

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

RAIL SAFETY NATIONAL LAW (ACT) BILL 2014

SUPPLEMENTARY EXPLANATORY STATEMENT

GOVERNMENT AMENDMENTS

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These amendments are circulated under Standing Order 182A on the basis that they are in response to comment made by the Standing Committee on Justice and Community Safety in its scrutiny role (Scrutiny Committee).

Outline of amendments

There are 5 amendments proposed to the Rail Safety National Law (Act) Bill 2014. The first four amendments amend clause 31 which relates to police power to search a rail safety worker who has been taken into custody. The fifth amendment inserts a new provision, clause 52A, which relates to the abrogation of privilege against self-incrimination.

Amendments 1-4

Amendments 1-4 relate to clause 31 which provides a power for police to remove items from a person taken into custody for breath analysis, oral fluid analysis or blood testing. The Scrutiny comments expressed concern that the power in the Bill to remove anything from a person was broader than required.

The Explanatory Statement for the Bill explained that clause 31 is based on section 18C of the *Road Transport (Alcohol and Drugs) Act 1977*. The clause gives a police officer power to search a rail safety worker who has been taken into custody and to take possession of anything found in the worker's possession and to keep anything so seized while the worker is in custody. The purposes of the provision are safety and prevention of escape from lawful custody. The provision is important to protect the safety of the tested person and the police officers who hold the tested worker in custody and any other people with whom the person may come into contact while in custody. However, having regard to the Scrutiny Committee comments, the Government agrees the purposes of the provision could be achieved with a more narrowly cast clause.

Amendments 1- 4 amend section 31 to provide for a police officer to take possession of an item in the tested worker's possession that could present a danger to a person or that could be used to assist the person to escape from lawful custody. The amendments to this clause provide that at the conclusion of the person being in custody they are entitled to the return of items unless possession of the item would be an offence or a police officer has reasonable grounds to believe possession of the item could present a danger to a person.

Human rights analysis - Right to liberty and security of person - search and seizure powers

It is considered that any limitation on a person's human rights arising from section 31, as amended, is reasonable and proportionate, and can be demonstrably justified in a free and democratic society in accordance with section 28 of the *Human Rights Act 2004* (HRA).

The nature of the right affected

Clause 31, as amended, provides that a person who has been taken into custody can be searched and prescribed items removed from the person's possession. These provisions may engage rights under the HRA including the right to liberty and security of the person under section 18 and the right under section 19 to humane treatment when deprived of liberty.

The importance of the purpose of the limitation

Section 31 of the Bill, as amended, provides the power of a police officer to take possession of an item in the worker's possession is limited to the power to take possession of a prescribed item, being an item that could present a danger to a person or that could be used to assist the person to escape from lawful custody. The Bill specifies that the rail safety worker is entitled to the return of an item taken from the worker, when the worker ceases to be in custody, unless possession of the item would be an offence or a police officer believes on reasonable grounds that possession of the item could present a danger to a person.

The purpose of the search and removal of items from a person is to reduce the risk of harm to the rail safety worker and to others during the person's period in custody, as well as reduce the risk that the person may escape from custody. Risk-reduction searches of this nature reflect the duty of care owed by police to persons in custody, especially intoxicated persons.

The nature and extent of the limitation

The circumstances in which the search and removal of property can occur are clearly specified, and the amendment represents a safeguard against arbitrary deprivation of property.

The relationship between the limitation and its purpose

While placing limits on the rights of people in relation to their property, a level of protection is provided to the same people, particularly where such people under the influence of alcohol or drugs may harm themselves or others.

Any less restrictive means reasonably available to achieve the purpose

As amended, clause 31 is the least restrictive means reasonably available to achieve the purpose of the limitation.

Notes on Clauses

Amendment 1

This amendment to clause 31(1) omits the word ‘anything’ and replaces it with ‘any prescribed item’. The effect of this amendment is to limit the sort of items that police may take possession of from a rail safety worker who is taken into custody to only those items which fall within the definition of ‘prescribed item’ which is set out in clause 31(4).

Amendment 2

This amendment omits original clause 31(3) and substitutes new clause 31(3). The substituted clause 31(3) provides that a rail safety worker is entitled to the return of a prescribed item taken from the worker, when the worker ceases to be in custody, unless:

- i. possession of the item would be an offence against a law of the Territory; or
- ii. a police officer believes on reasonable grounds that possession of the item could present a danger to a person.

Amendment 3

This amendment to clause 31(4) inserts a new definition, ‘prescribed item’ which makes clear the scope of items that police can remove from the possession of a rail safety worker in custody. It limits the items to those that could present a danger to a person or could be used to assist a person to escape.

Amendment 4

This amendment omits the definition of ‘seizable item’ and its accompanying note as this term is not used or necessary. Substituted clause 31(3) explains the types of items that police are not required to return to a rail safety worker.

Amendment 5

The fifth amendment provides derivative use immunity in relation to an answer to a question or information provided or a document obtained under a requirement or direction of a rail safety officer under Part 4 of the rail safety national law (RSNL).

The Scrutiny Committee expressed the view that clause 155(2) of the RSNL as drafted is likely to be found incompatible with the HRA and noted that in its application in Victoria it had been modified to provide a person with protection from prosecution using information derived from answers that a person is required to provide under the RSNL by including a derivative use immunity provision.

Having regard to the Scrutiny Committee’s views, the Government agrees that the inclusion of a direct use immunity provision would ensure that a person remains protected when the answer to a question or the provision of information or documentation leads to a chain of enquiry and to evidence that might otherwise incriminate the person.

Human Rights Analysis - Privilege against self-incrimination – powers to require provision of answers, documents and information

The nature of the right affected

The RSNL includes provisions that require the answering of questions and production of documents (section 154). Section 155(1) provides that a person is not excused from answering a question or providing information or a document on the ground that to do so may tend to incriminate the person or expose the person to a penalty. This provision engages the right, in section 22 of the HRA, of a person not to be compelled to testify against him or herself. It is an abrogation of the privilege against self-incrimination.

The importance of the purpose of the limitation

The limitation is important to achieve the purpose of effective enforcement of the RSNL, including investigation of possible breaches, and prosecution of alleged breaches of the RSNL. Investigation and prosecution of breaches would potentially be hampered or require far greater investigative resources if authorised personnel were not able to require those with custody of or access to relevant documents or information to produce those documents or that information.

The nature and extent of the limitation

The limitation effected by section 155(1) of the RSNL is on the right of a person not to be compelled to testify against himself or herself. However, section 155(2) limits the use of answers, information or documents that a person is required to give under Part 4 of the RSNL. They are not admissible as evidence against that person in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of information. Section 155(2) provides what is known as direct use immunity in relation to the answers, information or documents.

The inclusion of new clause 52A provides derivative use immunity giving a person protection from a prosecution using information derived from answers that a person is required to provide under the RSNL.

The relationship between the limitation and its purpose

The purpose of effective enforcement of the RSNL, including the necessary investigative powers to look into possible or actual safety breaches, is supported by the limitation.

Any less restrictive means reasonably available to achieve the purpose

New clause 52A, which extends the immunity provided by section 155(2) to include derivative use immunity, provides a less restrictive means of achieving the purpose of the provisions.

Notes on Clause

Amendment 5

Amendment 5 inserts new clause 52A - *Abrogation of privilege of self-incrimination - derivative use* which provides additional immunity against a prosecution using incriminating information that is derived from the answer, information or a document that the person is compelled to provide under the RSNL.