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

SCRUTINY REPORT 13

22 NOVEMBER 2013

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

AUSTRALIAN CAPITAL TERRITORY (MINISTERS) BILL 2013 (NO. 2)

This is a Bill for an Act to provide that there be no more than nine Ministers for the Territory.

GAMING MACHINE (RED TAPE REDUCTION) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Gaming Machine Act 2004* relating to the approval of financial arrangements for the acquisition of gaming machines or the encumbrance of existing gaming machines, and relating to the approval of arrangements for undisbursed jackpot amounts.

HEAVY VEHICLE NATIONAL LAW (CONSEQUENTIAL AMENDMENTS) BILL 2013

This Bill is cognate with the *Heavy Vehicle National Law (ACT) Bill 2013* and is for an Act to provide for amendments to a number of Territory laws consequential upon the anticipated enactment of the *Heavy Vehicle National Law (ACT) Act 2013*.

LONG SERVICE LEAVE (PORTABLE SCHEMES) AMENDMENT BILL 2013

This is a Bill for an Act to amend the *Long Service Leave (Portable Schemes) Act 2009* in ways that are largely of a technical nature.

PAYROLL TAX AMENDMENT BILL 2013 (NO. 2)

This is a Bill for an Act to amend the *Payroll Tax Act 2011* to provide for a payroll tax concession, of up to $4,000, to eligible employers who hire a recent school leaver with disability.

BILLS—COMMENT

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

CRIMES LEGISLATION AMENDMENT BILL 2013

This is a Bill for an Act to amend a number of Territory laws relating to the criminal law or the administration of that law. In particular, it proposes to permit the prosecution of certain historic sexual offences by retrospectively repealing two statutory limitation periods relating to offences committed between 1951 and 1985.

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**

General comment

The Explanatory Statement contains a human rights impact analysis in respect of several clauses of the Bill, and in most respects the Committee has nothing to add that would assist the Assembly any further. The relevant clauses are:

- clause 5, concerning the meaning of "in the company of a police officer" for the purposes of subsection 252F(3) of the *Crimes Act 1900* (Explanatory Statement at 6-7);
- clause 8, concerning section 16 of the *Crimes (Assumed Identities) Act 2009*, and designed to permit Commonwealth intelligence agencies to apply to the ACT Supreme Court to make an entry in a register of births, deaths and marriages (Explanatory Statement at 13);
- clause 14, concerning section 54 of the *Crimes (Forensic Procedures) Act 2000*, and relating to the sex of a person carrying out or helping carry out forensic procedures (Explanatory Statement at 15-16); and
- clause 16, concerning proposed sections 77A to 77C of the *Crimes (Forensic Procedures) Act* 2000, and relating to securing the presence of a serious offender at a hearing (Explanatory Statement at 19-22).

Clause 7 and the proposed retrospective repeal of limitation period on criminal proceeding for particular sexual offences

The *Crimes Act 1951* created criminal offences in respect of carnally knowing a girl between ten and sixteen, attempt to carnally know a girl between ten and sixteen, and indecent assault of a girl under sixteen. The Explanatory Statement notes that "[c]urrently the effect of the limitation period created in 1951 is that criminal proceedings for these offences that occurred between 14 December 1951 and 21 November 1985 (the latter date being when the limitation period was repealed) must have commenced within 12 months of the offence occurring". Thus, supposing a case where it was alleged that an offence took place on 21 November 1985, an accused could not be prosecuted after 21 November 1986.[1]

In respect of these offences, the effect of proposed subsection 441(1) (see clause 7) is that "a criminal proceeding for the offence may be begun as though the limitation law had never been in force". Thus, in the example just given, the proceeding may begin 27 or more years after the offence is alleged to have taken place.

The *Law Reform (Sexual Behaviour) Ordinance 1976* created criminal offences in respect of buggery and bestiality, attempt to commit buggery, and indecent assault on a male. The Explanatory Statement notes that "[c]urrently the effect of the limitation period created in 1976 is that criminal proceedings for these offences that occurred prior to 21 November 1985 (the latter date being when the limitation period was repealed) must have commenced within 12 months of the offence occurring". The example given above is also applicable in relation to the 1976 Ordinance offences.

[1] Of course, this date would be earlier with respect to offences alleged to have taken place at an earlier time than 21 November 1985.

(There are some qualifications to the removal of the limitation periods, but they are not material to the human rights analysis.)

Clause 7 and the right against retrospective criminal laws: HRA section 25

Section 25 provides:

> **25 Retrospective criminal laws**
>
> (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
>
> (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

The Explanatory Statement argues that proposed section 441 does not limit the rights stated in HRA section 25. The nub of this argument is that section 441 does not alter the definition of the crimes created by the 1951 Act and the 1976 Ordinance, nor does it increase the punishment for those crimes, but only revives the opportunity for their prosecution.

It might however be argued that the protection of HRA subsection 25(1) extends to a case where an expired limitation period is revived by a later law. It has been noted that "[s}ome scholars consider a statute of limitations as an exculpatory defence, which belongs to substantive criminal law. In their view, expiration of a prescription period not only removes the punishability of the crime and the right to institute criminal proceedings, but also eliminates the unlawfulness of the crime *ex nunc* [for the future]".[2] On this basis, the substantive effect of proposed section 441 is to create a new criminal offence, being an offence of the same kind as one in the 1951 or 1976 laws without any limitation period attaching to it.[3] This approach would mean that section 441 does limit HRA subsection 25(1).[4]

A rights analysis on a broader basis than HRA subsection 25(1)

The Explanatory Statement does not end its human rights analysis at this point, but goes on to say that "[w]hile the right to not have criminal proceedings brought against a person where a statutory limitation on such proceedings has accrued is not protected by the *Human Rights Act 2004* it warrants some discussion here. This right is limited by the amendment ...".[5]

The Explanatory Statement offers a justification for this limitation.

> The purpose of the amendment is to afford victims of historic sexual offences the opportunity to have a prosecution brought against the alleged offender, providing such victims with access to the justice system that was previously denied to them. It is particularly important to provide this

[2] Ruth Kok, *Statutory Limitations in International Law* (2007) quoted in Amicus Brief for the Constitution al Court of Georgia, accessible at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)012-e

[3] The Constitutional Court of Hungary has taken a similar view. It has ruled that the retroactive amendment of the statute of limitations in criminal cases is unconstitutional. See HUN-1992-S-001

[4] The United States Supreme Court has ruled that a law of the same kind as section 441 was inconsistent with the prohibition in the US Constitution of ex post fact laws; see *Stogner v California 539 US 607 (2003).* The European Court of Human Rights has left the issue open; see Amicus Brief for the Constitution al Court of Georgia, cited above. The relevant limitations on legislative power are stated somewhat differently to HRA subsection 25(1).

[5] The Committee commends this approach. The Committee's term of reference in (3)(a) of its resolution of appointment require it to assess whether a provision in a Bill may "unduly trespass on personal rights and liberties". The Assembly) is assisted by a recognition in an Explanatory Statement that there are many relevant rights not stated in the Human Rights Act that fall to be considered. It is possible that the Supreme Court would consider that this right was a dimension of the right to liberty and security stated in HRA subsection 18(1). The Committee does not pursue this line of analysis, as it would add nothing to the approach taken in the Explanatory Statement.

opportunity to historic sexual offence victims as it is well-documented that sexual assault and abuse victims are likely to delay reporting of the crime for a number of reasons and would therefore not have been in a position to report the offence within the 12- month limitation period. The amendment would have the effect of placing both the victim and defendant in these historic sexual offences in the same position as victims and defendants in other historic sexual offence cases, where no limitation period applies.

The amendment would remove a defendant's accrued right to immunity from prosecution. This is essential to afford victims of certain historical sexual offences the opportunity to have criminal proceedings brought for those offences.

There are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The issue of justification is however a particularly difficult one to resolve, for there are competing interests at stake.

One set of interests are constitutional values such as the rule of law. It might be argued that a provision reviving a limitation period is unfair to a defendant. At a basic level, it might be said that the State acts unfairly if it does not abide by the rules it established to govern the circumstances under which it could deprive people of their liberty.[6] This might be put as an argument that reviving a limitation period violates the rule of law.

It may also be argued that in some circumstances that the revival of an expired limitation period would be unfair to a defendant who had relied on the expiration remaining on foot. There will of course be cases where defendant could not have had the expiration of the period in mind, such as where he or she was aware that they were, within the original limitation period, under investigation. But often they may have been made aware, and after the tolling of the limitation period may not have preserved or sought to find exculpatory evidence. As one United States judge put it, "[f]or the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest".[7]

The most obvious cases of potential unfairness relate to the long delay in instituting a prosecution. This issue arises under other HRA rights.

Clause 7 and the right to a fair trial (HRA subsection 21(1), to be tried without unreasonable delay (HRA paragraph 22(2)(c)), and to examine prosecution witnesses (HRA paragraph 22(2)(g)

The shortest period of delay that would result from a prosecution as a result of section 441 would be 27 years. In such cases, and of course in cases where the delay would be longer, a defendant will often be placed in a forensic disadvantage. As the Explanatory Statement puts it, "[s]uch forensic disadvantage may be the death of a crucial witness, the loss of documents that could identify the location of the defendant on a particular date or the lost opportunity of investigating the circumstances of the alleged offences". There may be cases where in reliance on the expiration of the limitation period, the defendant did not preserve exculpatory evidence. There may be cases where the prosecution adduces hearsay evidence of a person who has died prior to trial, or is for some reason excused from attendance. Of course, such persons cannot be cross-examined. Unfairness to a defendant can arise in many ways.

[6] Compare Jen, 'Stogner v California; a Collision between the Ex Post facto Clause and California's Interest in Protecting Child Sex Abuse Victims' (2004) at 751

[7] *Falter v United States* 23 F. 2d 420 (1928) per Learned Hand J.

The Explanatory Statement (at pages 10-11) acknowledges that these rights might be engaged in relation to particular instances, and points to ameliorating considerations.

(1) A trial judge is in such cases required to warn the jury of forensic disadvantage to a defendant. On the other hand, there is a question whether a jury, unfamiliar with the law of evidence and procedure, can appreciate the difficulties faced by a defendant.

(2) The trial judge may permanently stay the prosecution, but this is a step rarely taken.

(3) On sentencing, the court may look at the range of sentences applicable at the time the offence occurred, but this is not necessarily of assistance to the convicted person. Whether delay is in any cases a mitigating factor lies in the discretion of the court.

It is also to be noted that the mere fact of being prosecuted for a sexual offence will damage the reputation of the defendant.

It might be considered that the risk of unfairness in any cases that might be prosecuted as a result of section 441 is such that the possibility of prosecution should not be created.

Are there less restrictive means available?

The purpose of the reform proposed is clear, and the difficult question is whether the specifics of the reform are proportionate. The Committee recommends that the Attorney-General provide a justification according to the framework stated in HRA subsection 28(2). In particular there is a question as to whether there are reasonably available means for achieving the purpose of the Bill that are less restrictive of the relevant rights of defendants.

The Explanatory Statement asserts that "[t]here are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve".

The Committee draws attention to a very similar law enacted in California in 1993. As summarised by a scholar:

> In 1993 California passed a statute allowing for the criminal prosecution of individuals where a prior statute of limitations already expired when: (1) the victim was less than eighteen years of age at the occurrence of the crime; (2) the crime involved substantial sexual abuse; (3) independent sources provide evidence "clearly and convincingly" corroborating the victim's allegations; (4) the victim reported the allegations to law enforcement; and (5) the state begins prosecution within one year of allegations made by the victim to law enforcement.[8]

The issue for the Assembly is whether similar limitations, or some of them, should be incorporated into proposed section 441.

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

HEAVY VEHICLE NATIONAL LAW (ACT) BILL 2013

This is a Bill for an Act to apply the Heavy Vehicle National Law (which is set out in a schedule to the *Heavy Vehicle National Law Act 2012* of Queensland) as a law of the Australian Capital Territory. The National Law provides for the national registration of heavy vehicles; prescribes standards for heavy

[8] Compare Jen, 'Stogner v California; a Collision between the Ex Post facto Clause and California's Interest in Protecting Child Sex Abuse Victims' (2004) at 728.

vehicles on the road; establishes requirements for heavy vehicle operation such as mass limits, size restrictions, and secure loading, and road access; prescribes measures to control speeding and to prevent driving while fatigued; and imposes duties and obligations on operators, drivers and other persons in the chain of responsibility whose activities may influence vehicle or driver compliance with requirements under the Law.

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**

I THE PROVISIONS OF THE BILL

In paragraph 7(1)(a), the bill applies, as a Territory law, the provisions of the Heavy Vehicle National Law set out in the schedule to the *Heavy Vehicle National Law Act 2012* (Queensland), as modified in schedule 1 of the Bill. This schedule is referred to as the Heavy Vehicle National Law, and is dealt with below. This section of the report deals with some issues arising out of provisions of the Bill.

The right to privacy (HRA section 12) and a misleading provision

Paragraph 29(1)(a) of the Bill provides that

> Despite any other territory law, the road transport authority is authorised, on its own initiative or at the request of the Regulator, to give the Regulator—
>
> (a) the information (including information given in confidence) in the authority's possession or control that the Regulator reasonably requires for the local application provisions of this Act or the *Heavy Vehicle National Law (ACT)*; … .

There are two matters for comment.

First, in some instances at least, the exercise of a power to disclose information given in confidence will limit the right to privacy of the confider of the information. There should be justification for the creation of such a power.

Secondly, it is misleading to suggest that this power may be exercised by the road transport authority "[d]espite any other territory law". This provision cannot limit the power of the Assembly at a time later than the coming into force of subsection 29(1) (assuming that occurs). The Committee has frequently made this point in relation to transitional provisions. In this case, it is more serious, given nature of the power conferred by subsection 29(1).

In this instance, there is a case to refer to a "previous territory law", rather than to "other territory law".

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

The right to privacy (HRA section 12) and a duty imposed on any person to disclose the identity of the driver of a heavy vehicle

Schedule 1 to the bill states the ways the Heavy Vehicle National Law is modified in its application to the Territory. Paragraph 1.2 proposes to insert section 576B in the National Law, and reads as follows:

(1) If the driver of a heavy vehicle is alleged to have committed an offence against this Law—

...

(b) anyone else must, when required to do so by an authorised officer, give any information that the person can give that may lead to the identification of the driver.

Failure to do so results in the commission of a criminal offence.

The Explanatory Statement argues that this power is "essential for the enforcement of the *Heavy Vehicle National Law (ACT)*". There is no doubt that a power to compel a person to provide this information will assist the enforcement authorities, but it is contrary to our legal tradition to require persons with no connection to the commission of crime to assist the police. The matter has a privacy dimension in that the persons questioned will in some cases at least have a personal connection with the driver. Enactment of such a power should be justified in terms of the framework in HRA subsection 28(2).

(The Committee notes that a similar power was stated in the 1999 Act, but this preceded the enactment of the *Human Rights Act 2004*. In any event, this fact has little bearing on the justification for this proposal.)

II THE PROVISIONS OF THE HEAVY VEHICLE NATIONAL LAW

General comment

In 2009 the Assembly passed into law the *Road Transport (Mass, Dimensions and Loading) Act 2009*. The bill for this Act was modelled on the national Road Transport Reform (Compliance and Enforcement) Bill, (Model Bill) which was developed by the National Road Transport Commission. The Explanatory Statement noted that "[it] was recognised when developing the Model Bill that jurisdictions, when implementing the national scheme, may need to modify provisions to satisfy their wider legal and policy requirements. The provisions in this Bill have been fine-tuned to reflect ACT criminal law and human rights policy". It then noted the "major changes" that had been made to the national law model.

The Explanatory Statement (at page 14) to this Bill (the Heavy Vehicle National Law (ACT) Bill 2013) notes the approach taken in 2009, and that some of the matters dealt with in departures to the national model made in the 2009 Bill are no longer of consequence in relation to the *Heavy Vehicle National Law Act 2012* of Queensland. But it then states:

> [w]here this is not the case (as with the absolute liability offences and the reasonable steps defence – both discussed below), the earlier departures have not been carried into the application provisions of the Bill. To do so would be inconsistent with the Territory's commitments as a signatory to the Intergovernmental Agreement.

On the other hand, the decision not to carry these earlier departures into this 2013 bill raises the prospect that in respect of its provisions which have not been modified, there is an incompatibility with the *Human Rights Act 2004*. It must be doubtful at least whether a court would consider that the Territory's commitments as a signatory to the Intergovernmental Agreement provide a justification for the limitation of an HRA right. Of perhaps more importance, members of the Legislative Assembly should be clearly directed to those provisions of the Bill that have not been modified in the way the equivalent provisions of the 2009 bill were modified.

The Committee recommends that the Attorney-General indicate which provisions of the Bill that have not been modified in the way the equivalent provisions of the 2009 bill were modified, and in each case state why it is considered that there is no incompatibility with the Human Rights Act.

The right to be presumed innocent until proven guilty: HRA subsection 22(1)

Absolute liability offences qualified by provision for a reasonable steps defence in respect of which the defendant carries a legal burden of proof

This issue is addressed in the Explanatory Statement at pages 18-20, and in the Victorian Compatibility Statement. The nub of the rights issue is stated in the latter:

> For many of the offence provisions throughout the Heavy Vehicle National Law, the 'mistake of fact' defence is not available to a person charged with an offence. Rather the 'reasonable steps' defence is available to the person.
>
> This is in accordance with the previous model national laws that have been implemented throughout Australia. The unavailability of a 'mistake of fact' defence exposes the defendants to absolute liability offences without access to a defence of making an honest and reasonable mistake of fact. The removal of this defence and replacement with another engages the right to the presumption of innocence because the 'reasonable steps' defence is only available if the defendant can prove that they did not know and could not reasonably be expected to have known of a contravention. The 'reasonable steps' defence places a legal burden on the defendant to prove that they did not know, and could not reasonably be expected to have known, of a contravention to avoid prosecution.[9]

The Committee draws attention to the justification for this limitation stated in the Explanatory Statement at pages 18-20.

Reversal of onus of proof

The Explanatory Statement notes that "there are a number of additional provisions in the National Law which variously reverse the onus of proof and place a legal burden on a person".[10] It identifies them and offers a justification for limiting the presumption of innocence in this way.

The Committee draws attention to the justification for this limitation stated in the Explanatory Statement at pages 20-22.

Certificate evidence

This issue not addressed by the Explanatory Statement. This may be because the Attorney-General takes the view that provision that a certification in some way by a person that a fact exists is "only evidence of the relevant matter, not conclusive evidence" and on this basis there is no limitation of the presumption of innocence.[11] The Committee considers this approach too narrow, and that HRA subsection 22(1) is engaged in any case where a provision of a bill (if enacted) would require a defendant to adduce evidence of facts as step in defending the relevant criminal charge. This wider approach is taken in the Victorian Compatibility Statement[12] (see below).

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[9] The limitation of HRA subsection 22(1) does not arise only because a legal burden of proof is placed on a defendant. It arises in any case where the effect of a law is to require a defendant to adduce evidence.

[10] The Committee notes that a reversal of the onus of proof arises in any case where the law requires a defendant to adduce evidence of facts relevant to avoiding conviction.

[11] See the response (at page 8) of the Minister for Transport (of 18 June 2009) to the Committee's comments on clause 413(a) of the Road Transport (Mass, Dimensions and Loading) Bill 2009. The Committee's report is in *Scrutiny Report No 7 of the 7th Assembly*, and the response in *Scrutiny Report No 8.*

[12] Accessible at Victorian Hansard (18 April 2013, p. 1318)

The issue is addressed in the Victorian Compatibility Statement:

> Sections 32 to 38 of the bill are evidentiary provisions which set out how certificates may be used to prove evidence: of road distance; speed; engine management system data and prescribed road safety cameras.
>
> Certificate evidence greatly assists the efficiency of the criminal justice system by allowing what are usually non-controversial evidentiary matters to be presented in court without the need to personally call the expert who prepared the certificate to be present in court to give the evidence.
>
> Certificate evidence is accepted in court in the absence of evidence to the contrary. This means that to challenge certificate evidence a defendant is obliged to call evidence. Requiring a defendant to provide evidence runs contrary to the defendant's right to silence. These provisions place an evidential burden on the defendant. ... The defendant has the right to the presumption of innocence and is not required, in the usual course of the criminal justice process, to give evidence. The onus rests entirely upon the prosecution to prove the matter. As such, certificate evidence engages the right to the presumption of innocence.
>
> Evidence produced by certificate, in accordance with the relevant section, is presumed proof to be evidence of a matter unless evidence to the contrary is raised. Providing evidence by way of certificate is important for the criminal justice system and can be justified because:
>
> - the evidentiary certificates relate to matters that are generally non-contentious;
> - if the matter is contentious in the context of a particular proceeding, the evidence is not conclusive and the defence can lead evidence that is contrary to the certificate;
> - the evidence is often extracted from records maintained by the regulator or road authority; [and]
> - use of evidentiary certificates streamline the administration of justice and provide cost savings through not having to call a witness for issues that are not in dispute.
>
> The availability of certificate evidence through sections 32 to 38 of the bill engages but does not limit the right to the presumption of innocence.

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

Deeming provisions

The Victorian Compatibility Statement notes that in chapter 4 the Heavy Vehicle National Law gives "seven examples of 'deemed convictions' or 'deemed evidence of a conviction'". For example, subsection 130(3) provides: "If the **driver** of the pilot vehicle or escort vehicle commits an offence against subsection (2), the **operator** of the heavy vehicle is taken to have committed an offence against this subsection" (emphasis added). The statement continues:

> The deeming of the existence of evidence engages the charter right to the presumption of innocence as the commission of an offence means a person has also committed an offence.
>
> The reason for this use of deemed evidence of conviction is to assist with proving extended liability offences. The extension of liability is consistent with the approach taken across the Heavy Vehicle National Law to hold accountable those persons who are in a position to influence the actions of the heavy vehicle driver. The use of deemed evidence of conviction in chapter 4 of the Heavy Vehicle National Law is justified, despite it engaging the presumption of innocence,

> because persons other than the driver and operator of heavy vehicles are often responsible for a breach of the relevant requirements.
>
> The extension of liability provisions ensure that all parties responsible for conduct which affects compliance are made accountable for failure to discharge that responsibility.

This issue is not addressed in the Explanatory Statement.

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

The privilege against self-incrimination: HRA subsection 22(2)(i)

This issue is identified in the Explanatory Statement (page 24):

> Section 22 (Rights in criminal proceedings), ss 22(2)(i) of the Human Rights Act provides that anyone charged with a criminal offence is entitled to the minimum guarantee, equal with everyone else, not to be compelled to testify against himself or herself or to confess guilt.
>
> As noted above, part 9.4, division 4 (Information-gathering powers) has a number of requirements in relation to the provision of information; in particular, three provisions (sections 569, 570 and 577) empower an authorised officer to demand information, documents or assistance from a person. The person must comply with the requirements unless there is a reasonable excuse. The claim of privilege against self-incrimination is not a reasonable excuse. These provisions clearly engage a person's right to be free from the compulsion to provide information that may incriminate him or herself.

Subsection 569(1) of the Heavy Vehicle National Law states that "[an] authorised officer may require a responsible person for a heavy vehicle to make available for inspection by an authorised officer, or to produce to an authorised officer for inspection, at a reasonable time and place nominated by the officer" various kinds of documents. Except in one case, these are documents created as a consequence of the person having voluntarily engaged in the business of using heavy vehicles on the roads. The kind stated in paragraph 569(1)(e) is wider, being "a document in the person's possession or under the person's control relating to any business practices". Subsection 569(4) states that "[it] is not a reasonable excuse for the person to fail to comply with a requirement made under subsection (1) that complying with the requirement might tend to incriminate the person or make the person liable to a penalty".

Subsection 570(1) states that "[an] authorised officer may, for compliance purposes, require a responsible person for a heavy vehicle to give the officer kinds[13] of simply "information", which includes information not recorded in a document (oral information). Again, a person cannot refuse to meet the requirement on the ground that to do so might tend to incriminate the person.

Section 577 contains similar provisions.

These provisions deal with three kinds of information:

> that in documents created as a consequence of the person having voluntarily engaged in the business of using heavy vehicles on the roads;

[13] Such as "information about the vehicle or any load or equipment carried or intended to be carried by the vehicle".

that in documents that may have no relation to the person having voluntarily engaged in the business; and

oral information.

Section 588 relates to these three provisions.

588 Evidential immunity for individuals complying with particular requirements

(1) This section applies to a requirement made by an authorised officer under section 569(1)(c) to (f), 570 or 577.

(2) The following is not admissible in evidence against an individual in a criminal proceeding (except a proceeding for an offence against this Chapter) —

(a) information provided by an individual in compliance with the requirement;

(b) information directly or indirectly derived from information mentioned in paragraph (a).

(3) Any document produced by an individual in compliance with the requirement is not inadmissible in evidence against the individual in a criminal proceeding on the ground that the document might incriminate the individual.

(4) Subsection (2) does not apply to a proceeding about the false or misleading nature of anything in the information or in which the false or misleading nature of the information is relevant evidence; (emphasis added).

Section 588 affords only limited protection of the privilege against self-incrimination. First, note needs be taken of the words "except a proceeding for an offence against this Chapter". This exception is more extensive than the usual form of exception in that it is not limited to offences arising out of any false statement made under compulsion by the person, or out of a refusal to answer questions or produce documents. The offences in chapter 9 cover much more extensive ground.[14] In respect of these offences, the privilege is totally abrogated. There is a view that where the privilege is not available, justification for its displacement under HRA section 28 requires that there should be some protection against use of the matter disclosed by compulsion, by at least a use immunity, and better yet, by the addition of a derivative use immunity. In relation to chapter 9 offences, there is neither, and there is a real question whether in this respect there is an incompatibility with HRA subsection 22(2)(i).

(In respect of the use of compulsorily acquired oral information on a prosecution for some other offence created by the National Law, section 55 does provide for both a use and derivative-use immunity, and in these cases a section 28 justification can be made out.)

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

[14] A similar point was made by the Committee in relation to the Work Safety Bill 2008; see *Scrutiny Report No 59 of the 6th Assembly*. The Bill was amended so that the exception to the immunity applied only to offences for failing to answer questions or produce documents.

Secondly, in respect of a **document** produced by an individual in compliance with a relevant requirement, the privilege is, on any kind of a criminal proceeding against the person, totally abrogated (subsection 588(3)). The Explanatory Statement (at page 25) justification adopts the comments made in the explanatory notes to a Queensland bill. The first point made is that

> [i]n the absence of a provision compelling the production of specified documents by an individual, and further providing for the use of those documents as evidence, prosecuting breaches of the National Law would require far greater investigative resources. This applies particularly to offences detected during the course of on-road enforcement activities. Public safety is liable to be compromised if prosecution of heavy vehicle offences is more difficult under the National Law than existing jurisdictional laws.

Two comments may be made to assist the Assembly to gauge weight of this argument. The first is that subsection 588(3) applies to **any kind** of criminal offence, and not only to those created by the National Law. The question is: why should it have such a wide application?

The second comment is that the argument is available in respect of many kinds of criminal investigations. In relation to many criminal investigations, the task of the police would be much easier were they not hampered by the application of the privilege against self-incrimination to documents. The judgment has been made, (and is reflected in HRA subsection 22(2)(i)) that the needs of investigation sometimes yield to a 'higher' value. In relation to this right, the privilege rest on the principle that "the individual is sovereign and ... proper rules of battle between government and individual require that the individual ... not be conscripted by his opponent to defeat himself".[15]

The next point made in the Queensland explanatory notes is a slightly narrower one. It is that "the prior existence of a document at the time it was required to be produced weighs in favour of abrogating privilege".[16] The Queensland notes argue that "[S]ince the document already exists, the individual is not compelled to communicate the information for the purpose of the investigation or inquiry. Although the individual may be forced to produce the document, there may be less cause in such a situation for the application of the rationales for either of the privileges". The weight of this argument depends on what is taken to be the rationales for the privilege. On one view, forcing a person to produce information that may be helpful to a prosecution does contradict those rationales.

A narrower justification may be thought to carry more weight. The Queensland notes argue that the argument just made "may be particularly so if the document is one that is required to be kept in compliance with a legislative regulatory scheme". As noted above, however, the category of documents covered by the requirement to produce documents stated in paragraph 569(1)(e) is not limited to those "required to be kept in compliance with a legislative regulatory scheme". In respect of these documents, this narrower justification appears to carry little if any weight, and in this respect there is a question whether subsection 588(3) is compatible with HRA paragraph 22(2)(i).

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

Privacy and reputation: HRA section 12

The Committee refers to the discussion in the Explanatory Statement at pages 14-17.

[15] These words come from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2251, at 318. They were quoted in Canadian cases, one of which was relied upon by the Minister for Transport in his response to the Committee's comments on clause 413(a) of the Road Transport (Mass, Dimensions and Loading) Bill 2009.

[16] These are the words of the Explanatory Statement (page 25).

Freedom of movement: HRA section 13

The Committee refers to the discussion in the Explanatory Statement at page 18.

The right not to be punished more than once: HRA section 13

The Committee refers to the discussion in the Explanatory Statement at pages 25-26.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—paragraph (3)(a) of the terms of reference

Extension of criminal liability

The Explanatory Statement notes that "[l]iability for contraventions of many provisions of the National Law is extended to other parties in the supply chain reflecting the principle that all persons responsible for compliance with relevant requirements be made accountable for failures to discharge their responsibilities. In particular, this includes persons in addition to drivers and operators"(page 22). Relevant detail is stated at pages 22-24.

The Explanatory Statement does not identify any limitation to a right stated in the Human Rights Act.[17] It perhaps means to adopt the statement in the explanatory notes to the *Heavy Vehicle National Law Bill 2011* (Queensland) that "extending liability to these parties does potentially limit the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals by expanding the scope of legal liability beyond the driver and operator of a heavy vehicle to persons whose actions directly influence or control compliance with the relevant requirements".[18]

The Committee draws attention to the justification for extension of criminal liability stated in the Explanatory Statement at pages 22-24.

COMMENT ON PROPOSED GOVERNMENT AMENDMENTS—CRIMES LEGISLATION AMENDMENT BILL 2013

The Attorney-General has proposed amendments to this Bill, proposing to insert clauses 4A and 4B. Clause 4B proposes the insertion of a new section 61B – presumably into the *Crimes Act 1900*.

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**

Subsections 61B(1) and (5) propose two different offences, and each will be taken in turn.

Subsections 61B(1)-(4)

There are 4 elements to the offence stated in subsection 61B(1), and each is identified by the relevant paragraph of the subsection.

[17] The right to liberty and security of the person in HRA subsection 18(1) might be thought to be engaged, and some judicial decisions have relied on this right in cases where the relevant provision did not directly affect a person's liberty or security.

[18] Accessible at https://www.legislation.qld.gov.au/Bills/53PDF/2011/HeavyVNatLawB11Exp.pdf. (The Committee cannot find such notes to a 2012 version of the Bill, as is stated to exist in the Explanatory Statement at page 23, footnote 34.)

Element (a) is satisfied if a person (D) has observed another person (P) with the aid of a device (such as binoculars), or in some way visually recorded or captured visual data of another person (such as by taking a photograph). **The committee understands** that the prosecution must prove that D intended to make the observation, or to make the visual recording etc of P. For example, if D's photograph of P is taken accidentally, D cannot commit the crime created by subsection 61B(1).

The Committee draws this matter to the attention of the Assembly and recommends that the Minister indicate whether the committee's understanding is correct.

Element (b) is satisfied merely by the prosecution proving that in the circumstances in which P was situated at the relevant time, and assuming P to be a reasonable person, P "would expect to be given privacy"; for example, that P would not expect to have been photographed. This element is one of absolute liability, so that no account need be taken of what, if anything, D thought about whether P had an expectation of privacy.

As the Supplementary Explanatory Statement acknowledges, creation of an absolute liability element of an offence engages the presumption of innocence in HRA subsection 22(1). The Committee accepts that this may be justified on the basis that the point of this element is merely to describe a circumstance in which D's observation etc has taken place, and that, as the Explanatory Statement puts it (at top page 4). "the question of [D's] state of mind is not relevant". The Explanatory Statement goes on, however, to say that "[i]n these circumstances it is appropriate to place responsibility on a person filming another person to exercise caution and refrain from filming where they are not absolutely sure about whether it is appropriate, in the circumstances, to afford another person privacy". On the other hands, it might be argued that if whatever degree of caution D took is irrelevant, why would D be concerned to take any caution at all?

Also puzzling is the statement that the objective test in element (b) "...allows the circumstances of the observing, visual recording or capturing of visual data to be assessed objectively as 'reasonable' or not. If a reasonable person, in the circumstances, would expect to be given privacy, there should be no mistake of fact available."

The Committee understands that the relevant circumstances are those in which P was placed at the time of the observation, and not the circumstances surrounding the making of the observation itself.

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

Element (c) requires that the prosecution prove that P was "in a private place", or, alternatively, was "engaging in a private act" at the time the observation, etc was made by D.

The Explanatory Statement states (page 4) that this element is one of strict rather than absolute liability in order to permit D to rely on the defence of mistake of fact. The Committee considers that this point should be further explained. The reference is to section 36 of the *Criminal Code 2002*. There should also be explanation of the general defence in section 39 (intervening conduct or event) of the Code.

That an element of strict liability offence is included in this offence provision is a serious matter, given that a penalty of 2 years imprisonment might attach to a conviction. The question arises: why should not the prosecution be required to prove that D knew that the place was a private place, or that P was engaging in a private act? Of course, this obligation would make conviction more unlikely, but where imprisonment is a possible result, is this justifiable? Justification should be in accord with all the elements the framework stated HRA subsection 28(2).

There is a high degree of vagueness about the concepts of "private place" and "engaging in a private act". For example, is the beating of a puppy with a stick a "private act"? Or, is it intended that the acts be ones of a sexual nature? That vagueness raises a rights issue and is dealt with below.

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

Element (d) is that what is observed etc "is, in all the circumstances, indecent". The Explanatory Statement states that this "will be assessed according to what is 'contrary to the ordinary standards of morality of respectable people within the community', as well as to the context of the 'nature and quality of the act itself'" (citations omitted). This offers very little guidance, and emphasises the vagueness of the test. For example, is the beating of a puppy with a stick "indecent"?

This high degree of vagueness, (and this point also applies to element (c)), raises a question as to whether in these respects the offence provision is compatible with the HRA, and/or is an undue trespass on personal rights and liberties. This general issue was addressed in *Scrutiny Report No 20 of the 7th Assembly*, where, in relation to the Crimes (Serious Organised Crime) Amendment Bill 2010, the Committee said:

> many precedent cases that state a principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[19] The principle was expressed long ago by the United States Supreme Court thus:
>
> > [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[20]
>
> This principle might be found to be an element of one or more rights stated in the HRA[, such as the right to liberty and security in HRA subsection 18(1)].
>
> Another way to state the objection is to see it as a delegation of legislative power to a court called upon to interpret the vague term, or, at least, as requiring the court to make "political" or "value" judgements.[21]

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

Section 61B(4) allows D to raise, in the alternative, one or other of 2 matters of defence to a prosecution for an offence against subsection 61B(1), and imposes a legal burden of proof on D in these respects. D may prove that s/he believed on reasonable grounds that P consented, or, that s/he did not know, and could not reasonably be expected to have known, that the observing, etc was without P's consent.

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[19] See generally the discussion in *Report No 6* of *2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20* of the *Fifth Assembly*, concerning the Criminal Code 2002, and *Report No 20* of the *Sixth Assembly*, concerning the Casino Control Bill 2005.

[20] *Lanzetta v New Jersey* (1939) 306 US 451, quoting *Connally v General Construction Co*., 269 U.S. 385, 391.

[21] In *Taikato v R* [1996] HCA 28, the majority of the High Court said that "under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing".

This issue is addressed in the Explanatory Statement at pages 4-5. The imposition of a legal burden engages HRA subsection 22(1).In both cases, the question is why it should not be sufficient for D to prove that they had a genuine belief – whether reasonable or not – that P consented, or, alternatively, that D did not know that P did not consent? Again, that imprisonment might result might be argued to point to avoiding D's conduct being measured by an objective standard.

It is also the case that the statement of an objective standard introduces another element of vagueness into this offence.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister indicate whether the committee's understanding is correct.

Subsections 61B(5)-(7)

There are 2 elements to the offence stated in subsection 61B(1), and each is identified by the relevant paragraph of the subsection.

Element (a) is satisfied if a person (D) has observed another person (P) with the aid of a device (such as binoculars) , or in some way visually recorded or captured visual data of another person (such as by taking a photograph), but only where what is observed is P's genital or anal region (whether covered by underwear or bare), or, for a female or a transgender or intersex person who identifies as female, the breasts (whether covered by underwear or bare); see subsection 61B(10) for relevant definitions.

The committee understands that the prosecution must prove that D intended to make the observation, or to make the visual recording etc of P. For example, if D's photograph of P is taken accidentally, D cannot commit the crime created by subsection 61B(5).

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

The concept of a person's "genital or anal region" introduces an area of vagueness. What is conceived to be this region?

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

Element (b) is satisfied merely by the prosecution proving that in the circumstances in which P was situated at the relevant time, and assuming P to be a reasonable person, P "would expect to be given privacy"; for example, P would not expect to have been photographed. This element is one of absolute liability, so that no account need be taken of what, if anything, D thought about whether P had an expectation of privacy.

The discussion above concerning the imposition of absolute liability in relation to subsection 61B(1) applies here too.

So far as concerns the 'proportionality' of the offence in subsection 61B(5), it should be noted that the Explanatory Statement appears to proceed on an erroneous view of its scope. In a comment designed to apply to both subsections 61B(1) and (5), the Explanatory Statement states:

> It is recognised that there is some concern about people taking innocuous images and being charged with this offence. In order to prevent this, the prosecution must prove, beyond reasonable doubt, that the content of the observation with a device, visual recording or the capturing of visual data is indecent (page 3).

There is not such limitation applying to subsection 61B(5). The same error is made when seeking to justify the imposition of a legal burden in relation to the defence available under subsection 61B(7) (which is closely similar to subsection 61B(4), discussed above). The Explanatory Statement implies that the prosecution must prove the "indecent content" element before D need prove the elements of the defence is an important matter in justification. Thus, so far as the offence in subsection 61B(5) is concerned, the mistake made weakens considerably the imposition of a legal burden in relation to the defence available under subsection 61B(7).

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 DI2013-229 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2013 (No. 1) made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **revokes determines the priority household target for the compliance period 1 January to 31 December 2014.**

Disallowable Instrument DI2013-230 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2013 (No. 1) made under Schedule 3, section 3.4 of the *Workers Compensation Act 1951* **appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to employer interests.**

Disallowable Instrument DI2013-231 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2013 (No. 2) made under Schedule 3, section 3.4 of the *Workers Compensation Act 1951* **appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to worker interests.**

Disallowable Instrument DI2013-232 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2013 (No. 3) made under Schedule 3, section 3.4 of the *Workers Compensation Act 1951* **appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to insurer interests.**

Disallowable Instrument DI2013-234 being the Public Place Names (Greenway) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new street in the Division of Greenway.**

Disallowable Instrument DI2013-235 being the Public Place Names (Kingston) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of a new park in the Division of Kingston.**

Disallowable Instrument DI2013-237 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 3) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2013-243 being the ACT Teacher Quality Institute Board Appointment 2013 (No. 3) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the ACT Teacher Quality Institute, representing teachers and principals of the non-government sector.**

Disallowable Instrument DI2013-244 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Franchise Customers) Terms of Reference Determination 2013 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 franchise customers.**

Disallowable Instrument DI2013-245 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2013-179 and determines the standard percentage, discount percentage, relevant percentage and income threshold amount for the purposes of the Land Rent Act 2008.**

Disallowable Instrument DI2013-246 being the Land Rent (Total income of lessee—post-1 October 2013 leases) Determination 2013 (No. 1) made under section 9A of the *Land Rent Act 2008* **determines what constitutes the total income of a lessee and provides a definition of "domestic partner".**

Disallowable Instrument DI2013-247 being the Justices of the Peace (Role) Guideline 2013 made under section 3A of the *Justices of the Peace Act 1989* **revokes DI2006-217 and approves a guideline which sets out the role of Justices of the Peace.**

Disallowable Instrument DI2013-249 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2013 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2013-250 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2013 (No. 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2013-251 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2013 (No. 3) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2013-252 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2013 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

Disallowable Instrument DI2013-253 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2013 (No. 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

Disallowable Instrument DI2013-254 being the Work Health and Safety (Work Safety Council Member and Chair) Appointment 2013 (No. 1) made under Schedule 2, sections 2.3 and 2.5 of the *Work Health and Safety Act 2011* **appoints a specified person as a member and chair of the Work Safety Council.**

Disallowable Instrument DI2013-255 being the Work Health and Safety (Work Safety Council Member) Appointment 2013 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council.**

Disallowable Instrument DI2013-256 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2013 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **and section 209 of the** *Legislation Act 2001* **appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2013-257 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2013 (No. 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **and section 209 of the** *Legislation Act 2001* **appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2013-258 being the Work Health and Safety (Work Safety Council Acting Employer Representative) Appointment 2013 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **and section 209 of the** *Legislation Act 2001* **appoints a specified person as an acting member of the Work Safety Council, representing the interests of employers.**

Disallowable Instrument DI2013-259 being the Work Health and Safety (Work Safety Council Deputy Chair) Appointment 2013 (No. 1) made under Schedule 2, section 2.5 of the *Work Health and Safety Act 2011* **appoints a specified person as deputy chair of the Work Safety Council.**

Disallowable Instrument DI2013-260 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2013 (No. 1) made under section 20 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 DI2013-261 being the Civil Law (Wrongs) Institute of Chartered Accountants in Australia (ACT) Scheme 2013 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the ACT Professional Standards Council's approval of the Institute of Chartered Accountants in Australia (ACT) Scheme.**

Disallowable Instrument DI2013-263 being the Public Place Names (Mitchell) Determination 2013 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends and determines the name of a road in the Division of Mitchell.**

Disallowable Instrument DI2013-266 being the ACT Civil and Administrative Tribunal (Non-Presidential Members) Appointment 2013 (No. 1) made under section 96 of the *ACT Civil and Administrative Tribunal Act 2008* **appoints a specified person as a non-presidential member of the ACT Civil and Administrative Tribunal.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Validity of appointment / adequacy of explanatory statement

Disallowable Instrument DI2013-233 being the Education (Government Schools Education Council) Appointment 2013 (No. 7) made under section 57 of the *Education Act 2004* **appoints a specified person as an education member of the Government Schools Education Council, representing school boards.**

This instrument appoints a specified person as an education member of the Government Schools Education Council, representing school boards. The instrument is made under section 57 of the *Education Act 2004*, which provides:

57 Appointed members of council (government)

(1) The Minister must appoint the following members of the council:

(a) a chairperson;

(b) 6 people who, in the Minister's opinion, have experience in 1 or more of the areas of business and commerce, public policy, early childhood care, education, the special needs of young people and teacher education (the ***community members***);

(c) 10 people who, in the Minister's opinion, represent the views of government school education (the ***education members***).

Note 1 For the making of appointments (including acting appointments), see Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) For subsection (1) (c), the Minister must appoint—

(a) 2 education members chosen from nominations of the peak organisation representing principals; and

(b) 2 education members chosen from nominations of the government teacher union; and

(c) 2 education members chosen from nominations of the peak organisation representing parent associations of government schools; and

(d) 2 education members chosen from nominations of the peak organisation representing students; and

(e) 1 education member chosen from nominations of the peak organisation representing school boards; and

(f) 1 education member chosen from nominations of the peak organisation representing preschool parents.

Section 3 of this instrument states that the specified person is appointed as “an education member representing school boards”. This means that the person is presumably appointed under paragraph 57(2)(e) of the Education Act, which requires that a person appointed be “chosen from nominations of the peak organisation representing school boards”.

The Committee notes that there is nothing in the instrument, or in the explanatory statement for the instrument, that states that the specified person has been "chosen from nominations of the peak organisation representing school boards". The explanatory statement states:

> This instrument appoints [the specified person] for three years from the day after notification to the position of education member representing school boards. The appointee is not a public servant and the determination is a disallowable instrument for the purpose of division 19.3.3 of the *Legislation Act 2001*.

In the absence of a statement to the effect that the specified person has been "chosen from nominations of the peak organisation representing school boards", the Committee (and the Legislative Assembly) can only assume that this is the case. While it may be thought that this should be taken from the very fact that the appointment has been made, by the Minister, the Committee would prefer if the instrument of appointment, or explanatory statements for instruments of appointment, expressly indicated that any pre-requisites for the appointment have been addressed.

As the Committee has consistently stated, it does not consider it to be an onerous requirement for instruments of appointment, either on their face or in the explanatory statement, to demonstrate that any formal requirements in relation to the appointment have been met.

As the Committee noted in its Scrutiny Report No 47 of the *Seventh Assembly* (at pages 29-30), in relation to the Racing Appeals Tribunal Appointment 2011 (No. 5) (DI2011-303), in making this comment, the Committee suggests that it is not merely being pedantic in relation to trying to ensure that any pre-requisites for a particular appointment have been met.

As the Committee has previously noted, in 2011, in the case of *Kutlu v Director of Professional Services Review* ([2011] FCAFC 94 (28 July 2011), see http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html, the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth *Health Insurance Act 1973*, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

In *Kutlu*, a medical practitioner challenged action taken against him on the basis that members of various committees appointed from the PSR Panel that were involved in the action against him were not properly appointed, because the AMA had not been consulted in relation to various appointments. The Full Federal Court considered whether the statutory requirement to consult was a mandatory requirement, or merely direction that would not result in invalidity if not followed. The Court found that it was a mandatory requirement and that the requirements to consult were "essential preliminaries to the Minister's exercise of the power of appointment". The Full Court found that, as a result, various things done in relation to Dr Kutlu, by various committees, were invalid. The Court stated (at para 32):

> [T]he scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices …

The wider effect of the decision in *Kutlu* was to invalidate scores of other investigations of other medical practitioners. Its effect was extremely damaging – including in a financial sense – to the Commonwealth.

The decision in *Kutlu* (and its consequences) underlines the Committee's reasons for maintaining its diligence in relation to attempting to ensure that any pre-requisites for appointments that come before the Committee have been met. As the Committee has consistently stated, the Committee does not consider that what it seeks imposes an onerous requirement on those who make appointments.

This comment does not require a response from the Minister.

Minor drafting issues

Disallowable Instrument DI2013-236 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 2) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as chairperson of the Bushfire Council.**

Disallowable Instrument DI2013-238 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 4) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2013-239 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 5) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2013-240 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 6) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2013-241 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 7) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

Disallowable Instrument DI2013-242 being the Emergencies (Bushfire Council Members) Appointment 2013 (No. 8) made under section 129 of the *Emergencies Act 2004* **appoints a specified person as a member of the Bushfire Council.**

The first instrument mentioned above appoints a specified person as the chairperson of the Bushfire Council. Both the instrument and the explanatory statement for the instrument states that the appointment is made under section 129 of the *Emergencies Act 2004*. The Committee notes that section 129 of the Emergencies Act does not provide for the appointment of a chairperson of the Bushfire Council – it only provides for the appointment of members. While section 128 of the Emergencies Act mentions a chairperson (and a deputy chairperson), no other provision of the Emergencies Act provides for the appointment of a chairperson. This means that the appointment presumably also relies on section 79 of the *Financial Management Act 1996*, which provides (in part):

79 Appointment of chair and deputy chair

(1) The responsible Minister for a territory authority with a governing board may appoint a chair for the board and, unless the establishing Act otherwise provides, a deputy chair for the board.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

If this is the case then the instrument, and/or the explanatory statement for the instrument, might also have referred to section 79 of the Financial Management Act, as do other instruments of appointment.

This comment does not require a response from the Minister.

The second, third and fourth instruments mentioned above each appoint a specified person as a member of the Bushfire Council. However, in each case, the Committee notes that section 3 of the instrument states:

3 Appointment of Chairperson to the Bushfire Council

I appoint [specified person] to be a Member of the Bushfire Council for a period of three (3) years commencing on 1 October 2013 and expiring on 30 September 2016.

Obviously, the heading to the section does not reflect the content of the section (though the Committee notes that the error is not otherwise repeated in the instrument or in the explanatory statement for the instrument).

The same error is contained in section 2 of the fifth and sixth instruments mentioned above.

This demonstrates a problem that can arise when instruments (or explanatory statements for instruments) are drafted using an earlier instrument as a template or precedent. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), the Committee stated:

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

> will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

The Committee reminds agencies of this point.

This comment does not require a response from the Minister.

Minor drafting issue

Disallowable Instrument DI2013-248 being the Fisheries Prohibition and Declaration 2013 (No. 1) made under sections 13, 15, 16, and 17 of the *Fisheries Act 2000* **revokes DI2010-285 and determines the restrictions and requirements on fishing.**

The Committee notes that section 9 of this instrument revokes a previous instrument – DI2010-285. The Committee notes also that, in the "overview" and in the "costs and benefits statement", the explanatory statement for the instrument indicates that it revokes **DI2000-290**. However, the Committee also notes that this error is not repeated in that part of the explanatory statement dealing specifically with section 9, which correctly refers to the fact that the instrument revokes DI2010-285.

The Committee notes that DI2000-290 was, in fact, revoked by DI2010-248, which was, in turn, revoked by DI2010-285 (ie the instrument revoked by *this* instrument).

Clearly, there is some confusion created by the explanatory statement for this instrument. That confusion may or may not have been created by the use of an explanatory statement for an earlier instrument as a template or precedent. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), the Committee stated:

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

The Committee reminds agencies of this point.

This comment does not require a response from the Minister.

Appointment of public servants by disallowable instrument

Disallowable Instrument DI2013-262 being the Children and Young People (Children and Youth Services Council) Appointment 2013 (No. 1) made under Part 2.2, subsections 30(1) and 31(1), of the *Children and Young People Act 2008* **appoints specified persons as chair, deputy chair and members of the Children and Youth Services Council.**

This instrument appoints 7 specified persons to the Children and Youth Services Council. Five are appointed as members and the other 2 persons are appointed as chair and deputy chair. The instrument states that it is made under subsections 30(1) and 31(1) of the *Children and Young People Act 2008* which, respectively, provide for the appointment of members of the Council and the appointment of the chair and deputy chair of the Council. The instrument is a disallowable instrument.

As the Committee has noted in its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role), as a result of paragraph 227(2)(a) of the *Legislation Act 2001*, only the appointments of persons *other than* public servants need to be made by disallowable instrument. It is for this reason that the Committee has consistently stated that, in order for the Committee (and the Legislative Assembly) to be certain that an appointment is properly made by disallowable instrument, the Committee would prefer to see, in the explanatory statement for an instrument of appointment, as statement to the effect that "this is not a public servant appointment" or "the person appointed is not a public servant".

As already noted, this instrument covers multiple appointments. There is no statement, in relation to any of the appointees, that "this is not a public servant appointment" or that "the person appointed is not a public servant". However, there is a statement, in relation to 2 of the persons appointed, that they are ACT Government employees. While it might be assumed from this that the remaining appointees are not public servants, it would be preferable if there was an express statement to this effect, in relation to the remaining appointees.

The Committee also notes that there is no need to appoint the ACT Government employees by disallowable instrument. However, the Committee also notes that this does not affect the validity of the instrument (though it may unnecessarily open the appointments up to disallowance).

This comment does not require a response from the Minister.

Disapplication of subsections 47(5) and (6) of the Legislation Act 2001 / minor drafting issues

Disallowable Instrument DI2013-264 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2013 (No. 1) made under section 25 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **revokes DI2012-279 and approves the Energy Efficiency Improvement Eligible Activities Interim Code of Practice.**

Disallowable Instrument DI2013-265 being the Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2013 (No. 1) made under section 25 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **revokes DI2012-268 and approves Energy Efficiency (Cost of Living) Improvement Record Keeping and Reporting Code of Practice.**

The 2 instruments mentioned above approve 2 new codes of practice, under section 25 of the *Energy (Cost of Living) Improvement Act 2012*. Sections 4 and 5 of the first instrument mentioned above provide:

> **4 Disapplication of Legislation Act, s47(5) and 47(6)**
>
> The *Legislation Act 2001*, sections 47(5) and 47(6) do not apply in relation to an instrument applied, adopted or incorporated as in force from time to time under this instrument.

5 Referenced documents

(1) Australian Standards are available at www.standards.org.au.

(2) A copy of the National Construction Code, which incorporates the Building Code of Australia and the Plumbing Code of Australia, is available for inspection by members of the public between 9am and 4.30pm on business days at the Environment and Sustainable Development Directorate shopfront, Dame Pattie Menzies House, 16 Challis Street, Dickson, or for purchase at www.abcb.gov.au.

Sections 4 and 5 of the second instrument are identical to what is set out above, other than that subsection 5(2) of the second instrument refers only to the Building Code of Australia.

It should be noted at the outset that subsection 25(3) of the Energy (Cost of Living) Improvement Act provides:

(3) An approved code of practice may apply, adopt or incorporate an instrument, as in force from time to time.

This means that subsection 47(3) of the Legislation Act also does not apply to these instruments.

The Committee notes that the effect of section 4 of each instrument is that the various instruments that are incorporated by reference by each of these 2 instruments need not be published on the ACT Legislation Register, as "notifiable instruments". Nor do any amendments to those instruments.

The explanatory statement for the first instrument, by way of explanation for the disapplication of subsections 47(5) and (6), states:

Clause 4 Disapplication of notification requirement

Clause 5 disapplies … sections 47 (5) and 47(6) of the *Legislation Act 2001*, so that published standards and codes that are relied on in the code of practice do not have to be notified on the ACT legislation register. This has been done for copyright reasons.

Documents referenced in the code include Australian Standards, the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA). These documents are subject to copyright, making them inappropriate to notify on the legislation register. Australian Standards are available at www.standards.org.au. The BCA and PCA, including published State and Territory appendices, are available on the ABCB web site at www.abcb.gov.au.

Clause 5 Referenced documents

This clause provides advice regarding how the community can access the Australian Standards, the BCA and the PCA, including how they can freely access the BCA and PCA, considering that access to the standards and codes are generally otherwise by paid purchase or subscription.

Similar statements appear in the explanatory statement for the second instrument, albeit by reference to clauses 5 and 6 (an issue that the Committee discusses further below).

While the Committee always prefers that material that is incorporated by reference is freely available to the general public, the Committee also notes that the existence of copyright is a matter that has previously been accepted as a reason for the disapplication of subsections 47(5) and (6) of the Legislation Act. The Committee also notes that the instruments and the explanatory statements for the instruments also provides information about where at least some of the referenced material is freely available to the general public.

This comment does not require a response from the Minister.

As the Committee has noted above, the explanatory statement for the second instrument mentioned above incorrectly refers to "clauses 5 and 6" of the instrument when providing an explanation in relation to the disapplication of subsections 47(5) and (6) of the Legislation Act and to the referencing of documents. The Committee notes that this is because the explanatory statement for the second instrument incorrectly discusses the clause that revokes an earlier instrument as "clause 3" when, in fact, in both instruments, the provision that revokes the earlier instrument is, in fact, section 6 of the instrument.

The Committee also notes that section 49 of the code of practice that is approved by the second instrument provides (in part):

> **49 Consumer declaration – activities requiring authorised installers**
>
> For activities that require an authorised installer, the consumer must declare that—
>
> (a) (i) I am the tenant/resident/lessee (owner) of the residential premises at the installation address identified on this form; or
>
> (ii) I am an appropriate person representing the tenant / lessee (owner) of the business premises at the installation address identified on this form; and
>
> (b) The eligible activity(ies) recorded on this form have been carried out at the installation address on this form; and

Leaving aside the minor formatting issues, the Committee notes that (while the intended meaning is, nevertheless, relatively clear) "**activity(ies)**" is a less-than-optimum way of expressing what is intended.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Treasurer, dated 16 October 2013, in relation to comments made in Scrutiny Report 10 concerning the Disallowable Instrument DI2013-181—Land Tax (Certificate and Statement Fees) Determination 2013 (No. 1) (attached).
- The Attorney-General, dated 23 October 2013, in relation to comments made in Scrutiny Report 12 concerning the Marriage Equality Bill 2013 (attached).
- The Treasurer, dated 19 November 2013, in relation to comments made in Scrutiny Report 10 concerning the Disallowable Instrument DI2013-88—Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2) (attached).

The Committee wishes to thank the Treasurer and the Attorney-General for their helpful responses.

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

Mick Gentleman MLA
Deputy Chair

22 November 2013

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 12, dated 14 October 2013

Animal Welfare (Factory Farming) Amendment Bill 2013 Act citation:

Disallowable Instrument DI2013-223 - Animal Welfare (Mandatory Code of Practice) Approval 2013 (No. 1)

Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR SPORT AND RECREATION
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

Scrutiny Report 10 – Disallowable Instrument DI2013-181

I write in response to the comments in Scrutiny Report 10 (the Report) dated 12 August 2013 and issued by the Standing Committee on Justice and Community Safety (the Committee) in its Legislative Scrutiny role. The comments refer to Disallowable Instrument DI2013-181, being the *Land Tax (Certificate and Statement Fees) Determination 2013 (No 1)* (the Land Tax Instrument).

I thank the Committee for its comments in relation to fee determination instruments generally.

The Committee has identified that the Land Tax Instrument did not revoke an existing instrument. This is the first issue of such an instrument specifically in relation to land tax, and therefore there is no subordinate legislation that previously determined the relevant fee.

Following reconsideration of the fee amount for the Certificate of Rates, Land Tax and Other Charges (the Certificate), the fee was increased to align with charges for similar applications in other jurisdictions.

The Certificate relates to amounts payable for a parcel of land and is a requirement during the property conveyance process. Only one fee is payable for the Certificate; however, the taxpayer receives information on all charges payable with respect to the parcel in the resulting document. This includes any outstanding general rates, land tax, land rent and deferred duty amounts.

The absence of a specific land tax fee instrument did not prevent the Certificate being issued or prohibit land tax information being provided to a taxpayer, as the fee was

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determined by other instruments. The land tax information has always formed a supplementary part of the Certificate.

For completeness, from 1 July 2013 a separate instrument was created to determine the Certificate fee for land tax, thus ensuring that clear and individual Certificate instruments were then in place for general rates, land tax and land rent.

The ACT Revenue Office will continue to review these fee instruments, with an aim of creating one disallowable instrument to address this fee. It is hoped that this will remove any confusion in future.

I trust that the above adequately addresses the Committee's requests.

Yours sincerely

Andrew Barr MLA
Treasurer
16 October 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

Thank you for Scrutiny of Bills Report No. 12 of 14 October 2013. I offer the following response in relation to the Committee's comments on the Marriage Equality Bill 2013.

The Committee has commented on the Bill's reference to section 8 of the *Human Rights Act 2004* (Human Rights Act). The Committee draws to the attention of the Assembly the view that it will be a matter for 'each member of the Assembly to choose between an argument that, as Territory law now stands, there is substantive equality in the way in which two persons married under the Marriage Act are treated and the way in which two persons who cannot so marry are similarly treated, and the argument advanced in the Explanatory Statement that there remains an area of substantive inequality'. I have publicly expressed my view and the view of the Government on this issue.

The Committee has referred to ending a civil union and the rights of a child. The Committee refers to section 55A of the Commonwealth *Family Law Act 1975* (Family Law Act) and asks whether the interests of children would necessarily be protected when an order for dissolution of a marriage under the Marriage Equality Act is made in the Supreme Court. In the absence of a duty to consider the interests of children affected by the dissolution, the Committee appears to question whether the bill is consistent with the rights of children which are expressed under section 11(2). The Committee has drawn this matter to the Attention of the Assembly and recommended that I respond.

Issues concerning children and property will continue to be governed by existing laws and in addition, the interests of children will be relevant considerations for the ACT Supreme Court in the exercise of any of its jurisdiction under the proposed Act. Further detail is as follows.

In deciding an application for dissolution under the Marriage Equality Act, the Supreme Court will have a general discretion to consider the interests of children. The statutory power is given to the Court and will attract a general discretion to act in the interests of justice. Accordingly, the Court will be empowered to consider the interests of children where that consideration may impact on the

basis or effect of the dissolution order. In addition, the scope of the statutory power given to the Court, and therefore the nature and scope of the discretion, must be determined in light of the Human Rights Act. The interests of children will be relevant considerations having regard the rights in section 11(2) and section 30 of the Human Rights Act, which provides that

> *So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.*

The Family Law Act permits orders in relation to the dissolution of marriage, property of parties to a marriage or de facto relationship and children of a marriage, de facto relationship or other relationship. The general jurisdiction of the Family Court under the Family Law Act may be engaged in relation to these matters. Section 4(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) confers original jurisdiction on the Family Court in 'ACT matters', which include any matter arising under a Territory law, other than a criminal law. Section 9(3) of the Commonwealth *Jurisdiction of Courts (Cross-vesting) Act 1987* provides that the Federal Court or Family Court may exercise jurisdiction conferred on that court by a State or Territory cross-vesting law.

Accordingly, the Family Court has broad original jurisdiction in relation to an application for dissolution under the Marriage Equality Act, and this jurisdiction may be exercised concurrently with its general jurisdiction in relation to children and property matters.

The Committee has drawn attention to a number of particular issues where it believes that there is a degree of uncertainty relating to operation. I will address these issues in the order that they were raised.

1. The Committee asked about the relation of the notes attached to clause 7(1)(b) to the text of that paragraph. The notes are an explanatory device as per clause 4 of the Marriage Equality Bill. The notes attached to this clause clarify a marriage under the Marriage Equality Act will end an earlier civil union or civil partnership. This is relevant to eligibility for marriage under the Marriage Equality Act.

2. The Committee has asked whether it would make more sense to conclude clause 7(1)(c) with "because it would be a marriage within the meaning of that Act" I do not believe that the suggested amendment would make more sense that the clause as drafted. The current wording indicates that a person may marry under the Act where they cannot marry their proposed spouse under the *Marriage Act 1961* (Cth) because they are not eligible to marry under that Act. The proposed amendment could easily be confused as meaning that same-sex marriage is included in the definition of marriage under the Commonwealth Marriage Act. This is not the intention of the clause and would cause unnecessary uncertainty.

3. The Committee has questioned the necessity and desirability of clause 12(2), which provides that 'a minister of religion is not required to make a place (for example a church or other place of public worship) available for solemnising a marriage under this Act'. Section 12(2) is a clear statement that the bill will not impose on the religious freedoms guaranteed in section 14 of the Human Rights Act. The availability of any other place for the solemnising of a marriage under this Act will be subject to sections 7, 19 (Access to premises) and 20 (Goods, services and facilities) of the *Discrimination Act 1991* (the Discrimination Act).

4. The Committee has asked why there is a note concerning the effect of an example appended to clause 12(1), as 'there is no example stated anywhere in subclause 12'. The example is in parentheses in clause 12(2) and reads "for example a church or other place of public worship". The note explains that the example is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.

5. The Committee has asked for guidance as to who is a minister of religion of a religious body in relation to clause 13(1). I do not consider that a definition of religious body is necessary in order for this provision to operate and be understood. Section 32 of the Discrimination

Act refers to religious bodies and I would consider that the reference is sufficiently clear on an ordinary reading of this term.

6. The Committee has noted that 'on the face of it, clause 14 is imposed on a celebrant who is a minister of religion as well as to one who is not', and asked for clarification on this matter. Clause 14 requires authorised celebrants to explain the solemn and binding nature of a marriage under the Marriage Equality Act. The requirements expressed under the Marriage equality Act apply to authorised celebrants, which includes, under Part 5 the registrar-general and celebrants registered under the Act. A Minister of religion may be a registered celebrant under the Marriage Equality Act but only an authorised celebrant may solemnise a marriage under the Marriage Equality Act.

7. The Committee has asked about the necessity of the inclusion of clause 41(2). Subclause 41(2) is an additional, clarifying provision to assist in the interpretation of the Act. I appreciate the Committee's view that the provision may be unnecessary but consider that the provision may assist a layperson to understand that they will not be guilty of an offence under section 41(1) if they have merely performed a later religious ceremony of marriage under section 19 of the Marriage Equality Act.

The Committee has referred to clause 40(1) and asked whether its content is appropriate for subordinate law. This clause was inserted in order to allow for recognition of corresponding laws in other jurisdictions. If another jurisdiction passes legislation to recognise same-sex marriage, and it is a corresponding law to this Act, a relationship under the corresponding law will be recognised as a marriage under this Act. This is an administrative tool to allow for the recognition of corresponding laws, and I believe that it is an appropriate subject for subordinate law. The provision is consistent with the *Domestic Relationships Act 1994* and its provision for the recognition of civil partnerships under corresponding laws

The Committee has expressed concern that section 101(2) of the Bill has the character of a Henry VIII clause and that this is not justified in the Explanatory Statement. The Committee has also expressed concern that subclause 101(3) is misleading.

I note that this continues to be an issue for the Committee, despite the Government's past attempts to explain the purpose and scope of these clauses. I had hoped to resolve this issue in my response to the Committee in relation to the Business Names (Transition to Commonwealth) Bill 201 l. As the Committee has observed, a Henry VIII clause is one which would operate, or intend to, limit future enactments of the Legislative Assembly. The transitional provisions in the Bill operate to enable existing registered civil unions celebrants to be taken to be registered as registered celebrants under 35 of the Marriage Equality Act. The scope of these provisions is regulatory and uncontentious, and its purpose is merely to facilitate the transferral of those registrations. Proposed section 101(2) is not a Henry VIII clause - it is not expressed, and is not intended, to limit future enactments of the Legislative Assembly. First, a regulation under section 101(2) may only modify part 20 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. Second, any modification by regulation of part 20 of the Act has no ongoing effect after the expiry of that Part — 1 year after the commencement day. Lastly, any modification regulation would be subject to Legislative Assembly scrutiny and disallowance.

I trust that the above response answers the Committee's concerns and I thank the Committee for its observations.

Yours sincerely

Simon Corbell MLA
Attorney-General
23 October 2013

Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR SPORT AND RECREATION
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
C/- Scrutiny Committee Secretary
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mr Doszpot

I am writing in response to comments on disallowable instrument DI2013-88, the Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2), made by the Standing Committee on Justice and Community Safety (the Committee) in its Legislative Scrutiny role in Scrutiny Report No 10 of 12 August 2013.

The Committee, in its comments in the Scrutiny Report, requests that I provide a response on two issues — the consistency of the instrument with the *Human Rights Act 2004* (HRA) and the appropriateness of clause 6.1 of the instrument for inclusion in subordinate rather than primary legislation.

With regard to consistency of the instrument with the HRA, the instrument adds to and enhances a right created by statute that did not previously exist: a right to early payment of medical expenses, virtually irrespective of fault. Consequently, the creation of this new right could in no way be construed as having abridged rights previously non-existent. Therefore, the HRA is not engaged.

The intention of this instrument is to enhance the rights of people injured in motor vehicle accidents by broadening the entitlement to early payment for medical expenses and ensuring that the objects of the *Road Transport (Third-Party Insurance) Act 2008* (the CTP Act) with respect to the early payment were upheld by insurers. The primary objective is to facilitate earlier access to treatment and a greater focus of the CTP scheme on health outcomes and rehabilitation.

The ACT has a fault-based compulsory third-party insurance (CTP) scheme. By its nature, a fault-based CTP scheme requires negligence of another party to be established before there is any entitlement to access the scheme. In relation to the early payment for medical expenses this fault requirement is evidenced in section 72

of the CTP Act which requires that the injured person provide a declaration that "the motor accident was not caused wholly or mainly by the fault of the person".

However, clause 6 of the instrument gives effect to section 72 of the CTP Act. Clause 6 was drafted with the objective of giving effect to the Legislative Assembly's intention with amendments to the early payment provisions in the CTP Act in August 2012. These amendments were introduced due to concerns over the way the early payment was being managed by insurers and a desire expressed to increase uptake of the payment. The instrument, and specifically, clause 6 was intended to enable a greater number of people to take up the early payment by giving guidance as to the "wholly or mainly by the fault" criterion. As such, the clause was designed to, and will, enhance the rights of injured persons.

The Committee has suggested that Human Rights issues should have been discussed in the explanatory statement. As the Committee itself notes, there is no requirement that explanatory statements for subordinate instruments explicitly mention Human Rights and as the Government considers that the instrument does not raise any Human Rights issues it was deemed unnecessary to include any discussion of such issues in the explanatory statement to this instrument.

Finally, the Committee has requested that I provide a response as to whether clause 6.1 was appropriate for inclusion in subordinate legislation. The instrument was drafted specifically to be within the scope of the primary legislation, the CTP Act, which was itself amended by the previous assembly to accommodate a broadening of the provisions on which the instrument is based.

I thank the Committee for identifying a transposition error in the numbering of the explanatory statement to the Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 2) (the instrument). I intend to table a revised explanatory statement that corrects this error.

I trust these comments assist the Committee and address its concerns.

Yours sincerely

Andrew Barr MLA
Treasurer
19 November 2013