

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

SCRUTINY REPORT 22

16 OCTOBER 2018



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Ms Elizabeth Lee MLA (Chair)

Ms Bec Cody MLA (Deputy Chair)

Mr Michael Pettersson MLA

## SECRETARIAT

Ms Julia Agostino (Secretary)

Ms Anne Shannon (Assistant Secretary)

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## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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

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## BILLS

### BILLS—NO COMMENT

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

#### CRIMES LEGISLATION AMENDMENT BILL 2018

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This Bill amends various criminal law Acts to clarify that warrants under the *Crimes (Child Sex Offenders) Act 2005* are issued by magistrates and not by the Magistrates Court; to authorise associate judges of the ACT Supreme Court to issue warrants in their own name under various surveillance Acts; to allow back-up and related charges to be committed for trial to the Supreme Court on the application of the accused; and to increase the value of penalty units from \$150 to \$160 (for individuals) and from \$750 to \$810 for corporations.

#### LAND TAX (COMMUNITY HOUSING EXEMPTION) AMENDMENT BILL 2018

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This Private Member’s Bill will exempt properties from land tax where they are rented for community housing under an agreement with a registered community housing provider.

### BILLS—COMMENT

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

#### SENTENCING LEGISLATION AMENDMENT BILL 2018

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This Bill amends the *Crimes (Sentence Administration) Act 2005* and *Crimes (Sentencing) Act 2005* to make various changes to the Intensive Corrections Order scheme and other technical 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 LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

The Intensive Correction Order (ICO) scheme is intended to provide a sentence of ‘last resort’ as an alternative to full time detention. It allows a person convicted of an offence to serve their sentence in the community under strict conditions rather than be placed in full-time detention. One of the conditions placed on an ICO is that the offender not reoffend. If they do, under section 65 of the *Crimes (Sentencing Administration) Act*, the Court will cancel the remaining ICO period (unless it is not in the interests of justice to do so) and order that the remaining sentence be served in full or *in part* by full time detention. In *R v XH* [2017] ACTSC 236, Penfold J questioned the meaning of “in part” in section 65, including whether it allows the Court to re-sentence the offender.

The Bill will amend section 65 by making it clear that the Court, when cancelling the ICO, is to order that the remainder of the offender’s sentence is to be served by full time detention. The Court can also set a non-parole period which will provide the offender with the possibility, if they meet their parole conditions, to serve a period of their offence otherwise than in full-time detention.

The Bill, by providing for full-time detention to result from breaching the ICO conditions by committing an offence punishable by imprisonment, limits the right to liberty and security of a person protected by section 18 of the HRA. The explanatory statement recognises this limitation and provides a justification using the framework set out in section 28 of the HRA. The Committee refers the Assembly to this analysis, in particular the retention of the possibility for a reduced term of imprisonment to result from breach of the condition.

The Bill also extends the circumstances in which the length of an existing sentence may be affected by non-compliance with the conditions of an ICO. Currently, under subsection 80(2), any period of time that a warrant issued by a judge or magistrate for the offender's arrest is outstanding does not count as part of the offender's term of imprisonment by intensive correction. In other words, the issue of a warrant suspends the period of the ICO or imprisonment. The Bill will amend this so that the suspension does not extend to time in custody or detention under the *Mental Health Act 2015* while the warrant is outstanding (clause 8) and to include warrants issued by the Sentence Administration Board after a notice has been issued to an offender to attend a hearing before the Board (proposed section 212A).

As the Bill will in this way extend the period in which the offender has to serve the ICO (or imprisonment where the ICO is cancelled), the Bill limits the right to liberty and security of person protected under section 18 of the HRA. The explanatory statement accompanying the Bill includes a justification for this limitation and the Committee refers that analysis to the Assembly. In particular, the Committee notes that the warrant is issued by a judicial member of the Board where they consider that the offender will not appear before the Board as set out in a notice of breach of intensive order obligations.

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

#### RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The suspension of an offender's period of imprisonment through issue of a warrant by the Sentence Administration Board may also limit the right to a fair trial protected by section 21 of the HRA. The explanatory statement sets out a justification for any limitation, including the circumstance that offenders are made aware of the conditions on which they can serve an ICO, and that a warrant can only be issued by a judicial officer after a notice has been issued setting out the circumstances of any breach of those ICO conditions and requiring attendance before the Board.

**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 will amend the Crimes (Sentencing) Act to provide for assessments to be made of the offender's suitability to serve a sentence by ICO. In making an intensive correction assessment, an ACT public servant or someone with similar functions under a law of a State or the Northern Territory can require private information be provided, including highly personal matters such as alcohol or drug dependence, medical conditions, employment and personal circumstances, and living circumstances of the offender (ie the consent of persons living with the offender to living with the offender while serving intensive correction).

The Bill will, therefore, potentially unduly interfere with a person’s privacy and reputation as protected against by section 12 of the HRA. The explanatory statement accompanying the Bill sets out an analysis of why any interference will not be arbitrary and will be reasonable in the circumstances, and the Committee refers the Assembly to that analysis. In particular, the Committee notes that the intensive correction assessments mirror in many respects the function and information-gathering powers in making pre-sentencing reports under Chapter 4.2 of the Sentencing Act.

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

## STATUTE LAW AMENDMENT BILL 2018

This Bill provides for minor or technical and non-controversial amendments to a large number of Acts and regulations.

***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

Under clause 2 of the Bill, Section 5 and Schedule 3, Part 3.18 (*Heavy Vehicle National Law (ACT) Act 2013*) are taken to have commenced on 1 July 2018. This aspect of the Bill will, therefore, have retrospective effect. Part 3.18 omits various provisions from the *Heavy Vehicle National Law (ACT) Act 2013* (ACT Act). That law applies the Heavy Vehicle National Law as a law in the ACT, automatically including amendments made by Queensland legislation. Due to amendments to the Heavy Vehicle National Law made by the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018* (Qld) (Qld amending Act), various provisions of the ACT Act are now redundant. Given the Qld amending Act came into effect on 1 July 2018, any substantive changes to rights and obligations in the ACT were changed on that date. The retrospective effect of this Bill is therefore not substantial, and the Committee accepts that it does not require further justification.

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

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-227 being the *Work Health and Safety (Fees) Determination 2018 (No 2)* made under section 278 of the *Work Health and Safety Act 2011* revokes DI2018-113 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-228 being the *Domestic Violence Agencies (Council) Appointment 2018 (No 2)* made under section 6 of the *Domestic Violence Agencies Act 1986* appoints a specified person as a community member of the Domestic Violence Prevention Council, representing the views and interests of people of Aboriginal and Torres Strait Islands descent.**

- **Disallowable Instrument DI2018-229 being the Domestic Violence Agencies (Council) Appointment 2018 (No 4)** made under section 6 of the *Domestic Violence Agencies Act 1986* appoints a specified person to the position of Deputy Chief Police Officer (Crimes) at ACT Policing as a police officer member of the Domestic Violence Prevention Council.
- **Disallowable Instrument DI2018-230 being the Domestic Violence Agencies (Council) Appointment 2018 (No 3)** made under section 6 of the *Domestic Violence Agencies Act 1986* appoints a specified person as a community member of the Domestic Violence Prevention Council, capable of representing the views and interests of people of a non-English speaking background.
- **Disallowable Instrument DI2018-231 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 8)** made under Schedule 4, section 4.38 and section 4.39 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member and deputy chairperson of the ACT Professional Standards Council, representing New South Wales.
- **Disallowable Instrument DI2018-232 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 9)** made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the ACT Professional Standards Council, representing New South Wales.
- **Disallowable Instrument DI2018-233 being the Legislative Assembly (Members' Staff) Variable Terms of Employment Of Office-holders' Staff Determination 2018 (No 1)** made under subsection 6(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-281 and determines the remuneration, duties, and terms and conditions of employment of the Executive Chief of Staff.
- **Disallowable Instrument DI2018-234 being the Utilities (Technical Regulation) (Listed Dams) Determination 2018** made under section 69 of the *Utilities (Technical Regulation) Act 2014* revokes DI2015-44 and determines specified dams owned by Icon Water and the ACT Government to be "listed dams".

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 17 September 2018, in relation to comments made in Scrutiny Report 21 concerning the Civil Wrongs (Child Abuse Claims Against Unincorporated Bodies) Amendment Bill 2018.
- The Minister for Employment and Workplace Safety, dated 15 October 2018, in relation to comments made in Scrutiny Report 21 concerning the Government Procurement (Secure Local Jobs) Amendment Bill 2018.

[These responses](#)<sup>1</sup> can be viewed online.

- The Minister for City Services, dated 14 September 2018, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instruments:
  - DI2018-175—Domestic Animals (Fees) Determination 2018 (No 2); and

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<sup>1</sup> <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>.

- DI2018-177—Tree Protection (Fees) Determination 2018 (No 1).
- The Attorney-General, dated 17 September 2018, in relation comments made in Scrutiny Report 20 concerning Disallowable Instruments:
  - DI2018-188—Associations Incorporation (Fees) Determination 2018;
  - DI2018-189—Land Titles (Fees) Determination 2018;
  - DI2018-190—Liquor (Fees) Determination 2018;
  - DI2018-191—Partnership (Fees) Determination 2018;
  - DI2018-192—Security Industry (Fees) Determination 2018;
  - DI2018-193—Gaming Machine (Fees) Determination 2018;
  - DI2018-194—Race and Sports Bookmaking (Fees) Determination 2018;
  - DI2018-195—Unlawful Gambling (Charitable Gaming Application Fees) Determination 2018;
  - DI2018-196—Casino Control (Fees) Determination 2018;
  - DI2018-199—Public Trustee and Guardian (Fees) Determination 2018;
  - DI2018-200—Unit Titles (Management) (Fees) Determination 2018; and
  - DI2018-209—Court Procedures (Fees) Determination 2018.
- The Minister for Justice, Consumer Affairs and Road Safety, dated 19 September 2018, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instruments:
  - DI2018-125—Road Transport (General) Vehicle Registration and Related Fees Determination 2018 (No 2);
  - DI2018-126—Road Transport (General) Driver Licence and Related Fees Determination 2018 (No 1);
  - DI2018-127—Road Transport (General) Numberplate Fees Determination 2018 (No 2);
  - DI2018-128—Road Transport (General) Refund and Dishonoured Payments Fees Determination 2018 (No 1); and
  - DI2018-129—Road Transport (General) Fees for Publications Determination 2018 (No 1).
- The Minister for the Environment and Heritage, dated 20 September 2018, in relation to further comments made in Scrutiny Report 21 concerning Disallowable Instrument DI2018-202—Utilities (Technical Regulation) (ACT Dam Safety Code) Approval 2018.
- The Minister for Justice, Consumer Affairs and Road Safety, dated 25 September 2018, in relation to comments made in Scrutiny Report 21 concerning Subordinate Law SL2018-14—Road Transport (Offences) Amendment Regulation 2018 (No 2).

[These responses](#)<sup>2</sup> *can be viewed online.*

<sup>2</sup> <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 Committee wishes to thank the Attorney-General, the Minister for Employment and Workplace Safety, the Minister for City Services, the Minister for Justice, Consumer Affairs and Road Safety, and the Minister for the Environment and Heritage for their helpful responses.

Bec Cody MLA  
Acting Chair

16 October 2018

# OUTSTANDING RESPONSES

## BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
  - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
- **Report 8, dated 8 August 2017**
  - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
- **Report 12, dated 21 November 2017**
  - Crimes (Criminal Organisation Control) Bill 2017 (PMB).
- **Report 17, dated 4 May 2018**
  - Crimes (Consent) Amendment Bill 2018 (PMB).
- **Report 19, dated 24 July 2018**
  - Anti-corruption and Integrity Commission Bill 2018 (PMB)
- **Report 20, dated 7 August 2018**
  - Disallowable Instrument DI2018-138—Agents (Fees) Determination 2018
  - Disallowable Instrument DI2018-140—Births, Deaths and Marriages Registration (Fees) Determination 2018
  - Disallowable Instrument DI2018-142—Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2018
  - Disallowable Instrument DI2018-143—Co-operatives National Law (ACT) (Fees) Determination 2018
  - Disallowable Instrument DI2018-144—Prostitution (Fees) Determination 2018
  - Disallowable Instrument DI2018-145—Registration of Deeds (Fees) Determination 2018
  - Disallowable Instrument DI2018-146—Retirement Villages (Fees) Determination 2018
  - Disallowable Instrument DI2018-147—Traders (Licensing) (Fees) Determination 2018
- **Report 21, dated 11 September 2018**
  - Disallowable Instrument DI2018-223—Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2018 (No 1)