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

SCRUTINY REPORT 40

2 February 2016

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Ms Mary Porter AM, MLA (Deputy Chair)

Ms Joy Burch MLA

Mrs Giulia Jones MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

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

ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

  (a) unduly trespass on personal rights and liberties;

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

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

  (d) inappropriately delegate legislative powers; or

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

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

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

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BILLS

BILLS—NO COMMENT

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2015 (NO 2)

This is a Bill to amend the *Building (General) Regulation 2008*, the *Environment Protection Act 1997* and the *Environment Protection Regulation 2005*, the *Nature Conservation Act 2014*, the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008* in ways that make minor policy, technical and editorial changes.

PROTECTION OF RIGHTS (SERVICES) LEGISLATION AMENDMENT BILL 2015

This is a Bill to repeal the *Public Advocate Act 2005,* and to amend the *Human Rights Commission Act 2005*, the *Public Trustee Act 1985*, the *Domestic Violence Agencies Act 1986*, the *Guardianship and Management of Property Act 1991* and the *Victims Support Act 1994* to establish a restructured Human Rights Commission (HRC) and expanded Public Trustee and Guardian.

BILLS—COMMENT

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

CRIMES (SENTENCING AND RESTORATIVE JUSTICE) AMENDMENT BILL 2015

This is a Bill to amend the *Crimes (Sentencing) Act 2005*, the *Crimes (Sentence Administration) Act 2005* and *the Crimes (Restorative Justice) Act 2004*, primarily for the purposes of introducing an intensive corrections order as a sentencing option, and to provide for the staged implementation of phase 2 of restorative justice.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

ASPECTS OF THE PROPOSAL TO INTRODUCE AN "INTENSIVE CORRECTIONS ORDER"

The Explanatory Statement describes the nature of an intensive corrections order as follows:

> [It will] be a stand-alone way of serving a sentence of imprisonment. As such, it will sit just below a sentence of full-time imprisonment in the sentencing framework. It is intended as a sentence of 'last resort' for offenders before full-time imprisonment. The sentence can fulfil more than one of the purposes of sentencing in circumstances where community safety and other sentencing considerations do not require the sentence to be served by way of fulltime imprisonment.
>
> The intensive correction order is designed to be punitive while still allowing the courts to incorporate elements of rehabilitation. It will allow offenders to remain in employment and maintain their community ties which are important to reduce the risk of future offending. It is

> flexible enough to allow the courts to tailor the order to suit the circumstances of the offence and the offender but still sufficiently structured to ensure every order places appropriate demands on an offender.
>
> The intensive correction order is supported by clear and robust consequences in the event an offender does not adhere to the requirements of the order. If a new offence is committed during the term of the order, a court is required to activate the remaining term of imprisonment either in full or in part unless it is not in the interests of justice to do so. If one or more of the other conditions of the order are breached then the Sentence Administration Board is authorised to conduct a hearing of the matter. The Sentence Administration Board is provided with a power to act quickly and innovatively, by imposing a short period of fulltime imprisonment as well as other more traditional consequences, such as cancellation.

Under the heading "Human Rights Considerations", the Explanatory Statement (at 5 to 13) identifies ways in which provisions of the Bill that create this order limit various HRA rights. The Committee refers Members of the Assembly to the Explanatory Statement. The comments that follow identify issues that were not canvassed in the Explanatory Statement.

In the first place, however, the Committee notes that the Explanatory Statement takes a very narrow view of the scope of the HRA right stated in subsection 18(1). This provision reads:

> (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

It is argued (at page 7) that "[c]ommentary on the International Covenant on Civil and Political Rights (the ICCPR) suggests that the right to liberty and security of person relates only to a very specific aspect of human liberty, [Murdoch J.L. (ed), 2005, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person*], namely the forceful detention of a person at a certain narrowly bounded location, such as a prison or other detention facility". With respect, this is not a strong argument. The body that interprets and applies the ICCPR—the Human Rights Committee—is not, and does not operate like a court. Its opinions, while they might persuade a Territory court by force of their reasoning, are not judicial precedents. Moreover, a "commentary" on the ICCPR has less standing.[1] The Communication of the Human Rights Committee cited deals with the scope of the concept of "liberty" in the ICCPR equivalent to HRA subsection 18(1), and has no bearing on the scope of "security of the person".

On the other hand, in *Marion's case*, Brennan J of the High Court of Australia reasoned that an infringement of the bodily integrity of a person violated the "security" of the person as that concept is used in the ICCPR right that is replicated in the Human Rights Act.[2] This approach also accords to the HRA right a broad and generous interpretation, which the Committee understands to be the preferred stance on interpretation. It is not persuaded that the narrow approach stated in the Explanatory Statement should be taken.

The Committee will now turn to issues arising out of the proposed scheme for an intensive corrections order.

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[1] There is moreover no reference to any particular passage in the book cited by the Explanatory Statement that supports the proposition stated.

[2] See the discussion of this case in this Report in relation to the Powers of Attorney Amendment Bill 2015.

1. It may assist a reader of the Act (as amended) if at subsection 11(2) there was a cross-reference to section 77.

2. Proposed section 78 of the Act spells out how a court must go about determining the suitability of an offender for an intensive corrections order. One matter that must be addressed is an assessment by the director-general about whether an intensive correction order is suitable for the offender. **The director-general** must address specified matters, which include "[the] living circumstances of the offender" (see subsection 78(2), section 79, and Table 79 item 7, column 2). Subsection 78(5) provides that the **court** "must consider any indicators of unsuitability mentioned in table 79, column 3 that are stated in the assessment to apply to the offender".

Thus, if the **director-general's** assessment addressed the "living circumstances of the offender", the **court** must **consider** "[whether a] member of the offender's household does not consent to living with the offender while the offender is serving intensive correction", and "[whether] someone with parental responsibility or guardianship for a person who is a member of the offender's household does not consent to the person living with the offender while the offender is serving intensive correction".

A consideration of the indicator is merely that, and the court may choose to make an order notwithstanding the lack of consent. This raises the issue whether the scheme provides sufficient protection to the persons (and in particular, the children) that live in the household where they have indicated (or whose parent or guardian has indicated) that they do not consent to this arrangement. It is arguable that their rights to security (HRA subsection 18(1)) and privacy (HRA 12), and the children's right to protection (HRA section 11), require that lack of consent is a bar to a court finding that the order is suitable for the offender where it is contemplated that they will live in the relevant household.

Arising out of these provisions is the broader question of whether merely asking for the consent of a member of a household, or a parent or guardian, has the potential to create difficulties for those persons within the immediate and larger family of the offender. It acknowledges that this a particularly difficult issue to resolve.

3. Proposed subsection 78(7) requires the court to "record reasons for its decision to make, or decline to make, an intensive correction order for the offender", but only where the court's decision is contrary to the recommendation of an intensive correction assessment by the director-general. The duty to give reasons is a hall-mark of the exercise of judicial power[3] and, if subsection 78(3) was not included, it would be expected that the court would without exception give reasons for its decision to make, or decline to make, an intensive correction order for the offender. There are reasons to think this would be desirable. Members of the public, and in particular the relevant victims, may wish to know why a person sentenced to up to four years imprisonment is not in prison. The reasons statement will also operate as guidance to the legal profession and to other courts. It is arguable that it would be preferable to delete subsection 78(3), and leave it to the courts to follow the usual practice. This would need to be made plain in the debate on the Bill, lest it be argued that deletion meant that it was intended that the court need not give reasons at all.

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

[3] For a full review of this principle, see J Bosland and J Gill, The principle of open justice and the judicial duty to give public reasons (2014) 38 *Melbourne University Law Review* 482 http://law.unimelb.edu.au/__data/assets/pdf_file/0010/1586989/382BoslandandGill2.pdf

HEALTH LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend the *Civil Law (Wrongs) Act 2002* to protect people who may be impaired by a recreational drug from civil litigation when administering Naloxone in an emergency situation; to repeal part 3A of the *Health Act 1993*; and to amend the *Health Records (Privacy and Access) Act 1997*, in particular to insert a statement of principle regarding the right of access to health records by children and young people.

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 EXTENSION OF THE GOOD SAMARITAN PRINCIPLE TO PERSONS AFFECTED BY RECREATIONAL DRUGS

Section 3 of the *Civil Law (Wrongs) Act 2002* "provides that a person who gives assistance to another person who is injured or in need of emergency medical assistance does not incur personal civil liability except for in certain circumstances", but this protection is lost if the person rendering assistance is "significantly affected by a recreational drug" (paragraph 5(2)(b)). Clause 4 of the Bill proposes to insert subsection 5(2A), so that, despite paragraph 5(2)(b), if a good samaritan administers the drug known as naloxone, honestly and without recklessness, to a person apparently suffering from an overdose of an opioid drug for the purpose of resuscitating the person, the protection under subsection (1) applies even if the good samaritan's capacity to exercise appropriate care and skill was, at the time of administering the drug, impaired by a recreational drug.

The Act defines "recreational drug" to mean a drug consumed voluntarily for non-medicinal purposes, and includes alcohol, and examples appended to proposed subsection 5(2A) instance heroin, methadone, and morphine.

The Explanatory Statement argues that the success of the harm minimization approach to illicit drug use might be adversely affected were the uptake of naloxone to be inhibited, and "[t]he perception of the risk of liability may be a disincentive for people to participate in the program and hence the need for the exception".

There is, however, no human rights analysis of this amendment. On the one hand, if the administration of naloxone in a particular instance is successful, the life and personal security of the drug affected person is enhanced. On the other, if, whether or not the administration of the drug is successful, there is the possibility that the person (the victim) will in some way be injured or even killed by the drug affected person administering the naloxone (the administrator). In these circumstances, the victim and/or others might wish to pursue civil liability action against the administrator, and ordinarily such an action might be successful.

Removing this right of action engages and limits a number of HRA rights and/or common law rights. These are:

- the right to privacy (HRA section 12), in that a victim would have an expectation that their personal space would not be invaded by a drug-affected administrator;
- the right to life, and to security of the person (HRA section 18), in that the victim's life is put in peril, or that their "security" in the sense of the bodily integrity is also put in peril;

- the right to bodily integrity, seen as a dimension of an HRA right or as a common law right;[4] and
- the common law right to property, including the right to compensation for deprivation of property, in that the right to sue for damages is a species of property.

The Committee recommends that the Explanatory Statement provide a statement in accordance with HRA section 28 that provides a justification for the limitation of these rights. The Committee acknowledges that the right to property is not a right protected by the HRA. It is however a right within the concept of "personal rights and liberties" as that phrase is used in the Committee's terms of reference, and it would assist the Assembly were a justification provided.

If the extinguishment of the victim's right of action is in the public interest, there is a question of whether some public fund should compensate the victim.

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

JUSTICE LEGISLATION AMENDMENT BILL 2015

This is a Bill to amend Territory laws to provide for the recognition of interstate parentage orders; provide flexibility in processes for change of name certificates; remove gender specific terms in the *Births, Deaths and Marriages Registration Act 1997* and *Parentage Act 2004*; provide for recognised details certificates, and provide for proof of identity cards to be issued.

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 REMOVAL OF GENDER SPECIFIC TERMS IN THE LAWS RELATING TO THE REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES

The Explanatory Statement states:

> The Bill allows for recognition of gender diverse parents while also acknowledging that the terms 'mother' and 'father' are important to many people and people wish to have them used on official documentation. The Bill replaces the term 'mother' with 'birth parent' and the term 'father' with 'other parent'. The Bill makes it clear people can choose to use 'mother' and 'father' on official documentation such as birth certificates if they choose.

In the first place, these changes would be made by amendment of the *Births, Deaths and Marriages Registration Act 1997* and the *Births, Deaths and Marriages Registration Regulation 1998*. There are a number of matters that deserve comment.

The replacement of the term "mother" with "birth parent"

Section 5 of the Act provides for the registration of births. It does not impose any duties on the person described in the section as the "mother", but uses that term in its statement of the duties of others. By clause 4, this term would be replaced by the term "birth parent". Clause 5 would add a subsection 5(8), to provide that "***birth parent***, of a child, means the person who gave birth to the child".

[4] See the discussion in this report in relation to the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015.

This change is carried through into the proposed amendments to sections 4 and 5 of the Births, Deaths and Marriages Registration Regulation; see clause 20 (in relation to section 4) and clauses 21 to 25 (in relation to section 5). In addition, the amendments to section 5 of the regulation, which amplify details of what must be notified under section 5 of the Act, provide that the term "father" be changed to "other parent (other than the birth parent)", and the term "male and deceased female" be changed to "children". However, proposed subsection 5(2) of the Regulation (see clause 26) would qualify the changes proposed to section 5 of the Regulation, by providing as follows:

(2) For subsection (1) (f) to (i)—

(a) the birth parent of a child may be described as the mother; and

(b) the other parent (other than the birth parent) may be described as the father.

The Committee notes that the other parent **cannot** be described as a mother.

The Committee also notes that there is no process prescribed as to who is responsible for making the decisions involved or as to any process to be followed. If no choice is made, the default position will be that the terms "birth parent" and "other parent" will be used. It is arguable that the person or persons who may wish to have the certificate record the terms "mother" and "father" must be given the opportunity for these terms to be used.

Arising out of these provisions is the broader question of whether the birth certificate should contain information about the biological history of the child.

The Bill proposes to amend other sections in the Regulation that relate to other aspects of the scheme in the Act in the same manner as the changes outlined above, although there is no equivalent to what is proposed by subsection 5(2).

The Committee acknowledges that some may see an issue arising from these provisions as to their incompatibility with some of the rights stated in the HRA and, in particular, with the right in section 11 (protection of the family and children). It does not express any view point on the question.

The Committee draws these matters to the attention of the Assembly and does not call for a response from the Minister.

In the second place, these changes would be made by amendment of the *Parentage Act 2004*.

Application for a recognised details certificate by a person (or by parents or guardians on behalf of a child) for a recognised details certificate.

Clause 12 proposes the insertion of a new part 4.2 in the Act, and contains provisions that parallel provisions in the existing part 4.

Clause 46 would substitute section 7 of the Parentage Act with a new section that would insert gender-neutral terms, and clause 48 would have the same operation in respect of section 11 of the Act. The Committee's terms of reference require it report on "the clauses of bills introduced into the Assembly". This phrase does not suggest that a clause should not be considered because its text is substantially a restatement of existing law. Less technically, an understanding of the content and consequences of human rights (and of the content and meaning of "personal rights and liberties" employed in the

Committee's terms of reference) changes over time and may warrant a re-examination of existing law where that is restated in a clause of a Bill. It should also be noted that a court called upon to give effect to the HRA in relation to a provision of an Act would attach no weight to the fact that the provision was a re-enactment of a previously existing provision of a law. The Committee considers it appropriate to raise rights issues that relate to the proposals to restate sections 7 and 11.[5]

The critical issue raised by sections 7 and 11 is what bearing they will have on the ability of a child to obtain information about their genetic ancestors. Section 11 is the most significant provision, and in *Scrutiny Report No 41* of the *5th Assembly*, the Committee provided two examples of its operation that would raise this issue. It said: [6]

> [Take the example of] where woman A, who is in a domestic partnership with woman B, undergoes, with the consent of B, a procedure that involved the use of semen from man X, (and which led to the birth of child C). [In this situation]
>
> - the effect of subsection 11(4) of the Bill would be that B was conclusively presumed to be a parent of C, and
>
> - the effect of subsection 11(5) of the Bill would be that X was conclusively presumed not to be a parent of C.
>
> Similarly, if the ovum used in the procedure was produced by another woman (say Q), Q is conclusively presumed not to be the mother of any child born as a result of the pregnancy: subsection 11(3).
>
> In these examples, the 'social parents' A and B are conclusively presumed to be parents, (and it should be noted that by section 14, a child cannot have more than 2 parents at any one time). On the other hand, those (X and/or Q) who are the 'genetic parents' of C cannot be her or his parents.

In both situations, the rights issue is whether section 11 would create difficulties for a child who wishes to gather biological information about themself to identify the man X or the woman Q.

A document issued by the ACT government's *Parent Link* recognises the significance of this kind of information. It states:

> Our life story begins with our biology and the characteristics we inherit. Knowing where we come from helps us to understand who we are. Knowing our medical history is also important. It means we may be able to take steps to prevent or get early help for some diseases that may be passed on in our genes, for example, some cancers or heart disease.
>
> ...
>
> There is also a small but real risk that when your child is an adult they could be sexual with someone they are related to. If both people know their background they can check whether they are related before this happens.[7]

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[5] The Committee considered the current provisions in *Scrutiny Report No 41* of the *5th Assembly*, in relation to the Parentage Bill 2004. The Government Response is in *Scrutiny Report No 46*.

[6] References to clauses have been replaced by references to the current sections of the Act.

[7] http://www.parentlink.act.gov.au/parenting-resources/parenting-guides/adult-issues/donor-conception

There are arguments based on human rights law principles that support the right of a child (whether as a child or as an adult) to obtain information about their genetic ancestors. In *Scrutiny Report No 41* it said:

> In *Rose v Secretary of State for Health* [2002] EWHC 1593 (Admin), the applicant sought information about the man who had donated the sperm that was fertilised in the body of her mother. ... .
>
> The judge described the case as one where the claimant was trying to obtain information about her biological father, something that went to the very heart of her identity, and to her make-up as a person (above, para [33]). The claim was based on Article 8 of the European Convention on Human Rights, which states:
>
> > 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> >
> > 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.
>
> The claim was that the state authorities were obliged, in order to discharge positive duties under Article 8:
>
> > i) to collect and make available to A.I.D. offspring and their parents certain nonidentifying information about the donor including blood type, medical history, social and family background, religion, skills and interests, occupation, reasons for donation, willingness to be approached for identification and willingness to provide updating information; and
> >
> > ii) to establish a voluntary mechanism to facilitate the exchange of information and contact between willing A.I.D. offspring and willing donors, such as a voluntary contact register.

The court held that "[r]espect for private and family life has been interpreted by the European Court to incorporate the concept of personal identity (see *Gaskin*). Everyone should be able to establish details of his identity as a human being (*Johnston v Ireland* (1987) 9 EHRR 303 para 55). That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child. There is in my judgment no great leap in construing Article 8 in this way. It seems to me to fall naturally into line with the existing jurisprudence of the European Court.".

Section 11 of the HRA states a right to protection of the family. A right to obtain genetic information might also be based on rights stated in articles 6 and 8 the Convention on the Rights of the Child:

> ***Article 6***
>
> 1. States Parties recognize that every child has the inherent right to life.
>
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Substituted sections 7 and 11 do not have anything to say about the ability of a child (whether as a child, or later in life as an adult) to ascertain from government records the identity of their biological parents or their genetic identity. They may however operate to make it more difficult for the child to ascertain these matters. A Member of the Assembly, or a member of the public who may wish to communicate their views to an MLA, may wish to be aware of whether the sections might have this effect.

The Committee recommends that the Minister respond and advise the Assembly:

- **whether Territory law currently provides a means for a child to ascertain the identity of their biological parents (such as the man X and the woman Q in the examples given above); and**
- **whether proposed sections 7 and 11 would create any difficulty for a child to ascertain identity.**

POWERS OF ATTORNEY AMENDMENT BILL 2015

This is a Bill to amend the *Powers of Attorney Act 2006*, the *Guardianship and Management of Property Act 1991* and the *Medical Treatment (Health Directions) Act 2006* in a number of ways, with the major reform being to allow a substitute decision-maker to consent to a person with impaired decision-making capacity participating in potentially beneficial medical research.

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*

A person (the principal) may execute a power of attorney whereby the person authorises another (the attorney) "to make decisions and do particular other things for the" principal (section 6 of the Act). The power of attorney may be "general" or it may be expressed to be an "enduring power of attorney". A critical feature of the latter is that the powers conferred do not cease upon the principal losing decision-making capacity (sections 7 and 8).

An enduring power of attorney may be expressed so as to permit the attorney to make decisions in relation to "health care matters", but by paragraph 35(b), a principal cannot "authorise the attorney to exercise power in relation to special health care matters". The scope of this concept is stated in subsection 37(1), and includes "(d) participation in medical research or experimental health care". It is important to note that a person who, under the current law, granted this power to their attorney may have appreciated that the power was limited in this way.

By clause 12 of the Bill, paragraph 37(1)(d) would be repealed. The purpose of this change is stated in the Explanatory Statement as being "to remove barriers to people with impaired decision-making capacity participating in medical research". This would be achieved by permitting the attorney to make this decision without the consent of the principal.

By the insertion of a new part 4.3A (clause 13) the Bill proposes a new category of power of attorney, being that of the "medical research power of attorney" (proposed subsection 41A(1)). There are two ways this kind of power could come into existence:

1. upon the commencement of the amended Act, any existing power of attorney made before commencement that authorised an attorney to exercise power in relation to a health care matter, would in effect be taken to be a medical research power of attorney (see paragraph (b) of the definition of this concept in proposed subsection 41A(1); or
2. by an enduring power of attorney made after part 4.3A commences expressly authorising exercise of power in relation to a medical research matter.

The key purpose of new part 4.3A is "to allow a substitute decision-maker to consent to a person with impaired decision-making capacity participating in potentially beneficial medical research" (Explanatory Statement at 5).

The key human rights issues are:

1. Is it compatible with human rights that by a power of attorney that attorney should be empowered to make a decision that would subject the principal—who by definition does not have decision-making capacity and cannot consent—to participation in medical research?
2. If so, are the safeguards proposed in the Bill adequate to protect the interests of the principal?
3. If so, is there justification for the proposal to in effect deem any power of attorney existing at the commencement of this new scheme that authorised decisions in relation to health care to now include authorisation to exercise power in relation to a medical research matter?

Issue 1

The Explanatory Statement sees the human rights issue as one arising under HRA subsection 10(2), which provides that "[n]o-one may be subjected to medical or scientific experimentation or treatment without his or her free consent". It is accepted that the Bill "limits a person's right to consent to medical treatment under section 10(2) by allowing an enduring attorney or guardian (and in limited circumstances, a health attorney) to make a decision about a person with impaired decision-making capacity participating in medical research". A justification in terms of HRA section 28 is stated at pages 4 to 6, to which the Committee refers Members of the Assembly.

There is a broader human rights perspective, based on common law rights and on the right to "security" stated in HRA subsection 18(1). The common law has been developed by the courts and would influence how a court might approach the HRA compatibility question were it to be raised. (In any event, the common law falls to be considered in the application of the Committee's term of reference to address whether a clause of a Bill is an undue trespass on any personal rights and liberties.)

In *Department of Health and Community Services v JWB and SMB*[8] (*Marion's case*), a decision of the High Court, is a leading common law authority. It concerned a question of whether a 14 year old intellectually handicapped child should be sterilised without her consent. In their reasoning, the

[8] [1992] HCA 15.

majority relied in part upon the “right to a fundamental right to personal inviolability existing in the common law, a right which underscores the principles of assault, both criminal and civil, as well as on the practical exigencies accompanying this kind of decision which have been discussed”.[9]

Justice Brennan was more expansive, and pointed to recognition of the right in human rights instruments.

> 6. Blackstone declared the right to personal security to be an absolute, or individual, right vested in each person by "the immutable laws of nature" [Blackstone, *Commentaries on the laws of England* 17th ed. (1830)], vol 1, pp 124, 129; vol 3, p 119. Blackstone's reason for the rule which forbids any form of molestation, namely, that "every man's person (is) sacred", points to the value which underlies and informs the law: each person has a unique dignity which the law respects and which it will protect. Human dignity is a value common to our municipal law and to international instruments relating to human rights. The inherent dignity of all members of the human family is commonly proclaimed in the preambles to international instruments relating to human rights: see the United Nations Charter, the *International Covenant on Civil and Political Rights* (which declares "the right to ... security of person": Art.9), the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*. The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually able and of the intellectually disabled. Thus municipal law satisfies the requirement of the first paragraph of the 1971 United Nations *Declaration on the Rights of Mentally Retarded Persons* which reads:
>
> > "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings."
>
> Our law admits of no discrimination against the weak and disadvantaged in their human dignity. Intellectual disability justifies no impairment of human dignity, no invasion of the right to personal integrity.
>
> 7. Although the law's respect for the unique dignity of every person is the same, the protection of physical integrity which is required to preserve the dignity of one person may change from time to time and it may differ from the protection of physical integrity required to preserve the dignity of another. Differing measures of protection are required according to the physical and mental capacities of individuals at particular times: ... .

The Committee acknowledges that by an enduring power of attorney made after the amended Act commences a principal must authorise the attorney to consent to the principal’s participating in medical research.

There is nevertheless an issue whether the rights stated at common law and in the HRA are so strong that a principal should not (as is currently the law) have the ability to provide consent in anticipation that they might suffer from impaired decision-making at later point in time.

The Committee draws this matter to the attention of the Assembly.

[9] Per Mason CJ, Dawson, Toohey and Gaudron JJ at paragraph 55.

Issue 2

For a Member of the Assembly, the answer may turn on the nature of the safeguards that surround and constrain the making of a decision by the attorney to consent. This issue is taken up in the Explanatory Statement at page 5, to which the Committee refers Members of the Assembly.

Issue 3

Upon the commencement of the amended Act, any existing power of attorney made before commencement that authorised an attorney to exercise power in relation to a health care matter, would in effect be taken to be a medical research power of attorney (see paragraph (b) of the definition of this concept in proposed subsection 41A(1). This is intended to deal with the fact that at any time prior to the commencement of these amendments, a principal was prohibited from authorising an attorney to consent to the principal entering a program of medical research while lacking decision-making capacity.

The Bill assumes that the principal would, had they had power to do so, have wished to empower their attorney in this way. This is a contestable assumption. There may be some principals who noted that prohibition and were satisfied with the situation. It is the case, as the Explanatory Statement notes, that the principal could have made a health direction prohibiting consent to medical research, but it would have been unnecessary for them to do so.

The Explanatory Statement offers a justification for this proposal to deem a pre-amendment power of attorney in relation to health care matters to be a medical research power of attorney.

It is argued that treating a principal who made a power of attorney with a health care direction prior to the amendments in the same way as a principal who after amendment made an explicit authorisation in relation to medical research matters promotes equality under the law; see the Explanatory Statement at pages 2 and 4. On the other hand, it might be said that the two situations are so different that to treat them differently is warranted.

The argument is put somewhat differently at page 9, where, in relation to a pre-amendment situation, it is said that:

> it is considered appropriate to extend the trust provided to the enduring attorney to make decisions about health care matters for the principal to medical research matters, in order allow those people who do not or cannot make a power of attorney for medical research matters access to potentially beneficial medical research.

On the other hand, it must be noted that the situation under consideration is one where the principal may have been aware that they were not authorising medical research at a time when they lacked decision-making capacity and consciously welcomed this limitation. The trust that was vested in the attorney would be violated were the attorney, post-amendment, to authorise medical research. There are dangers in taking a view that the law may authorise medical research intervention on a person on the basis that this is thought to be in that person's interests. (It should also be noted that the authorised research need not necessarily be anticipated to be in the benefit of the principal. There is nothing in the definition of "medical research" (see proposed subsection 41A(1)) that requires any such anticipation, and that none be required is made plainer by paragraph 41D(2)(c)(ii), where there is reference to "the principal or others").

The Explanatory Statement argues that the scheme to be introduced would confer a financial benefit to the Territory, in that researchers would be more likely to stay in or come to the Territory; see the Explanatory Statement at page 3. It is very difficult to quantify this benefit, and there remains a question as to how any benefit is to be weighed against a limitation of a human right. (The Committee does not suggest that the Explanatory Statement meant to have these benefits weighed in this way.)

There is a question whether treating a health care direction made pre-commencement of the proposed amendments as if it conferred authority in the attorney to authorise a medical research intervention is a justifiable limitation of the right of the principal stated in subsection 10(2) of the Human Rights Act.

It may be possible to incorporate in the legislation a requirement that any existing health care direction is not to be taken to include a medical research direction unless the principal to the power of attorney has given explicit consent for this to be the result.

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

THE ROLE OF THE ACT CIVIL AND ADMINISTRATIVE TRIBUNAL (ACAT)

The imposition on the ACAT of a duty to provide non-binding advice to an attorney

Proposed subsection 41D(2) (clause 13) closely structures the exercise by an attorney of a power to authorise medical research (and, as such, is commended). Subsection 41D(3) permits (but does not compel) the attorney to apply to the ACAT for an opinion or advice "to assist the attorney to decide whether to give consent under subsection (2)". The ACAT must give its opinion or advice.

There is nothing said in the Explanatory Statement as to why it is thought that the ACAT has any particular expertise that might be of assistance. The Explanatory Statement (at pages 2 to 3) offers a justification for conferring a limited role on the ACAT (that is, of giving an opinion as against its usual function of making a decision) that recognises the undesirability of ACAT involvement.

> [Proposed subsection 41D(3)] requires the substitute decision-maker to decide about a person's participation in medical research with only limited involvement by the ACAT. An alternative approach would have been to require the ACAT to decide about a person's participation in medical research. This approach was not taken as it would have:
>
> - adversely impacted on the ACAT's workload, which is unjustified when a properly appointed decision-maker, often with a personal proximity to the principal, is available to make these decisions;
> - had the potentially perverse outcome of replacing the appointed decision-maker with an unknown person or panel of people; and
> - potentially undermined the aim of facilitating human involvement in ethically approved and potentially beneficial medical research, as it may have had the effect of dissuading decision-makers from pursuing medical research matters if they were required to apply to ACAT for the consent.

The issue the Committee raises is whether it is appropriate to confer on the ACAT a function—that is, of giving an advisory opinion—that is inconsistent with the role it plays when it exercises judicial power (such as where it determines issues of contractual or tortious liability). There is no constitutional barrier to the ACAT exercising both judicial and non-judicial power, but there is a point conferring non-judicial power is inconsistent with the joint exercise of judicial power on the basis that conferment of the non-judicial power undermines the independence of the court.[10] This is particularly so where the non-judicial power involves the mandatory provision of non-binding advice to an executive body.[11]

Another consideration is that where an advisory opinion is given, another panel of the ACAT that was called upon (under section 41G) to decide whether to make a decision in place of that made by the attorney might feel embarrassed by the earlier advisory opinion.

The issue is whether it is desirable to impose on the ACAT a duty to provide non-binding advice to an attorney. (This issue also arises in respect of proposed subsection 41C(3)).

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

The conferment on the ACAT of jurisdiction to review a decision of an attorney to authorise medical research

Once an attorney has made a decision under proposed subsection 41C(3) or proposed subsection 41D(2), then by proposed subsection 41G:

> An interested person for a principal may apply to the ACAT for review of the decision of the attorney to consent, or refuse to consent, to the principal participating in low-risk research under section 41C or medical research under section 41D.

The ACAT would exercise its usual powers to make a decision in place of that of the attorney, and could not attach any weight to the fact that the attorney had made their decision in a particular way; nor, it would seem, to the fact that the ACAT had previously given an advisory opinion to the attorney that was consistent with the attorney's decision.

It should also be noted that the Explanatory Statement rejected an approach that would have required the ACAT to make the initial decision (instead of the attorney) because, among other things, this would have "had the potentially perverse outcome of replacing the appointed decision-maker with an unknown person or panel of people". This reasoning would appear to have as much force to an approach that places the ACAT in a position where it might re-make the initial decision by the attorney.

Do any provisions of the Bill inappropriately delegate legislative powers?—paragraph (3)(d) of the terms of reference

The term "interested person" in proposed subsection 41G is not defined, and this is left as a matter to be "prescribed by regulation" (that is, by the Minister). There is an issue as to whether a matter of this significance should be provided for by the Act.

[10] This is a reference to the doctrine created by the High Court in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24.

[11] See *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs ("Hindmarsh Island Bridge case")* [1996] HCA 18.

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

TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2015

This is a Bill to amend the *Terrorism (Extraordinary Temporary Powers) Act 2006* to extend its operation for a further five years (to 19 November 2021) and requires a further review of the scheme after 13 years of operation.

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 Act allows a court to make a preventative detention order if it is satisfied that a terrorist act is happening or will happen sometime within the next 14 days, and that the order will substantially assist in preventing the terrorist act or reducing its impact or both. It notes that a very wide range of rights stated in the HRA are limited by the Act, and asserts without analysis that these limitations are "reasonable and proportionate in the context of responding to the threat of terrorism and the importance of achieving consistency within the national counter terrorism framework", thereby referring implicitly to HRA section 28. There is a slightly more expansive justification for the limitation of HRA section 13 (freedom of movement), and a little more justification for the limitation of HRA section 18 (the right to liberty and security of the person).

The Committee notes, however, that there was a very full examination of these issues by the Committee in *Scrutiny Report No 25* of the *6th Assembly* in relation to the Terrorism (Extraordinary Temporary Powers) Bill 2006. The extensive Government response is in *Scrutiny Report No 26* of the *6th Assembly*.

The Committee refers members of the Assembly to these documents.

WORKERS COMPENSATION AMENDMENT BILL 2015

This is a Bill to amend the *Workers' Compensation Act 1951* to require certain types of employer to appoint return to work coordinators, and to improve the regulators capacity to fulfil its employer focused compliance and enforcement role, by aligning inspector right of entry to workplace powers with the powers already available to the inspectorate under the related *Work Health and Safety Act 2011*.

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*

STRICT LIABILITY OFFENCES

The Explanatory Statement notes that "[t]wo new strict liability offences have also been introduced in Clause 4 to ensure that an employer appoints an appropriately trained return to work co-ordinator and provides the necessary facilities and assistance to allow them to perform their role". These offences stated in proposed subsection 103C(3) and proposed paragraph 103E(3).

The Explanatory Statement approaches the human rights issue by stating that these provisions have the potential to trespass on the presumption of innocence in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR). This is an odd approach. The ICCPR has no legal force in the Territory, and many of its provisions—including the presumption of innocence (see HRA subsection 22(2))—are replicated in the HRA. It would be more informative were the Explanatory Statement to refer to the Act.

The justification offered for the creation of a strict liability offence is of a kind accepted by the Committee as justifying a limitation of this right. In relation to proposed paragraph 103E(3), however, there are two additional matters to consider.

The employer's obligation in subsection 103E(1) is stated in a way that, in some respects, will require the exercise of judgement. Under paragraph 103E(1)(a), the employer will need to adjudge how a court might understand what facilities were "reasonably necessary" and, under paragraph 103E(1)(b), whether a person has "satisfactorily completed training" or "has experience" of a certain kind. Given these elements of the offence, there is a case to include a specific defence allowing the employer to prove that they took reasonable steps to comply with their duties.

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

The second matter is whether a Ministerial determination under paragraph 103E(1)(b)(ii), and Ministerial guidelines under paragraph 103E(1)(c) should be disallowable, rather than simply notifiable. These documents will in effect determine the elements of a criminal offence. It is arguable that the Assembly should have the opportunity to review the creation or elaboration of the content of a criminal offence.

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

LIMITATIONS OF THE RIGHT TO PRIVACY

As the Explanatory Statement notes and explains, several provisions in the Bill engage and limit the right to privacy stated in HRA section 12. (The Explanatory Statement refers however to article 17 of the ICCPR; the Committee has commented on this approach above.) The Committee refers Members of the Assembly to the discussion in the Explanatory Statement at pages 1 to 4. The Committee notes some other provisions that might be considered as limiting this right.

1. The register of return-to-work coordinators must include information about a person's "workplace address". This limitation is not expressed in relation to the person's telephone number or email address, and its absence might suggest that no such limitation is intended. The issue is whether this kind of limitation should be provided for expressly.

2. Under proposed subsection 191(1), an inspector may at any time enter premises that are, or that the inspector "reasonably suspects" are, a workplace. This contrasts to other powers of an inspector that may be exercised only where this person "believes on reasonable grounds" something (paragraph 192A(1)(d)(iii)), or "reasonably believes" something (paragraph 192B(c)(ii)). There is a material difference between holding a "suspicion" and holding a "belief", the latter being a higher threshold. There is no apparent reason for the different treatment.

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

PROPOSED GOVERNMENT AMENDMENTS

The Committee has considered proposed Government amendments to the Planning, Building and Environment Legislation Amendment Bill 2015 (No. 2). The Explanatory Statement contains a fulsome acknowledgement that the amendments will have the effect of enacting a law with retrospective effect, and that the Committee has considered that this is generally undesirable. With full reference to past reports of the Committee, the Explanatory Statement offers a justification, to which the Committee refers the Assembly.

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-286 being the Food (Regulated events) Declaration 2015 (No. 2) made under section 91 of the *Food Act 2001* **revokes DI2015-245 and declares specified events to be regulated events for the purposes of the Act.**

Disallowable Instrument DI2015-287 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2015 (No. 1) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **declares Eyre Kingston Pty Ltd to be a Parking Authority for the area block 50 section 19 in the suburb of Kingston.**

Disallowable Instrument DI2015-288 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2015 (No. 2) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **revokes DI2015-41 and appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2015-289 being the Road Transport (General) Non-Refundable Fees Determination 2015 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2000-313 and determines that specified fees, charges and other amounts are non-refundable.**

Disallowable Instrument DI2015-290 being the Legal Profession (Volunteer Solicitor Practising Fees) Determination 2015 made under section 84 of the *Legal Profession Act 2006* **determines fees payable for the grant of a restricted or unrestricted volunteer practising certificate.**

Disallowable Instrument DI2015-291 being the Radiation Protection (Fees) Determination 2015 (No. 1) made under section 120 of the *Radiation Protection Act 2006* **revokes DI2014-298 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-292 being the Food (Fees) Determination 2015 (No. 1) made under section 150 of the *Food Act 2001* **revokes DI2014-297 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-293 being the Public Health (Fees) Determination 2015 (No. 1) made under section 137 of the *Public Health Act 1997* **revokes DI2014-299 and determines fees payable for the purposes of the act.**

Disallowable Instrument DI2015-294 being the Health Records (Privacy and Access) (Fees) Determination 2015 (No. 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* **revokes DI2014-301 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-295 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2015 (No. 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* **revokes DI2014-300 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-296 being the Public Trustee (Investment Board) Appointment 2015 (No. 1) made under section 48 of the *Public Trustee Act 1985* **appoints a specified person as a member of the Public Trustee Investment Board.**

Disallowable Instrument DI2015-297 being the Road Transport (General) (Public Passenger Services Licence and Accreditation Fees) Determination 2015 made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2013-218 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2015-298 being the Cemeteries and Crematoria (Perpetual Care Trust Percentage and Perpetual Care Trust Reserve Percentage) Determination 2015 (No. 2) made under section 11 of the *Cemeteries and Crematoria Act 2003* **revokes DI2015-220 and determines the perpetual care trust reserve percentages payable to the Public Trustee by the operator of a specified cemetery or crematorium.**

Disallowable Instrument DI2015-307 being the Taxation Administration (Eligible Impacted Properties—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2015 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **establishes a duty concession scheme for eligible impacted properties.**

Disallowable Instrument DI2015-308 being the Planning and Development (Land Rent Payout) Policy Direction 2015 (No. 1) made under sub section 272C(1) of the *Planning and Development Act 2007* **repeals DI2009-162 and enables former "Mr Fluffy" home owners and those who have owned properties impacted by a "Mr Fluffy" home to take up a land rent lease.**

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2015-32 being the Children and Young People Amendment Regulation 2015 (No. 1) made under the *Children and Young People Act 2008* **prescribes what care and protections purposes are that are additional to out-of-home care services.**

Subordinate Law SL2015-33 being the Road Transport Legislation Amendment Regulation 2015 (No. 1) made under the *Road Transport (General) Act 1999* **and** *Road Transport (Safety and Traffic Management) Act 1999* **modifies the operation of the Australia Road Rules to provide for minimum overtaking distances when passing the rider of a bicycle and to allow riders to remain on their bicycles while crossing road crossings.**

Subordinate Law SL2015-34 being the Road Transport (Public Passenger Services) (Exemptions) Amendment Regulation 2015 (No. 1) made under the *Road Transport (Public Passenger Services) Act 2001* **permits the operation of rideshare and third-party booking services for taxis.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Speaker, dated 11 November 2015, in relation to comments made in Scrutiny Report 39 concerning Disallowable Instrument DI2015-281—Electoral (Electoral Commission Member) Appointment 2015 (attached).
- The Chief Minister, dated 16 November 2015, in relation to comments made in Scrutiny Report 39, concerning the Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Bill 2015 (attached).
- The Minister for Territory and Municipal Services, dated 17 November 2015, in relation to comments made in Scrutiny Report 39 concerning the Animal Diseases (Beekeeping) Amendment Bill 2015 (attached).
- The Attorney-General, dated 27 November 2015, in relation to comments made in Scrutiny Report 39 concerning Disallowable Instrument DI2015-283—Victims of Crime (Victims Advisory Board) Appointment 2015 (No. 1) (attached).
- The Minister for Children and Young People, dated 7 December 2015, in relation to comments made in Scrutiny Report 39 concerning Disallowable Instrument DI2015-284—Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015 (No. 3) (attached).

The Committee wishes to thank the Speaker, the Chief Minister, the Minister for Territory and Municipal Services, the Attorney-General, and the Minister for Children and Young People for their responses.

Steve Doszpot MLA
Chair

2 February 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 39, dated 10 November 2015

Disallowable Instrument DI2015-268 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2015 (No. 1), including a regulatory impact statement

Disallowable Instrument DI2015-269 - Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2015 (No. 1)

Disallowable Instrument DI2015-270 - Energy Efficiency (Cost of Living) Improvement (Emissions Multiplier) Determination 2015 (No. 1)

Disallowable Instrument DI2015-271 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2015 (No. 1)

Disallowable Instrument DI2015-272 - Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2015 (No. 1)

Subordinate Law SL2015-30 - Planning and Development Amendment Regulation 2015 (No. 1), including a regulatory impact statement

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

Dear Mr Doszpot

I refer to *Scrutiny Report 39* of the Standing Committee on Justice and Community Safety, in which the Committee commented on a recent appointment to the ACT Electoral Commission, notified by Disallowable Instrument DI2015-281.

I am advised that the appointee is not an ACT public servant.

I have noted your comments regarding the technical and stylistic standards expected by the Committee for disallowable instruments.

However, it appears that the committee has made an incorrect assumption in its critical comments on the instrument of appointment, namely that the *Legislation Act 2001*, division 19.3.3 applies to the instrument.

The committee appears to have overlooked the fact that the Speaker made the appointment instrument. The Speaker is not a Minister for the purposes of the Legislation Act, and therefore the division does not apply to the instrument.

Further, I note the *Electoral Act* 1992, s12(5), states that an instrument of appointment made by the Speaker under s12 of that Act is a disallowable instrument. Thus, the instrument is disallowable regardless of whether the appointee is a public servant or not. Section 12(5) is quite specific about the instrument's disallowable character.

There is no qualification by way of a signpost or other reference in the Electoral Act that Division 19.3.3 of the *Legislation Act 2001* applies in relation to the notification instrument. Indeed it would seem counter-productive to read down the specifics of the Electoral Act in favour of the generality of the Legislation Act.

Yours sincerely

Vicki Dunne MLA

November 2015

Andrew Barr MLA

CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR URBAN RENEWAL
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I am writing to respond to Scrutiny Report 39 of the Standing Committee on Justice and Community Safety in its Legislative Scrutiny Role ('the Committee'), which examined the Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Bill 2015 ('the Bill').

I thank the Committee for their comments and provide the following in response.

The compensation issue

The Committee has identified as an issue whether the reforms in the Bill might engage an enforceable right to compensation for loss of a property right. As noted in Scrutiny Report 39, this involves consideration of whether the interests of perpetual taxi licence holders constitute a property right, in the legal sense, and whether or to what extent any limitation on that right might be permissible, having regard to the fundamental right to ownership and peaceful enjoyment of property at common law.

As the Committee has observed, there is a view that the interests of perpetual taxi licence holders, created or affected by the regulatory framework, do not constitute property rights and that, accordingly, the reforms do not engage this right. The Government shares that view and notes that it is consistent with legal authority. Neither Scrutiny Report 39, nor the report of the Productivity Commission on which the comments are based, comes to a contrary view in light of that legal authority.

Even if that were not so, the Government considers that the proposed reforms would constitute reasonable limitations on any property rights perpetual taxi licence holders may have on the basis that they serve legitimate objectives within the scope of the regulatory scheme. The reforms would not 'acquire' or 'expropriate' such property but would promote the objectives of efficiency and competition in the area of public passenger services.

A Legislative Assembly resolution of 2 October 2015 agreed with the Government approach to perpetual taxi licence holders, namely to review how the introduction of ridesharing has influenced the price of perpetual taxi licences 24 months after the commencement of rideshare in the ACT.

The power of a court that has found a corporation that is a transport booking service guilty of certain offences to make a range of orders that require the corporation to take action—proposed section 36I (clause 10)

The Committee has also raised matters with the operation of provisions for the making of court orders under section 36I of the Bill. Section 36I applies where a court finds a corporation guilty of key provisions concerning compliance with legal requirements by transport booking services. Under the section, a court can order action to publicise information related to the offence or to carry out a project for public benefit.

The operation and requirements of this proposed section are generally consistent with the operation of section 49E of the *Crimes Act 1900*, with the exception of references to penalty units under subsection 36I(4) and inclusion of additional specified circumstances to take into account under subsection 36I(5).

The Committee has asked whether the matters specified in subsection 36I(5) to be taken into account by the court in making an order are an exhaustive statement of the matters relevant to the exercise of the court's discretion to make an order under subsection 36I(2). The Government's view is that the matters specified under subsection 36I(5) are not intended to be an exhaustive statement of matters for the purposes of subsection 36I(2). Accordingly, there is nothing in the language of the subsection to indicate that other matters must not be considered.

The Committee also commented on the drafting and operation of subsection 36I(3) as to whether the court's discretion to state a period in which the action, thing or project must be carried out is to be based on 'reasonable grounds'. The Government refers to the presumption that a court will act reasonably. As such, the provision does not need to expressly state that the court's decision must be made on reasonable grounds. However, many provisions include reasonable grounds for emphasis.

The Committee has suggested that the limits on orders under paragraph 36I(2)(c) are ambiguous. Paragraph 36I(2)(c) allows a court to make an order that a corporation guilty of an offence must carry out a stated project for the public benefit. As this wording aligns with the existing section 49E of the Crimes Act and as this power has a strong safeguard, namely that it is a power invested only in a court, the Government will retain the provision with its current drafting. However, the ACT Parliamentary Counsel's Office will review the drafting of these two clauses and any like provisions to see whether they might be drafted differently or amended in future legislative amendments.

As to the extent of powers conferred under section 36I, the transitions involved in the reform of the on-demand public transport are significant and the Government has determined that it needs the flexibility in approach to support both innovation in the industry and compliance with regulatory requirements imposed. The nature of new operators entering the industry may vary significantly from that has previously existed in the Territory. The Government intended to avail itself of the opportunity to act in the interests in the community by whichever means are best suited to achieve the desired outcome. The powers to make orders under section 36I are as mentioned above subject to the strong safeguard that they are invested in a court. All of the principles that relate to proper exercise of judicial power are applicable. Given that fundamental issues of public safety are at stake the breadth of these powers is considered appropriate. Accordingly, the Government does not intend to confine the powers proposed under section 36I of the Bill.

I trust this response addresses the Committee's comments in relation to the Bill. I thank the Committee again for its comments.

Yours sincerely

Andrew Barr MLA
Chief Minister

Shane Rattenbury MLA

MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR JUSTICE
MINISTER FOR SPORT AND RECREATION
MINISTER ASSISTING THE CHIEF MINISTER ON TRANSPORT REFORM

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I write in response to the Scrutiny of Bills Report 39 of 10 November 2015 which provided comment on the Animal Diseases (Beekeeping) Amendment Bill 2015.

I thank the Committee for its comments specifically in reference to the reversal of the burden of proof as provided by subsection 62B(2) of the Bill. As suggested by the Committee, the explanatory statement for the Bill has been revised and now correctly characterises the burden as a legal burden. The reference note under subsection 62B(2) of the Bill will also be corrected on republication.

I trust that this addresses the issue identified by the Committee.

Yours sincerely

Shane Rattenbury MLA
Minister for Territory and Municipal Services

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0005 Fax: (02) 6205 0007 Email: rattenbury@act.gov.au
Facebook: shanerattenburymla Twitter: @ShaneRattenbury

CANBERRA

Simon Corbell MLA

DEPUTY CHIEF MINISTER

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

MEMBER FOR MOLONGLO

Mr Steve Doszpot MLA (Chair)
Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Doszpot

I am writing to you about the Scrutiny Committee's comments on Disallowable Instrument DI2015-283 being the Victims of Crime (Victims Advisory Board) Appointment 2015 (No. 1) made under section 22D of the *Victims of Crime Act 1994*. This instrument appoints a specified person as the lawyer member of the Victims Advisory Board.

The Committee noted that in the explanatory statement provided, the words "the person appointed is not a public servant" were not included and seeks confirmation that this is in fact the case. I can confirm that Ms Katie McCann is not a public servant and therefore the appointment was appropriately effected by disallowable instrument.

The Committee's comments about the utility of including this information in explanatory statements has also been noted.

I trust this is of assistance.

Yours sincerely

Simon Corbell MLA
Attorney-General

ACT LEGISLATIVE ASSEMBLY

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

CANBERRA

Mick Gentleman MLA

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

MEMBER FOR BRINDABELLA

Mr Steve Doszpot MLA
Chair, Scrutiny Committee on Justice and Community Safety
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Doszpot

Thank you for providing Scrutiny Report No.39 and the Standing Committee on Justice and Community Safety's (the Committee) comments in relation to the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2015 (No. 3), DI 2015-255.

You have requested an explanation of the changes applied to the Guidelines and the reason for these requiring to be notified multiple times within a five month period.

The Guidelines have been updated three times in the past five months due to increases in the numbers of residential care properties required. These increases support the ACT to move to a therapeutic approach and a system of having smaller numbers of young people residing in each property.

The amendments to the Guidelines during 2015 increased the number of residential care properties the Official Visitor is able to visit. For example, in June 2015 the residential care properties increased from one to 16.

The decision to notify the additional properties as 'approved places of care' is to ensure Official Visitors are able to visit and provide young people in residential care with an independent person to speak with. The Official Visitors also increases the scrutiny of services delivered to vulnerable young people. I draw to the Committee's attention the fact the Guidelines may need to be regularly updated should additional 'approved places of care' be required to allow the Official Visitors to visit these properties and provide the appropriate oversight required in residential care.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0218 Fax: (02) 6205 0368 Email: GENTLEMAN@act.gov.au
Twitter: @GENTLEMANMick Facebook: www.facebook.com/MickGentleman

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Accordingly, future Explanatory Statements will be drafted to identify when there has only been a change in the number of residential care properties.

Once again, I thank the Committee for its comments.

Yours sincerely

Mick Gentleman MLA
Minister for Children and Young People
December 2015