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

SCRUTINY REPORT 42

1 MARCH 2016

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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.

TABLE OF CONTENTS

BILLS 1

BILLS—NO COMMENT 1

Protection of Rights (Services) Legislation Amendment Bill 2016 1

Road Transport (Safety and Traffic Management) (Autonomous Vehicle Trials) Amendment Bill 2016 1

Transplantation and Anatomy Amendment Bill 2016 1

BILLS—COMMENT 1

Road Transport Legislation Amendment Bill 2016 1

Smoke-Free Public Places Amendment Bill 2016 4

Victims of Crime (Financial Assistance) Bill 2016 6

Workplace Privacy Amendment Bill 2016 10

SUBORDINATE LEGISLATION 11

DISALLOWABLE INSTRUMENTS—NO COMMENT 11

SUBORDINATE LAW—NO COMMENT 12

NATIONAL LAWS—COMMENT 12

GOVERNMENT RESPONSES 19

COMMENT ON GOVERNMENT RESPONSE 20

COMMENT ON GOVERNMENT RESPONSE BY MEMBER OF THE COMMITTEE 21

OUTSTANDING RESPONSES 22

BILLS

BILLS—NO COMMENT

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

PROTECTION OF RIGHTS (SERVICES) LEGISLATION AMENDMENT BILL 2016

This Bill proposes to amend a range of legislation across the ACT statute book to make changes to references to, and functions of, the statutory office holders within the restructured Human Rights Commission and expanded Public Trustee and Guardian that will be consequential to the Protection of Rights (Services) Legislation Amendment Bill 2015 should it be passed into law.

ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) (AUTONOMOUS VEHICLE TRIALS) AMENDMENT BILL 2016

This is a Bill for an Act to allow for the safe testing of autonomous (or self-driving) cars in the ACT.

TRANSPLANTATION AND ANATOMY AMENDMENT BILL 2016

This is a Bill to amend the *Transplantation and Anatomy Act 1978* to permit suitably trained officers, who are not doctors, to remove whole organs where only parts of the organs, such as heart valves, are to be used subsequently.

BILLS—COMMENT

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

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend Territory road transport laws to reduce the number of police pursuits on ACT roads by enhancing the ability of police to prevent drivers or riders fleeing from police, and to apprehend and prosecute drivers or riders who commit this offence without the need to undertake a police pursuit.

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* (HRA)

Clause 22 of the Bill) proposes the insertion of section 5C into the *Road Transport (Safety and Traffic Management) Act 1999*.

5C Failing to stop motor vehicle for police

A person commits an offence if—

(a) the person is driving a motor vehicle; and

(b) a police officer asks or signals the person to stop the motor vehicle; and

(c) the person fails to comply with the police officer's request or signal as soon as practicable.

Maximum penalty:

(a) for an offence by a first offender—100 penalty units, imprisonment for 12 months or both; or

(b) for an offence by a repeat offender—300 penalty units, imprisonment for 3 years or both.

This provision should be read in conjunction with the proposed amendments to existing section 7 of the *Road Traffic (Safety and Traffic Management) Act 1999*, which creates offences in relation to furious, reckless or dangerous driving. The Explanatory Statement explains these amendments.

> This clause amends the maximum penalty for the existing offence of furious, reckless or dangerous driving in section 7. The maximum penalty for the simple offence is 100 penalty units, imprisonment for one year or both. The offence currently includes a number of aggravating factors which result in the offence being an aggravated offence if any of those factors existed at the time of the current offence. ... One of the aggravating factors currently is the person failed to comply with a request or signal given by a police officer to stop the vehicle (section 7A (a) (i)). This clause increases the maximum penalty for the aggravated offence where that aggravating factor (failing to stop motor vehicle for police) is present. The maximum penalty in this circumstance has been increased to 300 penalty units, imprisonment for three years or both – for a first offender, or 500 penalty units, imprisonment for five years or both – for a repeat offender.

Proposed section 5C will also operate in conjunction with section 60 of the *Road Traffic (General) Act 1999*, which provides, in the words of the Explanatory Statement, that "the responsible person for a vehicle, or a person in possession of the vehicle, must, when requested to do so by a police officer or authorised person, give information to a police officer about the name and home address of the driver of a vehicle at the time the vehicle was alleged to have been used to commit an offence against the road transport legislation". It is noted that "[t]he Bill amends the maximum penalty for failing to give this information where the offence alleged to have been committed was an offence against section 5C of the *Road Transport (Safety & Traffic Management) Act 1999* (Failing to stop motor vehicle for police)".

The Bill also proposes that other penalties apply to a person offending against section 5C, or against section 60 where it operates in conjunction with section 5C. The Explanatory Statement notes that (1) "[c]lauses 7 to 10 make amendments to the definition of immediate suspension offence, to include the new offence in section 5C of the *Road Transport (Safety and Traffic Management) Act 1999* (Failing to stop motor vehicle for police) and the offence in section 60 of the General Act, if the failure to give information was in relation to that failing to stop offence"; and (2) that "[c]lauses 25 to 35 extend the application of existing provisions for seizure, impounding and forfeiture of vehicles, where they have been used to commit certain offences, to include where they have been used in the commission of the offence of failing to stop for police".

The paragraphs above are a very summary statement of the complex provisions of the Bill. The Committee refers members of the Assembly to the more detailed explanations in the Explanatory Statement. Arising out of the proposals there are, from a rights perspective, three major matters to be addressed.

VESTING IN THE POLICE A POWER TO SIGNAL VEHICLES TO STOP; PROPOSED SECTION 5C OF THE ROAD TRAFFIC (SAFETY AND TRAFFIC MANAGEMENT) ACT AND THE RIGHT TO FREEDOM OF MOVEMENT IN HRA SECTION 13

The first matter is the creation of the new offence in section 5C of the Road Traffic (Safety and Traffic Management) Act. This provision engages and limits at least the right to freedom of movement stated in HRA section 13. At common law, a police officer has no power to stop a vehicle using a public road unless expressly authorised by law to do so. Of course, section 5C would so authorise the police. That however is not the end of the analysis for the purposes of the Human Rights Act, or for the Committee acting a term of reference to identify clauses in Bills that trespass on personal rights and liberties. For these purposes, the question is then whether the extent of the authority is justifiable.

More precisely, the issue is whether it is justifiable to empower the police to signal a person to stop a vehicle unaccompanied by any requirement that the officer has a suspicion or belief that any fact or circumstance exists (such as the driver of the vehicle had or was about to act contrary to the law in some respect).

It may be argued that absence of any such requirement means that the power is expressed arbitrarily, in that it gives no guidance to the police or to those who may be affected by its exercise as to when it may be exercised. On this basis the provision is not proportionate (using that term as shorthand for the way the tests in HRA section 28 are applied).

Section 5C is based on regulation 109 of the *Road Transport (Safety and Traffic Management) Regulation 2000*, but in a critical respect is different. Under the regulation, a person must not, **without reasonable excuse**, fail to comply with a request or signal made or given by a police officer (emphasis added). By this defence, the person may raise a wide range of considerations in justification for failing to stop. The Explanatory Statement does not draw attention to this difference. It does point out that "[t]he statutory defences in the *Criminal Code 2002*, such as duress or sudden emergency, are available to a person charged with the offence". These defences are much narrower than a "reasonable excuse" defence.

The gravity of proposed section 5C is also enhanced by the increase in penalty in comparison to that in regulation 109. While the maximum penalty for the latter offence is 20 penalty units, the maximum penalty for an offence under section 5C is, for a first offender is 100 penalty units, 12 months imprisonment or both, and for a repeat offender, the penalty is increased to 300 penalty units, three years imprisonment or both.

The Committee recommends that the Minister provide a justification for the enactment of section 5C in terms of the framework stated in HRA section 28. A particular issue is whether there is a sufficiently strong relationship between the limitation and its purpose (paragraph 28(2)(c)). The Explanatory Statement indicates that the purpose of the new offence is to offset the adoption by the police of a policy that "police will no longer pursue drivers unless it is necessary to prevent serious harm or the death of another person". It appears to be expected that section 5C will operate as an inducement to drivers to desist from fleeing from the police. The Committee suggest that this point needs elaboration.

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

POWER TO ENTER A PLACE WITHOUT CONSENT OF THE OWNER OR OCCUPIER AND THE RIGHT TO PRIVACY IN HRA SECTION 12

Under the heading "Power to enter a place without consent of the owner or occupier", the Explanatory Statement at pages 4 to 6 identifies a number of clauses that engage HRA section 12.

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

FAILING TO PROVIDE INFORMATION TO A POLICE OFFICER ABOUT THE DRIVER OF THE VEHICLE AND THE RIGHT NOT TO SELF-INCRIMINATE IN HRA SECTION 22

Under the heading "Failing to provide information to a police officer about the driver of the vehicle", the Explanatory Statement at pages 6 to 9 identifies a number of clauses that engage HRA section 12.

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

SMOKE-FREE PUBLIC PLACES AMENDMENT BILL 2016

This is a Bill for an Act to amend the *Smoke-Free Public Places Act 2003*, and in particular to permit the establishment of new smoke-free public places and events by Ministerial declaration and to facilitate the future declaration of public places or events in both the built environment and in outdoor or open locations.

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*

COMMUNITY CONSULTATION IN RESPECT OF A DECLARATION BY THE MINISTER OF A SMOKE-FREE PLACE OR EVENT AND THE RIGHT TO TAKE PART IN PUBLIC LIFE IN HRA SECTION 17

While the Chief Minister and the relevant Minister must jointly declare that a public place or event is a smoke-free public place or event, the Minister "must consult with the community, including people or organisations that would be directly affected if the declaration is made" (proposed subclause 9O(2) of the Act).

The Committee notes that nothing is said as to how this consultation is to take place. It recommends that the Minister advise on the feasibility of making provision for a non-exhaustive specification of particular steps that must be taken.

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

STRICT LIABILITY OFFENCES AND THE PRESUMPTION OF INNOCENCE STATED IN HRA SUBSECTION 22(1)

The Explanatory Statement notes that:

> Clause 5 of this Bill proposes to insert a new Part 2C into the Act. Six of the new sections within that new part contain strict liability offences, three of which (sections 9R, 9T and 9U) include defences that impose an evidential burden on the defendant. The offence in section 9S applies if reasonable steps are not taken by the defendant.
>
> New sections 9Q, 9R and 9S carry a maximum penalty of 50 penalty units. A maximum penalty of 20 penalty units is attached to new section 9U, and new sections 9T and 9V have a maximum penalty of just 5 penalty units.

The Committee notes that the penalties are within the generally acceptable range, and raises no issue with the "regulatory offence" justification stated at Explanatory Statement page 2. It also notes (and commends) the references to relevant defences available under the Criminal Code.

The comments that follow should be read together with the detailed analysis in the Explanatory Statement at pages 2 to 5.

Proposed section 9Q. If a declaration provides that an area may be designated in which smoking is allowed at a declared smoke-free public place or event, the owner or occupier may designate that area as prescribed in subsection 9Q(2). Such a person commits a strict liability offence if the area is designated other than "as required by the declaration", or other than "in accordance with this section" (subsection 9Q(5)). The words "designate an area" in this provision would seem to exclude any conduct by the owner or occupier that could be seen as a failure to conform to the obligations stated in subsection 9Q(4). These failures arise in an area that has been designated.

The Committee requests the Minister to confirm that this result is intended. If it is, the offence provision might be better worded. On any basis, if a failure to conform to subsection 9Q(4) falls within the offence provision, the Committee recommends that consideration be given to permitting a defendant to raise a "taking reasonable steps" defence in relation to paragraph 9Q(4)(b).

Proposed section 9R. The Explanatory Statement summarises this section as follows.

> The occupier or manager must ensure that in the designated smoking area there are: no people under 18 years old [paragraph 9R(1)(a)], there is no food or drink service [paragraph 9R(1)(b)], there is no food consumed [paragraph 9R(1)(c)], and there is no entertainment offered or directly accessible [paragraph 9R(1)(d)]. Entertainment includes television, but does not include public announcements or recorded music.
>
> A maximum penalty of 50 penalty units applies if the occupier or manager does not meet these requirements. However, there is no offence if the occupier or manager could not reasonably be expected to know that food was being consumed in the designated smoking area [subsection 9R(3)]. An offence against this section is a strict liability offence.

Thus, the defence under subsection 9R(3) applies only in relation to one of the four kinds of obligations imposed. It is arguable that in some circumstances an owner or manager could not reasonably be expected to have been aware that any of the other obligations in subsection 9R(1) had not been observed.

The Committee also notes that subsection 9S(2) is stated in terms that the prosecution must prove that the occupier or manager **failed to take reasonable steps** to prevent smoke from the designated smoking area entering any part of the public place or event that is not a designated smoking area. The Explanatory Statement notes that the provision is worded in this way because "there will be circumstances in which prevention is impossible or impractical to completely achieve, and as such the obligation is reduced to having taken reasonable steps to prevent it". It is arguable that the same might be said about the obligations stated in subsection 9R(1).

The Committee recommends that the Minister explain why the defence is limited.

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

VICTIMS OF CRIME (FINANCIAL ASSISTANCE) BILL 2016

This is a Bill for an Act to provide financial assistance for people affected by acts of violence.

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*

ISSUES ARISING UNDER SECTION 8 OF THE *HUMAN RIGHTS ACT 2004*

SPECIAL REPORTING CLASS VICTIMS

Clause 31 sets out the reporting requirements for applicants for financial assistance. It provides that applicants who are special reporting class victims are not required to report the act of violence to police to be eligible for an immediate need payment or an economic loss payment. Such victims are those who are in some position of vulnerability in relation to the offender.

The Explanatory Statement notes that "[s]ection 8 of the HRA provides that 'everyone is equal before the law and is entitled to the equal protection of the law without discrimination.' Clause 31 may be seen to engage this aspect of section 8 by providing different reporting requirements for different categories of victims. All victims other than special reporting class victims are required to report to police to be eligible for financial assistance.".

By reference to HRA section 28, the Explanatory Statement offers a justification for this limitation on HRA section 8, to which the Committee refers Members of the Assembly.

The Committee draws this matter to the attention of the Assembly and does not call for a response from the Minister.

THE EXTENSION, IN RELATION TO CLASS C VICTIMS, OF THE CONCEPT OF A "FAMILY MEMBER" IN FAVOUR OF PERSONS WHO ARE ABORIGINAL OR TORRES STRAIT ISLANDER

This issue is identified in the Explanatory Statement, as follows.

> Clauses 15 provides that a class C related victim is a person who, at the time a primary victim dies, is financially independent of the primary victim and is a family member of the primary victim.
>
> Clause 15(2) explains that a family member is a person who has a genuine personal relationship with the primary victim and is either a sibling of the primary victim (including stepsiblings and halfsiblings) or, if the primary victim was an Aboriginal person or Torres Strait Islander person, a person who in accordance with the primary victim's community is regarded as a sibling. The expanded definition of family member in clause 15(2)(b)(ii) is designed to recognise the kinship and cultural structures of Aboriginal or Torres Strait Islander people, and ensure that these family members are able to access the scheme.

These provisions engage and limit the rights stated in HRA section 8, and a justification in terms of section 28 is required. One matter to consider is whether there are other groups in the community that have kinship and cultural structures deserving of recognition.

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

LIMITATIONS ON LAWYERS' LEGAL COSTS

The provisions of the scheme proposed are quite complex and many who seek assistance may feel a need to obtain legal advice. Clause 96 proposes to empower the Minister, by regulation, to limit the costs recoverable from an applicant.

> **96 Limitation of lawyers legal costs**
>
> (1) A lawyer must not charge or seek to recover legal costs that are higher than the amount prescribed by regulation for the following:
>
> (a) legal services that relate to an application for financial assistance;
>
> (b) legal services that relate to an appeal or review process under this Act.

The Explanatory Statement states: "The purpose of this clause, which is substantively the same as part 5 of the repealed Act, is to ensure that access to legal services relating to the Act is affordable for applicants and offenders".

There are other professionals—such as medical practitioners and psychologists—whose services may also be called upon by an applicant, and there is no provision similar to clause 96 in relation to their fees. If professional advisers be regarded as the relevant class of persons, it is arguable that lawyers are not treated on an equal basis.

These provisions engage and limit the rights stated in HRA section 8, and a justification in terms of section 28 is required. One matter to consider is whether there is a sufficiently strong relationship between the object of clause 96 and the possible effect of its operation in practice; that is, it may be asked whether discouraging lawyers to act for applicants will improve access to the lawyers.

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

ISSUES ARISING UNDER SECTION 12 OF THE *HUMAN RIGHTS ACT 2004*

The Explanatory Statement notes that "[s]ection 12 of the HRA provides that 'everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.' In international law this has been interpreted as limiting public authorities to only obtaining information relating to an individual's private life the knowledge of which is essential in the interests of society".[1]

REQUESTS BY THE COMMISSIONER FOR INFORMATION WHEN DECIDING APPLICATION FOR FINANCIAL ASSISTANCE

Under the heading "Commissioner may ask for information when deciding application for financial assistance", the Explanatory Statement at pages 4 to 5 identifies a number of clauses in division 3.5 that empower the commissioner to obtain information when deciding applications for financial assistance.

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

THE PROTECTION OF THE IDENTITY OF A PERSON WHOSE STATEMENT ABOUT THE ACT OF VIOLENCE IS PROVIDED TO THE COMMISSIONER BY THE CHIEF OF POLICE

The Explanatory Statement notes that:

> Clause 40 provides the commissioner with power to ask the chief police officer or an investigating police officer (the requested officer) for certain information about an act of violence when deciding an application for financial assistance ... . Clause 40(1)(b) provides that the commissioner may also request a copy of any person's statement about the act of violence that is the subject of the application. ... Clause 40(5) requires the requested officer to remove all particulars identifying the maker of a statement mentioned in clause 40(1)(b) except particulars the officer believes are relevant to assist the commissioner to decide the application. Clause 40(6) provides that giving information or documents under this clause is authorised despite any other territory law.

The issue the Committee raises is whether the subclause 40(5) should be worded so that the officer must also remove any matter that might be a basis upon which the identity of the person could be ascertained.

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

The wording of subclause 40(6) raises a question as to whether the other provisions of clause 40 would be immune from attack under the HRA. This issue is addressed below.

[1] Citing [UN Human Rights Committee] General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) : . 08/04/1988.

REQUESTS BY THE COMMISSIONER TO THE REGISTRAR FOR INFORMATION RELEVANT TO RECOVERY ACTION

Under the heading "Commissioner may ask registrar for information relevant to recovery action", the Explanatory Statement at pages 5 to 6 identifies a number of clauses that engage HRA section 12.

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

REQUESTS BY THE COMMISSIONER TO A GOVERNMENT AGENCY FOR AN OFFENDER'S HOME ADDRESS TO ASSIST RECOVERY ACTION

This issue is raised by clause 79, which is summarised by the Explanatory Statement.

> Clause 79 provides that if the commissioner decides to take recovery action under this part the commissioner may, at any time, ask a government agency for the offender's home address. If a government agency has the information requested under subsection (1) the government agency must give that information to the commissioner unless any other law prevents the information from being given. This provision is expected to be used to obtain an address to enable a recovery intention notice to be given to an offender.

The Explanatory Statement at pages 8 to 9 provides a justification for this limitation of the offender's privacy at pages 8-9, to which the Committee refers members of the Assembly. (It should be noted that for part 6, dealing with recovery, "offender" is defined to mean "a person convicted or found guilty of a recompensed offence"; clause 69.)

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

ISSUE ARISING UNDER SUBSECTION 21(1) OF THE *HUMAN RIGHTS ACT 2004*

This issue is identified and discussed in the Explanatory Statement at pages 6 to 8.

The Committee draws this matter to the attention of the Assembly and does not call upon the Minister to respond.

THE INTERACTION BETWEEN CLAUSES OF THE BILL AND THE HRA

The HRA cannot affect the validity of any subsequent, inconsistent laws of the Territory. The Supreme Court of the Territory may, however, find a law to be inconsistent with a human right protected by the Act, and may make a Declaration of Incompatibility (section 32). Such a declaration does not affect the validity, operation or enforcement of the law or the right or obligations of anyone. A mechanism is however provided that is intended to impact on the parliamentary process by requiring the Attorney-General to present the Declaration to the parliament and respond to it.

The only direct legal effect of the HRA is in relation to the interpretation of Territory laws. Section 30 provides that "[s]o 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 HRA is not entrenched by the process provided for in section 26 of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth). The HRA may therefore be amended by ordinary legislative process (as it has been on several occasions). The operation of any or all of its provisions may also be displaced by a later law that expressly or by implication displaces its operation.

There are provisions in this Bill that might be taken to displace the HRA. Subclause 39(2) provides that "[d]espite any law or duty requiring a health practitioner to maintain the confidentiality of health examinations, a health practitioner may give the commissioner [certain information]. Subclause 41(6) provides that "[g]iving information or documents under this section is authorised despite any other territory law, including a law imposing an obligation to maintain confidentiality ...". Supposing a person wishes to obtain a declaration of incompatibility on the ground that one or other of these provisions unjustifiably limits the right to privacy in HRA section 12, a question arising would be whether the HRA has been displaced by the provisions. This would not be an easy question to answer.

It might be thought that the HRA should not be capable of being displaced except by an express provision to this effect. This would require amendment of the HRA.

For the present, subclauses 39(2) and 41(6) might be amended by inserting the words "subject to the *Human Rights Act 2004*" in relevant places.

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

WORKPLACE PRIVACY AMENDMENT BILL 2016

This is a Bill to amend the *Workplace Privacy Act 2011*, and in particular (1) to allow employers to apply to the Magistrates Court for an authority to conduct surveillance of employees outside the workplace, and (2) to remove notice requirements for tracking devices where it would be unduly difficult to affix a notice to the device, and where the employer has taken appropriate action to notify workers of the device's tracking capability.

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*

SURVEILLANCE OF A WORKER OUTSIDE THE WORKPLACE AND THE RIGHT TO PRIVACY (HRA SECTION 12)

The primary thrust of the amendments proposed is to allow employers to apply to the Magistrates Court for an authority to conduct surveillance of employees outside the workplace; see clauses 5 to 15. As The Explanatory Statement also notes, "[c]lause 4 of the Bill may also limit the right to privacy by amending section 17 of [the Act] to allow for tracking of equipment provided by the employer without a notice in limited circumstances".

The amendments engage and limit the right to privacy stated in HRA section 12. This is acknowledged in the Explanatory Statement and, in terms of the framework stated in HRA section 28, it contains a full justification of this limitation. The Committee refers Members of the Assembly to the Explanatory Statement.

In the Committee's view, a number of particular issues arise. The first is that, given the intrusive nature of this power, there needs to be more elaboration of why it is necessary. Focussing on the wording of proposed paragraph 17(2)(b), what could amount to reasonable steps, and what could amount to notification to workers? In particular, how could it be reasonably guaranteed that every worker at every point of time would have notice that the vehicle or other thing was being tracked? Some guidance as to what devices might be used in tracking would also be of assistance to the Assembly.

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

SURVEILLANCE OF A WORKER IN THE VICINITY OF A WORKER'S RESIDENCE AND THE RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN TO PRIVACY (HUMAN RIGHTS ACT 2004 SECTION 11)

The Explanatory Statement notes that "[i]n achieving the purpose of the Bill, part 4 has the potential to engage, and limit, the right to protection of the family and children, for example where covert surveillance is conducted in the vicinity of an employee's private residence and images of family members are captured in the course of surveillance".

The Explanatory Statement and, in terms of the framework stated in HRA section 28, contains a full justification of this limitation. The Committee refers Members of the Assembly to the Explanatory Statement.

The Committee commends the Explanatory Statement for its close attention to the issues arising under the Human Rights Act.

The Committee draws these matters to the attention of the Assembly and does not call for a response from the Minister.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-1 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2016 (No. 1) made under subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985* **revokes DI2014-56 and AF2014-22 and approves the blood donation declaration form.**

Disallowable Instrument DI2016-2 being the Radiation Protection (Chair of Council) Appointment 2016 (No. 1) made under section 70 of the *Radiation Protection Act 2006* **appoints a specified person as chair of the Radiation Council.**

Disallowable Instrument DI2016-3 being the Children and Young People (ACT Out of Home Care) Standards 2016 (No. 1) made under section 887 of the *Children and Young People Act 2008* **makes the ACT Out of Home Care Standards 2016.**

Disallowable Instrument DI2016-4 being the Taxation Administration (Eligible Impacted Properties—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-307 and establishes a duty concession scheme for eligible impacted properties.**

Disallowable Instrument DI2016-5 being the Financial Management (Transfer of Funds) Direction 2016 (No. 1) made under paragraph 14A(2)(b) of the *Financial Management Act 1996* **transfers Health Directorate Capital Injection appropriation to Net Cost of Outputs appropriation.**

SUBORDINATE LAW—NO COMMENT

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

Subordinate Law SL2016-1 being the Road Transport (Offences) Amendment Regulation 2016 (No. 1) made under the *Road Transport (General) Act 1999* **amends the Road Transport (Offences) Regulation to describe penalties for new offences created through amendment of the Heavy Vehicle National Law (ACT).**

NATIONAL LAWS—COMMENT

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

NO EXPLANATORY STATEMENT / RETROSPECTIVITY

Education and Care Services National Amendment Regulations 2015 (2015 No. 804), dated 11 December 2015, 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 formal part of these National Regulations indicates that they are 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 that, in the case of the ACT, this presumably refers to the *Education and Care Services National Law (ACT) Act 2011*. It presumably refers, in particular, to section 6 of that Act, which provides:

> **6 Adoption of Education and Care Services National Law**
>
> (1) Subject to this section, the Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—
>
> (a) applies as a territory law; and
>
> (b) as so applying may be referred to as the Education and Care Services National Law (ACT); and
>
> (c) so applies as if it were part of this Act.
>
> (2) A law that amends the Education and Care Services National Law set out in the schedule to the Victorian Act and is passed by the Victorian Parliament after this Act's notification day must be presented to the Legislative Assembly not later than 6 sitting days after the day it is passed.

(3) The amending law may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed.

Note See the Legislation Act, s 65 (Disallowance by resolution of Assembly).

(4) If the amending law is not presented to the Legislative Assembly in accordance with subsection (2), or is disallowed under subsection (3), the Education and Care Services National Law applying under subsection (1) is taken—

(a) not to include the amendments made by the amending law; and

(b) to include any provision repealed or amended by the amending law as if the amending law had not been made.

(5) Section 303 (4) (Parliamentary scrutiny of national regulations) of the Education and Care Services National Law set out in the schedule to the Victorian Act does not apply as a territory law.

Section 301 of the Education and Care Services National Law provides the power to make National Regulations. Section 302 of the Education and Care Services National Law provides for the publication of National Regulations:

302 Publication of national regulations

(1) The national regulations are to be published on the NSW Legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.

(2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

The Committee notes at this point that it is not especially user-friendly that the ACT Legislation Register, a Victorian Act and the NSW Legislation website have to be consulted in relation to the operation of these National Regulations. This lack of user-friendliness is exacerbated when (as discussed further below) there is no explanatory statement for these National Regulations.

Section 3 of these National Regulations provides:

3 Commencement

(1) These Regulations (except regulation 4) commence on the day on which they are published on the NSW Legislation website.

(2) Regulation 4 commences on 1 March 2016.

A search of the NSW Legislation website reveals that these National Regulations were published on the NSW Legislation website on 18 December 2015. This means that the National Regulations (except for regulation 4) commenced—including for the ACT—on 18 December 2015. This would appear to involve retrospective operation.

However, with the exception of regulation 4 from the 18 December 2015 commencement, this means that only one provision—regulation 5—commenced on 18 December 2015. That regulation provides:

> **5 General qualification for educators—centre-based services**
>
> In regulation 264(1) of the Education and Care Services National Regulations, for "2015" substitute "2017".

In simple terms, the effect of this amendment appears to be to extend the operation of modifications made by regulation 264 to the operation of section 126 of these National Regulations. Prior to the amendment, the modifications were to cease operation on 31 December 2015.

Regulation 126 of the National Law deals with the qualification requirements for educators at a centre-based service educating and caring for children preschool age or under.

While there is no explanatory statement for these National Regulations, the Committee notes that, when tabling these National Regulations in the Legislative Assembly, the Minister made a tabling statement, that said (in part):

> Madam Speaker, to return to the regulation being discussed today, in December 2015 the Education Council agreed to make two jurisdiction-specific minor amendments to the Education and Care Services National Regulations, which aim to improve the operation of the National Quality Framework for Early Childhood Education and Care.
>
> Section four of the amending regulation is specific to Victoria.
>
> Section five of the amending regulation is specific to the ACT and commenced on 18 December 2015 to extend a provision that would have ceased at the end of 2015. The provision allows qualified educators to be replaced during non-contact time, breaks and unexpected absences of up to five consecutive days with a lesser-qualified or unqualified educator. This provision has now been extended until 31 December 2017.
>
> This amendment responds to feedback from the education and care sector and will resolve an issue that has been raised since the introduction of the National Quality Framework.
>
> The amendment provides flexibility for staffing arrangements, for example during meal breaks, unexpected absences and probationary periods, without compromising children's education or safety.

The explanation above would appear to indicate that the retrospective operation of section 5 of these National Regulations does not involve any prejudicial effect on individuals, for the purposes of section 76 of the *Legislation Act 2001*. However, the issue is not directly addressed in the tabling statement.

The Committee has already noted that there is no explanatory statement for this National Regulation. While the Committee has always accepted that there is no formal, legal requirement that an explanatory statement be provided in relation to subordinate legislation, the Committee has always maintained that it is important that an explanatory statement nevertheless be provided.

In its document titled *Subordinate Legislation—Technical and Stylistic Standards: Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

> Principle (b) of the Committee's terms of reference [now principle (2)] requires 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 final paragraph above goes to what the Committee has stated above, in relation to the failure to address the retrospectivity issue. In the absence of a statement in relation to the application of section 76 of the Legislation Act, the Committee's terms of reference require it to seek an assurance from the Minister that there is no prejudicial retrospectivity involved in these National Regulations. In doing so, the Committee notes that, regardless of any argument that section 76 of the Legislation Act has been disapplied, by paragraph 7(1)(c) of the *Education and Care Services National Law (ACT) Act 2011*, principle (1)(b) of the Committee's terms of reference requires the Committee to 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) "unduly trespasses on rights previously established by law". Retrospective operation of laws, with prejudicial effect on persons other than the Territory, falls squarely within that term of reference, regardless of any disapplication of section 76 of the Legislation Act in this case.

The Committee also notes that, as it has previously observed (including as recently as *Scrutiny Report No. 36* of the *8th Assembly*, at page 25), a necessary consequence of the failure to provide the sort of information set out above in an explanatory statement or in a tabling statement in relation to National Regulations denies the Legislative Assembly (and the Committee) important information. The operation of National Regulations are invariably complicated. In the particular (complicated) circumstances of these National Regulations, the Committee (and the Legislative Assembly) would have been greatly assisted by an explanation such as that set out above, rather than the Committee (and the

Legislative Assembly) having to work out the mechanics of the operation (and, as discussed further below, the presentation and disallowance) of these National Regulations for itself.

The Committee draws the Legislative Assembly's attention to this National Regulation, under principle (2) of the Committee's terms of reference, on the basis that (in this case) the absence of an explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

The Committee requests that the Minister provide the Legislative Assembly with an explanatory statement for this national regulation.

The Committee also seeks the Minister's assurance that the retrospective operation of these National Regulations does not involve prejudicial retrospectivity, for section 76 of the *Legislation Act 2001.*

A further issue with these National Regulations is the parliamentary scrutiny of the National Regulations, by the Legislative Assembly and by the Committee. While not referred to in the Minister's tabling statement, the Committee notes that section 303 of the Education and Care Services National Law provides:

> **303 Parliamentary scrutiny of national regulations**
>
> (1) The member of the Ministerial Council representing a participating jurisdiction is to make arrangements for the tabling of a regulation made under this Law in each House of the Parliament of the participating jurisdiction.
>
> (2) A committee of the Parliament of a participating jurisdiction may consider, and report to the Parliament about, the regulation in the same way the committee may consider and report to the Parliament about regulations made under Acts of that jurisdiction.
>
> (3) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction in the same way, and within the same period, that a regulation made under an Act of that jurisdiction may be disallowed.
>
> (4) A regulation disallowed under subsection (3) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.
>
> (5) If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the day of its disallowance in the last of the jurisdictions forming the majority.
>
> (6) In this section—
>
> "**regulation**" includes a provision of a regulation.

Section 64 of the Legislation Act (in simple terms) requires that subordinate legislation be tabled within 6 sitting days of the Legislative Assembly of being notified on the ACT Legislation Register. In the present case, publication of these National Regulations on the NSW Legislation website corresponds to publication. As the Committee has already observed, these National Regulations were published on 18 December 2015. By that date, the Legislative Assembly had risen for 2015. The 6 sitting days therefore commenced on the first sitting day of the Legislative Assembly for 2016—ie 9 February 2016. The Committee notes that these National Regulations were tabled on 18 February 2016—ie the 6th sitting day of 2016. This means that the National Regulations were tabled within the required time. Under section 65 of the Legislation Act, these National Regulations may be disallowed by the Legislative Assembly by notice of motion to disallow given within the 6 sitting days from 18 February 2016.

The Committee notes that, again, in the particular (complicated) circumstances of these National Regulations, the Committee (and the Legislative Assembly) would have been greatly assisted by an explanation such as that set out above, rather than the Committee (and the Legislative Assembly) having to work out the mechanics of the presentation and disallowance of these National Regulations for itself.

This comment does not require a response from the Minister.

POSITIVE COMMENT / RETROSPECTIVITY

Heavy Vehicle National Amendment Regulation (2015 No. 824), made under the Heavy Vehicle National Law **as applied by the** *Heavy Vehicle National Law Act 2012* **(Queensland) and by the law of States and Territories.**

The Committee notes that an explanatory statement is provided for this National Regulation. The explanatory statement is generally helpful and generally avoids the Committee having to make some of the sorts of comments that it has made, in this Scrutiny Report, about the Education and Care Services National Amendment Regulations 2015 (2015 No. 804).

The Committee notes that section 2 of this National Regulation provides:

> **2 Commencement**
>
> (1) This Regulation, other than the provisions mentioned in subsection (2), commences on the commencement of the *Heavy Vehicle National Law Amendment Act 2015* (Queensland).
>
> (2) Sections 17, 19, 20, 25 and 26 commence when this Regulation is made.

Though it is not mentioned in the explanatory statement, the Committee notes, according to the Queensland Legislation website, the *Heavy Vehicle National Law Amendment Act 2015* (Queensland) was assented to on 24 September 2015. Section 2 of the Heavy Vehicle National Law Amendment Act provides that it commences "on a single day to be fixed by proclamation". The Committee can find no evidence that the commencement has been proclaimed. Further, the Austlii website indicates that this Act has not commenced see http://www5.austlii.edu.au/au/legis/nsw/consol_act/hvnl277/notes.html). That being so, it is not clear to the Committee whether there is any retrospectivity involved in subsection 2(1) of this National Regulation.

Turning to subsection 2(2), the Committee notes that this National Regulation is made under section 730 of the *Heavy Vehicle National Law Act 2012* (as applied by section 7 of the *Heavy Vehicle National Law (ACT) Act 2013*), which provides (in part):

> **730 National regulations**
>
> (1) For the purposes of this section, the designated authority is the Queensland Governor acting with the advice of the Executive Council of Queensland and on the unanimous recommendation of the responsible Ministers.
>
> (2) The designated authority may make regulations for the purposes of this Law.
>
> …….

The Queensland Legislation website indicates that the Heavy Vehicle National Amendment Regulation was "notified" on 17 December 2015. This would seem to suggest that the Heavy Vehicle National Amendment Regulation was *made* on that date. Coincidentally, the NSW Legislation website indicates that the Heavy Vehicle National Amendment Regulation was published on December 2015. If that is correct then sections 17, 19, 20, 25 and 26 of this National Regulation commenced on 17 December 2015 (though the Committee queries whether, if the rest of the National Regulation has not yet commenced—because, in fact, the *Heavy Vehicle National Law Amendment Act 2015 (Queensland)* has not yet commenced—these provisions are able to commence, without the prior commencement of the formal provisions, etc around them). This means that they would have a retrospective operation.

The Committee notes that the explanatory statement for this National Regulation does not address any retrospectivity issues and, in particular, whether there is any prejudicial retrospectivity, for section 76 of the *Legislation Act 2001*. In the absence of a statement (in the explanatory statement) in relation to the application of section 76 of the Legislation Act, the Committee's terms of reference require it to seek an assurance from the Minister that there is no prejudicial retrospectivity involved in this National Regulation. In doing so, the Committee notes that, regardless of any argument that section 76 of the Legislation Act has been disapplied, by subsection 8(1) of the *Heavy Vehicle National Law (ACT) Act 2013*, principle (1)(b) of the Committee's terms of reference requires the Committee to consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Legislative Assembly (including a regulation, rule or by-law) "unduly trespasses on rights previously established by law". Retrospective operation of laws, with prejudicial effect on persons other than the Territory, falls squarely within that term of reference, regardless of any disapplication of section 76 of the Legislation Act in this case.

The Committee draws the Legislative Assembly's attention to this National Regulation, under principle (2) of the Committee's terms of reference, on the basis that the explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

The Committee also seeks the Minister's assurance that any retrospective operation of this National Regulation does not involve prejudicial retrospectivity, for section 76 of the *Legislation Act 2001*.

A further issue with this National Regulation is the parliamentary scrutiny of the National Regulation, by the Legislative Assembly and by the Committee. While section 734 of the Heavy Vehicle National Law provides for parliamentary scrutiny of National Regulations (and while section 733 provides for publication, on the NSW Legislation website), there does not appear to be a provision requiring tabling of National Regulations, in the Legislative Assembly. However, the Committee notes that the explanatory statement for this National Regulation states:

> While the HVNL [ie Heavy Vehicle National Law] provides that the majority of the *Legislation Act 2001* does not apply in respect of the HVNL, section 8 of the Act provides that chapter 7 of the Legislation Act applies to a national regulation as if a reference to a subordinate law were a reference to a national regulation. As such, national regulations, and national amendment regulations, are required to be presented to the Legislative Assembly within 6 sitting days of notification on the NSW legislation register.

Section 64 of the Legislation Act (in simple terms) requires that subordinate legislation be tabled within 6 sitting days of the Legislative Assembly of being notified on the ACT Legislation Register. In the present case, publication of this National Regulation on the NSW Legislation website corresponds to publication. As the Committee has already observed, these National Regulations were published on 17 December 2015. By that date, the Legislative Assembly had risen for 2015. The 6 sitting days therefore commenced on the first sitting day of the Legislative Assembly for 2016—ie 9 February 2016. The Committee notes that these National Regulations were tabled on 18 February 2016—ie the 6th sitting day of 2016. This means that the National Regulations were tabled within the required time. Under section 65 of the Legislation Act, this National Regulation may be disallowed by the Legislative Assembly by notice of motion to disallow given within the 6 sitting days from 18 February 2016.

The Committee notes with approval that, in contrast to other National Regulations, the explanatory statement for this National Regulation was of some assistance to the Committee (and the Legislative Assembly) in working out the mechanics of the presentation and disallowance of this National Regulation. The Committee commends this approach to other Ministers.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Justice and Consumer Affairs, dated 15 February 2016, in relation to comments made in Scrutiny Report 40 concerning the Justice Legislation Amendment Bill 2015 (attached).
- The Attorney-General, dated 15 February 2016, in relation to comments made in Scrutiny Report 40 concerning the Powers of Attorney Amendment Bill 2015 (attached).
- The Minister for Health, dated 15 February 2016, in relation to comments made in Scrutiny Report 40 concerning the Health Legislation Amendment Bill 2015 (attached).
- The Minister for Workplace Safety and Industrial Relations, dated 12 February 2016, in relation to comments made in Scrutiny Report 40 concerning the Workers Compensation Amendment Bill 2015 (attached).

- The Minister for Planning and Land Management, dated 17 February 2016, in relation to comments made in Scrutiny Report 39 concerning Subordinate Law SL2015-30—Planning and Development Amendment Regulation 2015 (No. 1) (attached).
- The Attorney-General, dated 23 February 2016, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2015-314—ACT Civil and Administrative Tribunal (Non-Presidential Members) Appointment 2015 (No. 6) (attached).
- The Minister for Health, dated 26 February 2016, in relation to comments made in Scrutiny Report 41 concerning Subordinate Law SL2015-41—Health Amendment Regulation 2015 (No. 1) (attached).

The Committee wishes to thank the Minister for Justice and Consumer Affairs, the Attorney-General, the Minister for Health, the Minister for Workplace Safety and Industrial Relations and the Minister for Planning and Land Management for their responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee offers the following comments on the Government response to the Powers of Attorney Amendment Bill 2015:

Issue 1

The Committee did not "argue" that the right to security of the person "stated at common law and in the HRA are so strong that a principal should not (as is currently the law) have the ability to provide consent in anticipation that they might suffer from impaired decision-making at later point in time".

> It merely pointed out that there is "an issue" as to whether this is the case. Nor did it suggest that the High Court decisions in *Marion's case* provided an answer to how this issue might be resolved.

Issue 2

The Committee appreciates this restatement of the safeguards.

Issue 3

The Committee does not wish to add to the comments it made in its report.

Issue 1 concerning the role of ACAT

The Committee's comments on the role of ACAT are influenced in part by the remarks in the Explanatory Statement. In rejecting an approach that would "require the ACAT to decide about a person's participation in medical research", the explanatory statement at pages 2-3 states that it would have had "the potentially perverse outcome of replacing the appointed decision-maker with an unknown person or panel of people". The Committee cannot see that it has "misinterpreted" the explanatory statement.

The Minister's response has misunderstood the issue raised by the Committee. ACAT is a body that in some respects has a jurisdiction that involves the exercise of judicial power. The Committee raised an issue as to whether such a body should, even in respect of an exercise of non-judicial power, provide advisory opinions. It is a matter of constitutional principle, and not of any provision of the ACAT Act.

Issue 2 concerning the role of ACAT

The Committee did not pose any question in the terms stated in the Minister's response. It raised only the question as to whether it was desirable to permit the Minister to define the concept of "interested person". The Minister's response does not deal with this issue.

COMMENT ON GOVERNMENT RESPONSE BY MEMBER OF THE COMMITTEE

Mrs Jones offers the following comments on the response to the Justice Legislation Amendment Bill 2015:

"The Minister's reply states that in order for the children of donor conception or commercial surrogacy to know their complete biological make up and parentage would involve testing every child born the ACT. This is not correct and does an injustice to children who may in the future seek a government response to the opaque nature of current government controlled birth certificates.

In order to give this potentially vulnerable group of children the right to know their biological make up would involve special provisions to enable this group to have full access to their biological identity.

Those in the population conceived naturally are not in the same way vulnerable to government sanctioned denial of and disconnection from their full biological identity. The Minister's response is an overstatement of possible government responses which could be as simple as putting known biological data on birth certificates, even if as an addendum to the main data presented there.".

Steve Doszpot MLA
Chair

1 March 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 39, dated 10 November 2015

Disallowable Instrument DI2015-268 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2015 (No. 1), including a regulatory impact statement

Disallowable Instrument DI2015-269 - Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2015 (No. 1)

Disallowable Instrument DI2015-270 - Energy Efficiency (Cost of Living) Improvement (Emissions Multiplier) Determination 2015 (No. 1)

Disallowable Instrument DI2015-271 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2015 (No. 1)

Disallowable Instrument DI2015-272 - Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2015 (No. 1)

Report 41, dated 15 February 2016

Disallowable Instrument DI2015-322 - Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2015 (No. 1)

Disallowable Instrument DI2015-328 - Pool Betting (Prescribed Percentage) Determination 2015 (No. 1)

Disallowable Instrument DI2015-331 - Training and Tertiary Education (National Code of Good Practice for Australian Apprenticeships) Approval 2015

Disallowable Instrument DI2015-336 - Domestic Animals (Exercise Areas) Declaration 2015 (No. 1)

Disallowable Instrument DI2015-337 - Domestic Animals (Prohibited Areas) Declaration 2015 (No. 1)

SHANE RATTENBURY MLA

Minister for Education
Minister for Corrections
Minister for Justice and Consumer Affairs
Minister for Road Safety

Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No. 40 of 2 February 2016. I offer the following response to the Committee's comments on the *Justice Legislation Amendment Bill 2015*.

In response to the two questions you have asked me to address:

Whether Territory law currently provides a means for a child to ascertain the identity of their biological parents;
The ACT does not have a register of gamete donors though I understand these exist in other jurisdictions. Consideration of such a register is outside the scope of this Bill. Fertility clinics within the ACT operate in accordance with the National Health and Medical Research Councils "Ethical guidelines on the use of Assisted Reproductive Technology in clinical practice and research (2004)" which require that clinics must not use donated gametes unless the donor has agreed to the release of identifying information to people conceived as a result of their donation (6.1 of the NHMRC guidelines). Not all conceptions where the genetic and social parents are different are the result of assisted reproductive technology and the ACT Government would need to DNA test every child born in the ACT to ascertain if the declared parents are the genetic parents. The ACT Government does not intend to embark on such a program.

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Whether proposed sections 7 and 11 would create any difficulty for a child to ascertain identity.

It is not anticipated that the redrafted sections 7 and 11 would create a difficulty ascertaining their identity. Sections 7 and 11 cover a number of conception scenarios. If a child was conceived as a result of assisted reproductive technology within the ACT they would be able to access information about their gamete donor from the clinic involved in their conception. The ACT does not currently DNA test when parents register the birth of a child and does not intend to introduce this practise. For any birth in the ACT the Government accepts the declaration parents make when registering the birth without further testing.

Human rights implications

The issue regarding a person's genetic history is a complex one and one where there are many different views on what legislative regime best supports the protection of family and children. The case raised by the Committee, *Rose v Secretary of the State for* Health [2002] EWHC 1593 (Admin), related to an individual wanting to access clinic information about their donor which is something individuals are now able to do in the ACT. The Government supports donor conceived individuals being able to have this access.

The ACT Government does not currently hold information on individual genetic history for either assisted or non assisted conceptions. Allowing all individuals to access information about their genetic history on either application or by recording it at birth the ACT would require the Government to establish a process of capturing and recording this information for all births in the territory. Significant consideration would need to be given to a system like this from both practical and human rights perspectives. The Government believes that, at this time, the parentage presumptions and the ethical guidelines for assisted reproductive clinics are sufficient to support the needs of children and to uphold the protection of family and children.

I thank the Committee for considering this Bill.

Yours sincerely

Shane Rattenbury MLA
Minister for Justice and Consumer Affairs

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
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Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No. 40 of 2 February 2016. I offer the following response to the Committee's comments on the Powers of Attorney Amendment Bill 2015.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?

The Committee clarifies this question by raising three issues.

Issue 1: Is it compatible with the right to security in section 18 of the *Human Rights Act 2004* (HRA) that a principal be able to authorise their attorney to make decisions about the principal's participation in medical research?

By reference to *Department of Health and Community Services v JWB and SMB*[1] (Marion's Case) the Committee argues that the right to security of person is "so strong that a principal should not (as is currently the law) have the ability to provide consent in anticipation that they might suffer from impaired decision-making at [a] later point in time."

However, Marion's Case clearly illustrates that the right to security of person is not affected by the amendments proposed in the Bill.

[1] [1992] HCA 15

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First, Marion's Case is about a 14 year old girl unable to make her own decisions. The Bill, on the other hand, proposes to allow adults with full mental capacity to decide whether their enduring attorney may consider their participation in medical research.[2]

Second, Marion's Case involved parents wishing to make a decision on behalf of their child. The Bill is providing lucid adults the opportunity to make a decision for themselves. Not only does the Bill allow an adult to decide whether to appoint an enduring attorney to make medical research decisions, it also allows an adult to make a health direction stating that they do not wish to participate in medical research at all.

Third, Marion's Case did not involve research. Marion suffered from an intellectual disability and epilepsy, was severely deaf, had an ataxic gait and exhibited behavioural problems. Marion's parents wanted her to undergo a hysterectomy and an ovariectomy not to treat these issues, but to 'prevent the psychological and behavioural consequences' of pregnancy and menstruation. In contrast, the Bill deals only with research.

Last, the decision in Marion's Case turned largely on the severity of the procedure proposed: an irreversible sterilisation procedure on a child. The material presented in the case did not satisfy the Court that the procedure was justified. By contrast, the Bill contains several safeguards aimed at preserving a balance between the risks and benefits of participating in the research. In addition, the Bill requires all research considered by a substitute decision-maker to be approved by a human research ethics committee, such as ACT Health's Human Research Ethics Committee (HREC). The HREC aims to ensure the highest ethical standards are maintained in research projects carried out in the ACT and Australia. The types of research recently approved by the HREC are vastly different to the procedures proposed in Marion's Case and include:

a) an online survey evaluating follow-up practices for women at high-risk of breast cancer;
b) a study for people with metastatic pancreatic cancer, testing the safety and effectiveness of a new drug in combination with existing prescription drugs where the new drug has already been tested to determine the highest dose possible without serious side effects; and
c) a study for people with a common heart rhythm disorder, evaluating the standard-practice aggressive management of common cardiac risk factors. The normal treatment for the underlying condition is not changed or delayed.

<u>Issue 2: Are the safeguards in the Bill adequate?</u>

This Bill, including its safeguards, is the product of a significant amount of community consultation. This has resulted in an appropriate balance between removing barriers to participation in medical research and protecting the interests of participants in medical research projects and people who wish not to participate.

[2] The separate issue about a power of attorney made before these amendments commence (which, if authorising health care decisions, will also authorise medical research decisions) is discussed below at issue 3.

I note that the Committee commends the way section 41D(2) in clause 13 of the Bill closely structures the process by which an attorney may authorise medical research. This process itself contains a number of safeguards designed to promote careful consideration about a person's participation in medical research projects. The Bill also inserts these safeguard into the *Guardianship and Management of Property Act 1991* (the Guardianship Act), requiring guardians to follow a process where currently they have a broad power to decide about medical research matters with little direction.

In addition, the Bill introduces the following additional safeguards:

a) the attorney's exercise of power must accord with the decision-making principles in section 4 of the Guardianship Act, which require the attorney to, for example, give effect to the principal's wishes as far as they can be worked out;
b) the attorney must not receive a benefit from making a medical research decision; and
c) an interested person may apply to the ACT Civil and Administrative Tribunal for a review of a medical research decision.

Finally, the Bill strengthens the status of health directions. Currently, health directions are binding only on enduring attorneys appointed before a health direction is made, and guardians. The Bill requires all substitute decision-makers to comply with a health direction, including one that limits or refuses participation in medical research.

Together these safeguards provide strong protections for individuals so that medical research is carried out in the ACT in a measured and ethical manner.

I note the Committee's concerns that there is no absolute requirement for the research to benefit the principal. Rather, the Bill requires the research to have the potential to benefit the principal *or* other people with the principal's condition. This wording reflects the fact that it is never guaranteed that medical treatment will benefit the recipient. This is especially true for medical research projects where some participants receive a placebo rather than the drug being tested. The other safeguards in the Bill, including the requirement that the research project relate to the diagnosis, maintenance or treatment of a condition that the principal has or has had, or to which the principal has a significant risk of being exposed, protects principals against being included in research projects unnecessarily.

<u>Issue 3: Is there justification for the proposal to deem a power of attorney, made before the Bill commences and empowering the attorney to make decisions about health care matters, to also include a power to make decisions about medical research matters?</u>

It is correct that this deeming feature of the Bill limits the right to freedom from medical experimentation without consent in section 10(2) of the HRA. The Explanatory Statement at page 4 justifies this by reference to the right to recognition and equality before the law in section 8 of the HRA. The Explanatory Statement explains that the Bill addresses the current inequality between people who are the subject of guardianship orders (who can, if their guardian consents, participate in medical research) and people who have appointed an enduring power of attorney (who, on becoming incapacitated, cannot participate in medical

research). In addressing this inequality, the Bill has the potential to create another inequality by allowing people who made a power of attorney after the Bill commences to participate in medical research, while prohibiting participation for those whose powers of attorney predate the commencement of the Bill. The only way to avoid this inequality is deeming the pre-commencement powers of attorney to include a power to make medical research decisions in certain circumstances.

The Committee suggests incorporating into the Bill a requirement that any existing power of attorney does not include a power for medical research matters unless the principal has given an explicit direction for this to be the result. However this suggestion disregards the fact that there may be a number of people who are already incapacitated when the Bill commences. These people are prohibited from giving this direction under the current law and, due to incapacity, cannot give this direction following the Bill's commencement.

The proposal in the Bill is much less likely to result in discriminatory or unintentional consequences. It is true, as stated by the Committee, that a person making an enduring power of attorney under the current law may have fully appreciated that the attorney's power excluded the right to make decisions about participation in medical research or experimental health care. However, it is equally probable that the principal either was unaware of this prohibition, or wanted to authorise their attorney to make decisions about medical research or experimental health care but knew that such an authorisation was prohibited. Rather than adopting the Committee's proposed approach, which simply denies access to medical research for all people who were incapacitated before the Bill commences, the Bill provides a mechanism which empowers the attorney to consider the principal's participation in medical research, according to a strict set of criteria including considering the principal's wishes.

The role of the ACT Civil and Administrative Tribunal (ACAT)

The Committee raises two issues relating to the proposed role of the ACAT in the Bill.

<u>Issue 1: Is it desirable to impose on the ACAT a duty to provide non-binding advice?</u>

Stakeholders described the difficulty imposed on enduring attorneys and guardians while administering their roles, and welcomed the idea of an avenue for assistance by the ACAT.

In addition, the ACAT has significant expertise in dealing with cases involving people with impaired decision-making capacity, through its work under both the Guardianship Act and the *Powers of Attorney Act 2006*. This includes experience with medical research matters, as the ACAT confirmed that these matters are envisaged as part of medical procedures or other treatment under the current Guardianship Act.

The Committee misinterprets pages 2 and 3 of the Explanatory Statement as expressing the undesirability of ACAT involvement. Rather, the Explanatory Statement argues against the ACAT being the <u>only</u> decision-maker for medical research decisions.

I note the Committee's suggestion that a role for the ACAT which is inconsistent with its role when exercising judicial power is inappropriate. I refer the Committee to section 57 of the *ACT Civil and Administrative Act 2008* which provides that "an authorising law may set out the powers of the tribunal, and the decisions it may make on an application made under the authorising law." This section does not limit the powers of the Tribunal in the way suggested by the Committee.

Issue 2: By allowing the ACAT to review an attorney's decision at the request of an interested person, do any provisions of the Bill inappropriately delegate legislative powers?

This is one of the safeguards in the Bill aimed at protecting individuals who may be considered as a participant in a medical research project. Removing this safeguard is likely to skew the balance achieved by the Bill between removing barriers to participation in medical research and protecting the interests of medical research participants.

The Committee's view that empowering the ACAT to review a decision may have the same perverse outcome as empowering the ACAT to make the initial decision is misguided. When creating a power of attorney, the principal makes a conscious decision to appoint the attorney to make certain decisions on their behalf. To automatically replace that appointed attorney for medical research matters disregards the principal's wishes. However, by providing a mechanism for ACAT review, the Bill recognises that some attorneys may themselves disregard the principal's wishes, by taking advantage of their principal, or making inappropriate decisions, or failing to exercise their power. In addition, the right of an interested person to make an application to the ACAT acknowledges the role of others in the principal's life and gives these people an opportunity to be heard.

I note the Committee's comment that the term 'interested person' in proposed section 41G is not defined. As set out at pages 5 and 13 of the Explanatory Statement, 'interested person' is a term already defined in the Powers of Attorney Act.

Finally, I address the Committee's concern that the power given to the ACAT to assist with the attorney's decision and the power to review an attorney's decision are incompatible. It is common practice that on appeal an official is tasked with reviewing a colleague's previous decision or opinion. The potential for the ACAT, when reviewing an attorney's decision, to 'feel embarrassed by the earlier advisory decision' is not justification to remove the ACAT review mechanism from the Bill. This safeguard is an important protection for individuals being considered as participants in a research project.

I thank the Committee for considering this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
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Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 40 of 2 February 2016 which contains comments on the *Health Legislation Amendment Bill 2015* (the Bill).

The Committee notes that the explanatory statement argues that the success of the harm minimisation approach to illicit drug use might be adversely affected were the uptake of Naloxone to be inhibited, and the perception of the risk of liability may be a disincentive for people to participate in the program and hence the need for the exception.

The Committee comments further that, if the administration of Naloxone in a particular instance is successful, the life and personal security of the overdosed person is enhanced. If, however, the administration of the drug Naloxone is unsuccessful, there is the possibility that the person (the victim) will in some way be injured or even killed by the drug affected person administering the Naloxone (the administrator). In these circumstances, the victim and/or others might wish to pursue civil liability action against the administrator, and ordinarily such an action might be successful.

On the Committee's analysis the removal of the right of action would in their view engage a number of human rights.

In respect of the Committee's consideration of the Bill we believe that to the extent that there may be an engagement of human rights as identified by the Committee in the circumstances described, i.e. the right to privacy, which is over balanced by the potential benefit to the individual of them being resuscitated in a life threatening situation.

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The issue raised by the Committee in respect of invasion of privacy would also apply generally to Good Samaritan situations. The particular exemption relating to impairment of a Good Samaritan by a recreational drug acknowledges the potential for peers of an opiate drug user to be affected themselves by a recreational drug and is cast in the context of a long history of the safe use of Naloxone without harm to recipients.

Accordingly, we see no reason to amend the explanatory statement and would like to thank the Committee for its comments on the Bill.

Yours sincerely

Simon Corbell MLA

MICK GENTLEMAN MLA

Minister for Planning and Land Management
Minister for Racing and Gaming
Minister for Workplace Safety and Industrial Relations
Manager of Government Business

Member for Brindabella

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

Dear Mr Doszpot

I refer to Scrutiny Report 40 of the Standing Committee on Justice and Community Safety (the Committee) which relevantly examined the *Workers Compensation Amendment Bill 2015* (the Bill).

I thank the Committee for their comments and provide the following in response.

Terminology and references

As noted by the Committee, the ACT leads the country in the recognition of the human rights of its citizenry via the *Human Rights Act 2004*. The significant role of this legislation in the human rights environment has now been recognised through the relevant passages of the Bill's supporting Explanatory Statement.

The drafting of the Bill has also been clarified with respect to the nature of information to be contained within the register of return-to-work coordinators, making clear that the register is intended to only capture the workplace contact information of the coordinators.

The Committee also commented on the use of different levels of judgement to inform the exercise of regulatory powers by inspectors under ss 191, 192A and 192B of the Bill. The operation and requirements of proposed s 191(1) are consistent and aligned with the right of entry powers encapsulated in the nationally harmonised *Work Health and Safety Act 2011*. This is to ensure that inspectors have the power of entry to access a suspected workplace to perform their functions under both workers' compensation and health and safety laws.

Proposed 192A and 192B however, pertain to the exercise of powers upon entry by an inspector when performing a workers' compensation inspection. The powers of an inspector within the Workers Compensation Act 1951 are much narrower than those

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contained within the *Work Health and Safety Act 2011*, making it impractical to harmonise the wording.

The terminology used in s192A and 192B is consistent throughout the remainder of the *Workers Compensation Act 1951*.

Strict liability offences – ss 103E

The Committee further sought my response in relation to the intended operation and terminology of ss103E of the Bill. In particular, the Committee observed the apparent tension between the nature of this provision as strict liability offence and the use of thresholds that would require the exercise of subjective judgement on the part of the employer.

I accept the Committees observations. The Bill has been amended, as suggested by the Committee, to include a specific defence allowing an employer to prove that they took reasonable steps to comply with their duties under these provisions. The defence has been drafted in accordance with s59 of the *Criminal Code 2002*.

Ministerial guidelines

Common to both the ACT private sector workers' compensation and work health and safety regulatory frameworks is the use of notifiable instruments. These instruments serve a critical purpose in providing Government with a mechanism to address matters of operational significance that arise from time to time.

Significantly, the instruments allow the Government to respond to new and emerging operational pressures faced by Territory employers in a timely and responsive manner. The operational reality facing Canberra businesses is not a static one. The use of notifiable instruments to canvass issues that arise in the implementation of an employer's legal duties allows for a real time solution that achieves the Government's regulatory objectives without undue or unnecessary burden on business.

The use of a notifiable instrument as the vehicle to set out the return to work responsibilities on the part of Territory employers is consistent with the use of these instruments to establish operational guidelines (termed protocols) in relation to the Approved Insurers who underwrite the ACT private sector workers' compensation scheme.

This proposed course of action also ensures alignment with the Territory's work health and safety regulatory framework, which utilises notifiable instruments in the context of:

- health and safety representatives;
- training obligations for employers; and
- work health and safety guidelines.

I trust this response addresses the Committee's comments in relation to the Bill.

Yours sincerely

Mick Gentleman MLA

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Minister for Workplace Safety and Industrial Relations
Manager of Government Business

Member for Brindabella

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Role (the Committee) Report No.39 (the Report) on the Subordinate Law SL2015-30, being the Planning and Development Amendment Regulation 2015 (No. 1) (the Amendment Regulation).

I thank the Committee for its considered comments. The Committee has drawn the Legislative Assembly's attention to the Amendment Regulation on the basis that the Regulatory Impact Statement (RIS) does not meet the technical or stylistic standards expected by the Committee.

I note that, under s35(h) of the *Legislation Act 2001* (the Legislation Act), a regulatory impact statement for a subordinate law must include 'a brief assessment of the consistency of the proposed law with the Committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency'.

Officers from the Environment and Planning Directorate have sought clarification from the Committee Support Office (CSO) on the requirement for additional information requested by the Committee. The CSO was consulted on a draft response and it has advised the response was satisfactory. The response is enclosed at Attachment A.

Yours sincerely

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Minister for Planning and Land Management

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Response to the
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Scrutiny Report 39 (the Report)
on the Subordinate Law SL2015-30 being the
Planning and Development Amendment Regulation 2015 (No. 1) (the Amendment Regulation)

Scrutiny Committee Principles (terms of reference)

(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;

S6 of the *Planning and Development Act 2007* sets out the objects of the Act:

> The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—
> (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
> (b) in accordance with sound financial principles.

I refer the Committee to the introduction at page 2 of the regulatory impact statement, in particular:

The Regulation, Schedule 1 provides exemption for a range of minor works from the need for a DA, unless the works are at a place entered in the Register, or affected by a Heritage Agreement under the Heritage Act.

The Amendment Regulation seeks to ensure the exemptions of Schedule 1 can apply to heritage places but only if prior advice or approval is obtained from the ACT Heritage Council.

This meets the Objectives of the Planning and Development Act. By ensuring that minor works at heritage properties are treated in a similar manner as those at non-heritage places, orderly and sustainable development of the ACT may be achieved. This is consistent with the social, environmental and economic aspirations of the people of the ACT, providing fairness and equity for heritage property owners.

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

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

In respect of both of these terms of reference, I refer the Committee to the analysis of human rights contained in the explanatory statement at pages 5-6, in particular:

> *Development proposals that require a DA must typically be publicly notified and the general public has a right to make representations on the DA. There is also a right to seek ACAT merit review of a decision on a DA in relation to the relatively more significant development proposals. These features do not apply to development proposals that are DA exempt as there is no application to notify and no DA decision that can be subject to merit review.*

The proposed amendment regulation will by broadening the circumstances in which development may occur without a DA will impact on the ability to comment on the development and seek ACAT merit review. As a result the amendment regulation could be seen as impacting on the following human rights:

- *"Right to privacy" (section 12 of the Human Rights Act); and*
- *"Taking part in public life" (section 17); and*
- *"Fair trial" (section 21).*

The objective of the amendment regulation is an important one for the reasons noted above, that is, for removing unnecessary regulatory burdens and making the regulatory position of heritage property and non-heritage properties owner more consistent where this can be done so without impacting on heritage significance. As noted above, the objective of the amendment regulation is consistent with the objects of the Heritage Act and the Planning Act. The amendment regulation is necessary and effective in meeting the stated objectives and there are no other reasonable means available for doing this.

The types of changes proposed by the amending regulation are not considered to unduly impact on the abovementioned human rights. This is because the types of development that may be DA exempt as a result of the amendment regulation are relatively minor because they are works that:

- *would already be DA exempt under the Regulation but for the fact that the works are on a heritage property; and*
- *the Council advised would have no significant impact on heritage significance or are of a type already sanctioned under the Heritage Act.*

A decision of the Council to provide written advice to the effect that a proposed development will not impact on the heritage significance of a heritage property or is already sanctioned under the Heritage Act will be subject to review by the Supreme Court under the Administrative Decisions Judicial Review Act 1989 or the common law jurisdiction of the Supreme Court.

In relation to the section 21 human right, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be severe to constitute unlawful and arbitrary interference with a person's right to privacy.

Consistent with the above it is concluded that to the extent that the amendment regulation does impact on rights afforded by the Human Rights Act, it is considered that these amendments must meet the proportionality test of section 28 of the Human Rights Act.

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

In accordance with existing legislation, I believe the matters prescribed in the Amendment Regulation are appropriately dealt with through Amendment Regulation. As noted in the explanatory statement for the Amendment Regulation:

Sections 133(1)(c) and 135(1) of the Planning Act makes provision for exempt development which may be undertaken without a development application and development approval (DA), that is development that is "DA exempt". Section 20 of the Regulation sets out development that is DA exempt by reference to principally to schedule 1 of the Regulation and also to schedule 1A.

Because exempt development is already provided for through Regulation, it is appropriate that matters relating to exempt development for heritage places continue to be dealt with through the Regulation.

(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;

I trust that the information contained within this Attachment addresses the technical and stylistic standards expected by the Committee for a regulatory impact statement. I understand that the Committee accepted that the explanatory statement met the standards expected by the Committee.

Scrutiny Committee principles (3) and (4) are not relevant because this is a Regulation and not a Bill. Scrutiny principle (5) is a matter for the Committee.

(3) Consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly are deficient in relation to a number of specified matters
(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*

Principles 3 and 4 are not relevant to this matter, as they relate to Bills. The regulatory impact statement to which Scrutiny Report 39 refers is for a Regulation Amendment, not a Bill.

(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.

This is a matter for the Committee and is not relevant for the regulatory impact statement prepared for the Amendment Regulation.

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DEPUTY CHIEF MINISTER

Attorney-General
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Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
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Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report 41 of 15 February 2016 which provides comment on the *ACT Civil and Administrative Tribunal (Non-Presidential Members) Appointment 2015 (No 6)*.

In its Report, the Committee questioned whether the instrument was correctly presented as a disallowable instrument, given that section 96(5) of the *ACT Civil and Administrative Tribunal Act 2009* provides that appointments under this section are notifiable. While I note that this does not affect the validity of the appointment, I thank the Committee for bringing this error to my attention.

I also note the Committee's request that appointment instruments specifically identify where an appointee is not a public servant to provide clarity over whether an appointment should be made by disallowable instrument. I understand the Committee's stance on this issue and can advise that in this instance the appointee is not a public servant. The Committee's request has also been noted for future appointment instruments.

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I thank the Committee for its report and careful consideration of this instrument.

Yours sincerely

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Mr Steve Doszpot MLA
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Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 41 of 15 February 2016 which contains comments on the Subordinate Law SL2015-41 being the Health Amendment Regulation 2015 (No 1) made under the *Health Act 1993* which implements a more simplified legislative process for the approval of nurse practitioner positions.

As indicated by the Committee the subordinate law makes three amendments to the Health Regulation 2004. The first, set out in section 5 of the subordinate law, amends subsection 5(2) of the Health Regulation 2004 by replacing the previous requirement that the Minister determine criteria applicable to a decision (by the relevant director-general) to approve a position as a nurse practitioner position (under section 8 of the Health Regulation 2004) by disallowable instrument with a requirement that the Minister do so by notifiable instrument. This means that the relevant criteria will go from being disallowable by the Legislative Assembly (and subject to scrutiny by the Committee) to merely having to be notified on the ACT Legislation Register.

Given the importance of the Legislative Assembly's (and the Committee's) supervisory role in relation to instruments such as the criteria in question, and given that the criteria evidently were previously thought to warrant the application of that supervisory role, the Committee considers that an explanation ought to be provided for the diminution of the Legislative Assembly's (and the Committee's) role in this instance. Establishing the role of nurse practitioners is part of the Government's commitment to building a strong,

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sustainable nursing workforce in the Territory. The amendments proposed in the Health Amendment Regulation 2015 (No. 1) will facilitate the establishment of new nurse practitioner positions across the Territory.

Ensuring the approval and notification processes for nurse practitioner positions in the ACT, both within the public and private health sectors, are not administratively cumbersome will assist in the establishment of new nurse practitioner positions.

A nurse practitioner position can only be established if it meets the criteria determined under section 5 of the Health Regulation 2004. This requires the Director-General, ACT Health, to evaluate the applications in accordance with the formal criteria prescribed under section 5 of the Health Regulation 2004 which have been determined for the approval of nurse practitioner positions.

Under section 8 of the Health Regulation 2004 the Director-General, ACT Health, has been authorised to approve the establishment of any nurse practitioner positions in the public or private sectors.

Currently the criteria for nurse practitioner positions are approved by the Minister for Health and are a disallowable instrument. The criteria have not changed since they were first introduced in 2004. Arguably the need to have the criteria as a disallowable instrument is no longer necessary given that the initial opposition to, and interest in these positions has subsided since their introduction in 2004. Changing this legislative requirement will facilitate the development of innovative models of health service delivery for nurse practitioners in the ACT.

Likewise the need to notify on the legislation register the approval of nurse practitioner positions and the approval of their scope of practice is not required in other States and Territories and is unwarranted in the ACT given the level and nature of these positions. The removal of the need to notify these positions and the scope of their practice on the Legislation Register would help to remove an overly cumbersome approval and notification process and would allow these positions to be established in a more effective way.

Public notification of these positions is already occurring via notification on the Australian Health Practitioner Agency (AHPRA) website. To require notification on the ACT Legislation Register simply duplicates what is already happening nationally. The AHPRA website notification process is a far more effective way of notifying the general public regarding the approval of these positions.

The removal of unnecessary red tape and simplifying government approval processes especially those that impact upon the delivery of private sector services is a high priority of the Government. The changes contained in the Health Amendment Regulation 2015 (No. 1) have helped to bring the approval process for nurse practitioner positions in both the public and private sector in the ACT in line with other States and Territories.

There may be some concerns regarding a more simplified approval and notification process for nurse practitioner positions if it is only viewed as removing some of the public transparency and scrutiny relating to these decisions.

The development of nurse practitioner positions in the ACT has matured considerably since these positions were first introduced in the ACT in 2004. Nurse practitioner positions are now well accepted and the need for scrutiny at the Legislative Assembly level is no longer necessary.

No other State or Territory that has introduced nurse practitioner positions requires this level of scrutiny and to continue to require this very high level of scrutiny would be an ineffective use of the Legislative Assembly's resources.

I thank the Committee for its comments regarding this subordinate law and trust that this explanation has been of assistance.

Yours sincerely

Simon Corbell MLA
Minister for Health