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

SCRUTINY REPORT 43

30 MARCH 2016

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Ms Joy Burch MLA (Deputy Chair)

Mr Jayson Hinder 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	scrutiny@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

BILLS

BILLS—NO COMMENT

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

ACT CIVIL AND ADMINISTRATIVE TRIBUNAL AMENDMENT BILL 2016

This is a Bill to amend the *ACT Civil and Administrative Tribunal Act 2008* to validate the appointment of two presidential members following the inadvertent repeal of the appointments of these members.

GOVERNMENT PROCUREMENT (CAPITAL METRO) AMENDMENT BILL 2016

This is a Bill to amend the *Government Procurement Act 2001* so that any contracts entered into by the ACT Government and which are related to light rail must be published on the ACT Contracts Register.

PLANNING AND DEVELOPMENT (EFFICIENCIES) AMENDMENT BILL 2016

This is a Bill to amend the *Planning and Development Act 2007* to improve efficiency in planning processes concerning territory plan variations, environmental assessment, and development application assessment.

RED TAPE REDUCTION LEGISLATION AMENDMENT BILL 2016

This is a Bill to amend various Territory laws to address regulatory requirements that add unnecessary administrative and compliance costs for business, the community and government.

BILLS—COMMENT

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

ANIMAL WELFARE AMENDMENT BILL 2016

This is a Bill for an Act to amend the A*nimal Welfare Act 1992* in relation to the welfare, safety and health of animals, and their humane care.

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)

The requirement that persons provide their name and address to an inspector or to an authorised officer and the right to privacy in HRA subsection 12(1)

Proposed subsection 82A(2) of the Act (clause 10) would empower an inspector to "direct the person to give the inspector, immediately, any of the following personal details: (a) the person's full name; (b) the person's home address". By proposed subsection 82A(4), there are circumstances in which the inspector "may direct the person to produce evidence immediately of the correctness of the detail" provided by the person in response to a direction.

Such a person is one whom an inspector believes on reasonable grounds "(a) has committed, is committing or is about to commit an offence against this Act; or (b) may be able to assist in the investigation of an offence against this Act" (subsection 82A(1)).

(Provisions in proposed section 84AA (clause 13) are substantially identical to those just noted.)

The Committee notes that such a power is now commonly conferred on police and others empowered to enforce the law in some respect, and that in this particular instance the relevant officer must believe (and not simply suspect) that a direction is warranted.

However, these powers require close scrutiny in that they reverse the common law position that the police do not have power to require a person to provide their name and address. It is important to note the limits of the powers that would be created by proposed sections 84A and 84AA.

Taking section 82A for illustration, an inspector may require no more than the name and address of the person. They cannot, under this power, require answers to questions directed to whether the person has committed an offence, or is able to assist in the investigation of an offence. If the person is "in or on premises", then the inspector may exercise the power conferred by paragraph 82(1)(h) of the Act, which permits questioning "where the inspector considers it reasonable to enable him or her to exercise powers under [section 82]". None of the other powers stated subsection 82(1) would permit questions directed to whether the person has committed an offence, or is able to assist in the investigation of an offence. The end result is that the Bill's provisions are to the same effect as recommended by the Australian Law Reform Commission.[1]

The Committee recommends that the Minister indicate whether he accepts this understanding of the limits of these powers. If some wider effect is intended, the Committee recommends that this be outlined, and justified.

The proposed creation of offences of strict liability and the presumption of innocence in HRA subsection 22(1)

The proposed provisions of the Act concerning a requirement that may be imposed upon a person to provide their name and address are supplemented by proposed sections 82B (concerning inspectors) and 84AB (concerning authorised persons). These provisions would create a strict liability offence where a person failed to provide the name and/or address. A maximum penalty of 5 penalty points attaches to breach.

The Explanatory Statement (at 6) acknowledges that HRA subsection 22(1) is limited, but in justification makes no reference to HRA section 28. The difficulty here is that in many cases, the relevant person could not be said to have been aware of an obligation to comply, so that argument that this is a regulatory offence could not be advanced.

The Committee recommends that the Explanatory Statement state, according to the provisions of HRA section 28, a justification for the creation of this strict liability offence.

[1] See ALRC, Report No 2 (Interim), *Criminal Investigation* (1975) at 34-35.

Given that the nub of the offence is the failure to comply, there is a question why this offence need be one of strict liability. As an offence of strict liability, the prosecution would need to prove that a request was made and there was a refusal to comply. This would normally be proved by evidence of a statement of a request and evidence of a statement of refusal. If this was not an offence of strict liability the prosecution would also need to prove that the defendant intended a failure to comply. It would be natural to infer that a defendant who used words of refusal to comply intended to so refuse. If the defendant wished to put this matter in issue, they would need to adduce some credible evidence in support. The prosecution would then need to prove beyond reasonable doubt that the defendant did intend to refuse to comply. This approach would not involve any limitation of the presumption of innocence in HRA subsection 22(1).

The Committee also notes that while the Explanatory Statement makes reference to the availability of the defence of mistake of fact (Criminal Code 2002, section 36, and see paragraph 23(1)(b)) to a person charged with a strict liability offence, there is no reference to the availability of the defence of intervening conduct or event (Criminal Code 2002, section 39, and see paragraph 23(3)). As the Directorate of Justice and Community Services has noted, the defence in section 39 will cover situations not covered by section 36, and permit a variant of the defence of taking reasonable precautions. The defence in section 39 is a significant qualification to the derogation of the presumption of innocence that is brought about by the creation of a strict liability offence. The Committee's view is that the availability of this defence should be signalled in an Explanatory Statement. This is the approach now commonly taken in Explanatory Statements.

As it reads proposed section 82A and 82B, the failure of a person to obey a direction given to them by an inspector under subsection 82A(4) is not an offence or indeed result in any adverse legal consequences. The Committee recommends the Minister clarify whether this was always intended.

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

Vagueness of offence provisions and the right to liberty and security of person in HRA subsection 18(1)

Vagueness in the manner in which an offence provision states the elements of the offence will engage the HRA and otherwise may be seen as incompatible with the rights of a defendant. To adapt slightly what the Committee said in Scrutiny Report No 20 of the 7th Assembly, concerning the Crimes (Serious Organised Crime) Amendment Bill 2010:

> The vagueness of [an element of the crime] might lead to a conclusion that the offence provisions which turn in part on its application lack a sufficient degree of certainty. There are many precedent cases that state a principle that a criminal law should be sufficiently certain to permit the ordinary citizen to appreciate what he or she must do (or not do) to avoid breaching that law.[2] The principle was expressed long ago by the United States Supreme Court thus:
>
> > [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its

[2] See generally the discussion in *Report No 6 of 2000*, concerning the Adult Entertainment and Restricted Material Bill 2000, *Report No 20 of the Fifth Assembly*, concerning the Criminal Code 2002, and *Report No 20 of the Sixth Assembly*, concerning the Casino Control Bill 2005. See too *Scrutiny Report No 46 of the 7th Assembly*, concerning the Retirement Villages Bill 2011.

> penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[3]

This principle might be found to be an element of one or more rights stated in the HRA (such as the right to liberty and security of the person: HRA subsection 18(1)).

Another way to state the objection is to see it as a delegation of legislative power to a court called upon to interpret the vague term, or, at least, as requiring the court to make "political" or "value" judgements.

In *Taikato v R* [1996] HCA 28, the majority of the High Court said that

> under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing.

Proposed paragraph 6B(2)(a) of the Act (clause 4) creates an offence where a person "in charge of an animal"

> fails to take reasonable steps to provide the animal with appropriate—
>
> (i) food and water; or
>
> (ii) shelter or accommodation; or
>
> (iii) opportunity to display behaviour that is normal for the animal; or
>
> (iv) treatment for illness, disease, and injury; ... .

The maximum penalty upon conviction is 100 penalty points, and/or imprisonment for 1 year.

There is a considerable degree of vagueness about how a court is to determine what is "appropriate" to the particular animal. This may need to be a subject of expert evidence. More particularly, there is the question of how, in a particular case, the concept of "opportunity to display behaviour that is normal for the animal" is to be understood. For example, dogs are prone to approach other dogs, and are often restrained by the person in charge. When will such restraint be an inappropriate denial of such an opportunity?

These elements for vagueness will in effect confer considerable discretion on those who decide whether to prosecute, and then upon the court that must determine if there is breach of section 6B. Where a complaint is made by another person, the prosecutors may feel obliged to prosecute. The fact of being prosecuted will cause damage to the accused's reputation.

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

The Explanatory Statement (at 4) argues that the statements of elements in paragraph 6B(2)(a) are "moderate and reasonably defined boundaries of proper and humane care and management of animals. ... The list of acts that will be taken to constitute animal cruelty is, similarly, moderate, contemplating overt, excessive and deliberate acts of cruelty".

These qualifying concepts are not however stated in the section. This is not a strict liability offence, but a person's guilt is not determined by what steps they thought were required, but of what the court considers what steps a reasonable person "would be expected to take having regard to all the circumstances" (see subsection 6B(3)). This test grants to the court discretion as to how it will apply the law, and raises questions about what regard might be had (if any) to matters such as the age of the person – noting that many children have prime responsibility for the care of an animal, or their cultural background, and the like.

There are at least two ways in which the problem of the vagueness of this offence could be addressed.

The first is to more clearly specify the elements of the offence, perhaps by including in some way the Explanatory Statement standard that the Acts caught by the offence be "overt, excessive and deliberate acts of cruelty".

More fundamentally there is however a question whether these obligations might be enforced in ways other than by making the failure to observe them criminal, and subject to a potential period of imprisonment. Would it be feasible to provide for some other means of penalising at least some of the conduct that is caught by paragraph 6B(2)(a), such as by a regime of civil penalties?

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

Subsection 6B(1) provides simply that "[a] person in charge of an animal has a duty to care for the animal". Failure to observe this duty is not penalised in any way apparent to the Committee. If it is, there is the question of whether it is expressed in unacceptably vague terms.

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

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

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

By proposed subsections 101(2) and (3), a court would be empowered "in addition to any penalty which it may otherwise impose, make any order it considers appropriate" in certain circumstances. The framing of administrative or judicial powers in terms that they may be exercised without specification of parameters, and in particular in terms that require only the formation of a subjective opinion, raises questions under the Committee's terms of reference just stated.

From a rights perspective, the conferment of discretion in terms that it must be exercised upon the repository of the power having "reasonable grounds" to be satisfied of certain matters is preferable to a provision that does not contain this limitation.

In Scrutiny Report No 34 of the Sixth Assembly, the Committee supported the proposal in the Health Legislation Amendment Bill 2006 (No. 2) to amend what at that time was the current subsection 100(1) of the *Public Health Act 1997*—which provided that "the Minister may … determine" certain matters in relation to a disease or medical condition—so that it would after amendment provide that the Minister could not make a determination "unless the Minister believes, on reasonable grounds, that the determination is necessary to protect public health".

The Explanatory Statement to the Bill stated that "This amendment is necessary to avoid incompatibility with the *Human Rights Act 2004*". In Scrutiny Report No 32 of the Sixth Assembly, concerning the Revenue Legislation Amendment Bill 2006 (No. 2), the Committee explained how it might be that a widely drawn administrative power could result in the incompatibility of the scheme for the exercise of that power being incompatible with HRA subsection 21(1).

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

SMOKE-FREE LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend the *Tobacco Act 1927* to regulate the sale and promotion of personal vaporisers in the same way as tobacco and herbal products and apply the same offences for non-compliance. It also amends the *Smoke-Free Public Places Act 2003* and *Smoking in Cars with Children (Prohibition) Act 2011* to prohibit the use of personal vaporisers in legislated smoke-free areas and apply the same offences for non-compliance. The *Tobacco Act 1927* would be styled as the *Tobacco and Other Smoking Products Act 1927*.

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*

Introduction

An appreciation of the objects of the Bill is important to understanding the human rights issues that arise from its terms. At Explanatory Statement page 2, these objects are outlined.

> This Bill aims to protect the health of the public from the potential harms associated with personal vaporisers, commonly referred to as electronic cigarettes (e-cigarettes). The measures outlined in this Bill are designed to prevent the widespread uptake of personal vaporisers in the community, including by non-smokers and children, whilst still allowing adults to purchase personal vaporisers that do not contain nicotine from licensed tobacco sellers. The measures also protect against the renormalisation of smoking in the community and reduce the risk of personal vaporisers acting as a gateway to tobacco.
>
> Personal vaporisers are devices designed to produce a vapour that the user inhales. ...

> This Bill uses the term "personal vaporiser" instead of the more commonly used "e-cigarette" in order to encompass the breadth of personal vaporisers currently on the market, and allow flexibility to include devices that may emerge in the future as the technology and market evolve.

This statement is potentially misleading in some respects. First, there are many kinds of personal vaporisers sold to the public that are not referred to as e-cigarettes. This is apparent from the Explanatory Statement itself, as its reference to their use by non-smokers suggests. In its introduction to part 2 of the Bill at page 5, the Explanatory Statement notes that the prohibitions in this part "will apply whether or not the personal vaporiser contains nicotine". Secondly, the first paragraph of the quoted matter might be taken to suggest that adults will not be able to purchase vaporisers that *do* contain nicotine from licensed tobacco sellers. This is not the position.

The Committee recommends that the Explanatory Statement clarify these matters.

The Explanatory Statement states the two main ways in which the Tobacco Act will be changed.

> This Bill will introduce restrictions on personal vaporiser sales and promotion in the ACT, commensurate with existing restrictions on tobacco and herbal products. It will also prohibit the use of personal vaporisers in legislated smoke-free areas, including all enclosed public places (for example, shopping centres, cinemas, office buildings, buses, taxis, restaurants, pubs and clubs), outdoor eating or drinking places, underage music functions and in cars when children are present.

Each of these areas of proposed change will be taken in turn.

Restrictions on personal vaporiser sales and promotion

Subsection 61(1) of the Act provides that a person who sells a "smoking product" without a licence to do so commits an offence. (In addition, there are other offences relating to selling such products.) By proposed section 3A of the Act (see clause 27), the term "smoking product" will now include "a personal vaporiser or a personal vaporiser related product". (For ease of reading, the analysis will refer only to personal vaporisers.) By proposed section 3B, the term "personal vaporiser" is widely defined:

> personal vaporiser means—
>
> (a) a device that—
>
> (i) is made for the purpose or apparent purpose of delivering a substance into a person's body when the person inhales through the device; and
>
> (ii) has 1 or more of the following:
>
> (A) a battery;
>
> (B) an electric heating element;
>
> (C) a cartridge or container to store a substance; or
>
> (b) a device prescribed by regulation.

There are however a potentially wide range of exclusions from this definition of some kinds of personal vaporisers. These are: "a device designed to be used to deliver oxygen into an individual's

body" (paragraph 3B(2)(a); "a drug pipe" (paragraph 3B(2)(b)); a therapeutic good, a medical device, or a therapeutic device included in the Australian Register of Therapeutic Goods (other than such a thing that is by regulation made under the Act prescribed as a personal vaporiser) (paragraph 3B(2)(c)); and a device or other product prescribed by regulation to be treated as excluded (paragraph 3B(2)(d)).

Paragraphs 3B(2)(a) and (b) are reasonably certain as to their application, but without reference to the very large list of items in the Australian Register of Therapeutic Goods, it is not possible to ascertain just what kinds of personal vaporisers will fall within the primary part of the definition of personal vaporiser.

The potential application of the definition of personal vaporiser to devices that promote health and/or prevent harm to health and (1) the right to health, and (2) the rights of children stated in HRA subsection 11(2).

The Human Rights Act does not state a right to health, but such a right is stated in the *International Covenant on Economic, Social and Cultural Rights* in these terms: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". This right is taken into account by the Committee under paragraph (3)(a) of its terms of reference.

Rights issues arise because the wide definition of personal vaporiser will, on its face, apply to devices – such as asthma puffers and humidifiers – that promote health and alleviate or prevent harms to health. Unless such devices fall within the exclusion of items in the Australian Register of Therapeutic Goods, they may be purchased only from licensed tobacco sellers, which in turn might inhibit their ready availability. There is no obligation on tobacco retailers to stock for sale any particular kind of personal vaporiser.

The Explanatory Statement notes (at 12) that some health promoting devices that are *medical devices* will thereby be excluded from the definition (and this might be the basis for thinking that asthma puffers and some humidifiers will not fall within the definition of personal vaporiser). The Explanatory Statement also notes however that "no personal vaporisers have been approved for *therapeutic use* by the Therapeutic Goods Administration to date".

On the face of it, it is possible, perhaps likely, that some health saving or promoting devices will fall within the definition. If so, the Bill would operate to limit the right to health, and more specifically, given that some devices are directed primarily to the health of children, "the right to the protection needed by the child because of being a child" stated in HRA subsection 11(2).

The potential application of the definition of personal vaporiser to devices that do not contain nicotine and the right to privacy in HRA paragraph 12(a)

It is also likely that a device that does not contain nicotine, and is not directed to health saving or promotion, will fall within the wide definition of personal vaporiser. Restriction of the freedom to use devices that are not otherwise unlawful, or contain or expel unlawful substances, might be regarded as a breach of the right to privacy, as that right is stated in HRA paragraph 12(a), and/or as it is recognised at common law. The restriction would lie in the difficulty or perhaps the impossibility of purchasing such devices from licensed tobacco retailers.

The rights discussed in this section of the Report could be better protected were the definition of personal vaporisers be restricted to such devices as contained nicotine. The Committee recommends that the Minister explain in greater detail than is provided in the Explanatory Statement why it is considered necessary to proceed upon such a wide definition of personal vaporiser. The Explanatory Statement should also provide a justification in terms of HRA section 28 for the limitation of these rights.

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

The prohibition on the use of personal vaporisers in smoke-free areas and in cars when children are present

At page 5, the Explanatory Statement states:

> Part 2 [of the Bill] has the effect of prohibiting the use of personal vaporisers in places where smoking is banned under the *Smoke-Free Public Places Act 2003*, including at all enclosed public places, outdoor eating or drinking places, and underage music functions. This prohibition will apply whether or not the personal vaporiser contains nicotine.
>
> Strict liability offences will now apply for using a personal vaporiser in a smoke-free area and for occupiers if they allow personal vaporiser use in a smoke-free area.

At page 8, it is stated:

> Part 3 [of the Bill] has the effect of prohibiting personal vaporiser use in cars where children under the age of 16 are present. This prohibition will apply whether or not the personal vaporiser contains nicotine.
>
> The offences in section 7 and 8 of the *Smoking in Cars with Children (Prohibition) Act 2011* will now apply for using a personal vaporiser in a car with a child under the age of 16, or for failing to comply with a requirement by a police officer. The offences in section 7 and 8 are strict liability offences.

If it is accepted that a personal vaporiser may be equated with a tobacco product, then the amendment of these Acts seems to follow. The rights issues that arise out of the extensive nature of the definition of personal vaporisers apply in these contexts too.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-6 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 1) made under section 12 of the *Road Transport (General) Act 1999* **disapplies specified road transport legislation to a road or road related area that is a special stage of the Brindabella Motor Sport Test Day.**

Disallowable Instrument DI2016-7 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 2) made under section 12 of the *Road Transport (General) Act 1999* **disapplies specified road transport legislation to suspend pay parking in specified areas to support the 2016 National Multicultural Festival.**

Disallowable Instrument DI2016-8 being the Health (Fees) Determination 2016 (No. 1) made under section 192 of the *Health Act 1993* **revokes DI2015-204 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-9 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 3) made under section 12 of the *Road Transport (General) Act 1999* **declares that ARR 205 (parking for longer than indicated) does not apply to a road, or road related area with time limited parking signs, in specified areas identified in the schedule.**

Disallowable Instrument DI2016-10 being the Public Trustee (Fees) Determination 2016 (No. 1) made under section 75 of the *Public Trustee Act 1985* **revokes DI2015-140 and determines fees payable for the purposes of the Act.**

SUBORDINATE LAW—NO COMMENT

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

Subordinate Law SL2016-2 being the Utilities (Technical Regulation) (Light Rail—Regulated Utility Service) Regulation 2016 made under section 10 of the *Utilities (Technical Regulation) Act 2014* **prescribes the supply of electricity from a light rail network under the Act.**

SUBORDINATE LAWS—COMMENT

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

Human rights issues

Subordinate Law SL2016-3 being the Freedom of Information Amendment Regulation 2016 (No. 1) made under the *Freedom of Information Act 1989* **exempts the auditor-general from the operation of the Act in regard to documents of the auditor-general that relate to the functions given to the auditor-general under the** *Auditor-General Act 1996***.**

This subordinate law amends Schedule 2 to the *Freedom of Information Regulation 1991* by adding a new item 7. The effect of that item is to add a new exemption to the operation of the *Freedom of Information Act 1989* to:

> The auditor-general in relation to documents of the auditor-general that relate to functions given to the auditor-general under the *Auditor-General Act 1996*.

The Explanatory Statement for the subordinate law states:

> In accordance with section 6(4) of the FOI Act, the Amending Regulation exempts from the operation of the FOI Act documents of the auditor-general that relate to functions given to the auditor-general under the Auditor-General Act.

This exemption protects information provided by people being audited from third party access through the FOI process. It therefore promotes the efficacy of the functions of the auditor-general by encouraging full and frank disclosure by people being audited.

The public interest in access to documents is maintained because:

- the FOI applicant may seek access to the documents through the government organisation where those documents originated; and
- all audits conducted by the auditor general are summarised in reports publicly available on the ACT Audit Office website.

Significantly, the Explanatory Statement goes on to state:

The Amending Regulation does not engage the *Human Rights Act 2004*.

The Committee queries this statement. On the face of it, the addition of new item 7 to Schedule 2 engages and limits the rights in the *Human Rights Act 2004* (Human Rights Act) to seek and receive information (subsection 16(2)), and to take part in the conduct of public affairs (paragraph 17(a)). It may also, on the other hand, be seen to promote the right to privacy in section 12 of the Human Rights Act, but only insofar as it would operate to exempt matter in documents that relates to personal information. This latter right would be taken into account in the application of the tests stated in section 28 of the Human Rights Act.

A possible further problem here is that the exemption is stated in a way that would capture many more documents than those that could be seen to promote the right to privacy.

In the light of the above, the Committee considers that the Explanatory Statement does not adequately address the possible human rights issues that are possibly engaged by the subordinate law.

The Committee recommends that the Explanatory Statement for this subordinate law be amended, to provide a justification for the limitation of the relevant Human Rights Act rights.

This comment requires a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Road Safety, dated 8 March 2016, in relation to comments made in Scrutiny Report 42 concerning the Road Transport Legislation Amendment Bill 2016 (attached).
- The Attorney-General, dated 8 March 2016, in relation to comments made in Scrutiny Report 42 concerning the Victims of Crime (Financial Assistance) Bill 2016 (attached).
- The Assistant Minister for Health, dated 9 March 2016, in relation to comments made in Scrutiny Report 42 concerning the Smoke-Free Public Places Amendment Bill 2016 (attached).
- The Minister for Justice and Consumer Affairs, dated 17 March 2016, in relation to comments made in Scrutiny Report 42 concerning the Workplace Privacy Amendment Bill 2016 (attached).

- The Minister for Road Safety, dated 17 March 2016, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2015-322 - Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2015 (No. 1) (attached).
- The Minister for Transport and Municipal Services, dated 16 March 2016, in relation to comments made in Scrutiny Report 41 concerning Disallowable Instrument DI2015-336 - Domestic Animals (Exercise Areas) Declaration 2015 (No. 1) and Disallowable Instrument DI2015-337 - Domestic Animals (Prohibited Areas) Declaration 2015 (No. 1) (attached).

The Committee wishes to thank the Minister for Road Safety, Attorney-General, Assistant Minister for Health, Minister for Justice and Consumer Affairs and Minister for Transport and Municipal Services for their responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee offers the following comments on the Government response to the Victims of Crime (Financial Assistance) Bill 2016:

In its report the Committee was concerned with subclause 39(2) of the proposed Act, which 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]". Its concern is that this provision renders any consideration of the *Human Rights Act 2004* irrelevant so far as concerns the application of subclause 39(2). It suggested that the words "subject to the *Human Rights Act 2004"* be inserted into the subclause.

The Minister's response has not addressed this concern. Rather, the Minister has understood the point to be that there might be some incompatibility between subclause 39(2) and the HRA, which incompatibility could be resolved by reference to HRA section 28. This point is however is quite different to that raised by the Committee.

Steve Doszpot MLA
Chair

30 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 DI2015-328 - 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

Report 42, dated 1 March 2016

Disallowable Instrument - Education and Care Services National Amendment Regulations 2015 (2015 No. 804)

Disallowable Instrument - Heavy Vehicle National Amendment Regulation (2015 No. 824)

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 (Legislative Scrutiny Role)
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's Scrutiny Report 42 of 1 March 2016 which provides comment on the *Road Transport Legislation Amendment Bill 2016.*

In its Report, the Committee sought justification for the enactment of section 5C (clause 22 of the Bill - new offence of 'failing to stop motor vehicle for police') into the *Road Transport (Safety and Traffic Management) Act 1999* with reference to s28 of the Human Rights Act. In doing this, the Committee noted that section 5C appeared to be intended to operate as an inducement for drivers to desist from fleeing police and suggested that this point needed elaboration in the Explanatory Statement.

Police pursuits are inherently dangerous and have the potential to cause death and injury on ACT roads. Pursuits often involve high speeds and hazardous driving, which pose significant safety risks to the drivers and passengers of a fleeing vehicle, the police involved and innocent bystanders. Between 2000 and 2011, 185 fatal police pursuit-related vehicle crashes occurred in Australia, resulting in over 200 fatalities. Innocent bystanders accounted for over a third of those killed. In the ACT, there have been six fatal collisions, resulting in nine deaths, emanating from crashes relating to fleeing drivers since 2004.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0005 **Email** rattenbury@act.gov.au
CANBERRA
@ShaneRattenbury shanerattenburymla

The Committee may be aware that in November 2011, the ACT Government adopted the "Vision Zero" philosophy as part of the *ACT Road Safety Strategy 2011–2020*. Vision Zero means the ACT is striving for zero deaths and zero serious injuries on ACT roads and, consistent with this, road safety and other related policies must prioritise human life and health. The Vision Zero philosophy recognises that road trauma is not inevitable and that most road deaths are preventable.

High speed police pursuits impact significantly on the ACT's ability to achieve Vision Zero. Police pursuits introduce a high risk to the 'safe system' in which a highly skilled police officer is pursuing another driver who is generally not skilled or trained to drive at high speed around other traffic, vulnerable road users, pedestrians and other hazards. The 'safe system' approach means that efforts must be made to reduce or eliminate risk across the four pillars of roads, vehicles, speeds and people.

I have asked that a revised Explanatory Statement for the Bill be prepared to address more closely any limitation on human rights, particularly the right to freedom of movement, and its purpose.

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

Yours sincerely

Shane Rattenbury MLA
Minister for Road Safety

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
CANBERRA ACT 2601

Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No. 42 of 1 March 2016. I offer the following response in relation to the Committee's comments on the Victims of Crime (Financial Assistance) Bill 2016.

I note that the committee has drawn a number of matters to the attention of the Assembly, without calling for a response from me. In relation to the matters in respect of which the committee has requested that I respond, I provide the following information.

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

The Committee noted that the provisions of clause 15 "engage and limit the rights stated in HRA section 8 (recognition and equality before the law), 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."

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0000 **Email** corbell@act.gov.au
CANBERRA
@SimonCorbell simon.corbell

Aboriginal and Torres Strait Islander people have unique kinship structures that require recognition within the concept of a "family member". During the extensive consultation conducted on the policy and Bill with a wide range of stakeholders, many of who directly represent victims of crime, no stakeholders identified other groups in the community that have kinship and cultural structures that require recognition with the concept of a "family member" for the purposes of clause 15.

Measures intended to promote the equal opportunity of Aboriginal and Torres Strait Islander peoples are lawful under s 27 of the *Discrimination Act 1991.* Special measures to achieve equality of opportunity or to provide members of a relevant class of people access to opportunities to meet the special needs they have as members of the relevant class are recognised as legitimate and non-discriminatory in Australian anti-discrimination laws including the Discrimination Act.

It is widely acknowledged that many social and economic factors contribute to the over-representation of Aboriginal and Torres Strait Islander people within the justice system, as both victims and offenders. Aboriginal and Torres Strait Islander people have suffered a long history of social disadvantage, cultural displacement, trauma and grief, and poor health and living conditions. Despite some social and economic indicators pointing to improvement, [1] Aboriginal and Torres Strait Islander people remain seriously disadvantaged compared with other Australians. The extension of the concept of a "family member" in favour of Aboriginal or Torres Strait Islander people has the purpose of benefiting Aboriginal and Torres Strait Islander people to realise substantive equality.

Limitations on lawyers' legal costs

<u>Clause 96 engages and limits the rights stated in HRA section 8, and a justification in terms of section 28 is required.</u>

The committee noted that "If professional advisers [are] regarded as the relevant class of persons, it is arguable that lawyers are not treated on an equal basis [to other professionals], and that provisions 96(1)(a) and (b) "engage and limit the rights in HRA section 8, [recognition and equality before the law]".

Clause 96 restricts the amount a lawyer can charge or seek to recover for legal costs for services relating to the Act. The draft Regulation prescribes the amount of $1,123 for legal services that relate to an application and $2,246 for legal services that relate to an appeal or review process. The purpose of clause 96, which effectively replicates part 5 of the *Victims of Crime (Financial Assistance) Act 1989* (the repealed Act), is to prevent financial assistance provided through the scheme from being eroded by legal costs associated with accessing the scheme.

[1] Productivity Commission Steering Committee for the Review of Government Service Provision 2007

The role of a lawyer in relation to the victims financial assistance scheme is limited to assisting an applicant to lodge an application, provide advice as to eligibility and assist with applications for review. The role of various medical professionals for the purposes of the scheme is to provide therapeutic and other services to assist in an applicant's recovery. Lawyers assist applicants to access the scheme whereas medical professionals provide the services required to assist with the applicant's recovery. It is not appropriate to treat lawyers, medical practitioners and psychologists as a relevant class of persons for clause 96.

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.

As identified by the Committee, the purpose of clause 96, 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 for assistance and that payments made by the scheme are directed towards therapeutic and other services that assist in an applicant's recovery, rather than legal assistance to apply for the scheme.

The limitation on legal costs may discourage some lawyers from acting for applicants. However, the experience of the provision in the repealed act, which is substantially the same as clause 96, is that applicants are able to obtain legal advice where necessary. It is anticipated with a move from a court-based scheme to an administrative scheme under which eligibility is predictable, consistent and based on objective criteria, the need for legal assistance and the complexity of legal issues will be reduced. It is expected that the Commissioner will ensure the scheme is administered in a user friendly way with accessible information and guidelines to assist applicants. Advocates from Victim Support ACT will also be able to assist applicants. Any potential discouragement of lawyers from acting for applicants will have minimal impact on applicants' access to the scheme.

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 issue the Committee raises is whether subclause 40(5) should be worded so that the requested officer must remove any matter from a statement about an act of violence that might be a basis upon which the identity of the person who made the statement could be ascertained. Subclause 40(5) currently requires the requested officer to remove all particulars identifying the maker of a statement about an act of violence with the exception of particulars the officer believes are relevant to assist the commissioner to decide the application.

It is not necessary to amend the wording of subclause 40(5) as suggested. Clause 40(5) imposes a reasonable and proportionate limitation on a witness's right to privacy. Information that might be a basis upon which the identity of the person could be ascertained would only be provided in situations where the requested officer believes that that information is required by the Commissioner in order to allow a decision to be made.

Additional safeguards are in place under clause 40(3), which provides that the requested officer must not comply with a request for information if the officer believes on reasonable grounds that giving the information may prejudice an investigation to which the information may be relevant, lead to the identification of an informer or affect the safety of any person.

In order to administer the scheme it is essential that the Commissioner have access to sufficient information to make decisions. Information gathered by and statements made to ACT Policing will be a vital source of information upon which decisions can be based.

The identity of the person who has made a witness statement may be able to be ascertained from the very fact that they have provided a witness statement. A requirement to remove any matter that might be a basis upon which the identity of the person could be ascertained is likely to prevent the Commissioner from accessing any witness statements for the purpose of deciding an application for financial assistance. This would significantly hinder the Commissioner's ability to access information on which to make decisions.

The interaction between clauses of the bill and the HRA

The Committee indicates that subclauses 39(2) and 41(6) might be amended by inserting the words “subject to the Human Rights Act 2004” in relevant places. It appears that references in the Committee’s comment to subclause 41(6) should be taken to be a reference to subclause 40(6).

Clauses 39 and 40 both include a standard provision to clarify for the record holder the way in which various Territory laws interact. The provisions make it clear to a requested officer or a health practitioner that they are able to provide the specified information to the Commissioner.

It is essential for the operation of the scheme that the Commissioner is able to access the information required to make a decision.

Section 39 refers to situations in which the Commissioner requests that an applicant submit to an examination by a health practitioner and seeks a report of the examination. The provision ensures that the health practitioner is able to provide this report to the Commissioner but does not compel an applicant to submit to an examination. In situations where the Commissioner seeks information from the applicant’s existing health provider, the commissioner would be required to seek the applicant’s consent under clause 38.

Section 40 provides power for the Commissioner to obtain information from the chief police officer. It is expected that this will be the primary source of information to allow the Commissioner to make decisions under the Act.

The provisions identified do not displace the HRA. Section 28 of the *Human Rights Act 2004* allows for the limitation of the rights listed in the Act in certain circumstances. There is a legitimate purpose for limiting the right to privacy imposed in these provisions. The particular purpose of the limitation is to allow the Commissioner to access information necessary to make decisions under this Act.

The Act includes a strict secrecy provision (clause 89) which creates an offence relating to recording or divulging protected information by an official. This reinforces the right to privacy and ensures that the limitation is proportionate and the least restrictive limitation possible.

I thank the Committee for its consideration of this Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General

MEEGAN FITZHARRIS MLA

Minister for Higher Education, Training and Research
Minister for Transport and Municipal Services
Assistant Health Minister

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

Thank you for Scrutiny of Bills Report No. 42 (the Report) of 1 March 2016. I offer the following response to the Standing Committee's comments on the Smoke-Free Public Places Amendment Bill 2016 (the Bill).

In relation to the comment concerning the feasibility of making provision for a non-exhaustive specification of particular steps that must be taken, I wish to emphasise that the ACT Government is committed to engaging effectively with the ACT community. A guide to community engagement has been developed and has been in place since 2011 to assist directorates in improving community engagement planning and practice. ACT Health follows the guide that outlines engagement principles and practices when conducting public consultation and would do so in relation to subsequent proposed smoke-free areas under the Bill. It is therefore considered that it not necessary to make a specific provision of particular steps that must be taken during public consultation.

In relation to the comment concerning whether a failure to adhere to subsection 9Q4 would be covered by the offence in subsection 9Q5, I can confirm that it is intended that failure to adhere to any requirement in section 9Q, most notably those in subsections (2) and (4), is to constitute an offence as per section 9Q(5).

The Report seeks that consideration be given to permitting a defendant to raise a 'taking reasonable steps' defence in relation to paragraph 9Q(4)(b). As the offence provision captures section 9Q(4), the occupier should be able to raise as a defence that they undertook reasonable steps to avoid breaching subsection 4(b). On that basis the occupier would not be guilty of the offence if the occupier took reasonable steps to position the smoking area so as to minimise smoke from the area entering any smoke-free area.

It is not necessary to afford the occupier a defence of having taken reasonable steps for this offence. That defence is necessary and appropriate for section 9S(2) as the obligation in that instance is framed as an absolute (that the smoke must be prevented from entering a smoke free area). This is not the case with how the offence in section 9Q would operate. Notwithstanding the fact that the offence is a strict liability offence, in this instance the prosecution would still be required to prove that the area designated as a smoking area by the occupier was not in a position to minimise smoke entering a smoke-free area. The offence is only going to arise if the place selected did not reduce smoke-drift whatsoever.

At essence, the wording of 'minimising' has a comparable effect to that which 'taking reasonable steps' would for an offence framed as an absolute requirement. It is therefore considered that modification to the provision is not required.

The Standing Committee has questioned why the defence of having 'taken reasonable steps' was not offered in relation to the offence in proposed section 9R as it has been with section 9S. The provisions of subsection 9R were specifically drafted by the Parliamentary Counsel's Office to be consistent with the existing equivalent provisions in part 2A (Smoking prohibited in outdoor eating and drinking areas). In particular, the new section 9R mirrors existing section 9H. The policy rationale underlying the distinction already in the *Smoke-Free Public Places Act 2003* between sections 9H and 9I would be the same as would apply to the equivalent provisions in the Bill (new sections 9R and 9S).

Again, I thank the Standing Committee for its consideration and comments on the Bill.

Yours sincerely

Meegan Fitzharris MLA
Assistant Minister for Health

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0051 **Email** fitzharris@act.gov.au
CANBERRA
@MeeganFitzMLA MeeganFitzharrisMLA

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
(Legislative Scrutiny Role)
PO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

I refer to Scrutiny Report 42 in which questions were asked about the *Workplace Privacy Amendment Bill 2016* and its engagement with section 12 of the *Human Rights Act 2004*.

The absence of a legal means for an employer to collect evidence of an employee's work related unlawful activity outside the workplace was raised by industry stakeholders during the review of the *Workplace Privacy Act 2011*.

The review report indicates that "the absolute prohibition on surveillance of workers outside the workplace has consequences for the management of legal proceedings by the employee against the employer, for example, in relation to workers compensation. The inability of an employer to gather information through surveillance outside the workplace may increase an employer's vulnerability to false claims and a consequent increase in insurance and public administration costs. The capacity for an employer to conduct their case may in some cases only be achieved through surveillance taken outside the workplace".

To prevent arbitrary intrusions on a worker's right to privacy, it is necessary that employers have a legal means, subject to judicial oversight, to collect evidence to mitigate the risk of fraudulent claims by employees and inform action to limit adverse administrative and insurance costs.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0005 **Email** rattenbury@act.gov.au
CANBERRA
@ShaneRattenbury shanerattenburymla

With particular reference to the proposed new section 17(2)(b), an employer may discharge their obligation to take reasonable steps to inform an employee that a device or vehicle is being tracked by:

- providing written notice of a vehicle or device's tracking capability and operative hours to an employee as a precondition to its use;
- developing and circulating a policy to all employees that clearly identifies workplace vehicles and objects subject to tracking during prescribed hours;
- affixing a clearly visible notice to areas in which vehicles and devices that are subject to tracking are stored when not in use.

While each case will depend on its individual circumstances, taking these steps would ordinarily be expected to ensure that every employee who uses a vehicle or other thing is notified that the vehicle or thing is being tracked.

Examples of devices that may be used in the tracking of an employee include smartphones, tablets and laptop computers via internal GPS, cloud computing or installation of specialised software or applications.

I thank the Committee for its report and careful consideration of the Bill. I hope this information is of assistance.

Yours sincerely

Shane Rattenbury MLA
Minister for Justice and Consumer Affairs

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
(Legislative Scrutiny Role)
PO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

I refer to Scrutiny Report 41 in which comment was made and questions were asked about the *Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2015 (No. 1)* and its engagement with section 47 of the *Legislation Act 2001*.

I thank you and the Committee for the oversight it provides. As the Scrutiny Report has identified, the standards referred to in the instrument as drafted should have been notified.

The referenced standards are maintained by external organisations on which ACT officials are not represented. The standards are subject to amendment from time to time and reference further standards. Motorcyclists and retailers do not reference the standards when buying or selling a motorcycle helmet, instead relying on the markings on the helmet to indicate with which standard the helmet complies. Similarly, police officers and other authorised officers do not reference the standards for the purpose of establishing compliance, but will rely on the markings on the helmet as to which standards the helmet meets. Consequently, notification of the standards on the ACT legislation register is not considered critical.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0005 **Email** rattenbury@act.gov.au

CANBERRA

@ShaneRattenbury shanerattenburymla

As the Scrutiny Report also identifies, section 47 also provides that an instrument can effectively set aside the requirement to notify external documents. The failure to disapply the relevant part of section 47 was a drafting oversight. It notes that this does not make the instrument defective and riders must wear helmets complying with the standards specified in the instrument.

To rectify this oversight, the Road Transport Authority will remake the instrument disapplying the appropriate subsections of section 47 of the *Legislation Act 2001* negating the need to notify the external documents which are typically available to those who are interested from the organisations that maintain them or through searching the internet.

I trust this is satisfactory to the Committee.

Yours sincerely

Shane Rattenbury MLA
Minister for Road Safety

MEEGAN FITZHARRIS MLA

Minister for Higher Education, Training and Research
Minister for Transport and Municipal Services
Assistant Health Minister

Member for Molonglo

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

Dear Mr Doszpot

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 *Domestic Animals (Exercise Areas) Declaration 2015 (No 1)* and the *Domestic Animals (Prohibited Areas) Declaration 2015 ((No 1)*.

In December 2015, the Territory and Municipal Services Directorate (TAMS) commenced a trial of new dog exercise and prohibited areas. The trial followed a 2014 review of existing declared dog exercise areas, and a period of public consultation, which received over 1,700 submissions. The review was in response to demographic changes in Canberra over the past decade, including residential development in Gungahlin and Molonglo Valley.

At the commencement of the trial period, TAMS programmed and uploaded maps of the new dog exercise and prohibited areas on the ACTMAPi website. The then Minister for Territory and Municipal Services subsequently executed the instruments in question, which referenced the maps on the ACTMAPi website. The decision was made to do this to provide a definitive guide to dog exercise and prohibited areas in the ACT in a format that is easily accessible to the general public. Such an approach is consistent with the notification of other public information, such as the new public notices section of the ACT Government website, which displays notices required under various statutes.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0051 **Email** fitzharris@act.gov.au

CANBERRA

@MeeganFitzMLA MeeganFitzharrisMLA

In its report, the Committee has questioned the declarations on the following grounds: whether they are inconsistent with the requirements of section 47(3) of the *Legislation Act 2001* and whether they are a valid subdelegation of the Minister's power to declare exercise and prohibited areas.

Section 47(3), *Legislation Act 2001*
Updating dog exercise and prohibited areas was a major project with significant community interest and involvement.

ACTmapi is the ACT Government's online interactive mapping service. It provides a convenient way for the public to analyse ACT spatial data. The intention of using ACTMAPi in this project is that only the maps approved by the Minister can be displayed on the website. I am advised that the use of the ACTMAPi website is not inconsistent with section 47(3), because the relevant time is the approval of the maps by the Minister, not the time at which they might be accessed by a reader or user of the legislation.

Subdelegation
I am advised that authorising information on the ACTMAPi website is not a subdelegation of the power given to the Minister by the Legislative Assembly to declare dog exercise and prohibited areas. In giving the Minister the power to declare these areas, the Assembly is in fact giving a *function* to the Minister, not delegating its own *power*. *Function* is defined in the *Legislation Act 2001* as including 'authority, duty and power'. In this respect, I am advised that the Committee's position is not supported.

If the Minister has not been delegated the power to declare exercise and prohibited areas (because the Minister has instead been given the function of declaring the areas), the Minister therefore cannot *sub*delegate the power. I am further advised that it is well-established that a Minister may delegate their functions under an Act to another person: see section 254A, *Legislation Act 2001*.

Despite my comments above, I intend to declare replacement instruments after the trial period, which ends on 31 March 2016. These instruments will reflect the results of the trial. To avoid doubt, I have asked TAMS to investigate alternative methods of identifying dog exercise and prohibited areas rather than via ACTMAPi for future declarations.

I thank the Committee for its comments.

Yours sincerely

Meegan Fitzharris MLA
Minister for Transport and Municipal Services