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

SCRUTINY REPORT 17

29 APRIL 2014

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Mick Gentleman MLA (Deputy Chair)

Ms Yvette Berry 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	max.kiermaier@parliament.act.gov.au
Website	www.parliament.act.gov.au

ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

(a) unduly trespass on personal rights and liberties;

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

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

(d) inappropriately delegate legislative powers; or

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

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

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

TABLE OF CONTENTS

BILLS

BILLS—NO COMMENT

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

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Aboriginal and Torres Strait Islander Elected Body Act 2008* to permit the Aboriginal and Torres Strait Islander Elected Body election polling to commence on the first day of NAIDOC celebrations in the ACT.

INDEPENDENT COMPETITION AND REGULATORY COMMISSION (WATER AND SEWERAGE PRICE DIRECTION) BILL 2014

This is a Bill for an Act to confirm the validity of Terms of Reference of the inquiry by the Independent Competition and Regulatory Commission that led to the Commission's *Price Direction—Regulated Water and Sewerage Services 1 July 2013 to 30 June 2019*.

OFFICERS OF THE ASSEMBLY LEGISLATION AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Auditor-General Act 1996* and the *Financial Management Act 1996* in ways that relate primarily to the process for the recommended budget for the Auditor-General and the harmonisation of this process to ensure that it is the same across each of the three Officers of the Assembly.

PLANNING AND DEVELOPMENT (EXTENSION OF TIME) AMENDMENT BILL 2014

This is a Bill for an Act to amend the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008* in relation to provisions dealing with extension of time to complete works authorised by a development approval.

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2014

This is a Bill for an Act to amend various laws dealing with planning, building and the environment in ways that make minor policy changes, or of a minor or technical nature.

STATUTE LAW AMENDMENT BILL 2014

This is a Bill for an Act to amend various laws of the Territory for statute law revision purposes only.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2014-21 being the Public Place Names (Campbell) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of new roads in the Division of Campbell.**

Disallowable Instrument DI2014-22 being the ACT Teacher Quality Institute (Code of Practice) Approval 2014 (No. 1) made under section 59 of the *ACT Teacher Quality Institute Act 2010* **approves the code of professional practice and conduct for teachers.**

Disallowable Instrument DI2014-23 being the Animal Welfare (Humane Shooting of Kangaroos and Wallabies) Code of Practice 2014 (No. 1) made under section 22 of the *Animal Welfare Act 1992* **approves the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-Commercial Purposes as the Code for the ACT.**

Disallowable Instrument DI2014-24 being the Road Transport (General) Route Assessment Fees Determination 2014 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **replaces DI2010-23 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-25 being the Health (Fees) Determination 2014 (No. 2) made under section 192 of the *Health Act 1993* **revokes DI2014-3 and determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-26 being the Education (Non-Government Schools Education Council) Appointment 2014 (No. 1) 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 parent associations of non-government schools.**

Disallowable Instrument DI2014-28 being the Public Place Names (Ngunnawal) Determination 2014 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the name of new roads in the Division of Ngunnawal.**

Disallowable Instrument DI2014-29 being the Road Transport (General) Heavy Vehicle National Law Permit Exemption Fee Determination 2014 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **determines fees payable for the purposes of the Act.**

Disallowable Instrument DI2014-30 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2014 (No. 1) made under paragraph 174(1)(c) of the *Crimes (Sentence Administration) Act 2005* **revokes DI2011-212 and appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Disallowable Instrument DI2014-40 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2014 (No. 1) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **makes 200 megawatts of capacity available for a large-scale renewable energy wind auction.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Is this instrument validly made?

Disallowable Instrument DI2014-27 being the ACT Teacher Quality Institute Board Appointment 2014 (No. 1) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the ACT Teacher Quality Institute, representing independent schools of the ACT.**

This instrument appoints a specified person as a member of the board of the ACT Teacher Quality Institute. The Explanatory Statement for the instrument states that the person is appointed under paragraph 15(2)(d) of the *ACT Teacher Quality Institute Act 2010*. That provision requires that the board must include:

(d) 1 member nominated by the Association of Independent Schools of the ACT;

The Explanatory Statement for the instrument states:

> The vacancy has arisen with the resignation in December 2012 of [another specified person] as the member on the Institute board nominated by the Association of Independent Schools of the ACT.

However, the Explanatory Statement does not actually indicate that the specified person appointed by *this* instrument was nominated by the Association of Independent Schools of the ACT.

As the Committee has consistently stated, the Committee would prefer if the Explanatory Statements for instruments of appointment clearly indicate that any pre-requisites for appointment have been met. This allows the Committee (and the Legislative Assembly) to be satisfied that the relevant statutory power has been correctly exercised and that the appointment has been validly made. As the Committee has consistently maintained, the Committee does not consider this to be an onerous requirement.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2014-4 being the Court Procedures Amendment Rules 2014 (No. 1) made under section 7 of the *Court Procedures Act 2004* **amends the Court Procedures Rules.**

Subordinate Law SL2014-5 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2014 (No. 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **corrects a typographical error for a street reference.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- Minister for Education and Training, dated 28 March 2014, in relation to comments made in Scrutiny Report 15 concerning the explanatory statement for Disallowable Instrument DI2013-284 Education (Non-Government Schools Education Council) Appointment 2013 (No. 4) (attached).
- Treasurer, dated 4 April 2014, in relation to comments made in Scrutiny Report 15 concerning the Lifetime Care and Support (Catastrophic Injuries) Bill 2014 (attached).
- Minister for the Environment and Sustainable Development, dated 7 April 2014, in relation to comments made in Scrutiny Report 16 concerning the Planning and Development (Project Facilitation) Amendment Bill 2014 (attached).

- Minister for the Environment and Sustainable Development, dated 9 April 2014, in relation to comments made in Scrutiny Report 15 concerning Disallowable Instrument DI2013-316—Climate Change and Greenhouse Gas Reduction (Climate Change Council Membership) Appointment 2013 (No. 1) (attached).

The Committee wishes to thank the Minister for the Education and Training, the Treasurer and the Minister for the Environment and Sustainable Development for their helpful responses.

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.

COMMENT ON GOVERNMENT RESPONSE

- Attorney-General, dated 28 April 2014, in relation to comments made in Scrutiny Report 15 concerning the Rail Safety National Law (ACT) Bill 2014 (attached).

The Committee thanks the Attorney-General for his comprehensive and sympathetic response.

In Report 15, the Committee referred to page 40 of the Explanatory Statement and suggested that at this point it failed to appreciate the distinction between a direct and a derivative use immunity. The Attorney-General does not agree with this comment. The sentence the Committee had in mind is: "The direct use immunity ensures that a person remains protected when the answer to a question or the provision of information or documentation leads to a chain of enquiry and to evidence that might otherwise incriminate the person". It seemed to the Committee that this is a statement of the reach of a derivative use immunity.

The Committee notes that the Government proposes to amend the Bill to extend the operation of the relevant clause to offer protection against derivative use, and the Explanatory Statement will necessarily be amended.

Steve Doszpot MLA
Chair

29 April 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

Road Transport (Alcohol and Drugs) Amendment Bill

Report 15, dated 11 March 2014

Disallowable Instrument DI2013-313 - Official Visitor (Corrections Management) Appointment 2013 (No. 1)

Disallowable Instrument DI2013-314 - Official Visitor (Corrections Management) Aboriginal and Torres Strait Islander Appointment 2013 (No. 1)

Disallowable Instrument DI2013-325 - Official Visitor (Children and Young People) Aboriginal and Torres Strait Islander Appointment 2013

Disallowable Instrument DI2013-326 - Official Visitor (Disability Services) Appointment 2013 (No. 1)

Disallowable Instrument DI2013-327 - Official Visitor (Disability Services) Appointment 2013 (No. 2)

Disallowable Instrument DI2013-328 - Official Visitor (Housing Assistance) Appointment 2013

Report 16, dated 1 April 2014

Information Privacy Bill 2014

Joy Burch MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR DISABILITY, CHILDREN AND YOUNG PEOPLE
MINISTER FOR THE ARTS
MINISTER FOR WOMEN
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER FOR GAMING AND RACING

MEMBER FOR BRINDABELLA

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

Dear Mr Doszpot

Thank you for your Scrutiny of Bills Report No. 15 of 11 March 2014 in which the Committee made comment on the Explanatory Statement for Disallowable Instrument 2013-284 concerning an appointment to the Non-government Schools Education Council.

The Committee commented, "*There is nothing in the instrument or the Explanatory Statement that indicates that the person appointed was chosen from the nominations of organisations representing the non-Catholic independent schools.*"

I can advise the Committee that I received the nomination for this appointment from the Chair of the Association of Independent Schools of the ACT Incorporated.

In response to the Committee's feedback I have made steps to ensure that future appointment instruments will clearly advise how the nominee was chosen.

Yours sincerely

Joy Burch MLA
Minister for Education and Training
28 March 2014

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0020 Fax: (02) 6205 0495 Email: BURCH@act.gov.au
Twitter: @JoyBurchMLA Facebook: www.facebook.com/joyburchmla

CANBERRA

Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER
MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR COMMUNITY SERVICES
MINISTER FOR SPORT AND RECREATION
MINISTER FOR TOURISM AND EVENTS

MEMBER FOR MOLONGLO

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

Dear Mr Doszpot

I am writing in response to the comments in the Scrutiny Report 15 of 11 March 2014 on the Lifetime Care and Support (Catastrophic Injuries) Bill 2014 published by the Standing Committee on Justice and Community Safety in its Legislative Scrutiny role.

The Committee, in its comments, has requested that I respond to a number of issues raised by the Committee in two broad areas of personal rights and liberties and delegation of legislative power. For clarity, I will seek to address each issue separately under those two broad areas.

Before addressing the comments of the Committee I would like to reinforce that the Lifetime Care and Support (LTCS) Scheme to be established under this Bill will provide all the reasonable and necessary treatment and care needs of those who are catastrophically injured in a motor accident for the lifetime of the person, regardless of fault.

I emphasise that this Scheme will expand and enhance the current compulsory third-party (CTP) insurance scheme which is limited in providing financial compensation to those who can prove that someone else was at-fault in the motor accident that caused their injuries.

The Scheme will meet the ACT's commitment to establish a National Injury Insurance Scheme (NIIS) for motor accidents by 1 July 2014, which will coincide with the roll-out of the National Disability Insurance Scheme (NDIS) in the ACT. The Scheme will meet the nationally agreed minimum benchmarks, which can be accessed by using the following link http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/National-Injury-Insurance-Scheme/Benchmarks-for-motor-vehicle-accidents.

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone: (02) 6205 0011 Fax: (02) 6205 0157 Email: barr@act.gov.au
Facebook: Andrew.Barr.MLA Twitter: @ABarrMLA

CANBERRA

In doing so, it mirrors the NSW Lifetime Care and Support Scheme which now has the benefit of over 7 years experience in lifetime care service provision and is the scheme upon which the nationally agreed minimum benchmarks were largely derived. Consistency will facilitate the ACT in negotiating support from NSW in relation to service provision under the Scheme which will provide benefits in terms of experience and efficiencies for the ACT.

Personal rights and liberties

Compulsory referral of an injured person to LTCS Scheme.
The Committee has raised an issue with the provisions that allow CTP insurers to make an application for an injured person to participate in the Scheme without requiring that person's consent.

The Bill contains consequential amendments which will mean that liability for the treatment and care needs of someone who is eligible for the LTCS Scheme will not be a risk covered by the CTP Scheme under section 22 of the *Road Transport (Third-Party Insurance) Act 2008*. Consequently, the amount of a catastrophically injured person's treatment and care needs will not be a liability of insurers offering CTP policies in the ACT. Rather it will be met by the new LTCS Scheme. The injured person's CTP claim will be unaffected by the Bill for all other remaining heads of damages, such as loss of earning capacity and non-economic loss.

In this context, it is appropriate that the CTP insurer be able to make an application for the injured person to participate in the LTCS Scheme if they are eligible, in order to facilitate the provision of their treatment and care needs by the appropriate statutory scheme.

The proposed LTCS Scheme is specially designed to provide for the needs of those catastrophically injured, as the new scheme will be able to provide participants with their reasonable and necessary treatment and care needs on an ongoing basis, for the rest of their lifetime. The new Scheme also facilitates early provision of treatment and care which is critical for the long term recovery outcomes for injured people.

Right to a fair administrative determination: assessor qualifications
The Committee has asked why the dispute assessors under the scheme do not include persons with suitable legal expertise.

In answering this it might assist the Committee if I also outline the dispute mechanisms available under the proposed scheme.

Eligibility disputes
Disputes about eligibility under Division 7.1 of the Bill are disputes about whether an injured person meets the injury criteria. More specifically, these are the injury types listed in section 15 and the injury criteria to be detailed in the LTCS Guidelines. These are criteria about a person's medical condition to which a medical certificate is initially provided in support of an injured person's application to the scheme. As such, it is considered that medical practitioners would be the experts suitably qualified to review disputes about an injured person's medical condition.

The panels would comprise health and other professionals with expertise on the matter in dispute. Matters that are expected to be the subject of eligibility disputes are about medical/clinical matters, for example, is the injured person's function related to their brain injury or their dementia, or the person's brain tumour. As such, panels will ordinarily determine eligibility for participation based on their analysis of the injuries.

It would be expected that where a panel considers they require external legal advice before making a decision, such external advice would be possible under the Scheme. In this respect, we understand that in NSW panels are able to obtain external legal advice to assist in their determination should the need arise, and from time to time have in fact done so.

The Scheme allows for two stages of review of eligibility disputes, giving the injured person sufficient mechanisms / opportunity to challenge a decision made by the LTCS Commissioner under the Scheme. In addition, an injured person is not precluded under the Scheme from seeking judicial review of a decision if they believe the decision is wrong as a matter of law.

Motor accident injury disputes
Disputes under Division 7.2 of the Bill are disputes about whether an injury is a motor accident injury (i.e. an injury as a result of a motor accident).

A motor accident injury dispute is referred to a principal claims assessor, who assigns the dispute to three claims assessors for review who must be suitably qualified.

I am advised that with disputes of this kind where legal questions may arise, a person who is 'suitable qualified' would be someone with a number of years of legal experience. I understand that in NSW, whose Lifetime Care and Support Scheme is mirrored in this Bill, persons considered to be suitably qualified to decide a motor accident injury dispute would be claims assessors who are selected for their knowledge of the compulsory third-party scheme and experience in assessing personal injury claims. In addition, the Principal Claims Assessor must be an 'Australian lawyer'. The same will apply here.

I am also advised that in the NSW scheme they have had no motor accident injury disputes under their scheme.

Further, as the Committee has noted, for disputes of this kind (i.e. under Division 7.2), the Scheme will allow for reasonable legal costs to be paid under the scheme (section 50) in relation to the referral and determination of a motor accident injury dispute.

Treatment and care needs assessment dispute
Disputes under Division 7.3 of the Bill are disputes about a treatment and care needs assessment, or part of an assessment, made by the LTCS Commissioner under part 5 of the Bill. As such, a dispute under this division is in relation to the treatment and care needs that are available under the proposed Scheme as assessed on a case by case basis for each participant.

These are needs such as medical treatment, dental treatment, rehabilitation, ambulance transportation, respite care, attendant care services, aids and appliances, prostheses, education and vocational training, home and transport modification and workplace and educational facility modifications. As such these disputes are about clinical and care needs within the scope of the benefits available under the Scheme. Therefore, legal questions would not typically arise.

Assessors for such disputes are to be a health practitioner or a suitably qualified person. As such, they will be medical and allied health practitioners who have experience in addressing the clinical and care needs of those catastrophically injured. In the event that the panel considers that legal advice is required before making a decision, such advice can be obtained.

The Scheme allows for two stages of review for a dispute about a treatment and care needs assessment, giving the injured person sufficient opportunity and access to mechanisms to challenge a decision made by the LTCS Commissioner under the Scheme. In addition, an injured person is not precluded under the Scheme from seeking judicial review of a decision if it is believed the decision is wrong as a matter of law.

Based on the information above, I consider there to be adequate and appropriate review and appeal mechanisms available to injured persons under the Bill. Further, I can assure the Committee that assessors resolving disputes under part 7 of the Bill will not be operating in a vacuum without access to external legal advice.

<u>The privileges against self-incrimination and legal professional privilege</u>
I understand the Committee's concern here is whether sections 170 and 171 of the *Legislation Act 2001* still apply. I can assure the Committee that its presumption that these provisions continue to operate under the proposed scheme where applicable is correct as they are not expressly overridden in the Bill. As such, the recommended addition of a note is not considered to be necessary, particularly as notes do not form part of an Act.

I would add, for the benefit of the Committee, that the purpose of the authorisation to obtain information and documents under section 17 is to enable the LTCS Commissioner to determine the eligibility of an injured person for the proposed LTCS Scheme. Examples of the types of documents that may be required by the Commissioner would be CTP claim forms, ambulance or air ambulance/retrieval records, hospital records, treating doctors' reports, past medical records or school records, accident investigations or police reports.

<u>An ineffectual and misleading attempt to exclude judicial review</u>
This concern relates to the discussion above regarding the mechanisms for resolving disputes under the proposed Scheme. I understand that the Committee is concerned about the 'final and binding' nature of certificates made under the Scheme. Such certificates relate to treatment and care needs assessments and certificates issued on determination of disputes under part 7 of the Bill.

Indeed, this provision is not an attempt to exclude judicial review that would ensure decisions made under the Bill are properly made in accordance with legal principles. The intent of the final and binding nature of the certificates is to provide certainty in the Scheme based on decisions being made by appropriately experienced assessors (as outlined above).

Treatment and care programs can be short-term and are often in place for 3, 6 or 12 months with a person's needs continually assessed and reviewed. In particular, a treatment and care program can be reviewed if anything changes in a participant's life circumstances. As a result, due to the often short-term nature of the programs, this reduces the need for participants to dispute their treatment and care in order to have their needs met by the LTCS Scheme.

Omission of obligation to give reasons for a decision

While I understand the Committee's concern I would expect that all administrative decisions would be accompanied by reasons, as they would need to be provided in any case under section 13 of the *Administrative Decisions (Judicial Review) Act 1989*.

I understand that the proposed LTCS Guidelines will in fact require the eligibility review panel to provide a statement of the reasons for its decision.

Provisions concerning legal costs

Consistent with the policy intent underlying the National Disability Insurance Scheme (NDIS) one of the main objectives of the NIIS is to be able to respond to the treatment and care needs for the lifetime of those who are catastrophically injured.

The Committee's comments relating to disputes under Division 7.2 which allows for reasonable legal costs incurred by the injured person to be paid by the Commissioner could be taken to imply that a scheme whose primary purpose is to provide those catastrophically injured with their reasonable and necessary treatment and care needs, should also pay for legal costs under Division 7.2 above those considered reasonable by a court or cost assessor.

Based on actuarial advice, the cost of the scheme is currently estimated to be $34 which is to be paid by everyone who pays a CTP premium. I am therefore conscious of appropriately managing costs of the Scheme to ensure the most cost effective provision of these benefits and to minimise the burden on all Canberrans of this statutory arrangement as is prudent financial management.

As to section 53, the Committee suggests that the Explanatory Statement for this provision, which will accord primacy to this Bill over provisions in the *Legal Profession Act 2006*, is wrong and misleading. The Committee recommends that the Explanatory Statement be amended.

In answer to the Committee's concerns it is common for an explanatory statement to provide an explanation of the intent of the statutory instrument to which it relates. In this case it is the Bill as presented in the Assembly on 27 February 2014. As the Committee and previous Government responses have stated, it is well understood that this Bill or in fact, any other Act or regulation, does not restrain the power of the Legislative Assembly to make laws, which may include amending or appealing the provision specifically mentioned by the Committee here.

Further, any later Act or regulation that has the effect of amending or repealing section 53 would also be accompanied by an explanatory statement as to the intent of such legislation. As such, I do not consider it necessary for the Explanatory Statement for this Bill to single out one particular provision for special treatment when the power of the Assembly to make laws would apply generally.

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

The Committee has expressed a concern that the non-compellability of assessors under the Bill may limit a participant's access to documents.

Assessors that would be relied on to provide services for the LTCS Scheme would be drawn from medical and clinical practitioners regarded as experts in their fields. Due to the nature of the Scheme, current clinical practice will be a requirement for these assessors. As such, if they were to be compellable, it is our understanding that it is likely that these practitioners may not want to be involved in medico-legal matters and therefore be reluctant to provide the much needed services for the Scheme. However, a practitioner would be able to elect to give evidence if they wished to do so.

In any case I expect that the documents that would be relevant to the injured persons eligibility and/or participation in the Scheme would either be already in the possession or available to the injured person, for example certificates issued that would contain reasons for a decision, or be held by the Commissioner. As such, it would not be necessary to compel the assessor to produce a document that was already available.

Has there been an inappropriate delegation of legislative power?

The proposed LTCS Guidelines

The Committee has commented that the LTCS Commissioner, who will be a public servant, has been given a 'law-making power' under the Bill because of the proposed content of the Guidelines.

While the Act is the primary legislative basis for the scheme and sets the principles for the scheme, the proposed guidelines will provide further detail such as detailed criteria for making decisions around eligibility, based on medical assessment criteria and tools. This is a more appropriate mechanism to contain such detail, as this is a technical medical matter and this approach allows flexibility for adopting different medical assessment tools in line with national developments and reviews of these tools, as one would expect from time to time.

Of the sections identified by the Committee, the following sections providing guideline powers all have principles contained in the Act upon which the Guidelines would be based:

- subsection 15(1)(b) — the high level principles relating to injury criteria is contained in the Bill at 15(1)(a) which lists the types of injuries considered to be catastrophic for the purposes of eligibility in the scheme.
- subsection 15(4) — relates to subsection 15(1) such that high level principles are provided in the Bill. Further, motor accident is defined in the Act by way of reference to the *Road Transport (Third-Part Insurance) Act 2008.*
- subsection 23(3) —the high level principles relating to the assessment of treatment and care needs are contained in this section of the Bill i.e. must be reasonable and necessary treatment and care needs and must relate to the motor accident injury.
- subsection 30(5) — the high level principles for the payment of assessed treatment and care needs is contained in the Bill in sections 23, 30 and 31.

As is normal legislative practice, the guidelines will also set out the more technical and detailed elements of procedures and administrative processes under the Scheme which are more suited to a delegated instrument. Examples of such matters are applications to the scheme and dispute resolution.

Of the sections identified by the Committee, the following sections providing guideline powers are procedural and administrative in nature:

- section 18 — this is administrative detail in relation to the process for applications.
- section 27 — this is administrative detail on the nature of procedures for making assessments.
- subsection 43(1) — this is administrative detail about the procedures to be followed in relation to the referral of disputes.
- section 58 — this is administrative detail on the procedures to be followed by an assessor and the methods and criteria to be used to determine a dispute.
- section 63 — this is administrative detail on the procedures to be followed by a review panel and the methods and criteria to be used in relation to the review.
- subsection 71(8) — this is an administrative detail on the specification of a maximum payable for LTCS-related payments that are not determined by the Minister.

The Committee has also raised a concern that the LTCS Guidelines, as a notifiable instrument, would not be available for access on the ACT Legislation Register. I can confirm that as required under section 19 of the *Legislation Act 2001*, the LTCS Guidelines will be published on the ACT Legislation Register.

As the Guidelines will be publicly available anyone will have access to them for purposes which may include comment and questions in the Assembly or enquiries from the public and interested persons.

The Committee has also asked whether "consideration was given to providing for an alternative mode of access to the adopted laws" under Guidelines made under section 93 as these particular Guidelines are not notifiable instruments under section 47 of the *Legislation Act 200*. The Committee advised that it is common in such circumstances 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.

In answer to the Committee's concern about providing access to laws, etc that may be adopted under these particular Guidelines, such access will be provided once the document to be adopted is identified. Depending on the document adopted, there may need to be different methods of access made available depending on the Territory's own access arrangements or whether the document is already publicly available. Access for each document under section 93 will need to be assessed individually as they arise. The Guideline making power under section 93 does not deal with access arrangements generally.

Subsection 6(2) of the Bill
I understand the Committee is concerned that there is a justification for the power under subsection 6(2).

This clause has been adopted from the NSW legislation to allow flexibility in the implementation of the Scheme in the ACT, particularly in its early phases as well as recognising that the Scheme is part of our broader national commitments, which may change over time.

I note that, as the Committee points out, a Regulation would be a disallowable instrument and as such presented and subject to the scrutiny of the Legislative Assembly.

I trust the above adequately addresses the Committee's concerns.

Yours sincerely

Andrew Barr MLA
Treasurer
4 April 2013

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 MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Doszpot

I write in relation to the comments on the Planning and Development (Project Facilitation) Amendment Bill 2014 (the Bill) in the Scrutiny Report 16 of 1 April 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.

The Bill makes a number of amendments chiefly to the *Planning and Development Act 2007* (the Act). As the Committee observed, the Bill includes four key initiatives related to special precinct area variations, projects of major significance, lodgement of development applications based on draft Territory Plan variations and simultaneous notification of environmental impact statements and development applications. All of these elements are geared to the key objects of the Bill, namely, transparency, accountability and efficiency.

The Committee referred the Assembly to the process for the proposals for the identification of special precinct areas in new Part 5.3A of the Act and noted that the Explanatory Statement explains the proposed schemes in careful detail. In highlighting this feature the Committee has recognised the significance of these measures and indeed they are central to the process for the prioritisation of key community infrastructure and development.

The Committee also highlighted the proposed option of making restriction declarations in association with special precinct area variations. This option is available through new section 85N and related sections. Such a restriction if made has the effect of removing the *Heritage Act 2004* and/or the *Tree Protection Act 2005* from relevant development approval decisions as set out in new section 85Q of the Act. The granting of the development approval would then authorise development to proceed notwithstanding the operation of these Acts. This option is available in specific instances should the Government consider it necessary to ensure the timely delivery of priority projects. This is a balanced and appropriate measure. The measure can only be used in conjunction with a special precinct area variation; the measure must be put to the Heritage Council

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

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and Conservator of Flora and Fauna as required; and must be subject to public consultation. All comments of the Heritage Council and Conservator must be considered by the Executive in determining whether the special precinct area variation provides a substantial public benefit. The comments of the Heritage Council and Conservator must be put to the Legislative Assembly which has the power to disallow the special precinct area variation. These features ensure that this measure will be progressed in a transparent manner and will not be used arbitrarily.

The Committee also made a number of comments in relation to the proposed restrictions on review rights in relation to special precinct area variations and declarations of projects of major importance.

The Committee notes that the right to apply to ACAT for merit review of development approval and related decisions in relation to special precinct areas is removed but rights to seek review under the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act) and Supreme Court review under the common law remain in place. I note that these measures are affected through the amendment to existing section 407 of the Act. The Committee suggested that the retention of ADJR and common law rights of review was a:

> *"... justification [that] might be considered to have little weight given that judicial review is much less efficacious – being limited to a legality review rather than merit review – and is vastly more expensive. ..."*.

I do not agree with this particular suggestion. The continued availability of Supreme Court rights of review in this circumstance is significant. These rights, notwithstanding the costs involved are available to the community.

I would also point to the notes in the Explanatory Statement and quoted by the Committee on page 4 of its report, that the case law indicates that human rights legislation does not guarantee a right of appeal for civil matters. The case law recognises that such restrictions need to be considered in the context of other avenues of input such as the right to comment on development applications. In relation to this restriction and the following matters I would emphasise that the Bill includes significant alternate avenues for community input into these decisions. The Bill requires special precinct area variations and declarations of projects of major significance to be subject to public consultation and Legislative Assembly consideration. In addition to this, the standard development assessment procedures under the Act apply. Applications for development approval covered by these measures must be publicly notified and open to public representations. These and other measures amount to significant avenues for community input that are arguably more timely and more effective than litigation at the end stage of a development process.

The Committee notes that the Bill removes rights of Supreme Court review under the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act) in relation to the making of a special precinct area variations and projects of major significance declarations and also removes these rights in relation to development approval decisions in connection with projects of major significance. The Committee also notes that the Bill puts a time restriction on the right to seek Supreme Court review under the common law. The Bill requires any such proceedings to commence within 60 days of the relevant decision. I note that these measures are effected through new sections 85M, 137M of the Act and consequential amendment to item 15 of Schedule 1 of the ADJR Act.

The Committee questioned the worth of the proposed removal of rights of Supreme Court review under the ADJR Act while retaining the rights of review under the common law given the two sets of rights offer similar rights to remedy invalid decisions. The Committee also questioned the worth of this approach given that there are no statutory rights to a statement of reasons under the common law as there is under the ADJR Act.

The position of the Government on these matters is relatively straightforward. A key object of the Bill is to ensure that projects identified by the community and the Government as of prime importance are delivered with as much efficiency, finality and certainty as possible. When the Government and Legislative Assembly make it clear that a particular project is to proceed as a matter of priority, it is important that, as far as possible, such projects not be delayed through lengthy litigation in the Supreme Court. In order to achieve this, the Bill puts in place certain limitations on review rights. These restrictions strike a balance between the need for key projects to proceed with priority and the need to retain certain rights of review. In my view, it is appropriate to consider the removal of ADJR rights which are created by the legislature and as such can and have on a number of occasions been modified by the legislature. However, it is neither appropriate nor possible to remove common law rights of appeal to the Supreme Court. These are rights that are the prerogative of the Court not the legislature.

The Committee suggested that there is essentially little difference between ADJR rights of review and common law rights of review and therefore little efficiencies to be gained by the exclusion of ADJR review. I do not agree with this view. ADJR review rights are statutory rights which are granted in addition to, and are distinct from, common law rights of review. I note that it is not uncommon for a range of administrative decisions to be excluded from ADJR review. Whilst there is little material difference between the relief that may be granted under both forms of review, the two sets of review rights are not interchangeable. It is possible to pursue ADJR review in addition to, or instead of, seeking review under the common law. The grounds for and standing to seek review under the ADJR are codified in the ADJR Act, and both the grounds and the test for standing under the ADJR Act are arguably wider than those that are available at common law. The grounds for seeking review and standing under the common law are determined by the state of the common law at the relevant time. On that basis it is clear that the two rights, while in some respects similar, are nonetheless separate rights. Accordingly, the removal of ADJR rights of review is a meaningful and significant measure, which will minimise delays to the commencement of significant projects approved under the Bill.

The Committee also suggested that the exclusion of ADJR review will have the effect of removing a statutory 'right' under the ADJR Act to receive a statement of reasons for reviewable decisions. This is because the ability to request and receive reasons is provided for in the ADJR Act, while there is no common law requirement to give reasons for an administrative decision. I would note, by way of context, that this ability to request and receive reasons under the ADJR Act is subject to certain exceptions and it is possible that reasons for an administrative decision will not be provided in certain circumstances.

As I have indicated, the exclusion of ADJR review is necessary to set reasonable limits on court actions consistent with the priority nature of these projects. The suggestion of the Committee that this reform removes rights to statements of reasons does not represent the complete picture on these matters. In summary, requirements to provide statements of reasons remain in place. The Bill and the existing Act already require statements of reasons. New sections 85G(2)(e) and 85H(1)(d) inserted into the Act require the special precinct area variation to include a statement justifying the variation against the relevant criteria. In particular, the variation must state how the measure would achieve a substantial public benefit. New sections 137H(2)(d) and 137I in the Bill make similar requirements in relation to declarations of projects of major significance. The same issue applies to development approval decisions in relation to a declared project of major significance. In this case also statements of reason are required. Existing sections 170 and 171 of the Act require notices of decision to be forwarded to the applicant and persons who made a representation. The notices of decision must include reasons. For these reasons, the impact of the removal of ADJR on the provision of statements of reasons is of no practical consequence in this case.

The Committee also commented on the proposed time limits in the Bill in relation to Supreme Court common law rights of review. New sections 85M and 137M in the Act require certain applications for Supreme Court review under the common law to be made within 60 days of the relevant decision. This time limit applies to applications for review of decisions to make a special precinct area variation, declaration of project of major significance and also to development approvals and related decisions in connection with projects of major significance. The Committee commented that such provisions are:

> *" ... an unusual restriction on the availability of a Supreme Court remedy based on the common law in that it does not permit the court to extend time. An issue to be considered is whether clause 85M [and similar] should also provide for a court to extend the time limit of 60 days."*

The 60 day restriction is a significant measure. The Committee is correct; the intention is to limit court actions to proceedings commenced within the time frame. This measure is necessary to ensure a degree of certainty and finality in relation to priority projects and related key decisions. This cut off date will mean that the community, Government, industry and the proponent will be able to proceed with a priority project with some confidence that the project will not be disrupted by late legal proceedings months perhaps years after the relevant decision.

The measure, while perhaps unusual, is not unprecedented. The *Gungahlin Drive Extension Authorisation Act 2004* included time restrictions on such court proceedings. The existing Act (section 104) includes a provision requiring any court challenge to a provision of the Territory Plan to be made within three months of the commencement of the provision.

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

Yours sincerely

Simon Corbell MLA
Minister for the Environment and Sustainable Development
7 April 2014

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 MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Doszpot

I refer to Scrutiny Report No. 15 of 12 March 2014. This report included Committee comments on a disallowable instrument, that is, the Climate Change and Greenhouse Gas Reduction (Climate Change Council Membership) Appointment 2013 (No 1) DI2013-316 (the instrument). The Committee noted that the Legislation Act (s229) requirement for Ministerial appointments to be made through a disallowable instrument did not apply to appointees who are public servants (s227(2)(a)). The Committee questioned whether the instrument was a disallowable instrument and requested confirmation as to whether the two appointees were public servants.

The Committee also commented that the explanatory statement for the appointments did not confirm whether the appointees were public servants and as such the statement did not meet the technical or stylistic standards expected by the Committee.

I confirm that the appointee, Mr Toby Roxburgh was not a public servant at the time of appointment. I also confirm that Ms Dorte Ekelund as the Director-General of the Environment and Sustainable Development Directorate was a public servant at the time of appointment.

In light of this circumstance, I recognise that the Legislation Act required the instrument of appointment of Mr Toby Roxburgh to be disallowable but did not so require the instrument of appointment of Ms Dorte Ekelund. In this sense it was irregular, if convenient, for the two appointments to be combined in the same instrument.

I would also suggest that this irregularity, while undesirable, does not mean that the appointments are invalid. The appointment of Mr Roxburgh is valid as it has been properly made through the disallowable instrument process. The appointment of Ms Ekelund is valid as it meets the requirements in the Legislation Act (principally s216) for appointments, that is, it has been made through a written instrument by the requisite appointer. This conclusion is supported also by section 212 of the Legislation Act which states that an appointment is not invalid only because of a defect or irregularity in the appointment.

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

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I also acknowledge that the explanatory statement did not expressly confirm that the two appointees were not public servants as expected by the Committee's standards. This is not to say that the statement was silent on the status of the appointees. The statement did indicate that Ms Dorte Ekelund was appointed Director-General of the Environment and Sustainable Development Directorate and was appointed to the Climate Change Council as representative of the public sector. The statement did also set out the experience and qualifications of Mr Toby Roxburgh which experience did not include being a public servant in the ACT. However, I accept that a more direct statement on these matters could and should have been made.

For the future, I have instructed the Environment and Sustainable Development Directorate to ensure the joining of public servant and non-public servant Ministerial appointees in the same disallowable instrument does not recur. I have also instructed the Directorate to ensure that the explanatory statement for disallowable instruments of appointment expressly confirm that the appointee(s) is not a public servant.

I trust that I have addressed the concerns of the Committee and thank the Committee for its consideration of this instrument.

Yours sincerely

Simon Corbell MLA
Minister for the Environment and Sustainable Development
9 April 2014

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

Dear Mr Doszpot

Thank you for the Scrutiny of Bills Report No. 15 of 11 March 2014. I offer the following response in relation to the Committee's comments on the Rail Safety National Law (ACT) Bill 2014.

The exclusion of the Legislation Act and of other Territory laws

The Committee has drawn attention to clause 8 which states that a number of Territory laws do not apply to the National Rail Safety 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 Committee noted that the explanatory statement (ES) notes that "[t]hese oversight and accountability laws are excluded because South Australian oversight laws already apply to the Regulator". The Committee has requested that the relevant South Australian oversight laws, which were not listed in the ES be identified.

The relevant South Australian oversight laws which apply to participating jurisdictions are set out in section 263 of the Rail Safety National Law (RSNL) These are:
(a) the *Freedom of Information Act 1991* of South Australia;
(b) the *Ombudsman Act 1972* of South Australia;
(c) the *Public Finance and Audit Act 1987* of South Australia;
(d) the *State Records Act 1997* of South Australia.

The ES will be revised to provide the above information.

The Committee made further comments that 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.

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

The RSNL does not contain or apply a privacy law regime. South Australia does not have its own privacy legislation. Accordingly, the *Privacy Act 1988* (Cwlth), which currently applies in the ACT, will apply to the Regulator when exercising functions under this Law.

This information will be included in the clause 8 reference of the revised ES.

Part 3 of the Bill

The Committee has commented on the provisions of Part 3 of the Bill which provides processes to be followed for carrying out alcohol and drug testing and analysis of rail workers.

Part 3 - Detention powers

The Committee has raised concerns that the ES in relation to detention powers for the purpose of breath analysis (clause 14) and oral fluid analysis (clause 18) fails to explain what the maximum periods of detention might be and should include a justification in terms of the *Human Rights Act 2004* (HRA) section 28. The Committee also raised these concerns in relation to clause 26 which deals with detention for blood tests.

The ES does refer to the relevant provisions which set out the maximum time limits for the above mentioned purposes. The clauses immediately following the above mentioned clauses, ie clause 15 (conduct of breath analysis) and clause 19 (conduct of oral fluid analysis) respectively, set the outer limits of when these activities can be undertaken. Similarly, clause 25 sets out the time periods for detention for a blood test under clause 26. These provisions set out the detail that the Committee has asked for in relation to how the time limits will apply.

The ES has been revised to reference these provisions in a section 28 HRA framework.

The Committee has also raised concerns about the possibility that an exercise of power under these provisions could be open to abuse in that the police may take the opportunity to question the person about matters that are unrelated to the occasion for the detention. The reason for the detention in clauses 14, 18 and 26 are all very clearly outlined in both the clause headings and the clauses themselves. Additionally, all three clauses state that the person must not be held in custody after the sample has been taken or the test or analysis has been conducted, or the end of the relevant period. Accordingly, if the police use the detention powers for a purpose outside of the purposes of these clauses the detention would be unlawful and any evidence gathered may be inadmissible (*Evidence Act 2011* section 138 (Exclusion of improperly or illegally obtained evidence)). These factors taken together provide a significant safeguard for the detained person.

Part 3 - Search and seizure powers

The Committee seeks an explanation of why clause 31(1) (Power to search rail safety worker in custody) is expressed so broadly.

This clause is based on section 18C of the *Road Transport (Alcohol and Drugs) Act 1977* (the Alcohol and Drugs Act) which was introduced in 2011. Section 18C was modelled on the search power in section 5 of the *Intoxicated People (Care and Protection) Act 1994*.

The purposes of the clause are twofold. Firstly it is to ensure that when a person is taken into custody appropriate steps are taken to ensure the safety of the person themselves, the safety of officers taking them into custody and of any other persons with whom the person in custody may interact. The second purpose is to ensure that the person remains securely in custody, as authorised by the legislation.

While clause 31(1) was based on an existing provision of the Alcohol and Drugs Act, the Government agrees that the terms of section 31 are more broadly cast than necessary. The intended purpose of the provision could be achieved with a power for a police officer to take possession of an item in a worker's possession if the item could present a danger to a person or could be used to assist the person to escape from lawful custody. The Government will move an amendment to the Bill to revise clause 31 to this effect.

The ES will also be revised to present the justification for these provisions in the Bill in a section 28 HRA framework.

Part 3 - Imposition of a burden of proof on a defendant

The Committee notes clause 34, and has asked for an explanation of how the ordinary principles of criminal law will apply in relation to the legal burden of proof for this clause and clauses 35 and 37. If it is possible that the imposition of a legal burden of proof on a defendant will result, the Committee would like this to be justified.

The Committee is correct in noting that the ordinary principles of criminal law impose a legal burden of proof on the defendant. This burden of proof requires that the defendant prove the matter on the balance of probabilities and requires that the defendant prove the existence of the matter (in this case, that the failure or refusal was based on medical grounds).

It is worth noting that if the *Criminal Code 2002* were applicable to these clauses the defendant would still bear a legal burden of proof under section 59.

The ES has been revised to present the justification for these provisions in a section 28 HRA framework.

Part 3 - The disclosure of information provided in confidence and the right to privacy

The Committee 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, including information given in confidence that is reasonably required by the Regulator to exercise its functions.

The Committee has identified that 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 ES has been revised to present the justification for these provisions in a section 28 HRA framework.

The Rail Safety National Law (RSNL)

The Committee has commented on the provisions of RSNL and noted that many of the provisions of the RSNL raise human rights issues. The Committee notes that while the ES addresses human rights considerations, this is not consistently presented within the framework of section 28 of the HRA.

RSNL - Drug and alcohol testing of rail safety workers

The Committee has drawn attention to page 5 of the ES which addresses drug and alcohol testing of rail safety workers under the RNSL with a particular focus on the relationship between these provisions and the application of the HRA.

The Committee notes that although the purpose of the legislation is clear and important, the other compulsory considerations under section 28 of the HRA have not been addressed. Additionally, the Committee is concerned that the relevant provisions within the RSNL that may limit relevant rights have not been sufficiently identified.

The ES has been revised to present the justification for these provisions in a section 28 HRA framework.

The Committee has also noted that clause 42 of the RNSL, relating to the National Rail Safety Register, engages the right to privacy but that no analysis of this engagement has been offered and no justification of any limitation has been attempted,

The ES has been revised to present the justification for these provisions in a section 28 HRA framework.

RSNL - Strict liability offences

The Committee has noted that while the ES refers to the existence of strict liability offences throughout the RSNL, the ES is not adequate in its justification of these offences.

In relation to the comment that the relevant provisions of the RSNL are not identified, the reason for not identifying these clauses individually is that strict liability is used a number of offences and it would be cumbersome to identify each instance of its use. Although they range across different areas of the RSNL, they are identifiable by the fact that the physical element of the offence is detailed but there is no mental element required. While it is not proposed to enumerate the strict liability clauses, the ES has been revised to refer to examples of strict liability offences in the RSNL. In response to the other concerns raised about the ES discussion of these offences, the ES has been revised to present the justification for these provisions in a section 28 HRA framework.

RSNL - The privilege against self-incrimination

The Committee noted that the there is no attempt to justify the limitation of the rights to a fair trial and to not be compelled to testify against oneself in terms of section 28 of the HRA. The Committee stated that few, if any, workers would be aware that drug and alcohol testing was a condition of employment, and that this argument overlooks the realities of the choice open to prospective rail workers. The Committee's assertion that rail workers would generally be unaware of the requirements as to alcohol or drug testing is not accepted. Alcohol and drug testing of

operators or controllers of vehicles and other machinery is common and accepted practice within a number of industries including rail.

The Committee also states that the explanation on page 40 of the ES of clause 155(2) of the RSNL fails to appreciate the distinction between direct use immunity and derivative use immunity and recommends the ES be corrected. However, the ES clearly states that the immunity provided in clause 155(2) is "direct use immunity". There are two references to the immunity being a direct use immunity and there is no suggestion in the ES that clause 155(2) provides derivative use immunity.

The Committee 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 Government has considered the concerns raised by the Committee about the absence of a derivative use immunity in the RSNL and agrees that it would be appropriate to provide for such immunity in terms similar to those in the Victorian application law. A Government amendment to the Bill, to this effect, will be moved.

In the meantime, the ES for the Bill, as presented, will be revised to present the justification for the existing provisions of the Bill in a section 28 HRA framework.

I trust that the above response addresses the Committee's comments in relation to the Bill and the provisions of the RSNL. I thank the Committee for its comments and observations.

Yours sincerely

Simon Corbell MLA
Attorney-General