

Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)

SCRUTINY REPORT 17

4 MAY 2018

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

- (1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

BILLS—NO COMMENT

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2018

This Bill amends the following legislation, including to clarify their existing operation or amend consultation requirements: *City Renewal Authority and Suburban Land Agency Act 2017*; *Heritage Act 2004*; *Nature Conservation Act 2014*; and *Planning and Development Regulation 2008*.

WASTE MANAGEMENT AND RESOURCE RECOVERY AMENDMENT BILL 2018

This Bill amends the *Waste Management and Resource Recovery Act 2017* to provide for a two-year transition period for beverage suppliers to include a common refund marking on beverage containers which will apply across all Australian container deposit schemes.

BILLS—COMMENT

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

CRIMES (CONSENT) AMENDMENT BILL 2018

This Private Member's Bill will amend the *Crimes Act 1900* to extend the protection given to young people of similar age who consensually share intimate images to the production, trading and possession of child exploitation material or pornographic performances, and to include a statutory definition of consent in relation to sexual offence provisions.

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

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Various sexual offences under the Crimes Act involve establishing a lack of consent, either as an element of the offence (eg sexual intercourse without consent under section 54, an act of indecency without consent under section 60) or as a defence (eg sexual intercourse with a young person under paragraph 55(3)(b), act of indecency with a young person under paragraph 61(3)(b)). Section 67 of the Crimes Act currently sets out various acts which negate what might otherwise be consent, such as the infliction or threat of violence or humiliation or effect of intoxicating substances. The Crimes Act does not, however, provide any further definition of what constitutes consent. Courts in the ACT therefore refer to the common law position. Establishing sexual intercourse without consent, for example, involves establishing that the sexual intercourse was without the person's consent and that the defendant knew or was reckless as to whether the person did not consent. Recklessness includes where the defendant did not care about whether the person was consenting, either because they did not stop even though they knew there was a risk that the person did not consent, or had not considered whether the person consented or not.¹

¹ See *Sims v Drewson* [2008] ACTSC 91, as approved in *Director of Public Prosecutions v Walker* [2011] ACTCA 1

The Bill will amend the current approach in the ACT by defining consent of a person for those various sexual offences (as well as the proposed new defence in section 66A applying to young persons of a similar age). A person will consent when they give free and voluntary agreement; and the other person knows the agreement was freely and voluntarily given, or is satisfied on reasonable grounds that the agreement was freely and voluntarily given. The effect of this provision will be that the prosecution can establish the mental element of lack of consent through showing that there were no reasonable grounds open to the defendant to believe that the agreement was freely and voluntarily given. It is intended that the Bill will remove the ability of the defendant to show that they had an honest belief that the other person had consented where that belief was not reasonable in the circumstances.

As the Bill increases the evidential burden on the defendant to establish the reasonableness of their belief that the other person was consenting, the Bill will extend the circumstances in which an innocent person may be found guilty because they are unable to meet their evidential burden. The Bill therefore engages the right to the presumption of innocence protected by section 22 of the HRA.

The ACT Human Rights Commission, in its submission to the Crimes (Consent) Amendment Bill 2018—Exposure draft, dated 26 March 2018, raised the following concerns:

...

It is also welcome that the bill clarifies that, for the offences against ss 64 and 65, the defendant bears only an evidential burden in relation to the relevant matters. As we have previously noted, an evidential burden is more likely to be considered a proportionate limitation on the right to be presumed innocent (s 22(2)), in accordance with the reasonable limits test in s 28 of the HR Act.

However, it is not apparent why the bill omits to expressly extend this clarification to the offences in s 66 of the Crimes Act, and it is not clear if the intention is to apply a legal burden instead. Placing a legal burden on the defendant in these circumstances gives rise to a ***serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden*** (emphasis added) placed upon them to show they did not.

In our view, absent a clear justification for treating the offences in s 66 differently to the other child pornography offences in ss 64 and 65, the bill should clarify that the defendant has an evidential burden for those matters as well. Consideration could also be given to aligning the similar-age consent defences (that impose a legal burden on the defendant) currently contained in the Crimes Act – including in s 55 (sexual intercourse with a young person) and s 61 (acts of indecency with young people) – with this approach to ensure greater consistency across the Crimes Act...

...

While the Commission strongly supports the introduction of a statutory definition of consent that reflects a ‘communicative model’ of consent, we have some concerns about the provisions as currently drafted. Under the bill, the meaning of consent for the purposes of sexual and intimate image abuse offences is defined as requiring both (i) free and voluntary agreement by the person; and (ii) either subjective or objective knowledge by the other person that consent was present. The Explanatory Statement to the exposure bill states at page 2 that the objective knowledge requirement of the definition is ‘modelled upon the “reasonable belief” construction of section 273.2 of the Criminal Code (Canada) R.S.C., 1985, c. C-46’. The ‘reasonable belief’

construction in the comparable Canadian legislation, however, is **not** (emphasis added) included as part of the definition of consent, but is instead set out in a separate provision which addresses various matters where belief in consent is not a defence...

...

We are concerned that the provisions as currently drafted as **likely to result in ambiguity and uncertainty** (emphasis added), as they appear to conflate two discrete issues: (i) consent by one person and (ii) the responsibility of the other person to take steps to ascertain consent exists.

In our view, it would be preferable to adopt an approach consistent with other jurisdictions, by setting out the meaning of consent ('free and voluntary agreement') separately to the objective fault test for belief about consent. The purpose of adopting an objective fault test is to ensure that the person has reasonable grounds for their belief about consent, and that the person seeking consent has the responsibility to take steps to ascertain consent exists. While an objective fault test is central to assessing whether consent was freely and voluntarily given, it is not clear how the relevant offences in the Crimes Act would operate if it were included within the definition of consent itself. Dealing with the definition of consent and knowledge about consent separately does not detract from the objective of promoting a communicative model of consent. The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.

The Committee is concerned that the explanatory statement to the Bill (as tabled) or the revised explanatory statement to the Bill (as available on the legislation register) has not addressed the Human Rights Commission's concerns and, in the Committee's view, it should do so.

Under the current offences, the unreasonableness of the belief of consent may be an element in establishing the defendant's lack of belief that the other person had consented. The need for consent to depend on the reasonableness of the grounds on which the defendant believes free and voluntary agreement was given may, therefore, have only a minor impact on how the knowledge of lack of consent is established. It is on this basis that the explanatory statement concludes that any limitation on the innocence is reasonable, considering the objective of the Bill to establish a clearer, affirmative definition of consent.

As the explanatory statement suggests, the extent of any limitation of this right is 'difficult to ascertain at this stage'. The Committee is concerned that the new definition of consent may result in substantial changes to how knowledge or recklessness of the lack of consent is established. In particular, by including the need for an defendant to be satisfied on reasonable grounds within the definition of consent, and applying that definition to a number of offences, it is difficult to determine the extent of the evidential or legal burdens that may be faced by the defendant, such as whether they will need have evidence going both to their state of mind and the reasonableness of that state of mind. Therefore, the Committee is not satisfied, on the information available to it, that the amendments to the definition of consent will have only a reasonable limitation on the right to the presumption of innocence. The Committee therefore recommends that an inquiry is needed to establish the possible operation and impact of the amendments to the definition of consent included in the Bill.

The Committee draws this matter to the attention of the Assembly, and recommends that the Assembly refer the Bill to the Standing Committee on Justice and Community Safety for inquiry and report.

The Bill also introduces protections for young people who engage in various offences relating to the production and possession of exploitative material (sections 64 and subsection 65(1)), and grooming and depraving young persons (section 66). The Bill will not apply those offences where the young person being exploited or groomed was 10 years or older, there is not more than two years difference between the young person and the defendant, and the young person consented to the acts in question.

As stated in the note to the proposed offences, this exception to the provision generally places an evidential burden on the defendant to show there is a reasonable possibility that the relevant circumstances existed. As stated in section 58 of the *Criminal Code 2002*, where a burden of proof is imposed on a defendant, or the defendant wants to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence, only an evidential burden is imposed. As this places a burden on the defendant, it engages the presumption of innocence protected by section 22 of the HRA and should have been addressed in the explanatory statement. However, in the Committee's view the introduction of the exception in proposed section 66A does not disadvantage the defendant by increasing the burden on them to disprove an element of the offence, and is a reasonable limitation given the Bill's objective of reducing the risk of inappropriate criminalisation of young people who engage in consensual behaviour.

However, as referred to above, the note to the proposed section 66A in the Bill only refers to the evidential burden applying to offences against section 64 and subsection 65(1), and does not mention section 66. Subsection 66(2) states that the "Criminal Code, chapter 2 (other than the immediately applied provisions) does not apply to an offence under subsection (1)." Chapter 2 of the Criminal Code includes section 58 relating to evidential burdens. The Committee takes the view that this provision is unlikely to be sufficiently clear to change what would otherwise be the likely interpretation of proposed section 66A to impose only an evidential burden. Any uncertainty as to the inadvertent imposition of a legal burden should be clearly addressed.

The Committee therefore requests that the Member consider amending the explanatory statement to include consideration of the impact of the proposed section 66A on the right to the presumption of innocence in relation to the offence in section 66, and consider amendment of the proposed section to make it clear whether only an evidential burden is intended.

In addition, if the Committee's recommendation that an inquiry be held on the impact of the Bill's amendment to the definition of consent is adopted, and given that the proposed definition of consent will also apply to the proposed section 66A, the Committee recommends that the inquiry should also include consideration of the possible operation and impact of the proposed section 66A.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

LAND TAX AMENDMENT BILL 2018

This Bill amends the *Land Tax Act 2004* to extend the basis of the imposition of land tax from land that is rented or owned by a corporation or trustee to land that is not the owner's principal place of residence. It also imposes a surcharge on investment properties held in the ACT by non-Australian residents or citizens.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Land Tax Act currently requires an owner of land, or their agent, to inform the Commissioner for revenue if a parcel of land is rented and when the rental began.² The Bill will amend this requirement to include disclosure of any change in the person's circumstances that would cause land tax or foreign ownership surcharge to become payable.³ This would require a person to notify the Commissioner if they have changed their principal place of residence, or if the premises is no longer exempt from land tax due, for example, to becoming fit for occupation, a period of two years, or any further period if extended, has expired since the death of the previous owner, or the occupier starts to pay more than nil or nominal rent. Under proposed subsection 11A(3) the Commissioner also has to determine if two people in a domestic relationship have separated and there is no reasonable likelihood of cohabitation being resumed so as to allow those people to each have a separate place of residence.

The Bill adds to the personal information that the Commissioner will access and use in carrying out their functions under the Act and, therefore, limits the right to privacy protected by section 12 of the HRA. The explanatory statement should include a statement recognising this effect and set out the reasons why the limitation on the right to privacy is reasonable using the framework set out in section 28 of the HRA.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

RIGHT TO THE EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (SECTION 8 HRA)

The Bill introduces a foreign ownership surcharge which will impose an additional charge, at a rate set by the Treasurer through disallowable instrument, in addition to any land tax on residential land owned (or part owned) by a foreign individual, foreign corporation or trustee of a foreign trust. Foreign, for this purpose, will be defined to mean that the person, or majority owners of the corporations or beneficiaries in the trust, are neither Australian citizens or residents.

As the explanatory statement for the Bill recognises, by discriminating based on nationality the Bill will limit the right against discrimination protected by section 8 of the HRA. The explanatory statement, in justifying the Bill as a reasonable limitation on the right against discrimination, states that there has been a rise in approved foreign purchases of new ACT dwellings from 2013-14 to 2015-16. Demand for residential property is also claimed to "contribute to higher house prices and hinders local home buyers, many of whom intend to live in the property rather than own it as an investment". The explanatory statement also claims that foreign owners being absent from Australia is a strong indication that the home is owned as an offshore investment. The surcharge will reduce demand from foreign buyers which will "favour home buyers based in Australia, allowing local buyers to compete in the housing market on relatively equal terms".

The Committee, based on the information provided in the explanatory statement, is not able to assess the extent to which imposing a surcharge on only foreign owners will reduce overall demand for housing in the ACT or otherwise achieve the Bill's purported objective of improving housing affordability for local residents. The Bill will not impose the surcharge on Australian citizens resident overseas, or Australian residents who do not live locally, and who may also be likely to be purchasing the home as an investment property. The surcharge will also apply to all residential property and not just new residential property for which figures of foreign ownership are given. A comparison between numbers of foreign and other non-local ownership is also not provided. The Committee asks the Minister to provide a further justification for the proposed discriminatory effect of the Bill.

² Land Tax Act section 14.

³ See clause 22.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-38 being the Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2018 made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.**
- **Disallowable Instrument DI2018-39 being the Radiation Protection (Student) Exemption 2018 (No 1) made under section 114 of the *Radiation Protection Act 2006* revokes DI2014-294 and exempts undergraduate and postgraduate students undertaking course work or research at a university, or other educational institution, from the provisions of the Act while under supervision of a licensed person.**
- **Disallowable Instrument DI2018-40 being the Planning and Development (Remission of Lease Variation Charges—Environmental Sustainability) Determination 2018 (No 1) made under section 278 of the *Planning and Development Act 2007* determines the lease variation charge for a specified chargeable variation of a nominal rent lease.**
- **Disallowable Instrument DI2018-41 being the Public Place Names (Greenway) Determination 2018 made under section 3 of the *Public Place Names Act 1989* determines the names of one road for a public place in the Division of Greenway.**
- **Disallowable Instrument DI2018-42 being the Boxing Control (Combat Sports) Code of Practice 2018 (No 1) made under section 15 of the *Boxing Control Act 1993* revokes DI1996-233 and approves the Code of Practice (Combat Sports).**
- **Disallowable Instrument DI2018-43 being the Long Service Leave (Portable Schemes) Security Industry Levy Determination 2018 made under subsection 51 of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2012-233 and determines the levy payable by employers in the security industry for each quarter.**
- **Disallowable Instrument DI2018-44 being the Long Service Leave (Portable Schemes) Contract Cleaning Industry Levy Determination 2018 made under section 51 of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2015-21 and determines the levy payable by employers in the contract cleaning industry for each quarter.**
- **Disallowable Instrument DI2018-45 being the Long Service Leave (Portable Schemes) Community Sector Industry Levy Determination 2018 made under section 51 of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2015-22 and determines the levy payable by employers in the community sector for each quarter.**
- **Disallowable Instrument DI2018-46 being the Long Service Leave (Portable Schemes) Building and Construction Industry Levy Determination 2018 made under section 51 of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2013-225 and determines the levy payable by employers in the building and construction industry for each quarter.**
- **Disallowable Instrument DI2018-47 being the Utilities (Technical Regulation) (Gas Network Boundary Code) Approval 2018 made under section 14 of the *Utilities (Technical Regulation) Act 2014* approves the Gas Network Boundary Code.**

- **Disallowable Instrument DI2018-48 being the Gambling and Racing Control (Governing Board) Appointment 2018 (No 1) made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* and sections 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Gambling and Racing Commission Governing Board.**
- **Disallowable Instrument DI2018-49 being the Utilities (Gas Network Boundary Code) Revocation 2018 made under section 59 of the *Utilities Act 2000* revokes DI2013-72 as a result of the Technical Regulator enacting a new technical code under the Act.**
- **Disallowable Instrument DI2018-50 being the Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2018 made under section 45 of the *Tree Protection Act 2005* revokes DI2006-56 and determines the criteria for tree registration and cancellation of registration.**
- **Disallowable Instrument DI2018-51 being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2018 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-32 and determines a new rate for the calculation of Utilities Network Facilities Tax payable under the *Utilities (Network Facilities Tax) Act 2006*.**

SUBORDINATE LAW—NO COMMENT

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

- **Subordinate Law SL2018-1 being the Boxing Control Regulation 2018 made under the *Boxing Control Act 1993* exempts low risk training and demonstration boxing activities from the definition of a “boxing contest” and thus from requiring an approval to be sought.**

GOVERNMENT RESPONSES

- The Minister for Climate Change and Sustainability, dated 3 April 2018, in relation to comments made in Scrutiny Report 14 concerning Disallowable Instruments:
 - DI2017-308—Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2017.
 - DI2017-309—Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2017.

This response can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.
- The Minister for Justice, Consumer Affairs and Road Safety, dated 23 April 2018, in relation to comments made in Scrutiny Report 16 concerning :
 - Road Transport Reform (Light Rail) Legislation Amendment Bill 2018.
 - Heavy Vehicle (General) National Amendment Regulation.
 - Heavy Vehicle National Amendment Regulation 2017.
 - Rail Safety National Law National Regulations (Fees and Returns) Variation Regulations 2017.

- Rail Safety National Law National Regulations (Miscellaneous) Variation Regulations 2017.
- Rail Safety National Law National Regulations (Queensland Fatigue Provisions) Variation Regulations 2017.

This response can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation> or <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

- The Attorney-General, dated 6 April 2018, in relation to comments made in Scrutiny Report 16 concerning the Justice and Community Safety Legislation Amendment Bill 2018.
- The Minister for Transport and City Services, dated 9 April 2018, in relation to comments made in Scrutiny Report 16 concerning the Domestic Animals Legislation Amendment Bill 2018.

These responses can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

The Committee wishes to thank the Minister for Climate Change and Sustainability, the Attorney-General and the Minister for Transport and City Services for their helpful responses.

GOVERNMENT RESPONSES—COMMENT

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2018—AMENDMENTS TO THE *CIVIL LAW (WRONGS) ACT 2002*

The Justice and Community Safety Legislation Amendment Bill 2018 proposes amendments to the *Civil Law (Wrongs) Act 2002* to provide retrospective effect for extensions of the period in which a professional standards scheme, including interstate standards schemes, are in force in the ACT. In its Report 16, the Committee commented:

The explanatory statement suggests that retrospective operation is needed to prevent an administrative error in notification of the instrument leading to a different cap on damages being applicable. However, the ability to retrospectively extend the operation of a scheme is not limited to correction of administrative errors. It may potentially allow an extension to occur up to 12 months after the expiry of the scheme. In the committee’s view, further justification for the possible retrospective extension of a scheme is required.

The Attorney-General, in his response dated 6 April 2018, commented that the retrospective extension of interstate schemes will require professionals to maintain insurance between the expiry of the scheme and its extension in the ACT. It will also provide certainty to consumers and professionals about the maximum amounts that may be claimed in litigation covered by the scheme. The retrospective extension would also allow the Attorney-General to extend an interstate scheme where that interstate scheme was extended shortly before its expiry and there was insufficient time for the Attorney-General to also extend the scheme in its application to the ACT. The Attorney-General noted that any extension could only be for up to 12 months from the initial expiry of the scheme, regardless of when the extension occurred.

In the Committee's view, the Attorney-General has not provided sufficient justification for retrospectively extending the operation of non-interstate schemes. Further justification is also needed for the ability to extend interstate schemes up to 12 months after their original expiry, recognising that there may be a need for a short period in which to react to extensions of interstate schemes in other jurisdictions where those extensions occurred immediately prior to their expiry.

The Committee draws this matter to the attention of the Assembly, and asks the Attorney-General to respond.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2018—AMENDMENTS TO THE *HEAVY VEHICLES NATIONAL LAW (ACT) ACT 2013*

ROAD TRANSPORT REFORM (LIGHT RAIL) LEGISLATION AMENDMENT BILL 2018: AMENDMENTS TO THE *RAIL SAFETY NATIONAL LAW (ACT) ACT 2014*

The Justice and Community Safety Legislation Amendment Bill also proposed amendments to the Heavy Vehicles National Law (ACT) Act to extend the period in which national regulations for that National Law published on the New South Wales legislation website must be presented to the Assembly from the current six sitting days to 20 sitting days. The Road Transport Reform (Light Rail) Legislation Amendment Bill 2018 proposed a similar extension for national regulations made under the *Rail Safety National Law (ACT) Act 2014*. In respect of both these amendments, the Committee commented:

While the Committee recognises the general need for national laws to remain, in that sense, national, it is still essential for national regulations to be subject to parliamentary scrutiny by the Assembly in a timely fashion. The Committee therefore requests further explanation as to why the period for presentation to the Assembly should be extended to 20 sitting days.

The Attorney-General, in his response, dated 6 April 2018, indicated that extending the time frame for tabling of the national regulations was needed to allow time for identifying, preparing and presenting the relevant regulations and presentation documentation. The Attorney-General commented that “[i]n the absence of an automated system which advises the ACT that regulations are notified in other jurisdictions triggering the commencement of the six-day period, [the existing six-day timeframe] is posing unnecessary operational and presentation issues”.

The Minister for Justice, Consumer Affairs and Road Safety, in his response received by the Committee on 24 April 2018, responded to the Committee's concerns in similar terms to the Attorney-General and expressed his support for the Attorney-General's response. The Minister also pointed out that the likely timing of any amendments to the national regulations makes it unlikely that they will have legal effect for over six months without scrutiny by the Assembly under the proposed 20 sitting day requirement. The Minister also pointed out that the:

national regulations are agreed by all Ministers across Australia prior to them being passed and notified and have gone through significant consultation prior to that. As such the risks associated with any lengthy period without scrutiny by the Assembly are considered low.

The Committee would be concerned if changes to the National Regulations, which automatically have effect in the ACT subject only to disallowance by the Assembly, can come into effect, and potentially have effect for a substantial period, without anyone in the ACT being notified. However, the Committee notes that, as indicated by the Minister, the respective national laws provide for national regulations to be made on the unanimous recommendation of the responsible Ministers following a period of consultation. It is not clear why the relevant Minister would not be aware of imminent changes to the national regulations and have time to prepare those regulations and accompanying documentation for presentation to the Assembly in a timely fashion.

The Committee, therefore, asks the Attorney-General to provide a further response to the Committee's concerns, including information on what processes, if any, the relevant Ministers have in place to monitor development of national regulations and how relevant officials and those affected are informed of changes once they have come into effect.

The Committee draws these matters to the attention of the Assembly, and asks the Attorney-General and Minister for Justice, Consumer Affairs and Road Safety to respond.

Elizabeth Lee MLA

Chair

4 May 2018

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
 - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
- **Report 8, dated 8 August 2017**
 - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
- **Report 12, dated 21 November 2017**
 - Crimes (Criminal Organisation Control) Bill 2017 (PMB).
- **Report 14, dated 19 February 2018**
 - Education and Care Services National Further Amendment Regulations 2017.
- **Report 16, dated 3 April 2018**
 - Disallowable Instrument DI2018-20—Nature Conservation (Lower Cotter Catchment) Reserve Management Plan 2018 (No 1).