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

SCRUTINY REPORT 24

20 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.

TABLE OF CONTENTS

BILLS

BILL—NO COMMENT

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

PUBLIC SECTOR WORKERS COMPENSATION FUND BILL 2018

This Bill establishes the Public Sector Workers Compensation Fund and prudential governance to help meet the Territory's obligations as a self-insured licensee under the *Safety, Rehabilitation and Compensation Act 1988* (Cwlth).

BILLS—COMMENT

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

CITY RENEWAL AUTHORITY AND SUBURBAN LAND AGENCY AMENDMENT BILL 2018

RETROSPECTIVE OPERATION

This Bill will amend the *City Renewal Authority and Suburban Land Agency Act 2017*. That Act established two separate Territory authorities to, among other things, manage land development projects within the Territory in place of the Land Development Agency. Various assets, contracts and liabilities were transferred to the new Authority and Agency, effective from the 30 June 2017, through instruments issued under Division 9.6 of the *Financial Management Act 1996*. The remaining assets, contracts and liabilities were vested in the Territory on the 30 June 2017, the day the Land Development Agency ceased to exist (under section 122 of the Financial Management Act). This Bill will transfer the remaining assets, contracts and liabilities that were not included in those instruments, except for those that are listed in Schedules to the Bill.

The Bill commences the day after its notification. However, once commenced, the effect of the Bill is to vest the assets, contracts and liabilities in the respective authority and agency as at midnight on 30 June 2017, that is, as if the transfer to the Territory did not occur. This retrospective operation, however, does not have any prejudicial impact on the rights or liabilities of individuals not connected with the Authority and Agency.

The Committee notes that the effect of the Bill may have been achieved through the issue of instruments under the Financial Management Act, and commends the Minister on the use of amending legislation to ensure transparency and certainty of any transfer.

This comment does not require a response from the Minister.

DISABILITY SERVICES AMENDMENT BILL 2018

This Bill amends the *Disability Services Act 1991* to change the definition of visitable place, remove the requirement for approval of a place as disability accommodation, change the circumstances in which the Official Visitor can visit a visitable place or other place where a person is in receipt of disability services, and extend the range of persons who can be provided with the address of a visitable place.

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 *Official Visitor Act 2012* provides for the appointment of an Official Visitor to conduct inspections of visitable places. Visitable places are designated in various pieces of legislation including the Disability Services Act. The Disability Services Act currently defines a visitable place for the purposes of that Act as accommodation provided for a person with disability for respite or long-term residential purposes, other than a private home and residential aged care facilities that accommodate persons under 65. The Official Visitor must give 24 hours written notice of a visit to a visitable place unless an entitled person (the person who receives disability services) is at risk of harm and the entitled person consents to the visit. The Official Visitor can also visit non-visitable places where they have received a complaint, the entitled person consents to their visit, and they have provided 24 hours written notice.

The Bill will amend the definition of visitable place under the Disability Services Act to include accommodation provided to an entitled person that is owned, rented or operated by a specialist disability service provider or where the provider provides a specialist disability service. A private home is not generally excluded from the definition of visitable place—to be a non-visitable home, the entitled person must receive specialist disability services at home from only non-specialist providers or live with an adult family member who doesn't receive specialist disability services. A residential aged care facility is also not visitable if the entitled person is over 65 when they first receive specialist disability services.

The Bill will also remove the current requirement for 24 hours written notice. An official visitor can visit a visitable place at any reasonable time (given section 15 of the Official Visitor Act) or, after receiving a complaint, another place after giving reasonable notice to the owner or operating entity, or without notice if the official visitor reasonably believes that an entitled person at the place is at risk of harm.

Finally, the Bill will extend the information contained on the register of visitable places to include information on the specialist disability service provided and names, phone numbers and email addresses of employees and volunteers. The director-general is also able to give, on request, the address of a visitable place to a range of persons, including a member of the emergency services and anyone else approved by the director-general.

As the Bill will extend the range of private homes in which an official visit can be made, reduce the notice requirements relating to any such visit, extend the personal information included on the register and allow some of that information to be provided to others, the Bill potentially limits the protection against arbitrary and unlawful interference with privacy provided by section 12 of the HRA.

The explanatory statement accompanying the Bill justifies this potential limitation using the framework provided in section 28 of the HRA and the Committee refers the Assembly to that analysis. In particular, the Committee notes the various limits and protections of personal privacy included in the Bill, including the ability of the entitled person to request visits not be made, the extended definitions of family member for the purpose of determining when a private home is not visitable, and the various protections otherwise afforded in the use of personal information by the director-general.

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

DISCRIMINATION AMENDMENT BILL 2018

This Bill amends the *Discrimination Act 1991* to remove the exceptions that allow educational institutions conducted for religious purposes to discriminate against students and employees or contractors on the basis of attributes protected under the Act, while introducing a limited exception for discrimination by such institutions on grounds of religious belief.

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 FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF (SECTION 14 HRA)

The Discrimination Act protects against discrimination, either direct or, in an unreasonable way, indirect, against a person on the grounds of various protected attributes, including gender identity, intersex status, relationship status, religious conviction and sexuality. That protection extends to a variety of contexts including employment, contracts for work, and providing education. However, religious bodies are exempted for various purposes, including any practices "established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion" (section 32). Educational institutions do not engage in unlawful discrimination by employing staff or engaging someone under a contract for work, or in relation to the provision of education or training, in accordance with "the doctrines, tenets, beliefs or teachings of a particular religion or creed", and "in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed" (section 33). Religious educational institutions are also able generally to discriminate on the grounds of religious conviction (ie the religious convictions of the victim of discrimination) when considering applications for admission as a student (section 46).

The Bill will remove the general exemption from discrimination by religious bodies in section 32 from acts or practices in relation to employment or contracting for work in an educational institution, or the admission, treatment or continued enrolment of a person as a student in an educational institution. The exemption for educational institutions in section 33 will also be repealed. The ability for religious educational institutions to discriminate in relation to student admission on the grounds of religious conviction will be extended to staffing matters if the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with the doctrines, tenets, beliefs or teachings of that institution (proposed subsection 46(2)). However, to be exempt from discrimination in student admissions and staff matters will require the institution to have a policy on those matters readily accessible by prospective and current students and employees and contractors.

The Bill will therefore make unlawful, and subject to consideration and proceedings under the *Human Rights Commission Act 2005*, discrimination in religious educational institutions in relation to employment or contracts for work and students, with the only limited exemption being discrimination on the grounds of religious conviction. It will be unlawful for a religious educational institution to treat a person unfavourably, for example, by not employing or continuing to employ them or admitting them as a student, on the basis of protected attributes including their sexuality or married status, even where those attributes might be considered contrary to the tenants or beliefs of the religion in question. Similarly, a religious educational institution imposing a general condition or requirement that acts to disadvantage someone with a protected attribute may also be, albeit indirectly, acting unlawfully, depending on whether the condition can be considered reasonable in the circumstances.

The Bill therefore limits the right to freedom of thought, conscience, religion and belief protected by section 14 of the HRA. This limitation is acknowledged in the explanatory statement accompanying the Bill, and a comprehensive statement setting out why the limitation is reasonable and proportionate is provided using the framework set out in section 28 of the HRA. The Committee refers the Assembly to this analysis.

The Committee notes that the Bill presents difficult questions of the appropriate balance between protection of religious freedom and other rights, including rights to equality and non-discrimination, rights of children to protection and rights against undue interference with privacy. In the Committee's view, the balance struck by this bill is not necessarily to be considered an unreasonable limitation on religious freedoms to be considered incompatible with the HRA or an undue trespass on personal rights and liberties. It therefore considers the appropriateness of the balance struck by the Act to be appropriately the subject of debate on the merits of the Bill before the Assembly.

RIGHT TO EDUCATION (SECTION 27A HRA)

Section 27A of the HRA protects the right to education. Under subsection 27A(3), that right is limited to ensuring everyone is entitled to enjoy the right to education without discrimination, and that:

> to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

The explanatory statement accompanying the Bill argues that the protection of educational choice provided by the HRA reflects article 13 of the International Covenant on Economic, Social and Cultural Rights, and minimum educational standards should therefore be understood in that context. Those minimum education standards may provide inherent restraints on the right to religious freedom which reflect the right to equality and non-discrimination of students, their families and teachers. However, the explanatory statement does not deny that, by making discrimination on the basis of protected attributes other than religious conviction unlawful, the Bill may limit the choice of parents or guardians to schooling in conformity with the parents' or guardians' religious convictions. The Bill therefore may limit the protection provided by section 27A. The statement seeks to justify the limitation on that right on the basis of protection against non-discrimination as reasonable for the purposes of section 28 of the HRA. The Committee refers the Assembly to that statement.

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

DOMESTIC ANIMALS (DANGEROUS DOGS) LEGISLATION AMENDMENT BILL 2018

This Private Members' Bill amends the *Domestic Animals Act 2000* and the *Domestic Animals Regulation 2001* to require the investigation of a dog attack that caused the death of a domestic animal, that the outcome of any investigation be disclosed to a broader range of persons, and various other 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 PRIVACY AND REPUTATION (SECTION 12 HRA)

Under the Domestic Animals Act, the registrar must inform a person who has made a complaint under the Act whether there was an investigation and the outcome of any investigation. Notice can be provided to affected neighbours when a dog is declared to be a dangerous dog, a control order is issued or a nuisance order is issued, but only where the registrar considers it in the interest of the safety of the public and other animals to do so (section 55B).

Under proposed section 53A, the registrar must investigate an attack by a dog that caused the death or serious injury to a person or domestic animal as well as any written complaints about a menacing, aggressive or harassing dog unless satisfied the complaint is frivolous or vexatious. The registrar must, within 14 days, inform the keeper and any carer of the dog, any complainant, people occupying property adjacent or nearby to premises where the dog is kept, and the Minister of the outcome of the investigation. A record of investigations must also be kept and provided to the Minister at the end of each month.

Given the registrar has various powers under the Domestic Animals Act to enter premises, including in some circumstances residential premises, and can collect information of a personal nature in relation to a dog attack, the obligation to disclose the outcome of the investigation may involve disclosure of personal information and potentially limit the protection against unlawful and arbitrary interference with privacy protected under section 12 of the HRA. The explanatory statement accompanying the Bill does not recognise this potential limit. The member could consider amending the Bill to make it clear that it is not intended that private information, not otherwise known to those receiving information under the Bill, be included in reporting on the outcome of an investigation, or that other protections be put in place.

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

EMERGENCIES AMENDMENT BILL 2018

This Bill amends the *Emergencies Act 2004* (the Act) to enhance the clarity and operation of the Act, particularly in relation to the functions of the Security and Emergency Management Senior Officials Group (SEMSOG), emergency sub-plans and the application of the Act during an emergency.

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny—Committee terms of reference paragraph (3)(e)

STATUTORY APPOINTMENT

Under sections 150A and 159, the Chief Minister can appoint a person to be the emergency controller for an emergency or during a state of emergency. Under Division 19.3.3 of the *Legislation Act 2001*, the appointment to a statutory position requires consultation with the appropriate Assembly committee, unless the appointment is of a public servant, for less than six months, or where the only function of the position is to advise the Minister. The instrument making, or evidencing, an appointment requiring consultation is a disallowable instrument (Legislation Act, section 229).

Under the proposed amendments to sections 150A and 159 (clauses 11 and 16 of the Bill), Division 19.3.3 of the Legislation Act will not apply to appointments of the emergency controller. While the explanatory statement provides that this is intended to allow an appointment to be made in times of an emergency where consultation with the relevant Assembly committee may not be possible, there is no explanation for why the instrument of appointment will not be subjected to scrutiny by the Assembly as a disallowable instrument when appropriate. The Committee notes that the Bill will also enable any appointment as emergency controller outside of a state of emergency to continue once a state of emergency is declared, and that there is no other means provided in the Emergencies Act for the Assembly to end a state of emergency or otherwise bring the appointment of emergency controller to an end.

The Committee asks the Minister to confirm that it is intended to displace the obligation for any appointment to be subject to disallowance and to provide further explanation for why this is necessary.

If it is intended that the instrument of appointment not be a disallowable instrument, could the Minister consider providing for the tabling of the instrument of appointment in the Assembly together with a statement in support of the appointment.

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

GAMING LEGISLATION AMENDMENT BILL 2018

This Bill amends the *Gaming Machine Act 2004* and other legislation associated with gaming regulation in the ACT to give effect to a commitment to reduce the number of gaming machines below 4000 by 2020, and other 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 PRIVACY AND REPUTATION (SECTION 12 HRA)

Section 37 of the *Gaming and Racing Control Act 1999* allows a gaming officer (defined as any person who has acquired a confidential document or confidential information under a gaming law or as a result of exercising functions under or in relation to a gaming law[1]) to disclose information obtained under or in relation to the administration of a gaming law, including in paragraph (d) to listed people or persons authorised by them. Clause 12 of the Bill will expand the range of persons to include the administrative unit responsible for the Act, the ACT Gambling and Racing Commission, and the Minister. Disclosure is limited to the purpose of advising the Minister about policy matters or the operation of a gaming law, or, with the addition of a tax officer, for the purpose of administering Part 2A of the Gaming Machine Act (which deals with reducing the cap on authorisations to below 4000).

As the Bill will increase the range of persons who have access to confidential information obtained in relation to gaming regulation in the ACT, which may include an individual's personal information, the Bill potentially limits the protection against undue interference with privacy provided by section 12 of the HRA. This potential is recognised by the explanatory statement accompanying the Bill and an

[1] Note that gaming laws are the various pieces of legislation involved in regulation of gambling and other gaming activities in the Territory—see section 4 of the Gaming and Racing Control Act.

explanation is provided using the framework in section 28 of the HRA. The Committee refers the Assembly to this analysis. In particular, the Committee notes the various limitations on keeping records and disclosure provided by division 4.4 of the Gaming and Racing Control Act, including the offence of unauthorised secondary disclosures, and the various restrictions under the *Information Privacy Act 2014*.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Part 12 of the Gaming Machine Act provides for, and in some cases requires, licencees regulated by the Act to make various community contributions. Section 165 requires licensees to keep a record of each community contribution they make, which is then provided to the Commission to be summarised in a report to the Minister and the Assembly. A failure to keep the record is a strict liability offence with a maximum penalty of 20 units. Proposed section 171 will largely replicate this strict liability offence, with the requirement to include additional information, including the way the benefit is intended to be used and the nature of the benefit to be received.

As a strict liability offence which removes the onus to establish intention on the part of the defendant and places an onus on the defendant to establish a defence, the provision infringes the right to the presumption of innocence protected by section 22 of the HRA. The explanatory statement accompanying the Bill recognises this limitation and justifies the strict liability nature of the offence. The Committee refers the Assembly to this analysis. In particular, the Committee notes that the provision will apply to club licencees, which are either incorporated associations or corporations, that the explanatory statement includes reference to the various defences that are available under the Criminal Code, and the offence is regulatory in nature.

The Bill will also amend the existing strict liability offence in subsection 151(2) of the Gaming Machine Act which requires a licensee to display a warning notice complying with the Commission's determination under subsection 151(1). The Bill will continue the requirement to display the notice at the entrance to each gaming area but remove the requirement to display the notice on each gaming machine, given there are other notices that must be placed on each machine under section 126 of the Gaming Machine Act. As the explanatory statement sets out, this reduces the impact of this strict liability offence on the presumption of innocence and hence does not engage the protection under section 22 of the HRA.

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

RETROSPECTIVE OPERATION

The Committee notes that elements of the Bill are variously taken to have commenced on the day other pieces of legislation were notified, namely the *Gaming Machine (Reform) Amendment Act 2015*, the *Gaming and Racing (Red Tape Reduction) Legislation Amendment Act 2016*, and the *Casino (Electronic Gaming) Act 2017*. These Acts included schedules which have not yet commenced operation, and the Bill will repeal these non-commenced schedules. The retrospective operation of the Bill will, therefore, not have any prejudicial effect on rights and liberties of individuals.

This comment does not require a response from the Minister.

RESIDENTIAL TENANCIES AMENDMENT BILL 2018 (NO 2)

This Bill amends the *Residential Tenancies Act 1997* and the *Residential Tenancies Regulation 1998* to provide an improved framework for residential tenancy agreements, including making it easier for tenants to keep pets and make modifications to rental properties, amending provisions dealing with domestic violence and personal protection orders, allowing a tenant to leave during the fixed term period with no penalty after receiving a no-cause termination notice, amending the fees payable by the tenant when they break a fixed term lease, and requiring approval from the ACT Administrative and Civil Tribunal (ACAT) for rental increases above a prescribed amount.

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

Currently, under Part 5 of the *Residential Tenancies Act 1997*, a tenant can apply to ACAT to review an excessive rental rate increase excessive. Section 68 provides that, unless the Tribunal member is otherwise satisfied when taking into account various matters, an increase will be considered excessive if it is more than 20% greater than a general market increase, namely any increase in the rents component of the housing group of the Consumer Price Index for Canberra over the period since the last rental rate increase or beginning of the lease.

The Bill will amend the process for reviewing a rent increase by preventing an increase above a prescribed amount without prior consent (either in the rental agreement or after receipt of notice) or approval by ACAT. The Bill will also amend the Residential Tenancies Regulation to prescribe the rent increase as effectively 10% greater than any increase in the general market increase. The amount considered excessive has therefore been shifted to the regulations.

The prescribed amount to be set out in regulations has the effect of potentially limiting the amount of rent increase that can be charged by a landlord. Any change to the regulation will, unless otherwise provided for, have immediate effect prior to any opportunity for it to be disallowed by the Assembly. The explanatory statement, in justifying the shift of the limiting amount to regulations, states that "[t]he use of a regulation-making power means that this amount can be changed to respond to changes in the market" (page 5). However, the current and proposed limiting amounts reflect changes to market prices. It is not clear to the Committee what circumstances are intended to be included in "changes in the market" so as to be appropriately reflected in a change to the regulations, particularly in the context of the other amendments in the Bill which increase the restrictions placed on landlords to increase rent beyond the limiting amount. The Committee considers it that it would generally be appropriate to include the limiting amount in the primary Act and asks for further explanation for why the amount should be prescribed in regulations.

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

ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2018

This Bill will amend the *Crimes Act 1900, Crimes (Sentencing) Act 2005, Evidence (Miscellaneous Provisions) Act 1991* and other related legislation to implement various recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse relating to the criminal justice system.[2]

[2] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report. Available at: https://www.childabuseroyalcommission.gov.au/criminal-justice (accessed 11/11/2018) (Royal Commission 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)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill amends the Crimes Act to introduce an offence of failure by a person in authority to protect a child or young person from a sexual offence. The offence applies to people in authority in institutions or groups of institutions which provide facilities, activities or services to children under their care. Where the person in authority is aware that there is a substantial risk that a sexual offence will be committed against a child in the institution's care by a person associated with the institution, or against a young person over 16 by a person in authority in the institution, and they can, because of their position of authority, reduce or remove the risk, then the person commits the offence by intentionally or negligently failing to act. Negligently failing to reduce or remove the risk involves "a great falling short of the standard of care that a reasonable person would exercise in the circumstances" (subsection 66A(3)).

There are no exceptions provided in the Bill relating to how the person in authority comes to learn about the risks in question. Therefore, even where the person becomes aware of a substantial risk from information disclosed to them in confidence, or on the basis of them occupying a position of trust, then they may still have to act on that information. That information could include highly private or personal details of the potential victim or alleged offender. Acting on that information may involve disclosure which may affect a person's privacy or reputation. The provision therefore potentially limits the protection against undue interference with privacy and reputation protected by section 12 of the HRA.

The explanatory statement acknowledges this potential and provides the following justification:

> The purpose of the limitation is to prevent the concealment of child sexual abuse. The nature and extent of the limitation is to compel a person who has become aware of the substantial risk of child sexual abuse to take action to protect a child against the continuation of that abuse in certain circumstances. The limitation is the least restrictive means possible to achieve a balance between the rights of the person disclosing abuse or receiving a disclosure, and the abused child. This is because evidence shows that, unlike other categories of crime, child sexual abuse is not often reported and stopped at the time of the abuse because child victims face such difficulties in disclosing or reporting abuse. Further, a failure to protect against abuse could result in the continued abuse of the victim and potentially other children.

The Committee refers the Assembly to this justification. The Committee also notes that privileged communications may still be protected under the *Evidence Act 2011*, including the protection of religious confessions in section 127, and other legislation.

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

Generally, and depending on the nature of the offence, when bringing charges against an individual for a child sexual offence, only one act, matter or thing, or incident, can be included.[3] In bringing the charge, sufficient details of that incident must be included to enable the defendant to be able to identify and respond to the allegation made against them and adequately cross-examine the complainant. This has been accepted, by Australian courts as an application of the principles of procedural fairness, to generally require details of the essential factual ingredients of the offence such as the time, place and manner of the incident, at least as is available in the circumstances of the case.[4]

Requiring sufficient details of the offence to be included in a charge is an element of the rights in criminal proceedings protected by section 22 of the HRA. In particular, paragraph 22(2)(a) provides:

> (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
>
> (a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge; …

The Bill will introduce section 66B into the Crimes Act. This section will enable more than one incident—a course of conduct—to be included in a charge of a single child sexual offence. The section will require that each incident constitutes an offence against the same provision,[5] was committed by the same person, takes place on more than one occasion over an identified period, and together amount to a course of conduct. More than one type of physical act on different occasions may be alleged. The provision is similar to the course of conduct charge provided for in schedule 1, clause 4A(2) of the *Criminal Procedure Act 2009* (Vic). The Victorian provisions formed the basis of recommendation 23 of the Royal Commission's report in addressing the difficulties victims or survivors of sexual abuse faced in giving adequate or accurate details of the offending against them, particularly in the case of repeated abuse.[6]

Importantly, for the purposes of section 22 of the HRA, the charge need not include particulars of any specific incident of the offence, including the date, time, place, circumstances of occasion of the incident, or distinguish any specific incident of the offence from any other (proposed subsection 66B(5)). Therefore, as proposed, section 66B may limit the degree of information available to a defendant when compared to that otherwise required in a charge relating to a single child sexual offence, and hence limits the rights in criminal proceedings protected by section 22 of the HRA. The explanatory statement accompanying the Bill includes a detailed consideration of the protection afforded by section 22 of the HRA relevant to this provision. The Committee commends the statement for the considered response to this issue it presents and refers it to the Assembly.

In particular, the Committee notes that subsection 66B(4) requires that a course of conduct charge must "contain particulars that are necessary to give reasonable information about the various incidents of the offence that are alleged to amount to a course of conduct over a stated period". Under subsection 66B(6), the incidents, taken together, must also amount to a course of conduct,

---

[3] Note that section 56 of the Crimes Act, as amended by the *Crimes Legislation Amendment Act 2018*, provides that the offence of maintaining a sexual relationship with a young person or person under special care can be established without being satisfied of the particulars of a sexual act that would have been necessary if that act was charged as a separate offence.

[4] *WGC v The Queen* [2007] HCA 58 [127]. See generally the Royal Commission report, Parts III - VI, at pages 16-18.

[5] The Committee notes that this will prevent charges under section 56 from being brought at the same time as a course of conduct charge given section 56 requires two or more incidents to constitute the offence.

[6] See Royal Commission Report, Parts III - VI, Chapter 11 at page 10, and recommendation 23 at Chapter 12, page 74.

requiring an additional element that must be established beyond reasonable doubt before the prosecution can succeed. The charge must include sufficient details to establish a course of conduct having regard to the time, place and purpose of the incident as well as any other relevant matter (paragraph 66B(1)(d)). Therefore, even though under subsections 66B(7) and (8) it is not necessary to prove an incident to the same degree of specificity as would otherwise be required, establishing a course of conduct will generally require the prosecution to provide the particulars that are available.[7] As the explanatory statement suggests:

> However, a course of conduct charge should not be used as a tool to overcome the evidentiary deficiencies of a superficial investigation, nor should it be used merely as an alternative method of prosecuting what would otherwise be a series of substantive charges.[8]

Where evidence detailing two or more particular incidents is available, alternative charges including maintaining a sexual relationship with a young person or person under special care (section 56 of the Crimes Act) may be more appropriate. The Committee also notes that under subsection 66B(10) proceedings cannot be started without the consent of the director of public prosecutions.

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

RETROSPECTIVE CRIMINAL LAWS (SECTION 25 HRA)

Proposed section 66B applies to what has to be included in charges and proved for offences against a child in Part 3 of the Crimes Act or an offence against a child under a sexual offence provision in the Crimes Act previously in force (subsection 66B(12)). It is not clear whether this is intended to apply to charges brought in relation to offences in force prior to the commencement of the Bill, or past actions which constituted offences at the time and which can continue to be the subject of charges being laid. The Committee notes that the retrospective operation of the similar Victorian course of conduct provisions was referred to by the Royal Commission in its recommendations. The retrospective operation of the Victorian provisions was explicitly provided for in transition provisions at the time of their introduction, with there being some uncertainty over whether, in the absence of such explicit provisions, a general presumption against retrospective operation of procedural elements of criminal laws would have applied.[9]

Subsection 25(1) of the HRA provides that: "[n]o-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in". Proposed section 66B does not establish a new offence or otherwise limit this protection. However, the Committee would ask the Minister if it is intended that the proposed section 66B apply retrospectively to include charges laid after the commencement of the Bill, but applying to conduct occurring prior to commencement, and if so, to consider making amendments to the legislation to make this intended operation clear.

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

---

[7] This was accepted in the context of the Victorian course of conduct provisions for the purpose of the Victorian Human Rights Charter in *Director of Public Prosecutions v R S* [2016] VCC 1464.

[8] Explanatory Statement, page 21.

[9] See the discussion in *Director of Public Prosecutions v R S* [2016] VCC 1464 where it was suggested that, in the absence of explicit provisions, the presumption against what was described as a "significant departure from the fundamental common law requirement of particularity and involves a significant modification to the rule against duplicity" (at [42]).

Part 3 of the Bill will amend the Crimes (Sentencing) Act to require a court, for a sexual offence against a child, to "sentence the offender in accordance with sentencing practice, including sentencing patterns, at the time of sentencing" (proposed section 34A). As noted in that proposed section, a sentence is limited to the maximum sentence that applied to the offence when it was committed under section 25(2) of the HRA. The explanatory statement provides an extensive discussion of the approach of the courts to changes in sentencing practices and the recommendation of the Royal Commission that changes to sentencing practices be adopted. The Committee commends the Minister on the detail of this discussion and agrees that the proposed section 34A does not give rise to any limitation on the right against retrospective criminal laws or otherwise interfere with individual rights and liberties.

This comment does not require a response from the Minister.

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill also amends the Evidence (Miscellaneous Provisions) Act to implement recommendations of the Royal Commission relating to giving of video evidence in child sexual offence matters. These include extending the availability of pre-recording to all complainants, other vulnerable witnesses, and those in a special relationship with the complainant. There are also other amendments to ensure consistency throughout the Act, such as extending the special measures for recording evidence for certain witnesses in homicide matters, to all children required to give evidence in any proceedings and to people with a disability.

By extending the circumstances in which evidence is recorded prior to the hearing, the amendments potentially interfere with the ability to observe the demeanour and conduct of the witness when giving evidence and use those observations in cross-examination. This may limit the rights to a fair trial protected by section 21 of the HRA and the rights in criminal proceedings, including the right to cross-examine witnesses, protected by section 22 of the HRA.

The explanatory statement acknowledges the Bill's potential engagement with these protections and provides a brief statement using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis, noting in particular the limited impact on the ability to cross-examine witness that pre-recording provides and the various protections built into the use of such special measures since their introduction in some matters in 2008.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENT—NO COMMENT

The Committee has examined the following disallowable instrument and offers no comments on it:

Disallowable Instrument DI2018-266 being the Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018 made under section 61 of the *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* **makes the Restorative Justice Sexual and Family Violence Offences Guidelines 2018 for the management of restorative justice for sexual and family violence offences.**

Giulia Jones MLA
Chair

20 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)