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

SCRUTINY REPORT 15

11 MARCH 2014

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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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BILLS

BILLS—NO COMMENT

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

ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) AMENDMENT BILL 2014

This is a Bill for an Act to amend the Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011 to: increase the Feed-in Tariff capacity allowable under the Act; support generators to be located outside of the Australian Capital Region; and improve the administration of the Act.

BILLS—COMMENT

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

CONSTRUCTION AND ENERGY EFFICIENCY LEGISLATION AMENDMENT BILL 2014

This is a Bill to amend a number of laws administered by the Environment and Sustainable Development Directorate, being the *Construction Occupations (Licensing) Act 2004*, the *Construction Occupations (Licensing) Regulation 2004*, the *Electricity Safety Act 1971*, and the *Energy Efficiency (Cost of Living) Improvement Act 2012*, primarily to refine the operation of a range of regulations applying to construction and related work in the Territory, and the Energy Efficiency Improvement Scheme.

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 (at 24-28) notes that some clauses of the Bill engage some HRA rights, and offers a careful justification.

The Committee refers the Assembly to the Explanatory Statement.

CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2014

This is a Bill to amend (i) the *Births, Deaths and Marriages Registration Act 1997*, to require people who are serving a sentence of imprisonment and parolees to obtain approval from the Director-General before applying to change their name; (ii) the *Corrections Management Act 2007*, to give a court power to order a person in charge of a correctional facility to bring a detainee before the court for a civil proceeding; and (iii) the *Crimes (Sentence Administration) Act 2005*, to provide for any period when an offender is detained under the *Mental Health (Treatment and Care) Act 1994*, the offender is deemed to satisfy a relevant obligation, and to clarify that a person is not excluded from being appointed a member of the Sentence Administration Board merely because they are 70 years old or older.

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 amendments to the Births, Deaths and Marriages

Registration Act engage the HRA rights to privacy (section 12) and to freedom of expression (section 16), and offers a careful justification.

The Committee refers the Assembly to the Explanatory Statement.

LIFETIME CARE AND SUPPORT (CATASTROPHIC INJURIES) BILL 2014

This is a Bill for an Act to create a LTCS scheme, being a scheme for the lifetime care and support of people catastrophically injured in motor accidents occurring in the ACT. The Scheme will extend to injured persons who are at fault for the accident and to motor accidents for which no person is at fault.

The scheme would be administered by a Lifetime Care and Support Commissioner of the Australian Capital Territory (the LTCS Commissioner). This officer must be a public servant appointed by the Minister for term of not longer than 3 years (clause 10).

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*

Compulsory referral of an injured person to the Scheme

An insurer may apply, without the person's consent, for that person to be accepted into the proposed Scheme (paragraph 16(2)(c)). The Compulsory Third Party Insurance regulator (CTP regulator) can direct an insurer to make such an application, (subclause 16(6)), and the LTCS Commissioner must accept a person into the Scheme if he or she is eligible (subclause 19(2)).

As acceptance of a person into the scheme will relieve the insurer from direct liability for the payment for treatment and care, it may be presumed that all persons considered by the insurer to be eligible will be so referred. The person will lose an ability to pursue common law damages for treatment and care in respect of the injury.

However, there may be reasons why a person (personally or by the person's guardian or next friend) would not wish to be accepted into the Scheme. For example, a person may wish to pursue the payment of damages for treatment and care needs so as to be independent from the Scheme and not be subject to its ongoing assessment requirements or the current or any future terms in the guidelines to receive payment.

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

Right to a fair administrative determination: assessor qualifications

The assessors for "eligibility disputes" must have medical qualifications, or otherwise be "suitably qualified" (clause 36). Eligibility disputes will be referred to a panel of three such assessors (clause 35) all of whom could, it would appear, be medical practitioners, but none of whom may have legal expertise. An appeal is made to a panel of 3 such assessors (subclause 39(1)).

Similarly, the assessors for "treatment and care needs" would have "health qualifications" or other "suitable" qualifications (clause 57). An appeal is made to a panel of 3 such assessors (clause 62).

The Committee notes that resolving disputes over eligibility, and treatment and care needs may involve difficult questions regarding both the facts of a person's health condition and the law of

whether such health conditions or proposed treatment and care fall within the guidelines and the Act. This may include considering questions of causation or whether a particular condition meets a threshold set in the guidelines.

Similarly, a claims assessor for a dispute about whether an injury is a motor accident injury need only be "suitably qualified" (clauses 46 and 47). An appeal is made to a panel of 3 such assessors (clause 49).

An issue arising from these provisions is why there is no requirement that assessors dealing with these disputes must include a person with suitable legal expertise.

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

The privileges against self-incrimination and legal professional privilege

Clause 17 would empower the LTCS Commissioner to require an applicant to provide the Commissioner with authorisation to obtain information and documents relevant to their motor accident injury from stated people. It is presumed that sections 170 and 171 of the Legislation Act 2001 would apply to protect the operation of the privileges against self-incrimination and exposure to civil penalty (section 170) and of legal professional privilege (section 171).

The Committee recommends that there be inserted a note referring to sections 170 and 171 of the Legislation Act.

An ineffectual and misleading attempt to exclude judicial review

Subclauses 24(2), 40(2), and 49(4) provide that a particular kind of decision is "final and binding for this Act and any court proceeding under this Act". Such a clause is probably of no legal effect, inasmuch as it does not preclude judicial review of the legality of the decision under the *Administrative Decisions Judicial Review Act 1989*, or under other processes for such review. Their only effect is to emphasise that there is no appeal to a court.

In any event, were such clauses taken to ouster the judicial review jurisdiction of the Supreme Court, they would be invalid as inconsistent with section 48A of the *Australian Capital Territory (Self-Government) Act 1989*.

The Committee recommends that the Minister explain the utility of these clauses purporting to ouster judicial review.

Omission of obligation to give reasons for a decision

An injured person (and some others) may dispute a LTCS Commissioner decision concerning whether a motor accident injury suffered by an injured person satisfies the eligibility to participate in the LTCS scheme (subsection 34(1)). A three person eligibility panel decides whether to revoke or confirm the LTCS Commissioner decision. The panel gives a certificate setting out its reasons to the LTCS Commissioner, who then gives a copy to the injured person (subclauses 37(2) and (3)).

The panel decision may be reviewed by an eligibility review panel (subclause 39(1)).[1] In this case, the panel only gives a certificate of its decision to the LTCS Commissioner. There is no obligation to give reasons, and no provision requiring the Commissioner to give the certificate to the injured person.

The Committee cannot see any basis for these omissions. The Explanatory Statement makes no reference to these provisions. An obligation to give reasons is fundamental to a system of fair decision-making, and should be included.

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

Provisions concerning legal costs

An injured person seeking to take advantage of being a participant in the LTCS scheme may often find it necessary to engage the services of a lawyer, and it is unrealistic to think that these services will be provided free or at a charge reduced from the fees normally charged by a lawyer. Provisions of the Bill that may operate to discourage or preclude a person obtaining legal assistance will in effect amount to a barrier to the person pursuing their rights under the scheme. (It must also be noted that a person may be required to participate in the scheme – see above.) There are however several provisions that may have this effect.

By clause 25, "[t]he LTCS Commissioner is not liable for legal costs for legal services provided to a participant in the LTCS scheme in relation to an assessment of the participant's treatment and care needs".

By clause 42 the LTCS Commissioner is not liable for legal costs for legal services provided to an injured person or an insurer in relation to a decision by an eligibility assessment panel under section 37(2), or a review of the panel's decision by an eligibility review panel under section 39.

An interested person may dispute the commissioner's decision about whether an injury is a motor accident injury (subclause 47(1)). The dispute is determined by a claims assessment panel (subclause 49(2)). By subclause 50(2), a "panel's determination must include a determination of the amount of the reasonable legal costs payable by the injured person for legal services provided to the person in relation to the referral and determination of the dispute". These costs (and only these costs) are paid by the LTCS Commissioner (subclauses 50(3) and (4)).

There are then clauses of the Bill that concern legal costs incurred in relation to any kind of dispute arising under division 7. By subclause 51(1) a regulation may in this regard prescribe the maximum legal costs for legal services provided to an injured person, and a legal practitioner is not entitled to be paid any greater amount (subclause 51(2)). Also in this regard, by subclause 52(2), the "legal practitioner is not entitled to recover legal costs for a legal service or matter that a court or costs assessor determines were unreasonably incurred".

Clause 65 provides that no legal costs are payable by the LTCS Commissioner for legal services provided to a participant in the LTCS scheme in relation to the determination of a dispute about the participant's treatment and care needs; or a review of the assessor's determination by a treatment and care review panel.

[1] The grounds for review are ostensibly limited by subclause 38(3), but the ground in paragraph 38(3)(d) – that "the decision is demonstrably incorrect in a material respect" – is so broad that in practice there may be no limit. The point is that an assessment of whether this ground applies can only be reached after the facts have been presented (at least in many cases). It is unclear what the word "demonstrably" adds.

Subclause 53 then purports to accord primacy to the provisions in division 7 (including those just noted), and of a regulation under subclause 51(1), over any contrary provisions in the *Legal Profession Act 2006*. Clause 53 cannot be effectual so far as concerns provisions inserted into that Act after the commencement of an Act that is passed as a result of this Bill. The statement in the Explanatory Statement that clause 53 "provides that this division prevails over the *Legal Profession Act 2006* to the extent of any inconsistency between the two Acts" is wrong and misleading.

The Committee recommends that the Explanatory Statement be amended to rectify the error in the explanation of clause 53.

The rules governing legal costs discussed above are of such significance that the Explanatory Statement should contain a fuller description of them, and offer a justification for them.

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

Right to a fair trial and a restriction on the ability of a party to a matter to compel an assessor to give evidence or produce a document

By subclause 95(2), "[a]n assessor is, in any legal proceeding, competent but not compellable to give evidence or produce documents in relation to any matter in which the assessor was involved in the course of exercising the assessor's functions".

On the face of it, this provision might operate to deny to a party to a legal proceeding the opportunity to adduce evidence (through compulsion of an assessor) that would assist that party's case. This effect would limit the party's right to a fair trial (see HRA subsection 21(1)).

No justification is offered in the Explanatory Statement.

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

Has there been an inappropriate delegation of legislative power? – term of reference (3)(d)
Is the delegation of legislative power insufficiently subject to parliamentary scrutiny?– term of reference (3)(e)

Subclause 93(1) provides that the LTCS Commissioner "may make LTCS guidelines about any matter required or permitted by this Act to be included in the guidelines". There are many provisions of the Bill that would confer a power to make "guidelines" on topics that are critical to the substance of the LTCS scheme. Significant examples are to be found in:

- paragraph 15(1)(b) – creating criteria to govern whether an injury is such as to make a person eligible to participate in the scheme;
- subclause 15(4) – creating criteria to be satisfied in relation to a motor accident injury for the person to be eligible to be a participant in the scheme; and determining whether the motor accident injury satisfies the criteria;
- clause 18 – making provision for the making of applications for participation in the scheme, including the making and determination of applications; the payment of assessment costs by insurers; and imposing restrictions on the time within which an application can be made or requiring deferral of an application until an injury has stabilised;

- subclause 23(2) – stating how the LTCS Commissioner makes a treatment and care needs assessment of a participant;
- clause 27 – making provision for the treatment and care needs of a participant in the Scheme, including the procedures for such assessment; the intervals at which such assessment is to be carried out; the methods and criteria to be used to determine the treatment and care needs; and the information to be provided by participants;
- subclause 30(5) – making provision for determining which of an injured person's treatment and care are reasonable and necessary in the circumstances; and relate to the motor accident injury in relation to which the person is a participant in the LTCS scheme;
- subclause 43(1) – making provision about the procedures to be followed in relation to the referral of disputes for decision or review under this division;
- clause 58 – making provision for determining a dispute about a participant's treatment and care needs, including the methods and criteria to be used to determine the dispute;
- clause 63 – making provision for reviewing a treatment and care assessor's determination, including the methods and criteria to be used to determine the dispute; and
- subclause 71(8) – making provision for the maximum amount payable for LTCS-related payments that are not determined by the Minister.

It is very unusual to find such a wide range of matters of substance left to provision by a subordinate law. There are, moreover, three other significant aspects of these provisions that give rise to concern.

First, the law-making power is vested in a public servant, being the LTCS Commissioner. Powers of this significance are usually vested in a Minister.

Secondly, a guideline is only a notifiable instrument, so that the provisions in the Legislation Act that relate to the presentation and disallowance of subordinate laws do not apply to the guidelines. Again, this is very unusual. In contrast, similar guidelines made under the relevant NSW law (which is a model for this Bill), must be presented to the NSW Parliament and are disallowable; (see subsection 58(5) of the *Motor Accidents (Lifetime Care and Support) Act 2006*).

Thirdly, by subsection 93(3), guidelines may apply, adopt or incorporate the law of another jurisdiction or an instrument as in force from time to time, and by subclause 93(4),subsections 47(5) or (6) of the *Legislation Act 2001* do not apply to any guideline. The result is that a guideline would not be a notifiable instrument and thus not accessible on the ACT Legislation Register.

It is disappointing that the Explanatory Statement comment on clause 93 amounts only to stating that clause 93 "provides the LTCS Commissioner with a general LTCS guideline making power under this Act". This pays no attention to the significant issues identified above, most of which are usually acknowledged in Explanatory Statements.

These issues are such that the Committee reports to the Assembly that clause 93 and the associated powers are such that there is an inappropriate delegation of legislative power, and that the powers delegated are insufficiently subject to parliamentary scrutiny.

It is common to find in Territory laws that disapply section 47 of the Legislation Act provision for a member of the public to have access to the adopted law, etc at some designated place, such as at the office of the relevant regulator. Such access will not raise copyright problems.

The Committee recommends that the Minister advise whether consideration was given to providing for an alternative mode of access to the adopted laws.

There is also a significant delegation of legislative power in subclause 6(2), which provides that "[a] regulation may make provision for or in relation to limiting the application of this Act to a stated class of people". In effect, this is a Henry VIII clause, in that it would permit a substantial alteration to the Act.

The Explanatory Statement makes no reference to this power. Regulations would be disallowable, but there should be justification for the creation of such a power.

There is a similar power in the definition of "excluded treatment and care" in clause 9. The content of this concept is to be prescribed by regulation. There should be justification for the creation of such a power.

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

RAIL SAFETY NATIONAL LAW (ACT) BILL 2014

This is a Bill for an Act to provide for a national rail safety regulation scheme, including a national rail safety regulator and a national rail safety investigator, in accordance with the ACT's intergovernmental obligations.

Background

The Explanatory Statement notes (at 1-2) that "[i]n December 2009 the Council of Australian Governments agreed to the creation of a National Rail Safety Regulator (the Regulator) to administer the Rail Safety National Law (RSNL). Both the RSNL and the Regulator are hosted by South Australia". Futhermore, "[t]he RSNL was enacted as a schedule to the application law of South Australia, as the host jurisdiction, with enabling legislation to facilitate passage by each State and Territory. This Law establishes the Office of the National Rail Safety Regulator (ONRSR) and the responsibilities and obligations of all people undertaking work that affects or could affect rail safety in Australia".

There are two major components of this Bill.

First, section 6 of the Bill provides that the RSNL set out in the schedule to the South Australian Act, as amended from time to time, applies as a territory law; and as so applying may be referred to as the Rail Safety National Law (ACT); and so applies as if it were part of the Act proposed by this Bill.

Secondly, part 3 of the Bill relates to the provisions of the RSNL that establish a framework for testing rail safety workers for the presence of certain drugs or alcohol. The RSNL provides that rail safety works may be required to submit to preliminary (screening) alcohol or drug tests, and may also be required to a provide a sample of breath, oral fluid or blood for analysis. The Explanatory Statement notes that "[t]he RSNL contemplates that each jurisdiction will make provision under its application law for the processes to be followed in conducting alcohol and drug tests and analysis, to allow jurisdictions (should they so wish) to align their rail safety testing regimes with their road transport testing regimes" (at 5). This is the function of part 3

of the Bill, which provides processes to be followed for carrying out tests and analysis for the RSNL provisions.

The exclusion of the Legislation Act and of other Territory laws

Subclause 7(1) of the Bill provides that the Legislation Act does not apply to the proposed Rail Safety National Law (ACT), subject to an exception in favour of those provisions that relate to the presentation and disallowance of subordinate laws. Thus, this Committee may scrutinise national regulations (being those made under the Rail Safety National Law (ACT)), and the Assembly may disallow those regulations.

Clause 8 states that a number of Territory laws do not apply to the Regulator, and these include oversight laws such as the *Freedom of Information Act 1989*, the *Public Interest Disclosure Act 2012*, and the *Territory Records Act 2002*. The Explanatory Statement notes that "[t]hese oversight and accountability laws are excluded because South Australian oversight laws already apply to the Regulator".

The Committee recommends that the Minister identify the relevant South Australian laws.

There is no reference to the extent to which laws of the Territory relating to protection of personal information in records, and health information, apply in relation to the Regulator.

The Committee recommends that the Minister explain the extent to which these laws apply in relation to the Regulator.

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*

PART 3 OF THE BILL

It is convenient to deal with these provisions – which are unique to the Territory – before turning to the RSNL. As noted these clauses (10 – 52) of the Bill provide processes to be followed for carrying out testing and analysis in relation to alcohol and drugs for the RSNL provisions.

The Explanatory Statement notes that several of these clauses impact on rights.

Detention powers

Clause 14 authorises the detention of a rail safety worker for the purposes of breath analysis. Subclause 14(4) states limitations on the period for which the worker may be detained. Clause 18 allows a police officer to take a rail safety worker who either has undertaken a drug screening test that shows that a prescribed drug is present in the worker's oral fluid, or who has failed to submit a drug screening test, into custody for oral fluid analysis. Subclause 18(4) states limitations on the period for which the worker may be detained.

In relation to subclause 18(4), it is stated in the Explanatory Statement that it "is an important safeguard for human rights that the period and purposes for which detention is authorised are set out in the provisions that create the detention power". This would also apply to subclause 14(4). In neither case, however, does the Explanatory Statement explain just what the maximum of these periods of detention might be. In the case of subclause 14(4) at least, it appears that this might be for several hours.

A power to place a person who has not been charged or even under suspicion for an offence is a significant limitation on their right to liberty (HRA subsection 18(1)), and there should be a justification in terms of HRA section 28.

A further matter is that the exercise of a power vested in the police to place a person in custody under these provisions is open to abuse in that the police might take the opportunity to question the person about matters that are unrelated to the occasion for the detention. It might be presumed that the detainee would be fully informed of their rights under criminal investigation laws, but it would remain true that the person could not leave the place where they are detained, and some might feel under pressure to cooperate. This risk underlines the need for a justification.

This issue also arises out of the power of detention that is allowed for under clause 26.

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond, and in addition explain in some detail how the time limit provisions would apply.

Search powers

The Explanatory Statement notes that clause 31:

> gives a police officer power to search a rail safety worker who has been taken into custody under [clauses 14, 18 and 26], and to take possession of anything found in the worker's possession and to keep anything so seized while the worker is in custody. Although this power is a limitation on the right to privacy, it is essential to protect the safety of the tested person, sample takers and other people who carry out tests, the police officers who hold the tested worker in custody and other people at police stations and sampling facilities. This is particularly the case where a rail safety worker is impaired by alcohol and/or prescribed drugs and is uncooperative with testing requirements, as the risk of harm to self and others increases in that situation. Giving police the power to remove items that can be used to harm others or to self-harm is an essential preventative power and is a reasonable limitation on rights.

This explanation may be accepted, but subclause 31(1) is not expressly limited to pursuit of the purpose stated above. The thing seized may have nothing to do with the prevention of harm. That search on a broad basis may be intended is indicated by subclause 31(3). This entitles the worker to the return of seized items other than those that are a seizable item under the *Crimes Act 1900*, part 10. These powers relate to criminal investigation generally. Again, there is a risk of abuse of this power in subclause 31(1).

The Committee draws these matters to the attention of the Assembly and recommends that the Minister explain why subclause 31(1) is expressed so broadly.

Imposition of a burden of proof on a defendant

The Explanatory Statement notes that clause 34:

> provides that where an authorised person requires a rail safety worker to submit to an alcohol screening test or a breath analysis, and the worker fails to comply with the requirement or a reasonable direction in relation to the requirement, the worker is taken to have committed an offence against section 126 of the RSNL. ... The rail safety worker may have a defence if the worker proves that the refusal or failure was based on medical grounds.

A footnote explains that "[t]he Criminal Code does not apply to offences under the RSNL or to this

Bill. Accordingly, the ordinary principles of criminal law will apply in relation to establishing this defence".

If the ordinary principles of criminal law apply such that the defendant bears a legal burden of proof, there is a significant limitation of the HRA right to the presumption of innocence (HRA subclause 22(1)).

This issue arises also in respect of clauses 35 and 37.

The Committee recommends that the Minister explain how these principles of the criminal law will apply, and offer a justification if it is possible that they will result in the imposition of a legal burden of proof on a defendant.

Evidentiary certificates

Clauses 38 to 43 provide for the making of evidentiary certificates and result in limitations of the HRA right to the presumption of innocence. The Explanatory Statement offer a justification at page 6, and the Committee refers the Assembly to it.

The disclosure of information provided in confidence and the right to privacy (HRA section 12)

The Explanatory Statement notes that subclause 53(1) "provides that a person exercising a function under the Act or the RSNL is authorised to provide the Regulator with information or assistance that is reasonably required by the Regulator to exercise its functions".

It is not noted that this information includes "information given in confidence". The common law protection of information that is given in confidence is an important protection of the right to privacy, and its displacement should be justified under HRA section 28.

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

THE RSNL

There are 265 clauses in the RSNL, and many of them raise issues under the HRA and/or under paragraph (c)(i) of the terms of reference.

Issues identified in the Explanatory Statement

Human rights considerations are addressed under that title at pages 4 to 7 of the Explanatory Statement. In a few respects, there is also some analysis attached to particular clauses of the RSNL. The comments below follow the first approach.

As a preliminary, it is noted that at some points there is no reference to the particular HRA right in issue, and the framework for justification under HRA subsection 28(2) is often not fully addressed, even by allusion to its provisions.

To some extent, a person wishing to more fully appreciate the relevant human rights issues may consult the Statement of Compatibility tabled in the Legislative Assembly of the Victorian Parliament on 7 March 2013 by the Victorian Minister for Public Transport in accordance with the *Victorian Charter of Human Rights and Responsibilities Act 2006*.[2] (The Explanatory Statement has clearly

[2] http://www.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMB

drawn on this document, but it adds a great deal to what is in the Explanatory Statement.)

Drug and alcohol testing of rail safety workers

At page 5, the Explanatory Statement notes that "[t]he alcohol and drug testing provisions within the RSNL may engage the right to a fair hearing, rights in criminal proceedings, privacy, protection from medical treatment without consent and freedom of movement. Any limitation on these rights is considered to be necessary and proportionate having regard to the purpose of the legislation, which is the regulation of rail safety".

This purpose is clear and important, but this is but one of the mandatory relevant factors that must be addressed in a justification under HRA subsection 28(2). Nor does the Explanatory Statement identify the relevant provisions within the RSNL. Nothing is added at page 35 of the Explanatory Statement.

Clause 42 of the RSNL provides "that the Regulator must establish and maintain the National Rail Safety Register and sets out what is to be included in the Register. The Register will contain details of a person's 28 accreditation or registration and associated details including enforcement activities which have been undertaken in respect of the accredited or registered person". It is acknowledged that "the provision engages the right to privacy because it allows publication of information", and added that "However, the right is not limited". There is no reference to the HRA and no attempt at a justification.

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

Strict liability offences

Without identifying any example, the Explanatory Statement notes that:

> [t]he RSNL contains a number of strict liability offences, including in relation to general safety duties. Where strict liability applies, the prosecution is required only to prove the physical element of the offence. There are certain defences at common law that may be available to a defendant depending on the facts (including mistake of fact) – noting that the ACT Criminal Code does not apply to offences under the RSNL.
>
> While the imposition of strict liability is sometimes categorised as limiting the presumption of innocence in section 22 of the Human Rights Act, it may be considered a minor limitation because the imposition of strict liability does not preclude the defence of mistake of fact. The limitation is considered reasonable and justifiable in this context given the serious consequences arising from a breach of safety obligations in the rail sector. There are strong public safety reasons for ensuring that the rail safety regulatory regime is observed. As such, the use of strict liability offences in the RSNL is considered a reasonable limitation of rights.

This statement is inadequate in a number of respects: (i) the relevant clauses are not identified; (ii) in Territory practice, strict liability is always categorised as limiting the presumption of innocence; (iii) it is not a minor limitation simply or even significantly because the imposition of strict liability does not preclude the defence of mistake of fact (see below), and (iv) there is no reference to or attempt to

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satisfy HRA section 28. The mistake of fact defence does not permit any kind of 'reasonable steps' defence, and does not include a mistake of law. In any event, it is a formalistic justification that does not address the substance of why the presumption of innocence should be displaced.

The Committee notes that the Explanatory Statement follows very closely the Victorian Statement of Compatibility, which may explain why it is out of line with Territory practice.

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

Provisions that place an evidential burden on a defendant to establish a defence to an offence provision

The Committee refers the Assembly to the Explanatory Statement discussion at page 7.[3]

Powers of entry and search and seizure powers

The right to privacy in HRA section 12 is engaged by these provisions (and not simply "in theory" as stated in the Explanatory Statement). They also engage the common law presumption of liberty in favour of a right to property, reflected in article 17 of the Universal Declaration of Rights. The Committee refers the Assembly to the Explanatory Statement discussion at pages 7 to 8, which acknowledges these rights.

Children in the criminal process

The Committee refers the Assembly to the Explanatory Statement discussion at page 9.

The privilege against self-incrimination: HRA subsection 21(1) (right to a fair trial) and paragraph 22(2)(i) (right not to be compelled to testify against oneself)

In the first place, the Explanatory Statement (at 8) assumes[4] that this right is engaged by provisions in part 3 of the RSNL under which "rail safety workers will be required to provide samples of breath, oral fluid or blood for testing or analysis, and the results of those tests and analyses can be used in criminal proceedings against the worker. A failure or refusal to provide a sample may also be an offence".

There is no attempt to justify these limitations in terms of HRA section 28. It is said that "[e]ssentially it is a condition of employment as a rail safety worker that work is to be undertaken without the presence of alcohol or prescribed drugs in the worker's body and that this condition will be enforced through a program of workplace testing". Few if any workers would be aware that this was a condition of employment, and it is artificial to describe it as such. Moreover, the argument overlooks the realities of the choice open to prospective rail workers.

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

Secondly, the Explanatory Statement notes that

> there is a specific requirement in section 154 of the RSNL to produce documents and answer questions, in relation to which the privilege against self-incrimination is abrogated: see section

[3] The Victorian Statement of Compatibility contains much more detail in this respect.

[4] On the other hand, in *Saunders v United Kingdom* [1996] ECHR 65; (1997) 23 EHRR 313 the European Court of Human Rights commented that the right not to incriminate oneself did not extend to preclude obtaining compulsory evidence such as documents, breath samples, fingerprints, blood and urine samples and tissue samples.

> 155. However, the answer or information so provided is not then admissible against the person in civil or criminal proceedings, other than proceedings for giving false or misleading information or documents. This restriction [on the use of compelled material] does not extend to information or documents derived from the answers provided by the person.

Clause 154 of the RSNL requires that documents be produced and answers given to questions. Clause 155 abrogates the privilege:

> 155(1) A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.
>
> (2) However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

Notwithstanding the contrary statement in the Explanatory Statement notes to this clause (see at page 40), it is clear that subclause 155(2) provides only for a direct use immunity; that is, it is only the answer to a question or information or a document provided by an individual is not admissible in a later proceeding. On the other hand, incriminating information that is derived from the answer etc would be admissible. In other words, the person is not insulated from having the compelled incriminating testimony used to obtain other evidence against that person.

The explanation in the Explanatory Statement at page 40 fails to appreciate this distinction, and the Committee recommends that it be corrected.

The common law and the rights stated in HRA subsection 21(1) and paragraph 22(2)(i) extend to both a direct and a derivative use immunity.[5] The reason for this is stated by Warren CJ in Re an application under the *Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [84] (with an adaptation to indicate its relevance to clause 155 of the RSNL):

> no distinction can meaningfully be drawn between the harm that may flow from incriminating information provided directly and incriminating evidence derived from such information. From the witness's perspective, derivative information can present consequences as damaging as the original, self-incriminating information. An answer compelled from a witness, although not itself available to be used, [as is the case under subclause 155(2)], could point investigators in a direction allowing them to obtain admissible evidence against that person. In such a way, in truth, the accused person will have been forced to testify against him or herself and in effect to confess guilt contrary to the requirements of the human right.

It is clear that subclause 155(2) derogates from the common law right and the rights stated in HRA subsection 21(1) and paragraph 22(2)(i), in that it totally abrogates a critical element of these rights.[6] From the common law viewpoint, the question then is whether this derogation is an "undue trespass"; from that of the HRA, the question is whether the derogation is "' 'demonstrably justified

[5] See *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [46], per Warren CJ (henceforth *Major Crime*).

[6] *In Scrutiny Report No 14*, at 9, footnote 3, concerning the Totaliser Bill 2013, the Committee queried whether the HRA right had application to a case where (as here in respect of RSNL section 154), the questions were asked prior to a person being charged with a criminal offence. The Committee was there focussing on the right in paragraph 22(2)(i) of the HRA. In *Major Crime*, Warren CJ said that "the Charter's protection of the right against self-incrimination is at least as broad as the traditional common law right not to have an unfair trial and the right not to incriminate oneself" (at [80]). The common law applies in non-curial settings, such as that contemplated by RSNL section 154. In effect, Warren CJ relied on the right to a fair trial (HRA subsection 21(1)) as embracing the wider common law concept of the privilege against self-incrimination.

in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'".[7] Those factors are stated non-exhaustively in HRA subsection 28(2).

In *Major Crime* Warren CJ attached great weight to the nature of the right. She said:

> ... the right to a fair hearing and the privilege against self-incrimination are rights which define the relationship between the individual and the state and protect people against aggressive behaviour of those in authority. They reflect the philosophy that the state must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated.[8]

Warren CJ approached the justification question through the factors stated in subsection 7(2) of the Victorian Charter, which is identical to HRA subsection 28(2), and concluded that, in terms of paragraph 28(2)(e), the purpose of the limitation in the relevant Victorian statute could still be achieved by allowing for a form of derivative use immunity.[9] She said: '' ... the form of derivative use immunity reasonably appropriate is an immunity in relation to evidence that could not have been obtained, or its significance appreciated, but for the compelled testimony of the accused. The immunity should extend to unrelated crimes brought to light as a result of a witness' testimony. The Charter does not speak of the particular offence but about a person charged not being compelled to testify against him or herself".[10]

On this basis, the Committee considers that there is a significant possibility that an ACT court would find that subclause 155(2) of the RSNL is incompatible with HRA paragraph 22(2)(i). Similarly, the Assembly might consider the clause to be an undue trespass on the common law right.

It should be noted that the Victorian counterpart to this Bill modified subclause 155(2) to provide for protection against prosecution using information derived from answers that a person is required or directed to give by a rail safety officer under Part 4 of that Law; (see section 46 of the Rail Safety National Law application Act 2013 (Victoria)).

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2013-274 being the Nature Conservation (Threatened Ecological Communities and Species) Murrumbidgee Bossiaea Action Plan 2013 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **makes the Action Plan No. 34.**

Disallowable Instrument DI2013-275 being the Nature Conservation (Threatened Ecological Communities and Species) Glossy Black-Cockatoo Action Plan 2013 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **makes the Action Plan No. 33.**

[7] *Major Crime* [144].
[8] Ibid at [146].
[9] Ibid at [156].
[10] Ibid at [160].

Disallowable Instrument DI2013-276 being the Nature Conservation (Threatened Ecological Communities and Species) Little Eagle Action Plan 2013 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **makes the Action Plan No. 35.**

Disallowable Instrument DI2013-277 being the Nature Conservation (Threatened Ecological Communities and Species) Action Plan 2013 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **revokes DI2012-108, reinstates Action Plans Nos. 5, 6, 22, 30, 31 and 32.**

Disallowable Instrument DI2013-278 being the Nature Conservation (Threatened Ecological Communities and Species) Smoky Mouse Action Plan 2013 (No. 1) made under section 42 of the *Nature Conservation Act 1980* **makes the Revised Action Plan No. 23.**

Disallowable Instrument DI2013-279 being the Civil Law (Wrongs) Professional Surveyors' Occupational Association Scheme 2013 (No. 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the Professional Surveyors' Occupational Association Scheme.**

Disallowable Instrument DI2013-280 being the Board of Senior Secondary Studies Appointment 2013 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* **appoints a nominee of the ACT and Region Chamber of Commerce and Industry as a member of the ACT Board of Senior Secondary Studies.**

Disallowable Instrument DI2013-281 being the University of Canberra Council Appointment 2013 (No. 2) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2013-282 being the University of Canberra Council Appointment 2013 (No. 3) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2013-283 being the University of Canberra Council Appointment 2013 (No. 4) made under section 11 of the *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

Disallowable Instrument DI2013-286 being the Canberra Institute of Technology (Advisory Council) Appointment 2013 (No. 5) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, who represents the interests of industry and commerce relevant to the functions of the Council.**

Disallowable Instrument DI2013-288 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 5) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2013-289 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 6) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2013-290 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 7) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2013-291 being the Fair Trading (Motor Vehicle Repair Industry) (Fees) Determination 2013 (No. 2) made under section 55 of the *Fair Trading (Motor Vehicle Repair Industry) Act 2010* **revokes DI2013-110, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-292 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 8) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2013-293 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2013 (No. 2) made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* **revokes DI2013-105, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-294 being the Hawkers (Fees) Determination 2013 (No. 2) made under section 45 of the *Hawkers Act 2003* **revokes DI2013-114, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-295 being the Pawnbrokers (Fees) Determination 2013 (No. 2) made under section 27 of the *Pawnbrokers Act 1902* **revokes DI2013-120, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-296 being the Second-hand Dealers (Fees) Determination 2013 (No.2) made under section 17 of the *Second-hand Dealers Act 1906* **revokes DI2013-126, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-297 being the Agents (Fees) Determination 2013 (No. 2) made under section 176 of the *Agents Act 2003* **revokes DI2013-100, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-298 being the Sale of Motor Vehicles (Fees) Determination 2013 (No. 2) made under section 91 of the *Sale of Motor Vehicles Act 1977* **revokes DI2013-125, determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-299 being the Stock (Minimum Stock Levy) Determination 2013 (No. 1) made under section 7A of the *Stock Act 2005* **determines the minimum stock levy for landholdings.**

Disallowable Instrument DI2013-300 being the Radiation Protection (Fees) Determination 2013 (No. 1) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2012-265 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-301 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2013 (No. 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **revokes DI2012-264 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-302 being the Public Health (Fees) Determination 2013 (No. 2) made under section 137 of the *Public Health Act 1997* **revokes DI2013-30 and determines fees payable for the purposes of the act.**

Disallowable Instrument DI2013-303 being the Food (Fees) Determination 2013 (No. 1) made under section 150 of the *Food Act 2001* **revokes DI2012-280 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-304 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (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 2013 Citroen Rally Test Days.**

Disallowable Instrument DI2013-305 being the Health (Interest Charge) Determination 2013 (No. 1) made under section 193 of the *Health Act 1993* **revokes DI2012-263 and determines the interest charged on the aggregate amount of fees and charges unpaid after the due date.**

Disallowable Instrument DI2013-306 being the Radiation Protection (Council Member) Appointment 2013 (No. 3) made under section 68 of the *Radiation Protection Act 2006* **appoints a specified person as a member of the Radiation Council.**

Disallowable Instrument DI2013-307 being the Radiation Protection (Council Member) Appointment 2013 (No. 4) made under section 68 of the *Radiation Protection Act 2006* **appoints a specified person as a member of the Radiation Council.**

Disallowable Instrument DI2013-308 being the Radiation Protection (Council Member) Appointment 2013 (No. 5) made under section 68 of the *Radiation Protection Act 2006* **appoints a specified person as a member of the Radiation Council.**

Disallowable Instrument DI2013-309 being the Architects Board Appointment 2013 (No. 2) made under subsection 70(2) of the *Architects Act 2004* **appoints a specified person, as the community interest member who is not a registered architect, as a member of the Australian Capital Territory Architects Board.**

Disallowable Instrument DI2013-311 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2013 (No. 2) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **revokes DI2013-301 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-312 being the Health Records (Privacy and Access) (Fees) Determination 2013 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2012-262 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2013-315 being the Road Transport (General) Application of Road Transport Legislation Declaration 2013 (No. 7) made under section 12 of the *Road Transport (General) Act 1999* **disapplies Australian Road Rule 205 to a road or road areas around Manuka Oval on specified dates.**

Disallowable Instrument DI2013-317 being the Civil Law (Wrongs) Engineers Australia (NT) Professional Standards Scheme 2013 (No. 1) made under section 4.10, schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the Engineers Australia (NT) Professional Standards Scheme to operate in the Australian Capital Territory.**

Disallowable Instrument DI2013-318 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2013 made under section 13 of the *Road Transport (General) Act 1999* **removes application of the Road Transport (Third-Party Insurance) Act to ACT registered entrant, promotional and uninsured vehicles participating in the Summernats 27 Car Festival, and exempts vehicles from the provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.**

Disallowable Instrument DI2013-319 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2013-85 and determines the property value**

thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.

Disallowable Instrument DI2013-320 being the Taxation Administration (Amounts Payable—Eligibility—New and Substantially Renovated Homes and Land only—Home Buyer Concession Scheme) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2013-227 and determines, for the purposes of the Scheme, the income test and thresholds, eligibility criteria, conditions, method of calculation of duty payable and time limit for applications.**

Disallowable Instrument DI2013-321 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2013 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-321 and determines the property value thresholds for an eligible property and land value thresholds for an eligible vacant block, for the purposes of the calculation of duty payable.**

Disallowable Instrument DI2013-322 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-273 and determines, for the purposes of the Scheme, the eligibility criteria, conditions, method of calculation of duty payable and time limit for applications.**

Disallowable Instrument DI2013-323 being the Taxation Administration (Ambulance Levy) Determination 2013 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2012-277 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2014.**

Disallowable Instrument DI2013-324 being the Payroll Tax (Disability Employment Concession) Guidelines 2013 made under section 2.23, part 2.10, Schedule 2 of the *Payroll Tax Act 2011* **provides guidelines and information on the eligibility for and administration of the concession.**

Disallowable Instrument DI2014-1 being the Court Procedures (Fees) Determination 2014 (No. 1) made under section 13 of the *Court Procedures Act 2004* **revokes DI2013-107 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-2 being the Nature Conservation (Fees) Determination 2014 (No. 1) made under section 139 of the *Nature Conservation Act 1980* **revokes DI2013-157 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-3 being the Health (Fees) Determination 2014 (No. 1) made under section 192 of the *Health Act 1993* **revokes DI2013-166 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-5 being the Civil Law (Wrongs) CPA Australia Limited Professional Standards Scheme 2014 (No. 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* **approves the CPA Australia Limited Professional Standards Scheme.**

Disallowable Instrument DI2014-6 being the Road Transport (General) Fees For Publications Determination 2014 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2013-62 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-7 being the Radiation Protection (Student) Exemption 2014 (No. 1) made under section 114 of the *Radiation Protection Act 2006* **removes application of the Radiation**

Protection Act to undergraduate students undertaking course work or research at a university, or similar educational institution, while under supervision of a licensed person.

DISALLOWABLE INSTRUMENTS—COMMENT

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

Validity of appointment / adequacy of Explanatory Statement

Disallowable Instrument DI2013-284 being the Education (Non-Government Schools Education Council) Appointment 2013 (No. 4) made under section 109 of the *Education Act 2004* **appoints a specified person as an education member of the Non-government Schools Education Council, representing the independent schools.**

This instrument appoints a specified person as an education member of the Non-government Schools Education Council, representing the non-Catholic independent schools. The instrument is made under section 109 of the *Education Act 2004*, which provides:

109 Members of council (non-government)

(1) The Minister must appoint the following members of the council:

(a) a chairperson;

(b) 4 people who, in the Minister's opinion, represent the views of the general community (the community members);

(c) 6 people who, in the Minister's opinion, represent the views of non-government school education (the education members).

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) For subsection (1) (c), the Minister must appoint—

(a) 3 education members chosen from nominations of organisations representing Catholic schools; and

(b) 1 education member chosen from nominations of organisations representing non-Catholic independent schools; and

(c) 1 education member chosen from nominations of the nongovernment school union; and

(d) 1 education member chosen from nominations of organisations representing parent associations of non-government schools.

The Explanatory Statement for this instrument states:

> This instrument reappoints [the specified person] for three years from the day after notification to the position of education member representing the independent schools. The appointee is not an ACT public servant and the determination is a disallowable instrument for the purpose of division 19.3.3 of the *Legislation Act 2001*.

Section 3 of the instrument itself states that the instrument *reappoints* the specified person as "an education member representing the non-Catholic independent schools" This suggests that the appointment made by this instrument is made under paragraph 109(2)(b), which requires the Minister to appoint a person "chosen from nominations of organisations representing non-Catholic independent schools". There is nothing in the instrument or the Explanatory Statement that indicates that the person appointed was "chosen from nominations of organisations representing non-Catholic independent schools". While it may be argued that this can be assumed from the fact that the Minister has made the appointment (ie there is a "presumption of regularity") and from the fact that the person in question is actually being re-appointed, it would be preferable if this was made clear.

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

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

As the Committee has previously noted, in 2011, in the case of *Kutlu v Director of Professional Services Review*[11] ([2011] FCAFC 94 (28 July 2011), the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth *Health Insurance Act 1973*, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

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

> [T]he scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament

[11] http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html

> anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices …

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

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

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

Further, the Committee would be grateful if the Minister could confirm that the requirements of paragraph 109(2)(b) of the *Education Act 2004* have been met in relation to the appointment.

Minor drafting issue

Disallowable Instrument DI2013-285 being the Canberra Institute of Technology (Advisory Council) Appointment 2013 (No. 4) made under section 31 of the *Canberra Institute of Technology Act 1987* **appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, with experience and knowledge relevant to the functions of the Council.**

Section 3 of this instrument, which appoints a specified person as a member of the Canberra Institute of Technology Advisory Council, states:

> **3 Appointment**
>
> I reappoint [the specified person] as a member of the Canberra Institute of Technology Advisory Council, who does not represent**s** the interests of industry and commerce but has experience and knowledge relevant to the functions of the Council. [emphasis added]

The appointment is made under paragraph 31(2)(d) of the *Canberra Institute of Technology Act 1987*, which requires the Minister to ensure that there is always "2 members, not representing the interests of industry or commerce, who have experience and knowledge relevant to the functions of the council". While it appears that the appointment is validly made, the Committee notes the minor drafting issue in section 3. There are some similar (also minor) drafting issues in the Explanatory Statement for the instrument.

This comment does not require a response from the Minister.

Minor drafting issue

Disallowable Instrument DI2013-287 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2013 (No. 4) made under paragraph 174(1)(a) of the *Crimes (Sentence Administration) Act 2005* **appoints a specified person as chair of the Sentence Administration Board.**

This instrument appoints a specified person as the chair of the Sentence Administration Board. The appointment is made under subsection 174(1) of the *Crimes (Sentence Administration) Act 2005*, which provides (in part):

> **174 Appointment of board members**
>
> (1) The Minister must appoint the following board members:
>
> (a) a chair;
>
> (b) at least 1 deputy chair and not more than 2 deputy chairs;
>
> (c) not more than 8 other members.

The Committee notes that the formal parts of the instrument, and the Explanatory Statement for the instrument, indicate that the instrument is made under the:

> ***Crimes (Sentence Administration) Act 2005* s 174(1) (a) (Appointment of board members)**

The Committee notes that, in fact, paragraph 174(1)(a) relates to the appointment of the chair. The appointment of board members is dealt with in paragraph 174(1)(c), which is referred to in DI2013-288, DI2013-289, DI2013-290 and DI2013-292, which the Committee has also considered for this Report.

This comment does not require a response from the Minister.

No explanation provided in relation to fare increases

Disallowable Instrument DI2013-310 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2013 (No. 3) made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* **revokes DI2013-168 and determines maximum fares payable on regular route services provided by ACTION.**

This instrument determines the maximum fares payable by customers who use the ACTION bus system. The instrument is made under section 23 of the *Road Transport (Public Passenger Services) Act 2001.*

In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*[12], 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.

[12] Available: http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role

The Explanatory Statement for this instrument states:

> This determination increases fares payable for travel on ACTION buses.

The Explanatory Statement for the instrument does not say anything else about the increase in fares.

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

Validity of appointments / adequacy of Explanatory Statements

Disallowable Instrument DI2013-313 being the Official Visitor (Corrections Management) Appointment 2013 (No. 1) made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the** *Corrections Management Act 2007***.**

Disallowable Instrument DI2013-314 being the Official Visitor (Corrections Management) Aboriginal and Torres Strait Islander Appointment 2013 (No. 1) made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for** *the Corrections Management Act 2007***.**

Disallowable Instrument DI2013-325 being the Official Visitor (Children and Young People) Aboriginal and Torres Strait Islander Appointment 2013 made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the Children and Young People Act 2008.**

Disallowable Instrument DI2013-326 being the Official Visitor (Disability Services) Appointment 2013 (No. 1) made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the Disability Services Act 1991.**

Disallowable Instrument DI2013-327 being the Official Visitor (Disability Services) Appointment 2013 (No. 2) made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the Disability Services Act 1991.**

Disallowable Instrument DI2013-328 being the Official Visitor (Housing Assistance) Appointment 2013 made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the Housing Assistance Act 2007.**

Each of the instruments mentioned above appoints a specified person as an official visitor, under section 10 of the *Official Visitor Act 2012*. Section 10 provides:

> **10 Appointment**
>
> (1) The Minister must appoint the following:
>
> (a) for the Children and Young People Act 2008—at least 2 official visitors, including one official visitor who is an Aboriginal or Torres Strait Islander person;
>
> (b) for the Corrections Management Act 2007—at least 2 official visitors, including one official visitor who is an Aboriginal or Torres Strait Islander person;
>
> (c) for the Disability Services Act 1991—at least 1 official visitor;
>
> (d) for the Housing Assistance Act 2007—at least 1 official visitor;

(e) for the Mental Health (Treatment and Care) Act 1994—at least 1 official visitor.

(2) The Minister may appoint a person as an official visitor for an operational Act only if—

(a) the Minister has consulted the operational Minister; and

(b) satisfied on reasonable grounds that the person has suitable qualifications or experience to exercise the functions of an official visitor for the operational Act.

(3) However, the Minister must not appoint a person as an official visitor if the person—

(a) is a public employee; or

(b) has a relevant interest.

(4) An operational Act may prescribe additional requirements for deciding whether or not to appoint a person as an official visitor for the operational Act.

For each of the appointments made by the first 2 instruments mentioned above, the "operational Act" is the *Corrections Management Act 2007*. Both appointments are of Aboriginal or Torres Strait Islander persons. For the third instrument, also the appointment of an Aboriginal or Torres Strait Islander person, the "operational Act" is the *Children and Young People Act 2008*. For the fourth and fifth instruments, the "operational Act" is the *Disability Services Act 1991*. For the sixth instrument, the "operational Act" is the *Housing Assistance Act 2007*.

The Committee notes that none of the Explanatory Statements for the 6 instruments mentioned above addresses the requirement in paragraph 10(2)(a) of the Official Visitor Act that the Minister making the appointment has consulted the "operational Minister" (defined in the Dictionary for the Official Visitor Act as the Minister responsible for the operational Act). For the first 2 instruments, given that the operational Minister in this case is the Minister making the appointments, this can perhaps be assumed. However, it would be preferable if the Explanatory Statement addressed this issue expressly.

As for the third, fourth, fifth and sixth instruments, the Minister making the appointments is <u>not</u> the "operational Minister". This means that the assumption discussed above cannot apply. Again, it would be preferable if the Explanatory Statement for the instruments addressed this requirement, expressly.

In addition, the Explanatory Statement for neither of the first and second instruments addresses the prohibitions contained in subsection 10(3) of the Official Visitor Act against persons being appointed who (a) are public employees or (b) have a "relevant interest". While it may be argued that this can be assumed from the fact that the Minister has made the appointments (ie there is a "presumption of regularity"), it would be preferable if it was made clear that the pre-requisites for appointment have been met, in every case.

In making these comments, the Committee notes that the Explanatory Statements for the appointments made by the third, fourth, fifth and sixth instruments <u>do</u> expressly address the "this person is not a public servant" issue.

As the Committee has consistently stated, it does not consider it to be an onerous requirement for instruments of appointment, either on their face or in the Explanatory Statement, to demonstrate

that any formal requirements in relation to the appointment have been met.

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

As the Committee has previously noted, in 2011, in the case of *Kutlu v Director of Professional Services Review*[13] ([2011] FCAFC 94 (28 July 2011), the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth *Health Insurance Act 1973*, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

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

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

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

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

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

[13] http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html

Further, the Committee would be grateful if the Minister could confirm that the requirements of section 10 of the *Official Visitor Act 2012* have been met in relation to each of the appointments.

Is this a disallowable instrument?

Disallowable Instrument DI2013-316 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council) Appointment 2013 (No. 1) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* **appoints specified persons to be members of the Climate Change Council.**

This instrument appoints 2 specified persons to the ACT Climate Change Council. The appointments are made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010*. Obviously, the appointments are made by disallowable instrument.

The Committee notes that there is no indication as to whether or not, in fact, these appointments should be made by disallowable instrument. The Committee notes that, as a result of section 227 of the *Legislation Act 2001*, the requirement in section 229 of the Legislation Act that certain appointments be made by disallowable instrument only applies to appointments of persons *other than* public servants. It is for this reason that the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*[14], the Committee stated:

> Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the Explanatory Statement for an instrument of appointment contains a statement to the effect that "the person appointed is not a public servant".

There is no such statement for this instrument.

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

Further, the Committee would be grateful if the Minister could confirm that the persons appointed are not public servants.

Is this a disallowable instrument?

Disallowable Instrument DI2014-4 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2014 (No. 1) made under section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* **and section 194 of the** *Medicines, Poisons and Therapeutic Goods Act 2008* **appoints specified persons as chair and members of the Medicines Advisory Committee.**

[14] available http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role

This instrument appoints a specified person as chair, and 2 other specified persons as members, of the Medicines Advisory Committee. The appointments are made under section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*.

While the Explanatory Statement for the instrument addresses the various pre-requisites for the various appointments, the Committee notes that there is no indication as to whether or not, in fact, these appointments should be made by disallowable instrument. The Committee notes that, as a result of section 227 of the *Legislation Act 2001*, the requirement in section 229 of the Legislation Act that certain appointments be made by disallowable instrument only applies to appointments of persons *other than* public servants. It is for this reason that the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, the Committee stated:

> Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the Explanatory Statement for an instrument of appointment contains a statement to the effect that "the person appointed is not a public servant".

There is no such statement for this instrument.

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

Further, the Committee would be grateful if the Minister could confirm that the persons appointed are not public servants.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2013-30 being the Planning and Development Amendment Regulation 2013 (No. 1) made under the *Planning and Development Act 2007* **amends the demolition exemption by removing its application to the demolition of duplexes.**

Subordinate Law SL-2013-31 being the Radiation Protection (Solariums Prohibition) Amendment Regulation 2013 (No. 1) made under the *Radiation Protection Act 2006* **makes amendments to the Radiation Protection Regulation 2007 to ban commercial solariums in the ACT.**

Subordinate Law SL-2013-32 being the Court Procedures Amendment Rules 2013 (No. 2) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules.**

Subordinate Law SL-2013-33 being the Work Health and Safety Amendment Regulation 2013 (No. 1) made under the *Work Health and Safety Act 2011* **confirms that inspectors authorised under the Act are also authorised to commence, continue or complete an investigation into an offence committed under the Work Safety Act 2008.**

Subordinate Law SL2014-1 being the Road Transport (Alcohol and Drugs) Amendment Regulation 2014 (No. 1) made under the *Road Transport (Alcohol and Drugs) Act 1977* **prescribes the Dräger**

Alcotest 9510 AUS, also known as the Draeger Alcotest 9510 AUS, as a breath analysis instrument for the purposes of the Act.

Subordinate Law SL2014-2 being the Road Transport Legislation Amendment Regulation 2014 (No. 1) made under the *Road Transport (General) Act 1999 and Road Transport (Vehicle Registration) Act 1999* **adopts the latest version of the Australian Road Rules for Heavy Vehicles.**

SUBORDINATE LAWS—COMMENT

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

Application of "Henry VIII" clause

Subordinate Law SL2013-29 being the Firearms Amendment Regulation 2013 (No. 1) made under the *Firearms Act 1996* **inserts a description of a specified firearm.**

The Committee notes that section 4 of this subordinate law amends the *Firearms Act 1996*, inserting a new item 17A into Schedule 1 of that Act. This amendment is authorised by subsection 7(3) of the Firearms Act, which provides:

> (3) A regulation may amend schedule 1 by—
>
> (a) adding the name or description of a firearm; or
>
> (b) amending a name or description of a firearm to more accurately describe the firearm; or
>
> (c) omitting the name and description of a firearm.

The Committee notes that subsection 7(3) is a "Henry VIII" clause, as it allows for the amendment of primary legislation by subordinate legislation (see the Committee's publication titled *"Henry VIII" clauses – Fact* sheet[15]). However (as is pointed out in the Explanatory Statement for the subordinate law), the Committee also notes that this particular exercise of legislative power has been explicitly authorised by the Legislative Assembly.

This comment does not require a response from the Minister.

NATIONAL REGULATIONS—COMMENT

The Committee has examined the following national regulations, as applied by the *Heavy Vehicle National Law Act 2012*(Qld), and offers the following comments on them:

No Explanatory Statements

Heavy Vehicle (Fatigue Management) National Regulation—Subordinate Legislation 2013 No. 78.

Heavy Vehicle (General) National Regulation—Subordinate Legislation 2013 No. 79.

Heavy Vehicle (Mass, Dimension and Loading) National Amendment Regulation—Subordinate Legislation 2014 No. 9.

[15] available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role

Heavy Vehicle (Mass, Dimension and Loading) National Regulation—Subordinate Legislation 2013 No. 77.

Heavy Vehicle (Transitional) National Regulation—Subordinate Legislation 2014 No. 10.

Heavy Vehicle (Vehicle Standards) National Regulation—Subordinate Legislation 2013 No. 76.

The Committee notes that the following National Laws were tabled in the Legislative Assembly on 27 February 2014. These National Laws were made under the Heavy Vehicle National Law set out in the schedule to the *Heavy Vehicle National Law Act 2012* (Qld), as applied in the ACT by section 7 of the *Heavy Vehicle National Law (ACT) Act 2013*, and as modified by that (ACT) Act.

Section 7 of the *Heavy Vehicle National Law (ACT) Act 2013* provides:

> **7 Application of Heavy Vehicle National Law**
>
> (1) The Heavy Vehicle National Law set out in the schedule to the Queensland Act, as amended from time to time—
>
> (a) applies as a territory law, as modified by schedule 1; and
>
> (b) as so applying may be referred to as the Heavy Vehicle National Law (ACT); and
>
> (c) so applies as if it were part of this Act.
>
> *Note Some chapters of the Heavy Vehicle National Law (ACT) have a delayed application (see this Act, pt 5).*
>
> (2) Schedule 1, part 1.2 (Modifications—chapter 2) and this subsection expire at the beginning of the day that section 32 (Expiry—div 5.1) commences.

The making of "national regulations" is provided for in section 730 of the Heavy Vehicle National Law, which states:

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

It is important at this point to note that the effect of subsection 730(1) and (2) is that the Queensland Governor, acting with the advice of the Executive Council of Queensland and on the unanimous recommendation of the responsible Ministers (which includes an ACT Minister). Section 730 continues:

> (3) The regulations may provide for—
>
> (a) any matter a provision of this Law states may be provided for in the regulations; and
>
> (b) the imposition of a maximum fine for a contravention of a provision of the regulations of not more than—
>
> (i) for a contravention by an individual—$4000; or

(ii) in any other case—$20000; and

(c) any other matter that is necessary or convenient to be prescribed for carrying out or giving effect to this Law.

(4) Subsection (3)(b) does not require a provision of the regulations prescribing a maximum fine for an offence to expressly prescribe a maximum fine for a body corporate different to the maximum fine for an individual.

Note—See section 596 in relation to a provision of the regulations prescribing a maximum fine that does not expressly prescribe a maximum fine for a body corporate different to the maximum fine for an individual.

(5) In this section—

Queensland Governor means the Governor of the State of Queensland and includes—

(a) a person acting under a delegation under section 40 of the Constitution of Queensland 2001; and

(b) a person for the time being administering the Government of Queensland under section 41 of the Constitution of Queensland 2001.

Section 733 of the Heavy Vehicle National Law deals with publication of national regulations. It provides:

733 Publication of national regulations

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

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

The national regulations mentioned above were published on the NSW legislation website on the following dates:

Heavy Vehicle (Fatigue Management) National Regulation—31 May 2013;

Heavy Vehicle (General) National Regulation—31 May 2013;

Heavy Vehicle (Mass, Dimension and Loading) National Amendment Regulation—31 May 2013;

Heavy Vehicle (Mass, Dimension and Loading) National Regulation—31 January 2014;

Heavy Vehicle (Transitional) National Regulation—31 January 2014

Heavy Vehicle (Vehicle Standards) National Regulation—31 May 2013;

Section 734 of the Heavy Vehicle National Law deals with parliamentary scrutiny of national regulations. It provides:

734 Scrutiny of national regulations

(1) The responsible Minister for a participating jurisdiction is to refer any adverse report about a national regulation from a legislation scrutiny body for that jurisdiction to the responsible Ministers for consideration and advice.

(2) The responsible Ministers are to prepare advice on the adverse report and provide a report to the relevant responsible Minister about the issues raised.

(3) The report by the responsible Ministers is to be provided to the responsible Minister in sufficient time to ensure the responsible Minister can provide the response to the relevant scrutiny body within a period that is appropriate in the circumstances.

(4) Subsections (1) to (3) do not affect any legislative or other arrangements regarding scrutiny and disallowance in jurisdictions and do not limit a responsible Minister's ability to respond independently to any issues raised by a legislation scrutiny body.

(5) In this section—

legislation scrutiny body means a parliamentary committee (or other parliamentary body) whose functions include the scrutiny of regulations and other subordinate legislation.

However, before section 734 can have any operation in the ACT, there needs to be a mechanism that puts national regulations before this Committee. This is achieved by section 8 of the *Heavy Vehicle National Law (ACT) Act 2013*, which provides:

8 Exclusion of Legislation Act

(1) The Legislation Act does not apply to the Heavy Vehicle National Law (ACT).

(2) However, the Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation as if—

(a) a reference to a subordinate law were a reference to a national regulation; and

(b) a reference to 'notification day' in the Legislation Act, section 64 (Presentation of subordinate laws and disallowable instruments) were a reference to 'published' as mentioned in the Heavy Vehicle National Law (ACT), section 733(1)(Publication of national regulations); and

(c) any other necessary changes were made.

(3) Also, the Legislation Act, section 104 (References to laws include references to instruments under laws) and section 191 (Offences against 2 or more laws) apply to the Heavy Vehicle National Law (ACT) as if that Law were an Act.

(4) This section does not limit the application of the Legislation Act to the local application provisions of this Act.

(5) If a national regulation is published as mentioned in subsection (2)(b) before the day this section commences, the regulation is taken to have been published on the day this section commences.

(6) Subsection (5) and this subsection expire 12 months after the day this section commences.

Paragraph 8(2)(a) is relevant because it applies the presentation, amendment and disallowance provisions of the Legislation Act to a national regulation as if a reference to a subordinate law (in chapter 7 of the Legislation Act) were a reference to a national regulation. Paragraph 8(2)(b) is relevant because it provides that, for the purposes of section 64 of the Legislation Act, rather than being required to be presented in the Legislative Assembly 6 sitting days after being notified on the ACT Legislation Register, a national regulation is required to be presented in the Legislative Assembly 6 days after it was published on the NSW legislation website.

As already noted above, all but 2 of the national regulations mentioned above were published on 31 May 2013. This means that, clearly, more than 6 sitting days have passed since the publication of those national regulations. This would appear to bring subsection 64(2) of the Legislation Act into operation: It provides:

> (2) If a subordinate law or disallowable instrument is not presented in accordance with subsection (1) [ie the requirement to present to the Legislative Assembly within 6 sitting days of notification], it is taken to be repealed.

This would appear to create a problem for the 4 national regulations published on 31 May 2013. However, subsection 8(5) of the *Heavy Vehicle National Law (ACT) Act 2013* may provide a solution. As already indicated, it provides:

> (5) If a national regulation is published as mentioned in subsection (2)(b) before the day this section commences, the regulation is taken to have been published on the day this section commences.

In fact, this appears to be the case. Endnote 3 to the *Heavy Vehicle National Law (ACT) Act 2013* indicates that section 8 commenced on 10 February 2014. So, subsection 8(5) applies and all of the national regulations mentioned above appear to have been presented to the Legislative Assembly within the 6 sitting day period allowed by section 64 of the Legislation Act.

It is important to note that none of the background information set out above was presented with the national regulations in question. The only information that came from the national regulations in question was dates on which they were published.

None of the instruments was accompanied by an Explanatory Statement. In the particular (complicated) circumstances of these national regulations, the Committee (and the Legislative Assembly) would have been greatly assisted by an explanation such as that set out above, rather than the Committee (and the Legislative Assembly) having to work out the mechanics of the operation (and presentation, and disallowance) of these laws for itself.

As the Committee has previously noted, there is no formal requirement that subordinate legislation (or disallowable instruments) be accompanied by an Explanatory Statement. However, the Committee has also noted, in its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*[16], the value of Explanatory Statements to the Committee (and the Legislative Assembly):

> Principle (b) of the Committee's terms of reference require it to "consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the

[16] available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role

Committee". Many of the issues identified below involve things that the Committee considers ought to be addressed in the Explanatory Statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

A further point is that addressing potential issues expressly in Explanatory Statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee's comments. Often, the explanation is something that could have been included in the Explanatory Statement for a piece of subordinate legislation. It may involve no more than a sentence (eg "this is not a public servant appointment", this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee's comments.

These national regulations demonstrate one of the points that the Committee has consistently made about the value of Explanatory Statements, to the Committee and the Legislative Assembly. The absence of Explanatory Statements for these national regulations has required the Committee to undertake research and analysis in order to be satisfied that the national regulations in question are valid, etc. This would not have been necessary if Explanatory Statements had been provided that dealt with the issues that the Committee has discussed above.

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

REGULATORY IMPACT STATEMENT

The Committee has examined the regulatory impact statement for the following subordinate law and offer the following comments on it:

Subordinate Law SL2013-30 being the Planning and Development Amendment Regulation 2013 (No. 1) made under the *Planning and Development Act 2007* **amends the demolition exemption by removing its application to the demolition of duplexes.**

Chapter 5 of the *Legislation Act 2001* provides for regulatory impact statements (RISs) for subordinate laws and disallowable instruments. The basic requirement is set out in section 34 of the Legislation Act, which provides (in part):

34 Preparation of regulatory impact statements

(1) If a proposed subordinate law or disallowable instrument (the proposed law) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law (the

administering Minister) must arrange for a regulatory impact statement to be prepared for the proposed law.

Section 34 goes on to provide for exemptions to the RIS requirements.

Section 35 provides for the content of RISs:

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the proposed law) must include the following information about the proposed law in clear and precise language:

(a) the authorising law;

(b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

(i) a brief explanation of the relationship with the other law;

and

(ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

(i) if practicable and appropriate, quantifies the benefits and costs; and

(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency. [emphasis added]

Principle (2) of the Committee's terms of reference dove-tails with paragraph 35(h) of the Legislation Act, in that it requires the Committee to consider whether any regulatory impact statement associated with a subordinate law meets the technical or stylistic standards expected by the Committee.

The Committee notes that the RIS for this subordinate law meets the technical and stylistic standards expected by the Committee.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- Minister for the Environment and Sustainable Development, dated 24 February 2013, in relation to comments made in Scrutiny Report 14 concerning the Construction and Energy Efficiency Legislation Amendment Bill 2013 (No. 2) (attached).

The Committee wishes to thank the Minister for the Environment and Sustainable Development for his helpful response.

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

Steve Doszpot MLA
Chair

11 March 2014

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

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

Report 14, dated 18 February 2014

Births, Deaths and Marriages Registration Amendment Bill 2013

Road Transport (Alcohol and Drugs) Amendment Bill

Totalisator Bill 2013

Disallowable Instrument DI2013-270— Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2013 (No. 1)

Simon Corbell MLA

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

MEMBER FOR MOLONGLO

Mr Steve Doszpot
Chair
Standing Committee on Justice and Community Safety
GPO Box 1020
Canberra ACT 2601

Dear Mr Doszpot

I write in relation to the comments on the Construction and Energy Efficiency Legislation Amendment Bill 2013 (No 2) (the Bill) in the Scrutiny Report 14 of 18 February 2014 published by the Standing Committee on Justice and Community Safety (the Committee) in its Legislative Scrutiny role.

I appreciate the considered comments provided by the Committee and provide the following response.

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*

I thank the Committee for its comment that the analysis of the human rights issues related to the Bill is thoughtful and comprehensive, and that it is sufficient to refer to the Explanatory Statement. I note the useful additional information provided by the Committee on the engagement of human rights.

The power to destroy things seized under section 47 is an existing power under the *Energy Efficiency (Cost of Living) Improvement Act 2012*. The amendments allow a direction to apply to an electricity retailer that may be responsible for the unsafe nature of the thing. The amendments also allow a person to take an action to make a thing safe rather than to destroy it, which may be more appropriate and reduce the potential impact under the section.

ACT LEGISLATIVE ASSEMBLY

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Has there been an inappropriate delegation of legislative power?—term of reference (3)(d)

The Committee has asked whether consideration was given to providing for an alternative mode of access to laws adopted under regulations made under section 66 of the *Electricity Safety Act 1971*. It notes that it is common to find in Territory laws that disapply section 47 of the Legislation Act to provide for a member of the public to have access to the adopted law, etc at some designated place, such as at the office of the relevant regulator.

Access to documents was considered in the drafting of the Bill. In general, the method of alternative access is provided for only once the document to be adopted is identified. This is because different types of documents may need to be made available in different ways depending on the Territory's own access arrangements. Therefore, the regulation-making power does not attempt to prescribe an alternative access arrangement that may be suitable for all documents.

In addition, as noted in the Explanatory Statement it is the practice to provide notes and other information in the text of an instrument or in explanatory information highlighting where adopted instruments can be found. I consider that this practice need not be provided for in the legislation.

I trust that I have adequately addressed the Committee's concerns.

Yours sincerely

Simon Corbell MLA
Minister for the Environment and Sustainable Development
24 February 2014