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

SCRUTINY REPORT 6

2 MAY 2013

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Mick Gentleman MLA (Deputy Chair)

Ms Yvette Berry MLA

Mrs Giulia Jones MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone	02 6205 0173
Facsimile	02 6205 3109
Post	GPO Box 1020, CANBERRA ACT 2601
Email	max.kiermaier@parliament.act.gov.au
Website	www.parliament.act.gov.au

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 the duties of a scrutiny of bills and subordinate legislation committee) shall:

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (a) is in accord with the general objects of the Act under which it is made;

  (b) unduly trespasses on rights previously established by law;

  (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

  (a) unduly trespass on personal rights and liberties;

  (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (d) inappropriately delegate legislative powers; or

  (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

BILLS—NO COMMENT

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to make minor amendments to a number of laws concerning planning, building and the environment that are minor or technical and noncontroversial, or reflect only a minor policy change.

REVENUE LEGISLATION (TAX REFORM) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Land Tax Act 2004* and the *Rates Act 2004*, in particular to abolish commercial land tax, to remove reference to the tax free threshold in the calculation of general rates and Fire and Emergency Service Levy in the Rates Act, and to amend the Rates Deferral Scheme to allow non-pensioners who satisfy the age, asset, income and equity tests, to defer payments of their general rates.

ROAD TRANSPORT (GENERAL) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Road Transport (General) Act 1999* to allow the use of more powerful electric bicycles in the ACT.

STATUTE LAW AMENDMENT BILL 2013

This is a Bill for an Act to amend a number of ACT laws for statute law revision purposes.

BILL—COMMENT

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

COMMUNITY HOUSING PROVIDERS NATIONAL LAW (ACT) BILL 2013

This is a Bill for an Act to make provision for the registration and regulation of community housing by the adoption of the Community Housing Providers National Law, as in force from time to time, set out in the appendix to the *Community Housing Providers (Adoption of National Law) Act 2012*.

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

Apart from a concern as to whether an adopted law can be accessed easily, there is no general objection to an Act of the Assembly simply adopting as the law of the Territory the terms of a document. Access concerns are generally met when the adopted document is a statute of another Australian jurisdiction.

Term of reference (3)(d) is however engaged where the other body – whether it be (as in this case) the parliament of another Australia jurisdiction, or some other body – may in effect make law for the Act by amendment of the document adopted. This is the case here, for subclause 7(1) of this Bill provides that what is adopted is "as a Territory law" is "the Community Housing Providers National Law, *as in force from time to time*, set out in the appendix to the NSW Act" (emphasis added).

A concern that the Assembly would be handing over its legislative power to another Australian parliament is however addressed in subclauses 7(2), (3) and (4) of the Bill. In essence, any NSW amendment to the National Law must be presented to the Legislative Assembly not later than six sitting days after the day it is passed, and "may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed". In other words, the NSW amendment is treated in the same way as a disallowable instrument (such as a regulation) made by an ACT person or body (such as the executive) as authorised by a Territory statute.

It may however be questioned whether the two situations are sufficiently analogous to justify the same treatment. An ACT person or body to whom is delegated the power to make law is generally under the control or influence of a Minister, and can be expected to have reference to relevant government policy. The NSW parliament is in a completely independent position. Of course, so far as concerns a national scheme law, the NSW parliament would be influenced, if not in practice bound, to abide by some direction or policy of a national body that oversees the scheme. But then this national body is completely independent of the ACT executive.

These considerations may suggest that an amending law of the NSW parliament should not be merely disallowable, but come into force only after a positive resolution of the Legislative Assembly.

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

Clause 10 of the National Law

Clause 10 of the National Law[1] confers certain functions on the registrar (in the ACT, the Director-General, Community Services Directorate), including, for example, the function of assessing "the suitability of entities to be registered as registered community housing providers" (paragraph 10(1)(b)). By subclause 10(2), "[i]n exercising functions under this Law, a Registrar is required to comply with any guidelines made jointly by the relevant Ministers of each participating jurisdiction and published in the New South Wales Government Gazette or on the NSW legislation website". The guidelines could (and in many cases will) have a legislative quality in that they will create some principle or rule as to how the registrar should exercise her or his functions on critical matters such as stated in paragraph 10(1)(b).

In effect, by the adoption of clause 10 as a law of the Territory, the Assembly has provided for the delegation of legislative power to the entity that is comprised of the relevant Ministers of each participating jurisdiction. The Explanatory Statement to the Bill does not attempt to explain or justify clause 10.

[1] The National Law cannot be found in the Bill, and reference must be made to the appendix of the NSW Act.

There are two issues for the Assembly to consider; first, whether it has any power to control the exercise of the guideline making power, and secondly, how a person may obtain access to the guidelines.

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

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

A failure to protect the privileges against self-incrimination and of legal professional privilege

An entity may be registered by the registrar as a registered community housing provider, and must comply with the conditions to which its registration is subject (clause 15 of the National Law). Subclause 15(2) stipulates that certain conditions are mandatory, and paragraphs 15(2)(d)-(f) empower the registrar to compel a provider to provide documents and to attend meetings and answer questions with respect to the exercise of the provider's functions or affairs.

There is no specific protection of the common law privileges against self-incrimination and of legal professional privilege.[2] It is probable that if a provider objected to producing a document or answering a question on the basis that these privileges were available, a court would find that they were available. The court would reason that their displacement by subclause 15(2) could be achieved only by specific words to that effect.

There are two reasons why this is not satisfactory. First, a provider might be dissuaded from provoking a legal challenge by reason of the very high cost of such a proceeding. It would be far cheaper to hand over the documents or to answer the questions than to refuse on the basis of the common law privileges. Secondly, a provider, and their advisers, might not appreciate that the common law privileges might be available as a basis to refuse.

Through the *Legislation Act 2001* the Assembly has taken steps to enhance the probability that statutory provisions such as paragraphs 15(2)(d)-(f) will be read as not overriding the common law privileges. Subsection 170(1) provides that an "Act or statutory instrument must be interpreted to preserve the common law privileges against self-incrimination and exposure to the imposition of a civil penalty", and subsection 171(1) that an "Act or statutory instrument must be interpreted to preserve the common law privilege in relation to client legal privilege (also known as legal professional privilege)". Sections 170 and 171 are "determinative provisions", which means that their operation may be displaced only expressly or by a manifest contrary intention.[3]

[2] The *Evidence Act 2011* (sections 117ff) creates a client legal privilege, which is substantially similar to the common law legal professional privilege, but the Act applies only on the conduct of a trial (section 4). Paragraph 22(2)(i) of the Human Rights Act confers a substantially less extensive protection than the common law privilege against self-incrimination.

[3] See sections 5 and 6 of the Legislation Act. In contrast, a non-determinative provision may be displaced expressly or by a contrary intention. The distinction is illustrated by examples appended to section 6.

It is now generally the practice in drafting Territory bills to draw attention to sections 170 and 171 by a note to a provision in a bill that on its face compels, or allows a person to be compelled, to produce documents or to answer questions. Where this practice is not followed, the government generally accepts a recommendation from this Committee that it be done.

The problem here is that paragraphs 15(2)(d)-(f) are in the National Law and the Assembly has no power to alter this law. The matter might be addressed by inserting a provision in the Bill that makes it clear that the subsections 170(1) and 171(1) apply in relation to the exercise of all powers and functions of the registrar (the director-general) under the National Law.

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

<u>The exclusion of Territory liability to compensate a person adversely affected by actions of the registrar or a statutory manager</u>

The registrar has functions in relation to the registration of a provider, including in particular the cancellation of a registration. The registrar may appoint a statutory manager to conduct such of the affairs and activities of the provider as relate to the community housing assets of the provider (clause 21 of the National Law). Clause 24 provides for a very wide exclusion of Territory liability to compensate a person affected by actions of the registrar or a statutory manager.

> **No compensation payable by State**
>
> (1) Compensation is not payable by or on behalf of a State in connection with the operation of this Part.
>
> (2) Without limiting subsection (1), compensation is not payable by or on behalf of a State arising directly or indirectly from any of the following:
>
> (a) the cancellation of an entity's registration or the imposition of conditions on any such registration,
>
> (b) the publication of any notice of intent to cancel registration,
>
> (c) the issuing of binding instructions,
>
> (d) the appointment of a statutory manager,
>
> (e) the exercise by any person of any function of a statutory manager or a failure by any person to exercise any such function or any loss incurred by an entity during the term of office of a statutory manager for the entity.
>
> (3) In this section:
>
> "compensation" includes damages or any other form of monetary compensation.

Clause 24 proceeds on an assumption that actions of the registrar or a statutory manager could give rise to a liability to compensate, and normally it would be expected that the Territory might by vicariously liable for such actions. An exclusion of liability should be justified. The Explanatory Statement adopts the NSW explanation of the national law, and its brief reference to clause 24 does not attempt any justification.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister provide a justification for clause 24 of the National Law.

Comment on the Explanatory Statement

The Committee is obliged by paragraph 2 of its terms of reference to "consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the stylistic standards expected by the Committee". In order to guide the proponents of legislation as to its expectations, the Committee has issued a *Guide to writing an explanatory statement* (August 2011). The *Guide* is accessible at http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf.

The *Guide* provides advice in relation to national scheme bills.

3.6 The passage of national co-operative laws is a matter for the Assembly. The explanatory statement to bills creating or enhancing such schemes should fully explain the provisions of any law of another Australian jurisdiction (the model national law) that is adopted as law for the ACT. It should deal with the provisions of the model national law in the same way as it deals with any other bill. The explanatory statement might however refer instead to some source prepared by some Commonwealth, State or Territory body, such as an explanation of the model national law, or, so far as human rights analysis is concerned, a compatibility statement relating to that law.

3.7 In addition, the explanatory statement should:

- set out whether, and to what extent, the provisions of the Human Rights Act concerning scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities, will apply to the provisions of the bill and of the adopted model national law; and
- identify all respects in which a provision of the bill and of the adopted model national law affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws.

The Explanatory Statement to this Bill does not "deal with the provisions of the model national law in the same way as it deals with any other bill". The NSW explanation it adopts is far briefer than what is expected of an Territory explanation, and in particular it does not address the issue of the continued application of the common law privileges. Nor does it address the matters stated at paragraph 3.7 of the *Guide*.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-28 being the Public Place Names (Coombs) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of 35 roads in the Division of Coombs.**

Disallowable Instrument DI2013-29 being the Public Place Names (Bonner) Amendment Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends DI2009-232 by revoking the road name of a specified street in the Division of Bonner.**

Disallowable Instrument DI2013-30 being the Public Health (Fees) Determination 2013 (No. 1) made under section 137 of the *Public Health Act 1997* **revokes DI2012-235 and determines fees payable for the purposes of the act.**

Disallowable Instrument DI2013-31 being the Road Transport (General) (Police Motorcycle Rider) Exemption 2013 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **revokes DI2006-20 and exempts members of the Australian Federal Police who are undertaking police motorcycle rider training and assessment from the novice rider licensing requirements.**

Disallowable Instrument DI2013-32 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2013 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares the General Manager of the National Arboretum to be a Parking Authority for the area of Rural Block 73 in the District of Molonglo.**

Disallowable Instrument DI2013-33 being the Domestic Violence Agencies (Council) Appointment 2013 (No. 2) made under sections 6 and 6A of the *Domestic Violence Agencies Act 1986* **appoints specified people as chair and community members of the Domestic Violence Prevention Council.**

Disallowable Instrument DI2013-34 being the Heritage (Swinger Hill Cluster Housing) Guidelines 2013 (No. 1) made under section 25 of the *Heritage Act 2004* **makes guidelines in relation to the conservation of the heritage significance of the Swinger Hill housing precinct.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Workplace Safety and Industrial Relations, dated 8 April 2013, in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2012-232, being the Long Service Leave (Portable Schemes) Security Work Declaration 2012.
- The Attorney-General, dated 8 April 2013, in relation to comments made in Scrutiny Report 5 concerning the Road Transport Legislation Amendment Bill 2013.
- The Chief Minister, dated 8 April 2013, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instrument DI2012-238, being the Public Sector Management Amendment Standards 2012 (No. 3).

- The Attorney-General, dated 22 April 2013, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instrument DI2012-246, being the Road Transport (General) Withdrawal of Infringement Notices Guidelines 2012 (No. 1).
- The Attorney-General, dated 29 April 2013, in relation to comments made in Scrutiny Report 5 concerning Subordinate Law SL2013-5, being the Retirement Villages Regulation 2013.
- The Chief Minister, dated 30 April 2013, in relation to comments made in Scrutiny Report 5 concerning Disallowable Instrument DI2013-10, being the Auditor-General Standing Acting Appointment 2013.

The Committee wishes to thank the Chief Minister, Minister for Workplace Safety and Industrial Relations and the Attorney-General for their helpful responses.

COMMENT ON GOVERNMENT RESPONSES

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2013

The Committee would like to comment on the response of the Attorney-General dated 8 April 2013 regarding the Road Transport Legislation Amendment Bill 2013.

In *Scrutiny Report 5*, the Committee drew attention to the width of the power conferred on the executive by what is now paragraph 31A(4)(d) of the *Road Transport (General) Act 1999*. The Committee commented:

> Proposed subsection 31A(4) specifies matters to be included by an applicant in an application for an arrangement. [Paragraphs (a), (b), and (c) specify certain topics.] Paragraph 31A(4)(d) specifies "anything else prescribed by regulation". This is a very wide power and while a court would read it down so that a regulation to be valid must relate to the purpose of an arrangement, it is as a matter of principle desirable that such a limit be made explicit. **The issue is whether a form of words could be inserted into this power to limit its scope.**

The Minister's response rejects the suggestion that there should be any specific limitation of the scope of the power in paragraph 31A(4)(d) of the Act, offering two reasons that could be applied to any such power in any Act. The Minister's response stated:

> Firstly, the power to prescribe must be consistent with the legislative framework in which it operates, so that a requirement that is inconsistent with the Act or irrelevant to the exercise of the power would be outside the regulation making power. Secondly, the Assembly has the capacity to review regulations through the tabling and disallowance processes.

The Committee has not accepted the first reason. In *Scrutiny Report 47* of the *7th Assembly*, concerning the Public Unleased Land Bill 2011, the Committee commented in respect of some widely drawn administrative powers in that Bill, that

> [t]he possibility that a court would "read down" apparently unconfined discretions is not an adequate justification for inserting them in legislation. Explicit confinement in the law provides some guidance to those who might be affected by an exercise of the power, and, for those who have the resources to challenge a decision, assists a court or tribunal considering a challenge.

The second reason offered goes too far and if accepted would obviate any objection to a regulation making power, no matter how widely expressed. Given the Committee's term of reference (3)(d), to consider whether there has been an inappropriate delegation of legislative power, it cannot accept an argument that there should be no concern about the width of a delegation on the basis that the Assembly can disallow any disallowable exercise of the power.

In the past, the Committee has pointed out that a widely drawn administrative power might be found to be incompatible with subsection 21(1) of the *Human Rights Act 2004* (see *Scrutiny Report 32* of the *6th Assembly* concerning the Revenue Legislation Amendment Bill 2006 (No. 2)). This reasoning may not apply where the power is legislative in quality, but the situation is analogous.

The Committee also points out that in the drafting of the Public Unleased Land Bill 2012, the Government accepted the legitimacy of some of the comments the Committee made concerning the 2011 Bill. For example, subclause 19(5) of the 2011 Bill provided that an approval to carry out work on public unleased land may be made "conditional" by the director-general. There was no indication of what kinds of conditions might be imposed. In contrast, subclause 19(5) of the 2012 Bill confined the discretion by providing that an approval:

> may be subject to any condition that the director-general reasonably believes is necessary to—
>
> (a) eliminate an effect or risk mentioned in subsection (4); or
>
> (b) if the effect or risk cannot be eliminated—minimise the effect or risk.
>
> **Examples—conditions**
>
> 1 that the work site be lit from sunset to sunrise
>
> 2 that the work site be fenced

The Committee commends this as an example to be followed wherever feasible. It may be that in a particular instance there is good reason to leave a discretion unconfined, and the Committee notes that in this response the Attorney-General has gone on to indicate what matters might be prescribed and why it is desirable to be flexible.

To conclude, the Committee takes the position that discretion to take administrative action, or to make some delegated legislation, should not be conferred in open-ended language unless there is a specific justification for this form. It will then be a matter for the Assembly to consider in the debate on the relevant bill.

AUDITOR-GENERAL STANDING ACTING APPOINTMENT 2013

The Committee would like to comment on the response of the Chief Minister dated 30 April 2013 regarding the Auditor-General Standing Acting Appointment 2013.

In Scrutiny Report No 5, the Committee drew attention to the fact that this instrument was not accompanied by an explanatory statement. While noting that there was no formal requirement for an explanatory statement, the Committee noted its preference that explanatory statements be provided in relation to instruments.

In the response, the Chief Minister states:

> ... in this particular instance the instrument contained all relevant information and an explanatory statement could have provided no additional information or value.

The Chief Minister goes on to say:

> If the Committee does decide that explanatory statements to instruments of appointment are required, it would be useful to understand what extra information should be contained in the explanatory statement in straight forward instruments.

The Committee notes that its requirements in relation to explanatory statements, including requirements in relation to instruments of appointment, are set out in the Committee document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf). The document states:

> **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".
>
> Some appointments require that an appointee meet certain requirements (eg be legally qualified or be a doctor) or not have certain disqualifying attributes (eg, in some circumstances, people must not be appointed to positions if they are legally-qualified or if they are doctors). These requirements are usually mandatory (demonstrated by the use of the word "must"). In both situations, it assists the Committee (and the Legislative Assembly) is the Explanatory Statement for the appointment contains a statement that the person appointed has a required qualification or attribute or does not have a disqualifying qualification of attribute.
>
> Another issue has arisen in relation to appointments that require that a person nominated by a particular body (eg a professional association) be appointed or that a person be appointed from a list of persons submitted by a particular body. These requirements are usually mandatory (demonstrated by the use of the word "must"). In these situations, it assists the Committee if the Explanatory Statement for an instrument of appointment indicates that the relevant requirements have been met. Recently, the Committee has commented on Explanatory Statements in which, say, there is a statement that the person appointed is the nominee of a particular body when, in fact, the requirement is that a person be appointed from a list of persons submitted by a particular body. The point is that the Committee (and the Legislative Assembly) is assisted if the Explanatory Statement correctly recites the relevant requirement and indicates that the requirement has been met.
>
> Some instruments of appointment rely on the generic appointment provisions contained in sections 78 and 79 of the *Financial Management Act 1996*. In short, these provisions apply (in the absence of entity-specific provisions in individual Acts) to the appointment of members and chairs/deputy chairs of territory authorities with governing boards. If these provisions apply to

an appointment, it is preferable that the correct provision is identified. If an instrument merely appoints a person as a member of a governing board, for example, there is no need for the instrument to refer to the section that deals with the appointment of chairs and deputy chairs (ie section 79). See also the discussion below on the over-reliance on "templates" and "precedents".

The statement above reflects the Committee's views on the contents of explanatory statements in relation to instruments of appointment.

Steve Doszpot MLA
Chair

2 May 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 2, dated 4 February 2013
Directors Liability Legislation Amendment Bill 2012

Report 3, dated 25 February 2013
Disallowable Instrument DI2013-5 - Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 1)

Report 5, dated 4 April 2013
Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I am writing in response to comments made by the Standing Committee on Justice and Community Safety in Scrutiny Report No 1 of 29 November 2012 in relation to the Long Service Leave (Portable Schemes) Security Work Declaration 2012 ('the Disallowable Instrument').

I appreciate the Committee's efforts in reviewing the Disallowable Instrument and would like to thank it for its comments.

As the Committee noted, the Disallowable Instrument had the effect of declaring that work in the security industry was not work in the security industry for the purposes of the *Long Service Leave (Portable Schemes) Act 2009* (the Act) between 23 November 2012 and 31 December 2012.

As you would be aware, the *Long Service Leave (Portable Schemes) (Security Industry) Amendment Act 2012* (the amending Act) was passed by the Assembly on 8 May 2012 and provided for a portable long service leave scheme for the security industry.

Under section 79 (1) of the *Legislation Act 2001*, if a postponed law has not commenced within 6 months beginning on its notification day, it automatically commences on the first day after that period. The amending Act was expressed to commence by written notice, however due to the timing of the passage of the amending Act, section 79 (1) of the Legislation Act was given effect and the amending Act was commenced by default on 23 November 2012.

The unintended effect of this was that employers in the security industry would have become liable for all the requirements of the provisions of the amended Act from that date rather than the announced and industry agreed date of 1 January 2013.

ACT LEGISLATIVE ASSEMBLY

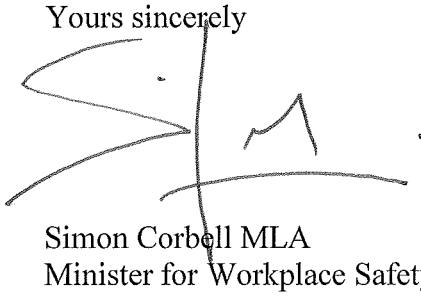
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535
Email corbell@act.gov.au Twitter: @SimonCorbell Facebook: www.facebook.com/simon.corbell

Advice was sought from the Government Solicitor's Office and the Parliamentary Counsel's Office and due to timing and process issues and it was generally agreed that a declaration under section 11 of the Act would provide the outcome sought and remove the unintended additional burden on employers.

As this was a remedy to a technical issue and to avoid and possibility of confusion or uncertainty for employers in the security industry, no further detail was provided in the explanatory memorandum.

Thank you again for the Committee's comments.

Yours sincerely



Simon Corbell MLA
Minister for Workplace Safety and Industrial Relations

8.4.13

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I am writing in response to the comments of the Standing Committee on Justice and Community Safety (the Committee) in Scrutiny Report No 5, 4 April 2013 on the Road Transport Legislation Amendment Bill 2013 (the Bill).

I note the Committee's comments in relation to the human rights impact of the Bill. The Committee will be aware that this Bill retains the policy underpinning legislation passed by the Assembly last year, the *Road Transport (General) (Infringement Notices) Amendment Act 2012* (the 2012 Act), while providing a more efficient administrative and operational framework in which to give expression to that policy.

Report under section 38 of the Human Rights Act 2004
I thank the Committee for its observations on engagement of this legislation with the provisions of the *Human Rights Act 2004*. I note that the Committee did not express a view in relation to sections 9(1) or 18(1) of that Act.

Concession cards (s 31A (4) (b))
The Committee has commented that clause 10 of the Bill provides that an application for an infringement notice management plan (INMP) must include information about 'a card prescribed by regulation that is current', if the person is the holder of such a card. Amendment [1.26] in schedule 1 of the Bill effectively relocates the detail of the relevant cards from the *Road Transport (General) Act 1999,* which was inserted by the 2012 Act, to the Road Transport (Offences) Regulation 2005. The Explanatory Statement set out the reasons for relocating this provision to the Offences Regulation, which in summary was to provide a faster, more responsive mechanism for keeping the list of recognised cards up to date. The Committee has suggested inserting the word "concession" into the regulation making power in new section 31A (4) (b).

The Government does not consider that is it necessary to add this word. While 'concession card' is a term in common use to describe a range of cards which entitle the holders to various discounts or services, it does not have a specific legal meaning in the context of this legislation. It is desirable to include some flexibility as to the range of cards that may be prescribed over time, to take account of future changes in the way that government financial assistance may be made available to people in

hardship – which may be through direct service provision, concessional rates, payments, rebates or other mechanisms. 'Concession' could be too narrow a term to encompass the range of cards to be prescribed.

'Circumstances' prescribed by regulation (s 31A (4) (d))

The Committee has commented on the width of the power to prescribe that an INMP application must include, in addition to certain matters specified by the legislation, 'anything else prescribed by regulation' and has asked whether it could be appropriate to include words of limitation. The Government believes that it is not necessary to include limiting words in relation to the power to prescribe additional matters for inclusion in applications. Firstly, the power to prescribe must be consistent with the legislative framework in which it operates, so that a requirement that is inconsistent with the Act or irrelevant to the exercise of the power would be outside the regulation making power. Secondly, the Assembly has the capacity to review regulations through the tabling and disallowance processes.

In terms of that matters that are anticipated to be prescribed, I can advise the Assembly that it is anticipated that future regulations made under this power would relate particularly to the administrative or operational details relevant to a person's proposed participation in a work or social development program.

Requiring information about the WDP provider will assist the responsible director-general to decide whether the applicant is suitable to participate in that program (ss 31B (4), 31C)Decisions by the Director-General are internally reviewable. It is appropriate that there be some flexibility, as this new option is implemented, to identify the type of information that will need to be provided for the purpose of making a decision about whether to allow an application. To an extent, the details of proposed regulations will depend on the information that is available from the various organisations who will be approved to provide the programs, and the way in which that information can be provided to the authority and director-general.

Guidelines (s 31C (5), (6))

The Committee commented on the proposed guideline making power in clause 10 of the Bill, which provides that the responsible director-general (defined in clause 6 to mean the director-general responsible for the *Crimes (Sentence Administration) Act 2005,* part 6.2) may make guidelines about the exercise of the director-general's functions under proposed section 31C (4) The Committee asked whether these Guidelines should be in the form of a disallowable instrument rather than a notifiable instrument.

The Guidelines must be consistent with the Act and any supporting regulations. As such, they will not create new rights or limit the existing legal rights or obligations of an applicant arising under the Act and its Regulations. As such, the guidelines are essentially administrative and procedural in nature.

The proposal to include them as a notifiable instrument is an amendment made by this Bill to the scheme introduced in 2012, and provides an additional layer of transparency and accountability in the administrative decision making process for the scheme. Given the non-determinative nature of the subject matter, the Government does not consider that it is necessary for administrative Guidelines of this nature to be made as disallowable instruments.

I thank the Committee for drawing these matters to my attention and trust that these comments address the Committee's questions.

Yours sincerely

Simon Corbell MLA
Attorney-General

8.4.13

Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Legislative Assembly
CIVIC SQUARE ACT 2600

Dear Mr Doszpot

I refer to the Standing Committee on Justice and Community Safety's *Scrutiny Report No 3* of 2013 and to comments made by the Committee in relation to the *Public Sector Management Amendment Standards 2012 (No 3) (DI2012-238).*

Those standards, while having retrospective application, are non-prejudicial provisions.

The elements of those standards relating to the ACT Public Service (ACTPS) Code of Conduct and ACTPS Values require the Commissioner for Public Administration to make a Code – which has occurred – and enunciate four values developed in consultation with ACTPS staff during 2011-12 intended to provide the foundation for proper standards of conduct and behaviour across the ACTPS. In this sense, both the Values and the Code itself are deliberately forward looking and establish positive expectations about the behaviour of staff in their dealings with the community and their colleagues.

DI2012-238 has no impact on the ACTPS framework or procedures for consideration of matters of misconduct or on code of conduct matters that were underway at the time the instrument was made or taken to have commenced. Both before and after the making of *DI2012-238*, misconduct by officials is determined in the context of section 9 of the *Public Sector Management Act 1994* under procedures set out in relevant industrial agreements which take account of general principles of public administration including in relation to the affording of natural justice.

I note the Committee's commentary in relation to the provision of information in explanatory statements in relation to retrospective operation, and have asked that this requirement be re-emphasised as part of ongoing training in such processes within the ACTPS.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Chief Minister

08 APR 2013

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030
Email: gallagher@act.gov.au Facebook: KatyGallagherMLA Twitter: @katyGMLA

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety Scrutiny of Bills and Subordinate Legislation (the Committee) Report No. 3 of 2013 (the Report), which sought my comment on Disallowable Instrument DI2012-246 *Road Transport (General) Withdrawal of Infringement Notices Guidelines 2012 (No 1)* (the Disallowable Instrument). I apologise for the delay in responding to the Report.

The Report raised three issues regarding the drafting of item 1.8 of schedule 1 of the Disallowable Instrument. First, the Committee asked how an infringement notice can be issued in the circumstances when section 53(5) of the *Road Transport (General) Act 1999* (the Act) applies.

In response, I can advise the Committee that section 53 (5) provides that the administering authority must not proceed against a person for an offence under the road transport legislation where the person disputes liability for an infringement notice offence and the administering authority fails to provide the Magistrates Court with information regarding the offence within 60 days after the person disputes the offence. For section 53(5) to apply in relation to a person, the person must first have been issued with an infringement notice for the relevant offence. It is this infringement notice to which the withdrawal guideline referred to in the Scrutiny Committee's comments would apply.

The person's ability to object to the relevant infringement notice is dependent on the person first being made aware of the alleged offence, by being issued with the infringement notice for that offence. If the person then disputes the offence, and the administering authority fails to act within the required time frame, then section 53(5) prevents the administering authority from taking further action in relation to that infringement notice. For this reason, it is consistent with section 53 (5) to include item 1.8, so that infringement notices are routinely withdrawn where section 53(5) of the Act applies. The guideline is included to provide users of the Disallowable Instrument with a single comprehensive set of circumstances in which withdrawal action may be taken, consistent with the Act under which it is made.

The Report then queried whether the wording "the administering authority should withdraw the infringement notice" is properly a "comment, exceptions [or] other limitations", as opposed to being an instruction to the administrative authority. In response, I can advise the Committee that the wording used in item 1.8 is consistent with the drafting approach taken in other items in the Disallowable Instrument.

Finally, the report queried the use of "should", as opposed to "must", in the context of the administering authority withdrawing the infringement notice offence when it has failed to respond to a notice of objection within the timeframe set out in section 53(5) of the Act. The use of "should" is consistent with the wording used throughout the Disallowable Instrument. Under section 38 (3) of the Act, the Guidelines are binding on the administering authority. Accordingly, in this context "should" applies in the directive rather than discretionary sense. Further, as explained in relation to the Committee's first point, item 1.8 both reflects the purpose of, and should be read with, section 53(5) of the Act. That section prevents the administering authority from continuing to take action in relation to an infringement notice offence when it has failed to respond to an objection within a timely manner. In this context, it is not open to a decision maker to fail to withdraw an infringement notice once it that decision maker is satisfied that, as a matter of fact, section 53 (5) applies in relation to that notice.

I thank the Committee for its consideration of the Disallowable Instrument and trust that these comments address the Committee's concerns.

Yours sincerely

Simon Corbell MLA
Attorney-General

22.4.13

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I note the Standing Committee on Justice and Community Safety (the Committee) has released Scrutiny Committee Report No. 5, 4 April 2013 (the Report) containing comments on the *Retirement Villages Regulation 2013* (the Regulation).

Strict liability offences

The Committee notes that there are two strict liability offences provided for under the Regulation and that the explanatory statement does not provide justification for the two offences being offences of strict liability.

The offences are provided for in sections 50 and 52 of the Regulation and relate to the treatment and disposal of uncollected goods (including personal documents) left at retirement village premises by a former occupant.

Following reconsideration of these offences, I agree that it is desirable to provide that the element of intent should be established in order to prove an offence against section 50 or 52 of the Regulation. Accordingly, I will be bringing forward amendments to the Regulation which will omit references to strict liability in the Regulation.

It is ACT Government policy that laws relating to contracts and arrangements entered into between parties should not generally criminalise behaviour by either party to the contract or arrangement.

The *Retirement Villages Act 2012* and the *Retirement Villages Regulation 2013* are however based on the NSW scheme which prescribes penalties for certain behaviours. The Regulation reflects this approach. Consideration was given to each offence before the regulation was enacted, and to the general enforcement scheme. The relevant offences relate to dealings with all uncollected goods,

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0000 Fax (02) 6205 0535
Email corbell@act.gov.au Twitter: @SimonCorbell Facebook: www.facebook.com/simon.corbell

including personal documents such as passports and drivers licences. Weight was also given to making these offences strict liability to facilitate applying an infringement notice scheme to them at a later time. In addition, the minor nature of the offences and low penalties mitigated any detriment to people likely to be caught by such an offence.

However, decisions about penalties and how they are enforced are very much a balancing act and I accept the Committee's recommendation in relation to these offences.

I thank the Committee for bringing this matter to my attention.

Yours sincerely

Simon Corbell MLA
Attorney-General

29.4.13

Katy Gallagher MLA

CHIEF MINISTER

MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
ACT Legislative Assembly
CANBERRA ACT 2602

Dear Mr ~~Doszpot~~ Steve

I am writing in response to the comments in the *Scrutiny Report Number 5 of 4 April 2013* on Disallowable Instrument DI2013-10, being the Auditor-General Standing Acting Appointment 2013.

The Committee has raised concerns that an explanatory statement was not provided when the disallowable instrument was submitted.

The general procedure for submitting disallowable instruments does not require explanatory statements. While, I recognise that in some circumstances an explanatory statement can provide further information for the Committee to consider, in this particular instance the instrument contained all relevant information and an explanatory statement could have provided no additional explanation or value.

With this in mind, I respectfully request that the Committee reconsider its preference for requiring explanatory statements for instruments of appointment.

If the Committee does decide that explanatory statements to instruments of appointment are required, it would be useful to understand what extra information should be contained in the explanatory statement in straight forward disallowable instruments.

I thank the Committee for bringing this matter to the Government's attention.

Yours sincerely

Katy Gallagher

Katy Gallagher MLA
Chief Minister

30 APR 2013

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0840 Fax (02) 6205 3030
Email: gallagher@act.gov.au Facebook: KatyGallagherMLA Twitter: @katyGMLA

100 CANBERRA