

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

SCRUTINY REPORT 25

23 NOVEMBER 2018

THE COMMITTEE

COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)
Ms Bec Cody MLA (Deputy Chair)
Mr Michael Pettersson MLA

SECRETARIAT

Ms Julia Agostino (Secretary)
Ms Anne Shannon (Assistant Secretary)
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)
Mr Daniel Stewart (Legal Adviser—Bills)

CONTACT INFORMATION

Telephone 02 6205 0173
Facsimile 02 6205 3109
Post GPO Box 1020, CANBERRA ACT 2601
Email scrutiny@parliament.act.gov.au
Website www.parliament.act.gov.au

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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DRAFT INTEGRITY COMMISSION BILL 2018

The Committee has examined the draft Integrity Commission Bill 2018 and offers these comments on it:

On 23 October 2018, the Assembly referred the draft Integrity Commission Bill 2018, when it became available, to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) for consideration and report, with the Committee to report by 27 November 2018. The draft Bill and accompanying explanatory statement were provided to the Committee on Friday, 16 November 2018. The Committee has considered the draft Bill and accompanying explanatory statement as if they were subject to the Committee's general terms of reference, in the same way as a bill presented to the Assembly.

The Committee was also provided with a document detailing proposed amendments, which may be considered by the Assembly. The Committee has not considered the proposed amendments and makes no comment on them.

Given the short time frame provided for the Committee to consider the draft Bill, it has not been possible to include in this report a detailed discussion of all matters coming within the Committee's terms of reference. This report focuses on some particular concerns raised by the draft Bill and explanatory material.

The Committee notes that the draft Bill reflects recommendations for the establishment of a standing ACT independent integrity body to investigate corruption in public administration made by the Select Committee on an Independent Integrity Commission in 2017. An exposure draft of the Integrity Commission Bill was tabled in the Legislative Assembly on 31 July 2018. This exposure draft was the subject of further examination by the Select Committee on an Independent Integrity Commission 2018's inquiry into the establishment of an independent integrity commission. The draft Bill incorporates 38 of the 57 recommendations of the 2018 Select Committee. In each of the select committee reports, there was some consideration given to issues that may arise under the *Human Rights Act 2004* and other matters which may fall within this Committee's terms of reference. Any comments or recommendations made by the select committees should not be taken to be endorsed or otherwise adopted by this Committee in making this report.

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)

The draft Bill, if enacted, will potentially limit a large number of rights protected under the Human Rights Act, including:

- Recognition and equality before the law (section 8);
- Protection of family life and of children (section 11);
- Privacy and reputation (section 12);
- Freedom of movement (section 13);
- Association (section 15);
- Freedom of expression (section 16);
- Participation in public life (section 17);

- Liberty (section 18);
- Fair trial (section 21); and
- Rights in criminal proceedings (section 22).

The Committee acknowledges the detailed consideration of these limitations included in the draft explanatory statement and refers the Assembly to that statement. The Committee also notes the discussion, in the explanatory statement's outline of clause 8, of the retrospective operation of the draft Bill in applying to corrupt conduct which occurred prior to the commencement of the draft Bill.

Subject to the considerations set out below, in the Committee's view, the limitations on these rights presented by the draft Bill are conditioned or limited in such a way so as to be a proportionate response to the objectives of the Bill and therefore considered a reasonable and justifiable limitation for the purposes of section 28 of the HRA.

PRELIMINARY INQUIRIES

The draft Bill provides for the establishment of the ACT Integrity Commission (the Commission). The Commission is given extensive powers to investigate and report on corrupt conduct by public officials (as those concepts are defined in the draft Bill). The Commission will be able to act on corruption reports (either a complaint from anyone about conduct that might be corrupt conduct, or a mandatory corruption notification received from the head of a public sector entity or senior executive). The Commission has an obligation to either dismiss the corruption report, generally because it doesn't justify investigation, refer the corruption report to another entity, either a referral entity which will also have power to investigate the matter or prosecutorial body, or investigate the corruption report (clause 70). The Commission is able to conduct an investigation where they suspect on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct (clause 103). The Commission may also conduct an investigation on its own initiative on the same basis (clause 104).

In deciding whether to dismiss, refer or investigate a corruption report or to investigate a matter of its own initiative, the Commission may carry out a preliminary inquiry. Various coercive powers available to the Commission when carrying out an investigation are not available in a preliminary inquiry, including powers of entry, search and seizure, to conduct an examination including the ability to summons witnesses, and to assume an identity, conduct a controlled operation or apply for a surveillance device under various other pieces of legislation (clause 89). The Commission is able, however, when carrying out a preliminary inquiry, to require heads of public sector entities (which can include non-government entities exercising functions of a public nature) to provide relevant information (clause 90).

In conducting a preliminary inquiry, the Commission is also able to issue a preliminary inquiry notice requiring any person to attend the Commission at a stated time and place to produce a document or other thing (clause 91). A preliminary inquiry notice generally requires seven days' notice, but can require immediate attendance where the Commission considers on reasonable grounds that a delay could mean evidence is lost, an offence committed, the person escapes, or there will be serious prejudice to the conduct of the preliminary inquiry (clause 95). A failure to comply with a preliminary inquiry notice without reasonable excuse may be a contempt of the Commission (under paragraph 172(1)(a)) or otherwise comprise a criminal offence (for example, a failure to give information as required without reasonable excuse in section 722 of the Criminal Code). Providing false or misleading information is also a serious offence (see section 338 of the Criminal Code).

Information obtained during a preliminary inquiry, like in other functions of the Commission under the draft Bill, can be disclosed to a variety of other entities where the information is relevant to that entity's functions and disclosure is considered appropriate (clause 204). It may also be made available in court proceedings (clause 210, subject to claims of privilege discussed below and other non-disclosure or confidentiality requirements which may be imposed by the Commission). Information disclosed as a result of a preliminary inquiry notice may be used in an investigation by the Commission, and potentially reported in an investigation or special report. There are also obligations to report the number of preliminary inquiries and preliminary inquiry notices issued (clause 225).

The issue of a preliminary inquiry notice is therefore a significant coercive power as well as exposing persons to further investigation by the Commission or other body. It potentially limits the protection against unlawful and arbitrary interference with privacy and reputation protected by section 12 of the HRA, freedom of movement protected by section 13 of the HRA, and rights to a fair trial, including procedural fairness protected by section 21 of the HRA. The role of the Commission in prosecuting contempt of the Commission in the Supreme Court for non-compliance with a preliminary notice inquiry may also give rise to limitations on the rights in criminal proceedings protected by section 22 of the HRA. To the extent preliminary inquiry notices are accompanied by a confidentiality notice issued under clause 78, where the Commission considers on reasonable grounds that disclosure of restricted information would be likely to prejudice the preliminary inquiry, freedom of expression protected by section 16 of the HRA may be limited. The exposure of persons with a disability or other vulnerability or children under 18 to having to comply with a preliminary inquiry notice may limit the protection of equal treatment in section 8 of the HRA and protection of children in section 11 of the HRA.

The draft explanatory statement includes a detailed justification for these potential limits and the Committee refers the Assembly to that analysis. It notes, in particular, the following limitations and protections built into the use of preliminary inquiry notices. The Commission has to have regard to various matters when considering whether issue of a preliminary notice is reasonable, including whether the thing or document is necessary, can be obtained in another way, and the impact on the person given their disability, health or cultural or linguistic background (clause 91(2)). There are also various limitations and restrictions on the use of preliminary inquiry notices: they do not apply to children under 16 years old and only issue to a person under 18 if the notice might produce compelling and probative evidence which cannot be obtained in another way; a person who complies with the notice has the same protections against as a witness in the Supreme Court; a person who receives a notice can seek legal advice; and they must be told about their rights and obligations before producing the object or document.

A person subject to a preliminary inquiry notice may also claim the document or thing is privileged or cannot lawfully be disclosed (clause 98), with any claim decided by the Supreme Court (clause 100). Privilege for this purpose includes any privilege a person is entitled to claim in a proceeding before a court or tribunal, including public interest immunity, client legal privilege, professional confidential relationship privilege, journalist privilege, and religious confession (clause 181).

The protection of privileged information against a preliminary inquiry notice does not include the privilege against self-incrimination and exposure to the imposition of a civil penalty (clause 182). However, any document or thing produced that is self-incriminatory is protected by a form of derivative use immunity: the document or thing is not admissible in evidence in civil or criminal proceedings, and cannot be used in disciplinary processes or actions unless the Commission has gone on to make a finding of serious or systematic corrupt conduct. Information or other evidence

that was obtained indirectly because of the self-incriminatory evidence being produced, such as evidence that was obtained from inquiries based on the self-incriminatory evidence, is also only admissible in civil or criminal proceedings where it could have been obtained or its significance appreciated in other ways (clause 183). The Committee notes that this form of derivative use immunity, where the prosecutors have the onus of establishing that evidence could have been discovered without the self-incriminatory information or was provided independently of that information, has been considered to be compatible with the right to a fair hearing protected under the Victorian *Charter of Human Rights and Responsibilities*.¹

Self-incriminatory information obtained through issue of a preliminary inquiry notice may therefore be used by the Commission in deciding whether to conduct an investigation, to assist with that investigation including in the examination of witnesses, and to form conclusions and recommendations. It may also be disclosed to other entities and potentially used in other civil and criminal proceedings subject to the direct and limited derivative use immunity provided in clause 183.

The Committee therefore remains concerned that the authority to issue a preliminary inquiry notice may be disproportionate to the role of preliminary inquiries in informing any decision to investigate potential corrupt conduct. In the draft explanatory statement, preliminary inquiry notices are considered an important step in ensuring the Commission is reasonably satisfied that a threshold has been met before conducting a full examination (see page 132). It allows allegations to be substantiated prior to a more coercive investigation, and prevents public funds being spent on expensive coercive investigations into allegations that are unsubstantiated and do not meet the definition of serious or systemic corrupt conduct. However, in the Committee's view, every investigation need not employ invasive and expensive powers in their early stages, and an investigation can be discontinued at any time if no longer justified, for example if evidence is obtained that fails to substantiate an allegation in a corruption complaint (clause 115).

In the committee's view, further reasonable restrictions on the use of preliminary inquiry notices may be available to reduce their potential limitation of rights protected under the HRA. For example, it could be a requirement before a preliminary inquiry notice is issued that the Commission, on reasonable grounds, form the view that production of the document or thing is necessary to decide whether to investigate an allegation of corruption (ie not merely have regard to that issue as in paragraph 91(2)(a)). The ability to require immediate attendance (clause 95) could be conditioned on serious prejudice to the conduct of any inquiry and not just a preliminary inquiry, requiring the commission to consider the extent to which the powers available in an investigation may provide access to the information in question or protect against prejudice to any investigation if notice is given.

Similarly, the issue of a confidentiality notice during a preliminary inquiry under clause 78 will, under the draft Bill, only be available if considered on reasonable grounds that the disclosure of restricted information would be likely to prejudice the preliminary inquiry. Consideration could be given to making confidentiality notices for preliminary inquiries also available to protect the safety or reputation of a person or the fair trial of a person who has been, or may be, charged with an offence in the same way as confidentiality notices during an investigation under clause 79.

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

¹ In the case of *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009).

CLARIFYING THAT DISCRETION TO BE EXERCISED CONSISTENTLY WITH HUMAN RIGHTS OBLIGATIONS

The Bill relies in various ways on the Commissioner exercising their discretion so as to reduce or justify any limitation on rights protected by the HRA. For example, the draft Bill introduces a strict liability offence of interference with something to which access has been restricted by an investigator under clause 124. This has the potential to apply to third parties who are not directly connected to the items or otherwise not aware of access having been limited. As acknowledged in the explanatory statement, investigators will therefore have to ensure that restricted items are physically secured in such a way to provide notice of the restrictions.

Before deciding to hold a public examination the Commissioner must consider, but not necessarily act on, whether a public examination can be held without unreasonably infringing a person's human rights (clause 146). Similarly, the Commission may give information about an investigation to various specified persons accompanied by a non-disclosure notice (clause 206). The Commission has a discretion to prohibit certain types of disclosure where it would be likely to prejudice an investigation, the safety or reputation of a person, or the fair trial of a person who has been, or may be, charged with an offence. The Committee is concerned that as currently drafted these and similar provisions do not require the Commission to act in a way which would protect a person's human rights (for example, holding a public hearing even in circumstances where the Commission considers it would be an unreasonable infringement of a person's human rights). The Committee recognizes that the Commission, and the Inspector, are subject to the HRA and generally have to act compatibly with the human rights protected by that Act. However, consideration could be given to amending the wording used in the draft Bill, or at least the draft explanatory statement, to make it clear that it is not intended that the Commission can act incompatibly with human rights in the exercise of these and similar discretions.

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

ADDITIONAL NOTICE OF POTENTIAL ADVERSE REPORT

The Committee acknowledges that there are a number of explicit restrictions placed on the information the Commission can include in investigation reports, special reports and annual reports to generally protect human rights. This includes information which:

- would prejudice a criminal investigation or other legal proceedings (see eg clauses 192, 217, 229);
- would identify a person who is not subject to adverse comment in the report (unless, among other things, identifying that person would not cause unreasonable damage to their reputation, safety or wellbeing) (eg clauses 193, 230); or
- otherwise would be, on balance, contrary to the public interest to include due to the infringement of an individual's right to privacy and reputation or other human right (clause 194).

The draft Bill establishes an Inspector who also has various powers to disclose information or report which are subject to requirements not to prejudice a fair trial or other human rights (eg clauses 265, 282, 288).

The draft Bill also requires a proposed investigation report or special report to be generally provided to the persons it relates to or anyone else considered to be directly interested in the report, and the Commission must consider comments received in response (eg clause 195, 220). However, there is no express provision for comment on annual reports by the Commission, or for special reports or annual reports of the Inspector which may similarly prejudice an individual. While the Committee recognizes that the Commission is generally required to comply with the rules of natural justice and procedural fairness in conducting examinations, and it can be generally implied that other decisions of the Commission and Inspector will similarly be subject to procedural fairness requirements, in the Committee's view this should be made explicit in relation to all public reports of the Commission or Inspector.

The Committee also takes the view that, particularly given the potential prejudicial effect of any finding of corrupt conduct made by the Commission even in the absence of a finding of guilt or recommendation of prosecution, consideration be given to enhancing the protection of persons that may be affected by publication of reports under the Act. For example, where the Commission has considered a comment, provided on a proposed report, that the report will, if unaltered, unreasonably impact on a person's human rights, and the Commission does not propose to substantially alter the report in response, then this should also be communicated to those affected prior to publication of the report.

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

Giulia Jones MLA
Chair

23 November 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 23, dated 29 October 2018**
 - Disallowable Instrument DI2018-239—Tobacco and Other Smoking Products (Fees) Determination 2018 (No 1)
 - Disallowable Instrument DI2018-250—Radiation Protection (Council Member, Chair and Deputy Chair) Appointment 2018 (No 1)
- **Report 24, dated 20 November 2018**
 - Domestic Animals (Dangerous Dogs) Legislation Amendment Bill 2018 (PMB)
 - Emergencies Amendment Bill 2018
 - Residential Tenancies Amendment Bill 2018 (No 2)
 - Royal Commission Criminal Justice Legislation Amendment Bill 2018