

Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)

SCRUTINY REPORT 13

6 FEBRUARY 2018

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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; and
- (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—COMMENT

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

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2017

This Bill amends various legislation relating to building and construction regulation in the Territory.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will amend the *Construction Occupations (Licencing) Act 2004* (COLA Act) relating to sharing information with other government agencies. Part 11AA of the COLA Act currently provides for a limited range of public safety agencies to exchange public safety information, or information relating to situations which present a likely risk of injury, significant harm to the environment or significant harm to property. The Bill will allow conditions to be imposed on how the information provided is to be used by the receiving agency, and will allow public safety information to be provided to analogous public safety agencies in other states and territories.

By authorising the disclosure of information obtained by public safety agencies in the course of their functions, the Bill will engage the right to privacy protected under section 12 of the HRA. This is recognised by the explanatory statement, and a justification given using the framework in section 28 of the HRA, and the Committee draws that analysis to the attention of the Assembly. In particular, the Committee notes that the disclosure of information is limited to agencies with a function analogous to those agencies in the Territory currently authorised to share public safety information, that the information relates to risks of harm to persons or significant harm to the environment or property that was first obtained by the agency because they were the agency in question, and the information can only be exchanged when satisfied it will be used to exercise a function under legislation relating to public safety. The Territory agencies will also be subject to the Territory Privacy Principles and other provisions of the *Information Privacy Act 2014*.¹

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

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

INCORPORATION OF AUSTRALIAN STANDARD

The Bill will also amend the *Electrical Safety Act 1971* to use the term “electrical wiring rules”. Currently the Electrical Safety Act makes it a strict liability offence to carry out electrical wiring work

¹ The Committee notes that the explanatory statement refers to IPP 6.2(e) as providing for the similar weighing of privacy considerations in providing for disclosure of information where disclosure is necessary for enforcement related activities. The Committee assumes that this is a reference to the Territory Privacy Principle (or TPP) as set out in Schedule 1 of the *Information Privacy Act 2014*.

without complying with the AS/NZS 3000 standard. The Bill will amend this to compliance with electrical wiring rules which are defined to mean the AS/NZS 3000 standard, an ACT Appendix to that standard, and any other documents prescribed by regulation. The ACT Appendix will be a disallowable instrument and hence presented to the Assembly and made publicly available on the ACT legislation register under section 46 of the Legislation Act 2001. The Bill will also require additional public notice of the ACT Appendix, including notice on the agency website or newspaper and details of where copies of the Appendix may be inspected or purchased. A note to the proposed subsection 3B(1) provides for where the AS/NZS 3000 standard may be purchased.

The Committee also notes the following passage in the explanatory statement (at p 9):

The provisions also allow for the publication and availability of the ACT Appendix and the electrical wiring rules. The ability to inspect the electrical wiring rules is important for access to law, particularly for the parts of the electrical wiring rules the Territory cannot reproduce or distribute under copyright laws, such as AS/NZS 3000.

However, the proposed amendments only provide for publication and access to the ACT Appendix to the AS/NZS 3000 standard and not to the standard themselves, or the electrical wiring rules as a whole.

As the Committee has commented in previous reports, legislative amendment which provides for the incorporation of Australian/New Zealand should include information on how those standards can be accessed. The Committee recognises that the Bill does not add to the role of the AS/NZS 3000 standard in the Electrical Safety Act, and continues the current exemption in the Electrical Safety Regulations for having to comply with amendments to that standard while electrical wiring work was being done. However, in the Committee's view the opportunity should have been taken in amending the Electrical Safety Act to provide for greater access to the AS/NZS 3000 standard.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

CRIMES (FORTIFICATION REMOVAL) AMENDMENT BILL 2017

This Bill will amend the *Crimes Act 1900* to make it an offence to fortify premises used in relation to serious offences for the purpose of preventing entry, and provides for orders by the Magistrates Court to compel removal of fortifications and entry and inspection of fortified premises without a warrant.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

By providing for offences relating to fortification of private premises, and the right of police officers to enter and inspect, without a warrant, private premises, whether commercial or residential, to compel the removal of fortifications that form part of or are attached to premises, the Bill engages the right to privacy protected by section 12 of the HRA.

The explanatory statement accompanying the Bill recognises the potential impact of the Bill on the right of privacy and sets out a justification for that impact using the framework set out in section 28 of the HRA. The Committee commends this statement to the Assembly. In particular, the Committee notes that the various intrusions on privacy are generally conditioned on the Magistrates Court being satisfied that the premises in question are fortified beyond that reasonably necessary to provide security for the ordinary lawful use of the premises, there are reasonable grounds to believe that the premises have or will be used in relation to an offence involving at least 5 years imprisonment, and that it is necessary for the chief police officer to have uninvited access to the premises in relation to the offence.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

There are no requirements in the Bill to provide notice to the occupier of premises that an application for a fortification removal or inspection order has been made, or that an order has been made. Proposed sections 252P and 252V refer to an order being made without the occupier of the premises subject to an order being present when the order is made. Therefore, it is not clear whether the Bill is intended to allow orders to be made compelling the removal of fortifications without notice and an opportunity to be heard being given to the occupier of the premises. If this is the intended effect of the provisions, this removal of procedural fairness requirements would engage the right to a fair trial protected by section 21 of the HRA, and a justification would be required using the framework set out in section 28 of the HRA. If, however, it is intended that obligations of notice and an opportunity to participate in any hearing of the application before the Magistrates Court are to be implied in the legislation, then this should be made clear in the explanatory statement.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

CRIMES LEGISLATION AMENDMENT BILL 2017 (No 2)

This Bill amends various criminal laws, including the *Crimes Act 1900* to give effect to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, and the *Magistrate's Court Act 1930* to establish a Childrens Circle Sentencing Court in the jurisdiction of the Children's Court.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Section 56 of the Crimes Act makes it an offence to engage in a sexual relationship with a young person. Currently, an adult is taken to be in a sexual relationship if they have engaged in various sexual acts on three or more occasions. The Bill will reduce this requirement to only two occasions, but importantly will not require the particulars of each occasion to be proved in order to establish the offence. It will be sufficient to establish the period over which the relationship persisted, and that the period included two or more sexual acts as defined for the purposes of the section without having to establish the particulars of any one or more sexual acts.

As the Bill will reduce the essential factual elements which need to be particularised and established to prove the offence, the amendments will engage the right to a fair trial protected through section 21 of the HRA. The explanatory statement provides a justification for the impact on the right to a fair trial using the framework set out in section 28 of the HRA. The Committee commends this analysis to the Assembly. In particular, the Committee notes the current provisions' lack of utility over charging each of the alleged sexual acts individually and the difficulty of establishing the particulars of each sexual act.

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

RETROSPECTIVE CRIMINAL LAWS (S 25 HRA)

The amendments to section 56 will apply to sexual relationships over a period prior to the amendment coming into effect. The amendments will also increase the maximum penalties associated with the offence. The amendments therefore engage the right to protection from retrospective criminal laws in section 25 of the HRA.

The explanatory statement sets out a considered justification for the limitation of the right to protection from retrospective laws using the framework in section 28 of the HRA. The Committee commends this statement to the Assembly. In particular, the Committee notes that the sexual acts which can constitute the sexual relationship are unchanged and are individually offences under the Act, and that delays are more common in child sexual abuse cases. The Court, in sentencing, must also consider the maximum penalty available when the offence was committed.

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

WORK HEALTH AND SAFETY LEGISLATION AMENDMENT BILL 2017

This Bill will amend the *Work Health and Safety Act 2011* (WHS Act) to provide for the regulation of use, storage and handling of hazardous chemicals through the *Work Health and Safety Regulations 2011* (WHS Regulations) by adoption of national model regulation, and consequential amendments to the *Dangerous Substances Act 2004* and other legislation. This Bill does not, however, effect any substantive amendment to the WHS Regulations.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

Schedule 1 of the WHS Act applies that Act with respect to dangerous goods and high-risk plant beyond workplaces or for use in carrying out work. The amendments will extend references in the WHS Act to generally include private premises. In this way, the amendments provide scope for the WHS Regulations to impose substantive requirements on the handling of dangerous goods, such as hazardous chemicals, to private premises, which may limit the right to privacy protected by section 12 of the HRA.

The explanatory statement acknowledges this potential effect, but suggests that any effect will be limited, either through existing explicit limitations on the application of the WHS Act beyond the work place or use in carrying out work already contained in section 10 of the WHS Regulations, or through the limited application to private premises of the terminology adopted in the WHS Act.

However, an adequate description of the nature and extent of the limitation of the right to privacy, as required by section 28 of the HRA, is not provided by the explanatory statement. The explanatory statement acknowledges that the Dangerous Substances Act currently imposes duties on all individuals to ensure public safety by minimising risks resulting from the handling of dangerous substances. However, the duties imposed by the national model regulations to be adopted following commencement of these amendments are not discussed in the explanatory statement. Therefore, a more detailed description of the nature of the limitation on privacy that might result from the amendments is needed before the reasonableness of any limit on the right to privacy can be decided. The Committee requests that consideration be given to amending the explanatory statement to provide further information on the nature and extent of the limitation on the right to privacy that is likely to result from the amendment.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny – Committee terms of reference paragraph (3)(e)

DISPLACEMENT OF SUBSECTIONS 47(5) AND 47(6) OF THE LEGISLATION ACT 2001

The Bill will insert a new subsection 213(2) into the Dangerous Substances Act to displace subsection 47(6) of the *Legislation Act 2001* to the application, adoption or incorporation of the ADG Code (the Australian Code for the Transport of Dangerous Goods by Road or Rail). The Bill will also substitute section 5 of the *Dangerous Substances (Explosives) Regulation 2004* to provide for the disapplication of subsection 47(5) of the Legislation Act to various instruments, including Australian Standards, that are applied, adopted or incorporated under that Regulation. The effect of these provisions is to prevent those instruments being taken to be a notifiable instrument, which will remove any obligation to register those instruments on the legislation register so as to make them publicly available.

As this Committee has commented previously, access to instruments incorporated into ACT legislation is an important element of subjecting the contents of those instruments to scrutiny and ensuring that people affected by the content of the instruments have access to them. A justification for the displacement of the usual notification requirements should be provided, and notice of how the instrument may be accessed, preferably without cost, should be provided.

The Bill will insert notes into the Dangerous Substances Act and Dangerous Substances (Explosives) Regulation referencing websites where the various instruments may be accessed. However, the Australian Standards incorporated are only available for purchase. The explanatory statement states the instruments have been excluded from the notification requirements as they are subject to copyright and may be accessed, or purchased, from the internet. There is no provision for public access to be provided to the Australian Standards in question. The Committee would request that consideration be given to making the various instruments not otherwise publicly available without purchase available for inspection, or further explanation provided as to why this is not practical or reasonable.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

PROPOSED GOVERNMENT AMENDMENTS

The Government has proposed further amendments to the Firearms and Prohibited Weapons Legislation Amendment Bill 2017, which will affect how antique firearms and centre-fire self-loading rifle magazines are regulated by the Bill.

RESPONSE TO COMMITTEE COMMENTS

In Scrutiny Report 10,² the Committee raised a concern over the regulation of the Firearms and Prohibited Weapons Legislation Amendment Bill 2017, and the description of the intended effect of one of the proposed sections. The supplementary explanatory statement addresses those concerns by correctly identifying the effect of the proposed provision in question. The Committee thanks the Minister for taking steps to address the Committee's concerns and has no further comment.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

Disallowable Instrument DI2017-255 being the Electoral Commission (Electoral Commissioner) Appointment 2017 (No 1) made under section 12 of the *Electoral Act 1992* appoints a specified person as Electoral Commissioner of the ACT Electoral Commission.

Disallowable Instrument DI2017-256 being the Veterinary Surgeons (Board President) Appointment 2017 (No 1) made under section 108 of the *Veterinary Surgeons Act 2015* appoints a specified person as president of the ACT Veterinary Surgeons Board.

Disallowable Instrument DI2017-257 being the Gambling and Racing Control (Governing Board) Appointment 2017 (No 2) made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* and sections 78 and 79 of the *Financial Management Act 1996* revokes DI2015-136 and appoints a specified person as a member and chair of the ACT Gambling and Racing Commission Governing Board.

Disallowable Instrument DI2017-258 being the Public Place Names (Gungahlin) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the name of one road for a public place in the Division of Gungahlin.

Disallowable Instrument DI2017-259 being the Public Place Names (Red Hill) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the names of five roads and one park for public places in the Division of Red Hill.

Disallowable Instrument DI2017-260 being the Road Transport (General) Numberplate Fees Determination 2017 (No 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-134 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-261 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Land Acquisition) Direction 2017 made under section 63 of the *City Renewal Authority and Suburban Land Agency Act 2017* requires the City Renewal Authority to provide to the responsible Minister a detailed business case of each proposed land acquisition for the purposes of the Act.

² *Scrutiny Report 10* of the 9th Assembly at p 5.

Disallowable Instrument DI2017-262 being the **City Renewal Authority and Suburban Land Agency (Suburban Land Agency Land Acquisition) Direction 2017** made under section 63 of the *City Renewal Authority and Suburban Land Agency Act 2017* requires the Suburban Land Agency to provide to the responsible Minister a detailed business case of each proposed land acquisition for the purposes of the Act.

Disallowable Instrument DI2017-264 being the **Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2017 (No 2)** made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.

Disallowable Instrument DI2017-265 being the **Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2017 (No 3)** made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.

Disallowable Instrument DI2017-266 being the **Civil Law (Wrongs) Australian Property Institute Valuers Limited Scheme Amendment 2017** made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of New South Wales' approval of the amendment to the Australian Property Institute Valuers Limited Scheme.

Disallowable Instrument DI2017-267 being the **City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2017 (No 5)** made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the City Renewal Authority Board.

Disallowable Instrument DI2017-268 being the **Plant Diseases (Importation Restriction Area) Declaration 2017 (No 2)**, including a regulatory impact statement made under section 12 of the *Plant Diseases Act 2002* declares specified parts of Western Australia subject to an importation restriction.

Disallowable Instrument DI2017-269 being the **Public Place Names (Molonglo Valley District) Determination 2017** made under section 3 of the *Public Place Names Act 1989* determines the name of a division in the District of Molonglo Valley.

DISALLOWABLE INSTRUMENTS—COMMENT

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

IS THIS A DISALLOWABLE INSTRUMENT?

Disallowable Instrument DI2017-263 being the **Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2017 (No 1)** made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.

This instrument appoints a specified person as a member of the Public Interest Monitor Panel that is provided for by section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006*. The explanatory statement for the instrument states:

As a senior manager and principal lawyer at Legal Aid ACT, Dr Boersig brings to the panel experience of service delivery within the legal aid sector, and significant experience within both a legal practice and a law and justice policy setting.

Dr Boersig is not a public servant.

The final paragraph above is relevant because it relates to whether or not, under the *Legislation Act 2001*, the appointment of the specified person must be by disallowable instrument. This is because paragraph 227(2)(a) of the *Legislation Act* excludes the appointment of public servants to statutory positions from the requirements of Division 19.3.3 of the *Legislation Act* (including the requirement that appointments be made by disallowable instrument).

In this context, the proposition that the specified person is “a senior manager and principal lawyer at Legal Aid ACT” seems inconsistent with the proposition that the specified person “is not a public servant”.

The Committee seeks the Minister’s confirmation that the specified person is not a public servant, for the purposes of paragraph 227(2)(a) of the *Legislation Act 2001*.

This comment requires a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2017-31 being the Crimes (Child Sex Offenders) Amendment Regulation 2017 (No 1) made under the *Crimes (Child Sex Offenders) Act 2005* authorises the disclosure of personal information from the Child Sex Offenders Register for the purposes of the Act.

NATIONAL REGULATIONS—COMMENT

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

Education and Care Services National Amendment Regulations 2017, dated 15 September 2017 made under sections 301 and 324 of the *Education and Care Services National Law as applied by the law of the States and Territories*.

The Committee notes with approval that these National Regulations are accompanied by a detailed and informative explanatory statement and tabling statement.

The Committee commends this approach to other Ministers and agencies.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the regulatory impact statement for the following disallowable instrument and offers no comments on it:

Disallowable Instrument DI2017-268 being the Plant Diseases (Importation Restriction Area) Declaration 2017 (No 2), including a regulatory impact statement made under section 12 of the *Plant Diseases Act 2002* declares specified parts of Western Australia subject to an importation restriction.

GOVERNMENT RESPONSES

- The Attorney-General, dated 27 November 2017, in relation to comments made in Scrutiny Report 12 concerning the Crimes (Police Powers and Firearms Offence) Amendment Bill 2017.
- The Minister for the Environment and Heritage, dated 18 December 2017, in relation to comments made in Scrutiny Report 12 concerning the Lakes Amendment Bill 2017.

These responses can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

- The Speaker, dated 21 November 2017, in relation to comments made in Scrutiny Report 8 concerning Disallowable Instrument DI2017-57—Electoral Commission (Chairperson) Appointment 2017 (No 2).
- The Minister for Health and Wellbeing, dated 29 November 2017, in relation to comments made in Scrutiny Report 11 concerning the Government response to Disallowable Instrument DI2017-165—Public Health (Cooling Towers) Risk Activity Declaration 2017 (No 1).
- The Minister for Health and Wellbeing, dated 29 November 2017, in relation to comments made in Scrutiny Report 11 concerning the Regulatory Impact Statement for Disallowable Instrument DI2017-249—Smoke-Free Public Places (Public Transport Stations) Declaration 2017 (No 1).
- The Minister for Justice, Consumer Affairs and Road Safety, dated 30 November 2017, in relation to comments made in Scrutiny Report 10 concerning the Heavy Vehicle National Amendment Regulation 2017.
- The Minister for Health and Wellbeing, dated 3 January 2018, in relation to comments made in Scrutiny Report 12 concerning the Government response to the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (Queensland—Act No 32 of 2017).

These responses can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

The Committee wishes to thank the Speaker; the Attorney-General; the Minister for Health and Wellbeing; the Minister for Justice, Consumer Affairs and Road Safety; and the Minister for the Environment and Heritage for their responses.

GOVERNMENT RESPONSES—COMMENT

HEAVY VEHICLE NATIONAL AMENDMENT REGULATION 2017 (2017 NO 329) MADE UNDER THE HEAVY VEHICLE NATIONAL LAW AS APPLIED BY THE LAW OF STATES AND TERRITORIES.

In *Scrutiny Report 10* of the 9th Assembly (30 October 2017) the Committee commented on the National Regulation mentioned above, made under the *Heavy Vehicle National Law (ACT) Act 2013*, raising an issue as to whether it had been tabled in accordance with the requirements of subsection 8(2) of the Heavy Vehicle National Law and section 64 of the *Legislation Act 2001*. The Committee speculated that, in fact, it had not and that, applying subsection 64(2) of the Legislation Act, this meant that this National Regulation was repealed.

The Committee requested Minister's advice on this issue.

The Minister for Justice, Consumer Affairs and Road Safety responded to the Committee, in a letter dated 30 November 2017.

In the letter, the Minister states:

The Committee has identified an issue with regard to the timeframe in which the Regulation was required to have been presented to the Legislative Assembly. I agree with the Committee that the Regulation was not presented as required and as such has no application in the ACT. I am working with Justice and Community Safety Directorate on measures to prevent a reoccurrence.

The Minister goes on to state:

In accordance with advice from Parliamentary Counsel's Office, I am arranging for the next appropriate bill (early next year) to include an amendment which will give retrospective effect to Regulation. This will ensure the ACT law remains consistent and in sync with the national law. In addition, the amendments are minor and technical and reduce regulatory burden so that actions that may be infringements without the Regulation are not infringements once the Regulation takes effect. Justice and Community Safety Directorate has advised that there are no operational issues with this approach.

The Committee awaits the introduction of the remedial legislation.

The Committee suggests that this is a demonstration of the effect of the complexities involved in "national scheme" legislation and that it underlines the importance of such legislation being made, published and tabled in accordance with relevant requirements.

*HEALTH PRACTITIONER REGULATION NATIONAL LAW AND OTHER LEGISLATION AMENDMENT ACT 2017
(QUEENSLAND—ACT NO 32 OF 2017)*

The Committee originally commented on the National Law mentioned above in *Scrutiny Report 10* of the 9th Assembly (30 October 2017). The Committee's comment focussed on the fact that the National Law was tabled (on 24 October 2017) without an explanatory statement or a tabling statement. As a result, the Committee (and the Legislative Assembly) was not provided with information as to how the National Law affected the ACT, nor how (if at all) it is relevant to the ACT. In particular, no information was provided as to the capacity of the Legislative Assembly to scrutinise (or amend) this National Law.

The Committee drew the attention of the Legislative Assembly to this National Law, under principle (2) of the Committee's terms of reference, on the basis that (in this case) the absence of an explanatory statement did not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements. As it was important that the Legislative Assembly's capacity to scrutinise and amend this National Law be clarified before any opportunity to amend (or disallow) this National Law had expired, the Committee stated that its comment required a response from the Minister as a matter of urgency.

The Minister for Health and Wellbeing responded to the Committee’s comment, in a letter dated 2 November 2017. The Committee commented on the Minister’s response in *Scrutiny Report 12* of the 9th Assembly (21 November 2017).

The Minister’s first response stated:

ACT Health has been advised by the ACT Parliamentary Counsel’s Office that an Explanatory Statement is not required for the tabling of the *Health Practitioner Regulation National Law* amendments in the ACT. This is because the amendments to the *Health Practitioner Regulation National Law* (National Law) that are being made in [the National Law that was the subject of the Committee’s comment] automatically apply in the ACT as passed by the Queensland Parliament on 6 September 2017 (according to the commencement provision in s 2). For clarity, the effect of the *Health Practitioner National Law (ACT) Act 2010*, s 6 is to apply the national law [sic] as in force from time to time. The ACT Legislative Assembly is not required to pass these provisions.

In *Scrutiny Report 12*, the Committee noted that the original National Law—ie the Health Practitioner Regulation National Law (ACT) Bill 2009—was considered by its predecessor Committee in *Scrutiny Report No 18* of the 7th Assembly (see https://www.parliament.act.gov.au/data/assets/pdf_file/0003/371469/7scrutiny18.pdf). In that *Scrutiny Report*, referring to the explanatory statement for the National Law, noted that the explanatory statement stated that:

... “introduction of national law in a State or Territory Parliament for adoption by other participating States and Territories, is a standard approach to implementing national schemes in areas, like health, where Constitutional powers rest with the States and Territories, and not the Commonwealth”, but acknowledges that “concerns about abrogating the rights of Parliaments tend to be greatest when, as in this case, the proposed law includes pre-determined legislative provisions based on an agreement between governments”.

Scrutiny Report No 18 went on to state:

The Committee has reviewed the provisions for the adoption in the Territory of the Queensland Act as a national law and those for the making and operation of regulations under that law. The Committee will, in a future report, reflect on aspects of the scheme contained in this Bill. At this point, the Committee notes only that it should not be taken to have accepted any aspect of this scheme as a precedent for other national law schemes.

In *Scrutiny Report 12*, the Committee noted that it has kept the issue of “national scheme” legislation under close review and that it had recently written to the Attorney-General, seeking to open a dialogue with the Executive on legislative scrutiny issues that arise from “national scheme” legislation.

In *Scrutiny Report 12*, the Committee noted that *Scrutiny Report No 18* goes on to state:

The Committee recommends that the Minister responsible for the administration of this national registration scheme advise the Assembly of any proposed change to the legislation or to the regulations.

The Committee went on to note (in *Scrutiny Report 12*) that, though it is not mentioned in the Minister's response, it should be noted that (at least) the tabling of the National Law that was the subject of the Committee's recent comment follows that recommendation. The Committee noted that the Minister's response first stated:

[The National Law that was the subject of the Committee's comment] was provided to the members of the ACT Legislative Assembly for information only.

The Committee noted that the Minister's first response goes on to state:

Following the amendments made to the National Law through [the National Law that was the subject of the Committee's comment], the *Health Practitioner National Law (ACT)* was republished on 28 September 2017 and is available on the ACT Legislation Register.

The Minister's response then advises:

I have sought further advice from ACT Health regarding the appropriate process for Assembly scrutiny of amendments of this nature.

In the light of these comments, in *Scrutiny Report 12*, the Committee requested that the Minister provide a copy of that further advice, when it is received, as that further advice can be expected to inform any dialogue that the Committee enters into with the Attorney-General.

Finally, in *Scrutiny Report 12*, the Committee noted that the Minister's response also provides a copy of the Explanatory Notes for the National Law that was the subject of the Committee's comment, as passed by the Queensland Parliament. The Committee thanked the Minister for this further information. The Committee noted, however, that it would have been preferable if that information was provided at the time of the tabling of the National Law that was the subject of the Committee's original comment.

The Minister has now provided a further response to the Committee, dated 3 January 2018. In this further response, the Minister states:

ACT Health sought advice and has been advised by the ACT Parliamentary Counsel's Office (PCO) that the ACT Legislative Assembly's role in scrutiny of amendments or regulations made under national laws depends on the terms of the particular national law.

The requirements for the tabling of the amendments or regulation made under national laws are not the same in every case. Some amendments or regulations made under national laws do require tabling in the ACT Legislative Assembly, whilst some do not.

In this case there is no requirement for amendments of the national law itself or of national regulations made under that law to be tabled in the Assembly.

Amendments of the National Law and regulation apply automatically in the ACT and are brought about by the terms of the ACT legislation that originally applied the national law scheme in the Territory, that is, the *Health Practitioner Regulation National Law (ACT) Act 2010* (s 6 of that Act).

Given that there is no requirement to table any amendments to the National Law, it followed that no explanatory statement was required to be tabled with the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017*.

The Committee is aware that the requirements for the tabling of the amendments or regulations made under National Laws are not the same in every case. This is a matter of ongoing concern for the Committee. The Committee is mindful of endeavouring to ensure that some level of consistency is imposed on such requirements. In particular, the Committee is mindful of endeavouring to ensure that all amendments or regulations made under National Laws are subject to tabling in, and/or disallowance by, the Legislative Assembly.

As to the proposition that the absence, in this case, of a requirement to table meant that no explanatory statement was required, the Committee disagrees. As the Committee has consistently noted (see, eg, the discussion in *Scrutiny Report 15* of the 8th Assembly, 11 March 2014, at page 28), the particular (complicated) circumstances of National Laws mean that the Committee (and the Legislative Assembly) would be greatly assisted by an explanation of the relevant legislative scheme, saving the Committee (and the Legislative Assembly) from having to work out the mechanics of the operation (and presentation, and disallowance) of such laws for itself.

Further, as the Committee has also previously noted, there is no formal requirement that subordinate legislation (or disallowable instruments) be accompanied by an Explanatory Statement. However, the Committee has also noted, in its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the value of explanatory statements to the Committee (and the Legislative Assembly):

Principle (b) of the Committee’s terms of reference require it to “consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee”. Many of the issues identified below involve things that the Committee considers ought to be addressed in the Explanatory Statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

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

The issues that the Committee has identified with these National Regulations demonstrate one of the points that the Committee has consistently made about the value of explanatory statements, to the Committee and the Legislative Assembly. The absence of an explanatory statement for these National Regulations required the Committee to undertake research and analysis in order to be satisfied that the National Regulations in question are valid, etc. This (and the discussion that the Committee has had with the Minister) might not have been necessary if an explanatory statement had been provided that dealt with the procedural issues that the Committee has discussed above.

The Committee recommends to Ministers that, in circumstances such as with this National Regulation, where there is no formal requirement to table amendments, etc, then, at the very least, explanatory material produced in the “host” jurisdiction for the National Regulation be tabled in the Legislative Assembly.

Bec Cody MLA
Deputy Chair

6 February 2018

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
 - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB)

- **Report 8, dated 8 August 2017**
 - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB)

- **Report 12, dated 21 November 2017**
 - Crimes (Criminal Organisation Control) Bill 2017 (PMB)