Ms Elizabeth Lee MLA

Chair

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

Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

Dear Ms Lee

I write about comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (Scrutiny Committee) in its *Scrutiny Report 16* published on 3 April 2018 in relation to the *Road Transport Reform (Light Rail) Legislation Amendment Bill 2018* (the Bill), Rail Safety National Law Regulations and Heavy Vehicle National Law Regulations.

**Road Transport Reform (Light Rail) Legislation Amendment Bill 2018**

Retrospectivity of Rail Safety National Law Regulations

I note the Committee’s concerns about the retrospective application of the three rail safety national law regulations tabled in the Assembly on 22 March 2018, in particular, any amendments to the operation of provisions that have a criminal penalty attached.

As stated in my tabling statement the amendments in these regulations are minor and technical in nature and give effect to annual fee increases and changes to reporting obligations on rail operators to the national rail safety regulator. The national rail safety regulator routinely consults with all operators when developing proposed fee variations and changes in reporting obligations.

As identified by the Committee, the *Rail Safety National Law National Regulations (Queensland Fatigue provisions) Variation Regulations 2017* contains amendments to provisions relating to the requirements on QLD rail transport operators in relation the content of their risk management plans. It is an offence under the Rail Safety National Law (RSNL) for a rail transport operator to not prepare and implement a fatigue risk management program (section 116 RSNL).

The amendments related to this offence only apply to QLD rail transport operators. Prior to
1 July 2017, QLD had not adopted the RSNL but had these provisions in its own state based law. The amendment also references specific NSW requirements. This is only required due to the renumbering required to the provision as a result of the adoption by QLD of the RSNL. The specific provisions relating to NSW have been in place since NSW adopted the RSNL in 2012.

The *Rail Safety National Law National Regulations (Fees and Returns) Variation Regulations 2017* also contains an amendment that relates to an offence provision which creates an obligation on a rail transport operator to provide information to the national regulator when given notice by the national regulator. The amendment removes the requirement for a rail transport operator to report monthly on the number of employees of a rail transport operator that were engaged to undertake rail safety work. This means that all information required to be reported under section 56 of the RSNL National Regulations 2012 is now done monthly rather than part annually and part monthly.

Section 25 of the *Human Rights Act 2004* (HRA) provides that a person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed. Section 25 (2) provides that a penalty may not be imposed for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. This only applies where the ‘penalty’ has a punitive objective, as opposed to a community safety objective.

Section 25 can be engaged by activities that seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken or expand the range of activities that are covered by an existing criminal offence.

None of the rail safety national law regulations that are being applied retrospectively do either of these things. It is therefore considered that these regulations do not engage section 25 of the HRA or unduly trespass on personal rights and liberties.

Right to freedom of expression

I note the Committee’s comments that sections 70AAL and section 70AAN of the Bill could be seen to be limiting a person’s right to freedom of expression protected by section 16 of the *Human Rights Act 2004* (HRA). To address these comments, I intend to table a revised explanatory statement which addresses the right to freedom of expression. The explanatory statement has been revised to clearly note that while authorised persons and police have the power to direct a person to leave a light rail vehicle or a light rail stop if they are under the influence of alcohol or a drug and are causing or are likely to cause a nuisance or annoyance to someone else, the annoyance or nuisance must be directly related to the person’s intoxication or drug use. The explanatory statement notes that authorised persons and police do not have the power to direct a person to get off or not get on a light rail vehicle or leave a light rail stop simply because the person’s behaviour is causing or likely to cause a nuisance or annoyance to someone else.

A copy of the revised explanatory statement is enclosed for the information of the Committee.

Extension of time to present Rail Safety National Law Regulations to the Assembly

I note the Committee’s concern that extending the time for presentation to the Assembly to 20 sitting days may mean that changes to the RSNL National Regulations may not be subject to scrutiny by the Assembly, and will continue to have legal effect for possibly over six months.

Extending the tabling timeframe from six to 20 days will allow sufficient time for identification of regulations which need to be presented in the Assembly. In 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, this timeframe is posing unnecessary operational and presentation issues.

Extending the timeframe will also allow for presentation documentation such as explanatory statements and the like to be prepared to the Committee’s standards and expectations, in particular, proper consideration of any potential human rights implications. In most instances an explanatory statement is not prepared by the jurisdiction passing the regulations and therefore one needs to be prepared to accompany the presentation of the regulations to the Assembly- a commitment I previously made to the Committee.

The only time when the national regulation may have legal effect for over six months without scrutiny by the Assembly during that period would be in the situation where the national regulation is notified before a significant gap in sittings of the Legislative Assembly, for example the Christmas/New Year period. Noting that amendments to the national regulations are generally progressed at the beginning or the middle of the year, the concerns raised by the Committee are unlikely to be an issue. 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.

While every effort will be made to table the regulations in the shortest timeframe possible within the 20 days, this provision will provide adequate time to ensure that national regulations are not taken to be repealed if not tabled in the Assembly within six sitting days of their publication.

I note that the Committee also raised concerns about a similar provision being introduced into the Heavy Vehicle National Law in the Justice and Community Safety Legislation Amendment Bill 2018. A response has been provided by the Attorney-General to the Committee on this matter. As the Minister responsible for the Heavy Vehicle National Law, I note my support of that response.

**Rail Safety National Law Regulations**

I note the Committee’s concerns regarding compliance with section 64 of the Legislation Act.

As correctly identified by the Committee these regulations were not tabled in accordance with section 64 of the Legislation Act. This is addressed through proposed section 122 of Bill as noted by the Committee in its report.

I also note the Committee drew the Legislative Assembly’s attention to principles (1) (a) and (1) (b) of the Committee’s terms of reference. The RSNL is adopted in the ACT through the *Rail Safety National Law (ACT) Act 2014* and includes the *Rail Safety National Law National Regulations 2012.* Regulations under the RSNL are agreed by the Transport and Infrastructure Council, passed through the South Australian Parliament and published on the New South Wales Legislation Register. Consultation on the regulations is undertaken nationally through the Transport and Infrastructure Council and by the Office of the National Rail Safety Regulator.

The objects of the RSNL include providing for the effective management of safety risks associated with railway operations, to provide for the safe carrying out of railway operations, to provide for continuous improvement of the safe carrying out of railway operations, and to make special provision for the control of particular risks arising from railway operations.

Guiding principles of the RSNL include to operate the national scheme in a timely, transparent, accountable, efficient, effective, consistent and fair way and fees required to be paid for the provision of the national scheme are to be reasonable having regard to the efficient and effective operation of the scheme.

I consider the rail safety national law regulations considered by the Committee to be consistent with the objects and guiding principles of the RSNL.

As noted earlier, I consider that these regulations do not unduly trespass on personal rights and liberties already established by law.

**Heavy Vehicle National Law Regulations**

I note the Committee’s concerns regarding compliance with section 64 of the Legislation Act.

As correctly identified by the Committee these regulations were not tabled in accordance with section 64 of the Legislation Act. This has been addressed through the insertion of a new Part 10 in the *Heavy Vehicle National Law (ACT) Act 2013* through the Justice and Community Safety Legislation Amendment Bill 2018, as noted by the Committee in its report.

The regulations will apply retrospectively so that the ACT law remains consistent and in sync with the national law. This approach has been previously adopted where this issue has arisen in respect of other national laws applied in the ACT where the amendments have been technical in nature.

I also note the Committee drew the Legislative Assembly’s attention to principles (1) (a) and (1) (b) of the Committee’s terms of reference. Amendments to the Heavy Vehicle National Law (HVNL), including any regulations, are agreed to by the Transport and Infrastructure Council. Once agreed they are progressed through the Queensland Parliament, published on the NSW legislation register and adopted automatically in the Act.

The objects of the HVNL include managing the impact of heavy vehicles on the environment, road infrastructure and public amenity, promoting industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles, encouraging and promoting productive, efficient, innovative and safe business practices and promoting public safety.

These regulations give effect to a number of minor and technical amendments that amount to a lessening of regulation. The amendments have no significant impact on heavy vehicle operators and tidy up existing national regulations.

The *Heavy Vehicle (General) National Amendment Regulation 2016* (No 261) provides for payment of the part of the registration fee paid by owners and operators of heavy vehicles identified as the Regulatory Component to the National Heavy Vehicle Regulator. The regulation also provides for the fee for the application for a written work diary to increase from $20 to $25. This increased fee has been applied in the ACT since 1 July 2016 through the *Road Transport (General) Fees for Publications Determination 2016 (No 1).*

The *Heavy Vehicle National Amendment Regulation 2017* made a number of minor and technical amendments identified through the maintenance process. The majority of these amendments are a relaxation to the regulatory requirements.

The Heavy Vehicle National Amendment Regulation 2017 made amendments to the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation* which included renumbering a provision about higher mass limits which is linked to an offence in section 96 of the HVNL which carries a penalty. As this does not increase the penalty, seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken or expand the range of activities that are covered by an existing criminal offence, this amendment is not considered to engage section 25 of the HRA.

The Heavy Vehicle National Amendment Regulation 2017 made amendments to the *Heavy Vehicle (Vehicle Standards) National Regulation* which included a number of amendments related to offences under section 60 of the HVNL for breaching vehicle standards. The amendments are either technical in nature or are a relaxation of requirements.

Section 25 of the HRA provides that a person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed. Section 25 could be engaged by activities that seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken or expand the range of activities that are covered by an existing criminal offence.

The relaxations to the *Heavy Vehicle (Vehicle Standards) National Regulation* have been given effect in the ACT through an exemption notice to provide operators with the benefit of these relaxations until the regulatory changes are given formal effect in the ACT. This ensured that an operator would not be found to be non-compliant in the ACT, while being compliant in another participating jurisdiction.

These regulations are therefore considered to be consistent with the objects of the HVNL and do not unduly trespass on personal rights and liberties already established by law.

I thank the Committee for its report and careful consideration of the Bill, the Rail Safety National Law Regulations and the Heavy Vehicle National Law regulations.

Yours sincerely

Shane Rattenbury MLA

Minister for Justice, Consumer Affairs and Road Safety