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

SCRUTINY REPORT 37

21 SEPTEMBER 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (a) is in accord with the general objects of the Act under which it is made;

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

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

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

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

  (a) unduly trespass on personal rights and liberties;

  (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

  (d) inappropriately delegate legislative powers; or

  (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-222 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 5) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the Brindabella Motor Sport Club Test Day.**

Disallowable Instrument DI2015-227 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2015 (No. 1) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **makes 200MW of capacity available for a large-scale renewable energy wind auction (Wind Auction II).**

Disallowable Instrument DI2015-228 being the Domestic Violence Agencies (Council) Appointment 2015 (No. 1) made under section 6 of the *Domestic Violence Agencies Act 1986* **appoints specified people as community members of the Domestic Violence Prevention Council, representing the views and interests of culturally and linguistically diverse people and people of Aboriginal and Torres Strait Islander descent.**

Disallowable Instrument DI2015-229 being the Domestic Violence Agencies (Council) Appointment 2015 (No. 2) made under section 6 of the *Domestic Violence Agencies Act 1986* **revokes DI2013-33 and appoints the occupant of the position of Deputy Chief Police Officer (Crime) as a police officer member of the Domestic Violence Prevention Council.**

Disallowable Instrument DI2015-231 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2015 (No. 2) made under section 29 of the *Cemeteries and Crematoria Act 2003* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person as deputy chair of the ACT Public Cemeteries Authority Governing Board.**

Disallowable Instrument DI2015-232 being the Children and Young People (Death Review Committee) Deputy Chair Appointment 2015 (No. 1) made under section 727EA of the *Children and Young People Act 2008* appoints a specified person as deputy chair of the Children and Young People Death Review Committee.**

Disallowable Instrument DI2015-233 being the Public Place Names (Moncrieff) Determination 2015 (No. 6) made under section 3 of the *Public Place Names Act 1989* **determines the names of seven roads in the Division of Moncrieff.**

Disallowable Instrument DI2015-234 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2015 (No. 5) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2014-258 and approves specified agencies as approved sports bookmaking venues.**

Disallowable Instrument DI2015-235 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2015 (No. 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2014-259 and approves specified sub-agencies as approved sports bookmaking venues.**

Disallowable Instrument DI2015-237 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2015 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2014-263 and approves a specified place as an approved sports bookmaking venue.**

Disallowable Instrument DI2015-238 being the Financial Management Investment Guidelines 2015 made under section 133 of the *Financial Management Act 1996* **revokes DI2011-165 and prescribes the investments for the purposes of the Act.**

Disallowable Instrument DI2015-239 being the Superannuation Management Guidelines 2015 made under section 16 of the *Territory Superannuation Provision Protection Act 2000* **revokes DI2011-169 and prescribes the investments for the Superannuation provision Account.**

Disallowable Instrument DI2015-240 being the Civil Law (Wrongs) Institute of Chartered Accountants in Australia Professional Standards Scheme Amendment 2015 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* **gives notice of the ACT Professional Standards Council's approval of an amendment to the Institute of Chartered Accountants in Australia Professional Standards Scheme (ACT).**

Disallowable Instrument DI2015-241 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2015 (No. 2) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2015-172 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors, including the salary allocation for the 2015-2016 financial year.**

Disallowable Instrument DI2015-242 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2015 (No. 2) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2015-173 and determines the conditions under which Members may employ staff and engage consultants or contractors, including salary allocations for the 2015-2016 financial year.**

Disallowable Instrument DI2015-243 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 6) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the Brindabella Motor Sport Club Test Day.**

Disallowable Instrument DI2015-244 being the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015 (No. 2) made under section 23 of the *Official Visitor Act 2012* **revokes DI2015-120 and makes the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines.**

Disallowable Instrument DI2015-246 being the Gaming Machine (Fees) Determination 2015 (No. 2) made under section 177 of the *Gaming Machine Act 2004* **revokes DI2015-175 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-249 being the Official Visitor (Children and Young People) Appointment 2015 (No. 2) made under paragraph 10(1)(a) of the *Official Visitor Act 2012* **appoints specified persons as an official visitors for the purposes of the Act.**

Disallowable Instrument DI2015-250 being the Road Transport (General) (Pay Parking Area Fees) Determination 2015 (No. 2) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-203 and determines relevant parking fees for Territory-operated pay parking areas.**

Disallowable Instrument DI2015-258 being the University of Canberra (Student Conduct) Statute 2015 made under section 40 of the *University of Canberra Act 1989* **revokes DI1992-188, allows for the appointment of a student conduct officer and inserts a new definition of "assessment".**

Disallowable Instrument DI2015-259 being the University of Canberra (Liquor) Statute 2015 made under section 40 of the *University of Canberra Act 1989* **revokes DI2011-243 and regulates the conditions for the sale and purchase of liquor at the University, including Union premises, for the purposes of the *Liquor Act 2010*.**

Disallowable Instrument DI2015-260 being the University of Canberra (Obligations) Statute 2015 made under section 40 of the *University of Canberra Act 1989* **revokes DI1995-172, provides for the appointment of an obligations officer and a delegation power for the Vice-Chancellor and authorises Council to make Rules.**

Disallowable Instrument DI2015-261 being the University of Canberra (Academic Progress) Statute 2015 made under section 40 of the *University of Canberra Act 1989* **revokes DI1995-168 and provides a definition of academic probation and the imposition of academic probation.**

Disallowable Instrument DI2015-262 being the University of Canberra (Parking and Traffic) Statute 2015 made under section 40 of the *University of Canberra Act 1989* **revokes the *Traffic Statute 1995*, provides for the management of parking and traffic at the University and updates parking arrangements to reflect the development at the campus.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

RETROSPECTIVE EFFECT

Disallowable Instrument DI2015-223 being the Land Rent (Total income of lessee—post-1 October 2013 leases) Determination 2015 (No. 1) made under section 9A of the *Land Rent Act 2008* **revokes DI2013-246 and determines what constitutes the total income of a lessee.**

Disallowable Instrument DI2015-224 being the Land Rent (Total income of lessee—pre-1 October 2013 leases) Determination 2015 (No. 1) made under section 9A of the *Land Rent Act 2008* **revokes DI2014 318 and determines what constitutes the total income of a lessee.**

Disallowable Instrument DI2015-225 being the Rates (Deferral) Determination 2015 (No. 1) made under section 46 of the *Rates Act 2004* **revokes DI2014-183 and determines the income, asset and equity requirements that form the eligibility criteria for the rates deferral scheme.**

Disallowable Instrument DI2015-226 being the Taxation Administration (Amounts Payable—Over 60s Home Bonus Scheme) Determination 2015 (No. 3) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-107 and determines, for the purposes of the Scheme, the eligibility criteria, amounts, conditions, method of calculation of duty payable and the time limit for applications.**

Disallowable Instrument DI2015-230 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2015 (No. 3) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-109 and determines, for the purposes of the Scheme, the eligibility criteria, amounts, conditions, method of calculation of duty payable and the time limit for applications.**

The five instruments mentioned above determine various rates and thresholds for the *Land Rent Act 2008*, the *Rates Act 2004* and the *Taxation Administration Act 1999*. Each of the first three instruments mentioned above was made on 6 August 2015 and notified on the ACT Legislation Register on 13 August 2015. Section 2 of each instrument provides that the instrument is taken to have commenced on 1 June 2015.

The fourth and fifth instruments mentioned above were also made on 6 August 2015 and notified on 13 August 2015. Section 2 of each instrument provides that the instrument is taken to have commenced on 3 June 2015.

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

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

As a result of the requirements of section 76, for legislation with a retrospective effect, the Committee generally prefers that the Explanatory Statement for the instrument expressly addresses the section 76 issue and provide an assurance to the Committee (and to the Legislative Assembly) that there is no prejudicial retrospectivity (see the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf). The Committee notes that the Explanatory Statements for these instruments do not address this requirement.

The Committee draws the Legislative Assembly's attention to these instruments under principle (1)(b) of the Committee's terms of reference, on the basis that they may unduly trespass on rights previously established by law.

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

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

POSITIVE COMMENT

Disallowable Instrument DI2015-236 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2015 (No. 3) made under subsection 23(1) of the Race and Sports Bookmaking Act 2001 revokes DI2012-240 and determines the rules for sports bookmaking for methods of betting, including telecommunications equipment.

The Committee notes with approval that the Explanatory Statement for this instrument states that, among other amendments, the instrument corrects a minor drafting error identified by the Committee in its *Scrutiny Report No 1 of the 8th Assembly*, on 29 November 2012.

This comment does not require a response from the Minister.

EXERCISE OF POWERS PRIOR TO COMMENCEMENT OF EMPOWERING PROVISION

Disallowable Instrument DI2015-247 being the First Home Owner Grant (Amount) Determination 2015 (No. 1) made under paragraph 18(b) of the *First Home Owner Grant Act 2000* **determines the amount of the First Home Owner Grant.**

This instrument determines the amount of the First Home Owner Grant. It reduces the amount from $12,500 to $10,000, with effect from 1 January 2016.

The Committee notes that the instrument relies on paragraph 18(b) of the *First Home Owner Grant Act 2000*. At the time that the instrument was made, section 18 provided:

> **18 Amount of grant**
>
> The amount of a first home owner grant is the lesser of the following:
>
> (a) the consideration for the eligible transaction;
>
> (b) $12 500.

Paragraph 18(b) clearly does not provide for the power relied upon by the instrument. However, the Committee notes that, with effect from 1 January 2016, the *First Home Owner Grant Amendment Act 2015* inserts into the First Home Owner Grant Act a new paragraph 18(b) that *does* contain the relevant power.

The Committee notes that the exercise of the new power prior to its commencement is consistent with section 81 of the *Legislation Act* 2015, which provides:

81 Exercise of powers between notification and commencement

(1) This section applies to a power to make an appointment or statutory instrument, or to do anything else, in the following situations:

(a) the power is given by a law (the ***authorising law***) that has been notified but has not commenced;

(b) the power is given by a law (the ***authorising law***) as amended by another law (the ***amending law***) and the laws have been notified, but all or any of them have not commenced.

....

(2) To remove any doubt and without limiting subsection (1), this section applies to any of the following powers if the power is to be exercised in relation to an entity to be established by the authorising law or the authorising law as amended by the amending law:

(a) a power to make an appointment to the entity;

(b) a power to make a statutory instrument for the purposes of the entity;

(c) a power to do anything else in relation to the entity.

Example

This section applies to powers under an authorising law to be exercised in relation to the conduct of an election for members of a board to be established as a corporation by the authorising law.

(3) The power may be exercised at any time even though the authorising law, or the authorising law and amending law (or either of them), is not in force at the time.

(4) For the exercise of the power, the authorising law, or the authorising law and amending law, are taken to be in force at the time of the exercise of the power.

(5) Also, anything else may be done under the power at any time for the purpose of bringing, or in relation to bringing, the authorising law, or the authorising law as amended by the amending law, into operation.

(6) If an appointment or statutory instrument made under this section declares that this subsection applies to it, then, unless the appointment or instrument commences on a different date or at a different time under another provision of this chapter, the appointment or instrument commences on—

(a) for an appointment or statutory instrument that is a legislative instrument—the day after its notification day; or

(b) for any other appointment or statutory instrument—the day after the day it is made or, if it is required under an Act or statutory instrument to be approved (however described) by the Executive, a Minister or any other entity, the day after the day it is approved.

(7) In any other case, an appointment or statutory instrument made under this section commences on the latest of the following:

(a) the commencement of the authorising law or, if subsection (1)(b) applies and the amending law commences after the authorising law, the commencement of the amending law;

(b) on the day or at the time the appointment or instrument would have commenced if it had not been made under this section.

(8) In the application of this section to a statutory instrument that is not a legislative instrument, a reference to the instrument being ***notified*** is a reference to the instrument being made or, if it is required under an Act or statutory instrument to be approved (however described) by the Executive, a Minister or any other entity, to the instrument being approved.

(9) This section is a determinative provision.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

The Committee notes that, while the *First Home Owner Grant Amendment Act 2015* is referred to in the Explanatory Statement for this instrument, there is no reference to section 81 of the Legislation Act or the instrument's reliance on the power provided by section 81. The Committee also notes that subsection 81(6) clearly contemplates that an instrument that relies on section 81 do so expressly. The Committee suggests that agencies bear this in mind when relying on section 81 of the Legislation Act.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2015-248 being the Lands Acquisition (Reconsideration of pre-acquisition declaration—Block 4 Section 33 Division of Dickson) Confirmation 2015 made under sections 24 and 25 of the *Lands Acquisition Act 1994* **confirms pre-acquisition declaration (NI2015-53) relating to the establishment of the Dickson bus interchange.**

The Committee notes that the Explanatory Statement for this instrument states:

> The effect of the Instrument is to acquire part of Block 4 Section 33 Division of Dickson for a public purpose being the establishment of the Dickson Bus Interchange. Public purpose means a purpose in respect of which the Legislative Assembly or the Commonwealth Parliament has powers to make laws.

In relation to human rights issues, the Explanatory Statement goes on to state:

> There are no specific interactions with human rights declared in the *Human Rights Act 2004*. Some may view the acquisition of land as affecting human rights. However the process is in accordance with the Act, including public accountability and transparency, and the lessee has a right under the Act to claim compensation on just terms.

The Committee draws the Legislative Assembly's attention to the above explanation.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—COMMENT

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

AMENDMENT OF PRIMARY LEGISLATION BY DELEGATED LEGISLATION – RELIANCE ON "HENRY VIII" CLAUSE / HUMAN RIGHTS ISSUES

Subordinate Law SL2015-27 being the Gaming Legislation Amendment Regulation 2015 (No. 1), including a regulatory impact statement, made under the *Gambling and Racing Control Act 1999* **and *Gaming Machine Act 2004* amends the *Gaming Machine Regulation 2004* to support the implementation of the gaming machine trading scheme, new licensing and authorisation framework and transition arrangements.**

The Committee notes that sections 29 to 40 of this subordinate law amend the Gaming Machine Regulation 2004 with the effect of amending the *Gaming Machine Act 2004*. The amendments rely on section 310 of the Gaming Machine Act, which provides:

> **310 Transitional regulations**
>
> (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Gaming Machine (Reform) Amendment Act 2015*.
>
> (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 Committee notes that it has consistently queried whether, in fact, a provision such as subsection 310(3) correctly reflects the law in the ACT. Subsection 310(3) would appear to contradict the power of the Legislative Assembly, under the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), to make laws from time to time, including (of course) at a time subsequent to the making of the earlier law. It might also be seen as an ineffective attempt to entrench a regulation made under subsection 310(3).

That issue aside, the Committee notes that section 310 is a "Henry VIII" clause, in that it allows the effective amendment (or, in this case, the "modification") of primary legislation by delegated legislation (see the Committee's *Henry VIII clauses – Fact sheet* http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

In relation to the need for the amendments, the Explanatory Statement for the instrument states:

> Transitional arrangements for in-principle approvals are provided at section 306 to section 309 of the Amendment Act [ie the *Gaming Machine (Reform) Amendment Act 2015*]. New section 309A has been inserted to provide a necessary transitional arrangement for a conversion of an in-principle approval. This is to retain the right for an existing in-principle approval granted under the Act to be converted. The current transitional arrangements under the Amendment Act
>
> only cater for those situations where an application was received by the Commission prior to the commencement of the Amendment Act. The amendment is within the scope and objects of the Act and has been confined to the power granted under the Amendment Act.
>
> Subsection 309B provides that the Commission must issue a storage permit for a general purpose for 12 months, where prior to the commencement of the Amendment Act the Commission had approved the temporary storage of gaming machines under a licence. This is to enable a seamless transition for the temporary storage of gaming machines under the new licensing and authorisation framework and minimise the occurrences where a licensee may inadvertently be committing an offence under the Act. The amendment is within the scope and objects of the Act and has been confined to the power granted under the Amendment Act.

The Committee notes that there is no indication as to why the need for these transitional arrangements could not have been foreseen at the time of the passage of the *Gaming Machine (Reform) Amendment Act 2015*. The Committee also notes (with approval) that, as a result of section 311 of the Gaming Machine Act, the "Henry VIII" powers in the Gaming Machine Act have a limited life and expire four years after the commencement of the *Gaming Machine (Reform) Amendment Act 2015*.

This comment does not require a response from the Minister.

The Committee notes that the Explanatory Statement for this subordinate law discusses the human rights implications of the subordinate law. It states:

> During the development of the Amendment Regulation consideration was given to the impact on human rights. Clause 7 of the Amendment Regulation requires that contractual information be supplied to the Commission for premises where gaming machine activities may occur. This requirement has been applied since the Regulation commenced in November 2004.
>
> While the Amendment Regulation generally deals with entities and not individuals, it is possible that some contracts may relate to individuals. Therefore section 12 (Privacy and reputation) of the *Human Rights Act 2004* may be engaged as the contractual information may indicate an individual's personal information.

An assessment was made as to whether any less restrictive means were available to ascertain the contractual information relevant to the Commission meeting its enforcement obligations – see below (this contractual information may include the identity of an entity or individual, or information on commercial financial arrangements). Furthermore consideration was given to the type of contractual information that would be obtained. It was determined that where personal information was acquired it would include limited details namely, the identity of a person and their address. Other personal information, including such matters as criminal history, are not able to be sought under section 6 of the Regulation and nor would such extension be warranted.

Information on contractual arrangements assists the Commission to, among other things, identify 'kick-backs' and possible money laundering activities. The omission must have the necessary tools to meet its obligations under subsection 7(b) of the *Gambling and Racing Control Act 1999*, to minimise the possibility of criminal or unethical activity. Obtaining information on contracts is a means to achieving such obligations.

Once the information is received the Commission is bound by strict requirements under the *Information and Privacy Act 2014* and *Privacy Act 1988* (Cwlth). Division 4.4 (Secrecy) of the *Gambling and Racing Control Act 1999* provides further strong safeguards for the handling, confidentiality, and permitted disclosures of information that the Commission acquires as a result of exercising its functions under or in relation to a gaming law. Offence provisions apply for a person making a record of confidential information other than in accordance with their duties and unauthorised disclosure. The maximum penalty that can be applied is 50 penalty units, imprisonment for 6 months or both.

It was ascertained that there was no other means available to obtain contractual information. Accordingly, when balancing the risks involved; the type of information likely to be disclosed; and the strict protection requirements for information once disclosed, the amendment was considered reasonable and proportionate.

The Committee draws the Legislative Assembly's attention to the above explanation.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Subordinate Law SL2015-28 being the Environment Protection Amendment Regulation 2015 (No. 1) made under the *Environment Protection Act 1997* **makes the regulation of noise from the construction and maintenance of railways, light rail and dedicated bus ways consistent with existing regulation of noise from the construction and maintenance of roads.**

This subordinate law amends the *Environment Protection Regulation 2005*, to exclude noise from the construction and maintenance of a dedicated bus way, a railway or a light rail from the restriction on noise emission provided for by regulation 25 of the Environment Protection Regulation. The Explanatory Statement for the subordinate law states that the amendment is "consistent with the existing regulation of noise from the construction and maintenance of major roads".

The Committee notes that the Explanatory Statement for the subordinate law contains the following discussion of the human rights implications of the subordinate law:

In a broad sense, the potential human rights impacts of the amendment regulation, if any, are limited because the amendment regulation does not in itself diminish any rights of review or create any new offences or liabilities.

Conceivably the amendment regulation might be considered to enliven the Human Right 11 Protection of the family and children and the Human Right 12 Privacy and reputation to the extent that the amendment regulation might result in noise levels in excess of the existing standards in the regulation with impacts on family or life at home.

It is considered that to the extent that the measures in the amendment regulation might be said to impact on the abovementioned human rights, the measures are nonetheless proportionate and appropriate taking into account the factors noted in section 28 of the Human Rights Act. Section 28 of the Human Rights Act provides as follows:

> 28 Human rights may be limited
>
> (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
>
> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;
>
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Specifically, the measures in the amendment regulation are the only practical means for achieving the significant objective of establishing a more consistent and appropriate framework for the regulation of noise from the construction of transport corridors as noted above.

The impact of the measures are limited because the amendment regulation does not mean an absence of oversight of noise levels but rather creates the possibility of alternative, more flexible forms of oversight through, for example, development approval conditions under the Planning and Development Act. In addition, as noted above, there will be continued general oversight by the EPA [Environment Protection Authority]. For example, the EPA will continue to be able to issue a stop work notice if the EPA considers that noise levels are such that they constitute environmental harm notwithstanding that the specific noise standards do not apply. People will continue to be able to notify the EPA of concerns in this regard.

The impacts of the measures are acceptable given the benefits of the amendment regulation in establishing a more consistent and appropriate framework for the regulation of noise from the construction of major public infrastructure in transport corridors as noted above.

The Committee draws the Legislative Assembly's attention to the above explanation.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Subordinate Law SL2015-29 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2015 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **amends the Road Transport (Safety and Traffic Management) Regulation in relation to location codes for fixed and mobile camera sites.**

This subordinate law amends the Road Transport (Safety and Traffic) Regulation 2000 to remove from regulation 108 the requirement that "location codes" on images taken by speed or red-light cameras. The Explanatory Statement for the subordinate law states:

> To enhance community information on the Road Safety Camera Program, details of all fixed camera locations and mobile camera sites will be provided on the road safety pages of the Justice and Community Safety Directorate's website. As new mobile camera locations are assessed as suitable, details will be included on the website.
>
> It is expected that this will provide a more accessible and obvious location for this information than inclusion in a schedule to a regulation.

The Explanatory Statement also contains the following discussion of the human rights implications of the subordinate law:

> These minor amendments are considered to be consistent with human rights, and are not considered to engage any rights protected by the *Human Rights Act 2004*.

The Committee draws the Legislative Assembly's attention to the above explanation.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined a Regulatory Impact Statement for the following subordinate law and offers no comment on it:

Disallowable Instrument DI2015-248 being the Lands Acquisition (Reconsideration of pre-acquisition declaration—Block 4 Section 33 Division of Dickson) Confirmation 2015 made under sections 24 and 25 of the *Lands Acquisition Act 1994* **confirms pre-acquisition declaration (NI2015-53) relating to the establishment of the Dickson bus interchange.**

REGULATORY IMPACT STATEMENT—COMMENT

The Committee has examined a Regulatory Impact Statement for the following subordinate law and offers these comments on it:

POSITIVE COMMENT

Subordinate Law SL2015-27 being the Gaming Legislation Amendment Regulation 2015 (No. 1), including a regulatory impact statement, made under the *Gambling and Racing Control Act 1999* **and** *Gaming Machine Act 2004* **amends the *Gaming Machine Regulation 2004* to support the implementation of the gaming machine trading scheme, new licensing and authorisation framework and transition arrangements.**

The Committee notes that the Regulatory Impact Statement for this subordinate law addresses the requirements of the section 35 of the *Legislation Act 2001* in a manner that is to be commended and serves as an example to other agencies of how to adequately address the requirements of section 35.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Minister for Workplace Safety and Industrial Relations, dated 15 September 2015, in relation to comments made in Scrutiny Report 34 concerning the following Subordinate Laws (attached):
  - SL2015-17—Building (General) Amendment Regulation 2015 (No. 1);
  - SL2015-18—Civil Law (Sale of Residential Property) Amendment Regulation 2015 (No. 1); and
- the Attorney-General), dated 17 September 2015, in relation to comments made in Scrutiny Report 36 concerning the Crimes (Child Sex Offenders) Amendment Bill 2015 and the Crimes Legislation Amendment Bill 2015 (attached).

The Committee wishes to thank the Minister for Workplace Safety and Industrial Relations and the Attorney-General for their responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee offers the following comments on the response to the Crimes (Child Sex Offenders) Amendment Bill 2015 The response will follow the order of the Attorney-General's response, except that comments in relation to the form and content of an Explanatory Statement are left until the end.

ACHIEVING THE PURPOSE OF "PREVENTING FUTURE OFFENDING" – JUSTIFICATION OF PROPOSED LIMITATIONS

The Attorney-General notes correctly that "[t]he Committee expressed concerns that, based on material at pages 6 to 7 of the Explanatory Statement, the child sex offenders scheme may have little effect by way of preventing future offending". It is not, however, correct to assert that "[t]he Committee asserts that the material indicates that registers, reporting obligations and monitoring powers do not work". The Committee was very careful to limit the use to which the material at Explanatory Statement pages 6 to 7 might be put. At page 3, after quoting some of the material in the Explanatory Statement, it said:

> [t]his material suggests that insofar as a provision of the Bill that limits a human right is said to achieve the purpose of preventing re-offending, there is a question whether it will achieve that purpose. To the extent that it might not, it might be argued that there is a weak relationship between the limitation and its purpose (a factor that must be considered in the application of section 28—see paragraph 28(2)(d)), and that in turn there is a question whether the limitation is justified. The Committee notes that this is not the only factor to be considered in the application of section 28.

The Committee raised a question as to the weight to be attached to what was said in the Explanatory Statement about the rate of recidivism of child sex offenders. It said (at page 3):

> the weight to be attached to the points made in the Explanatory Statement concerning rate of recidivism cannot be assessed unless there is some quantification of what the rate is in relation to child sex offenders. It may be lower than in the case of other offenders, but it may not be a low rate. This needs to be clarified.

The Attorney-General's response is that

> [t]he Explanatory Statement makes it very clear (see pages 6 to 7) that quantification is difficult due to underreporting and the difficulty of investigating this type of crime. This information is provided with direct reference to a number of reputable sources. It is clear from the Explanatory Statement that even if figures could be provided, they would not be reliable.

The Committee noticed the qualifications made in the Explanatory Statement, but thought that there must be some point to the statements made. If the statements suggesting that there was a low rate of recidivism were not reliable, it might be asked why they were set out. The same point may be made in relation to the Attorney-General's statement that "[w]hen the paragraphs under 'a picture of child sex offending' are read together, it is clear that any concerns about the efficacy of registration relates to 'public registers' and 'community notification laws'".

APPLICATION BY A YOUNG OFFENDER TO APPLY TO THE SENTENCING COURT TO NOT BE REGISTERED

The Committee has no further comment.

THE POWER OF THE MAGISTRATES COURT TO MAKE A REGISTRATION ORDER IN RELATION TO A PREVIOUS OFFENDER

The Committee has no further comment.

A REVISED OFFENCE WHERE A REGISTRABLE OFFENDER FAILS TO REPORT CERTAIN MATTERS ANNUALLY

At mid page 4 of the response, the Attorney-General has responded to comments made at pages 7 to 8 of the Committee's report. The Committee raised a question about the purpose of inserting proposed new paragraph 37(2)(b). Subsection 37(1) creates a rule of law to the effect that a registrable offender must make certain annual reports. The effect of subsection 12(2) of the Criminal Code is that, unless a particular stature provides otherwise, an offender cannot argue that they were unaware of this rule. Paragraphs 37(2)(b) and (c) appear to provide otherwise. That is, they provide that the prosecution must prove that the accused recklessly failed to be aware that they had an obligation to report; in other words, that they were recklessly unaware of the rule of law state in subsection 37(1).

The Committee does not accept that it ignored any aspect of the registration scheme. It has a different understanding of what proposed section 37 is saying. Paragraphs 37(2)(b) and (c) are beneficial to a registrable offender, and the Committee has no further comment on this aspect of proposed section 37.

The Attorney-General's response to the Committee's comments on the imposition of strict liability in relation to the element of the offence in paragraph 37(2)(c) warrants more comment.

The Attorney-General states that "[s]ection 22(1)of the HR Act (that a person has the right to be presumed innocent until proven guilty) is not discussed in detail in the Explanatory Statement as this right is not directly engaged. The registrable offender has full knowledge of their reporting obligations". With respect, the Committee considers this statement to be incorrect.

It is no longer questioned that imposition of strict liability offence engages and limits HRA subsection 22(1). This must be so where only one element of the offences imposes strict liability. This is what proposed subsection 37(3) does so far as concerns the element of the offences stated in paragraph 37(2)(c); that is, that the defendant has failed to report as required.

A justification for this limitation was therefore required. The statement that "[t]he registrable offender has full knowledge of their reporting obligations" may be taken as justifying strict liability on the basis that it is a regulatory offence. Justification for providing imprisonment is another matter. On its face provision for a maximum penalty of "500 penalty points, imprisonment for five years or both" contradicts the guideline stated in the *Guide to Framing Offences*[1] issued by the former Department of Justice and Community Safety in April 2010. It is stated there that:

> [a]s these [strict liability] offences are primarily aimed at conduct on the less serious side of the criminal spectrum, the maximum penalty is usually limited to a monetary penalty (maximum 50 penalty units). Only in appropriate cases would a penalty of imprisonment be compliant with human rights law. Any strict liability offence holding imprisonment as a penalty **must have** a general defence of 'taking reasonable steps'; 'due diligence'; or another defence of a similar nature to be compliant with human rights (page 29) (emphasis added).

There is no "reasonable steps" kind of defence in proposed section 37. The Explanatory Statement refers to the defence of mistake of fact stated in section 36 of the Criminal Code, Also relevant, in particular because it may state a limited form of a "reasonable steps" defence, is section 39, which states the defence of intervening conduct or event. This defence is explained in the *Guide to Framing Offences* at page 23:

> It is a defence if the conduct in question is the result of an act of another person, or non-human activity, over which the defendant had no control and against which they could not reasonably be expected to guard. The defence is only relevant to offences, or physical elements, involving strict liability or absolute liability, because the circumstances that make up the defence would negate any fault element.

REVISED PROVISIONS FOR PHOTOGRAPHING A REGISTRABLE OFFENDER

The Committee has no further comment.

PUBLIC NOTICES ISSUED BY THE CHIEF POLICE OFFICER CONCERNING A REGISTRABLE OFFENDER

The Attorney-General notes that "[t]he Committee raises a question about whether proposed limitations that a public notice will not state that the person is a registrable offender will in practice operate as a safeguard against damage to that person's privacy". Other than to note that the Attorney-General disagrees with the Committee's concern, the Committee has no further comment.

[1] http://www.justice.act.gov.au/resources/attachments/report_GuideforFramingOffences_LPB_2010.pdf

ENTRY AND SEARCH WARRANTS

The Magistrates Court may issue an entry and search warrant if satisfied on reasonable grounds that either (1) the registrable offender has incorrectly reported, or is likely to incorrectly report, personal details; or (2) if the registrable offender is subject to an order under chapter 5A (Orders prohibiting offender conduct), has breached, or is likely to breach, the order (proposed section 116F).

Subsection 116H(1) however permits the Magistrates Court to authorise an executing officer to do things that extend beyond these purposes. For example, under paragraph 116H(1)(d), the warrant may authorise the officer to "seize other things found at the premises in the course of the search that the executing officer or an assisting officer believes on reasonable grounds to be connected to an offence punishable by imprisonment for 12 months or longer". This plainly refers to any kind of offence.

The Committee accepts that it is sensible to permit the police to seize things in these circumstances, but the question is why this power is provided for in these provisions, rather than in a law that has general application to any situation in which the police discover things that are believed to be connected to such an offence. (There may well be such a law.)

The power in paragraph 116H(1)(d) is greatly enhanced where the warrant authorises the police to use the stop and detain power stated in paragraph 116H(1)(i). Under paragraph 116H(1)(i), the warrant may authorise the officer to "stop and detain a person at the premises for as long as reasonably necessary (but not longer than 2 hours) to assist the executing officer or an assisting officer to exercise any power authorised under the warrant". (This time period might be extended to four hours; see subsection 116H(3)). Thus, the police might exercise this detention power (if authorised to do so) to better enable them to seize things connected to any kind of offence punishable by imprisonment for 12 months or longer. In this way, the registrable offender would, by being compelled to give assistance, be involved in self-incriminating.

It must be noted that there is no statement in the Bill of any matters the Magistrates Court must or must not address when considering whether to grant authority to the police to exercise the powers in paragraphs 116H(1)(d) and (i). In particular, there is no need to consider the likelihood that things in connection with some offence (other than those referred to in section 116F) have been or might have been committed.

Again, the Committee accepts that it is sensible to permit the police to use a stop and detain power in these circumstances, but the question is why this power is provided for in these provisions, rather than in a law that has general application. Again, there may well be such a law.

It is for these reasons that the Committee asked why the police powers that might be authorised by a warrant extended beyond the purposes of verifying the offender's personal details, or if the offender is subject to an order under chapter 5A (orders prohibiting offender conduct), whether the offender has breached, or is likely to breach, the order.

At mid page 6 of the response, the Attorney-General has responded to this question. The Committee makes these comments on the response.

The Attorney-General states that "[u]se of material obtained using the entry and search powers in part 3.11 is limited to the operation of the Act, sexual offences against children or to registration, or certain administration of justice offences". In the case that things are seized under

paragraph 116H(1)(d), the Attorney-General's view is that these things could not be used towards proof that the relevant offence had been committed. The response states in relation to paragraphs 116H(1)(d), (e) and (f) that "the things seized would only be admissible as evidence against a very limited range of other offences (s 116Z)".

Section 116Z does not have the effect it is stated to have in the Explanatory Statement and this undercuts the Attorney-General's point to some extent. Amendment of the Bill may partly solve this problem if there is provision for a derivative immunity.

The Attorney-General also states that "[p]art 3.11 warrants will not be used to investigate offences in the first instance". But this is what the power stated in paragraph 116H(1)(d) seems to contemplate.

The Attorney-General meets the Committee's concern that these powers are "capable of being used to extend beyond the purposes of verifying the offender's personal details" or whether an offender has breached or is likely to breach an order" by arguing that "[p]olice are trained and take great care in executing their powers under warrants". With respect, this does not meet the point that the powers are too extensive. The further point that "[e]vidence that has been obtained unlawfully or without appropriate authority is likely to be inadmissible in court and therefore impair any prosecution" also does not meet this point. (In any event, this prediction is on unsafe ground given the great width of the discretion of a court to admit this kind of evidence; see section 138 of the *Evidence Act 2011*).

The Attorney-General also argues that "if during the execution of a warrant there is evidence to show that an offence has taken or is taking place, the requirements of part 1C of the *Crimes Act 1914* (Cwlth) will apply. For example, the person will be cautioned (s 23F), given an opportunity to contact a friend, relative or legal practitioner (s 23G) etc". The Committee is not clear as to the legal basis for this statement. This question was raised by the Committee and it suggested that the answer might lie in subsection 23B(2) of the *Crimes Act 1914* (Cwlth).[2] The Attorney-General has not commented on this suggestion, and perhaps does not accept it.

The Committee notes that the Attorney-General states, in apparent response to something said by the Committee, that "it is absurd to suggest that police should have to leave a thing found during a part 3.11 search at the premises if is unlawful for a person to be in possession of that thing, such as illicit drugs or weapons". The Committee made no such suggestion.

The Committee poses this suggestion as a less restrictive way of achieving the object of providing for entry and search warrants. After deciding to issue a warrant under section 116F, the Magistrates Court be expressly confined to authorising the exercise of the powers stated in section 116H only to the extent that they would serve the purpose determining whether the registrable offender has correctly reported personal details, or has breached an order under chapter 5A. This limitation would make it clear that insofar as in the exercise of these powers the police discovered things or circumstances that suggested that the registrable offender had committed other crimes, the police would need to rely on their general powers of criminal investigation. If the material seized or otherwise discovered is obtained in the exercise of general powers, prosecution of the offender would not be hampered by an inability (such as is expressed in section 116Z) to use that material. In this way the rights of victims of these other offences are protected.

[2] In its report, the Committee cited this incorrectly as the *Crimes Act 1900*, but in context, this error should be apparent.

COMMENT ON THE EXPLANATORY STATEMENT

The Attorney-General began by making this initial comment. "By way of initial comment, I appreciate that the Bill and the child sex offender legislative scheme it puts in place deal with a number of complex legal concepts, including in relation to statutory interpretation. I acknowledge the Committee's concession that it does not have the 'time nor the expertise' to deal with certain matters raised in the Bill and related legislation. I am certain that, if the Committee had taken more time to review the Explanatory Statement it would have found the form and content of the document far less confusing".

The Committee cannot see that in any respect the Bill deals with legal concepts relating to statutory interpretation. The "concession" the Committee made related to only one particular matter, not to "matters". This matter was the inter-relationship between part 1C of the *Crimes Act 1914* (Cwlth) and the powers of investigation provided for by the Bill. This was not an issue addressed in the Explanatory Statement and the Committee regarded it as quite significant. It is highly appropriate that it concede that the Attorney-General's advisers would be better placed to give an expert opinion. The interchange between the Committee and the relevant Minister is designed to provide accurate information to the Assembly.

It should also be apparent to a reader of the report that considerable time was devoted to trying to understand the Attorney-General's standpoint on the very many, and at points quite complex, legal and human rights issues raised by the Bill. It is also not logical to argue that the concession made by the Committee somehow suggests that it did not examine the Explanatory Statement thoroughly.

Very few of the inadequacies identified by the Committee are addressed in the Attorney-General's response. The Committee will leave it to the Assembly to consider whether the Explanatory Statement was of assistance.

The Committee has issued a *Guide to writing an explanatory statement* that sets out its views about its content.[3] At paragraph 3.9 it notes the significance of section 38 of the *Human Rights Act 2004*. Without elaboration, the Committee suggests that the time might have arrived for adopting a new approach, comprising essentially two elements. (1) A compatibility statement that contains much more than a bare statement that the Attorney-General is of opinion that the Bill, as presented to the Legislative Assembly, is consistent with the Human Rights Act. Following the Victorian and Commonwealth models, the statement should address all the human rights issues that arise. (2) A separate set of explanatory notes that describe each clause, and, if necessary, each subclause. The detail will vary, but, in particular, clauses that give rise to a rights issue should be clearly identified.

Steve Doszpot MLA
Chair

21 September 2015

[3] http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 36, dated 14 September 2015

National Regulation (2015 No. 317) - Rail Safety National Law National Regulations (Fees) Variation Regulations 2015

National Regulation (2015 No. 318) - Rail Safety National Law National Regulations Variation Regulations 2015

Mick Gentleman MLA

MINISTER FOR PLANNING
MINISTER FOR ROADS AND PARKING
MINISTER FOR WORKPLACE SAFETY AND INDUSTRIAL RELATIONS
MINISTER FOR CHILDREN AND YOUNG PEOPLE
MINISTER FOR AGEING

MEMBER FOR BRINDABELLA

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

Dear Mr Doszpot

I am writing in response to the Standing Committee on Justice and Community Safety's examination of the *Building (General) Amendment Regulation 2015 (No 1)* and the *Civil Law (Sale of Residential Property) Amendment Regulation 2015 (No 1)* in Scrutiny Report 34.

In relation to the *Building (General) Amendment Regulation 2015 (No 1)*, the Committee has queried the meaning of a reference to 'the Regulation' in the Explanatory Statement for this Regulation. The Explanatory Statement should in fact have referred to 'that Regulation' (ie the *Dangerous Substances (General) Regulation 2004*) rather than 'the Regulation'. The requirements referred to are the requirements to have an inspection of the living areas of residential premises for the presence of loose-fill asbestos contamination.

I note that I have now provided the Committee with a response to both Scrutiny Report 32 and Scrutiny Report 33 and trust that those responses clarify the interaction of the amendments to the *Dangerous Substances (General) Regulation 2004* made by the *Dangerous Substances (General) Amendment Regulation 2015 (No 1)* and the *Dangerous Substances (General) Amendment Regulation 2015 (No 2)*.

I thank the Committee for its comments and observations.

Yours sincerely

Mick Gentleman MLA
Minister for Workplace Safety and Industrial Relations
September 2015

Simon Corbell MLA

DEPUTY CHIEF MINISTER

ATTORNEY-GENERAL
MINISTER FOR HEALTH
MINISTER FOR THE ENVIRONMENT
MINISTER FOR CAPITAL METRO

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 36 of 15 September 2015 which contains comments on the *Crimes (Child Sex Offender) Amendment Bill 2015* and *Crimes Legislation Amendment Bill 2015* (the Bill).

Crimes (Child Sex Offender) Amendment Bill 2015

The Committee's report draws 18 matters to the attention of the Assembly and recommended that I respond.

By way of initial comment, I appreciate that the Bill and the child sex offender legislative scheme it puts in place deal with a number of complex legal concepts, including in relation to statutory interpretation. I acknowledge the Committee's concession that it does not have the 'time nor the expertise' to deal with certain matters raised in the Bill and related legislation. I am certain that, if the Committee had taken more time to review the Explanatory Statement it would have found the form and content of the document far less confusing.

I also wish to express my disappointment that the Report was tabled in the Assembly two days before the Bill was scheduled for debate. This is a significant departure from practice and has the potential to affect the proper consideration of the Bill by the Assembly.

Achieving the purpose of 'preventing future offending' – justification of proposed limitations
The Committee expressed concerns that, based on material at pages 6 to 7 of the Explanatory Statement, the child sex offenders scheme may have little effect by way of preventing future offending. The Committee drew this conclusion based on material relating to the nature of child sex offending and the public perceptions of this type of crime. The Committee has construed the

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material in a manner that leads to questions about whether the Bill will achieve the purpose of reducing the likelihood of reoffending, or whether there is a weak relationship between the limitation and its purpose.

The Committee's comments on these provisions are based on an incorrect reading of the Explanatory Statement material relating to the efficacy of registers and rates of recidivism. The Committee asserts that the material indicates that registers, reporting obligations and monitoring powers do not work. On the contrary, as stated on page 7 of the Explanatory Statement, these tools do work to reduce the likelihood of reoffending.

The material under the heading 'a picture of child sex offending' was included to highlight the importance of balanced and evidence-based laws and reforms in relation to managing child sex offenders. Although there is a tendency for the media and community to overestimate the problem, this does not automatically mean that there is no problem or a minimal problem. As stated on a number of occasions throughout the Explanatory Statement, the amendments have been developed based on the ACT Policing experience of administering the register and monitoring offenders.

The Committee has cited particular paragraphs from the background material. When the paragraphs under 'a picture of child sex offending' are read together, it is clear that any concerns about the efficacy of registration relates to 'public registers' and 'community notification laws'.

Accordingly, there is no question about whether the provisions will achieve the important purpose of 'reducing the likelihood of reoffending'.

On this point, the Committee has also asked for clarification of rates of recidivism in relation to child sex offenders. The Explanatory Statement makes it very clear (see pages 6 to 7) that quantification is difficult due to underreporting and the difficulty of investigating this type of crime. This information is provided with direct reference to a number of reputable sources. It is clear from the Explanatory Statement that even if figures could be provided, they would not be reliable.

In terms of the points relating to section 8(3) of the *Human Rights Act 2004* (HR Act), I draw the Committee's attention to my response above regarding the Committee's incorrect interpretation of the material relating to the efficacy of registration schemes.

The Committee has also stated that the Explanatory Statement 'avoids section 8' [of the HR Act] via a 'justification' under 'human rights law'. I do not agree that this is the case. The explanatory material directly references the engagement with the right to equality before the law and outlines the nature of this engagement, how the right is limited, and the justifications for this limitation. The limitation is demonstrably justifiable and the amendments are designed to achieve a legitimate aim.

Application by a young offender to apply to the sentencing court to not be registered
The Committee has questioned whether it should be open to an offender who is not a young person to make an application to the sentencing court that he or she not be made a registrable offender.

The Government considered this question during the policy development stage of progressing these reforms, and a deliberate decision was made to not expand the scope to include adult offenders.

As noted at pages 28 to 29 of the Explanatory Statement, this amendment has been carefully considered to apply to young offenders with the aim of promoting rehabilitation and individualised justice for young people. As the Committee would be aware, young people are entitled to special treatment under sections 11(2) and 22(3) of the HR Act. This amendment specifically aims to uphold those protections by taking into account the distinct circumstances that arise where an offender is a young person.

Those protections can be distinguished from the general protections afforded to adults under the HR Act. Adults do not require the special treatment afforded to young people and to allow them the ability to apply to not be registered would likely impose a significant burden on the courts and potentially undermine the intent of the amendment.

The power of the Magistrates Court to make a registration order in relation to a previous offender

The Committee has used its assessment of division 2.2.3 of the Bill to target what it considers to be 'inadequacies' relating to the nature of the referencing throughout the Explanatory Statement. I will respond to this minor issue before addressing the more substantive issues that the Committee has raised in relation to this amendment.

I support the approach adopted in the Explanatory Statement to preparing explanatory material as it is important to strike a balance between 'standard legal drafting' and creating a document that is accessible to the general public. In this case, using legal referencing would arguably erect unnecessary barriers to its accessibility as it would require a large number of footnotes and cross-references. The result would be an awkward document that would not serve the purpose of clarifying the broad nature and purpose of the provisions in the Bill.

In relation to minor errors in the Explanatory Statement identified by the Committee I will be tabling a revised ES in the Legislative Assembly to address those issues.

The Committee has noted at page 6 of the report that the statement 'where there is strong evidence that the person continues to pose a broad risk to children and should be subject to reporting obligations and ongoing monitoring' is not warranted by the content of sections 18B or 18C. I do not agree with this statement and draw the Committee's attention to the factors that must be considered by an officer and by the Magistrate when an application and order are made.

Material in the Explanatory Statement dealing with the power of the CPO to apply to the court for the making of child sex offender registration order in relation to previous offender is equally applicable to the power of a Magistrate to make such an order. Limitations on power are addressed in section 18D which sets out the matters that a court must consider before making a registration order in relation to a previous offender. This is a significant limitation on the power of the Magistrate and an important safeguard for the rights of the offender. These factors are broadly reflected by the summary statement used in the ES as quoted above.

Reference to the factors in section 18D also answers the Committee's question about the provisions of the Bill that justify the proposition that there is a 'real risk of reoffending' leading to a limitation on the freedom of movement. The Magistrate's consideration of these factors will necessarily include a determination of this risk (see in particular s 18D (1) (d)).

The Committee states that there is limited analysis of the section 28 issues in relation to division 2.2.3. Given the significant discussion under the 'Human Rights Overview' section at the beginning of the Explanatory Statement, and the discussion in relation to the section 25 (2) HR Act right relating to retrospective criminal laws, I do not accept that this is the case. While I will be providing a Revised Explanatory Statement that refers to division 2.2.3 under the discussion of the right to privacy in the 'Human Rights Overview' section, the engagement of human rights by division 2.2.3 is already sufficiently justified and the amendments are the least restrictive means possible to achieve the stated purposes. Anything short of registration in these circumstances will be of little effect and would likely involve surveillance and monitoring activities. This is not realistic and would run a real risk of an arbitrary and/or improper use of powers. The amendment as proposed ensures that the use of powers is transparent and that appropriate safeguards on the limitation of human rights are in place.

I note that the Committee has raised common law principles relating to retrospective criminal laws. As noted by the Committee, division 2.2.3 should not be characterised as proposing a retrospective criminal law, and it has been addressed accordingly in the Explanatory Statement.

A revised offence where a registrable offender fails to report certain matters annually
The Committee has noted that it is not generally a requirement for a person to be aware of the crime they are alleged to have committed. However, this comment ignores the nature of the registration scheme and the fact that there is a positive obligation on registrable offenders to be aware of the requirements to report. Given this positive reporting obligation, and the fact that not reporting is an offence, it is necessary to show that the offender was aware of and understood these obligations.

As outlined in the Explanatory Statement, ACT Policing undertakes a comprehensive process to ensure that a registrable offender understands their reporting obligations. This includes providing offenders with a Notice of Reporting Obligations (the Notice), which sets out the obligations of each person and requires a signature acknowledging that the offender has read and understood the obligations. Registrable offenders are also reminded of the month in which they are next required to report as well as when their reporting obligations end and to sign to acknowledge these reminders.

These processes go a considerable way toward proving that an offender's failure to report was not due to lack of knowledge or understanding of their obligations. The Notice also indicates that offenders have agreed to their obligations to report, knowing all consequences of failing to do so.

The Committee has also stated that the insertion of paragraph 37 (2) (b) has the effect that the prosecution 'must prove that the accused recklessly failed to be aware that they had an obligation to report' and that it might be difficult for the prosecution to meet this requirement. These amendments were developed in close consultation with the Director of Public Prosecutions who supports this approach to ensuring compliance with reporting requirements.

Section 37 (3) provides that the offence of failing to report is one of strict liability and recklessness. The Committee has noted that while it is not unusual to find that a requirement that a person report some matter is made an offence of strict liability, 'provision that an offender may be imprisoned is very rare'. Once again, I point to the nature of the registration scheme, and highlight that this offence reflects the seriousness of the requirement for registrable offenders to uphold their reporting obligations. Reporting underpins the integrity of the entire registration scheme, and this is the case not only in the Territory but across all Australian and many international jurisdictions. It is therefore critical to reflect this seriousness in the legislation to deter registrable offenders from failing to report.

Section 22(1) of the HR Act (that a person has the right to be presumed innocent until proven guilty) is not discussed in detail in the Explanatory Statement as this right is not directly engaged. The registrable offender has full knowledge of their reporting obligations.

Additionally, the defence of mistake of fact is open for strict liability offences unless the offence states otherwise. In the case of section 37 (2), a person could successfully defend a charge where they can show that:

- their actions were the result of a mistake and not mere ignorance;
- the mistake was one of fact;
- the mistake was honest and reasonable; and
- the mistake renders the act innocent.

Revised provisions for photographing a registrable offender
The Committee has made a number of comments in relation to the proposed reforms relating to the power to take photographs. Firstly, the Committee seeks clarification for the inclusion of the

reference to reporting a 'changed tattoo or birth mark'. The Act provides that changes to these personal details must be reported in person.[4] Accordingly, proposed section 78(1) will provide a power for an officer to photograph these personal details when the registrable offender reports in person.

Secondly the Committee has asked for further information about the relationship between the right to security of the person in section 18 (1) of the HR Act and the proposed power to use force in proposed section 78A. This information has been included in the amended Explanatory Statement and I thank the Committee for drawing this matter to my attention.

Public notices issued by the Chief Police Officer concerning a registrable offender
The Committee has expressed concerns about the proposed power to allow the CPO to issue a public notice about a registrable offender in certain circumstances.

Proposed section 116A aims to reduce the risk to the lives or sexual safety of one or more people or the community in general. Given this important purpose, it necessarily requires a limitation of an offender's right to privacy and has been drafted so as to limit that right to the least extent possible, while still achieving the aim of the amendment (see the 'Human Rights Overview' section of the Explanatory Statement for discussion of this issue).

The Committee raises a question about whether proposed limitations that a public notice will not state that the person is a registrable offender will in practice operate as a safeguard against damage to that person's privacy. I am clear that, in practice, this limitation will operate as an effective safeguard. The safeguard has been included to limit the engagement with the privacy of the subject of the notice as much as reasonably possible. While I acknowledge that it is theoretically possible that members of the public may speculate that the subject of the notice is a registrable offender, this risk is mitigated by the fact that the CPO will only issue a notice where the CPO or DCPO believes on reasonable grounds that there may be a risk to lives or sexual safety, **and** that the publication of a notice will reduce that risk. In those circumstances, it is justified to accept the security risk to a registrable offender where a balanced consideration is undertaken about the risk, and it is determined that issuing the public notice is necessary to protect the safety of others.

The Committee has also questioned whether the exercise of the power should be exercisable only after the CPO makes an application, supported by evidence on oath or by affidavit, to a Magistrate. I acknowledge that this goes to a consideration of whether an offender's right to privacy can be limited in a less restrictive way, while still achieving the purpose of the amendment. Although this option was considered during the policy development of the Bill, on balance it was decided that an application to a Magistrate would impose an unnecessary burden on both the courts and police. The addition of this process would be unlikely to result in a less restrictive means for achieving the outcome, and delays would have a real potential to further compromise the safety of a person or the community. Police currently issue public notices in the way set out in section 116A in relation to similarly sensitive matters. I do not consider that these circumstances can be distinguished as unreasonably limiting an offender's rights, and as a result, I am satisfied that the case does not warrant a significantly more complex process.

Entry and search warrants
The Committee has a number of queries regarding entry and search warrants and I will address these in turn below.

Why are these powers capable of being used to extend beyond the purposes of verifying the offender's personal details, or if the offender is subject to an order under chapter 5A (orders prohibiting offender conduct), whether the offender has breached, or is likely to breach, the order?

[4] Section 54 (2)(a)(ii) provides that registrable offenders must report in person details of any tattoo or permanent distinguishing mark that the offender has (including details of a tattoo or mark that has been acquired or removed).

The primary purpose for these entry and search powers is to allow police to verify reportable information provided by a registered offender. Reporting true and accurate information is fundamental to the success of the registration scheme and therefore the protection of the community. Engagement and limitation of the right to privacy is discussed extensively in the Explanatory Statement.

Use of material obtained using the entry and search powers in part 3.11 is limited to the operation of the Act, sexual offences against children or to registration, or certain administration of justice offences. The actions authorised under the warrant are entirely appropriate and necessary to allow police to verify whether or not the registered offender is complying with their requirements, or whether the offender is continuing to commit sexual offences against children.

I note that the Committee suggests that these powers are "capable of being used to extend beyond the purposes of verifying the offender's personal details" or whether an offender has breached or is likely to breach an order. Police are trained and take great care in executing their powers under warrants. Evidence that has been obtained unlawfully or without appropriate authority is likely to be inadmissible in court and therefore impair any prosecution. Part 3.11 warrants will not be used to investigate offences in the first instance. However, if during the execution of a warrant there is evidence to show that an offence has taken or is taking place, the requirements of part 1C of the *Crimes Act 1914* will apply. For example, the person will be cautioned (s 23F), given an opportunity to contact a friend, relative or legal practitioner (s 23G) etc.

Regarding the Committee's concerns about section 116H (1) (d), (e) and (f), while the warrant authorises the seizure of things that an officer believes on reasonable grounds are connected to an offence, the things seized would only be admissible as evidence against a very limited range of other offences (s 116Z). In other cases, it is absurd to suggest that police should have to leave a thing found during a part 3.11 search at the premises if is unlawful for a person to be in possession of that thing, such as illicit drugs or weapons.

Whether the Bill should provide that the police may not question a person detained under paragraph 116H(1)(i).

The purpose for detaining a person under section 116H (1) (i) is "to assist the executing officer or an assisting officer to exercise any power authorised under the warrant."

It is not clear how the Committee expects the person to be of assistance if police are not able to ask that person questions.

How does the power in proposed section 116K relate to paragraph 116H(1)(a), which in some respects appears to be less limited than the power in section 116K?

Section 116H(1)(a) relates only to entry to the premises and authorises a reasonable use of force. Section 116K extends the authority to use reasonable force during the execution of the warrant, for example during the search if it is necessary for police to open a locked bag by force.

Why is an exercise of a power under proposed section 116P not limited to the purposes of a warrant as described in section 116B?

The purposes of the warrant apply to all of the provisions in part 3.11 consistent with principles of statutory interpretation.

The Committee notes that proposed subsection 116Q(4) provides only a very limited immunity from compelled evidence being used in a later prosecution for an offence and calls for a justification for

this provision that addresses the question whether a broader immunity (as outlined by the Committee) should apply.

I agree that the immunities in section 116Q (4) and 116Z warrant further consideration. I propose to move government amendments to give full effect to the direct and derivative use immunities that are intended to apply in the Bill.

Crimes Legislation Amendment Bill 2015

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

Crimes (Forensic Procedures) Act 2000
The Committee has drawn my attention to clause 20 of the Bill which inserts a new requirement for a police officer, when intending to ask an Aboriginal or Torres Strait Islander suspect to consent to a forensic procedure, to inform the suspect that the Aboriginal Legal Service (NSW/ACT) will be notified. The police officer is to notify the Aboriginal Legal Service as soon as practicable. The Committee is concerned that the legislation does not provide what time period must elapse before the police may assume that there is no lawyer involved.

Unless the suspect has expressly waived their right to have a lawyer present the police officer must allow the suspect to communicate or attempt to communicate with their interview friend or lawyer. Following this the police officer may request the suspect to consent to the taking of forensic material. While a time period is not specifically referred to it is clear from the legislation that certain steps must be taken before the suspect can be asked to consent to the forensic procedure and as such I do not believe an amendment is necessary.

In respect of possible delays while waiting for notification to the relevant Aboriginal Legal Service, the Aboriginal Legal Service notification service is operated from a dedicated telephone line operating 24 hours / 7 days with legal staff on separate shifts available throughout the day and night.

The Committee has suggested that a more explicit reference to the right to equality before the law and a section 28 justification is required in relation to the additional rights afforded to Aboriginal and Torres Strait Islander people in the Bill which the Committee has suggested limits rights.

The right to equal protection of the law prohibits discrimination in law or in practice in any field regulated by public authorities.

Section 8 of the HR Act is based on article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) which provides for the 'right to equality before the law'. The Office of the High Commissioner for Human Rights (UNHRC) has highlighted the importance of this provision in General Comment 18, stating that 'non-discrimination, together with equality before the law...constitute a basic and general principle relating to the protection of human rights'.[5]

However, the committee also observes that:

> *'not every differentiation of treatment will constitute discrimination, if the criteria for such discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'*.[6]

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[5] Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1989 'General Comment No.18, 'Non-discrimination' para 1. Available: http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_(GC18)_en.pdf.

[6] Ibid, para 14.

Human rights law recognises that formal equality can lead to unequal outcomes, and that sometimes to achieve substantive equality differences in treatment may be necessary.[7] It also recognises that not every difference of treatment amounts to discrimination.[8]

The amendments ensure that Aboriginal and Torres Strait Islander people are treated differently to ensure an equality of outcome. Under the provisions they will be given additional measures to ensure they understand the proceedings, they are legally represented, and that they have the ability, like all others, to decline the presence of an interview friend.

Restrictions on the right to equality are permitted provided the distinction is reasonable and objective, and is designed to achieve a legitimate purpose; it will not infringe section 8.[9] In this case, the restrictions are clearly defined; they are reasonable, objective and are designed to achieve the purpose of ensuring protections of Aboriginal and Torres Strait Islander people. The amendment confers a benefit on Aboriginal and Torres Strait Islander people to ensure that they actually enjoy equality in the justice system.

This amendment therefore supports the right to equality under section 8 of the HR Act in ensuring substantive equality of outcomes for people who may be at a disadvantage before the law.

As such I consider that the Explanatory Statement addresses the human rights requirements sufficiently.

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

Yours sincerely

Simon Corbell MLA
Attorney-General

[7] General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures; *Broeks v. the Netherlands*, (172/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec.196; Australian Human Rights Commission, *Guide to the Law – Special Measures* https://www.humanrights.gov.au/guide-law-special-measures

[8] Ibid.

[9] *Broeks v. the Netherlands*, (172/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec.196; *Zwaan-de Vries v. the Netherlands*, (182/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec. 209; Human Rights Committee General Comment 18, para 13.