

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

SCRUTINY REPORT 10

OCTOBER 2017



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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

### BILL—NO COMMENT

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

UTILITIES LEGISLATION AMENDMENT BILL 2017
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This Bill amends the *Utilities Act 2000* and *Utilities (Technical Regulation) Act 2014* by authorising regulations to exempt classes of utility services from the regulatory requirements of those Acts, and establishes the *Utilities (General) Regulation 2017* and amends the *Utilities (Technical Regulation) Regulation 2017* to add embedded networks (distribution system involving multiple customers who are aggregated together through a single connection point to the electricity network) as an exempt class of regulated utility service.

### BILLS—COMMENT

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

ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) AMENDMENT BILL 2017
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This Bill amends the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* (the EF(LREG) Act) and the *Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017* (the EF(LREG) Regulation) to introduce matters the Minister must consider when confirming surrender of a Feed in Tariff entitlement (FiT entitlement), to increase oversight of the amounts that the ACT electricity distributor passes on to the ACT's electricity retailers to compensate the distributor for its costs in complying with various requirements under the EF(LREG) Act, and provide for an audit of information provided by the ACT electricity distributor under section 21 of that Act.

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

*RIGHT TO COMPENSATION FOR THE ACQUISITION OF PROPERTY*

The EF(LREG) Act provides for the grant of FiT entitlements to large renewable energy generators. Holders of FiT entitlements can receive support payments, or a tariff, for eligible electricity they generate. Under section 14 of that Act, the holder of a FiT entitlement may surrender the entitlement by giving written notice to the Minister, the Minister must confirm the surrender by issuing a surrender notice. The surrender, ie the loss of the FiT entitlement, takes effect on the day and time stated in the surrender notice.

Apart from having to issue the surrender notice, the EF(LREG) Act currently does not set out any factors that have to be considered in deciding when the surrender will take effect. Clause 4 of the Bill will amend this by inserting section 14(4):

- (4) In fixing the day and time for the surrender of a FiT entitlement to take effect, the Minister must consider any matters prescribed by regulation

Part 3 of the Bill then inserts a new clause in the EF(LREG) Regulation:

**3 When surrender notice takes effect—matters to consider—Act, section 14 (4)**

The following matters are prescribed:

- (a) the objectives of the Act;
- (b) any deed of FiT entitlement that has been executed;
- (c) how long the Territory is likely to take to obtain another source of electricity that is—
  - (i) generated from a renewable energy source; and
  - (ii) equivalent in quantity to the source to which the FiT entitlement relates.

The effect of these amendments is to require the Minister to consider how long it will take to replace the lost renewable energy in deciding from when the surrender notice will take effect. They are drafted on the basis that they extend the range of relevant matters that have to be considered in determining when the FiT entitlements are effectively surrendered. They may therefore allow for an additional delay before that happens.

The explanatory statement describes the objective of these amendments as:

to permit the Minister to take into account the impact that an entitlement surrender might have on the Territory’s ability to meet its renewable electricity target when issuing a surrender notice. An immediate surrender could have the effect of disrupting the ability of the Territory to meet this target if the Territory is not able to quickly obtain an alternative source of renewable electricity. [at p 6]

However, delaying the effect of a surrender notice does not in itself ensure the meeting of the renewable energy target. That target is currently set out in the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2016, a disallowable instrument made under section 9 of the *Climate Change and Greenhouse Gas Reduction Act 2010*. The target relates to the “use or generation of renewable energy in the ACT.” Any impact of delaying the effect of a surrender notice therefore depends on there being an obligation to continue to generate and supply renewable energy.

A condition to supply electricity might be a condition on the grant of a FiT entitlement (see section 12(2)(h) of the EF(LREG) Act) or part of a written agreement with the Territory (required to be entered into under section 12(3)). However, it is not clear why either of these elements create an obligation for a holder of an FiT entitlement to continue to supply electricity after they have asked to surrender that entitlement.

The amendments therefore do not directly extend the obligations placed on FiT entitlement holders, although they may do so indirectly through the operation of any written agreement with the Territory in relation to the supply of renewable energy. It is therefore unlikely that the amendments can be considered to be an acquisition of property requiring just terms under section 23(1) of the *Australian Capital Territory (Self-Government) Act 1988*. Even if the FiT entitlements are considered to be property for the purposes of that provision, the effect of the amendments is to potentially extend the period in which the holder can potentially enjoy the benefits associated with those

entitlements. Those rights are not “acquired” by the amendments in the sense of being transferred or able to be enjoyed for the benefit of others.

#### *RETROSPECTIVE OPERATION OF THE LAW*

Clause 4 and Part 3 of the Bill, which amend the time of effect of the surrender of FiT entitlements, are set to commence on 14 September 2017, the date on which the Bill was introduced to the Assembly. As the Bill will change the basis on which the Minister will respond to a notice provided by the FiT entitlement holder prior to the enactment of the Bill, and indeed potentially invalidate any surrender notice issued by the Minister after 14 September 2017 until the Bill is passed by the Assembly, the Bill will therefore have retrospective effect.

The explanatory statement acknowledges this proposed retrospective operation of the Bill and sets out a detailed justification, including the desire to prevent current FiT entitlement holders from seeking to surrender their entitlements prior to the amendments taking effect and the limited substantive effect of the amendment. The Committee refers the Assembly to this justification.

The Committee commends the detailed consideration given to the issue of retrospectivity in the explanatory statement, but notes that this issue is dealt with separately from addressing the Committee’s scrutiny principle of unduly trespassing on personal rights and liberties. The explanatory statement states:

The Amendment Bill does not unduly trespass on personal rights and liberties because it only applies to business organisations being the ACT electricity distributor and renewable electricity companies that hold ACT large FiT entitlements.

While the Committee acknowledges that the corporate nature of those directly affected is a factor justifying the retrospective operation of the amendments, it does not accept that this takes it outside of the scope of the Committee’s terms of appointment. Leaving aside the question of whether a corporation can enjoy “personal rights and liberties”, the amendment in question is not formally limited to corporations. While the holders of ACT FiT entitlements may have been, at the time of the introduction of the Bill, corporations, it is not necessarily the case that they will continue to be up until the time of enactment. The issue of whether there is a potential effect on the rights and liberties of non-corporate actors remains. The individuals who act on behalf of the corporation are also potentially affected by the retrospective nature of the amendments. The Committee therefore considers it relevant to its appointment to comment on any retrospective operation of laws even where the legal effect of any amendment is directly applied to corporate actors rather than individuals.

**The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

#### FIREARMS AND PROHIBITED WEAPONS LEGISLATION AMENDMENT BILL 2017

This Bill amends the *Firearms Act 1996*, *Firearms Regulation 2008*, *Prohibited Weapons Act 1996* and *Prohibited Weapons Regulation 1997* to improve the operations of that legislation, including providing for the withholding of security sensitive information in deciding on a person’s suitability for various purposes under the Firearms Act, and to allow the Registrar of Firearms to authorise the use of suppressors for certain prescribed purposes.

***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 A FAIR TRIAL (SECTION 21 HRA)*

Section 17 of the Firearms Act requires various considerations be taken into account by the registrar when deciding whether an individual is suitable for various purposes under that Act (including whether they should be authorised as an instructor or to sell ammunition to club members, they have applied for a firearms licence, cancellation of a firearms licence, or whether a person is prohibited from being involved in a firearms' dealing business). Those considerations include (under section 18(1)(c)):

whether the registrar believes on reasonable grounds that information held by a law enforcement agency in relation to the individual indicates that it would be contrary to the public interest for the individual to have access to a firearm.

The Bill will insert sections 18A to 18C to allow the registrar, when they have formed the belief set out in section 18(1)(c), to not disclose, in any reasons for their decision, "security sensitive information". "Security sensitive information" is defined to mean (in proposed section 18A(3)):

information held by a law enforcement agency that relates to actual or suspected criminal activity ... the disclosure of which could reasonably be expected to –

- (a) prejudice a criminal investigation; or
- (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
- (c) endanger a person's life or physical safety.

Where an application is made to ACAT or the court for review of a decision where security sensitive information has been withheld, the registrar must apply to ACAT or the court for a decision about whether the reasons disclose security sensitive information. The applicant for review need not be told about the registrar's application. If ACAT or the court decides that the reasons disclose sensitive security information then ACAT or the court must ensure that information is not disclosed in any reasons for the decision, and must be received in evidence or submissions in private in the absence of the public, the applicant for review, the applicant's representative and any other interested party.

While it is not made explicit in the Bill, the clearly implied effect of the amendments will be to remove any procedural fairness obligation on the registrar, when deciding on a person's suitability under section 17, to disclose any prejudicial security sensitive information to that person. ACAT or the Court will be expressly precluded from disclosing this information in the making of their decision.

As the explanatory statement acknowledges, this denial of procedural fairness engages the right to a fair trial under section 21(1) of the HRA.<sup>1</sup> The requirement that any evidence or submissions disclosing security sensitive information be held in private also engages this right. The explanatory statement, using the framework set out in section 28 of the HRA, provides a justification for why the limit of this right is considered reasonable and justifiable and the Committee refers this analysis to the Assembly.

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<sup>1</sup> The Committee notes that the explanatory statement erroneously refers at various times to section 22(1) of the HRA.

In particular, the Committee notes that the denial of procedural fairness only arises in the limited circumstances included in the definition of security sensitive information, and that whether information is security sensitive information is explicitly subject to review in applying for review of the registrar’s decision not to grant or to cancel a licence. The registrar is also prevented from delegating their various functions relating to the withholding of security sensitive information.

Proposed section 18C(3) states that:

However, the ACAT or court need not receive evidence or submissions in accordance with subsection (2)(b) [which requires ACAT or the court to receive evidence and submissions in private] if the registrar otherwise agrees.

The outline of clause 7 in the explanatory statement refers to section 18C(3) as providing for ACAT or the court to not receive evidence or submissions on security sensitive information if the registrar otherwise agrees. However, in discussing the human rights implications of this clause, this provision is described as having the effect of allowing the registrar to “choose to allow certain parts of any information to be released to the applicant in a hearing, despite that information’s status as security sensitive information.” Given section 18B requires the registrar to apply for a decision about whether the reasons disclose security sensitive information and ACAT or the court has to make a decision on that issue, section 18C would appear limited to only allowing the requirements of section 18C(2)(b) to be dispensed with. In other words, if the registrar considers that security sensitive information formed part of the reasons for their decision, and that decision is subject to review, then the registrar must disclose those reasons to ACAT or the court under section 18B. The Committee recommends that consideration be given to amend the explanatory statement to ensure this is made clear throughout the statement.

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

GOVERNMENT PROCUREMENT (FINANCIAL INTEGRITY) AMENDMENT BILL 2017
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This Bill amends the *Government Procurement Act 2001* to amend the definition of notifiable invoice to increase the range of government payments that have to be disclosed. It also amends the *Financial Management Act 1996* and associated legislation to create an act of grace payments register.

***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)*

Section 130 of the Financial Management Act authorises the Treasurer to make payments in special circumstances where that payment is not otherwise authorised by law or required to meet a legal liability (“act of grace payments”). Act of grace payments must be reported in notes to annual financial statements, indicating the amount and grounds for the payment (sections 130(8)-(9)). However, any report must not disclose the identity of the payee unless the disclosure was agreed to by the payee as a condition of authorising the payment (section 130(10)).

The Bill will add a requirement for the director-general to keep an electronic register of act of grace payments, including the date the payment was authorised and paid, the amount and grounds of the payment, who made it and anything else prescribed by regulations or considered appropriate by the director-general. The register is to be updated within 21 days of the payment. As in section 130(10), the identity of the person receiving the payment must not be disclosed by the directorate or authority making the payment unless they agreed to their identity being disclosed as a condition of authorising the payment.

As the explanatory statement acknowledges, there is a chance that public disclosure of this information may be sufficient to allow details of the payments to be linked to individuals. To the extent that possibility might be considered reasonable and is enhanced by the contemporaneous nature of the disclosure provided by the proposed amendments, the right to privacy under section 12 of the HRA is engaged by the Bill. The explanatory statement sets out, using the framework provided under section 28 of the HRA, a justification for why any limitation on the right to privacy is reasonable and demonstrably justified and the Committee refers the Assembly to that analysis.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Member.**

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2017 (No 2)
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This Bill amends a number of laws in the Justice and Community Safety portfolio to improve their operation.

***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 A FAIR TRIAL (SECTION 21 HRA)*

The Bill amends the *Associations Incorporation Act 1991* and *Associations Incorporation Regulation 1991* to prevent a person being appointed or acting as a public officer or committee member of an incorporated association, without leave of the Supreme Court, after they have been disqualified from managing a corporation or Aboriginal and Torres Strait Islander corporation under various provisions of relevant Commonwealth legislation (including for criminal convictions, bankruptcy or insolvency, or repeated contraventions of the relevant Act).

To the extent that disqualification arises without the benefit of a court hearing—namely being an undischarged bankrupt or not complying with a personal insolvency agreement—the disqualification from managing an incorporated association provided for in the Bill limits the right to a fair trial under section 21 of the HRA. The explanatory statement sets out a justification for this limitation using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that analysis.

In particular, the Committee notes that the grounds for automatic qualification without a hearing are limited in nature, reasonably related to the purpose of the limitation in upholding the integrity, including financial integrity, of incorporated associations in the ACT, and affected persons can seek leave of the Supreme Court to continue to act in the position of management.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

The Bill also amends the *Court Procedures Act 2004* to add security of court premises, including the use of electronic devices in court premises, as a new subject matter for court rules developed by the rule-making committee under section 7 of that Act. To the extent that this makes it possible for rules to be introduced which limit the use of electronic devices in or around hearings, this may limit the right to a fair trial under section 21 of the HRA.

The explanatory statement provides that any limitation is likely to fall within the exceptions to the right to a fair trial set out in section 21(2) of the HRA (namely: to protect morals, public order or national security in a democratic society (section 21(2)(a); if the interest of the private lives of the parties require the exclusion (section 21(2)(b); or if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice (section 21(2)(c)). However, the amendment extends the power to make rules by referring to the security of court premises, which is not limited to the exceptions set out in section 21(2). The explanatory statement then sets out that, to the extent the exceptions to section 21(2) do not apply:

the amendments represent a proportionate limitation under section 28 of the HRA to protect the security of the courts and the parties' right to privacy and to promote the proper administration of justice.

The explanatory statement does not provide any further justification for why it is reasonable to allow limitations on a fair and public hearing which relate to security of court premises. While the authority to develop any such rules is likely to be interpreted under section 30 of the HRA as only extending to rules compatible with human rights, including the right to a fair trial, the Committee takes the view that further justification for the proposal should be provided in the explanatory statement.

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

#### *FREEDOM OF EXPRESSION (SECTION 16 HRA)*

The Bill also proposes to amend the *Freedom of Information Act 2016* (FOI Act). The definition of territory authority is amended to exclude the judicial council established under the *Judicial Commissions Act 1994* and the law society established under the *Legal Profession Act 2006*. This means that information held by these bodies, created under ACT legislation, will be excluded from any requirement for disclosure under the FOI Act.

The Bill will add to the categories of information for which disclosure is "taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law" (see Schedule 1). This will now include: Information in the possession of a court or tribunal that is not administrative in nature; disclosure to the person to whom the information relates of information that is confidential under the *Adoption Act 1993*, section 60; voluntary reports under the *Children and Young People Act 2008* (added to the mandatory reports currently considered contrary to the public interest to disclose); and Information held by the Ombudsman obtained or generated in relation to reportable conduct in the care, wellbeing and education of children and young people.

To the extent these amendments exclude or limit access to information they limit the right to freedom of expression protected by section 21 of the HRA. The explanatory statement sets out, utilising the framework provided in section 28 of the HRA, a justification for these limitations based on the historical intention to not subject certain bodies to freedom of information legislation, the sensitive nature of the material in question, and the alternative and more specialised access regimes available for the information in question. The Committee refers the Assembly to that analysis.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

LEGISLATIVE ASSEMBLY LEGISLATION AMENDMENT BILL 2017
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This Bill amend a number of provisions which have a bearing on the effective operation of the Office of the Legislative Assembly and Officers of the Legislative Assembly.

***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 TAKE PART IN PUBLIC LIFE (SECTION 17 HRA)*

The explanatory statement refers to two aspects of the Bill that may impact on the right to take part in public life protected by section 17 of the HRA. The Committee takes the view that neither gives rise to human rights issues which should be drawn to the attention of the Assembly.

The Bill will enable the Speaker of the Assembly to delegate powers under the *Legislative Assembly Precincts Act 2001* relating to removal of persons from the Assembly precinct to a broader category of staff of the Office of the Legislative Assembly. While this may in practice facilitate the removal of persons from the Assembly precinct, the basis on which any person can be removed, and hence the basis on which any person may not be able to engage with proceedings at the Assembly in person, will not be amended.

The Bill will also reintroduce a non-renewable term of appointment for the Auditor-General which potentially engages the right to have access, on general terms of equality, for appointment to the public service and public office protected under section 17(c) of the HRA. The amendment reintroduces eligibility provisions that were in place at the time of the appointment of the current Auditor-General, and hence the appointment of the current Auditor-General will be unaffected. Future appointments will be on the same terms as the current Auditor-General. The amendments do not discriminate, in the sense of treating unequally, individuals in or potentially seeking public office.

**The Committee draws this matter to the attention of the Assembly, but does not require a response.**

NATURE CONSERVATION (MINOR PUBLIC WORKS) AMENDMENT BILL 2017
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This Bill amends the *Nature Conservation Act 2014*, the *Planning and Development Act 2007* and makes consequential amendments to the *Planning and Development Regulation 2008* to allow minor public works to be carried out by the Territory on reserved land in accordance with a minor public works code approved by the conservator of flora and fauna.

***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 A FAIR TRIAL (SECTION 21 HRA)*

*RIGHT TO TAKE PART IN PUBLIC LIFE (SECTION 17 HRA)*

The Bill will enable various development work in reserved land to be carried out without development approval provided it complies with the new minor public works code. The works will therefore not require public notification associated with a development application and hence there will not be any approval or rejection decision which can be reviewed by ACAT.

Currently minor works can be exempted from these elements of the development application process by the issue of an Environmental Significance Opinion (ESO) by the conservator stating that the works will not have a significant adverse environmental impact. This ESO will essentially be replaced under the amendments with compliance with the new Code. To that extent there will not be a loss of public notification or appeal rights when compared to those available after the issue of an ESO—scrutiny of the Code and its compliance in any particular instance will remain available.

To the extent that the amendments do give rise to a limitation on the right to a fair trial under section 21 of the HRA and the right to take part in public life under section 17 HRA, the explanatory statement provides a justification for that limitation and the Committee refers the Assembly to that analysis.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

RESIDENTIAL TENANCIES AMENDMENT BILL 2017
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This Bill amends the *Residential Tenancies Act 1997* to provide for registration of commercial guarantees or indemnities before they can be used in relation to a residential tenancy, and to support electronic lodgement of rental bonds and remove the requirement for signatures on rental bond lodgement forms.

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

*RETROSPECTIVE OPERATION OF THE LAW*

Schedule 1 of the Bill will remove the ability to use a commercial guarantee in relation to a residential tenancy agreement in addition to or in place of a bond. A commercial guarantee is defined as a contract or arrangement between the lessor, the tenant and a third party where the third party, for a fee, benefit or reward, provides a guarantee or indemnity to the lessor for the performance of the tenant’s obligations under the residential tenancy agreement.

Under clause 2 of the Bill, Schedule 1 “is taken to have commenced on the day the bill for this Act was presented to the Legislative Assembly.” The Bill was presented on 14 September 2017. As it will commence prior to notification, the Act, once enacted, will have a retrospective operation.

Schedule 2 of the Bill, which makes provision for the registration of standard commercial guarantees by the Commissioner for Fair Trading, will commence on a day fixed by the Minister by written notice, or, if not yet commenced, within 12 months if the Act's notification. Schedule 2 will replace the effect of Schedule 1 in allowing commercial guarantees in relation to residential tenancy agreements provided they are registered. Schedule 1 therefore operates as a temporary restriction on the use of commercial guarantees until the registration process commences.

The explanatory statement acknowledges the concerns around retrospective operation of laws and offers the following justification:

The common law has a general protection against the retrospective application of law. The purpose of this protection includes fairness, in that it seeks to protect the expectations of those who assume that the quality of their past acts would be assessed on the basis of the law as it then stood. The amendments are justified, as those offering commercial guarantees will be on notice from the date of introduction of these changes. The changes will also not apply to arrangements already in place before introduction of the Bill.

There is no service currently providing commercial guarantees although one provider has publically [sic] stated an intention to offer them starting 1 October 2017. The changes need to take immediate effect as the Government is aware that at least one provider is seeking to offer commercial guarantees from 1 October 2017. The Bill will prevent these guarantees being accepted as an alternative to a bond while the Government does further work to regulate guarantees.

The Committee refers this explanation to the Assembly.

The Committee also notes that the explanatory statement originally placed on the ACT Legislation Register was replaced on 28 September 2017 with the correct version. The Committee requests that it be informed of any changes to explanatory statements to ensure that it is considering the correct version at the time of preparing its report.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

#### *RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)*

The Bill amends the regulation making power in section 136 of the Residential Tenancies Act by authorising regulations in relation to commercial guarantees, including: "if a person has registered a standard guarantee contract—information that the person must give to another person before entering into a commercial guarantee with the other person." It is not clear what type or class of information may be required.

The explanatory statement includes a statement that no human rights implications arise from the Bill. The Committee therefore interprets these amendments, consistently with the approach provided under section 30 of the HRA, as not extending to authorising regulations which require the unreasonable disclosure of personal information so as to give rise to limitations on the right to privacy and reputation under section 12 of the HRA. The Committee asks the Minister to confirm that this is the intended operation of the amendments and to clarify the nature of the information which may be required to be disclosed before entering into a commercial guarantee with the other person.

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

UTILITIES (TECHNICAL REGULATION) AMENDMENT BILL 2017
--

This Bill will amend the *Utilities (Technical Regulation) Act 2014* to seek to mitigate the risk of overhead electricity infrastructure causing fires by allocating responsibility to the electricity distribution utility to inspect and maintain electricity infrastructure, ensure vegetation is cleared, and to set out the role for a code of enforceable standards on how trees should be pruned.

***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 Bill will authorise utility providers to enter and occupy private land to clear vegetation and maintain or assess the condition of electrical distribution infrastructure. As the explanatory statement recognises, this limits the right to privacy protected by section 12 of the HRA which includes the right not to have your home interfered with unlawfully or arbitrarily. The explanatory statement sets out a detailed analysis using the framework set out in section 28 of the HRA of why this interference with the right to privacy is reasonably limited and demonstrably justified. The Committee commends this analysis and refers it to the Assembly.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

*CULTURAL RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (SECTION 27 HRA)*

The authorisation to access unleased territory land under the amendments has the potential to affect objects or places that have cultural significance to Aboriginal or Torres Strait Islander peoples. As the explanatory statement points out, any authorisation is subject to the existing protections applying to Aboriginal and Torres Strait Islander places and objects within the meaning of the *Heritage Act 2004*. The explanatory statement provides:

Given these safeguards [under the *Heritage Act 2004* and if appropriate, the *Tree Protection Act 2005*], and the public interest in maintaining electrical infrastructure and its surrounding environment to mitigate bushfire risks, any impacts on the cultural rights of Aboriginal and Torres Strait Islanders are appropriately circumscribed and demonstrably justified.

While the justification for any interference with this right does not explicitly set out all elements of the section 28 HRA framework, when considered in the context of the analysis of the interference with the right to privacy and reputation the Committee accepts the analysis provided and refers this to the Assembly.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

*STRICT LIABILITY OFFENCES AND THE RIGHT TO A FAIR TRIAL (SECTION 21 HRA)*

The Bill will introduce two strict liability offences: failing to comply with a requirement of the technical code (clause 5, section 16(2)) and failing to adequately clear vegetation from an aerial line (clause 7, section 41D(4)). The explanatory statement, in its discussion of the provisions in detail, identifies the strict liability offences and justifies the removal of any fault element and the maximum penalty to be imposed. The Committee refers the Assembly to that discussion.

In particular, the Committee notes that the negligent breach of a technical code is currently an offence punishable by up to 2000 penalty units, whereas the strict liability offence will only incur a penalty of up to 30 penalty units. It is intended that the offence will apply to minor breaches of mandatory elements of the technical codes that do not have an element of subjectivity, and that it applies to regulated utilities who can be expected to understand their legal obligations. The explanatory statement also notes that the defence of reasonable mistake of fact applies. Similarly the offence relating to allowing vegetation to grow too close to aerial lines has a maximum penalty of 10 penalty units, does not depend on subjective assessment and is imposed on regulated utilities.

While the strict liability offences are identified and justified in the explanatory statement, there is no recognition that strict liability offences, as they remove the requirement to establish a fault element in the commission of the offence and place the burden on the defendant to establish a defence, engage the right to the presumption of innocence set out in section 22 of the HRA. Any justification for the use of strict liability offences should generally be included in the discussion of the Bill's compatibility with the HRA and, preferably, utilise the framework set out in section 28 of that Act.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

WASTE MANAGEMENT AND RESOURCE RECOVERY AMENDMENT BILL 2017
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This Bill amends the *Waste Management and Resource Recovery Act 2016* to establish a container deposit scheme to assist the beverage industry in reducing and dealing with waste beverage product packaging and to promote the recovery, reuse and recycling of empty beverage containers, and other minor amendments.

***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)*

The Bill will introduce a number of strict liability offences:

- failure to comply with a condition of approval of beverage containers (s 64V—50 penalty units)
- collection point operator fails to keep records (s 64Z—40 penalty units)

There are also offences with strict liability in relation to one or more elements of the offences:

- Supply of an unapproved container or without a relevant supply arrangement in place (s 64W—1000 penalty units)
- Supplying container without a refund marking (s 64X—1000 penalty units)

The explanatory statement acknowledges that strict liability in relation to a criminal offence engages the presumption of innocence protected by section 22 of the HRA. The explanatory statement provides a justification for the use of strict liability and the Committee refers this analysis to the Assembly. In particular, the Committee notes the regulatory nature of the offences and the objective nature of the strict liability elements.

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

*RIGHT TO PRIVACY (SECTION 12 HRA)*

Under the proposed section 64Z, a collection point operator may require a person claiming a refund to give the operator a refund declaration containing information prescribed by regulation. The collection point operator may refuse to provide a refund if they are not satisfied of the person's identity. Where a refund is sought for enough containers, including cumulatively over time, as set out in regulations, then a refund declaration and proof of identity must be provided. The collection point operator must to keep these records for three years. The explanatory statement describes this provision as "designed to guard against fraudulent refund claims."

The collection and storage of a person's identity, along with refunds paid and other information provided for in regulations, engages the right to privacy protected under section 12 of the HRA. The explanatory statement should set out a more extensive justification for the provision using the framework set out in section 28 of the HRA. In particular, the nature of the additional information to be collected and the safeguards, if any, on the security of the information being stored and means of destruction should be set out.

**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 DI2017-201 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 5) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to a designated vehicle or the driver of a designated vehicle while participating in the event at Big Boys Toys 2017.**

**Disallowable Instrument DI2017-202 being the Veterinary Surgeons (Board) Appointment Revocation 2017 (No 1) made under section 108 of the *Veterinary Surgeons Act 2015* revokes DI2015-64.**

**Disallowable Instrument DI2017-204 being the Architects Board Appointment 2017 (No 2) made under subsection 70(2) of the *Architects Act 2004* appoints specified persons to the Australian Capital Territory Architects Board as community representative members.**

**Disallowable Instrument DI2017-205 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2017 (No 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* determines specified Tabcorp ACT Pty Ltd locations to be sports bookmaking venues for the purposes of the Act.**

**Disallowable Instrument DI2017-206 being the Official Visitor (Housing Assistance) Appointment 2017 (No 2) made under section 10(1)(d) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the *Housing Assistance Act 2007*.**

**Disallowable Instrument DI2017-207 being the Official Visitor (Disability Services) Appointment 2017 (No 2) made under paragraph 10(1)(c) of the *Official Visitor Act 2012* appoints specified persons as official visitors for the purposes of the *Disability Services Act 1991*.**

**Disallowable Instrument DI2017-208 being the Planning and Development (Lease Variation Charges) Determination 2017 (No 2) made under paragraph 276C(2)(a) and subsection 276E(1) of the *Planning and Development Act 2007* revokes DI2017-176 and determines lease variation charges for the purposes of the Act.**

**Disallowable Instrument DI2017-209 being the Public Place Names (Denman Prospect) Determination 2017 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the names of nine roads in the Division of Denman Prospect.**

**Disallowable Instrument DI2017-210 being the Public Health (Notifiable Conditions) Determination 2017 made under section 100 of the *Public Health Act 1997* revokes DI2005-220 and determines specified diseases as notifiable conditions.**

**Disallowable Instrument DI2017-211 being the Public Health (Reporting of Notifiable Conditions) Code of Practice 2017 (No 1) made under section 133 of the *Public Health Act 1997* revokes DI2006-5 and determines the Reporting of Notifiable Conditions Code of Practice 2017.**

**Disallowable Instrument DI2017-212 being the Road Transport (General) Driver Licence and Related Fees Determination 2017 (No 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-133 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2017-213 being the Civil Law (Wrongs) Professional Standards Council Appointment 2017 (No 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.**

**Disallowable Instrument DI2017-214 being the ACT Teacher Quality Institute Board Appointment 2017 (No 4) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board, nominated by the NSW/ACT Independent Education Union.**

**Disallowable Instrument DI2017-215 being the ACT Teacher Quality Institute Board Appointment 2017 (No 5) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board, nominated by the University of Canberra.**

**Disallowable Instrument DI2017-216 being the ACT Teacher Quality Institute Board Appointment 2017 (No 6) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board, nominated by the Australian Catholic University.**

**Disallowable Instrument DI2017-217 being the ACT Teacher Quality Institute Board Appointment 2017 (No 7) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Teacher Quality Institute Board.**

**Disallowable Instrument DI2017-220 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2017 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

**Disallowable Instrument DI2017-221 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2017 (No 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* revokes DI2016-227 and appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

**Disallowable Instrument DI2017-222 being the Work Health and Safety (Work Safety Council Member) Appointment 2017 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council.**

**Disallowable Instrument DI2017-223 being the Environment Protection (Fees) Determination 2017 (No 2) made under section 165 of the *Environment Protection Act 1997* revokes DI2017 152 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2017-224 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 6) made under section 13 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to a designated vehicle or the driver of a designated vehicle participating in the Innate Test Day.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### *DISAPPLICATION OF SUBSECTION 47(6) OF THE LEGISLATION ACT 2001*

**Disallowable Instrument DI2017-203 being the Road Transport (Safety and Traffic Management) Child Safety Equipment Approval 2017 made under paragraphs 66(1)(b), 66(1)(c), and 66(1)(d) of the *Road Transport (Safety and Traffic Management) Regulation 2000* revokes DI2011-30, DI2011-31 and DI2011-32 and determines the use of child restraints, booster seats and child safety harnesses relating to the Australian Standard AS/NZS 1754 and AS/NZS 4370, and accommodates the use of child restraints that were manufactured to earlier versions of the AZ/NZS 1754 standard.**

This instrument, made under subsection 66(1) of the *Road Transport (Safety and Traffic Management) Regulation 2000*, approves booster seats, child restraints and child safety harnesses. It relies on three Australian/New Zealand Standards, referred to in the definition of **relevant Australian Standard**, in section 7 of the instrument.

Section 6 of the instrument disapplies subsection 47(6) of the *Legislation Act 2001* in relation to the instrument. This means that there is no obligation to publish, on the ACT Legislation Register, any other instrument applied, adopted or incorporated by the instrument (ie including the three Australian/New Zealand Standards).

However, the Committee notes that the note to section 6 of the instrument states:

*Note* This means the relevant Australian Standard does not need to be notified under the Legislation Act. The relevant Australian Standard can be purchased from SAI Global Limited <http://www.standards.org.au/SearchandBuyAStandard/Pages/default.aspx>.

A copy of the relevant Australian standard can be viewed by contacting [roadsafety@act.gov.au](mailto:roadsafety@act.gov.au) to arrange a time to view during business hours.

In addition, the explanatory statement for the instrument states:

The purpose of Clause 6 is to disapply the provisions of section 47 of the *Legislation Act 2001* which would otherwise require notification of instruments applied by reference (in this case the Australian/New Zealand Standards referred to in clause 7). The standards referenced are technical in nature and describe performance standards with which a child restraint must

comply. Due to this it is considered that the standards are technical in nature and are unlikely to be accessed by members of the public. As noted above all child restraints sold in Australia must comply with these standards and be labelled with an Australian standards sticker indicating it complies with AS/NZS 1754.

Summary guides and information booklets are provided by a number of organisations (for example, Kidsafe, Neuroscience Research Australia and motoring associations) that provide easily digestible information on the use of restraints for passengers under 16 years old, including photos showing how to install and use child restraints appropriately.

The standards are regularly updated and are copyright. The ACT Government's access to the standards is regulated by terms and conditions that govern how they can be used and disclosed. The standards referenced in clause 7 can be purchased from the publisher SAI Global in either electronic or paper versions through the Standards Australia website ([www.standards.org.au](http://www.standards.org.au)) or on 131 242. Alternatively, a copy of the relevant Australian Standards can be viewed by contacting [roadsafety@act.gov.au](mailto:roadsafety@act.gov.au) to organise a viewing time during business hours

The Committee notes with approval that a justification has been provided for the disapplication of subsection 47(6) of the Legislation Act and an alternative form of access to (ie alternative to purchasing) the relevant Australian/New Zealand Standards has been provided.

The Committee commends this approach to other agencies.

**This comment does not require a response from the Minister.**

#### *RE-MAKING OF INSTRUMENTS*

**Disallowable Instrument DI2017-218 being the Firearms (Use of Noise Suppression Devices) Declaration 2017 (No 3) made under section 31 of the *Firearms Act 1996* declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.**

**Disallowable Instrument DI2017-219 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2017 (No 3) made under section 4L of the *Prohibited Weapons Act 1996* determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.**

These instruments revoke and re-make previous instruments that exempt the use of "noise suppression devices" (ie silencers) from prohibitions that would otherwise apply under the *Firearms Act 1996* and the *Prohibited Weapons Act 1996*. The instruments revoked (which were part of a series of instruments, revoked and re-made every three months) were the subject of a comment by the Committee in *Scrutiny Report 3* of the 9<sup>th</sup> Assembly (14 March 2017) and, again, in *Scrutiny Report 5* of the 9<sup>th</sup> Assembly (27 April 2017). The basis of the Committee's original comment (under principle (1)(d) of the Committee's terms of reference) was whether the instruments may contain material that should properly be dealt with in an Act of the Legislative Assembly.

The Committee notes that the Minister for Police and Emergency Services responded to the original comment, in a letter dated 23 March 2017. The Committee notes that, in that response, the Minister advised that he intended "to introduce amendments to give legislative effect to the declarations in the Spring 2017 sittings of the Legislative Assembly".

**The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## SUBORDINATE LAWS—NO COMMENT

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

**Subordinate Law SL2017-24 being the Work Health and Safety Amendment Regulation 2017 (No 1) made under the *Work Health and Safety Act 2011* makes technical amendments the Work Health and Safety Regulation to address inadvertent errors.**

**Subordinate Law SL2017-26 being the City Renewal Authority and Suburban Land Agency Regulation 2017 made under the *City Renewal Authority and Suburban Land Agency Act 2017* prescribes a criterion for the appointment of a person as an expert member of the City Renewal Authority Board, and provides for the Commonwealth Minister responsible for the Nation Capital Authority Board to nominate one expert member from the National Capital Authority Board to be dually appointed to the City Renewal Authority Board.**

**Subordinate Law SL2017-27 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2017 (No 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* amends the Medicines, Poisons and Therapeutic Good Regulation to authorise a designated prescriber to prescribe controlled medicines to treat drug-dependency.**

**Subordinate Law SL2017-29 being the Land Titles Amendment Regulation 2017 (No 1) made under the *Land Titles Act 1925* amends the Land Titles Regulation by implementing proof of identity system requirements arising from the Barrier Free model for the collection of conveyance duty.**

## SUBORDINATE LAW—COMMENT

The Committee has examined the following subordinate law and offers these comments on it:

### *RELIANCE ON "HENRY VIII" CLAUSE*

**Subordinate Law SL2017-25 being the Family Violence (Transitional Provisions) Regulation 2017 made under the *Family Violence Act 2016* modifies a specified part of the *Family Violence Act 2016* to provide a transition between the repealed Act, *Domestic Violence and Protection Orders Act 2008*, and the new Act.**

This instrument is made under section 201 of the *Family Violence Act 2016*, which provides:

#### **201 Transitional regulations**

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

Subsection 201(2), above is a "Henry VIII" clause, in that it allows the amendment of primary legislation by delegated legislation. This subordinate law relies on subsection 201(2). By way of explanation, the explanatory statement for the subordinate law states:

The *Family Violence (Transitional Provisions) Regulation 2017* (the **regulation**) modifies part 20 of the *Family Violence Act 2015* [sic] (the **new Act**).

The new Act commenced on 1 May 2017, except for part 9, which is due to commence on 19 August 2017. The new Act repealed the *Domestic Violence and Protection Orders Act 2008* (the **repealed Act**). Part 20 of the new Act provides for transition between the repealed Act and new Act. In particular, section 200A of the new Act provides that part 12 of the repealed Act continues to apply in relation to an order that corresponds to a domestic violence order until the commencement of part 9 of the new Act.

Part 9 of the new Act contains provisions that relate to the National Domestic Violence Order scheme (the **NDVO scheme**). While part 9 commences on 19 August 2017, the proposed national commencement date for the NDVO scheme is 25 November 2017.

In the period between 19 August and 25 November 2017, some provisions of the repealed Act relating to interstate domestic violence orders will be required to remain operational to ensure that the Magistrates Court can continue to register those orders in the ACT.

Section 201 of the new Act provides that a regulation may modify part 20 of that Act to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately dealt with in that part.

In the Executive's option, it is necessary to modify part 20 of the new Act to provide for the recognition of interstate family violence orders between 19 August and 25 November 2017, when the NDVO scheme is due to commence.

If the NDVO scheme does not commence on 25 November 2017 the regulation will remain in place until it commences.

**The Committee draws the attention of the Legislative Assembly to the above explanation.**

**This comment does not require a response from the Minister.**

#### *HUMAN RIGHTS ISSUES*

**Subordinate Law SL2017-28 being the Road Transport (Driver Licensing) Amendment Regulation 2017 (No 1) made under the Road Transport (Driver Licensing) Act 1999 allows for driver licence photographs to be used for other ACT Government registration cards and licence types.**

This subordinate law amends the *Road Transport (Driver Licensing) Regulation 2000*, to increase the maximum period of a full driver licence, to give driver licence holders the option of having their licence issued or renewed for a longer period. It also allows for driver licence photographs to be used for other ACT Government registration cards and licence types.

In relation to the latter issue, the explanatory statement for the instrument states:

This initiative will improve customer service by allowing people to apply for certain registration cards and licenses online – without having to attend an Access Canberra Service Centre to get their photograph taken.

The Committee notes that the explanatory statement for the subordinate law contains a detailed and helpful discussion of the human rights implications of the amendments made by the subordinate law.

**The Committee draws the attention of the Legislative Assembly to the human rights discussion in the explanatory statement for this instrument.**

**This comment does not require a response from the Minister.**

## NATIONAL LAW—COMMENT

The Committee has examined the following national law and offers these comments on it:

**Heavy Vehicle National Amendment Regulation 2017 (2017 No 329), made under the Heavy Vehicle National Law as applied by the law of States and Territories.**

This National Regulation, made under the *Heavy Vehicle National Law (ACT) Act 2013*, amends four other National Regulations—the Heavy Vehicle (Fatigue Management) National Regulation, the Heavy Vehicle (General) National Regulation, the Heavy Vehicle (Mass, Dimension and Loading) National Regulation and the Heavy Vehicle (Vehicle Standards) National Regulation. It was tabled in the Legislative Assembly on 19 September 2017. According to the explanatory statement that was tabled with the National Regulation, it “gives effect to a number of minor maintenance amendments”.

The explanatory statement goes on to state that:

... the Heavy Vehicle National Law (HVNL) set out in the schedule to the Queensland Act, as amended from time to time, applies as a territory law, as modified by schedule 1 of the Act, and may be referred to as the Heavy Vehicle National Law (ACT).

Regulations under the HVNL are notified on the NSW legislation register.

Maintenance of the HVNL is the responsibility of the National Transport Commission (NTC), and is subject to approval by the Transport and Infrastructure Council (the Council) comprised of each State and Territory Government’s transport and infrastructure portfolio ministers.

Where the Council approves an amendment to the HVNL, that amendment is progressed through the Queensland Parliament and, in the case of the ACT, adopted automatically.

Under the *Legislation Act 2001*, subordinate law, including national subordinate law must be presented to the Legislative Assembly.

The application of the Heavy Vehicle National Law in the ACT is provided for in section 7 of the Heavy Vehicle National Law (ACT) Act, which provides:

### **7 Application of Heavy Vehicle National Law**

- (1) The Heavy Vehicle National Law set out in the schedule to the Queensland Act, as amended from time to time—
  - (a) applies as a territory law, as modified by schedule 1; and

- (b) as so applying may be referred to as the *Heavy Vehicle National Law (ACT)*; and
- (c) so applies as if it were part of this Act.

*Note* Some chapters of the *Heavy Vehicle National Law (ACT)* have a delayed application (see this Act, pt 5).

- (2) Schedule 1, part 1.2 (Modifications—chapter 2) and this subsection expire at the beginning of the day that section 32 (Expiry—div 5.1) commences.

Section 8 of the *Heavy Vehicle National Law (ACT)* Act is also important to the application of the *Heavy Vehicle National Law* in the ACT. It provides.

#### **8 Exclusion of Legislation Act**

- (1) The Legislation Act does not apply to the *Heavy Vehicle National Law (ACT)*.
- (2) However, the Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation as if—
  - (a) a reference to a subordinate law were a reference to a national regulation; and
  - (b) a reference to ‘notification day’ in the Legislation Act, section 64 (Presentation of subordinate laws and disallowable instruments) were a reference to ‘published’ as mentioned in the *Heavy Vehicle National Law (ACT)*, section 733(1) (Publication of national regulations); and
  - (c) any other necessary changes were made.
- (3) Also, the Legislation Act, section 104 (References to laws include references to instruments under laws) and section 191 (Offences against 2 or more laws) apply to the *Heavy Vehicle National Law (ACT)* as if that Law were an Act.
- (4) This section does not limit the application of the Legislation Act to the local application provisions of this Act.

The significance of subsection 8(2) is that it deals with the requirement to table National Regulations in the Legislative Assembly, thereby bringing such National Regulations within the scrutiny jurisdiction of the Committee. In turn, the provision also deals with the Legislative Assembly’s capacity to scrutinise and disallow a National Regulation.

The effect of the modification of section 64 of the *Legislation Act 2001* is that a National Regulation must be tabled in the Legislative Assembly not later than 6 sitting days after it was “published”, for the purposes of subsection 733(1) of the *Heavy Vehicle National Law*. Subsection 733(1) provides:

#### **733 Publication of national regulations**

- (1) The national regulations are to be published on the NSW legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.

- (2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

An endnote to the National Regulation now before the Committee advises that this particular National Regulation was published on the NSW Legislation website, in accordance with Part 6A of the *Interpretation Act 1987* (NSW), on 30 June 2017. An examination of the NSW Legislation website confirms that this is correct (see <https://www.legislation.nsw.gov.au/regulations/2017-329.pdf>).

Section 64 of the Legislation Act provides:

**64 Presentation of subordinate laws and disallowable instruments**

- (1) A subordinate law or disallowable instrument must be presented to the Legislative Assembly not later than 6 sitting days after its notification day.
- (2) If a subordinate law or disallowable instrument is not presented in accordance with subsection (1), it is taken to be repealed.
- (3) This section is a determinative provision.

*Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

Applying subsection 64 to this National Regulation, (unless the Committee is missing something) this National Regulation should have been tabled in the Legislative Assembly by 17 August 2017. As already noted, it was, in fact, tabled on 19 September 2017. Applying subsection 64(2), (again, unless the Committee is missing something), the failure to table this National Regulation by 17 August means that this National Regulation is repealed.

**The Committee requests the advice of the Minister in relation to the comments above.**

**This comment requires a response from the Minister.**

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Education and Early Childhood Development, dated 5 September 2017, in relation to comments made in Scrutiny Report 6 concerning the *Education and Care Services National Law Amendment Act 2017* (Victoria).

A copy of this response can be view on line 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 Attorney-General, undated, in relation to comments made in Scrutiny Report 9 concerning the Casino (Electronic Gaming) Bill 2017.

A copy of 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/responses-to-comments-on-bills>.

The Committee would like to thank the Minister for Education and Early Childhood Development and the Attorney-General for their helpful responses.

Giulia Jones MLA  
Chair

October 2017

## 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)

Disallowable Instrument DI2017-57 - Electoral Commission (Chairperson) Appointment 2017 (No 2)

**Report 9, dated 5 September 2017**

Disallowable Instrument DI2017-165 - Public Health (Cooling Towers) Risk Activity Declaration 2017 (No 1)

Disallowable Instrument DI2017-193 - Health (Fees) Determination 2017 (No 2)

Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2017