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

SCRUTINY REPORT 18

12 MAY 2014

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Mick Gentleman MLA (Deputy Chair)

Ms Yvette Berry MLA

Mrs Giulia Jones MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

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

ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing 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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2014-31 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2014 (No. 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2013-170 and determines the maximum fares relating to the hiring or use of a taxi.**

Disallowable Instrument DI2014-32 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2014 (No. 1) made under section 20 of the *Remuneration Tribunal Act 1995* **determines fees and allowances for members of the Remuneration Tribunal.**

Disallowable Instrument DI2014-34 being the Work Health and Safety (Work Safety Council Member) Appointment 2014 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **revokes DI2012-101 and appoints a specified person as a member of the Work Safety Council.**

Disallowable Instrument DI2014-37 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2014 (No. 1) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Building and Construction Industry Training Fund Board, representing the interests of employees in the building and construction industry.**

Disallowable Instrument DI2014-38 being the Board of Senior Secondary Studies Appointment 2014 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of vocational education and training organisations as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2014-39 being the Board of Senior Secondary Studies Appointment 2014 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the Association of Parents and Friends of ACT Schools as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2014-41 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 1) made under section 32 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as chair of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2014-42 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 2) made under section 32 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as deputy chair of the Canberra Institute of Technology Advisory Council.**

Disallowable Instrument DI2014-43 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 3) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2014-44 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 4) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2014-45 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 5) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing the interests of industry and commerce.**

Disallowable Instrument DI2014-46 being the Canberra Institute of Technology (Advisory Council) Appointment 2014 (No. 6) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, representing an organisation that represents the teaching staff.**

Disallowable Instrument DI2014-47 being the Planning and Development (Remission of Lease Variation Charges for Adaptive Re-use—Environmental Performance) Revocation 2014 (No. 1) made under section 278E of the *Planning and Development Act 2007* **revokes DI2012-78.**

Disallowable Instrument DI2014-50 being the Public Place Names (Watson) Determination 2014 (No. 1) made under section 3 of the Public Place Names Act 1989 determines the name of a commemorative park in the Division of Watson.

DISALLOWABLE INSTRUMENTS—COMMENT

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

Disallowable Instrument DI2014-33 being the Work Health and Safety (Work Safety Council Acting Employer Representative) Appointment 2014 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **and section 209 of the** *Legislation Act 2001* **revokes DI2013-258 and appoints a specified person as an acting member of the Work Safety Council, representing the interests of employers.**

Disallowable Instrument DI2014-35 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2014 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

Disallowable Instrument DI2014-36 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2014 (No. 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* **appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

The first instrument mentioned above appoints a specified person as an acting member of the Work Safety Council, to represent the interests of employers. The Explanatory Statement for the instrument indicates that the appointment is made under paragraph 2.3(b) of Schedule 2 to the *Work Health and Safety Act 2011*, which provides that the Council includes:

> 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employers …

There is nothing in either the instrument itself or in the Explanatory Statement for the instrument to indicate that the consultation requirements of paragraph 2.3(b) have been complied with before the appointment was made.

The third instrument mentioned above appoints a specified person as a member of the Work Safety Council, to represent the interests of employers. Again, the Explanatory Statement for the instrument indicates that the appointment is made under paragraph 2.3(b) of Schedule 2 to the Work Health and Safety Act. Again, there is nothing in either the instrument itself or in the Explanatory Statement for the instrument to indicate that the consultation requirements of paragraph 2.3(b) have been complied with before the appointment was made.

The second instrument mentioned above appoints a specified person as an member of the Work Safety Council, to represent the interests of employees. The Explanatory Statement for the instrument indicates that the appointment is made under paragraph 2.3(a) of Schedule 2 to the *Work Health and Safety Act 2011*, which provides that the Council includes:

> 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employees …

Again, there is nothing in either the instrument itself or in the Explanatory Statement for the instrument to indicate that the consultation requirements of paragraph 2.3(a) have been complied with before the appointment was made.

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

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

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

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

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

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

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

The Committee draws the Legislative Assembly's attention to these instruments under principle (2) of the Committee's terms of reference, on the basis that the Explanatory Statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

Further, the Committee would be grateful if the Minister could confirm that the requirements of paragraphs 2.3(a) and (b) (as applicable) of Schedule 2 to the *Work Health and Safety Act 2011* have been met in relation to the appointments.

Retrospectivity / disapplication of subsection 47(5) of the Legislation Act 2001

Disallowable Instrument DI2014-48 being the Planning and Development (Remission of Lease Variation Charges—Economic Stimulus and Sustainability) Determination 2014 (No. 1) made under sections 278 and 278E of the *Planning and Development Act 2007* **proscribes the circumstances and the amounts that must be remitted in relation to a Lease Variation Charge applying to a development application approved on or after 6 March 2014, where the Development Application also relates to development of a building on the land under lease.**

This instrument, made under sections 278 and 278E of the *Planning and Development Act 2007*, replaces the *Planning and Development (Remission of Lease Variation Charges for Adaptive Re-use—Environmental Performance) Determination 2012 (No 1)*, which is revoked by DI2014-47 (which the Committee has also considered for the purposes of this Scrutiny Report). The Explanatory Statement for this instrument states:

> The ACT Government aims to generate construction and investment activity at a time when demand is easing off and to encourage higher sustainability outcomes in those developments. The instrument applies to any development application (DA) approved on or after 6 March 2014 and where the DA also relates to development of a building on the land under the lease. This means that a DA may have already been lodged, but not approved, and if the DA meets the criteria or circumstances prescribed in the instrument then it may be eligible for a remission. For the purposes of this explanatory statement a DA that the instrument applies to is called an 'eligible DA'.
>
> The instrument only applies to a s277 chargeable variation as defined at section 276 Definitions – div 9.6.3, s277 chargeable variations. It cannot apply to a s276E chargeable variation.

This instrument is made under two sections of the Act:

- section 278 When the commissioner must remit lease variation charge – sustainability; and
- section 278E When the commissioner must remit lease variation charges – other of the Act.

Section 278 provides that the Minister may determine requirements for energy efficiency for a building and that the Treasurer may determine an amount to be remitted and when the remission may be made.

Section 278E (1) provides that the Minister may determine circumstances, in addition to s278 to s278D, in which an amount of the charge for a s277 chargeable variation must be remitted. The section provides that the Treasurer may determine an amount to be remitted for a variation that meets the determined circumstances.

Together s278 and s278E provides a platform to give effect to the objectives of the instrument. Section 278 provides a remission for sustainability while s278E provides a remission as both an economic stimulus and to encourage adaptable housing.

A lessee who seeks to vary a lease, and the variation is a s277 chargeable variation, will gain a economic stimulus remission of 25% of the added value under s278E. Further remissions, up-to the value of 25% of the LVC, under s278 and s278E are available if an eligible DA meets stated requirements or circumstances i.e. the eligible DA nominates a high average Green Star rating or NatHERS rating or meets the Australian Standard for adaptable housing.

In this way the lessee will have the option to only take-up the economic stimulus component i.e. 25% of added value or to also access sustainability remissions up-to a further 25% of the LVC [Lease Variation Charge]. The final amount of remission i.e. the total of all remissions under the instrument is a one-off transaction against the LVC and is made at the time the LVC is determined and a notice of assessment under s276D (the Act) is given to the lessee. An approved lease variation cannot be actioned until the LVC is paid.

Section 2 of the instrument states that the instrument is taken to have commenced on 6 March 2014. Given that the instrument is dated 31 March 2014 (and was notified on the ACT Legislation Register on 10 April 2014), this means that the instrument has a retrospective effect.

Section 76 of the *Legislation Act 2001* provides that only "non-prejudicial" provisions of a statutory instrument (which includes a disallowable instrument such as this) can commence retrospectively. That concept is defined in subsection 76(4) of the Legislation Act, which provides (in part):

> ***non-prejudicial provision*** means a provision that is not a prejudicial provision.
>
> ***prejudicial provision*** means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—
>
> (a) adversely affecting the person's rights; or
>
> (b) imposing liabilities on the person.

As a result of the requirements of section 76, for legislation with a retrospective effect, the Committee generally prefers that the Explanatory Statement for the instrument expressly addresses the section 76 issue and provide an assurance to the Committee (and to the Legislative Assembly) that there is no prejudicial retrospectivity (see the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role).

The Committee notes that, in the case of this instrument, while the requirements of section 76 of the Legislation Act are not expressly addressed, the Explanatory Statement contains the following statements:

4. RETROSPECTIVE LEGISLATION

The instrument takes effect from the date of announcement that is 6 March 2014 and will expire on 6 March 2016. However, because of the need to draft the instrument it will not be physically made until after it has taken to have commenced. In this respect the instrument is retrospective legislation. Retrospective legislation is not the norm but there is no provision prohibiting the enactment of retrospective legislation in the Australian Constitution Rather a retrospective commencement is to be used only in exceptional cases and only with the parliamentary counsel's approval [footnote to ACT Parliamentary Counsel's Office *Drafting Practice Guide* omitted].

In this instance retrospective legislation is acceptable as the government made the policy announcements for LVC remissions through a media release which was widely reported in the media including radio, television and print. The announcements indicated remission values and timeframes and the instrument gives effect to these.

Further, industry groups had been lobbying government for a number of months for reforms in LVC and remissions and the instrument directly responds to this. As industry has known that government was intending to review LVC fees, amongst other things, for a number of months a proponent could withhold the DA until after the government's announcement if they desired as the economic advantage would likely out-weigh the time delay in progressing the DA.

The instrument does not unduly disadvantage a proponent of a DA that is lodged but not approved at the date of commencement. A proponent can still access remissions under the instrument if the DA is an eligible DA i.e. it includes a lease variation, is a section 277 chargeable variation for which LVC will be determined, and includes a design and siting for a building on the land in the lease.

A DA that has already been lodged and approved, but only seeks a lease variation i.e. it does not propose a building, would not be eligible for a remission in any case as it does not meet the prescribed circumstances and requirements.

The effect of the commencement of the instrument is as if it was made and effective on the date of the announcement. This means that all proponents of DAs from 6 March onwards are equally able to access the remissions made through the instrument. Further, the application of the instrument has been extended to those DAs already lodged but not approved as at 6 March 2014 providing the DA also meets prescribed circumstances or requirements.

This means that more proponents are able to access a remission than would have been available had the instrument been made before 6 March and commenced on 6 March 2014 and its application not been extended to apply to a DA already lodged. Proponents are also able to amend or withdraw the DA and re-lodge a DA so as to take-up a remission.

…….

Regulatory impact statement
The *Legislation Act 2001* section 36 states:

> 36. (1) A regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument (the proposed law) if the proposed law only provides for, or to the extent it only provides for:
> (b) a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by—
> (i) adversely affecting the person's rights; or
> (ii) imposing liabilities on the person;
> (k) an amendment of a fee, charge or tax consistent with announced government policy.

In this case, a regulatory impact statement is not required. This is because the instrument:

- does not adversely affect any rights and does not impose liabilities. The instrument instead operates to a lessee's advantage by reducing the LVC in specified circumstances. The lessee determines whether or not they will take-up any component of the instrument and it operates in the same way for all lessees.
- gives effect to announced government policy.

In the light of the above, the Committee makes no further comment on the retrospectivity issue.

This comment does not require a response from the Minister.

The Committee notes that section 12 of the instrument disapplies subsection 47(5) of the Legislation Act. Section 12 provides:

> **12 Disapplication of Legislation Act, s 47 (5)**
>
> The Legislation Act, section 47 (5) does not apply to the following under this instrument:
>
> (a) AS 4299-1995 Adaptable housing;
>
> (b) a Green Star rating or related document;
>
> (c) a NatHERS rating or related document.
>
> *Note 1* The text of another instrument applied under this instrument is taken to be applied as in force when this instrument was made (see Legislation Act, s 47 (4) (b)).
>
> *Note 2* AS 4299-1995 Adaptable housing may be purchased at www.standards.org.au. Green Star ratings and related documents may be accessed at www.gbca.org.au. NatHERS ratings and related documents may be accessed at www.nathers.gov.au.

Subsection 47(5) of the Legislation Act would ordinarily make the 3 documents referred to in section 12 of the instrument – which are incorporated by reference into the body of the instrument – "notifiable instruments". This would require them to be published on the ACT Legislation Register. Disapplying subsection 47(5) means that there is no obligation to publish the documents in question on the ACT Legislation Register. This has the effect of making all the material relevant to the understanding of the effect of the instrument less accessible to users of the instrument.

On this issue, the Explanatory Statement for the instrument states:

> **12 DISAPPLICATION OF LEGISLATION ACT, S 47 (5)**
>
> The material mentioned in section 12 is incorporated into the disallowable instrument. The Legislation Act, s 47 (5) provides that an incorporated document is taken to be a notifiable instrument. A notifiable instrument must be notified on the legislation register under the Legislation Act.
>
> However, the Legislation Act, s 47 (5) may be displaced by the authorising law (the Act) or the incorporating instrument (this disallowable instrument) (see s 47 (7)).
>
> The Legislation Act, s 47 (5) is displaced here because the incorporated material may be subject to copyright and is available over the Internet.

It should be noted, of course, that (as acknowledged in the instrument) AS 4299-1995 Adaptable housing is only available over the Internet at a cost. However (as acknowledged in the Explanatory Statement), there are copyright issues involved in relation to the use of Australian Standards and this is not an uncommon situation.

In the light of the above, the Committee makes no further comment on this issue.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—COMMENT

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

Human rights issues

Subordinate Law SL2014-6 being the Criminal Code (Controlled Drugs) Legislation Amendment Regulation 2014 (No. 1) made under the Criminal Code 2002 and Drugs of Dependence Act 1989 implements a series of measures to enhance the transparency and efficacy of drug enforcement.

The Committee notes that the Explanatory Statement for this subordinate law provides the following explanation as to the content of the subordinate law:

> The *Criminal Code (Controlled Drugs) Legislation Amendment Regulation 2014 (No 1)* amends the *Criminal Code Regulation 2005* and the *Drugs of Dependence Regulation 2009*.
>
> The *Criminal Code Regulation 2005* specifies the substances and plants that are 'controlled drugs', 'controlled plants' and 'controlled precursors' pursuant to the *Criminal Code 2002*. The regulation also specifies the trafficable, commercial and large commercial quantities for each substance and plant.
>
> The Drugs of Dependence Regulation defines 'drugs of dependence' and 'prohibited substances' for the purposes of the *Drugs of Dependence Act 1989*. It defines these terms with reference to Schedule 1 of the Criminal Code Regulation.
>
> This regulation implements a series of measures to enhance the transparency and efficacy of drug enforcement, including:
>
> - the addition of 44 new illicit substances to the Schedule 1 of the Criminal Code Regulation;

- changing the trafficable quantities of the 5 most common drugs (and their associated substances);
- adopting a uniform multiplier to govern the relationship between trafficable, commercial and large commercial quantities of drugs; and
- the adoption of a 'mixed weight' purity regime of drug enforcement.

The regulation makes minor typographical amendments to drug names to ensure greater consistency of nomenclature. The regulation also makes minor consequential amendments to the Drugs of Dependence Regulation arising from the *Criminal Code Amendment Regulation 2010*.

The Committee notes that the Explanatory Statement for the subordinate law then goes on to provide a reasonably detailed human rights analysis in relation to the effect of the subordinate law.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received these responses from:

- Attorney-General, dated 5 May 2014, in relation to comments made in Scrutiny Report 15 concerning subordinate legislations; Disallowable Instrument DI2013-310—Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2013 (No. 3) (attached).

- Attorney-General, dated 8 May 2014, in relation to comments made in Scrutiny Report 14 concerning the Road Transport (Alcohol & Drugs) Amendment Bill 2013 (attached).

The Committee wishes to thank the Attorney-General for his helpful responses.

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

Steve Doszpot MLA
Chair

12 May 2014

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 15, dated 11 March 2014

Disallowable Instrument DI2013-313 - Official Visitor (Corrections Management) Appointment 2013 (No. 1)

Disallowable Instrument DI2013-314 - Official Visitor (Corrections Management) Aboriginal and Torres Strait Islander Appointment 2013 (No. 1)

Disallowable Instrument DI2013-325 - Official Visitor (Children and Young People) Aboriginal and Torres Strait Islander Appointment 2013

Disallowable Instrument DI2013-326 - Official Visitor (Disability Services) Appointment 2013 (No. 1)

Disallowable Instrument DI2013-327 - Official Visitor (Disability Services) Appointment 2013 (No. 2)

Disallowable Instrument DI2013-328 - Official Visitor (Housing Assistance) Appointment 2013

Report 16, dated 1 April 2014

Information Privacy Bill 2014

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee Report No 15 on the Disallowable Instrument, Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2013 (No. 3) DI2013-310.

The Committee sought the inclusion in the Explanatory Statement of information on fare increases payable for travel on ACTION buses. As it is not possible to change the Explanatory Statement at this stage, I offer the following information.

MyWay fares were increased 7.5%, to cover 2.5% allocated in the 2013-14 ACT Budget and an additional 5% to offset increasing operational costs. A table comparing fares payable on ACTION buses before and after the fare increase is at Attachment A.

I thank the Committee for its comments.

Yours sincerely

Simon Corbell MLA
Attorney-General
5 May 2014

ACT LEGISLATIVE ASSEMBLY

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

Attachment A – MyWay fare comparison

		ACTION fares prior to 4/1/2014	Current ACTION fares
MyWay Peak	Adult	$2.65	$2.84
	Concession	$1.32	$1.41
	Tertiary	$1.32	$1.41
	School Student	$1.00	$1.07
MyWay Off Peak	Adult	$2.10	$2.25
	Concession	$0.58	$0.62
	Tertiary	$1.32	$1.41
	School Student	$1.00	$1.07
Cash	Adult	$4.20	$4.50
	Concession	$2.10	$2.20
Weekday Daily Fare Cap/Daily Cash Fare	Adult	$8.00	$8.60
	Concession	$4.00	$4.30
Weekend Daily MyWay Fare Cap	Adult	$4.83	$5.19
	Concession	$1.79	$1.92
Non School Days	School Student	$1.32	$1.41
Default Fare	Adult	$1.55	$1.66
	Concession	$0.78	$0.79
	Tertiary	$0.78	$0.79
	School Student	$0.78	$0.79

Estimated Monthly Cost*	Adult	$106.00	$114.00
	Concession	$52.80	$57.00
	School Student	$30.00	$32.00

*Assumptions - 21 working/school days per month, 2 paid MyWay trips per day, no weekend/off peak travel or other discounted MyWay fares applied, no change to monthly fare caps.

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write with reference to Scrutiny Report 14 provided by the Standing Committee on Justice and Community Safety (the Committee) on 18 February 2013 which provides comment on the Road Transport (Alcohol & Drugs) Amendment Bill 2013 (the Bill). I thank the Committee for its consideration of the Bill.

Proposed power of a police officer to direct drivers to remain at the scene where they were originally pulled over by police for the purpose of an alcohol or drug screening test where a screening device is not immediately available or not in working order

The Committee noted that clauses 5 to 12 of the Bill propose to empower a police officer to direct a driver to remain at the scene where they were originally pulled over by police for the purpose of an alcohol or drug screening test where a screening device is not immediately available or not in working order. The Committee considered that the exercise of the proposed power of detention may be viewed as a significant qualification of the rights to liberty and of freedom of movement, under the *Human Rights Act 2004* (HRA). To the extent that this power constitutes a qualification of these rights, the provisions have been included in the Bill on the basis that the power is justified and proportionate. The Committee noted the justifications in the Explanatory Statement, but recommended that that the explanatory statement offer its justification in terms of the framework in section 28 of the HRA.

A revised Explanatory Statement has been prepared, setting out the justifications for the relevant clauses of the Bill in terms of the section 28 (2) framework of the HRA.

The Committee also queried "whether an order under proposed subsection 8 (1A) should be based on some more particular consideration relevant to the state of the driver". Proposed subsection 8 (1A), as inserted by clause 5 of the Bill, currently provides that a person must remain at the place where the alcohol screening test is being carried out for the time (not exceeding 30 minutes) reasonably necessary for the test to be completed in accordance with the police officer's directions.

Similar provisions are created by clauses 6 to 12, which relate to existing provisions under which police can require a driver or driver trainer to undergo an alcohol and drug screening test.

The *Road Transport (Alcohol and Drugs) Act 1977* (the Act) (section 8) has long provided for a police officer to require a person to undergo an alcohol screening test based on nothing more than the fact of the person being the driver of a vehicle on a road or road related area, or the police officer having reasonable cause to suspect that the person was, shortly before the requirement to undergo the screening test, a driver on road or road related area. In more recent years, the Act has been amended to extend these requirements to driver trainers and to provide for drug screening.

There is presently no requirement, under sections 8 (alcohol screening) or 13A (drug screening) of the Act, for the police officer to suspect that the driver or driver trainer is under the influence of, or otherwise affected by, alcohol and/or drugs. This is the foundation that underpins random alcohol and drug testing. Random alcohol and drug testing allows police officers to request a breath or oral fluid sample from a driver at any time they are, or have just been, a driver on a road or road related area. Drivers may be randomly tested, under the provisions of sections 8 or 13A in, broadly, two ways. The first is in the context of scheduled mass random alcohol or drug screening, where police set up along roadsides and require randomly selected drivers to pull-over and undergo a screening test. The second circumstance in which testing is random, is where a driver has been stopped or pulled over by police in relation to driving, or non-driving related matters. In this situation police may consider that it is necessary to screen the driver for alcohol or drugs, before allowing the driver to resume driving. Police may base this on factors which include the driver's behaviour, the visible presence or smell of alcohol or drugs in the vehicle, or information the driver gives to the police about the consumption of alcohol or drugs.

In the scheduled mass screening situation, police will have set up with the required equipment to conduct the screening efficiently and will have no need to require drivers to wait for up to 30 minutes to conduct screening tests.

However, in the second situation, where police are not equipped with screening devices and encounter a driver who they consider should be screened before being allowed to resume driving, they may need to detain the driver until a screening device can be sourced, for up to the maximum 30 minutes proposed by clause 5.

The random nature of testing in both contexts – ie mass roadside screening and administering a screening test when police otherwise encounter a driver who they suspect may be affected by alcohol or drugs - is an important factor in the significant deterrent value of this road safety measure.

As noted in the Explanatory Statement, there is common law precedent that a power to direct a driver to stop to allow an alcohol or drug screening test to be conducted necessarily includes an obligation that the driver remain stationary for such reasonable time as may be necessary to allow the police officer to administer the test. The amendments in clauses 5 to 12 are intended to codify that common law power, to provide certainty for both police officers and the general public, as to the maximum period that a driver may be directed to remain. It is noted that other jurisdictions that have similar provisions do not specify the maximum period that a driver may be directed to remain.

Following a number of expressions of concern that the legislation should require police to have a suspicion that a driver has consumed alcohol or drugs, in order to have the power to direct them to wait up to 30 minutes for a screening test to be conducted, I have agreed to the development of Government amendments to the Bill to this effect. They will be drafted to minimise the risk of compromising the efficacy of sections 8 and 13A which are the provisions that support "random" alcohol and drug screening. They will not extend to sections 9, 9A, 10, 13B, 13BA and 13C where the power to screen arises where police suspect a person has been the driver or driver trainer of a vehicle involved in an accident, or reasonably suspect the driver or driver trainer has committed a

culpable driving offence. I have attached a copy of the proposed amendments, and a supplementary explanatory statement to support the amendments, for your information.

Restricting the ability of a driver to rely on the defence of honest and reasonable mistake of fact for an offence of driving with a prescribed drug in the person's oral fluid or blood when the driver claims he or she believed they had not consumed a prescribed drug, but believed the drug they had consumed was another controlled drug.

The Committee noted the amendment, particularly the restriction on the mistake of fact defence in section 36 of the *Criminal Code 2002*, may limit the presumption of innocence justification. The Committee noted the justification for any limitation in the Explanatory Statement. The Committee considered that justification for the amendment should be offered in the context of section 28 (2) of the *HRA*.

Accordingly, the Explanatory Statement has been revised to set out the justification within a section 28 framework.

The Committee also considered the reference in the Explanatory Statement to "illicit, non-prescribed, drugs" was somewhat confusing given that there was no reference to how that term equated to a 'controlled drug' as used in the legislation. The revised Explanatory Statement has been amended to address this matter.

Creation of a new offence of refusing a screening test

Clause 15 of the Bill creates a new offence of refusing an alcohol or drug screening test, which is a strict liability offence. The Committee noted the justification for the use of the strict liability element, but considered that the Explanatory Statement did not specifically acknowledge that section 22C (3) placed a legal burden of proof on a defendant. Section 22C (3) provides that it is a defence to a prosecution for a breach of section 22C (Refusing to undergo screening test) if the defendant proves that the failure was based on medical grounds.

The Committee also noted that the Explanatory Statement acknowledged that a limitation of the presumption of innocence may arise, but queried whether section 22C (3) "would sufficiently meet the object of the limitation if the defendant carried only an evidential burden". The Committee also noted that the Explanatory Statement did not reference section 28 of the HRA in the justification offered for this limitation.

An evidential burden requires a defendant to provide evidence that suggests a reasonable possibility that the exception or defence is made out. Once the defendant has met the evidential burden, the prosecution must refute the exception or defence and prove all elements of the offence beyond reasonable doubt. Section 22C (3) would impose a legal burden of proof on a defendant. A legal burden requires the defendant to establish the exception or defence on the balance of probabilities. Once this is done, the prosecution must refute the exception or defence beyond reasonable doubt.

To the extent that the imposition of a legal burden can be seen as interfering with or restricting human rights, particularly the right to a fair trial and rights in criminal proceedings, it is considered that this interference is a reasonable limitation that can be demonstrably justified, as required by section 28 of the HRA, as necessary for ensuring the effective operation of the alcohol and drug testing scheme established by the Act, which is an integral part of the Territory's road safety strategy.

In relation to section 28 (2) (b), the purpose of the amendments (promotion of road safety through prevention of drink or drug driving) is considered to be of high importance, given the known risks of death and injury associated with drink and drug impaired driving. For section 28 (2) (c), the extent of any limitation is not considered to be extensive, and is considered to be justified by the

road safety benefits arising from removing drivers affected by alcohol or drugs from ACT roads. In terms of section 28 (2) (d), any limitation caused by imposing such a burden on the defendant is justified as the defendant is best placed to know the existence and nature of any medical condition that would prevent them from safely undertaking a screening test. The defendant has the burden of proof because the defence arises from matters peculiarly in the defendant's knowledge. It is noted that any limitation relates to a defence that is designed to protect a person's human rights, by protecting them from committing an offence of refusing to undertake a screening test where they are medically unable to undertake such a test. Finally, it is considered that there are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The legal burden imposed in section 22C (3) is consistent with the remainder of the Act, which imposes a legal burden on defendants in comparable circumstances. For example, section 22A (Refusing to provide oral fluid sample) imposes a similar legal burden on a defendant to prove that a failure to provide a sample of oral fluid was based on medical grounds. A similar legal burden is also imposed on a defendant in section 19, requiring a defendant to provide that the concentration of alcohol in their blood or breath was caused either by the consumption of a an alcoholic beverage that formed part of a religious observance or the consumption or use of a substance that was not consumed or used for its alcohol content.

For these reasons any limitation is considered to be demonstrably justified in a free and democratic society for the purposes of section 28 of the HRA. The revised Explanatory Statement addresses this. A copy of the revised Explanatory Statement, which will be tabled in the Legislative Assembly, is attached for your reference.

In addition to the changes made in the revised Explanatory Statement, in response the Committee's comments on the Bill, one other substantive amendment has been made in the explanation of the amendments to section 47 made by clause 19. An additional paragraph has been added in response to a query about the omission of reference, in the replacement section 47, to a person acting on behalf of an arrested person.

In addition, the opportunity has been taken to correct some minor typographical errors and make minor editing changes to improve the clarity of the Explanatory Statement. None of these changes are substantive.

Yours sincerely

Simon Corbell MLA
Attorney-General
8 May 2014