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

SCRUTINY REPORT 44

2 MAY 2016

COMMITTEE MEMBERSHIP

Mr Steve Doszpot MLA (Chair)

Mr Jayson Hinder 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.

TABLE OF CONTENTS

BILLS

BILLS—NO COMMENT

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

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

LONG SERVICE LEAVE (PORTABLE SCHEMES) AMENDMENT BILL 2016

This is a Bill to amend the *Long Service Leave (Portable Schemes) Act 2009* to extend the community sector and contract cleaning portable long service leave schemes to allow workers in the aged care and waste sectors respectively, to have similar long service leave entitlements currently available to workers already in these schemes.

BILLS—COMMENT

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

LIFETIME CARE AND SUPPORT (CATASTROPHIC INJURIES) AMENDMENT BILL 2016

This is a Bill for an Act to amend the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* to extend the Lifetime Care and Support (LTCS) Scheme to provide lifetime care to catastrophically injured workers covered by the *Workers Compensation Act 1951,* where the injury was suffered after 30 June 2016 or the passing of the Bill, whichever is later.

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)

The entitlement to equal protection of the law (HRA subsection 8(3)) and the exclusion of a person who suffers an injury as a result of the worker's engagement in professional sporting activity

Proposed section 6 (clause 4) provides rules for the application of the Act, including in particular to those who suffer a work injury. By paragraph (5)(b) however, the Act does not apply to an injury suffered by a worker if the injury is sustained as a result of the worker's engagement in professional sporting activity.

This exclusion mirrors the exclusion of such injuries from the coverage of the Workers Compensation Act (see section 84 of the Act). This exclusion was introduced by a 1995 amendment to the Act, but the Explanatory Statement to the relevant Bill provided no reason for this change.

On the face of it, the exclusion of workers engaged in professional sporting activity from the coverage of the LTCS Scheme is an abrogation of the entitlement to equal protection of the law (HRA subsection 8(3)). The Explanatory Statement should offer a justification for this abrogation.

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

THE RIGHT TO PRIVACY (HRA SECTION 12) AND THE EXTENSION OF THE PROVISIONS IN THE ACT THAT ALLOW FOR INFORMATION TO BE SHARED BETWEEN THE LTCS COMMISSIONER, INSURERS, HOSPITAL, THE NSW LIFETIME CARE AND SUPPORT (LTCS) AUTHORITY, AND ANYONE APPROVED BY THE LTCS COMMISSIONER

The relevant provisions of the Bill are clauses 60 (amending subsection 94(1)), 62 (inserting subsections 94(1A) and (1B)), and 63 (expanding the definition of "information" in connection with the exchange of information between the LTCS commissioner and others).

The Explanatory Statement notes that these provisions "may engage section 12 of the *Human Rights Act 2004*, the right to privacy and reputation, or be considered to trespass on personal rights and liberties". It goes on to state a very brief justification:

> The provisions however provide participants with a clear expectation as to the type of information and who that information will be shared with lawfully under the Act. The provisions are required as part of the operation of the LTCS scheme as they will assist in indentifying those who are eligible for the Scheme earlier and ensure that the costs of treatment and care are met by the Scheme properly.

These amendments are not such as to require a lengthy analysis, but for completeness, a reference to HRA section 28 should have been included.

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

THE RIGHT TO PROPERTY AND/OR TO PRIVACY AND THE RESTRICTION OR LIMITATION OF EXISTING STATUTORY OR COMMON LAW RIGHTS TO DAMAGES FOR A WORKPLACE INJURY

By section 137 of the Workers Compensation Act, a worker may commute some or all of their entitlements under this Act to a payout by lump sum by the employer. The Explanatory Statement explains that by clause 1.8 of schedule 1 of the Bill, proposed subsection 137(2A) of the Act would amend the Act so that "before a worker who may be eligible for LTCS Scheme makes a claim to commute their rights for treatment and care under section 137(2) of the WC Act, an application must be made to participate in the LTCS Scheme" (page 15).

The existing statutory right to commute under section 137 might be regarded as akin to or even encompassed[1] by the "right to own property" stated in article 17(1) of the *Universal Declaration of Human Rights*. Article 17(2) states that"[no] one shall be arbitrarily deprived of his property".

The Committee recommends that Minister explain the effect (if any) of this proposed amendment on the ability of a worker to commute under subsection 137(2) of the Act and, if necessary, state a justification for the limitation of this ability.

Subject to certain restrictions in part 9 of the Workers Compensation Act, a worker may seek common law damages arising out of a workplace injury. The Explanatory Statement states that proposed section 182EA (clause 1.13) would "require that the worker must apply to be considered a participant in the LTCS Scheme, before a claim for damages under part 9 of the WC Act can be made

[1] The notion of "property" is given a generous meaning in the various international rights instruments; see Jayawickrama. *The judicial application of human right law* (2002), at 909ff.

by the worker in respect of the work injury". It is also said that "[t]his amendment restricts the injured worker's right to common law damages for treatment and care, where a worker suffers a catastrophic injury and is subsequently accepted as a participant in the LTCS Scheme. It is designed to avoid double payment for treatment and care costs".

It appears to the Committee however that the requirements imposed by proposed section 182EA are overstated by the Explanatory Statement. It only requires a worker to make an application, and says nothing about double payments. Perhaps the point is that if the worker is accepted as a participant, the effect of clause 1.14 will be that there can be no double payment because clause 1.14 will have the effect that the worker cannot make a claim for common law damages.

The Committee recommends that the Explanatory Statement be reconsidered.

The Explanatory Statement states that clause 1.14 proposes to "[insert] a new part 9.4 to restrict the right to common law damages or a settlement made to an injured worker, who is a participant in the LTCS Scheme relating to treatment and care needs or any excluded treatment and care as defined under the LTCS Act". This is an awkward explanation, and might be clearer if the words "relating to" were replaced with "but only in relation to".

Section 186A would apply to a person who is a participant in the LTCS Scheme in relation to a workplace injury, and by subsection 186A(2)

> [an] award of damages or offer of settlement made to the person in relation to the workplace injury must not include an amount for the person's treatment and care needs, or any excluded treatment and care, that—(a) relate to the workplace injury; and (b) arise while the person is a participant in the LTCS scheme.

The object of clauses 1.13 and 1.14 seems to be to prevent an injured worker from making a claim for common law damages for the person's treatment and care needs, or any excluded treatment and care, rather than to prevent the worker obtaining double payment. Clause 1.14 seems to be directed to preventing double payment, but by precluding a worker from seeking common law damages in relation to treatment and care needs or any excluded treatment and care as defined under the LTCS Act.

The Explanatory Statement does not state any justification for precluding a worker resorting to common law damages in these respects, unless this is what is implied in the statement that "[an] award of damages that includes an injured worker's treatment and care needs payable under the LTCS Scheme would not meet the nationally agreed NIIS minimum benchmarks".

The Committee recommends that the Explanatory Statement be reconsidered and in particular provide a more detailed justification for precluding a worker from making a claim for common law damages.

THE PRESUMPTION OF INNOCENCE (HRA SUBSECTION 22(1)) AND THE IMPOSITION OF A LEGAL BURDEN OF PROOF ON A DEFENDANT TO ESTABLISH A DEFENCE TO A CRIMINAL OFFENCE

Clause 1.10 proposes to insert section 142A into the Workers Compensation Act that would provide that the relevant employer has an obligation to provide vocational rehabilitation to an injured worker who is a participant in the LTCS Scheme. As noted by the Explanatory Statement, it is provided that "an employer commits an offence if the employer is given a copy of the assessment of the workers'

treatment and care needs for the workplace injury under section 23 of the LTCS Act and the employer fails to provide the service required to be provided under the assessment to assist the worker's return to work".

By subsection 142A(2), "[it] is a defence to a prosecution for an offence against subsection (1)(d) if the defendant proves that the defendant had a reasonable excuse for failing to provide the service". This form of words results in a legal burden being imposed on a defendant to prove (on the balance of probabilities) the elements of this defence.

The Explanatory Statement (pages 16) asserts that this is "permissible reasonable limitation under section 28, *Human Rights Act 2004*", on the basis, it seems, that establishing the defence "involves matters that would be within the peculiar knowledge of the defendant, i.e. a reasonable excuse for failing to provide the service". It should be noted that the right that is limited is the presumption of innocence stated in HRA subsection 22(1).

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2016

This is a Bill for an Act to amend a number of Territory laws relating to planning and environmental protection.

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 identifies a number of ways in which amendments proposed by the Bill engage and arguable limit various rights stated in the *Human Rights Act 2004* and the quality of the analysis is such that the Committee need do no more than draw attention to these instances.

1. An amendment to the *Environment Protection Regulation 2005* relates to the use of agvet chemical products. Section 55(2)(b) of the Regulation states that a person commits an offence if they use an agvet chemical product other than in a way authorised by the Australian Pesticides and Veterinary Medicines Authority (APVMA). New section 55 (2A), to be inserted by clause 22, introduces an exception to the section 55(2)(b) offence to allow for the use of agvet chemicals by veterinary surgeons or persons acting under instructions from a vet in the course of treating animals, notwithstanding that the use is not specifically authorised by the APVMA.

The Explanatory Statement (page 14) notes that "[t]he provision is relevant to the human right of a fair trial. The provision does not limit this human right as it creates an exception to an existing offence".

The Committee adds that it is debateable whether the HRA right to a fair trial (section 21) is engaged in a positive sense; the right to liberty and security of the person stated in subsection 18(1) may be more pertinent. This matter is not however significant. It should also be noted that the wording of the proposed exception, by providing that the offence provision "does not apply" in the stated circumstances, is such as to impose only an evidential burden on a defendant; (see subsection 59(3) of the *Criminal Code 2002* and accompanying Examples).

2. Existing section 30 of the *Heritage Act 2004* permits applications to the Heritage Council for urgent consideration of a proposed provisional registration. Clause 28 of the Bill proposes that applications for urgent consideration must include reasons why urgent consideration is warranted (proposed paragraph 30(2)(d), to be inserted by clause 28). Further, the Bill makes it clear that the Heritage Council has a discretion to refuse or grant an application for urgent consideration based on the merits of the application, and to this end specifies the factors that the Council must consider in exercising this discretion (proposed paragraph 30(3)(c), to be inserted by clause 29). The Explanatory Statement also notes that "[t]he decision on urgency by the Heritage Council is not subject to ACAT merit review consistent with the fact that under the existing legislation the substantive decision on the actual provisional registration is not itself subject to ACAT merit review".

The Explanatory Statement notes that HRA sections 17 and 21 may be engaged by these provisions:

> This measure might be considered to be one which engages section 17 of the Human Rights Act, that is the right of taking part in public life. This is because consideration of provisional registration amounts to consideration of whether a heritage registration proposal is to be progressed further through public consultation, Heritage Council assessment of final registration and potentially ACAT merit review. Further, this measure might be considered to engage section 21 of the Human Rights Act (Fair trial) on the basis that it gives the Heritage Council a discretion to refuse applications for urgent consideration based on specified criteria and the exercise of this discretion is not subject to ACAT merit review.

The Explanatory Statement (pages 16-17) provides a justification for any limitations involved by reference to the framework stated in HRA section 28.

3. Section 54 of the *Heritage Act 2004* permits the Heritage Council to declare particular information about the location or nature of certain places or objects to be restricted information. This declaration process applies to places or objects that have heritage significance and to Aboriginal places or Aboriginal objects. Subject to certain exceptions, it is an offence to publish restricted information without the approval of the Heritage Council (section 55).

Clause 34 of the Bill proposes the amendment of section 57 of the Heritage Act to expand the potential access to restricted information. The Explanatory Statement notes that:

> [t]he expansion of access to restricted information could be considered to engage section 27 of the Human Rights Act (Cultural and other rights) of Aboriginal and Torres Strait Islander peoples and other minorities. This is because the release of restricted information could be considered as an action which could conceivably result in damage to sensitive sites and therefore impact on abilities recognised under section 27 of the Human Rights Act including the ability to enjoy or practice own culture and related matters. Further, it could be considered to be an action that could for similar reasons potentially impact on right of Aboriginal and Torres Strait Islander peoples under section 27 including the right to maintain, control, protect and develop cultural heritage and distinctive spiritual practices, observances, beliefs and teachings.

The Explanatory Statement (pages 18-20) provides a justification for any limitations involved by reference to the framework stated in HRA section 28.

4. The Heritage Council has various functions under the Heritage Act. These functions include providing notice to lessees (and other persons) of decisions on provisional and final registration of the leased land and other matters. Clause 41 of the Bill proposes to insert section 118B into the Heritage Act to allow the Heritage Council to ask the Commissioner for Revenue for contact information relating to all leases in the ACT, and to request this information (updates) on a regular basis, but no more frequently than every three months or such longer period as might be prescribed.

The Explanatory Statement notes that "[as] this provision relates to the release of personal information in the form of names and contact details of lessees, it has the potential to impact on the right to privacy in section 12 of the Human Rights Act ...". The Explanatory Statement (pages 21-22) provides a justification for any limitations involved by reference to the framework stated in HRA section 28.

5. Under section 157 of the *Nature Conservation Act 2014* the Minister can declare a native species to be a controlled native species if satisfied the species is having an unacceptable environmental, social or economic impact. Sections 158-165 of the Act establish a process for the development, finalisation and amendment of controlled native species management plans. Clause 50 of the Bill proposes the amendment of section 161 to require direct consultation only with a lessee of stated land to which the plan applies, where the plan places a direct obligation on the lessee.

The Explanatory Statement notes that "[i]n redefining who must be consulted directly on a draft plan, the amendment engages with the right to take part in public life in section 17 of the Human Rights Act. This is because existing section 161(1) required direct consultation with all lessees of all lands to which the draft plan applied".

The Explanatory Statement (pages 23-24) provides a justification for any limitations involved by reference to the framework stated in HRA section 28.

In all these respects, the Committee draws this discussion to the attention of the Assembly, and does not call for a response from the Minister.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-11 being the Public Health (Community Pharmacy) Code of Practice 2016 (No. 1) made under section 133 of the *Public Health Act 1997* **determines the Community Pharmacy Code of Practice 2016 to be a code of practice under the Act.**

Disallowable Instrument DI2016-13 being the Road Transport (General) Independent Taxi Operator Exemption Declaration 2016 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **extends the Independent Taxi Operator Pilot (ITOP) from 1 March to 31 December 2016 to ensure legal coverage for ITOP participants.**

Disallowable Instrument DI2016-14 being the Road Transport (General) (Pay Parking Area Fees) Determination 2016 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* **revokes DI2015-250 and determines relevant parking fees for Territory-operated pay parking areas.**

Disallowable Instrument DI2016-17 being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2016 (No. 1) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-46 and determines a new rate for the calculation of Utilities (Network Facilities Tax) payable under the *Utilities (Network Facilities Tax) Act 2006*.**

Disallowable Instrument DI2016-18 being the Utilities (Technical Regulation) (Light Rail Regulated Utility (Electrical) Network Code) Approval 2016 made under section 14 of the *Utilities (Technical Regulation) Act 2014* **provides the code for technical requirements for a light rail regulated utility that provides a light rail regulated utility service.**

Disallowable Instrument DI2016-19 being the Utilities (Technical Regulation) (Light Rail Regulated Utility (Electrical) Network Boundary Code) Approval 2016 made under section 14 of the Utilities (Technical Regulation) Act 2014 provides the code that defines the boundary between a light rail regulated utility (electricity) network and an electricity distribution network.

Disallowable Instrument DI2016-20 being the Utilities (Technical Regulation) (Regulated Utility Coordination Code) Approval 2016 made under section 14 of the *Utilities (Technical Regulation) Act 2014* **clarifies the responsibilities of regulated utilities by facilitating coordination amongst regulated utilities and any light rail regulated utility network.**

Disallowable Instrument DI2016-23 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2016 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI 2015-235 and determines Tabcorp ACT Pty Ltd sub-agencies as a sports bookmaking venue by approving areas within a one metre radius of a selling terminal owned and operated by Tabcorp ACT Pty Ltd and located in venues specified by the Schedule in this instrument.**

Disallowable Instrument DI2016-24 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2016 (No. 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI 2015-234 and approves specific areas as identified in the Schedule as approved sports bookmaking venues.**

Disallowable Instrument DI2016-25 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No. 4) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area used for the Light Car Club of Canberra rallies to be held on 20 March 2016 and 9 October 2016.**

Disallowable Instrument DI2016-26 being the Health (Protected Area) Declaration 2016 (No. 1) made under section 86 of the *Health Act 1993* **declares a protected area around an approved medical facility.**

Disallowable Instrument DI2016-27 being the Waste Minimisation (Landfill Fees) Determination 2016 (No. 1) made under section 45 of the *Waste Minimisation Act 2001* revokes DI2015-85 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2016-29 being the Public Place Names (Throsby) Determination 2016 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of 22 roads in the Division of Throsby.**

Disallowable Instrument DI2016-30 being the Public Place Names (Canberra Central and Majura Districts) Determination 2016 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of public places specified in the schedule in the Canberra Central and Majura Districts.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

DRAFTING ISSUE

Disallowable Instrument DI2016-12 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2016 (No. 1) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* **provides that pharmacists and intern pharmacists may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards at Schedule 1 of the instrument.**

Disallowable Instrument DI2016-21 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2016 (No. 2) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* **revokes DI2016-12 and provides that pharmacists and intern pharmacists may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards at Schedule 1 of the instrument.**

Each of the instruments mentioned above gives directions, under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, in relation to the administration of a vaccine to an adult, without prescription, by a pharmacist or intern pharmacist. The first instrument mentioned above was made on 1 March 2016 and notified on the ACT Legislation Register on 2 March 2016. The second instrument mentioned above was made on 15 March 2016 and registered on the ACT Legislation Register on 21 March 2016. Section 3 of the second instrument revokes the first instrument.

The Committee notes that, by way of explanation for the need to revoke and re-make the first instrument so soon after it was made, the Explanatory Statement for the second instrument states:

> This instrument repeals the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2016 (No 1) to allow for a minor update in keeping with the intended scope of pharmacist vaccinations, namely that pharmacist administration of vaccines not be limited to a community pharmacy setting.

The Committee notes that the substantive difference between the first and second instrument appears to be the omission of the words “in a community pharmacy setting” from the opening words of the “Practice Standards” in Part B of Schedule 1 to the instrument, which (in the first instrument) read as follows:

In administering vaccinations to patients without a prescription, pharmacists must practice in accordance with the below practice standards in a community pharmacy setting.

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTIONS 47(5) AND (6) OF THE LEGISLATION ACT 2001

Disallowable Instrument DI2016-22 being the Road Transport (Safety and Traffic Management) Protective Helmets for Motorbike Riders Approval 2016 (No. 1) made under paragraph 66(1)(3) of the *Road Transport (Safety and Traffic Management) Regulation 2000* **revokes DI2015-322 and specifies protective helmets considered acceptable by the Road Transport Authority as suitable protective helmets for use by motorbike riders.**

This instrument approves standards in relation to motorbike helmets, under paragraph 66(1)(e) of the *Road Transport (Safety and Traffic Management) Regulation 2000*. Section 3 of the instrument revokes the Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2015 (No 1) (DI2015-322), which the Committee commented on in *Scrutiny Report 41* of the *8th Assembly*. The issue identified by the Committee in that Scrutiny Report related to the reliance of the instrument on various extrinsic documents (including Australian Standards) without those extrinsic documents being notified on the ACT Legislation Register, as required by subsection 47(5) of the *Legislation Act 2001*.

The Minister for Education, Corrections, Justice and Consumer Affairs and Road Safety responded to the Committee in a letter that was published in the Committee's *Scrutiny Report 42* of the *8th Assembly*. In that letter, the Minister acknowledged the issues identified by the Committee (noting that the referenced documents would be notifiable, as the instrument was drafted) and indicated that the instrument would be re-made. This new instruments carries out that intention. In particular, the instrument disapplies subsections 47(5) and (6) of the Legislation Act, with the effect that the referenced documents do not need to be notified on the ACT Legislation Register, nor do any amendments, etc to the documents (ie as required by subsection 47(6)).

By way of explanation, the Explanatory Statement for this instrument states:

> This instrument disapplies the provisions of section 47 of the *Legislation Act 2001* which would otherwise require notification of instruments applied by reference (in this case Australian/New Zealand and European helmet standards referred to in clause 4). The standards are technical in nature and describe performance standards with which a helmet must comply.
>
> A person buying a helmet or a police officer or authorised person enforcing the requirements for which helmets may be sold or worn would typically simply check stickers or labels for information on the standard that the helmet is claimed to meet.
>
> Any further, more detailed, checks on whether the helmet is suitable for use would usually require a helmet to be taken away and tested in a laboratory by qualified testing authorities.
>
> Given this, it is not considered necessary to notify the standards referenced in the approved motorcycle helmet instrument. If a person is interested in the specific wording of a particular standard, the standards are generally available from the relevant standards organisation. In most cases they can be found and viewed free of charge using basic searches of the internet.

This instrument revokes and replaces the *Road Transport (Safety and Traffic Management) Approval of protective Helmets for Motorbike Riders Determination 2015 (No 1)* and by the operation of clause 6 sets aside the requirements to notify the standards referenced in the instrument.

The Committee notes the above explanation as to the availability of the extrinsic documents that are referenced by the instrument.

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTION 47(5) OF THE LEGISLATION ACT 2001

Disallowable Instrument DI2016-28 being the Planning and Development (Remission of Lease Variation Charges—Economic Stimulus and Sustainability) Determination 2016 (No. 1) made under sections 278 and 278E of the *Planning and Development Act 2007* **proscribes the circumstances and the amounts that must be remitted in relation to a Lease Variation Charge applying to a development application approved on or after 7 March 2016, where the development application also relates to development of a building on the land under lease.**

This instrument prescribes circumstances under which lease variation charges must be remitted, under sections 278 and 278E of the *Planning and Development Act 2007*. Section 12 of the instrument provides:

12 Disapplication of Legislation Act, s 47 (5)

The Legislation Act, section 47 (5) does not apply to the following under this instrument:

(a) AS 4299-1995 Adaptable housing;

(b) a Green Star rating or related document;

(c) a NatHERS rating or related document.

Note 1 The text of another instrument applied under this instrument is taken to be applied as in force when this instrument was made (see Legislation Act, s 47 (4) (b)).

Note 2 AS 4299-1995 Adaptable housing may be purchased at www.standards.org.au. Green Star ratings and related documents may be accessed at www.gbca.org.au. NatHERS ratings and related documents may be accessed at www.nathers.gov.au.

The various external documents mentioned above are referred to in various substantive provisions of the instrument, which rely on those documents for their operation. The effect of disapplying subsection 47(5) of the *Legislation Act 2001* is that those external documents are not "notifiable instruments" and, as a result, do not have to be published on the ACT Legislation Register.

The Committee notes that, by way of explanation for the disapplication of subsection 47(5), the Explanatory Statement for the instrument states:

12 DISAPPLICATION OF LEGISLATION ACT, S 47 (5)

The material mentioned in section 12 is incorporated into the disallowable instrument. The *Legislation Act 2001* section 47 (5) provides that an incorporated document is taken to be a notifiable instrument. A notifiable instrument must be notified on the legislation register under the Legislation Act.

However, the *Legislation Act* section 47 (5) may be displaced by the authorising law (the Act) or the incorporating instrument (this disallowable instrument) (see section 47 (7)). Section 47 (5) is displaced here because the incorporated material may be subject to copyright and is available over the Internet.

The Committee notes that AS 4299-1995 Adaptable housing is available for purchase from SAI Global. The cheapest price for access appears to be $85.69. However, unlike other instruments that have been considered by the Committee, neither the instrument nor the Explanatory Statement provides information about whether the standard is otherwise freely and readily available.

For example, the Committee notes the following provision in the Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2015 (No 1) [DI2015–267]:

5 Referenced documents

(1) Australian Standards are available for purchase at *www.standards.org.au*.

(2) A copy of the Building Code of Australia is available for inspection by members of the public between 9am and 4.30pm on business days at the Environment and Planning Directorate shopfront, Dame Pattie Menzies House, 16 Challis Street, Dickson, or for purchase at *www.abcb.gov.au*.

The Committee seeks the Minister's advice as to whether there is any possibility that AS 4299-1995 Adaptable housing is (or may be made) freely available for inspection by users of this instrument and, if not, seeks advice as to the reasons why it cannot (or need not) be made freely available.

This comment requires a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2016-4 being the Magistrates Court (Health Infringement Notices) Regulation 2016 made under the *Magistrates Court Act 1930* **provides for infringement notices to be issued for offences against subsections 87(1) and (2) of the Health Act.**

Subordinate Law SL2016-5 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2016 (No. 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* **authorises pharmacists and intern pharmacists to administer vaccines without a prescription, in accordance with a direction of the Chief Health Officer.**

Subordinate Law SL2016-6 being the Planning and Development (Lease Variation Charge Exemption) Amendment Regulation 2016 (No. 1) made under the *Planning and Development Act 2007* **amends the *Planning and Development Regulation 2008*.**

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Assistant Minister for Health, dated 4 April 2016, in relation to comments made in Scrutiny Report 43 concerning the Smoke-Free Legislation Amendment Bill 2016 (attached).
- The Minister for Transport and Municipal Services, dated 4 April 2016, in relation to comments made in Scrutiny Report 43 concerning the Animal Welfare Amendment Bill 2016 (attached).
- The Minister for the Environment and Climate Change, dated 5 April 2016, in relation to comments made in Scrutiny Report 39 concerning disallowable instruments (attached):
  - DI2015-268—Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2015 (No. 1), including a regulatory impact statement
  - DI2015-269—Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2015 (No. 1)
  - DI2015-270—Energy Efficiency (Cost of Living) Improvement (Emissions Multiplier) Determination 2015 (No. 1)
  - DI2015-271—Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2015 (No. 1)
  - DI2015-272—Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2015 (No. 1)
- The Minister for Road Safety, dated 19 April 2016, in relation to comments made in Scrutiny Report 43 concerning the Animal Welfare Amendment Bill 2016 (attached).

The Committee wishes to thank the Assistant Minister for Health, the Minister for Transport and Municipal Services, the Minister for the Environment and Climate Change and the Minister for Road Safety for their responses.

COMMENT ON GOVERNMENT RESPONSE

The Committee offers further comment on the response by the Minister for Transport and Municipal Services to comments made in Scrutiny Report 43 concerning the Animal Welfare Amendment Bill 2016:

1. The Committee recommended that the Explanatory Statement state a justification for the creation of a strict liability offence by reference to the framework stated in HRA subsection 28(2). The Committee notes and refers the Assembly to the Minister's opinion that, in substance, the Explanatory Statement addressed the criteria stated in subsection 28(2).

The Committee's comment was prompted by its view that subsection 28(2) has a significant constitutional purpose. It was inserted by amendment to the Act to provide specific guidance on the range of relevant factors that must be taken into account when assessing whether a limitation on a

human right is reasonable and justified.[2] It plays a critical role in educating the public service and the public about the circumstances in which a limitation of the HRA rights is justifiable. Limitation of HRA rights should not be routine, and a specific reference to the criteria in subsection 28(2) may operate to restrain too ready limitation of the HRA and make clearer why there is a limitation. This will in turn promote dialogue between the Assembly[3] and the promoter of the relevant Bill, and assist a court should it be called upon to address the question of justification.

2. The Committee notes and refers to the Assembly the Minister's response to the Committee's concern that the offence provision in proposed section 6B is too vague. It notes that the Minister provides illustrations of the uncertainty that will be involved in the application of this section. The Committee also notes that section 44 of the *Domestic Animals Act 2000* applies only to a dog in a public place, a restriction not found in section 6B.

3. The Committee has placed considerable emphasis on the desirability of framing administrative powers in ways that confine their parameters as closely as feasible. That is, if an administrative body, or a court, is given a discretion to do something, the law should state the matters that are relevant, or irrelevant, to the exercise of the discretion to do that something. Subsections 101(2) and (3) of the Animal Welfare Act state what kinds of orders may be made, (and the Minister's response draws attention to these matters), but the provisions say nothing about the considerations relevant to the exercise of the discretion to make those orders.

The Committee is aware that a court might—indeed probably would—find that the parameters of the discretion could be ascertained by reference to the objects of the law. It should not however be necessary for a person to be put to the great expense of resort to court. Specification of the parameters is also a firmer basis upon which a court can review the legality of an exercise of a power.

Secondly, administrative power should not expressed in terms that appear to require only the formation of a subjective opinion by the repository of the power as to whether the parameters of a power are satisfied in a particular case. But this is what proposed subsections 101(2) and (3) of the Animal Welfare Act appear to do. They provide that a court may "make any order it considers appropriate". Read literally, the only question is whether the court formed an opinion that the order was appropriate. There is no express limitation in terms that the court must have reasonable grounds for the formation of the opinion. A discretion stated n these terms raises a question of the compatibility of the power with the HRA, as the Committee pointed out in *Report No 43*.

Steve Doszpot MLA
Chair

2 May 2016

[2] See Explanatory Statement to the Human Rights Amendment Bill 2007, page 2. The Explanatory Statement also said that "[i]ts intention is to provide guidance in the application of the general limitation clause in section 28(1) and to reduce its uncertainty".

[3] See further the Committee's *Guide to writing an explanatory statement* (2011); http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015
Public Sector Bill 2014

Report 41, dated 15 February 2016
Disallowable Instrument DI2015-328—Pool Betting (Prescribed Percentage) Determination 2015 (No. 1)
Disallowable Instrument DI2015-331—Training and Tertiary Education (National Code of Good Practice for Australian Apprenticeships) Approval 2015

Report 42, dated 1 March 2016
Education and Care Services National Amendment Regulations 2015 (2015 No. 804)

Report 43, dated 30 March 2016
Subordinate Law SL2016-3—Freedom of Information Amendment Regulation 2016 (No. 1)

MEEGAN FITZHARRIS MLA

Minister for Higher Education, Training and Research
Minister for Transport and Municipal Services
Assistant Health Minister

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

Thank you for Scrutiny of Bills Report No. 43 (the Report) of 30 March 2016. I offer the following response to the Standing Committee's comments on the Smoke-Free Legislation Amendment Bill 2016 (the Bill).

The Standing Committee recommended that the Explanatory Statement (the Statement) better clarify the breadth of personal vaporisers available and the application of the Bill to personal vaporisers that do and do not contain nicotine. The Statement has been amended to provide clarification on these matters. In particular, the Statement now explains that the sale and possession of personal vaporisers that contain nicotine is currently illegal without approval under the *Medicines, Poisons and Therapeutic Goods Act 2008*. As no approval has been granted for the supply of nicotine for use in personal vaporisers, ACT retailers cannot currently legally sell personal vaporisers that contain nicotine. The provisions of the Bill apply to all personal vaporisers, irrespective of whether they contain nicotine, and the provisions in the *Medicines, Poisons and Therapeutic Goods Act 2008* will continue to apply.

A further comment is made about the potential application of the definition to personal vaporisers that do not contain nicotine. It should be noted that the provisions of the Bill apply to all personal vaporisers, irrespective of whether they contain nicotine. This is the specific public health policy intent of the Bill. The Statement outlines the health justification and policy rationale for regulating personal vaporisers. Any limitations to human rights are considered reasonable and proportionate given the aim of preventing potential health harm from personal vaporiser use and exposure, as outlined in the Statement. It is therefore not considered appropriate or necessary to provide further detail in the Statement.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0051 **Email** fitzharris@act.gov.au

CANBERRA

@MeeganFitzMLA MeeganFitzharrisMLA

The Standing Committee also raised concerns that the definition of 'personal vaporiser' in the Bill could inadvertently capture devices that promote health and/or alleviate or prevent harms to health, raising human rights concerns. The definition is considered appropriate as it has been drafted based on advice from the Parliamentary Counsel's Office and with regard to the application of the Commonwealth *Therapeutic Goods Act 1989*. The definition excludes goods that are included in the Australian Register of Therapeutic Goods, thereby excluding all therapeutic goods, therapeutic devices and medical devices, including asthma puffers. This is explained in the Statement. As the name implies, therapeutic goods are products that either promote health or which alleviate or prevent harms to health. By ensuring such products are specifically excluded from the meaning of 'personal vaporiser' the human rights issues about which the Committee expressed concern are not impacted. The Bill does not limit the right to health or the protection of children.

Section 3B (2)(d) provides an additional safeguard to ensure that the definition will not prevent access to devices that promote health and/or alleviate or prevent harms to health. It enables a regulation under the *Tobacco and Other Smoking Products Act 1927* to explicitly exclude products that are not intended to be regulated as personal vaporisers. This allows an assessment of a product on a case-by-case basis. It also provides clarity to consumers, industry and those involved in supporting compliance and enforcement activities with respect to the *Tobacco and Other Smoking Products Act 1927*.

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

Yours sincerely

Meegan Fitzharris MLA
Assistant Minister for Health

MEEGAN FITZHARRIS MLA

Minister for Higher Education, Training and Research
Minister for Transport and Municipal Services
Assistant Health Minister

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 Standing Committee on Justice and Community Safety Committee's Report No 43. The Committee has made a number of comments on the Animal Welfare Amendment Bill 2016 (the bill), and has recommended that I respond.

The requirement that persons provide their name and address to an inspector or an authorised officer and the right to privacy in HRA subsection 12 (1)

The Committee has referred to sections 82A (2) and 84AA (2) of the bill, which provide, in limited and specific circumstances, for an inspector or authorised officer to direct a person to give their name and address to the inspector or authorised officer. The Committee has observed that it is important to note the limits of the powers that would be created by sections 82A and 84AA. The Committee has recommended that I indicate whether I accept its understanding of the limits of the powers under sections 82A and 84AA. If some wider effect is intended, the Committee has recommended that this be outlined and justified.

As I have noted above, the proposed power to direct a person to give their name and address to an inspector or authorised officer can only be exercised in limited and specific circumstances.

First, the inspector or authorised officer must be properly authorised under the *Animal Welfare Act 1992* (the Act), or must be a police officer. Second, the inspector or authorised officer must have entered premises in accordance with the requirements of the Act, to exercise the specific and limited powers listed under sections 82 and 84, respectively, of the Act.

Further, as the Committee has correctly noted, the power at sections 82 (1) (h) and 84 (1) (i) to

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0051 **Email** fitzharris@act.gov.au
CANBERRA
@MeeganFitzMLA MeeganFitzharrisMLA

ask questions of any person in or on the premises, is clearly limited to the powers listed under the preceding subsections, that is, to—

a) examine any animal in or on the premises; or
b) give assistance to any animal on the premises; or
c) take a sample of tissue, blood, urine or other bodily material from an animal or carcass on the premises; or
d) inspect the premises and anything in or on the premises (including a document); or
e) take copies of, or extracts from, any document in or on the premises; or
f) take photographs or make films or videotapes of the premises or any animal or thing in or on the premises; or
g) seize any animal, or anything (including a document), that the officer believes on reasonable grounds to be connected with an offence.

The proposed creation of offences of strict liability and the presumption of innocence in HRA subsection 22 (1)

The Committee has referred to discussion of the bill's human rights limitations in the Explanatory Statement. Specifically, the Committee has expressed the view that the Explanatory Statement (at 6) makes no reference to the *Human Rights Act 2004* (HRA), section 28.

The Committee has observed in relation to sections 82A, 82B and 84AA 84AB, that—

> *"The difficulty here is that in many cases, the relevant person could not be said to have been aware of an obligation to comply, so that the argument that this is a regulatory offence could not be advanced."*

I do not share the Committee's view that the offences are not regulatory in nature or that a person would not be aware of their obligation to comply. Sections 82A (5) and 84AA (5) expressly require an inspector or authorised officer to tell a person that it is an offence to fail to comply. Sections 82B (4) and 84AB (4) expressly provide that an offence will not apply if the inspector or authorised officer did not, before giving the direction, warn the person that failure to comply with the direction is an offence.

The Committee has recommended that the Explanatory Statement state, according to the provisions of HRA section 28, a justification for the creation of this strict liability offence. While I thank the Committee for its views, I do not consider that the Explanatory Statement has failed to justify the creation of the strict liability offences in the bill. With reference to each requirement of section 28 of the HRA, the Explanatory Statement for the bill provides that—

- the offences in the bill limit the right to privacy and rights in criminal proceedings (page 4);
- the limitations are necessary to ensure the objectives of the Act, i.e., that officers performing compliance and enforcement functions under the Act have an effective mechanism and the minimum powers necessary to discharge their functions safely and effectively (in a manner that is consistent with powers exercised by authorised officers in equivalent circumstances under other Territory legislation) (pages 5 and 6);

- the power can only be exercised in the specific and limited circumstances that I have listed above; the penalty units for the offences are within the acceptable range for a strict liability offence; exceptions will apply under the provisions themselves and section 36 of the *Criminal Code 2002* (I thank the Committee for its observation that section 39 of the Criminal Code will also apply) (page 6);
- the limitations are necessary to ensure officers performing compliance and enforcement functions under the Act can do so safely and effectively, and to maintain an appropriate balance between protecting human rights and maintaining an effective framework for animal welfare and protection (page 7);
- the limitations are the least restrictive reasonably available to protect the welfare, safety and health of animals and ensure their proper and humane care and management; the construction of these provisions as strict liability offences ensures consistency in the scope and application of powers exercised by authorised officers under Territory legislation (page 6).

I therefore consider that the Explanatory Statement justifies its offences, including the strict liability offences, in some detail. The Explanatory Statement clearly states that these provisions are found in the *Public Unleased Land Act 2013* and *Domestic Animals Act 2000*.

The Committee has observed,

> *"As it reads, (sic) proposed section 82A and 82B, the failure of a person to obey a direction given to them by an inspector under subsection 82A (4) is not an offence or indeed (sic) result in any adverse legal consequences. The Committee recommends the Minister clarify whether this was always intended."*

I thank the Committee for its observation. I confirm that the same also applies for proposed sections 84AA and 84AB— neither section 82B (1) (a) nor section 84AB (1) (a) are intended to refer to sections 84AA (4) or 84AB (4).

The purpose of the power to direct a person to give name and address details is to allow, in limited and specific circumstances, an inspector or authorised officer to obtain information that is relevant and necessary to the investigation and enforcement of animal welfare matters.

Sections 82A and 84AA establish, within the context of the Act, the framework in which the authority to direct a person to give their name and address can be exercised. Sections 82B and 84AB provide consequences for a failure to comply with a direction under sections 82A (2) and 84AA (2). As discussed, both offences are strict liability offences, consistent with the Government's purpose that fault elements such as intention or recklessness will not apply to a failure to give personal details.

Sections 82A (4) and 84AA (4) provide that if the inspector or authorised officer believes on reasonable grounds that a personal detail [...] is false or misleading, the inspector or authorised officer *may* direct a person to produce evidence immediately of the correctness of the (personal) detail. These provisions establish a lawful authority to obtain evidence of name and address if the inspector or authorised officer believes on reasonable grounds that a person has provided false or misleading information in response to a direction under subsection (2). For

example, a person who says, “My name is Daffy Duck and I live in Disneyland”, can be directed to provide evidence of these details.

I do not intend to enforce a direction to produce evidence of name and address. This would have the effect of requiring all people to carry personal identification with them at all times. This is not within the ambit of my legislation and is not necessary to achieve its purpose.

I thank the Committee for posing this question and will consider, at an appropriate time, the operation of this and other template powers for authorised officers.

Vagueness of offence provisions and the right to liberty and security of person in HRA subsection 18 (1)

I do not consider that proposed section 6B (2) (to which the Committee specifically refers), or the definitions that apply in this section, are vague or incompatible with the rights of a defendant.

New section 6B is consistent with duties expressed in animal welfare legislation in Queensland, the Northern Territory, Tasmania, New South Wales, Victoria and South Australia. Its definitions provide for the inspectorate and the courts to consider what is appropriate and reasonable, having regard to all the circumstances.

Sections 6A and 6B will replace section 8 (pain) to more clearly and effectively prohibit animal neglect and cruelty. Section 8 (2) (d) of the Act had created an unintended barrier to the prosecution of neglect because it criminalised the outcome of neglect, not the neglect itself. Specifically, it required the prosecution to establish that a person had neglected an animal in a way that caused it pain. This issue of construction was the subject of Burns J’s comment in recent appeal proceedings—

> *“It will immediately be observed that s 8 (2) (d) of the Act does not criminalise all forms of neglect of an animal, but only those that cause the animal pain.”*[4]

Section 6B will allow for a measured and lawful approach to the protection of animals because it allows for differences in circumstances, species and environment. For example, a large dog will require more room, more food and more water than a small dog. That animal may require more water in summer than in winter. A dog with very long and thick hair will require more grooming than a dog with short or no hair. A dog with no hair will have a particular need to be kept warm in winter. A person who fails to provide food or water for their animal or who fails to seek veterinary treatment because they were suddenly seriously ill should not be prosecuted for neglect.

The law must and can provide appropriately for different circumstances and different animals. I am satisfied that the bill achieves an effective balance between animal welfare and rights that are protected under the HRA.

---

[4] *Croatto v Banks* [2015] ACTSC 398

The Committee has referred to Subsection 6B (1), which provides that a person in charge of an animal has a duty to care for the animal. The Committee has observed that failure to observe this duty is not penalised in any way apparent to the Committee.

Section 6B (1) is indeed a statement of principle, to which no penalty is attached. As the Committee has identified, offences are listed at section 6B (2)—

A person in charge of an animal commits an offence if the person—

(a) fails to take reasonable steps to provide the animal with appropriate—
  (i) food and water; or
  (ii) shelter and accommodation; or
  (iii) opportunity to display behaviour that is normal for the animal; or
  (iv) treatment for illness, disease, and injury; or
(b) abandons the animal.

The Committee has observed,

> *'there is the question of how, in a particular case, the concept of "opportunity to display behaviour that is normal for the animal" is to be understood.'*

The Committee has provided an example, that dogs are prone to approach other dogs, and are often restrained by the person in charge, and asked,

> *"When will such restraint be an inappropriate denial of such an opportunity?"*

Opportunity to display behaviour that is normal for the animal should be considered with reference to the concepts of *appropriate* and *reasonable*, which are defined at subsection (3). Noting the Committee's example (I will return to this momentarily), a better example of an offence under section 6B (2) (iii) would be tethering a large dog with a 20 centimetre lead so that it cannot move more than one step in any direction, with no opportunity for other exercise. This was one of the cases prosecuted during the last year. The risk of being more specific in the legislation is that it will become restrictive, excessively narrow or intrusive. To offer another example, I do not consider that legislation should specify how often or how far a person must walk their dog.

Codes of practice made under section 22 and 23 of the Act provide further and more detailed guidance on the welfare of animals and responsible animal ownership.

Turning briefly to the Committee's example of restraining a dog, section 44 of the Domestic Animals Act provides that—

> *A carer must not be in a public place with a dog that is not restrained by a leash, unless the person is in an area designated as an area where dogs are not required to be restrained on a leash.*

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties? Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

Turning to the Committee's final comment, the Committee has referred to proposed subsections 101 (2) and (3) of the bill, and advised—

"The framing of administrative or judicial powers in terms that they may be exercised without specification of parameters, and in particular in terms that require only the formulation of a subjective opinion, raises questions under the Committee's terms of reference".

I do not consider that the Committee's comments apply to the proposed provisions. Objective and clearly defined parameters are specified in each provision. Specifically, under section 101, the court may make an order *only* if—

(a) a court has convicted or found guilty a person in charge of an animal of an offence in relation to the animal; and
(b) the court is satisfied that, unless an appropriate order under this section is made, the person would be likely to commit a further offence in relation to the animal or any other animal.

Section 101 (2) then provides that the court make an order it considers appropriate in relation to —

(a) the disposal of—
    (i) the animal in relation to which the offence was committed; and
    (ii) any other animal of which the person is in charge; and
(b) the payment to the Territory of expenses incurred in the care of—
    (i) the animal in relation to which the offence was committed; and
    (ii) any other animal of which the person is in charge.

These are limited, specific and objective matters which will be determined on the basis of the evidence before the court. Where expenses are incurred in the care of an animal by the RSPCA ACT, on behalf of the Territory, I would anticipate the costs would be clearly itemised and verified, that is, without regard to subjective opinion.

Section 101 (3) then provides that the court may, in addition to any penalty which it may impose, make an order as it considers appropriate that the person must not—

(a) purchase or acquire any animal within the period stated in the order; or
(b) keep, care for, or control any animal within the period stated in the order.

These orders are also clearly limited, specific, and capable of objective determination.

I am satisfied that this bill has achieved an appropriate balance to achieve our community's animal welfare expectations without unduly trespassing on human rights. This bill is an example of workable, moderate and considered legislative reform.

I thank the Committee for its comments.

Yours sincerely

Meegan Fitzharris MLA
Minister for Transport and Municipal Services

SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

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

Member for Molonglo

Mr Steve Doszpot
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Doszpot

Thank you for the Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee (the Committee) Report No 39 (the Report) on the regulatory impact statement (RIS) for the following instruments:

- Disallowable Instrument DI2015-268 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2015 (No. 1)
- Disallowable Instrument DI2015-269 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2015 (No. 1)
- Disallowable Instrument DI2015-270 being the Energy Efficiency (Cost of Living) Improvement (Emissions Multiplier) Determination 2015 (No. 1)
- Disallowable Instrument DI2015-271 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2015 (No. 1)
- Disallowable Instrument DI2015-272 being the Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2015 (No. 1).

The committee has drawn the Legislative Assembly's attention to the Regulation on the basis that the Regulatory Impact Statement (RIS) does not meet the technical or stylistic standards expected by the Committee.

I note that, under s35(h) of the *Legislation Act 2001*, a regulatory impact statement for a subordinate law, including disallowable instrument must include 'a brief assessment of the

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

consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with those principles, the reasons for the inconsistency'. It would seem, in this instance, the RIS did not adequately address this requirement.

In light of the Committee's concern, I have asked the Environment and Planning Directorate to do an assessment of the instruments and their consistency with the Committee's scrutiny principles. I am pleased to inform the Committee that the instruments are consistent with the Committee's scrutiny principles for the following reasons.

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

The instruments are in accord with the objects of the *Energy Efficiency (Cost of Living) Improvement Act 2012* (the Act). In fact, it is through the relevant Disallowable Instruments that the Act operates to meet its objects, namely:

a) encourage the efficient use of energy
b) reduce greenhouse gas emissions associated with stationary energy use in the Territory
c) reduce household and business energy use and costs
d) increase opportunities for priority households to reduce energy use and costs.

(b) The disallowable instruments do not unduly trespasses on rights previously established by law

The instruments do not unduly trespass on rights previously established by law. The instruments determine targets, values, formula and eligible activities for implementing the Energy Efficiency Improvement Scheme, including for electricity retailers to meet their energy savings obligations.

(c) The disallowable instruments do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions

The instruments do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. Any decisions which may affect rights, liberties and/or obligations based on the targets, values, formula and eligible activities determined in the instruments are reviewable, see Items 4, 5, 6 and 7 of Schedule 1 of the Act.

While it is novel to have a single RIS covering five Disallowable Instruments, because of the interrelated nature of the instruments and their operation under the Act, it was decided to present the information in a single RIS to assist the Committee and the public in the interpretation of the RIS rather than each Disallowable Instrument in isolation.

I trust this response addresses the Committee's comments in relation to the RIS for the Disallowable Instruments. I thank the Committee for its comments and careful consideration of the relevant Disallowable Instruments and their RIS.

Yours sincerely

Simon Corbell MLA
Minister for the Environment and Climate Change

SHANE RATTENBURY MLA

Minister for Education
Minister for Corrections
Minister for Justice and Consumer Affairs
Minister for Road Safety

Member for Molonglo

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

Dear Mr Doszpot

I refer to Scrutiny Report 42 in which the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) asked about the *Heavy Vehicle National Amendment Regulation (2015 No 824)*, made under the Heavy Vehicle National Law as applied by the *Heavy Vehicle National Law Act 2012* (Queensland) and by the laws of States and Territories.

The Committee noted that section 2 of the *Heavy Vehicle National Law Amendment Act 2015* (Queensland) provides that it 'commences on a single day to be fixed by proclamation' but that the Committee could find no evidence that the commencement has been proclaimed. The report raises the question about whether provisions of the amendment regulation can commence given the apparent non-commencement of formal provisions. The report additionally questions whether, if parts of the amendment regulation commenced prior to commencement of the formal provisions, there is any retrospectivity and, if so, whether there is any prejudicial retrospectivity.

A copy of the proclamation notice is attached for information.

There are no prejudicial retrospectivity issues arising from the commencement of sections 17, 19, 20, 15, and 26 of the *Vehicle National Amendment Regulation 2015* on 17 December 2015 rather than 6 February 2016.

ACT LEGISLATIVE ASSEMBLY
Phone (02) 6205 0005 **Email** rattenbury@act.gov.au
CANBERRA
@ShaneRattenbury shanerattenburymla

Section 17 deletes a number of fees payable to the National Heavy Vehicle Regulator and reduces another fee. Those fees are in relation to parts of the Heavy Vehicle National Law that is yet to be applied in the ACT, noting that ACT operators may be subject to those provisions when driving in other jurisdictions.

Sections 19, 20, 25, and 26 relate to regulating a 6.5tonne steer axle mass allowance. The requirements have not changed, but the amendments bring the allowance into the main part of the regulation from the former Schedule.

Early commencement of those parts of the amendment regulation provides a positive benefit to operators affected by them.

I trust the above information is of assistance, and thank the Committee for bringing these matters to my attention.

Yours sincerely

Shane Rattenbury MLA
Minister for Road Safety

Queensland

Proclamation

Subordinate Legislation 2015 No. 186

made under the

Heavy Vehicle National Law Amendment Act 2015
[Act No. 12 of 2015]

I, PAUL de JERSEY AC, Governor, fix **6 February 2016** for the commencement of the provisions of the Act that are not in force.

[L.S.]

PAUL de JERSEY AC,

Governor

Signed and sealed on 17 December 2015.

By Command STIRLING HINCHLIFFE

God Save the Queen

ENDNOTES

1 Notified on the Queensland legislation website on 18 December 2015.

2 The administering agency is the Department of Transport and Main Roads.