2011 (NO. 2)

This Bill proposes the amendment of a number of Territory laws for statute law revision purposes only.

TRANSPLANTATION AND ANATOMY AMENDMENT BILL 2011

This Bill proposes the amendment of the *Transplantation and Anatomy Act 1978* to increase the number of designated officers who may authorise the removal of organs and tissue from the body of a deceased person located in an ACT hospital for the purpose of transplantation to the body of a living person or for other therapeutic, medical or scientific purposes; and to allow authorised and trained tissue retrievalists to retrieve all tissue (musculoskeletal, cardiovascular, eye and skin tissue) and not just eye tissue for the purpose of corneal transplantation.

Bill—Comment

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

**BUSINESS NAMES REGISTRATION (TRANSITION TO COMMONWEALTH)
BILL 2011**

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

The right to privacy – HRA paragraph 12(a)

The Explanatory Statement acknowledges that the Bill engages the right to privacy, inasmuch as clause 7 “authorises the Office of Regulatory Services to transfer information relating to holders of ACT business names to ASIC”. In terms of section 28 of the *Human Rights Act 2004*, the Explanatory Statement advances a justification for this derogation of the right to privacy.

The Committee refers the Assembly to the discussion in the Explanatory Statement.

Does a clause of the Bill inappropriately delegate legislative power? Committee term of reference (c)(iv)

Subclause 13(2) confers on the executive a power, stated in a form now commonly found in Territory Acts, to make transitional regulations that may modify that part of the Act that governs the topic of “transitional matters”. Concerning this kind of clause, the Committee in *Scrutiny Report No 40* of the 7th Assembly (11 August 2011) observed that:

[a] “Henry VIII” clause is usually a provision in an Act which allows that a regulation may validly change some provision of the Act or of some other law of the Territory. These provisions derogate from the authority of the Legislative Assembly and should not generally be included in an Act without justification. The justification should be offered in the relevant explanatory statement so that the Assembly may consider whether its legislative power should be diminished.

The Committee notes that the Explanatory Statement to this Bill does not offer a justification. In this instance, the matter requiring particular attention is that absence of any limitation in point of time on the operation of subclause 13(2). This is a significant point of difference in comparison to some other similar provisions.

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

Misleading provisions

Subclause 6(3) of the Bill provides:

(1) This section has effect despite anything in another territory law.

This is misleading in that a provision of a Territory statute cannot limit the power of the Legislative Assembly to enact a later statute to amend an earlier statute. The public should be able to rely on what a plain reading of a statute suggests, and this is clearly not the case with subclause 23(1). It once again recommends that such clauses not be stated in a bill.

Subclause 13(3) provides:

- (3) A [transitional] regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

This provision is open both to the objection just noted, and to the objection that it is a Henry VIII clause (as to the latter, see above).

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

SUBORDINATE LEGISLATION

Disallowable Instruments—No comment

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

Disallowable Instrument DI2011-273 being the Public Places Names (Macgregor) Determination 2011 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the names of two roads in the Division of Macgregor.

Disallowable Instrument DI2011-275 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2011 (No. 1) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2011-19 and determines fares payable for MyWay smart cards and cash fares on ACTION buses.

Disallowable Instrument DI2011-276 being the Legal Profession (Bar Council Fees) Determination 2011 (No. 1) made under subsection 84(2) of the *Legal Profession Act 2006* revokes DI2008-54 and determines fees payable for applications for the grant or renewal of a barrister practising certificate.

Disallowable Instrument DI2011-278 being the Cultural Facilities Corporation (Governing Board) Appointment 2011 (No. 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 79 of the *Financial Management Act 1996* appoints a specified person as chair of the Cultural Facilities Corporation.

Disallowable Instruments—Comment

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

Why is this instrument being re-made?

Disallowable Instrument DI2011-263 being the Road Transport (General) (Segway Exemption) Determination 2011 (No. 2) made under section 13 of the *Road Transport (General) Act 1999* revokes DI2011-251 and determines that a segway, or an operator or rider of a segway, is exempt from certain legislation.

The Committee notes that section 6 of this instrument revokes DI2011-251, which the Committee considered (without making a comment) in its *Scrutiny Report No 44* of the *Seventh Assembly*. DI2011-251 was notified on 16 September 2011. This instrument was notified on 30 September 2011.

It is not obvious to the Committee what the difference is between this instrument and DI2011-251. The Explanatory Statement for this instrument contains no explanation as to any difference(s) between this instrument and DI2011-251 or the reason why it has been necessary to revoke and re-make DI2011-251 so soon after it was made.

In the absence of an explanation in the Explanatory Statement, the Committee seeks the Minister's advice as to why it has been necessary to revoke and re-make DI2011-251 so soon after it was made.

Accessibility of legislation

Disallowable Instrument DI2011-272 being the Gas Safety (Codes of Practice) Determination 2011 (No. 1) made under section 65 of the *Gas Safety Act 2000* revokes DI2002-145 and approves various codes of practice relating to gas safety.

This instrument is made under section 65 of the *Gas Safety Act 2000*, which provides:

65 Codes of practice

- (1) The Minister may, in writing, approve codes of practice for this Act.

Note A power given under an Act to make a statutory instrument (including a code of practice) includes power to amend or repeal the instrument (see Legislation Act, s 46 (1)).

- (2) A code of practice may do the following:

- (a) apply an instrument as in force from time to time;
- (b) set out practices, standards and other matters about—
 - (i) the safe installation, connection, repair, maintenance or operation of consumer piping systems or appliances; or
 - (ii) notifications and certifications on completion of any gasfitting work or appliance work.

Note A statutory instrument may also apply, adopt or incorporate (with or without change) a law or instrument (or a provision of a law or instrument) as in force at a particular time (see Legislation Act, s 47 (1)).

- (3) An approved code of practice is a disallowable instrument.

Note 1 A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Note 2 An amendment or repeal of a code of practice is also a disallowable instrument (see Legislation Act, s 46 (2)).

- (4) For the gas safety legislation, a code is relevant to gasfitting or appliance work, a consumer piping system or an appliance if the code purports to apply to it.
- (5) The construction occupations registrar must make a copy of each code, and any instrument (or provision of an instrument) applied (with or without change) by the code, available for public inspection during ordinary office hours at—
 - (a) the office of the construction occupations registrar; or

- (b) another place prescribed under the regulations.
- (6) In this section:

applied includes adopted and incorporated.

Section 4 of this instrument approves 7 specified Australia/New Zealand Standards.

Section 5 of the instrument expressly disapplies subsection 47(6) of the *Legislation Act 2001*, which provides:

- (6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
 - (a) the law or instrument as in force at the time the relevant instrument is made;
 - (b) each subsequent amendment of the law or instrument;
 - (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
 - (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

A “notifiable instrument” must be published on the ACT Legislation Register. The disapplication of subsection 47(6) of the *Legislation Act* means that there is no obligation to publish the Australia/New Zealand Standards that are incorporated by reference by this instrument. On its face, that denies to persons who need to know what they are required to comply with, under the Gas Safety Act, access to the instruments that set out those requirements. This means that similar issues are raised to those raised in the paper on Australia/New Zealand Standards delivered at the recent Australia-New Zealand Scrutiny of Legislation Conference (held in Brisbane, on 26-28 July 2011). The paper was presented by the Hon Janine Freeman MLA, a member of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament (see http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/current-inquiries/SLC_Conference). The Committee notes that it referred to these issues in its *Scrutiny Report No 43* of the *Seventh Assembly*.

The Committee also notes, however, that any concerns about the accessibility of this instrument are minimised by the fact that subsection 65(5) of the Gas Safety Act requires the constructions occupations registrar to make available to the public, during ordinary office hours, a copy of any code approved under section 65 and a copy of any instrument applied by a code. The Committee also notes (with approval) that the Explanatory Statement for this instrument makes this clear, stating:

Copies of codes

Copies of these codes of practice will be made available for public inspection during ordinary office hours at the Department of Environment and Sustainable Development Shopfront, 16 Challis Street, Dickson in the Australian Capital Territory.

This comment does not require a response from the Minister.

Has this instrument been validly made?

Disallowable Instrument DI2011-274 being the Utilities (Emergency Planning Code) Determination 2011 made under sections 59, 63 and 65 of the *Utilities Act 2000* revokes DI2010-170 and determines the Emergency Planning Code 2011.

This instrument determines an Emergency Planning Code. The formal part of the instrument indicates that it is made under a series of provisions, including section 59 of the *Utilities Act 2000*, which provides:

59 Determined codes

- (1) ICRC [Independent Competition and Regulatory Commission] may, in writing, determine an industry code if it—
 - (a) has consulted the Minister, and the Minister responsible for part 5 (Technical regulation), in relation to the code; and
 - (b) is satisfied that—
 - (i) the code is not inconsistent in material respects with another industry code or a technical code; and
 - (ii) it is necessary or convenient to determine the code.
 - (2) ICRC may determine an industry code, for example, in the following circumstances:
 - (a) if a utility fails to submit a draft industry code in accordance with a direction under section 57;
 - (b) the proponent of a draft industry code fails to submit a further draft of the code in accordance with a requirement in a notice of refusal under section 58;
 - (c) ICRC is satisfied that a draft industry code submitted for consideration or approval is not appropriate;
 - (d) to give effect to a direction by the Minister under section 19.
- Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).
- (3) ICRC must, as soon as practicable, give a copy of each determined code to each utility to which the code would apply.

The instrument also indicates that it is made under sections 63 and 65 of the Utilities Act, which provide:

63 Public access

- (1) ICRC must make copies of each of the documents mentioned in subsection (2) available for public inspection during ordinary office hours, at the office of ICRC and any other place determined by ICRC.
- (2) Subsection (1) applies to each of the following documents:
 - (a) each industry code;
 - (b) a record of each of the following decisions by ICRC:

- (i) to approve an industry code;
 - (ii) to refuse to approve an industry code, a draft of which has been submitted to ICRC for consideration;
 - (iii) to determine an industry code;
 - (iv) to approve, or determine, a variation of an industry code.
- (3) A person may inspect, or make a copy of, all or part of a document mentioned in subsection (2).
- Note* A fee may be determined under s 254 for this subsection.
- (4) If a person requests that a copy be made available in electronic form, ICRC may provide the relevant information—
- (a) on a data storage device; or
 - (b) by electronic transmission.
- (5) The ICRC Act, section 46 does not apply to a document mentioned in subsection (2).

65 Application of industry code provisions

Part 4 (Industry codes) applies to a technical code as if it were an industry code, but with the following changes:

- (a) the approval or determination of a technical code, or any variation of a technical code, is to be done by the Minister;
- (b) the Minister may act as stated in paragraph (a) only if the Minister has—
 - (i) consulted ICRC and each utility to which the technical code applies, or would apply; and
 - (ii) had due regard to any representation by ICRC or the utility about the Minister's action;
- (c) the Minister must make copies of each technical code available for public inspection in accordance with section 63 (Public access).

The Committee notes that the code determined by this instrument has been determined by the Minister for Environment and Sustainable Development, under section 65 of the Utilities Act. While it is not stated in the Explanatory Statement for the instrument, the Committee assumes that, in determining the code, the Minister has (i) consulted ICRC and each utility to which the technical code applies, or would apply and (ii) had due regard to any representation by ICRC or the utility about the Minister's action.

In making this assumption, the Committee notes with approval that other formal requirements in relation to the making of the code appear to be expressly dealt with, either in the instrument itself or in the Explanatory Statement for the instrument.

This comment does not require a response from the Minister.

Inadequate Explanatory Statement

Disallowable Instrument DI2011-277 being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2011 made under section 84 of the *Legal Profession Act 2006* revokes DI2010-64 and determines fees payable for the grant or renewal of a practising certificate.

The Committee notes that this instrument determines fees payable for the grant or renewal of practising certificates for barristers, under section 84 of the *Legal Profession Act 2006*. The Committee notes that it has consistently requested that, for fees determinations, either the face of the instrument or the Explanatory Statement for the instrument indicate (a) any new fees created by the instrument and (b) the magnitude of any fees increases provided for in the instrument. This facilitates the scrutiny of fees determinations—which are an important part of the financial framework of the ACT—by the Committee (and the Legislative Assembly).

The Explanatory Statement for this instrument states:

The fees have been increased in line with the Consumer Price Index to keep pace with inflation.

There is otherwise no explanation of the magnitude of the fees increases.

The Committee compares this instrument with DI2011-277, which determines fees payable for the grant or renewal of practising certificates by “government lawyers” and “in-house lawyers”. The Committee notes that the Explanatory Statement for DI2011-277, in addition to generally indicating that the fees increases provided for by that instrument are “in line with the Consumer Price Index to keep pace with inflation”, sets out both the new fee and the fee under the instrument that it revokes and replaces. The Committee commends the approach taken in relation to DI2011-277 to the makers of this instrument.

In making this comment, the Committee notes that an express statement of the level of any fee increase allows the Committee (and the Legislative Assembly) to make an assessment as to the regulatory impact of any fees increases and, as a result, whether or not it is appropriate that (as here) no regulatory impact statement has been provided in relation to the fee increase.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Community Services, dated 24 October 2011, in relation to comments made in Scrutiny Report 44 concerning proposed government amendments to the Working with Vulnerable People (Background Checking) Bill 2010.
- The Acting Minister for Economic Development, dated 2 November 2011, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instrument DI2011-241, being the Planning and Development (Land Agency Board) Appointment 2011 (No. 1).
- The Treasurer, dated 8 November 2011, in relation to comments made in Scrutiny Report 42 concerning Disallowable Instrument DI2011-197, being the Planning and Development (Remission of Lease Variation Charges) Determination 2011 (No. 1).

The Committee wishes to thank the Minister for Community Services, the Acting Minister for Economic Development and the Treasurer for their helpful comments.

John Hargreaves, MLA
Deputy Chair

November 2011

**JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION COMMITTEE)**

REPORTS—2008-2009-2010-2011

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 10 December 2008

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill
2008

Report 2, dated 4 February 2009

Education Amendment Bill 2008 (PMB)

Report 8, dated 22 June 2009

Disallowable Instrument DI2009-75—Utilities (Consumer Protection Code)
Determination 2009

Report 10, dated 10 August 2009

Disallowable Instrument DI2009-93—Utilities (Grant of Licence Application Fee)
Determination 2009 (No. 2)

Report 12, dated 14 September 2009

Civil Partnerships Amendment Bill 2009 (PMB)

Report 14, dated 9 November 2009

Building and Construction Industry (Security of Payment) Bill 2009
Disallowable Instrument DI2009-58—Heritage (Council Chairperson) Appointment
2009 (No. 1)

Report 18, dated 1 February 2010

Planning and Development (Notifications and Review) Amendment Bill 2009 (PMB)

Report 19, dated 22 February 2010

Education (Suspensions) Amendment Bill 2010 (PMB)

Report 22, dated 27 April 2010

Infrastructure Canberra Bill 2010 (PMB)
Radiation Protection (Tanning Units) Amendment Bill 2010 (PMB)

Report 24, dated 28 June 2010

Disallowable Instrument DI2010-65—Auditor-General (Standing Acting Arrangements)
Appointment 2010

Bills/Subordinate Legislation

Report 30, dated 15 November 2010

Corrections Management (Mandatory Urine Testing) Amendment Bill 2010 (PMB)
Discrimination Amendment Bill 2010 (PMB)

Report 34, dated 24 March 2011

Road Transport (Third-Party Insurance) Amendment Bill 2011

Report 38, dated 27 June 2011

Disallowable Instrument DI2011-75—Territory Records (Advisory Council)
Appointment 2011 (No. 1)
Disallowable Instrument DI2011-76—Territory Records (Advisory Council)
Appointment 2011 (No. 2)
Disallowable Instrument DI2011-77—Territory Records (Advisory Council)
Appointment 2011 (No. 3)
Disallowable Instrument DI2011-78—Territory Records (Advisory Council)
Appointment 2011 (No. 4)
Disallowable Instrument DI2011-79—Territory Records (Advisory Council)
Appointment 2011 (No. 5)
Disallowable Instrument DI2011-80—Territory Records (Advisory Council)
Appointment 2011 (No. 6)

Report 39, dated 28 June 2011

Electoral (Donation Limit) Amendment Bill 2011 (PMB)

Report 40, dated 11 August 2011

Crimes (Penalties) Amendment Bill 2011 (PMB)

Report 42, dated 15 September 2011

Children and Young People (Transition to Independence) Amendment Bill 2011 (PMB)

Report 43, dated 13 October 2011

Disallowable Instrument DI2011-194 - Tobacco (Compliance Testing Procedures)
Approval 2011 (No. 1)
Disallowable Instrument DI2011-228 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 1)
Disallowable Instrument DI2011-229 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 2)
Disallowable Instrument DI2011-231 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 3)
Disallowable Instrument DI2011-232 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 4)
Disallowable Instrument DI2011-233 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 5)
Disallowable Instrument DI2011-234 - Health (Local Hospital Network Council—
Member) Appointment 2011 (No. 6)

Bills/Subordinate Legislation

<p>Disallowable Instrument DI2011-235 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 7)</p> <p>Disallowable Instrument DI2011-236 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 8)</p> <p>Disallowable Instrument DI2011-237 - Health (Local Hospital Network Council—Member) Appointment 2011 (No. 9)</p> <p>Subordinate Law SL2011-26 - Gene Technology Amendment Regulation 2011 (No. 1)</p>

<p><u>Report 44, dated 24 October 2011</u></p>

<p>Disallowable Instrument DI2011-246 - Domestic Animals (Cat Curfew Area) Declaration 2011 (No. 1)</p> <p>Disallowable Instrument DI2011-264 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 1)</p> <p>Disallowable Instrument DI2011-265 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 2)</p> <p>Disallowable Instrument DI2011-266 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 3)</p> <p>Disallowable Instrument DI2011-267 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 4)</p> <p>Disallowable Instrument DI2011-268 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 5)</p> <p>Disallowable Instrument DI2011-269 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 6)</p> <p>Disallowable Instrument DI2011-270 - Emergencies (Bushfire Council Members) Appointment 2011 (No. 7)</p>



Joy Burch MLA

MINISTER FOR COMMUNITY SERVICES
MINISTER FOR MULTICULTURAL AFFAIRS

MINISTER FOR AGEING

MINISTER FOR WOMEN

MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

Mr Max Kiermaier
Secretary
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Kiermaier

I am writing to provide a response to Scrutiny of Bills Committee Report 44 which became available on 24 October 2011 and raises concerns regarding the proposed government amendments to the *Working with Vulnerable People (Background Checking) Bill 2010* (the Bill).

In Report 44 the Committee requested a *Human Rights Act 2004*, section 28 justification of the inclusion of an identified Aboriginal or Torres Strait Islander background as an Independent Advisor to the Commissioner. The Committee advised that this privileges persons who possess a particular racial characteristic and engages the right to equal protection of the law.

The identifying of a person who is of Aboriginal or Torres Strait Islander Background rather than a person who represents the interests of Aboriginal or Torres Strait Islander as an Independent Advisor to the Commissioner resulted from comments received from the Human Rights and Discrimination Commissioner's (HR&DC) Office. The HR&DC office advised the Community Services Directorate (CSD), via email –

'...criteria for appointment ... currently refers to a person with expertise or experience in relation to Aboriginal and Torres Strait Islander people ... This really should reflect a preference for Aboriginal or Torres Strait Islander people..., rather than a person with 'expertise or experience'.

As advised by the HR&DC, a person or persons of Aboriginal or Torres Strait Islander background is preferred to when the Commissioner is seeking to appoint Independent Advisors rather than a person who represented the interests of Aboriginal or Torres Strait Islander people.

ACT LEGISLATIVE ASSEMBLY

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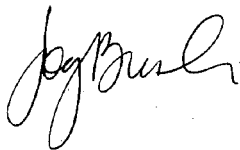
The precedent for identifying an Aboriginal or Torres Strait Islander to represent the interests of this specific cultural group in a particular context has been established in other ACT legislation, for example, the *Children and Young People Act 2008* (s29, Children and Youth Services Council).

The Committee noted that proposed government amendments to the Bill cross referenced other proposed government amendments which were not evident in the copy provided to Committee.

The proposed government amendments to the Bill, which were provided to Committee recently, were only those which had not arisen from earlier Committee comments.

Subsequent to the new proposed government amendments being provided to the Committee, Mr Peter Bayne requested a full copy of the proposed amendments be provided to him. All the proposed government amendments were emailed to Mr Bayne on 19 October 2011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joy Burch', with a stylized, cursive script.

Joy Burch MLA
Minister for Community Services
24 October 2011.



Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH

MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

ACT Legislative Assembly

GPO BOX 1020

CANBERRA ACT 2601

Dear Mrs. ^{Vicki}Dunne

Thank you for the Scrutiny of Bills and Subordinate Legislation Committee's Report No 43 of 2011 (the Report).

In the Report, the Committee noted that the Disallowable Instrument DI2011-241 to appoint Ms Sandra Lambert as a member of the Land Agency Board differed from the Explanatory Statement in terms of the section of the *Financial Management Act 1996* (the FMA Act) under which the appointment was made.

The reference in both the Instrument and the Explanatory Statement should have been made to Section 78 of the FMA Act only and future Disallowable Instruments for the Economic Development Directorate will comply with this reference.

Thank you for bringing this matter to my attention.

Yours sincerely

Katy Gallagher MLA

Acting Minister for Economic Development

- 2 NOV 2011

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Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT

MINISTER FOR EDUCATION AND TRAINING

MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Committee's Scrutiny Report No. 42 of 15 September 2011. The Report commented on the Disallowable Instrument DI2011-197, the *Planning and Development (Remission of Lease Variation Charges) Determination 2011 (No. 1)* (the determination). This determination was made under section 278F of the *Planning and Development Act 2007*, and sets amounts to be remitted for lease variation charges.

The Committee noted with approval that the Explanatory Statement for this instrument expressly addressed the requirements of section 76 of the *Legislation Act 2001*, which prohibits prejudicial retrospectivity.

The Committee also questioned the logic behind section 4 of the determination. Section 4 of the determination states as follows:

- "4 Remission of lease variation charges—all other chargeable variations—Act, s 278F (1)**
- (1) This section applies to a chargeable variation other than a chargeable variation mentioned in section 2 or section 3.
 - (2) The determined amount of the lease variation charge for the chargeable variation to be remitted is an amount equal to 0% of the charge."

The Committee suggested section 4 could be read as requiring the Treasurer to determine a zero amount for any chargeable variation not covered by sections 2 or 3 of the determination. The Committee contrasted this approach with an alternative. The Committee referred to s278F(1) of the *Planning and Development Act* which creates the power to make the determination. The Committee suggested this power was discretionary because the section states that "The Treasurer may determine ... an

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amount to be remitted for ... lease variation charge ...". The Committee suggested further that this discretion contrasts with section 4 of the determination which fixes a determination of a zero remission amount in every relevant instance.

I agree with the Committee's conclusion that s278F(1) does give the Treasurer a discretion to determine a remission amount for lease variation charges. However, section 278F requires this discretion to be exercised in a certain way. In particular, s278F does not permit the Treasurer to exercise the discretion on a case by case or ad hoc basis for each lease variation that arises from time to time. This is clear from a reading of s278F as a whole. In summary, section 278F requires, among other matters, any determination of a remission amount to be:

- applied to lease variation charges in a nominated financial year (s278F(1));
- applied to each and every lease variation charge that arises in the nominated financial year (s278F(1));
- made at least 12 months before the beginning of the nominated financial year (s278F(3)). There is an exception to this requirement for transitional purposes (s278F(6)); and
- applied in full by the Commissioner for Revenue (s278F(4)).

The requirement is for any determination to be made and applied in a transparent, comprehensive and systemic way. There is indeed a discretion to determine or not determine a remission amount. However, the exercise of discretion must be consistent with the above requirements. It is not possible under s278F to exercise the discretion on a case by case basis as and when relevant lease variations arise.

I trust this answers the Committee's query as to the logic behind section 4 of the determination and I thank the Committee for its comments.

Yours sincerely



Andrew Barr MLA
Treasurer

8 NOV 2011

