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

SCRUTINY REPORT 47

8 AUGUST 2016

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Jayson Hinder MLA (Deputy Chair)

Ms Joy Burch MLA

Mrs Giulia Jones MLA

SECRETARIAT

Ms Janice Rafferty (Acting 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

BILL—NO COMMENT

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

PUBLIC HEALTH AMENDMENT BILL 2016

This is a Bill to amend to amend the *Public Health Act 1997* to implement measures designed to reduce administrative complexity and streamline regulatory processes in dealing with an alleged insanitary condition.

BILL—COMMENT

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2016 (NO 2)

This is a Bill for an Act to amend: the *Civil Law (Wrongs) Act 2002* and the *Limitation Act 1985* to remove limitation periods that apply to claims for damages brought by survivors of child sexual abuse in an institutional context; the *Supreme Court Act 1933*; and the *Victims of Crime Act 1994* to increase the victims' services levy.

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*

The Explanatory Statement notes that the Civil Law (Wrongs) Act and the Limitation Act seek to implement key recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[1] In summary, as stated in the Explanatory Statement, the Bill proposes to "remove all limitation periods for claims for damages with respect to personal injury caused by child sexual abuse in an institutional context", and that this change will apply retrospectively.

The removal of limitation periods and the individual's right to a fair trial before a competent, independent and impartial court or tribunal (section 21 of the Human Rights Act 2004 (HRA))

The limitations inherent in the concept of sexual abuse in an institution and the equal protection of the law (section 8 of the HRA)

At pages 2 to 4, the Explanatory Statement acknowledges that HRA section 21 is engaged and offers a justification for its limitations according to HRA section 28. The Committee refers the Assembly to this analysis. It is important to note the comment in the Explanatory Statement that:

> the defendant will be protected from unfair proceedings by two factors. Firstly, the claimant will still need to prove their case through admissible evidence. Secondly,... the courts' relevant existing jurisdictions and powers to stay proceedings,[2] for example where the defendant is unable to obtain a fair trial, are expressly preserved by this Bill.

[1] See chapter 14 of *Final report Redress and Civil Litigation* http://www.childabuseroyalcommission.gov.au/policy-and-research/redress/final-report-redress-and-civil-litigation

[2] See *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27.

The problems that may arises from the word "substantially" in proposed paragraph 21C(1)(a)

The Royal Commission proposed that "State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim **is founded on** the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child" (emphasis added). In contrast, proposed paragraph 21C(1)(a) requires that the cause of action "**substantially arises from** sexual abuse to which the person was subjected when the person was a child in an institutional context" (emphasis added). The narrower wording of paragraph 21C(1)(a) may increase the chances that there will be a need for an interlocutory proceeding to determine whether there is no limitation period, and thereby undermine a purpose of the reforms proposed by the Commission.

The Committee notes that the Victorian law follows the Commission's wording; see section 27 of the *Limitations Act 1958*.

Should the reform extend to a cause of action founded on physical abuse?

A submission by the Australian Lawyers Alliance to the Royal Commission argued that:

> sexual or physical abuse or associated psychological injury should be included. Sheer physical abuse can lead to devastating trauma ... . Beatings, deprivation of food and warmth in an orphanage were clearly at least as causative of psychological injury as anything else. Separating out sexual and physical injury would be wholly inappropriate in these circumstances ... .

The Commission did not recommend that the reform extend to physical abuse, perhaps for the reason that its terms of reference extended only to child sexual abuse in institutions. It did however say that "[w]hile our recommendations relate to institutional child sexual abuse, we have no objection to state and territory governments providing for wider changes. However, if change is made we are firmly of the view that it should be consistent across jurisdictions".

Both the Victorian and New South Wales Limitations Acts have been amended—although in different ways—so that the removal of a limitation period extends beyond a claim arising out of sexual abuse.[3] It seems that a national approach will not be adopted, and the ACT might choose to follow either of the reforms just noted, or take a different path, to including claims of physical abuse. (It would seem more sensible to follow the NSW path, in order to reduce the opportunity for form shopping and delay that would necessarily follow.)

This is not purely a policy issue. It may be argued that the two situations – that is, of sexual abuse alone, and on the other hand of sexual and physical abuse, are not distinguishable such that different treatment is warranted. If this is correct, the effect is to deny equal protection of the law (HRA subsection 8(3)) to those who claim to have suffered physical abuse.

The Committee notes that there might be good reasons to make provision in respect of only sexual abuse, given that in past times what would now be considered physical abuse would not have been considered unreasonable.

[3] See section 27 of the *Limitations Act 1958* (Victoria) and section 6A of the *Limitations Act 1969* of NSW.

Should the reform extend to a cause of action founded on sexual (and perhaps physical) abuse in a context other than in an "institutional context"?

The concepts of "institution" and "institutional context" are defined broadly, but will exclude some situations which are not readily distinguishable from the contexts in which the reforms will apply. The case of *Stingel v Clark* [2006] HCA 37 is illustrative. Justice Hayne described the action in these words:

"[t]he appellant claimed damages for personal injury allegedly suffered as a result of the respondent's assault upon her on two separate occasions in 1971. She was aged 16 years at the time of the alleged assaults. The appellant alleged that she suffered post-traumatic stress disorder of delayed onset and that she became aware of the connection between the assaults and the disorder only in 2000". The alleged rapes took place in public places, when the accused was in the company of other men.

The Royal Commission did not reject the need for reform in relation to claims of sexual abuse in such contexts, and as the comment it made that is noted above makes clear, it had no objection to a wider application of its reforms.

This is also not purely a policy issue. It may be argued that the two situations—that is, of sexual abuse in an institution, and on the other hand of sexual abuse in other contexts, are not distinguishable such that different treatment is warranted. If this is correct, the effect is to deny equal protection of the law (HRA subsection 8(3)) to those who claim to have suffered sexual abuse in other contexts.

The Committee notes that both the Victorian and NSW reforms appear to also apply in contexts other than the institutional context.

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

The retrospective application of the reform

It is quite plain that the reform will operate retrospectively. Proposed section 21C will apply whether the cause of action accrues before, on or after its commencement; see paragraph 21C(1)(c).[4] This adopts a recommendation of the Royal Commission, but the Explanatory Statement does not otherwise attempt to justify this departure from a common law principle. The principle is also reflected in section 75B of the *Legislation Act 2001*, which recognises however that it may be displaced by clear language. This is the case here.

Guidance as to when it is appropriate to displace the principle may be taken from section 76 of the Legislation Act. This provides that a statutory instrument cannot provide that a prejudicial provision of an instrument commences retrospectively unless that is expressly permitted by the relevant empowering statute. The section defines "prejudicial provision" to mean a provision that operates to the disadvantage of a person by adversely affecting the person's rights, or imposing liabilities on the person. Section 76 has no application here, but provides a guide. On this basis, the question becomes whether and to what extent paragraph 21C(1)(c) would prejudice a person.

[4] Compare subsection 75A(1) of the *Legislation Act 2001*.

A person who might now be sued would be prejudiced, but this might be justified on the basis that this is more than offset by the need to provide redress to those who suffered as a result of historical sexual abuse. It was also put to the Royal Commission that there would be prejudice to insurers of those responsible that would have undesirable effects beyond merely that compensation for past abuse would not be recoverable.

This matter was addressed in the Commission report. In evidence, a representative of the Insurance Council of Australia said that "insurers and reinsurers might have to increase premiums to compensate for claims that were not adequately funded and that any increases would be likely to be charges within the class of business, such as for institutions caring for children". The Report continued:

> In response to a further question as to whether he accepts that some people may see institutions carrying a burden through insurance as an appropriate social outcome, Mr Whelan told the public hearing:
>
> > Yes. The only caveat I would add to that is that there is a concern about the cost and affordability of insurance going forward and the accessibility of that insurance. Any concern I would have would be about whether those costs start to make certain institutions unable to take out that sort of insurance, the costs associated with those specific requirements around child abuse or sexual molestation within the policy, and that accessibility for some institutions to be able to take that cover out and also whether the insurance companies going forward will continue to have an appetite to underwrite that risk.
>
> In responding to further questions, Mr Whelan agreed that any flow-on effects are undetermined and they cannot be determined before they happen.

This last comment appears to be the Commission's answer to this concern. It also identified another kind of objection to the reform having retrospective effect:

> In the Consultation Paper, we identified that, if limitation periods are removed altogether, there would be a risk that defendants may be required to defend proceedings without having evidence that would have been available to them previously and in circumstances where the trial could not be fair.
>
> In his submission in response to the Consultation Paper, Associate Professor Mathews submitted that, if limitation periods were removed:
>
> > Courts would still possess a sufficient residual control on these claims. Courts have the sufficient experience and expertise to implement natural controls on litigation of unfair claims, especially where due to the passage of time and the loss of evidence a defendant has been made unable to defend their case; this is embodied in the common law, and a legislative provision could explicitly embody this (see the Victorian Bill, s 4 inserting s 27R).

The relevant provisions of the Bill are to be found in proposed subsections 21C(2) and (3).

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

GOVERNMENT AMENDMENTS

The Committee has examined proposed Government amendments to the Crimes (Serious Organised Crime) Legislation Amendment Bill 2016 and the Personal Violence Bill 2016 and has no comment to make in relation to them.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-69 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2016 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2016-23 and amends the schedule of determined venues to include the Lighthouse Pub as an approved sports bookmaking venue.**

Disallowable Instrument DI2016-73 being the Health (Fees) Determination 2016 (No. 2) made under section 192 of the *Health Act 1993* **revokes DI2016-8 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-74 being the Taxation Administration (Amounts Payable—Pensioner Duty Scheme) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-334 and determines, for the purposes of the Scheme, the time limit for applications, determination of amounts, method of calculation of duty payable and eligibility requirements.**

Disallowable Instrument DI2016-75 being the Taxation Administration (Amounts Payable—Over 60s Home Bonus Scheme) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-335 and determines, for the purposes of the Scheme, the time limit for applications, determination of amounts, method of calculation of duty payable and eligibility requirements.**

Disallowable Instrument DI2016-76 being the Taxation Administration (Amounts Payable—Duty) Determination 2015 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-161 and determines the amount of duty payable under various provisions of the *Duties Act 1999*.**

Disallowable Instrument DI2016-77 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-333 and determines, for the purposes of the Scheme, the income test and thresholds, time limit for applications, eligibility criteria, determination of amounts, and method of calculation of duty payable.**

Disallowable Instrument DI2016-79 being the Lotteries (Fees) Determination 2016 (No. 1) made under section 18A of the *Lotteries Act 1964* **revokes DI2015-300 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-80 being the Public Place Names (Kowen and Majura Districts) Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* **amends the** ***Commonwealth of Australia Gazette No. P9*****, by renaming a specified portion of Pialligo Avenue as Yass Road.**

Disallowable Instrument DI2016-83 being the Official Visitor (Mental Health) Appointment 2016 (No. 1) made under paragraph 10(1)(e) of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the purposes of the Act.**

Disallowable Instrument DI2016-84 being the Mental Health (Principal Official Visitor) Appointment 2016 (No. 2) made under section 210 of the *Mental Health Act 2015* **appoints a specified person as the principal official visitor for the purposes of the Act.**

Disallowable Instrument DI2016-93 being the Electoral (Fees) Determination 2016 made under section 340B of the *Electoral Act 1992* **revokes DI2015-185 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-103 being the Firearms (Fees) Determination 2016 made under section 270 of the *Firearms Act 1996* **revokes DI2015-117 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-108 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2016 (No. 1) made under section 49 of the *Cemeteries and Crematoria Act 2003* **revokes DI2015-299 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-109 being the Taxation Administration (Rates—Fire and Emergency Services Levy) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-166 and determines new amounts for the calculation of the fire and emergency services levy for the purposes of the Rates Act 2004.**

Disallowable Instrument DI2016-110 being the Taxation Administration (Rates) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-162 and determines variable rating factors for the calculation of rates payable for the purposes of the Rates Act 2004.**

Disallowable Instrument DI2016-111 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2016 (No. 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2015-242 and determines the conditions under which Members may employ staff and engage consultants or contractors, including salary allocations for the 2016-2017 financial year. The instrument also provides the authority for a Member to allocate part or all of the Member's uncommitted salary allocation to another member and to received part or all of the uncommitted salary allocation from another Member.**

Disallowable Instrument DI2016-112 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2016 (No. 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2015-241 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors, including the salary allocation for the 2016-2017 financial year. The instrument also provides the authority for the Speaker to allocate part or all of the Speaker's uncommitted salary allocation to another member and to received part or all of the uncommitted salary allocation from another Member.**

Disallowable Instrument DI2016-113 being the Planning and Development (Land Agency Board) Appointment 2016 (No. 2) made under section 42 of the *Planning and Development Act 2007* **and section 78 of the** *Financial Management Act 1996* **revokes DI2015-201 and appoints a specified person, with expertise in the area of economics, as a member of the Land Agency Board.**

Disallowable Instrument DI2016-114 being the Planning and Development (Land Agency Board) Appointment 2016 (No. 3) made under section 42 of the *Planning and Development Act 2007* **and section 78 of the** *Financial Management Act 1996* **revokes DI2015-202 and appoints a specified person, with expertise in the area of land development, as a member of the Land Agency Board.**

Disallowable Instrument DI2016-115 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2016 (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 DI2016-116 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2016 (No. 2) 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 DI2016-117 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2016 (No. 3) 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 employers in the building and construction industry.**

Disallowable Instrument DI2016-118 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2016 (No. 4) 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 employers in the building and construction industry.**

Disallowable Instrument DI2016-119 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2016 (No. 5) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as chair of the Building and Construction Industry Training Fund Board.**

Disallowable Instrument DI2016-120 being the Planning and Development (Land Agency Board) Appointment 2016 (No. 1) made under section 42 of the *Planning and Development Act 2007* **and section 79 of the** *Financial Management Act 1996* **revokes DI2014-143 and appoints a specified person as deputy chair of the Land Agency Board.**

Disallowable Instrument DI2016-121 being the Financial Management (Periodic and Annual Financial Statements) Guidelines 2016 made under section 133 of the *Financial Management Act 1996* **revokes DI2011-130 and prescribes the reporting requirements for the periodic and annual financial statements.**

Disallowable Instrument DI2016-122 being the Financial Management (Statement of Performance Scrutiny) Guidelines 2016 made under section 133 of the *Financial Management Act 1996* **revokes DI2011-167 and prescribes the information to be included in statements of performance of directorates and Territory authorities and annual scrutiny by the Auditor-General.**

Disallowable Instrument DI2016-123 being the Architects (Fees) Determination 2016 made under section 91 of the *Architects Act 2004* **revokes DI2015-194 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-124 being the Building (Fees) Determination 2016 (No. 1) made under section 150 of the *Building Act 2004* **revokes DI2015-198 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-125 being the Community Title (Fees) Determination 2016 made under section 96 of the *Community Title Act 2001* **revokes DI2015-197 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-126 being the Construction Occupations Licensing (Fees) Determination 2016 made under section 127 of the *Construction Occupations (Licensing) Act 2004* **revokes DI2015-193 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-127 being the Electricity Safety (Fees) Determination 2016 made under section 64 of the *Electricity Safety Act 1971* **revokes DI2015-195 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-128 being the Gas Safety (Fees) Determination 2016 made under section 67 of the *Gas Safety Act 2000* **revokes DI2015-196 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-129 being the Heritage (Fees) Determination 2016 made under section 120 of the *Heritage Act 2004* **revokes DI2015-188 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-130 being the Planning and Development (Fees) Determination 2016 (No. 1) made under section 424 of the *Planning and Development Act 2007* **revokes DI2015-189 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-131 being the Surveyors (Fees) Determination 2016 made under section 80 of the *Surveyors Act 2007* **revokes DI2015-190 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-132 being the Unit Titles (Fees) Determination 2016 made under section 179 of the *Unit Titles Act 2001* **revokes DI2015-192 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-133 being the Water and Sewerage (Fees) Determination 2016 (No. 1) made under section 45 of the *Water and Sewerage Act 2000* **revokes DI2015-191 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-134 being the Stock (Levy) Determination 2016 made under section 6 of the *Stock Act 2005* **revokes DI2015-82 and determines the number of animals making up a stock unit and the levy amount per stock unit.**

Disallowable Instrument DI2016-135 being the Stock (Minimum Stock Levy) Determination 2016 made under section 7A of the *Stock Act 2005* **revokes DI2015-83 and determines the minimum stock levy for landholdings.**

Disallowable Instrument DI2016-136 being the Animal Diseases (Fees) Revocation 2016 made under section 88 of the *Animal Diseases Act 2005* **revokes DI2015-74.**

Disallowable Instrument DI2016-137 being the Stock (Fees) Determination 2016 made under section 68 of the *Stock Act 2005* **revokes DI2015-81 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-138 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Small Customers on Standard Retail Contracts) Terms of Reference Determination 2016 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* **refers to the Independent Competition and Regulatory Commission the provision of a price direction for the supply of electricity to small customers on standard retail contracts for the period 1 July 2017 to 30 June 2020.**

Disallowable Instrument DI2016-139 being the Taxation Administration (Amounts Payable—Duty) Determination 2016 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2016-76 and determines the amount of duty payable under various provisions of the *Duties Act 1999*.**

Disallowable Instrument DI2016-140 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-165 and determines the standard percentage, discount percentage, relevant percentage and income threshold amount for the purposes of the *Land Rent Act 2008*.**

Disallowable Instrument DI2016-141 being the Rates, Land Tax and Land Rent (Certificate and Statement Fees) Determination 2016 (No. 1) made under section 78 of the *Rates Act 2004,* **section 43 of the** *Land Tax Act 2004* **and section 32 of the** *Land Rent Act 2008* **revokes DI2015-164 and determines the fee for the provision of a certificate of rates, land tax, land rent and other charges, and a statement of amounts payable and payments made.**

Disallowable Instrument DI2016-142 being the Taxation Administration (Amounts Payable—Disability Duty Concession Scheme) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-106 and determines, for the purposes of the Disability Duty Concession Scheme, the time limit for applications, the dutiable value of, and interest in, a subject property and the eligibility requirements.**

Disallowable Instrument DI2016-143 being the Taxation Administration (Land Tax) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-163 and determines the rates for the calculation of land tax for residential land for the purposes of the *Land Tax Act 2004*.**

Disallowable Instrument DI2016-144 being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-183 and determines the differential amounts of duty payable on the application for register a motor vehicle.**

Disallowable Instrument DI2016-145 being the Taxation Administration (Amounts and Rates—Payroll Tax) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2014-180 and determines the threshold for the payment of ACT payroll tax.**

Disallowable Instrument DI2016-146 being the Taxation Administration (Rates—Discount Rate) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2004-59 and determines the discount rate for the purposes of the *Rates Act 2004*.**

Disallowable Instrument DI2016-147 being the Taxation Administration (Amounts Payable—Rates and Land Tax Interest) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2014-180 and determines the interest rate for unpaid rates for land tax as the rate calculated under the Act.**

Disallowable Instrument DI2016-148 being the Rates (Deferral) Determination 2016 (No. 1) made under section 46 of the *Rates Act 2004* **revokes DI2015-225 and determines the income, asset and equity requirements that form the eligibility criteria for the rates deferral scheme.**

Disallowable Instrument DI2016-149 being the Taxation Administration (Amounts Payable—Rates Fixed Charge) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **implements the Safer Families Levy through variations to the general rates fixed charge.**

Disallowable Instrument DI2016-150 being the Taxation Administration (Rates—Eligible Person Since 30 June 1997) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **determines the amount of the fixed charges for an eligible person under the *Rates Act 2004*.**

Disallowable Instrument DI2016-151 being the Taxation Administration (Rates—Fire and Emergency Services—Eligible Person Levy) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **implements required changes by varying the Fire and Emergency Services Levy fixed charge for the purposes of the *Rates Act 2004*.**

Disallowable Instrument DI2016-152 being the Gaming Machine (Fees) Determination 2016 (No. 1) made under section 177 of the *Gaming Machine Act 2004* **revokes DI2015-246 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-153 being the Road Transport (General) Segway Exemption Determination 2016 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **allows the existing commercial Segway tour operator to continue to operate under unchanged conditions while the review of Segway use is finalised.**

Disallowable Instrument DI2016-154 being the Casino Control (Fees) Determination 2016 (No. 1) made under section 143 of the *Casino Control Act 2006* **revokes DI2015-174 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-155 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2016 (No. 1) made under section 48 of the *Unlawful Gambling Act 2009* **revokes DI2015-177 and determines the fee payable for a charitable organisation to apply to the ACT Gambling and Racing Commission for approval to conduct charitable gaming.**

Disallowable Instrument DI2016-156 being the Race and Sports Bookmaking (Fees) Determination 2016 (No. 1) made under section 97 of the *Race and Sports Bookmaking Act 2001* **revokes DI2015-176 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-157 being the Taxation Administration (Special Arrangements—Lodging of Returns) Approval 2016 (No. 1) made under section 42 of the *Taxation Administration Act 1999* **exempts registered insurers from the requirement to lodge monthly returns to the ACT Revenue Office. It also exempts insured people from any requirement to lodge returns with the Commissioner for ACT Revenue.**

Disallowable Instrument DI2016-158 being the Animal Welfare (Fees) Determination 2016 (No. 1) made under section 110 of the *Animal Welfare Act 1992* **revokes DI2015-80 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-159 being the Domestic Animals (Fees) Determination 2016 (No. 1) made under section 144 of the *Domestic Animals Act 2000* **revokes DI2015-79 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-160 being the Tree Protection (Fees) Determination 2016 (No. 1) made under section 109 of the *Tree Protection Act 2005* **revokes DI2015-84 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-161 being the Waste Minimisation (Fees) Determination 2016 (No. 1) made under section 45 of the *Waste Minimisation Act 2001* **revokes Disallowable Instrument DI2016-27 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-162 being the Public Unleased Land (Fees) Determination 2016 (No. 1) made under section 130 of the *Public Unleased Land Act 2013* **revokes DI2015-86 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-163 being the Lifetime Care and Support (Catastrophic Injuries) Disputes about Injury Guideline 2016 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* **revokes DI2014-204 and remakes part 3 of the Lifetime Care and Support Guidelines to included references to work injuries and other matters under the *Workers Compensation Act 1951*.**

Disallowable Instrument DI2016-164 being the Road Transport (General) Parking Permit Fees Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-171 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-165 being the Road Transport (General) (Pay Parking Area Fees) Determination 2016 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2016-14 and determines relevant parking fees for Territory-operated pay parking areas.**

Disallowable Instrument DI2016-166 being the Lifetime Care and Support (Catastrophic Injuries) LTCS Eligibility Disputes Guideline 2016 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* **revokes DI2014-203 and remakes part 2 of the Lifetime Care and Support guidelines to include references to work injuries and other matters under the *Workers Compensation Act 1951*.**

Disallowable Instrument DI2016-167 being the Lifetime Care and Support (Catastrophic Injuries) LTCS Eligibility Guideline 2016 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* **revokes DI2014-192 and remakes part 1 of the Lifetime Care and Support guidelines to include references to work injuries and other matters under the *Workers Compensation Act 1951*.**

Disallowable Instrument DI2016-168 being the Lifetime Care and Support (Catastrophic Injuries) LTCS Work Injury Levy Guideline 2016 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* **provides that the LTCS Work Injury Levy amount for each year will be calculated in the same way that the ACT Workers Compensation Regulatory Levy is apportioned.**

Disallowable Instrument DI2016-169 being the Lifetime Care and Support (Catastrophic Injuries) Treatment and Care for Work Injuries Guideline 2016 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* **ensures that the existing process for making decisions about approved treatment and care in the LTCS Scheme applies to work injuries in the same way as motor vehicle injuries.**

Disallowable Instrument DI2016-170 being the Tobacco (Fees) Determination 2016 (No. 1) made under section 70 of the *Tobacco Act 1927* **revokes DI2015-213 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-172 being the Public Place Names (Greenway) Determination 2016 made under section 3 of the *Public Place Names Act 1989* **determines the names of a public place in the Division of Greenway.**

Disallowable Instrument DI2016-173 being the Public Place Names (Campbell) Determination 2016 made under section 3 of the *Public Place Names Act 1989* **determines the names of a public place in the Division of Campbell.**

Disallowable Instrument DI2016-176 being the Clinical Waste (Fees) Determination 2016 made under section 40 of the *Clinical Waste Act 1990* **revokes DI2015-157 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-177 being the Environment Protection (Fees) Determination 2016 made under section 165 of the *Environment Protection Act 1997* **revokes DI2015-158 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-178 being the Fisheries (Fees) Determination 2016 made under section 114 of the *Fisheries Act 2000* **revokes DI2015-159 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-179 being the Nature Conservation (Fees) Determination 2016 made under section 368 of the *Nature Conservation Act 2014* **revokes DI2015-119 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-180 being the Water Resources (Fees) Determination 2016 made under section 107 of the *Water Resources Act 2007* **revokes DI2015-160 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-181 being the Juries (Payment) Determination 2016 made under section 51 of the *Juries Act 1967* **revokes DI2015-199 and determines payments made to jurors for the purposes of the Act.**

Disallowable Instrument DI2016-182 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Chair and Member) Appointment 2016 (No. 1) made under sections 20 and 21 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **appoints specified persons as chair and a member of the Climate Change Council.**

Disallowable Instrument DI2016-183 being the Public Pools (Active Leisure Centre Fees) Determination 2016 (No. 1) made under section 54 of the *Public Pools Act 2015* **revokes DI2015-179 and determines fees payable for the purposes of the Act.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

EXPLANATION OF FEES INCREASES

Disallowable Instrument DI2016-64 being the Workers Compensation (Fees) Determination 2016 made under section 221 of the *Workers Compensation Act 1951* **revokes DI2015-114 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-65 being the Dangerous Substances (Fees) Determination 2016 made under section 221 of the *Dangerous Substances Act 2004* **revokes DI2015-115 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-66 being the Scaffolding and Lifts (Fees) Determination 2016 made under section 21 of the *Scaffolding and Lifts Act 1912* **revokes DI2015-112 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-67 being the Machinery (Fees) Determination 2016 made under section 5 of the *Machinery Act 1949* **revokes DI2015-111 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-68 being the Work Health and Safety (Fees) Determination 2016 (No. 1) made under section 278 of the *Work Health and Safety Act 2011* **revokes DI2015-113 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-81 being the Agents (Fees) Determination 2016 made under section 176 of the *Agents Act 2003* **revokes DI2015-122 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-82 being the Births, Deaths and Marriages Registration (Fees) Determination 2016 made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* **revokes DI2015-123 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-85 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2016 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* **revokes DI2015-124 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-86 being the Cooperatives (Fees) Determination 2016 made under section 465 of the *Cooperatives Act 2002* **revokes DI2015-125 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-87 being the Fair Trading (Motor Vehicle Repair Industry) (Fees) Determination 2016 made under section 55 of the *Fair Trading (Motor Vehicle Repair Industry) Act 2010* **revokes DI2015-126 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-88 being the Pawnbrokers (Fees) Determination 2016 made under section 27 of the *Pawnbrokers Act 1902* **revokes DI2015-128 and determines the fee payable for a licence.**

Disallowable Instrument DI2016-89 being the Registration of Deeds (Fees) Determination 2016 made under section 8 of the *Registration of Deeds Act 1957* **revokes DI2015-129 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-90 being the Retirement Villages (Fees) Determination 2016 made under section 262 of the *Retirement Villages Act 2012* **revokes DI2015-130 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-91 being the Sale of Motor Vehicles (Fees) Determination 2016 made under section 91 of the *Sale of Motor Vehicles Act 1977* **revokes DI2015-131 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-92 being the Second-hand Dealers (Fees) Determination 2016 made under section 17 of the *Second-hand Dealers Act 1906* **revokes DI2015-132 and determines the fee payable for a licence.**

Disallowable Instrument DI2016-94 being the Associations Incorporation (Fees) Determination 2016 made under section 125 of the *Associations Incorporation Act 1991* **revokes DI2015-142 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-95 being the Civil Unions (Fees) Determination 2016 made under section 28 of the *Civil Unions Act 2012* **revokes DI2015-143 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-96 being the Land Titles (Fees) Determination 2016 made under section 139 of the *Land Titles Act 1925* **revokes DI2015-144 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-97 being the Liquor (Fees) Determination 2016 made under section 227 of the *Liquor Act 2010* **revokes DI2015-145 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-98 being the Partnership (Fees) Determination 2016 made under section 99 of the *Partnership Act 1963* **revokes DI2015-146 and determines the fee payable for an application for registration as an incorporated limited partnership.**

Disallowable Instrument DI2016-99 being the Prostitution (Fees) Determination 2016 made under section 29 of the *Prostitution Act 1992* **revokes DI2015-147 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-100 being the Security Industry (Fees) Determination 2016 made under section 50 of the *Security Industry Act 2003* **revokes DI2015-148 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-101 being the Court Procedures (Fees) Determination 2016 (No. 2) made under section 13 of the *Court Procedures Act 2004* **revokes DI2016-35 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-102 being the Emergencies (Fees) Determination 2016 made under section 201 of the *Emergencies Act 2004* **revokes DI2015-116 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-104 being the Freedom of Information (Fees) Determination 2016 made under section 80 of the *Freedom of Information Act 1989* **revokes DI2015-138 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-105 being the Guardianship and Management of Property (Fees) Determination 2016 made under section 75 of the *Guardianship and Management of Property Act 1991* **revokes DI2015-139 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-106 being the Public Trustee and Guardian (Fees) Determination 2016 made under section 75 of the *Public Trustee and Guardian Act 1985* **revokes DI2016-10 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2016-107 being the Unit Titles (Management) (Fees) Determination 2016 made under section 119 of the *Unit Titles (Management) Act 2011* **revokes DI2015-141 and determines fees payable for the purposes of the Act.**

The Committee has consistently taken a keen interest into fees determinations. In the Committee's document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

> The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

Each of the instruments mentioned above determines fees under a relevant Act. In each case, the Explanatory Statement for the instrument states:

> Fees in the 2016-17 Financial Year have been generally increased from fees in the previous Financial Year by an indexation of 4% and rounded to an appropriate value.

It is evident that this is a "standard" paragraph that has been adopted in relation to the relevant fees increases. A slight variation appears in the Explanatory Statement for the Firearms (Fees) Determination 2016 (DI2016-103), which states:

> Firearms fees in the 2016-17 Financial Year will increase from fees in the previous Financial Year by an indexation of 4% and rounded to an appropriate value. This increase is the same increase for all regulatory fees.

The Committee has two issues with the "standard" paragraph. The first is the statement that fees have "generally" been increased at the relevant rate. The Committee considers that it would be preferable if any exceptions to the "general" increase were identified, either in the instruments themselves or in the Explanatory Statement. In this regard, the Committee commends the approach

taken in the Explanatory Statement for the Health (Fees) Determination 2016 (No. 2) (DI2016-73), which specifically deals with different levels of increase (or decrease) in fees.

Similarly, the Committee commends the approach taken in the Explanatory Statement for the Waste Minimisation (Fees) Determination 2016 (No. 1) (DI2016-161), which states:

> This determination increases fees since the previous determination by 4%, rounded for cash handling and other purposes, **with the following exceptions**:
>
> (1) Items 1.8 and 1.9, fees for mattress acceptance, collection and recycling were not indexed due to being introduced in April 2016.
>
> (2) Item 1.10, fee for mattress acceptance at transfer stations was not indexed due to being amended in April 2016. [emphasis added]

The second issue is the concept of fees increases being "rounded to an appropriate value". A similar explanation is provided in the Explanatory Statements for the Architects (Fees) Determination 2016 (DI2016-123) and the Building (Fees) Determination 2016 (No. 1) (DI2016-124), which state:

> The regulatory fees in the determination have been increased by 4% for the 2016-17 financial year, as per the government's decision in the 2014-15 Budget. Administration fees relating to refunds are increased by 1.6% (the Wage Price Index), as per the government's Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

The concept of "appropriate rounding" also appears in the Explanatory Statements for the Construction Occupations Licensing (Fees) Determination 2016 (DI2016-126), the Electricity Safety (Fees) Determination 2016 (DI2016-127), the Gas Safety (Fees) Determination 2016 (DI2016-128), the Heritage (Fees) Determination 2016 (DI2016-129), the Planning and Development (Fees) Determination 2016 (No. 1) (DI2016-130), the Surveyors (Fees) Determination 2016 (DI2016-131), the Unit Titles (Fees) Determination 2016 (DI2016-132), the Water and Sewerage (Fees) Determination 2016 (No. 1) (DI2016-133), the Stock (Levy) Determination 2016 (DI2016-134), the Stock (Fees) Determination 2016 (DI2016-137), the Clinical Waste (Fees) Determination 2016 (DI2016-176), the Clinical Waste (Fees) Determination 2016 (DI2016-176), the Environment Protection (Fees) Determination 2016 (DI2016-177), the Fisheries (Fees) Determination 2016 (DI2016-178), the Nature Conservation (Fees) Determination 2016 (DI2016-179) and the Water Resources (Fees) Determination 2016 (DI2016-180).

A slightly different explanation is provided (for example) in the Explanatory Statement for the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2016 (No. 1) (DI2016-108), which states:

> The determination increases fees by 2 per cent in accordance with the Wage Price Index, consistent with the Governments [sic] announcement, made as part of the 2006/2007 ACT Budget. The increased fee is rounded for cash handling purposes.

The Explanatory Statements for the Animal Welfare (Fees) Determination 2016 (No. 1) (DI2016-158), the Domestic Animals (Fees) Determination 2016 (No. 1) (DI2016-159) and the Tree Protection (Fees) Determination 2016 (No. 1) (DI2016-160) indicate that there has been "rounding for cash handling and other purposes".

The Committee considers that a preferable approach is that taken (for example) in the Explanatory Statement for the Lotteries (Fees) Determination 2016 (No. 1) (DI2016-79), which states:

> This instrument increases fees in accordance with Government policy which is based on the Wage Price Index estimate for 2016-2017 of 1.6%. **Rounding to the nearest dollar has occurred in relation to the increases**. A comparative table indicating the previous and revised fees is included as an Attachment to this Explanatory Statement. [emphasis added]

Another approach that the Committee considers to be preferable is that taken in the Explanatory Statement for the Road Transport (General) Parking Permit Fees Determination 2016 (No. 1) (DI2016-164), which states:

> The regulatory fees in the determination have been increased by 4%, as per the government's decision in the 2014-15 Budget and rounded down to the nearest ten cents. Administration fees relating to refunds or dishonoured payments are increased by 1.6% (the Wage Price Index), rounded down to the nearest ten cents, as per the government's Fees and Charges Policy and Guidelines.

However, this begs the question of why the fees in the Lotteries (Fees) Determination 2016 (No. 1) (DI2016-79) are rounded to the nearest dollar if the Government's Fees and Charges Policy and Guidelines require rounding down to the nearest 10 cents.

Another confusing issue is the reference to the Wage Price Index and the Consumer Price Index. The Explanatory Statement for the Emergencies (Fees) Determination 2016 (DI2016-102) states:

> Fees in the 2016-17 Financial Year were generally increased from fees in the previous Financial Year by an indexation of 1.6% and rounded to an appropriate value.

A similar explanation to that set out above is set out in the Explanatory Statements for the Freedom of Information (Fees) Determination 2016 (DI2016-104), the Guardianship and Management of Property (Fees) Determination 2016 (DI2016-105), the Public Trustee and Guardian (Fees) Determination 2016 (DI2016-106) and the Unit Titles (Management) (Fees) Determination 2016 (DI2016-107).

Compare with the Explanatory Statement for the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2016 (No. 1) (DI2016-108), which states:

> The determination increases fees by 2 per cent in accordance with the Wage Price Index, consistent with the Governments [sic] announcement, made as part of the 2006/2007 ACT Budget. The increased fee is rounded for cash handling purposes.

The 2% Wage Price Index figure is also mentioned in the Explanatory Statement for the Public Pools (Active Leisure Centre Fees) Determination 2016 (No. 1) (DI2016-183).

On the Wage Price Index, the Australian Bureau of Statistics website (see http://www.abs.gov.au/ausstats%5Cabs@.nsf/mediareleasesbyCatalogue/955FBDF6A933C1FDCA2568A900136286?Opendocument) states, in relation to the March 2016 quarter:

> In the March quarter 2016, private sector wages grew 0.4 per cent and public sector wages rose 0.5 per cent (seasonally adjusted).

This could possibly explain the difference between the 1.6% and 2% figures, ie one might be relying on the annualised growth in private sector wages and the other on the annualised growth in public sector wages. Nevertheless, the differences in the Explanatory Statements (absent any further explanation of the differences in approach) is confusing.

The Explanatory Statement for the Rates, Land Tax and Land Rent (Certificate and Statement Fees) Determination 2016 (No. 1) (DI2016-141) offers another variation on the explanation:

> As announced in the 2014-15 Budget, all ACT Government regulatory service fees will be indexed on a consistent basis from 2014-15, with the indexation rate set at WPI plus 1 per cent (3.6 per cent total for this financial year). Accordingly, for 2016 17 the fee has been increased from $103 to $107 (rounded up to the nearest dollar).

Another slight variation appears in the Explanatory Statement for the Juries (Payment) Determination 2016 (DI2016-181), which states:

> The 2016-17 ACT Budget has forecast a CPI of 1% for 2016-17. This index has been applied to the payments set in 2015-16 to calculate the payments for the 2016-17 period.

As a general comment, it is the Committee's view that the overall standard of explanations provided for fees increases is much-improved, compared to previous years. However, it would be preferable if Ministers and agencies could consider the issues raised above when preparing future fees instruments.

These comments do not require a response from the Minister.

NO EXPLANATION FOR FEES INCREASES

Disallowable Instrument DI2016-171 being the Working with Vulnerable People Background Checking (Fees) Determination 2016 (No. 1) made under section 68 of the *Working with Vulnerable People (Background Checking) Act 2011* **repeals DI2015-181 and determines the fees for services provided by the Working With Vulnerable People Screening Unit.**

This instrument determines fees for the *Working With Vulnerable People (Background Checking) Act 2011*. The Explanatory Statement for the instrument states:

> Fees are charged in respect of applications for registration for the purposes of the Act for a person who will be in paid employment, renewal registrations, and cards and for the issuing of a duplicate registration card.
>
> No fee is charged for the purposes of the Act for a person who volunteers their time for no payment.
>
> Changes in the fee determination from the previous instrument is that the fee for paid employees has increased to $79 and the fee for paid employees renewing registrations is $79.

However, no explanation is provided either as to what the relevant fee was increased *from* or as to the reason for the fee increase. The Committee has consistently taken a keen interest into fees determinations. In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

> The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

An examination of the instrument that this instrument revokes (ie DI2015), which sets the fees that have been increased, reveals that fees have been increased from $76.00 to $79.00 and from $19.00 to $20.00. However, this information should have been provided in the Explanatory Statement for this instrument, together with an explanation as to the reason for the fee increases.

The Committee seeks the Minister's advice as to the basis for the fees increases provided for by this instrument.

This comment requires a response from the Minister.

WHY ARE THESE INSTRUMENTS BEING RE-MADE?

Disallowable Instrument DI2016-174 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2016 (No. 2) made under section 4L of the *Prohibited Weapons Act 1996* **revokes DI2016-51 and determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.**

Disallowable Instrument DI2016-175 being the Firearms (Use of Noise Suppression Devices) Declaration 2016 (No. 2) made under section 31 of the *Firearms Act 1996* **revokes DI2016-52 and declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.**

The two instruments mentioned above relate to the use of "noise suppression devices". They are both dated 27 June 2016. The instruments revoke and re-make two previous instruments—DI2016-51 and DI2016-52, respectively. The two previous instruments are both dated 13 May 2016, meaning that the instruments have been revoked and re-made within six weeks of being made. No explanation is provided as to the differences between the new and old instruments or as to the need for the new instruments to be made. In the circumstances, the Committee considers that it would have been preferable if such an explanation was provided.

The Committee seeks the Minister's advice as to why it has been necessary to revoke and re-make the previous instruments so soon after they were made.

This response requires a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2016-14 being the Uncollected Good Regulation 2016 made under the *Uncollected Goods Act 1996* **prescribes purposes for the use of interest that is accrued from the investment of money paid into the uncollected good trust bank account.**

Subordinate Law SL2016-15 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2016 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **exempts motorbike riders from the rule prohibiting a vehicle from parking in a space if another vehicle is already parked there and to allow for up to three motorbikes to be parked in a space.**

Subordinate Law SL2016-16 being the Medicines, Poisons and Therapeutic Goods (Controlled Medicines) Amendment Regulation 2016 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **supports increased clinical flexibility for prescribers when prescribing certain controlled medicines for their patients.**

Subordinate Law SL2016-17 being the Court Procedures Amendment Rules 2016 (No. 1) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules.**

SUBORDINATE LAW—COMMENT

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

RELIANCE ON "HENRY VIII" CLAUSE

Subordinate Law SL2016-13 being the Veterinary Surgeons (Transitional Provisions) Regulation 2016 made under the *Veterinary Surgeons Act 2015* **modifies the Act to provide for a situation where a complaint is received under the new Act about conduct that occurred under the repealed Act.**

This subordinate law is made under section 207 of the *Veterinary Surgeons Act 2015*. It has the effect of modifying Part 20 of the Veterinary Surgeons Act. This means that it relies on the operation of a "Henry VIII" clause—ie section 207, which provides:

207 Transitional regulations

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.

(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

The modification to Part 20 of the Veterinary Surgeons Act is made by section 3 of the subordinate law, which inserts a new section 205A into the Veterinary Surgeons Act. It provides:

205A Grounds for occupational discipline

(1) This section applies to a veterinary surgeon who was a veterinary surgeon under the repealed Act immediately before the commencement day.

(2) Each of the following is taken to be a ground for occupational discipline under section 59 (Grounds for occupational discipline), in relation to the veterinary surgeon:

(a) the veterinary surgeon contravened, before the commencement day, a standard of practice that applied to the veterinary surgeon under the repealed Act;

(b) the veterinary surgeon, before the commencement day, put public safety at risk;

(c) the veterinary surgeon, before the commencement day, did not satisfy the suitability to practise requirements for a veterinary surgeon under the repealed Act.

(3) This section expires on the day the Veterinary Surgeons (Transitional Provisions) Regulation 2016 expires.

When enacted, the Veterinary Surgeons Act replaced parts of the *Health Professionals Act 2004* that dealt with veterinary surgeons. The effect of the amendment is to allow a veterinary surgeon who contravened the "old" legislation to be the subject of occupational discipline under the "new" Act.

The Explanatory Statement for the subordinate law states:

> Part 20 of the new Act provides for transition between the repealed Act and new Act. These transitional provisions include, in section 205, that an inquiry that had commenced under the repealed Act, but which had not finished (or under which no action had been taken), is taken to be a disciplinary inquiry under the new Act.
>
> The transitional provisions in part 20 of the new Act do not, however, cover the situation where a veterinary surgeon engaged in conduct that could have been the subject of occupational discipline under the repealed Act, but about which a complaint was not received until after the commencement of the new Act.
>
> Section 207 of the new Act provides that a regulation may modify part 20 of the Act to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately dealt with in that part.
>
> In the Executive's option, it is necessary to modify part 20 of the new Act to provide for the situation where a complaint is received under the new Act about conduct that occurred under the repealed Act.

While it is clear that the subordinate law is within the power provided by section 207 of the Veterinary Surgeons Act, the Committee queries why the issue dealt with by this subordinate law could not have been addressed in the drafting of Part 20 of the Veterinary Surgeons Act (ie the Part that deals with the transition from the "old" to the "new" Act). In particular the Committee queries why, in drafting the "new" Act, it was not contemplated that there could have been contraventions of the "old" Act that might not come to light until after the "old" Act had been repealed.

However, as the subordinate law is clearly within the empowering provision, the Committee makes no further comment on this issue.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 28 July 2016, in relation to comments made in Scrutiny Report 46 concerning the Reportable Conduct and Information Sharing Legislation Amendment Bill 2016 (attached).
- The Attorney-General, dated 29 July 2016, in relation to comments made in Scrutiny Report 46 concerning the Family Violence Bill 2016 and the Residential Tenancies Legislation Amendment Bill 2016 (attached).
- The Attorney-General, dated 1 August 2016, in relation to comments made in Scrutiny Report 46 concerning the Discrimination Amendment Bill 2016 (attached).
- The Chief Minister, dated 1 August 2016, in relation to comments made in Scrutiny Report 46 concerning the Public Sector Management Amendment Bill 2016 (attached).

The Committee wishes to thank the Chief Minister and the Attorney-General for their responses.

EXECUTIVE MEMBERS' RESPONSE

The Committee has received a response from Mr Rattenbury, dated 1 August 2016, in relation to comments made in Scrutiny Report 45 concerning the Freedom of Information Bill 2016 (attached).

The Committee wishes to thank Mr Rattenbury for his response.

COMMENT ON GOVERNMENT RESPONSES

Family Violence Bill 2016

The Committee makes the following short comments in reply to the Attorney-General's response.

Although this is not conclusive of the issue, the Committee considers that the High Court decision in the NAAJA case is clearly distinguishable. The detention power addressed in that case was confined to circumstances where the detainee "was arrested because the [police officer] believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence"; (see *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 at [16]). (It is not clear why the Attorney-General's letter states that these were only "included" circumstances.)

Clause 105 of the Bill confers a detention power in broader terms. Having regard in particular to the broad definition of "family violence" in clause 8 of the Bill, it is apparent that there may be circumstances where the actions of the respondent will not amount to an offence or to a possibility that they will commit an offence.

In relation to the location and conditions of detention, the Attorney-General states that "[t]he nature of the "detention" is likely to be that a person is not free to leave the address at which the police attend ... ". Looking at clause 105, it may be that the detention power arises only after the police officer has removed the person to another police.

Concerning the Committee's comment on the admissibility of statements made by the detainee to the police during a period of detention, the Attorney-General notes (correctly) that admissibility will be governed by the *Evidence Act 2011*. It is further stated that "[a]ny statement made by the detainee that raises in the mind of a police officer a reasonable suspicion that the person has committed an offence will enliven the protections in the *Crimes Act 1914*". This response does not deal with the case where the suspicion arises after an admission has been made by the detainee. If no warning has been given upon detention, then an admission is more likely.

The Committee has, on other occasions, made a similar point about the exercise of a power of detention by the police. In many such cases, the detention will not enliven the protection in the *Crimes Act 1914* and thus give rise to the possibility that a person might make admissions that would not have been made had those protections applied. **This is an important point and the Committee requests that the Minister make a further response.** The question is whether that full range of protections should apply at the commencement of the detention.

Public Sector Management Amendment Bill 2016

The Committee makes the following short comments in reply to the Chief Minister's response.

Responding to the Committee's comments on proposed subsection 9(4) of the Act (which is in clause 6 of the Bill), the Chief Minister states that "ACT public servants continue to be welcome to express their views, political or otherwise, in private". The Committee notes that the Explanatory Statement stated that "section 9(2)(a) deliberately includes actions by public servants that are undertaken outside of official duties", and also that "section 9(4) places a positive obligation on employees to report any ... misconduct" (emphasis in original). It appears to be the case that privately expressed views that cause damage to the reputation of the public service will amount to misconduct, and that subsection 9(4) will operate in such cases.

COMMENT ON EXECUTIVE MEMBERS' RESPONSE

Freedom of Information Bill 2016

The Committee makes the following comments in reply to Mr Rattenbury's response.

The Committee is surprised by the tenor of the comments made by the Member and some of his particular assertions. The Committee's function is to place before Members of the Assembly a commentary that permits it to make a judgement as to whether there is an issue of a kind stated in the Committee's terms of reference and, in particular, an issue that arises about human rights as they are defined in the *Human Rights Act 2004*.

In its report, the Committee was cautious in its comments, pointing only to matters that might inhibit the achievement of the object of the Bill. This is beyond its terms of reference. Section 38(1) of the HRA requires the Committee to report to the Legislative Assembly "about human rights issues" raised by bills.

These comments will now follow the numbering in the Member's letter.

1. The Member asserts that the Committee has not fully considered the operation of the Bill. The next sentence in the Member's response is incomplete, but appears to assert that the Committee assumed that, if a factor relevant to the termination of the public interest as set out in Schedule 2.2 of the Bill was satisfied, disclosure would necessarily be contrary to the public interest. At no point did the Committee take this view.

The Member then asserts that the Committee misconstrued its own assertion that "There is no reference to a Human Rights Act in the Queensland law, and on the face of it this exemption could expand considerably the bases on which a request could be refused". What the Committee did was to point to Schedule 2 paragraph 2.2(a)(ii) of the Bill, which specifies as a factor to be taken into account, as favouring non-disclosure, that disclosure could reasonably be expected to "prejudice the protection of "any (other) right under the Human Rights Act 2004". On its face, this is an extension (when compared to the *Freedom of Information Act 1989*) of the grounds upon which a request might be denied.

Whether this is problematic—in the sense that less information is disclosed than would otherwise be the case—can be assessed only after the proposed scheme of the Bill had been in operation. It is perhaps more likely that there will be more occasions for the decision-maker to consult with a third party whose rights under the HRA might be affected; see paragraph 38(3)(a)(ii). The time taken to complete a consultation process necessarily delays the granting of access, or of notification of a refusal.

The Committee's point here is that paragraph 2.2(ii) should be carefully considered. It does mark a significant point of departure from the scheme in the Queensland Act, and careful consideration should be given to its potential impact. The Committee notes that the Member considers the merit in including paragraph 2.2(a)(ii).

The Member then considers that the Committee overlooked the operation of HRA paragraph 40B(1)(b). His point is that it would have the same effect as proposed paragraph 2.2(a)(ii).

It is not, however, clear that were the relevant parts of paragraph 2.2(a)(ii) to be omitted, the same result would follow from HRA paragraph 40B(1)(b). This provides that "[i]t It is unlawful for a public authority ... in making a decision, to fail to give proper consideration to a relevant human right". Proposed subsection 7(1) of the Bill creates a right to access to information. If a decision-maker concludes that an applicant has a right to access, it is doubtful that they would act unlawfully were they to grant access without regard to the rights stated in the HRA. This a very complex question, and in the end it is not necessary to take a view upon it. The Member's comments apply irrespective of the possible effect of HRA paragraph 40B(1)(b).

2. The Committee has no further comment on the issues raised here, other than to say that having three tiers of decision-making necessarily adds to the delay in obtaining a final decision on an application for document. Furthermore, the Committee has already noted that the requirement for third-party consultation would now be more complex.

3. The Committee drew attention to the costs to an applicant merely to draw attention to the issue. There was no adverse comment on the scheme in the Bill.

4. In this respect, the Committee points out that it suggested for consideration only whether the obligation to give reasons for decisions might be structured to provide for two stages. The first is that the statement would be in short form, and the second is that upon a request from the applicant, a statement in the usual form would be provided. It is not merely theoretical that this scheme might obviate a great deal of unnecessary work within agencies as they deal with requests.

Experience in the working of the FOI Acts indicates that applicants will often state their requests very broadly and then, on receipt of a reason statement of the kind specified in the Bill, will considerably alter their position so as to focus on a much more limited range of documents. They are able to do so because the reasons statement provides them with a list of the documents that have been located. the result is that a great deal of the work done within the agency to justify non-disclosure of the documents no longer sought has been wasted. This wastage is to the cost of handling other requests. A short reasons statement would provide a list of the documents, and obviate this wastage.

The Member has failed to understand the point made by the Committee, and has advanced a criticism which is beside the point. The Committee's suggestion was designed to facilitate the efficient operation of a disclosure scheme, and not to inhibit it.

The Member's final comments are simply unwarranted. The Committee did not stray into policy and did not operate without sufficient knowledge of the operation of the current scheme. It has not misrepresented the impacts that the Bill may have. The Member's comments suggest that he has not grasped how his own bill might operate.

Steve Doszpot MLA

Chair

8 August2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 41, dated 15 February 2016

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

Report 46, dated 19 July 2016

Disallowable Instrument DI2016-38 - Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2016

Disallowable Instrument DI2016-42 - Road Transport (General) Vehicle Registration and Related Fees Determination 2016 (No. 1)

Disallowable Instrument DI2016-43 - Road Transport (General) Driver Licence and Related Fees Determination 2016 (No. 1)

Disallowable Instrument DI2016-48 – Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2016 (No. 2)

ANDREW BARR MLA
CHIEF MINISTER OF THE AUSTRALIAN CAPITAL TERRITORY

Treasurer
Minister for Economic Development
Minister for Urban Renewal
Minister for Tourism and Events

Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Scrutiny Function)
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 No 46 of 19 July 2016 (the Scrutiny Report) and comments made on the Reportable Conduct and Information Sharing Legislation Amendment Bill 2016 (the Bill).

The following response is provided to the Committee on the points raised.

Human Rights Compatibility

The Standing Committee requested more detailed explanation about the engagement of section 12 the *Human Rights Act 2004* (HRA) and consideration given to section 28 of the HRA. As the explanatory statement states, the Bill allows for more effective sharing of information between entities working towards the protection of children, and there is a necessary and consequential engagement of the individual's right to privacy as codified under section 12 of the HRA. These amendments constitute a reasonable limitation of this right.

As required by section 28 of the HRA, all relevant factors have been considered and the amendments can be demonstrably justified in a free and democratic society given there are:

- protections providing for the manner in which reportable conduct information is shared by designated entities (sections 863A, 863B, 863C and 863D)
- offence provisions for making false or misleading allegations regarding reportable conduct (section 17P)
- enhancements providing protections for other rights including the protection from cruel, inhuman or degrading treatment (section 10 of the HRA) and protection of family and children (section 11 of the HRA).

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601, Australia GPO Box 1020, Canberra ACT 2601, Australia
Phone + 61 2 6205 0011 **Fax** + 61 2 6205 0157 **Email** barr@act.gov.au
CANBERRA
@ABarrMLA Andrew.Barr.MLA andrewbarr

Further to this, proposed section 17F of the Bill requires that the Ombudsman must monitor the practices and procedures of designated entities managing reportable allegations or reportable convictions. This role will help to ensure reportable conduct responses including allegations, investigations and information sharing are handled appropriately with consideration for Territory Law, including the HRA.

Privacy concerns

It is acknowledged there is potential for the sharing of reportable conduct information to impact the reputation of the person who is the subject of the information. It should be noted that the Explanatory Statement speaks of the importance of considering the safety, welfare and wellbeing of children as more important than protecting confidentiality of information and personal privacy. This assertion is made with reflection on the ACT Government Commitment to uphold the UN Convention on the Rights of the Child, the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse to date, and an extensive body of advice detailing how privacy laws should support rather than hinder protections for vulnerable people, including children.

The United Nations Convention on the Rights of the Child, which is applicable to the ACT stipulates each signatory has a duty to ensure the protection, care and well-being of children and young people (article 3). This duty is further reinforced by article 19 which states signatories should take every legislative and administrative step to protect children and young people from all forms of physical and mental violence, injury or abuse, neglect or exploitation. The article 34 also specifies that similar steps should be taken to protect children and young people from all forms of sexual exploitation and abuse. The protections in the Bill and the development of supporting policies have been balanced in accordance with the duties and requirements of the Convention to ensure that the stated policy purpose to protect the rights of children can be achieved in the reasonably least restrictive manner possible.

In addition, the Royal Commission has identified through its research and numerous case studies, the importance of effective co-ordination and exchange of information between service providers, regulator/oversight bodies, and other government and non-government agencies. For example *Case Study 2: YMCA New South Wales' response to the conduct of Jonathan Lord*, showed how information about seemingly isolated or insignificant incidents can, when considered cumulatively, paint a more complete and concerning picture.

In other research, including the *Discussion Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, the Royal Commission states: "Arrangements that allow sharing of what may appear, in isolation, to be low level concerns may be of benefit in protecting children in OOHC contexts." The threshold provision for the sharing of information are modelled on existing legislation in NSW, which the Royal Commission argues will capture the low level concerns relevant to safety, welfare or wellbeing of a child that may contribute to the identification of significant risk to a child or a group of children.
Furthermore, in regards to the sharing of information, the Australian Law Reform Commission noted in a report on Australian privacy laws in 2008 that, "[r]ather than

preventing appropriate information sharing, privacy laws and regulators should encourage agencies and organisations to design information-sharing schemes that are compliant with privacy requirements". As the Australian Law Reform Commission understood the issue, it was not so much that the two values were mutually exclusive but how best to ensure a system that could complement both. I firmly believe the reportable conduct legislation as it currently stands works optimally to ensure both values are guaranteed without one unnecessarily inhibiting the other.

I also draw your attention to the comments of the R*eport of the Special Commission of Inquiry into Child Protection Services* in NSW which emphasised the importance of exchanging information for the purpose of ensuring the safety, welfare and well-being of a child or young person. If we do not allow the responsible agencies sufficient scope, we risk seriously impairing their capacity to address these concerns.

Lastly on this point, the recent *Review into the system level response to family violence in the ACT* by Laurie Glanfield AM, recommended reform to improve information sharing. Mr Glanfield found that there is considerable room for improvement in relation to this issue, particularly in relation to the operations of child protection and family violence protection agencies. This report recommended legislative change to clearly authorise information exchange between relevant agencies and that the ACT foster an information sharing culture between agencies.

<u>Definition of 'designated entity'</u>

Regarding the definition of 'designated entity' proposed Section 17D(1), the Scrutiny Report notes the Dictionary in the *Legislation Act 2001* and that the term "entity" should be understood to include any "person". The Explanatory Statement to the Bill details the intent of the legislation to "through the provisions of oversight, build on the capacity of organisations in the ACT to respond appropriately and effectively to allegations of abuse, mistreatment or neglect of children in their care, and will be a key feature of child-safe organisations." With this in mind, a 'designated entity' prescribed by regulation under Section 17D(1), will refer to entities who deliver services or have safeguarding functions for children and young people.

In addition, proposed amendments to sections 33 and 53 of the *Working with Vulnerable People (Background Checking) Act 2011* adopt the term "entity". The Explanatory Statement to the Bill outlines that the intent of these amendments is to ensure that the Commissioner for Fair Trading holds relevant information about an individual that is critical for decision-making about protecting children and vulnerable people. Further, proposed amendments list examples of an "entity" that include the chief police officer, an administrative unit and an employer for a regulated activity. It is the intent of this Bill that an "entity" refer to an individual or organisation who is in possession of relevant knowledge as a consequence of their employment function, particularly with regards to their safeguarding functions for vulnerable people.

Information sharing

Regarding the sharing of reportable conduct information, the Scrutiny Report has raised whether these provisions between information sharing entities are justified, and whether there are sufficient restrictions on the provision of reportable conduct information.

On the first question, the Bill allows a 'designated entity' to share 'reportable conduct information' defined as 'any information that is relevant to the protection of a child or young person or a class of child or young person against reportable conduct' (section 863A(1)).

Organisations that have significant care responsibilities for children in the community are not restricted to government entities and the sharing of reportable conduct information will support organisations' capacity to put in place policies and procedures to protect children from harm. Given this, there is justification for allowing the sharing of reportable conduct information between government or nongovernment entities with care responsibility for children where there are sufficient protections in place to protect both the interests of the child or children of concern and any other person who is the subject of reportable conduct information.

Protections and restrictions placed on the reporting and sharing of reportable conduct information support and protect the individual's right to privacy as codified at section 12 of the HRA, as discussed above. As noted in the Scrutiny Report, the Bill places restrictions on both the requesting and providing parties to ensure the information is being used only for purposes of promoting the safety, welfare or wellbeing of a child, or a class of children.

The Scrutiny Report also notes that the considerations of an entity responding to a request for reportable conduct information (Section 863C) are more extensive than those of the requesting entity (Section 863B). These provisions are structured in a way so as to allow the entity that holds information to identify what part of the information is relevant to a request and the requesting entity to seek relevant information. These provisions give consideration to and support the practices of designated entities.

Definition of 'reportable conduct'

On the definition of 'reportable conduct' at subsection 17E(1) the Scrutiny Report notes the scope of the reportable conduct may include the actions of an employee outside the course of their employment. I again bring to the Committee's attention Case Study 2 of the Royal Commission into Institutional Responses to Child Sexual Abuse which focuses on the conduct of Jonathan Lord while working for YMCA NSW and who was convicted of sexually abusing 11 children following a grooming period which took place both in and out of the course of his employment. With this in mind, the definition of 'reportable conduct' at subsection 17E(1) is considered appropriate, and also aligns with the definition used by New South Wales under their scheme.

Role of the ACT Ombudsman

The Scrutiny Report considers that the Bill expands the role of the Ombudsman from its original conception, which it identifies as dealing with maladministration. The Ombudsman's

current role is broader in scope and includes elements that can be closely drawn upon in the performance of these new duties. At present the Ombudsman seeks to resolve complaints through independent review of complaints, fosters good administration, develops policies and principles for accountability and reviews statutory compliance by law enforcement agencies with a range of record keeping requirements. The new functions of the Ombudsman, in supporting and oversighting designated entities, and performing investigations, where necessary, will be supported by the expertise and experience of the office, as well as the broader Commonwealth Ombudsman's office. The Ombudsman is considered well placed to take on such functions.

The role of the Ombudsman to conduct investigations into allegations of reportable conduct is intended to be a substitute for employer investigations when that employer is unable or unwilling to conduct one of their own accord (Section 17K). As noted in the Scrutiny Report, existing provisions within the Ombudsman Act for investigations (Sections 9 and 11) would apply to these investigations. Concern regarding the utility of subsection 9(6) and (8) are noted; however it is clear that the requirement to provide a person an opportunity to appear is to occur prior to the investigation being completed. It is appropriate that the Ombudsman have available the strong powers in existing Section 11 to obtain information when investigating allegations of reportable conduct.

In the event that the Ombudsman does use these powers, they will be able to pass on self-incriminating information to the Commissioner for Fair Trading under section 17M of the Bill. This is considered appropriate as this information will be of use to the commissioner in exercising their functions under the *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act).

Regarding the Ombudsman's ability to share information with the Commissioner for Fair Trading, the Scrutiny Report asks whether the Ombudsman should apply a test to ensure the "reliability" of information shared. Through exercising functions given under section 17F and 17I the Ombudsman has a role in helping to ensure investigation policy and procedures of entities are consistent with quality investigative process.

Further, it is a policy matter to be resolved between the Ombudsman and the Commissioner for Fair Trading as to the type of information the Commissioner for Fair Trading requires to make a risk assessment under the WWVP Act.

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

Yours sincerely

Andrew Barr MLA
Chief Minister

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

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

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 No 46 of 19 July 2016 which comments on the *Family Violence Bill 2016* (the FV Bill) and the *Residential Tenancies Legislation Amendment Bill 2016* (the RT Bill).

Family Violence Bill 2016

The Committee's report draws three matters to the attention of the Assembly and recommends that I respond.

By way of initial comment, I note the Committee's comments throughout the report in relation to domestic and family violence more broadly. It is important to note that domestic and family violence often occurs within a relationship of power and control that extends well beyond any physical incident. This relationship is particularly highlighted through the adversarial court process when the victim of such violence is often subjected to further abuse because of the inherent nature of the relationship. In particular, given the overwhelming imbalance of power and control that characterises abusive relationships, speaking out, seeking help, obtaining protection and giving evidence in court can be equally, if not more, overwhelming and traumatic for victims than the initial violent incident.

I would stress again, as I did in relation to the Committee's Report No 38 of 20 October 2015, that the reforms must be considered in the context of the underlying nature of domestic, family and

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

sexual abuse and the lasting psychological trauma it can cause for victims. I also note my support for training on the nature of domestic, family and sexual violence for all ACT Government, particularly those closely involved with or affected by the reforms.

I thank the Committee for their comments seeking clarification in relation to certain sections of the explanatory statement. I do not propose to table a revised Explanatory Statement and have addressed the issues raised below.

Protection of families

At page 8 of the report, the Committee queried the need to amend s 37 of the FV Bill to make express mention of the entitlement of the family to protection. Specific mention of this right would necessarily undermine the purpose and scope of the entire family violence order scheme by placing the family unit as a paramount consideration even if one or more members of that family unit are seeking protection from abuse.

Cross-examination of an affected person by a self-represented respondent and the right to a fair trial

At page 10 of the report, the Committee has recommended that a "section 28 justification be included in the Explanatory Statement" to justify the need for a restriction on a respondent's right to a fair trial through the amendment at clause 63 of the FV Bill.

The prohibition of a self-represented person personally cross-examining a victim of family violence or sexual assault exists in all other criminal matters relating to similar power and control relationships[1] and has done for many years. This amendment does not limit the right to a fair trial as it does not limit in any way the questions that can be asked, nor does it limit the availability of evidence to be adduced by a self-represented person. The limitation extends only so far as to prevent a self-represented person from *personally* cross-examining a victim who is seeking protection from the Territory from that self-represented person. The self-represented respondent will always retain the ability to have a representative ask questions on their behalf, as is the current practice in criminal matters that deal with this kind of abuse. In that way, the section 21 right to fair trial is upheld.

Detention and after-hours orders

The Committee comments on the after-hours order scheme, questioning whether the power to detain a person for up to four hours derogates from the right to liberty and security of person under s 18 (1) of the Human Rights Act. This question raises two issues, the power of a police officer to detain a person in the prescribed situation, and the conditions under which the person is detained, including the admissibility of statements made by the detainee to the police during that time. It is noted that the after-hours orders scheme largely remakes the emergency orders scheme established in the *Domestic Violence and Protection Orders Act 2008*. As indicated by the previous description of "emergency" orders, it is intended that the orders are to be used in exceptional circumstances as an operational response by police officers to uphold the safety of the community.

As the Committee notes, the High Court has considered the use of administrative detention and the circumstances in which this type of detention may be considered appropriate.[2] That is, the detention must not be punitive, as this would be an incident of exercising judicial function. The

[1] See *Evidence (Miscellaneous Provisions) Act 1991*, Div 4.2.2.

[2] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

exception to this principle is the detention of a person accused of crime to ensure that he or she is available to be dealt with by the courts. This principle was affirmed in the recent case of *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 ("NAAJA Case"). In the NAAJA Case, the majority of the High Court found that keeping a person in custody for up to four hours under certain circumstances, as prescribed by Division 4AA of the *Police Administration Act* (NT), was not punitive, as the exercise of the detention power was confined to circumstances including the need to ensure the person is available to be dealt with in respect of an offence, preserve public order and safety, and prevent the commission of an offence. These are similar circumstances to those set out in clause 105.

For after-hours orders, the purpose of detention is to hold a person to make them available to be dealt with by a judicial officer. Specifically, a person will be held for the time it takes to resolve an application of a police officer to a judicial officer for a protection order in relation to the person being detained. This falls clearly within the scope of lawful administrative detention, as set out by the High Court in the NAAJA Case.

The after-hours order scheme is constructed as an appropriate and proportionate response to the insidious threat of domestic and family violence. It is protective and preventative in nature, as an operational response to risks to safety in an attempt to prevent further potential harm. Police officers are only to use detention in specific circumstances prescribed by law, for a short timeframe (up to four hours) and in accordance with established operational procedures. The police officer must be reasonably satisfied that there is a risk to an affected person of family violence by the respondent and that the order is necessary to ensure the person's safety or protection of their property. These are serious circumstances, in which the police officer must assess the appropriate balance of the safety of an affected person against the detention of the person posing the threat. It is intended that police officers will undertake a risk assessment and consider alternative responses and options for protection before taking the action to detain. Further, the exercise of police powers is subject to well-established mechanism of legal supervision such as actions of false imprisonment. This mitigates the potential for misuse of the powers and abrogation of the right to liberty and security of the person. These safeguarding features of the scheme ameliorate any perceived issues with the arbitrary nature or application of the law.

A separate question raised by the Committee is the location and conditions of detention. Under clause 105, a police officer cannot detain a person if an offence has been committed. In that situation, police must follow standard procedure, under Part 10 of the *Crimes Act 1900* and Part 1C of the *Crimes Act 1914* in relation to the alleged offence committed. By the same reasoning, as the Committee notes, those provisions will not apply to circumstances activated by clause 105. The Committee correctly identifies that the conditions of detention are not prescribed in the FV Bill. This is largely due to the fact that the circumstances that would enliven the after-hours orders scheme are by their nature, individual and variable. The nature of the "detention" is likely to be that a person is not free to leave the address at which the police attend when they respond to an alleged domestic and family violence incident except as requested by police. This is not an unusual situation, in which a police officer requires time to investigate a situation and requires parties to remain at a specified location to facilitate that investigation. Where appropriate, it is intended that police officers will make contact with support services such as Domestic Violence Crisis Service, who can provide support and counselling to parties involved in an incident where domestic and family violence is alleged to have occurred.

In relation to the Committee's comment on the admissibility of statements made by the detainee to police during a period of detention under the after-hours scheme, any statements made will be governed by the *Evidence Act 2011*. Any statement made by the detainee that raises in the mind of a police officer a reasonable suspicion that the person has committed any offence will enliven the protections in the *Crimes Act 1914*.

Residential Tenancies Legislation Amendment Bill 2016

In its examination of the RT Bill the Committee raises a deprivation of property issue in terms of both the common law right to property and paragraph 23 (1) (a) of the *Australia Capital Territory (Self-Government) Act 1988* (Cth). The Committee has asked that I address the deprivation of property issue that will occur when the ACAT makes an order under the proposed new 6.5A that is inserted in the Act by the RT Bill.

A person may only make an application under new division 6.5A if the Magistrates Court has already made an order the effect of which is to exclude the respondent from being on the same premises as the protected person or alternatively, the respondent has given an undertaking to the court to leave the premises. In this respect, the ACAT is dealing with the follow on consequences of the order that has already been made by the Magistrates Court or—in the case of an undertaking—the voluntary undertaking already made by the respondent. The acquisition of a property right (a right to exclusive possession of the rental premises) is arguably only formalising the effective acquisition that has already been ordered by a court. Similarly the interference with the respondent's common law right to property is also formalising the interference that is a consequence of the court order.

As is noted in the explanatory statement for the RT Bill, the interference with the respondent's property right is accompanied by adequate and effective safeguards. The formal termination of the respondent's property rights is subject to administrative oversight as it requires consideration by the ACAT and may only occur after the grant of a personal protection order or domestic violence protection order by an ACT Court. Second, to make an order to terminate an existing tenancy, ACAT must be satisfied that is reasonable to make the order:

1. in light of the length of the protection order and time remaining on the term of the existing tenancy agreement; and
2. in light of the interests of any other tenants (albeit, not including the respondent).

The RT Bill ensures that a respondent is given the opportunity to oppose an application to terminate a residential tenancy to which they are a party. New section 85A(3)(c) requires that the respondent is made a party to the application and thereby has an opportunity to oppose it and flag any undue hardship they may suffer if the residential tenancy is terminated by the ACAT.

I thank the Committee for its report and careful consideration of these Bills.

Yours sincerely

Simon Corbell MLA
Attorney-General

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

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

Member for Molonglo

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

Dear Mr Doszpot

Thank you for Scrutiny of Bills Report No. 46 of 19 July 2016. I offer the following response in relation to the Committee's comments on the Discrimination Amendment Bill 2016 (the Bill).

Does section 67A burden the freedom of political communication?

As noted in the explanatory statement to the Bill, the changes to the vilification provisions in the Discrimination Act engage and limit the right to freedom of expression under the *Human Rights Act 2004*. The Government considers that these limitations are reasonable and demonstrably justifiable in a free and democratic society where we strive to include all members of the community.

It is also considered that the amendments do not impermissibly burden the implied freedom of political communication. The implied freedom only extends to protections for communication necessary for the effective operation of the system of representative and responsible government provided for by the Constitution. Public discussion of issues of sexuality and race may have implications for policies adopted by the Commonwealth and hold relevance to the development of

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

public opinion about the social and economic features of Australian society.[1] The vilification provisions restrict some forms of communication about these issues and may amount to a burden.

However the purpose of the act is not to directly restrict particular kinds of political communication, but to prevent incitement to violence or abuse of minority groups. There may be an indirect restriction on political communication but the restriction is not disproportionate to the aim of the anti-vilification provisions, having regard to the high threshold test of vilification and the exceptions for public communications done in the public interest, reasonably and honestly.[2]

In any case the implied freedom of political communication does not prohibit laws which burden communication but are otherwise appropriate and adapted to a legitimate end that is compatible with the system of government prescribed by the Constitution.[3]

Is the end (object) sought to be achieved by section 67A legitimate?

The Government believes that the vilification provisions are appropriate and adapted for the legitimate purpose of maintaining our democratic system of government in which the various and diverse communities which make up Australian society are able to participate in society without being vilified or subjected to abuse and violence.

They are aimed at preventing the most egregious personal attacks on a person because of their particular personal attributes which involves inciting hatred, serious contempt, ridicule of or revulsion of the person. There is no denying that insults can be legitimate forms of public discourse, as the comments point out, but that does not provide a right to denigrate and abuse in a way that incites hatred or violence.

The vilification provisions in the ACT have a higher threshold than those in section 18C of the Commonwealth *Racial Discrimination Act 1975*, which are framed in terms of offence, and which have been upheld as appropriate and adapted.[4]

Numerous cases have upheld equivalent provisions in other state and territory anti-discrimination legislation.[5] For example Allsop J considering the equivalent NSW vilification provisions in the context of communications vilifying homosexuals participating in the Sydney Gay and Lesbian Mardi Gras parade said:

> Notwithstanding this affectation, the provision remains compatible with the maintenance of the prescribed system of government. The degree to which a Parliament is entitled to entrench upon communications of a political or governmental character must depend, in part, upon the nature and importance of the end to which the law must be reasonably adapted. Certain subject matters are of a character that care needs to be taken in discussion of them in order that forces of anger, violence, alienation and discord are not fostered. Race, religion and sexuality may be seen as examples of such. Racial vilification of the kind with

---

[1] See e.g. *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46 at 124; *Hogan v Hinch* [2011] HCA 4 at 49.
[2] See e.g. *Levy v State of Victoria* [1997] HCA 32 at 619; *Sunol v Collier* (No 2) [2012] NSWCA 44 (22 March 2012) at 51-52 per Bathurst CJ.
[3] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-567.
[4] *Jones v Scully* [2002] FCA 1080 (2 September 2002) AT 239-240.
[5] E.g. *Sunol v Collier* (No 2) [2012] NSWCA 44 (22 March 2012); *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) at 113; 210.

> which the Federal Court dealt in *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 is capable of arousing the most violent and disturbing passions in people. If it were to be carried on for political purposes it would make the effect on people no less drastic. Similar types of vilification can be contemplated directed to other racial groups, other religious groups or groups having different sexual orientations than what might be said to be "usual". A diverse society that seeks to maintain respectful and harmonious relations between racial and religious groups and that seeks to minimise violence and contemptuous behaviour directed towards minorities, including those based on sexual orientation, is entitled to require civility or reason and good faith in the discussion of certain topics. Those topics are, at least in the first instance, for Parliament to choose, although it will always be for the courts to apply the laws and the Constitution.[6]

The right to freedom of expression in the Human Rights Act provides a broader right than that implied in the Constitution, which has been said to be a systemic or structural right aimed at providing through law an equal platform for people to engage in the Australian political discourse, rather than an individual or personal freedom to say anything without consequences.[7]

Just as the Human Rights Act recognises that individual rights may conflict when exercised, and require balancing and the imposition of limitations, so too does the *Lange* test of the implied freedom of political communication require a proportionality assessment. The criteria in section 28 of the Human Rights Act substantially covers the elements set out in the *McCloy* test raised in the report as a useful test of proportionality.

The Government does not believe that the changes to the vilification provisions change an assessment that the restrictions on freedom of expression imposed by vilification laws generally are proportionate.

Including the phrase 'revulsion of' is intended to cover situations where a person vilifies a person by inciting serious disgust – for example calling African black people 'cockroaches' or 'vermin' or 'a virus' to draw on a recent UK example.

Exceptions continue to apply to cover discussion or debate about any matter in the public interest.

As was noted in the explanatory statement accompanying the Bill –

> These exceptions uphold the public interest in maintaining right to freedom of expression necessary to facilitate public discussion and debate, in good faith, but also recognise that vilifying conduct diminishes the dignity and sense of community inclusion of a person by denying the right of the person to equality and non - discrimination. Vilification acts as a barrier to individuals engaging in and contributing to ACT society, driving divisions in the community, rather than promoting respect and inclusion.

[6] *Sunol v Collier* (No 2) [2012] NSWCA 44 (22 March 2012) at 73.
[7] See e.g. *APLA v Legal Services Commission NSW* [2005] HCA 44 at 381; *McCloy v New South Wales* [2015] HCA 34 at 29-30.

The Government considers that legislation which promotes the right to equal participation of all Canberrans no matter what race or sexuality or disability in our community without vilification is reasonable and justifiable, and for the purposes of the Constitution, appropriate and adapted to the maintenance of a respectful, fair and safe ACT society.

If the end is legitimate, is the manner in which it is sought by section 67A, when read with the provisions in the HRC Act concerning ACAT power, reasonably appropriate and adapted to achieving the end in a manner compatible with the system of representative and responsible government?

The changes to the ACAT complaints process do not change the test for vilification in a way that impacts on the proportionality assessment under either the Human Rights Act or the *Lange* test (as modified by *Coleman*) for the implied freedom of political communication.

The ability of a party with sufficient interest to complain on behalf of a person with an attribute is designed to make it easier for vulnerable people who have suffered discrimination to enforce their rights, where they would otherwise be discouraged by the (perceived) complexity of the process, or the possibility of being stressed, victimised or not taken seriously. The change will allow recognised support and advocacy groups to assist the person with the complaint process, but does not allow the complaint to be made on behalf of an unidentified complainant or without the particular person's consent. It is considered that while more complaints may perhaps be brought to the ACAT they are not complaints that could not have been complained about under the existing provisions (except to the extent that they relate to new or expanded attributes).

Although a vilification complaint will go through the Human Rights Commission and possibly to ACAT, the change to the burden of proof has not been amended with respect to vilification complaints.

The reversed onus of proof only applies to discrimination by a person against another person by treating or proposing treat another person unfavourably (the test for direct discrimination) or by imposing or proposing to impose a condition or requirement that will have a disadvantageous effect on the other person (s 53CA).

The equal protection of the law without discrimination (HRA section 8) and the definition of "religious conviction" to accord protection to Aboriginal or Torres Strait Islander persons

The Discrimination Amendment Bill will include in the non-exhaustive definition of religious conviction:

(c) the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and
(d) engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples.

The Committee notes that "[o]n their face, these provisions engage and derogate from the right in HRA 8 to the equal protection of the law without discrimination, and a section 28 justification should be provided".

Clause 7 of the preamble to the Human Rights Act states that "although human rights belong to all individuals, they have a special significance for Indigenous people – the first owners of this land, member of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance".

Section 27(2) of the Human Rights Act provides that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and provides that they must not be denied the right to maintain, control, protect and develop these rights.

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.

This is also reflected in international human rights law.[8] The United Nations Human Rights Committee in its *General Comment 18 – Non-discrimination* has stated that:

> the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[9]

In this case there was not clear indication of whether the spiritual customs, practices, observances and teachings of Aboriginal and Torres Strait Islander peoples would fall within the existing definition of 'religious convictions'. It is also considered that those practices and beliefs should be explicitly articulated as protected, given the Human Rights Act requires recognition of their distinctiveness. In this case the distinction is justifiable, genuine and for a legitimate purpose as required by the application of special measures under Australian discrimination laws and in accordance with the content of the right to equality as articulated by the Human Rights Committee.

The case of *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (28 November 2011) is a recent examination of the law relating to special measures. Parks Victoria applied to the Victorian Civil and Administrative Tribunal for an exemption from certain provisions of the *Victorian Equal Opportunity Act 2010* to allow it to advertise for and employ only Indigenous people working to care for and protect Wurundjeri country. The Tribunal found that this measure was proportionate and appropriately targeted to "provide opportunities of connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country". The Tribunal found that

---

[8] See e.g. Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994); *R v Kapp*, 2008 SCC 41 (27 June 2008)
[9] Human Rights Committee, General Comment 18 at 10, 13.

those purposes had the broader purpose of realising substantive equality for Indigenous people and was satisfied that it would be undertaken in good faith.[10]

The Member also concluded that having regard to the "legislative means by which the connections to country and culture have been recognised and the Charter right created by section 19, it is apparent that the purpose of the proposed conduct is to realise substantive equality for Indigenous applicants for the field and office based positions and more broadly for Indigenous people...is a special measure ... shown to be necessary, genuine, objective, and justifiable."[11]

There is a dynamic interplay of rights to equality and non-discrimination and special measures to improve opportunities to members of groups that have been disadvantaged. The Government considers that explicitly including Aboriginal and Torres Strait Islander cultural heritage and distinctive spiritual practices, observances, beliefs and teachings in the definition of religious conviction is an important change and one that does not limit the rights under the Human Rights Act.

I thank the Committee for its consideration of this Bill and trust that this response to its questions is of assistance to the Assembly.

Yours sincerely

Simon Corbell MLA
Attorney-General

[10] Human Rights Law Centre, *Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act – Case note* (28 November 2011) available at http://hrlc.org.au/tribunal-considers-special-measures-and-discrimination-under-the-charter-and-new-equal-opportunity-act/

[11] *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (28 November 2011) at para [52]

ANDREW BARR MLA
CHIEF MINISTER OF THE AUSTRALIAN CAPITAL TERRITORY

Treasurer
Minister for Economic Development
Minister for Urban Renewal
Minister for Tourism and Events

Member for Molonglo

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

Dear Mr Doszpot

I refer to the report presented following the Justice and Community Safety Standing Committee Inquiry into the Public Sector Management Amendment Bill 2016.

The report identifies two areas of concern in relation to proposed changes to the Public Sector Management Act. I have had due regard to these concerns and accordingly have had appropriate changes made to the Bill.

The Government formally responds to each of the recommendations contained in the report as follows:

Recommendation 1
The proposed provision that a public servant must not engage in conduct that causes damage to the reputation of the service or the executive can amount to an undue trespass on personal rights and liberties.

The Government appreciates the Committee's concerns that the proposed paragraph 9(2)(a) in the Amendment Bill, which provides that a public servant must not engage in conduct that causes damage to the reputation of the service or the Executive, may amount to an undue burden on political communication and the right to freedom of expression (*Human Rights Act* Section 16). The Government

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601, Australia GPO Box 1020, Canberra ACT 2601, Australia
Phone + 61 2 6205 0011 **Fax** + 61 2 6205 0157 **Email** barr@act.gov.au
CANBERRA
@ABarrMLA Andrew.Barr.MLA andrewbarr

recognises and celebrates freedom of expression of all individuals in the ACT and all of Australia. However, we remain of the view that, in this case, the limit to freedom of expression for public servants is reasonable as the need to maintain public confidence in the public service outweighs any impingement on an individual's right to freedom of expression or participation in democratic processes.

Further, there are robust alternative mechanisms for public servants to appropriately address any concerns in relation to corrupt conduct or maladministration. The primary mechanism is the *Public Interest Disclosure Act 2012* which allows a public official to disclose to a Minister, or to the media, any report of disclosable conduct by another public employee.

Clause 9 (4) of the Bill requires this type of conduct to be reported. It is another example of the transparency and anti-corruption mechanisms introduced by this Government. Appropriate identification of corruption allows the Government and the ACT public service to take immediate action to investigate and remediate the situation as required. While a public disclosure of this nature may damage the reputation of the service or the Executive, the *Public Interest Disclosure Act* provides full protections for a public servant in this situation.

The proposed paragraph in the Amendment Bill demonstrates the existing expectations of ACT public servants under the ACTPS Code of Conduct which outlines a responsibility for public servants to consider how their actions may be perceived by the general public and whether they may damage the reputation of the service or the Executive. This includes actions outside of official duties such as employee participation in social media fora. ACT public servants continue to be welcome to express their views, political or otherwise, in private. This is also welcome in public situations; provided that it is clear they are not representative of the service but are doing so in their capacity as a private citizen.

Furthermore, these limitations are consistent with the obligations that apply to employees of any organisation where damage can be caused to the employer's reputation. This is outlined in clause 1.07 of the *Fair Work Regulations 2009* which defines serious misconduct as behaviour that is "inconsistent with the continuation of the contract of employment" and can cause "serious and imminent risk to ... the reputation, viability or profitability of the employer's business".

Therefore, in our view and in accordance with S28 of the *Human Rights Act*, the limitations to personal freedoms proposed in this amendment are reasonable. However, the Government recognises that clause 9(2)(a), with regard to the reputation of the Executive, could be seen to limit political expression. This Government welcomes appropriate criticism from all sectors of the community and accordingly we have excluded conduct which causes damage to the reputation of the Executive, from the proscribed behaviours. The Bill has been amended accordingly.

Recommendation 2
The proposed powers for the Head of Service to decide that an office must be occupied by Aboriginal or Torres Strait Islander Persons or Persons with Disability may derogate from the right in the HRA section 8 to the equal protection of the law without discrimination.

The Government does not accept that the proposed section 27 of the Amendment Bill derogates from the equal protection of the law without discrimination under section 8 of the *Human Rights Act*.

Categorising a position that is identified by the head of service as one that must be occupied by an Aboriginal or Torres Strait Islander person or a person with disability is an exception to unlawful discrimination as outlined by the *Discrimination Act 1991*. Section 27 of the *Discrimination Act* describes measures that are intended to achieve equality where it is not unlawful where the purpose of the act is to:
"(a) to ensure that members of a relevant class of people have equal opportunities with other people; or
(b) to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class."

In this respect, Section 27 of the Amendment Bill allows the application of equal employment opportunity principles to Aboriginal or Torres Strait Islander persons or persons with disability. This is consistent with Section 28 of the *Human Rights Act* as the benefits of the proposed section 27 for equal opportunity employment outweigh any discrimination as a result of the amendment. Accordingly, no change will be made to Section 27 of the Amendment Bill.

I would like to thank the Committee for its comprehensive review and analysis of the proposed Bill and Directions. The input provided has added significant value to the quality of these important reporting tools and contributed to our ongoing commitment to providing open government.

Yours sincerely

Andrew Barr MLA
Chief Minister

Shane Rattenbury MLA

ACT Greens Member for Molonglo

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
London Cct
Canberra ACT 2601

Dear Mr Doszpot,

I write in response to the Committee's comments on the Freedom of Information Bill 2016 in report 45 dated 31 May 2016.

Before I respond to the detailed remarks made by the Committee, I would like to ensure that the Committee clearly understands the structure and operation of the Bill, as the comments do not appear to reflect a full appreciation of the Bill.

This Bill does two key things:

- Introduces an open access scheme, to establish processes for the regular disclosure of government reports and information; and
- Creates a public interest test for what information is released to the community.

The Bill creates a statutory right of access to information held by the Government wherever it is not contrary to the public interest for that information to be disclosed and sets up a clear framework for determining the public interest in the disclosure or non disclosure of government held information.

The Bill removes the class based exemptions that exist under the current FOI scheme and recognises that the public interest in the disclosure of information will depend on the circumstances and the nature of the particular information in question rather than the class of information that it happens to be part of. Instead of broad

Ph: 6205 0005 **Fax:** 6205 0007 **Email**: Rattenbury@act.gov.au

Post: GPO Box 1020, Canberra, ACT 2601 **Online:** Follow me on Facebook and Twitter

exemptions to the public right to access government information, the Bill deems a relatively small number of discrete categories of information that are defined, either by reference to specific legislative provisions or by the outcomes which may come about from their release, to be contrary to the public interest to release.

In addition to revising the scheme for providing information in response to particular requests, the Bill also places a much greater emphasis on the proactive disclosure of information without the need for a formal request for the particular information. Commonly referred to as the 'push model' for the provision of information, the Bill provides that a range of information including policy documents, details about agency activities and budgeting, certain expert reports and from three years after they are written: incoming minister briefs, question time briefs and estimates and annual reports briefs must be proactively published by agencies unless it is contrary to the public interest to do so.

The Bill further imposes an obligation on government agencies to continually consider what additional information they can make proactively available and authorises agencies to provide information in response to informal requests for information to avoid the need to go through the formal FOI process. The intention is that requests for information under the application process in the Bill will become a last resort and that the community will have access to a much larger range of government information without the need for formal requests.

Responding to each of the Committee's four comments on the Bill in turn:

1. *The complexity of the law could lead to delay and conservative decision making.*

FOI schemes are complex. This is evidenced by the many and varied judicial and quasi judicial decisions made to implement them. If anything the Bill will significantly simplify the FOI scheme by removing the existing multiplicity of mechanisms by which the executive may decide that a document is not required to be provided to the public and replacing them with a single public interest test. The consequence of doing this is that the application of the public interest test becomes particularly important and it is of course an inherently difficult task.

Under the *Right to Information Act 2009* (QLD) (**QLD RTI Act**) the public interest test has proven to be an effective means of increasing the availability of government information to the community. Furthermore following the initial learning curve evidenced by the number of decisions varied by the QLD Information Commissioner, decision makers have become adept at applying the test and there is no evidence that the scheme there has operated to create greater delays in decision making or foster excessive conservativeness.

Evident from the Committee's comments is the fact that the Committee has not fully considered the operation of the Bill. The Committee incorrectly equates the factors relevant to the determination of the public interest set out in schedule 2.2 of the Bill. The factors are not of themselves a basis to deny access to information. This is abundantly clear from the terms of clause 17. The assertion that in relation to paragraph 2.2(a)(ii) of schedule 2, "There is no reference to a Human Rights Act in the Queensland law, and on the face of it this exemption could expand considerably the bases on which a request could be refused" is misconstrued.

To the contrary the structure of the public interest test, which is essentially the same as the test set out in the QLD RTI Act, and the role of schedule 2 in the application of the test will assist decision makers apply the test.

The particular example used by the Committee to illustrate its point is even more problematic for two reasons. Whilst the corresponding factor relevant to the determination of the public interest set out in the QLD RTI Act is limited to a consideration of the right to privacy and not to individual rights more generally because Queensland does not have a Human Rights Act, the rights protected by the HRA may well also be relevant to a determination of the public interest under the QLD RTI Act. Similar to clause 17 of the Bill, section 49 of the QLD RTI Act makes it clear that the relevant schedule of factors is not exhaustive and decision makers are required to consider any relevant public interest factor.

Secondly and perhaps more significantly, to assert that the requirement to consider the potential impact on an individual's protected rights is somehow problematic is directly contradictory to the Committee's terms of reference and to the obligation on the executive created by section 40B(1)(b) of the HRA which provides that it is unlawful for a public authority in making a decision, to fail to give proper consideration to a relevant human right. In effect the relevant item of the schedule simply draws this existing obligation to the decision maker's attention to ensure that protected rights are properly considered when making a decision.

In the event that access to government information is denied because doing so would impact on an individual's rights to the extent that it was not in the public interest to release the information, that is a good outcome that is consistent with the HRA and the community's obligation to act in its collective interest but not in such as way as to unreasonably curtail the rights of individuals.

2. The length of time for decisions and the appropriate review mechanisms

The length of time for initial decisions by agencies is effectively the same under the Bill as under the current FOI Act (section 18 of the current Act provides for 30 days to make a decision and clause 40 of the Bill provides for 20 working days to make a decision).

Following the initial decision, under the current FOI Act applicants can apply for internal review (see section 59) for which there is no time limit prescribed in the Act. Ombudsman review under the Bill, which it can be said effectively replaces internal review, must be decided within 20 working days (see clause 74). Under both the existing and proposed schemes applicants then have access to ACAT review.

Having three tiers of decision making is the standard that has been adopted across Australian jurisdictions. Similarly to the Bill other jurisdictions also provide for two levels of external review. See for example:

- the QLD RTI Act which provides for QCAT review of Information Commissioner decisions (note that this is only on points of law);
- The *Freedom of Information Act 1982* (Cth) which provides for the AAT to review decisions of the Information Commissioner;
- The *Freedom of Information Act 1991* (SA) where a right of appeal from decisions of the Ombudsman to the District Court exists.

3. Fees

Without doubt cost is a significant factor in the effectiveness of any FOI scheme. However it is well accepted that there should be a level of cost recovery from those who use the scheme. The Committee will note that there are significant new constraints on when fees can be charged and how they are to be calculated (see clauses 104-107). Given that the fee structure proposed in the Bill is more clearly prescribed and more favorable to applicants than the scheme under the current FOI Act it is difficult to see on what basis the Committee made the comment and how it is that the proposed fee structure is having an adverse impact on individual rights protected by sections 16 and 17 of the *Human Rights Act 2004*.

4. Costs and requiring decision notices.

Notwithstanding that the Committee has raised the issue of the fees for applicants, the committee also raises the issue of the cost of decision making to agencies. Put at its highest the Committee's comment offers nothing more than mere speculation about a theoretically possible, yet most unlikely, outcome. To suggest that the ACT executive would consciously or systematically fail to fulfil a statutory obligation raises issues far beyond this particular Bill. The question of funding and the impact of funding on the operation of any legislative scheme is a constant issue for any government and any Parliament. There is nothing unique or peculiar about the potential impact resourcing decisions will have on this particular obligation on the executive.

The comments also ignore the fact that the open access scheme is designed to reduce the overall number of FOI requests, as the government would proactively release more information.

The Committee's comment is problematic for two further reasons; it ignores the existing requirement under the current FOI Act and it is contradictory to the well accepted position that requiring reasons improves the quality of administrative decision making.

Section 25 of the current FOI Act already requires decision makers to provide statements of reasons for their decisions. Similarly section 26 of the Commonwealth FOI Act, section 22 of the *Right to Information Act 2009* (Tas) and section 54 of the QLD RTI Act also require decision makers to provide reasons for their decisions without the need for a specific applicant request.

This is not a new or excessively onerous requirement and it is well accepted that a requirement for decision makers to provide statements of reasons improves the decision making process. So much is expressly stated by the Queensland Information Commissioner in the guidelines on writing statements of reasons, which state, "Writing good statements of reasons is a fundamental aspect of good decision making."[1] The Administrative Review Council has also commented on a number of occasions that the provision of statements of reasons improves decision making.[2]

Given the Committee's role in identifying for the Assembly when administrative decision makers are insufficiently accountable for the decisions that they make it is difficult to see why the Committee would make a comment effectively criticising such a well accepted and widely adopted accountability mechanism.

I would also like to make a general comment about the Committee's report, which correctly identifies that the object of the Bill is to increase the amount of government held information available to the community, the report then states:

> *The Committee's comments are designed only to point to matters that might undermine the achievement of this object, at least to the extent expected. There are various practical considerations that can undermine the effective working of a freedom of information law.*

---

[1] https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/notice-of-decision/statement-of-reasons-making-decisions-under-the-rti-act-and-ip-act.

[2] See for example Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons* available at http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/PracticalGuidelinesforpreparingstatementsofreasons2000revised2002.aspx; Administrative Review Council, *Decision Making: Reasons* Best-practice guide 4 (August 2007) available at http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide4Reasons.aspx

In straying into commenting on the policy of the Bill without sufficient knowledge of the operation of the current *Freedom of Information Act 1989* (**current FOI Act)** scheme and the operation of other similar schemes to what is proposed in the Bill, the Committee has misrepresented the impacts that the Bill may have. In addition to being misleading the Committee's comments are at times directly inconsistent with the Committee's role of drawing to the Assembly's attention clauses in Bills which may limit rights or inappropriately create executive powers over which there is insufficient scrutiny and appear to be advocating a position less favourable to individual rights and executive accountability.

Yours sincerely

Shane Rattenbury MLA
1 August 2016