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

SCRUTINY REPORT 16

1 APRIL 2014

COMMITTEE MEMBERSHIP

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ROLE OF COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2013-14 (NO. 2)

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

APPROPRIATION BILL 2013-14 (NO. 2)

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

DUTIES (COMMERCIAL LEASES) AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Duties Act 1999* to introduce a premium-based method for assessing duty on commercial leases, being leases that have only a commercial purpose, or more than one purpose including commercial purposes.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2014

This is a Bill to amend a number of laws administered by the Directorate of Justice and Community Safety.

TERRITORY-OWNED CORPORATIONS AMENDMENT BILL 2014

This is a Bill to amend the *Territory-owned Corporations Act 1990* to exclude ACTTAB Limited from the application of the *Territory-owned Corporations Act 1990* in order to facilitate the sale of the company.

BILLS—COMMENT

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

PLANNING AND DEVELOPMENT (PROJECT FACILITATION) AMENDMENT BILL 2014

This is a Bill to amend the *Planning and Development Act 2007* to improve process efficiencies in the development assessment and Territory Plan variation process and facilitate the delivery of key Government projects. In particular, it would (i) allow the Territory Executive to vary the Territory Plan through a special precinct area variation; (ii) allow the Executive to declare certain development proposals to be projects of major significance to the Territory; (iii) allow a development proponent to lodge a development application that applies a draft Territory Plan variation; and (iv) in the impact track, allow simultaneous DA notification and public consultation on the attached Environmental Impact Statement (EIS).

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

The substantial issue arising under the Bill relates to the clauses that govern both merits and judicial review of decision made under the elements of the scheme of the Act that are proposed by the bill. There is also a question as to the adequacy of the provision for consultation between the Executive and the public, or to a more limited class, prior to the making of a decision to prescribe a special precinct area, to make a restriction declaration, or to declare that a development proposal is a project of major significance. These matters are dealt with in this report by reference to each of these stages.

Given that these decisions have high policy content, the Committee's particular comments relate to particular clauses that do not raise a policy question to any great degree.

Special precinct area variations

The Bill proposes to insert a new Part 5.3A into the Act to prescribe requirements for the variation of the Territory Plan to identify a special precinct area. At pages 3 to 16, the Explanatory Statement explains the scheme in careful detail.

Public consultation

As the Explanatory Statement states, the Executive "must be satisfied that the special precinct area would achieve a substantial public benefit. The Executive must assess the public benefit in light of public comments made on the special precinct variation".

The Committee has no comment to make about these provisions other than to refer the Assembly to the Bill and to the outline in the Explanatory Statement referred to above.

Access to justice

There are two aspects to this issue.

First, the Bill proposes to limit the scope for judicial review in regard to Executive decisions in respect of a special precinct variation. Such decisions are of an administrative character and would ordinarily be subject to review on legality grounds by the Supreme Court under remedies based on the common law (see section 34B of the *Supreme Court Act 1937*, and the *Court Procedures Rules 2006)*, or under the statutory means for review provided for in the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act). In substance, these alternative means for review do not differ in respect of the particular grounds upon which the Supreme Court might find the administrative action invalid. In both respects, the costs of seeking review do not differ; they are very expensive. There is one potentially significant difference. At common law, the starting point is that the person affected by the decision has no right to be given reasons for it, whereas such a person who can utilise the ADJR process can obtain reasons as a preliminary step; see section 13 of the ADJR Act. While this difference may not in many cases be significant once the matter gets to court, having a reasons statement will be useful in determining whether to seek review.

The ADJR Act specifies various classes of administrative decision that are excluded from review under the Act. Item 15 of Schedule 1 specifies certain decisions taken under the Planning and Development Act, and clause 54 proposes to add three classes relating to the amendments proposed in this Bill, being:

- a decision making, or forming part of the process of making, or leading up to the making of, a special precinct variation[;]

- a decision making, or forming part of the process of making, or leading up to the making of, a significant project declaration[; and]
- a decision under chapter 7, chapter 8 or chapter 9 in relation to a project that has been declared by the Executive to be a project of major significance.

At this point, the committee is concerned with the effect of the first dot point. Its effect is that a person cannot seek an ADJR remedy in respect of these decisions; nor could they seek reasons for the decision. They could however seek the common law based remedies. The inability to obtain reasons is noted above.

Given that common law based judicial review – with its consequent delays and expense – is still available, there is a question as to the utility of excluding ADJR relief. This may or may not make it more difficult to obtain a common law based remedy.

The Committee draws this matter to the attention of the Assembly.

The availability of a common law remedy is proposed to be limited by clause 85M, which states that "[a] person may not start a proceeding in a court in relation to a special precinct variation more than 60 days after the variation is made".

In contrast, it should be noted that ADJR relief must be sought within 28 days of reasons for the decision being given to the person affected, or of the notification of the decision; see subsection 10(2) of the ADJR Act. The Supreme Court may however allow further time (section 10(1)). An application for a Supreme Court remedy based on the common law "must be filed in the court not later than 60 days after the day when the grounds for the grant of the relief sought first arose" (Court Procedure Rules subrule 3557(2)). The court "may extend the time mentioned in subrule (2) only in special circumstances" (subrule 3557(3)).

Clause 85M is then an unusual restriction on the availability of a Supreme Court remedy based on the common law in that it does not permit the court to extend time. An issue to be considered is whether clause 85M should also provide for a court to extend the time limit of 60 days.

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

Secondly, there is the matter of the scope for review of decision with respect to particular development approvals within a special precinct area. The policy reflected in the Act is stated in the Explanatory Statement:

> The development assessment and approval process, with some exceptions for relatively minor matters, is subject to ACAT merit review by both the proponent and third parties.
>
> This topic is regulated by chapter 13 of the Act; see in particular sections 407 (definition of "reviewable decision") and 408. By clause 53 of the Bill, the definition would be amended to exclude "a decision under chapter 7, chapter 8 or chapter 9 in relation to a development proposal that has been declared by the Executive to be a project of major significance under section 137H (Declaration of projects of major significance)".

The Explanatory Statement offers this justification:

> In order to expedite the development assessment and approval process, the Bill removes merit review by the ACAT for development applications on land in special precinct areas established by a special precinct variation. This removes a possible element of uncertainty in relation to developments in special precinct areas and reduces potential costs and delays associated with litigation. This is not an unprecedented exclusion. The Planning and Development Act and Planning and Development Regulation exclude a number of other development areas from ACAT merit review including town centres, industrial areas and the Kingston Foreshore.

It is also noted that "[d]evelopment approvals within the special precinct area will still be subject to review by the Supreme Court under common law and under the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act)". This justification might be considered to have little weight given that judicial review is much less efficacious – being limited to a legality review rather than merit review – and is vastly more expensive.

The Explanatory Statement also considers whether there might be an incompatibility between clause 53 and the right to take part in the conduct of public affairs stated in HRA paragraph 17(a), and/or the right to a fair trial in HRA subsection 21(1). It says:

> case law indicates that human rights legislation does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. For example, in *Thomson v ACT Planning and Land Authority* [2009] ACAT 38, the Commissioner commented, "...providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights." [*Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at para 99]

The Committee draws these matters to the attention of the Assembly.

<u>Restriction declarations in special precincts</u>

The Explanatory Statement at 11 outlines the nature of this element of the Bill, and justifies its inclusion:

> The bill provides that a restriction may be made for special precinct variations. A restriction declaration means that the *Heritage Act 2004* and *Tree Protection Act 2005* (apart from declared sites and registered trees) do not apply to development approvals for these matters. A restriction declaration also means the Heritage Council and Conservator of Flora and Fauna do not provide advice on development applications.
>
> This amendment is not a significant departure from the existing planning system. The Planning and Development Act already permits the planning and land authority to approve development applications (DAs) contrary to advice provided by the Heritage Council or the Conservator of Flora and Fauna (Conservator) on tree protection in limited circumstances. The Act permits the planning and land authority to approve a DA inconsistent with advice given if satisfied that any applicable guidelines and realistic alternatives to the proposed development have been considered, and the decision to approve is consistent with the objects of the Territory Plan (sections Sections 119(2) and 128(2)). However Conservator advice on a registered tree or declared site must be complied with in all circumstances (sections 119(3) and 128(1)(b)(iii)).

The Committee draws this matter to the attention of the Assembly.

Projects of major significance

The Bill introduces a new process for the Executive to declare certain development proposals to be projects of major significance to the Territory. At pages 17 to 22, the Explanatory Statement explains the scheme in careful detail.

Access to justice

The issues that arise here are identical to those just discussed in relation to special precinct variations. By clause 53, the definition of "reviewable decision" for the purposes of specifying ACAT merits review is amended to exclude decisions under chapter 7 (Development approvals), 8 (Environmental impact statements and inquiries) or 9 (Leases and licences) in relation to a project that has been declared by the Executive to be a project of major significance under s137H.

The justification offered is identical to that noted above in relation to special precinct variations.

The Explanatory Statement also notes:

> The bill also excludes projects of major significance from review by the Supreme Court under the ADJR Act. Schedule 1, Part 1.1 of the Bill amends schedule 1, item 15, column 3 of the ADJR Act, which lists decisions to which the ADJR Act does not apply. The bill provides that the ADJR Act does not apply to a decision making or forming part of the process of making, or leading up to the making, of a significant project declaration. The bill also provides that the ADJR Act does not apply to a decision under chapter 7 (development approvals), chapter 8 ((Environmental impact statements and inquiries) or 9 (Leases and licences) in relation to a development proposal that has been declared by the Executive to be a project of major significance, other than a decision prescribed by regulation.

Furthermore,

> [t]he bill also places time restrictions on review of projects of major significance by the Supreme Court under its common law jurisdiction. New section 137M (Projects of major significance – time limit on bringing court proceedings) provides that a person may not start a proceeding in a court in relation to a significant project declaration more than 60 days after the declaration is made. A person may not start a proceeding in a court in relation to a development application to which a significant project declaration is in force more than 60 days after the day the development application is approved.

The justification offered is similar to that noted above:

> [t]hese restrictions are appropriate given the need to ensure that such projects that have been identified as projects of major significance to the community can be finalised as quickly as possible. The restrictions are proportionate given the proposed opportunity for extensive public and Legislative Assembly debate through the precinct declaration process. Further debate and challenge to the operation of the declaration through the courts is not necessary or appropriate.

The Committee draws these matters to the attention of the Assembly.

INFORMATION PRIVACY BILL 2014

This is a bill for an Act to regulate the handling of personal information (other than personal health information) by public sector agencies in the Territory.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference
Report under section 38 of the *Human Rights Act 2004*

Enhancement and limitation of the right to privacy (HRA section 12), and limitation of the right to freedom of expression (common law and HRA section 16)

Section 12 of the *Human Rights Act 2004* states a right to privacy, a particular aspect of which is the right of a person "not to have his or her privacy ... interfered with unlawfully or arbitrarily". The Committee agrees with the Explanatory Statement that the Bill

> supports and enhances the right to privacy by ensuring that there is a clear framework setting out how ACT public sector agencies collect, use, disclose and otherwise manage personal information.
>
> Ensuring there is a comprehensive and clearly identifiable privacy regime in the ACT means that individuals are protected from arbitrary or unlawful breaches of an individual's right to privacy. If breaches do occur, the Information Privacy Bill establishes mechanisms for the independent investigation and resolution of complaints and an avenue for redress through the courts.

The Explanatory Statement acknowledges that clauses 24 and 25 may impose a limitation in the right to privacy by exempting some public sector agencies from the operation of the Act. It then offers a justification, referring to HRA section 28. The Committee refers the Assembly to the Explanatory Statement pages 4-5. The Explanatory Statement also acknowledges that the scheme in the Bill may limit the HRA right (section 16) to freedom of expression, and offers a justification; see at pages 6-7.

The Committee considers that clause 43 may be seen as a serious derogation from the right to reputation (HRA paragraph 12(b)). There is also a privacy issue arising out of clause 44. These matters are dealt with below.

Provision of a means for determining whether there has been an interference with an individual's privacy

By clause 11, an act or practice of a public sector agency will be an interference with the privacy of an individual where it breaches a Territory privacy principle in relation to personal information about the individual, or breaches a TPP code that binds the agency in relation to personal information about the individual. A complaint in this regard may be made to an Information Commissioner (clause 34). The Commissioner may decide not to deal with the complaint if reasonably satisfied of one or more of a range of matters.

One such ground is that "dealing, or further dealing, with the act or practice is not warranted having regard to all the circumstances" (paragraph 39(d)). This ground is cast widely, and on its face might be used to affect significantly the efficacy of the complaint procedure. Given the other grounds, and in particular the ground for refusal that "the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith" (paragraph 39(c)), the ground in paragraph 39(d) might be invoked even where there is substance to the complaint.

There is no explanation in the Explanatory Statement as to why paragraph 39(d) is included. It may be that it is envisaged that the volume of complaints may be such that a selection between them might be necessary. Taking the TPPs and the TPP codes into account, there might be hundreds of discrete grounds for making a complaint. Given that there is no costs discipline that might be imposed on a complainant, the Commissioner might be swamped with complaints.

If that is the concern, then a more specific ground for refusal to deal with complaints might be stated.

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

Natural justice to an agency employee identified (or identifiable) in a report by the Commissioner to the Minister of a serious or a repeated interference with a complainant's privacy: HRA paragraph 12(b)

The Explanatory Statement notes that clause 43

> provides the Information Privacy Commissioner with a discretion to give a report to the Attorney General in situations where the Commissioner is reasonably satisfied that a public sector agency, or contracted service provider, has done an act or engaged in a practice which is a serious interference with the privacy of an individual, or where the agency has repeatedly done an act, or engaged in a practice that is an interference with the privacy of one or more individuals.

The Minister must then table the report in the Legislative Assembly within six sitting days.

An exercise of this power could be seriously damaging to the reputation and career of an agency employee who is identified in, or who is identifiable from, the report. The clause engages HRA paragraph 12(b) which provides that a person has the right "not to have his or her reputation unlawfully attacked" and on the face of it is incompatible with that right.

In this kind of case, it is usual to provide a mechanism whereby the individual affected – here the agency employee – is notified of the intention to make an adverse comment, and offered an opportunity to respond. In addition, it might be provided that the report to the Assembly must not identify any person, or be such that a person could be identified.

There may also be circumstances where a person who made a complaint to the Commissioner might not wish that even its subject matter be the subject of a report. There might also be reason to consider taking account of this person's interests.

If it intended to retain this clause, the Committee recommends that the Minister provide a full justification according to all the elements of the framework in HRA section 28.

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

The disclosure of information provided in confidence and the right to privacy (HRA section 12)

Clause 44 provides that the Information Privacy Commissioner may also ask anyone to give the Commissioner information so that the Commissioner may deal with a privacy complaint. A public sector agency or public official for the agency must comply with a request for information by the Commissioner.

This is a very widely expressed power, and there is a question whether it should be limited to protect the privacy or other interests of persons.

There is no limit set to the kind of information that might be sought, except that it might assist in the Commissioner's dealing with a complaint. On the face of it, the information might have nothing to do with the exercise of the public official's functions, or the functions of an agency. The information might be such that a person might be able to claim that he or she provided it to someone (not necessarily to the agency or a public official) in confidence. The common law protection of information that is given in confidence is an important element of the extent to which the common law protects privacy, but would be displaced by subclause 44(2). There might be circumstances where the public official or another person might be able to claim that he or she has the ability to resist disclosure on the grounds of client legal privilege or the privilege against self-incrimination.

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

Adequacy of the remedy for an interference with privacy

By clause 45, where the Information Privacy Commissioner is reasonably satisfied after dealing with a privacy complaint that there has been an interference with the complainant's privacy, the Commissioner must give written notice to the complainant and respondent telling them this. The Commissioner must also tell the complainant that they may apply to a court for an order. By clause 46, within six months of a notification by the Commissioner, a complainant may apply to a court to make an application for one or more of the orders listed in clause 47.

The clause 47 orders are adequate to remedy an interference, and indeed include an order "that the complainant is entitled to a stated amount, of not more than $100 000, to compensate the complainant for economic loss or damage suffered by the complainant because of the act or practice complained of" (paragraph 47(a)(iv)).

Resorting to court might be a very costly exercise, and the vagueness of the standards in the TPPs (and perhaps in the codes) will mean that it will be very hard in many instances to predict whether a court will find the complaint substantiated and, if so, what order the court will make. Many complainants will be dissuaded from resorting to court-enforcement through fear that a loss would lead to a significant loss of money, in their own costs and the costs of the government.

An issue arising is why the Commissioner, having found an interference, should not have power to make an order of a kind stated in clause 47. (The exception might be the case of an order of a kind in paragraph 47(a)(iv).) If that is unattractive, then perhaps ACAT might be the enforcement body.

The question also arises as to what court a person might resort. This would have a bearing on the costs of court action and perhaps as to the remedies that might be available.

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

A particular issue is the scope of the power of a court to make "an order that the complainant be reimbursed for expenses reasonably incurred in relation to making the complaint" (paragraph 47(d)). This does not appear to cover expenses reasonably incurred in relation to seeking a court order.

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

Has there been an inappropriate delegation of legislative power? – term of reference (3)(d)
Is the delegation of legislative power insufficiently subject to parliamentary scrutiny? - term of reference (3)(e)

Exclusion of agencies, or particular agency functions, from the scheme

By paragraph 24(d), the Executive, by regulation, may provide that the proposed Act not apply a public sector agency. This is power that could be used to significantly affect the utility of the scheme of the bill. Similarly, paragraph 25(1)(f) would permit the Executive by regulation to prescribe that the scheme did not apply to certain acts and practices of a particular agency.

Any regulation would be disallowable, but consideration might be given to providing that a regulation did not take effect until approved by resolution of the Assembly.

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

The TPP codes

Part 7 of the Bill provides for the development of codes of practice about information privacy. A TPP code is a code of practice about information privacy, and it must set out how one or more of the TPPs are to be applied or complied with. It may provide for other matters, such as stating additional obligations that go beyond the requirements of a TPP but which the agencies subscribing to the TPP code are willing to accept.

TPP codes may be developed by a public sector agency, in consultation with any other entity the agency considers appropriate. Agencies can also develop an amendment to an existing approved code. The public sector agency must publish the draft TPP code, or draft amendment on the agency's website or in a daily newspaper and invite submissions within a stated period of at least 28 days. The agency must consider any submissions made within this period. A TPP code which is to be adopted by the public sector agency after consultation is a notifiable instrument. The Explanatory Statement notes that "[b]y requiring the agency to table the code as a notifiable instrument there is opportunity for public scrutiny and oversight of the proposed". But it is also a consequence that the Legislative Assembly has no power to disallow a TPP code.

The TPP codes will be significant pieces of legislation, and the starting point is that they should be disallowable. The Committee recommends that the Minister state why it would not be feasible to make the TPP codes disallowable.

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 DI2014-8 being the Public Place Names (Chisholm) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a public park in the Division of Chisholm.**

Disallowable Instrument DI2014-9 being the Public Place Names (Weetangera) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a public park in the Division of Weetangera.**

Disallowable Instrument DI2014-10 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Certain Small Customers) Terms of Reference Determination 2014 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the provision of a price direction for the supply of electricity to certain small customers.**

Disallowable Instrument DI2014-11 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2014 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **and section 46 of the** *Legislation Act 2001* **repeals DI2013-244.**

Disallowable Instrument DI2014-12 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2014 (No. 1) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person as an Independent Chair of the Long Service Leave Governing Board.**

Disallowable Instrument DI2014-13 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2014 (No. 2) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave Governing Board, representing employer organisations.**

Disallowable Instrument DI2014-14 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2014 (No. 3) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Long Service Leave Governing Board, representing employee organisations.**

Disallowable Instrument DI2014-15 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2014 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2013-224 and approves specified ACTTAB Limited Agencies as bookmaking venues for the purposes of the Act.**

Disallowable Instrument DI2014-16 being the Public Trustee (Investment Board) Appointment 2014 (No. 1) made under section 48 of the *Public Trustee Act 1985* **appoints a specified person as a member of the Public Trustee Investment Board.**

Disallowable Instrument DI2014-17 being the Taxation Administration (Amounts payable-Utilities (Network Facilities Tax)) Determination 2014 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-276 and determines the rate for the calculation of Utilities (Network Facilities tax) payable under the Utilities (Network Facilities Tax) Act 2006.**

Disallowable Instrument DI2014-18 being the Road Transport (General) Application of Road Transport Legislation Declaration 2014 (No. 1) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the National Capital Rally, Test Events, Corporate Events and Media Events.**

Disallowable Instrument DI2014-19 being the Public Place Names (Canberra Central and Majura Districts) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends DI1992-161 to correct a discrepancy regarding a road in the Division of Fyshwick and determines the name of a road in the Canberra Central and Majura Districts.**

Disallowable Instrument DI2014-20 being the Public Place Names (Molonglo Valley District) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a hill in the District of Molonglo Valley.**

SUBORDINATE LAWS—NO COMMENT

The Committee has examined the following subordinate law and offers no comment on it:

Subordinate Law SL2014-3 being the Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014 made under the *Magistrates Court Act 1930* **enables infringement notices to be issued for offences against the Animal Welfare Act 1992.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- Minister for Racing and Gaming, dated 12 March 2014, in relation to comments made in Scrutiny Report 14 concerning the Totalisator Bill 2013 (attached).
- Attorney-General, dated 19 March 2014, in relation to comments made in Scrutiny Report 14 concerning the Births, Deaths and Marriages Registration Amendment Bill 2013 (attached).
- Minister for Health, dated 28 March 2014, in relation to comments made in Scrutiny Report 14 and 15 concerning subordinate legislations; Disallowable Instrument DI2013-270—Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2013 (No. 1) and Disallowable Instrument DI2014-4—Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2014 (No. 1) (attached).

The Committee wishes to thank the Minister for Racing and Gaming, the Attorney-General and the Minister for Health for their helpful responses.

Those responses provided to the Committee in a format which meets Web Content Accessibility Guidelines 2.0 (WCAG 2.0), and indicated as "attached", are reproduced at the end of this report.

Steve Doszpot MLA
Chair

1 April 2014

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 14, dated 18 February 2014

Road Transport (Alcohol and Drugs) Amendment Bill

Report 15, dated 11 March 2014

Disallowable Instrument DI2013-284 - Education (Non-Government Schools Education Council) Appointment 2013 (No. 4)
Disallowable Instrument DI2013-313 - Official Visitor (Corrections Management) Appointment 2013 (No. 1)
Disallowable Instrument DI2013-314 - Official Visitor (Corrections Management) Aboriginal and Torres Strait Islander Appointment 2013 (No. 1)
Disallowable Instrument DI2013-316 - Climate Change and Greenhouse Gas Reduction (Climate Change Council Membership) Appointment 2013 (No. 1)
Disallowable Instrument DI2013-325 - Official Visitor (Children and Young People) Aboriginal and Torres Strait Islander Appointment 2013
Disallowable Instrument DI2013-326 - Official Visitor (Disability Services) Appointment 2013 (No. 1)
Disallowable Instrument DI2013-327 - Official Visitor (Disability Services) Appointment 2013 (No. 2)
Disallowable Instrument DI2013-328 - Official Visitor (Housing Assistance) Appointment 2013
Lifetime Care and Support (Catastrophic Injuries) Bill 2014
Rail Safety National Law (ACT) Bill 2014

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

MEMBER FOR BRINDABELLA

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 Scrutiny Report 14 provided by the Standing Committee on Justice and Community Safety on 18 February 2014, which provides comment on the proposed Totalisator Bill 2013 (the Bill).

In responding to the report, I make the following overarching observations. A key objective of the regulation of totalisators is to ensure that the general public is protected from any issue that may arise due to the integrity of the totalisator being compromised. This includes the infiltration of the industry by criminal elements. An equally important purpose of regulation is to minimise harm from problem gambling. This Bill, addressing the regulation of totalisator activities in the ACT, is part of, and consistent with, the ACT's suite of racing and gaming legislation. It provides appropriate and proportionate powers aimed at achieving these important objectives and is to be applied alongside the *Gambling and Racing Control Act 1999*.

The totalisator licensee is analogous to the casino licensee and as such similar strict regulatory safeguards must be in place. The licensee is an entity and not an individual and human rights considerations need to be viewed in that context. I note also that a Compatibility Statement under the *Human Rights Act 2004* (HRA) has been issued by the Attorney General for the Bill.

Conferral of administrative powers

The Committee asks whether consideration might be given to inserting in each case an indication of the matters relevant or irrelevant to the exercise of the discretionary power.

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I would like to note at the outset that these provisions were drafted in consideration of a fundamental principle of administrative law, in that powers are exercised with due regard to their conferring statute. As Chief Justice Robert French AC, Chief Justice of the High Court (in a speech on 6 July 2012) stated "there is no such thing as unfettered discretion. Official discretions conferred by statute must be exercised consistently with the scope, objects and subject matter of the statute."

Accordingly, any power conferred on the Minister under the Totalisator Bill will be limited to matters reasonably relating to the operation of a totalisator business.

Given the diverse nature of the totalisator industry and its globalisation the legislation must provide the Minister with the capacity to be responsive to emerging market developments. The Bill provides flexibility to ensure that appropriate conditions can be placed on the licence to respond to unforeseen issues, which may be necessary to avoid risks to consumer protection or to uphold the integrity of the industry. However, as provided for in the Bill, the totalisator licence is exclusive and therefore the reach of the Minister's power in this regard is limited to the licensee.

There is also an inherent restraint on exercising the power to place conditions on a licence. Should the conditions be considered too onerous, a licensee could surrender the licence – an action which would have revenue impacts for the Territory. In addition, procedural fairness is awarded to the licensee (under clause 17) where a proposed amendment would have a material monetary impact on the licensee.

Scrutiny consideration of section 22 of the *Casino Control Act 2006* is relevant here. The *Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report 20*, dated 12 December 2005, reviewed section 22 and the Committee noted that a number of clauses of the Bill conferred administrative powers in terms that were undefined. The report notes

> "*However, the exercise of any of these powers is reviewable (see clause 137), and thus the notice given to the person affected of an exercise of the power would state specific reasons for the decision, (this is the effect of clause 139). The Committee raises no concern about these powers.*" [emphasis added]

The Totalisator Bill has identical provisions as those commented on by the 2005 Committee, see clause 16 – licence conditions, clause 64 - meaning of reviewable decision and clause 66 - applications for review. As a totalisator licensee is analogous to the casino licensee it is appropriate that similar provisions be applied as legislated in the *Casino Control Act 2006*, specifically given that those provisions were considered by the Committee post the HRA being enacted.

Notwithstanding the above, I have decided to put forward minor amendments to provide further clarification on certain powers in the Bill (see table provided at Attachment A).

For the remaining matters the Committee's comments are noted, but amendments are not proposed. These remaining matters relate to fundamental and legislated obligations of the ACT Gambling and Racing Commission (the Commission) under section 7 of the *Gambling and Racing Control Act 1999*; specifically, how the Commission must exercise its functions to promote consumer protection, minimise the possibility of criminal or unethical activity and reduce the risks and costs to the community and to the individuals of problem gambling.

A Revised Explanatory Statement will be tabled explaining that due to the nature and diversity of the gaming industry the range of powers provided for in the Bill are appropriate, proportionate to the risks involved and the only available means to provide the necessary safeguards.

Reasonable grounds for exercising powers

The Committee asks whether consideration might be given to inserting in each case a requirement that the power be exercised only where there are 'reasonable grounds' to consider the power should be exercised. Where appropriate, for clarification, I am proposing a number of amendments (outlined at Attachment A).

In some of the instances raised by the Committee, the provisions are already limited by the 'grounds' that may apply. This is specifically evident for the framework relating to disciplinary action which must be read in conjunction with other clauses of the Bill. For example, clause 45 prescribes the 'grounds' for disciplinary action against a licensee.

Gambling is a highly regulated industry due to the fact that unforeseen issues can arise which can impact consumer protection and may expose the industry to infiltration by criminal elements of society. Therefore, the Committee's suggested amendments will not be applied where to do so would hamper the regulatory function of the Commission. This is also addressed in the Revised Explanatory Statement.

Trespass on personal rights and liberties

The concerns raised by the Committee in relation to the right to privacy and reputation under section 12 of the HRA were covered in the Bill's Explanatory Statement. However, further justification will be provided in the Revised Explanatory Statement for these measures to ensure the justification is clear.

In developing the legislation, an assessment was made as to whether any less restrictive means were available to verify the identity of a person to be involved with the operation of a totalisator. Furthermore, consideration was given to the need for personal information. It was determined that there was no other means available to sufficiently ensure that the person was an eligible person to be involved in the operation of a totalisator. However, the eligibility testing is restricted to people at the highest level of the organisation, namely executive officers. The Commission's powers in this regard must only be exercised to fulfil the function of establishing a person's eligibility to be involved in the operation, management or administration of a totalisator.

The identity and behaviour of a person is fundamental to protecting the public and minimising exposure to criminal activities and influence. It is therefore considered that while this provision will engage section 12 (Privacy and reputation) of the HRA, due to the nature of the industry there is no other alternative means to achieve the required safeguards.

The Committee further asks whether consideration might be given to qualifying the obligation of a person to comply with a direction given under the subclause 28 (1) so that the person might claim that they have a 'reasonable excuse' of non-compliance.

Consideration was given to whether less restrictive means, such as a reasonable excuse for not providing the requested information, could be adopted. The regulatory framework for the gambling industry must be robust and able to minimise circumstances that may impact consumer protection and prevent unethical and criminal activity. The risks to consumer protection of allowing a person to be involved in the industry where they have not disclosed requested information is high and should not be underestimated.

An offence provision for non-compliance was considered, however, this would not achieve the necessary requirement for information being provided to the Commission. Accordingly, non-participation in totalisator activities is a necessary consequence of a failure to provide requested information. There is no less restrictive means available due to the nature of the industry and the fundamental requirement to ensure the industry's integrity and the Commission's legislated obligations.

I further note the Committee's expectation that reference is to be made in the Explanatory Statement to the application of defences in the Criminal Code, in particular the mistake of fact defence (Code section 36) and the defence of intervening act (Code section 39) in relation to the strict liability offence. I am happy to take the Committee's advice on this matter and the defences will be included in the Revised Explanatory Statement.

The Committee raised concern that the Minister had the ability to suspend a licence without notice (clause 43). I would like to thank the Committee for raising this issue and an amendment has been made to clause 42 of the Bill to provide a procedural fairness mechanism at the start of any process for issuing a direction. A further amendment has been made to clause 42 to make it clear that a direction may only be given where the Minister is satisfied that the integrity of the totalisator may be seriously compromised.

Clause 43 of the Bill will only be exercised in the rare circumstance of non-compliance with a direction. This is considered one of the most serious breaches under the Act. The power conferred by clause 43 is necessary given the potential consequences to the public should the integrity of the totalisator be compromised.

Finally, the Committee raised the issue whether the disciplinary action the Commission may take under paragraph 49(1)(c) [sic 46(1)(c)] should be classified as a "criminal proceeding" for the purposes of the HRA.

While I appreciate the concerns of the Committee, consideration was given to Practice Note 2 (Interim) of the Commonwealth Joint Committee on Human Rights during the development of this disciplinary penalty. In accordance with the Practice Note, the monetary amount takes into account the regulation of the specific industry, the nature of the industry sector being regulated and the relative size of the operation and the ability to pay. In the context of the licence that is being issued, the amount is disciplinary in nature and not criminal.

Furthermore, as a licensee is analogous to the casino licensee an identical monetary amount has been applied as legislated under the *Casino Control Act 2006*. I note that the disciplinary amount of $1,000,000 was enacted after the HRA without adverse comment.

I trust that the response addresses the Committee's comments in relation to the Bill. I thank the Committee for its comments and observations.

Yours sincerely

Joy Burch MLA
Minister for Racing and Gaming

12 March 2014

DETAILED RESPONSES - TOTALISATOR BILL 2013

SCRUTINY REPORT No 14 (18 February 2014)

Topic	Section	Amendment	Comments
Do any clauses of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? – term of reference (3)(c)			
Conferral of unfettered powers			***In each case the Committee asks the Minister whether consideration might be given to inserting in each case an indication of the matters relevant or irrelevant to the exercise of the discretionary function.***
	11(1)	No	Provision is limited by subsection 11(2) and must be read in-conjunction with sections 24 and 25.
	16	No	Chief Justice Robert French AC, Chief Justice of the High Court (in a speech on 6 July 2012) stated "*there is no such thing as unfettered discretion. Official discretions conferred by statute must be exercised consistently with the scope, objects and subject matter of the statute*." Accordingly, any power conferred on the Minister under the Totalisator Bill will be limited to matters reasonably relating to the operation of a totalisator business. The Minister must have the capacity to respond to emerging issues in a diverse industry facing increasing globalisation. The reach of the Minister's powers is limited as the totalisator licence is exclusive to one licensee. The ability of the licensee to surrender the licence should licence conditions be too onerous, with consequent revenue impacts to the Territory, will also operate as an inherent restraint on the exercise of the power. An identical provision is applied under section 22 of the *Casino Control Act 2006*. The *Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report 20*, dated 12 December 2005, reviewed section 22 and the Committee noted that a number of clauses of the Bill conferred administrative powers in terms that were undefined. The report notes *"However, the exercise of any of these powers is reviewable (see clause 137), and thus the notice given to the person affected of an exercise of the power would state specific reasons for the decision, (this is the effect of clause 139). <u>The Committee raises no concern about these powers</u>*." The Totalisator Bill has the identical provisions as noted in the assessment – see clause 22 – licence conditions, clause 64 - meaning of reviewable decision and clause 66 - application for review. As a totalisator licensee is analogous to the casino licensee it is appropriate that similar provisions be applied as legislated in the *Casino Control Act 2006*.
	17	No	Note above in clause 16. Provision relates to the need for the Minister to consult with the licensee if amending a licence where there is a material monetary impact on the licensee. It provides an inherent constraint on the Minister exercising the power.
	18(5)	No	Note above in clause 16. Provision is a reviewable decision.
	24(1)(d)	Yes	Amend to incorporate the concept that "the commission has reasonable grounds to believe the corporation".
	24(2)	No	Provision confers a right to an applicant and is not limiting a right.
	25(1)(b)	Yes	Amend to incorporate the concept that "the commission has reasonable grounds to believe the individual".
	25(2)	No	Provision confers a right to an applicant and is not limiting a right.
	27(c) 28(1)	Yes	At the beginning of the Part insert a provision to indicate that the exercise of the Commission's powers must be relevant to assessing an individual's eligibility.

Topic	Section	Amendment	Comments
	37(1), 37(4) 38(1) 38(4)	No	The gaming industry is highly regulated - unforseen and diverse issues can arise which can affect the public interest, consumer protection and infiltration of the industry by criminal aspects of society. Commission needs to be able to respond immediately to those risks. Explanatory Statement (ES) to be amended.
	41(3)	Yes	Delete provision.
	42(1)	No	Provision is limited – section only applies where integrity likely to be seriously compromised.
	42(2)	Yes	Amend provision to provide the necessary nexus for the Minister having reasonable grounds to consider that the integrity of the totalisator is likely to be affected.
	43(2)	Yes (other section)	Insert a new provision in section 42 which provides that a licensee may provide the Minister with written reasons why the direction should be removed. Decision to issue direction stays in place until the Minister gives written notice that the direction is revoked. Changes applied to section 42 provide procedural fairness mechanism as provision is only used for non-compliance with a direction under section 42.
	47(1) 49(1)(b) 49(3)	No	Section is limited by the requirements of section 45 – these are grounds for disciplinary action. The action is limited by section 46. ES to be amended to provide information on limitation to the exercise of powers.
	50(1)(b)	No	Minister's powers limited by the public interest test requirements.
	52(1)	No	Minister's powers limited by the public interest test requirements.
	52(3)	No	Note explanation at clause 16.
	70(6)	No	Gaming industry is highly regulated and unforseen and diverse issues can arise which can affect the public interest, consumer protection and infiltration of the industry by criminal aspects of society. Commission needs to be able to respond immediately to those risks. ES to be amended.
Reasonable grounds			***In each case the Committee asks the Minister whether consideration might be given to inserting in each case a requirement that the power be exercised only where the Minister or the commission has "reasonable grounds" to consider the power should be exercised.***
Duplicate	24(1)(d)	Yes	Amend to incorporate the concept that "the commission has reasonable grounds to believe the corporation".
Duplicate	24(2)	No	Provision confers a right to an applicant and is not limiting a right.
Duplicate	25(2)	No	Provision confers a right to an applicant and is not limiting a right.
Duplicate	27(c)	Yes	At the beginning of the Part insert a provision to indicate that the exercise of the Commission's powers must be relevant to assessing an individual's eligibility.
Duplicate	41(3)	Yes	Delete provision.
Duplicate	43(2)	No	Provision 42 to be recast (see above).
	48(1)	No	Section is limited by the requirements of section 45 – these are grounds for disciplinary action.

Topic	Section	Amendment	Comments
	49(2)	No	Question of fact – licensee has either complied with a direction or not.
	49(6)	No	Section is limited by the requirements of section 45 – these are grounds for disciplinary action.
Duplicate	50(1)(b)	No	Minister considers suspension and cancellation in the context of public interest test requirements.
Duplicate	52(1)(b)	No	Minister's powers limited by the public interest test requirements.
Duplicate	52(3)	No	Note explanation at clause 16.
Duplicate	70(6)	No	Gaming industry highly regulated - unforseen and diverse issues can arise which can affect the public interest, consumer protection and infiltration of the industry by criminal aspects of society. Commission needs to be able to respond immediately to those risks. ES to be amended.
Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?-paragraph (3)(a) of the terms of reference. Report under section 38 of the *Human Rights Act 2004*			
The right to privacy in HRA section 12 and the requirements to provide information			***The Committee draws these matters to the attention of the Assembly and recommends that the explanatory statement offer its justification in terms of the framework in HRA section 28.***
	7	No	ES to be amended.
	8	No	ES to be amended.
	9	No	ES to be amended.
	24	No	ES to be amended.
	25	No	ES to be amended.
	27	No	ES to be amended.
	28	Partial	***The Committee asks the Minister whether consideration might be given to requiring the commission to state the purpose for which the information or documents, or the authorities and consents, are sought.*** ***The Committee asks the Minister whether consideration might be given to qualifying the obligation of a person to comply with a direction given under subclause 28(1) so that the person might claim that they have a "reasonable excuse" of non-compliance.***
			The Part is to be amended to reflect that information sought must be for the specific purpose of determining an individual's eligibility. No amendment will be applied for a reasonable excuse for not providing information. In relation to protection of the interests of a third party, consideration needs include 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. In this case the information is required to promote consumer protection; minimise the possibility of criminal or unethical activity; and reduce the risks and costs, to the community and to the individuals concerned, of problem gambling. The ES will be amended to make the reasoning more explicit to the risks being addressed.

Topic	Section	Amendment	Comments
	41	No	ES to be amended.
Displacement of the common law privileges, HRA paragraph 22(2)(i)			***The Committee draws these matters to the attention of the Assembly and recommends that the explanatory statement offers its justification in terms of the framework in HRA section 28.***
	28(1), (2) and (3)	No	The ES will be amended. HRA certificate of compatibility was issued.
Strict liability offences and presumption of innocence (HRA subsection 22(1))			
	55(1) 55(2)	No	ES to be amended to draw attention to the Criminal Code defences.
Natural justice and Minister's power to suspend a licence without notice			***The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.***
Duplicate	43	Yes	A new provision is to be inserted in section 42 which provides that a licensee may provide the Minister with written reasons why the direction should be removed. The decision to issue a direction stays in place until the Minister gives written notice that the direction is revoked. The ability of the licensee to appeal to ACAT is of value as a licensee can seek an immediate stay order to suspend the decision pending a hearing. While it is recognised that serious consequences can flow to a licensee's business if suspended this action must be measured against the consequences to the public if a suspension was not applied.
Should disciplinary action the commission may take under paragraph 49(1)(c) [sic 46(1)(c)] be classified as a "criminal proceeding" for the purposes of the HRA and if so, what is the consequence?			***The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.***
	46	No	The monetary amount takes into account the regulation of the specific industry, the nature of the industry sector being regulated and the relative size of the operation and ability to pay. Accordingly, in the context of the licence that is being issued the amount is disciplinary in nature and not criminal. As a licensee is analogous to the casino licensee an identical monetary amount has been applied as legislated in the *Casino Control Act 2006*.

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
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Dear Mr Doszpot

I write in response to Scrutiny Report 14 provided by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 18 February 2014 which includes comments on the Births, Deaths and Marriages Registration Amendment Bill 2013. Following are my responses to each of the issues raised by the Committee.

1. Why is self-determination not sufficient for an adult to make an application for a sex change?
I note the Committee's comments in relation to self-identification and recognise that the provisions contained in clause 8 of the bill engage the right to privacy (s 12, Human Rights Act) and the right to recognition before the law (s 8, Human Rights Act).

As noted in the Law Reform Advisory Council's report, *Beyond the binary:*

> "At the heart of the issue [of setting requirements for a person to be eligible to change their sex] is the extent to which the person applying ... has to offer some guarantee or level of comfort that their change of sex and gender identity is genuine and is being recorded in good faith. ... If the threshold for establishing a new gender identity is not as high as requiring surgery, it nevertheless needs to be high enough to maintain a level of comfort as to risk of fraud, to be accepted within the national network of registries and to be relied on generally."

This view was also expressed by the Australian Human Rights Commission's (AHRC) paper *Sex files: the legal recognition of sex in documents and government records* (2009) which states "in order to verify identities for the purposes of security, it is also important that there are objective criteria and evidence for amending sex identity" (at p 39).

The criteria proposed in this bill strike a balance between the rights of an individual to have their sex and gender identity recognised, while at the same time ensuring the integrity and security of the Register. This criteria is consistent with those set out in the Australian *Government Guidelines on the Recognition of Sex and Gender, July 2013* (which incorporates the earlier Passport Office policy) and satisfies recommendation 18 of *Beyond the binary*, that the criteria is no more onerous than that of the Australian Passport Office's policy, *Sex and gender diverse passport applicants.*

2. Whether paragraph 24(1)(c)(i) might be better replaced by a statement that better captures the Australian Human Rights Commission's viewpoint that "psychological counselling ... should satisfy the criteria of sex affirmation".

One of the criteria proposed by the AHRC for a person be able to seek change in legal sex was if they have undergone, or are undergoing, 'sex affirmation treatment', which would mean surgical procedure or medical treatment to confirm the person's sexual identity. AHRC stated that psychological counselling concerning sex or gender identity should satisfy the criteria of sex affirmation. It also stated that 'sex affirmation surgery or hormonal therapy should also satisfy the criteria" (at p. 31).

The evidence required under the proposed s 24(1)(c)(i) (and in the proposed s 24 (2)(c)) is, in my view, consistent with that proposed by the AHRC. It has the advantage of allowing people to make a choice about their preferred 'clinical treatment' and to select the appropriate medical professional to attest to their chosen identity.

3. Questions in relation to children.

(a) Whether the requirement in paragraph 24(2)(c) affords sufficient protection to a child?

The Committee raises the question of whether it is problematic that the bill does not require parents to pay regard to the desires of the child.

It is a well established that the principle of 'best interest of the child' is that where a child is capable of forming and expressing a view, that view must be allowed to be freely expressed and be taken into account (Convention on the Rights of the Child, article 12). Importantly, the bill also contains the additional protection of the requirement for appropriate clinical treatment for alteration of the child's sex which means that a parent cannot arbitrarily change a child's sex.

It is also important to note that, compared to the existing legislation, this bill provides an addition protection for children by ensuring that parents consciously consider the best interest of their children in circumstances that will often be difficult and sensitive. By removing the requirement for sexual reassignment surgery, this bill abolishes the requirement for a child to undergo potentially dangerous surgical procedures and, as a child develops, provides the flexibility to change the sex of the child where it becomes apparent that the child identifies with a gender other than that recorded on their birth certificate.

(b) Whether an alteration to the records should be available only in respect of children who are above a certain age?

It would be problematic to apply an age above which a child's sex can be altered. Children develop at different rates, physically, emotionally and intellectually. To prescribe a minimum age at which a child's sex can be changed may result in discrimination that may be harmful to the child.

This bill relates only to registration of a person's sex or gender in a way that better reflects their gender identity. It does not reflect or impact on the personal journey that a person, whether an adult or a child, goes through to realise that identity. This bill seeks to address, in part, the harm that may be caused by failing to legally recognise their preferred sex or gender.

(c) Whether parents should be required to state that the child desires the alteration.

As outlined above, an important aspect of the principle of 'best interest of the child' is that, where a child is capable of forming a view, those views should be able to be freely expressed and considered.

If a child is old enough to express a view about their sex and gender identity and that view does not accord with those of their parents, it is unlikely that one of the professionals involved would proceed with treatment.

(a) there should be some process that would permit a child to procure an alteration to a record where one or all of the relevant parents and guardians do not consider an alteration to be in the child's best interests.

Based on discussions with relevant agencies and stakeholders, it seems that this situation is unlikely to occur. The bill only relates to a registration process which necessarily must be preceded by clinical treatment. The bill also requires a doctor or psychologist to provide a statutory declaration certifying that the child has received appropriate clinical treatment. If a child is old enough to express a view about their sex and gender identity and that view does not accord with those of their parents this would receive strong weight.

I thank the Committee for its comments.

Yours sincerely

Simon Corbell MLA
Attorney-General
19 March 2014

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)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

Thank you for providing Scrutiny Reports No. 14 and 15 and the Standing Committee on Justice and Community Safety's (the Committee) comments on subordinate legislations - *Disallowable Instrument DI2013-270, Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2013 (No. 1)* and *Disallowable Instrument DI2014-4 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2014 (No. 1).*

I thank the Committee for its consideration of the instrument that appoints persons to the Medicines Advisory Committee under the *Medicines, Poisons and Therapeutic Goods Act 2008*. The Committee has sought confirmation that the appointed persons are not public servants and that the appointments satisfy membership requirements under the Medicines, Poisons and Therapeutic Goods Regulation 2008 (the Regulation).

I can confirm that the appointed persons satisfy the membership requirements as prescribed by the Regulation. I wish to advise the Committee that Disallowable Instrument DI2014-4 clearly demonstrates that these persons have been appointed in accordance with the Regulation.

I further advise the Committee that one of the persons appointed to the Medicines Advisory Committee is a public servant. This person has been appointed to the Medicines Advisory Committee as a doctor with experience in the teaching or practice of psychiatry as required by subsection 635(3) of the Regulation.

I note the Committee's comment that the appointment of a public servant to a statutory position is not a disallowable decision. However, I do not believe that a supplementary explanatory statement is warranted in this circumstance. I will take the Committee's comments under consideration for further refinement of statutory appointments.

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

Yours sincerely

Katy Gallagher MLA
Minister for Health
28 March 2014