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

SCRUTINY REPORT 36

15 October 2019
THE COMMITTEE

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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:

**ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) AMENDMENT BILL 2019**

This Bill amends the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* to allow the Minister to amend the current limit on the capacity of generating systems that hold feed-in tariff entitlements (ie where there is a guaranteed price for the energy from those systems). The Minister must consider if the limit is reasonably necessary to achieve compliance with the renewable energy target determined under the *Climate Change and Greenhouse Gas Reduction Act 2010*.

**STATUTE LAW AMENDMENT BILL 2019**

This Bill makes minor or technical amendments to a large number of Acts and regulations to maintain and enhance the standard of the ACT statute book.

**WORKERS COMPENSATION AMENDMENT BILL 2019**

This Bill will amend the *Workers Compensation Act 1951* to put beyond doubt that the Default Insurance Fund covers workers’ compensation claims where both the principal and contractor are uninsured, to ensure the Act will cover educators engaged by an approved family day care service as provided for by the *Educational and Care Services National Law (ACT) Act 2011* without the current need for a Ministerial declaration, and to make other technical amendments.

BILLS—COMMENT

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

**ELECTORAL LEGISLATION AMENDMENT BILL 2019**

This Bill amends the *Electoral Act 1992* and the *Public Unleased Land Act 2013* to allow voters to enrol to vote right up until the close of polls on election day, require a person’s full name to be shown when authorising electoral matter, prevent the disclosure of address details on gift disclosures, amend rounding down of fractional transfer values, 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 PRIVACY AND REPUTATION (SECTION 12 HRA)**

The Bill will require the full name of a person authorising electoral matter to be included in any authorising statement. By requiring the inclusion of additional personal information, the Bill may limit protection against interference with privacy provided by section 12 of the HRA. This potential limit is recognised in the explanatory statement accompanying the Bill and a justification provided using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.

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

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

The Bill will allow an authorised officer to immediately remove electoral advertising signs from public unleased land where the person placing the signs or the signs themselves do not comply with the movable signs code of practice approved under section 27 of the *Public Unleased Land Act 2013*. This will act in conjunction with the current requirements to comply with a removal direction to remove such signs within seven days. The person who has authorised the signs will be notified of the removal as soon as practicable, and, if not collected, signs may be disposed of after seven days from notice being provided.

By further limiting the ability to communicate electoral matter on unleased public land the Bill will limit the freedom of expression protected by section 16 of the HRA and the right to take part in public life protected by section 17 of the HRA. The explanatory statement accompanying the Bill recognises these potential impacts and sets out a justification for the reasonableness of any limitation using the framework in section 28 of the HRA. The Committee refers the Assembly to that statement, noting in particular the ability to review any decision to remove signs in the ACT Civil and Administrative Tribunal and that, in practice, where the non-compliance of the signs involves potentially subjective elements (such as being offensive), they will be assessed by more senior officials before any decision is taken to remove them.

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

**EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2019**

This Bill amends the *Evidence (Miscellaneous Provisions) Act 1991* and the *Evidence (Miscellaneous Provisions) Regulation 2009* to give effect to recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*¹ by providing for an intermediary to assist witnesses who are vulnerable or otherwise have trouble communicating and for a ground rules hearing to be held prior to the witness giving evidence to allow the court to consider the communication, support or other needs of the witness and how the proceeding is to be conducted to meet those needs.

*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 RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)**

The Bill will require an intermediary to be appointed by the court, and a ground rules hearing provided, where the witness is prescribed in regulations. The Bill will also amend the regulations to prescribe a child complainant in a sexual offence proceeding and a child in a serious violent offence proceeding involving the death of a person. Other witnesses with communication difficulties may

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apply, either themselves or through the prosecution or accused, for an intermediary to be appointed or, where it is in the interests of justice, for a ground rules hearing to be held. The distinction between prescribed witnesses and other witnesses potentially limits the right to equality before the law protected by section 8 of the HRA. This potential limit is recognised by the explanatory statement accompanying the Bill and a justification for the reasonableness of the limitation is provided using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

By providing for an intermediary to be appointed and a ground rules hearing be held, the Bill will alter what may otherwise have been considered a fair trial protected under section 21 of the HRA. Given the time involved in appointing an intermediary and holding a ground rules hearing, and the role of the intermediary in any communication between the witness and the person putting questions and otherwise assisting the court or other lawyers, the Bill will also potentially limit various rights in criminal proceedings protected by section 22 of the HRA, in particular the right to be tried without unreasonable delay (paragraph 22(2)(c) of the HRA) and the right of the accused to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses (paragraph 22(2)(g) of the HRA).

These potential limits are recognised by the explanatory statement accompanying the Bill and a justification for the reasonableness of the limitations is provided using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting the following elements of the Bill (as set out in that statement):

- the Court can make a direction at a ground rules hearing only where it considers it in the interests of justice to do so;
- intermediaries are independent officers of the Court who have a legislated duty to act impartially when assisting communication with the witness;
- evidence of a witness given in the presence of an intermediary must be given in circumstances in which the Court and any lawyer appearing in the proceeding are able to see and hear the witness giving evidence and communicate with the intermediary; and
- the Court has a discretion to not appoint an intermediary where it is not in the interests of justice to do so.

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

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2 The Committee notes that the explanatory statement incorrectly identifies this as paragraph 22(2)(f).
This Bill amends the Residential Tenancies Act 1997 to give effect to various recommendations of the 2016 review of that Act. In addition to those discussed below, the amendments include increasing the notice period for landlords to terminate a periodic lease in some circumstances, removing requirements for landlords to establish detriment where the tenant has used the premises for an illegal purpose, and clarifying and strengthening the ACT Civil and Administrative Tribunal’s powers to resolve residential tenancy disputes.

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 recognition and equality before the law (section 8 HRA)

The Bill will allow a tenant to terminate a residential tenancy with 14 days’ notice when the tenant has accepted accommodation in either a residential aged care facility or premises managed by the housing commissioner or a registered community housing provider. These tenants will not be subject to the usual notice and compensation requirements associated with ending a tenancy agreement early. The Bill will therefore provide for unequal treatment for particular classes of tenants, potentially limiting the right to equal protection before the law provided by section 8 of the HRA.

The explanatory statement accompanying the Bill claims that section 8 of the HRA is not engaged because the differential treatment is not clearly based on a prohibited ground of discrimination. However, as the explanatory statement also notes, the HRA does not set out any exhaustive list of prohibited grounds or otherwise expressly limit the protection provided by section 8. The Committee would also note that the distinctions drawn by the Bill may relate indirectly to considerations of age or disability that would clearly fall within any prohibited grounds. In any event, the explanatory statement goes on to justify the reasonableness of any limitation of section 8 of the HRA. The Committee refers that statement to the Assembly, noting in particular that tenants who otherwise face severe hardship will remain eligible to apply to ACAT to terminate a fixed term agreement under section 44 of the Act.

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)

Currently, it is a standard term in residential tenancy agreements (as set out in clause 70 of the Schedule 1 of the Residential Tenancies Act) that a tenant must not use the premises, or permit them to be used, for an illegal purpose to the detriment of the lessor’s interest in the premises. The Bill will amend this clause by removing the detriment requirement. This will make it easier for a tenant to be required to vacate the premises, potentially interfering with the protection of a person’s and their family’s home provided by section 12 of the HRA.

The explanatory statement accompanying the Bill provides a justification for why any limit should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly. In particular, the Committee notes the process required before a tenant is forced to leave the premises. That process will includes in most cases the serving of notice requiring remedying of the breach within two weeks, and a further notice requiring the tenant to
then vacate the property. If the tenant refuses to vacate the property because they consider the notice was unreasonable or unlawful, the landlord can seek an order from ACAT terminating the tenancy and requiring the tenant to vacate the premises (see clause 93 of Schedule 1). The Bill will amend the basis on which the Tribunal makes such an order where breach of the tenancy agreement relates to use of the premises for an illegal purpose, requiring the Tribunal to also be satisfied that the tenant used the premises for an illegal purpose and that use justifies the termination of the tenancy, taking into account the nature of the illegal use, any previous illegal use, and the previous history of the tenancy. This will allow the Tribunal to consider the circumstances of the illegal use and the impact on the tenant in considering whether it is appropriate to terminate the tenancy.

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

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

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

HENRY VIII CLAUSE

INCORPORATION OF AUSTRALIAN STANDARD AND DISPLACEMENT OF SECTION 47(6) OF THE LEGISLATION ACT 2001

The Bill will extend the power to make regulations to provide minimum standards for premises under a residential tenancy agreement, including in relation to physical accessibility, energy efficiency, safety and security, sanitation and amenity (clause 19). The explanatory statement accompanying the Bill suggests that this amendment to the regulation-making power will enable minimum standards to be prescribed which will detail the requirements set out in clause 54 of the standard terms set out in Schedule 1 of the Act. Clause 54 relevantly provides that, at the start of a tenancy, the landlord must ensure that the premises and any included furniture, fittings and appliances, are fit for habitation, reasonably clean, in a reasonable state of repair and reasonably secure. It is not clear to the Committee how the minimum standards to be provided for in regulations are intended to affect this standard clause. If, as the explanatory statement suggests, it is intended that the minimum standards set out in regulations have to be met to comply with the requirements in clause 54, and therefore that the regulations will amend the operation of the standard clauses and in that way amend the content of the Act, then this should be made clear in the Act.

The explanatory statement describes the power to make minimum standards as enabling the executive to respond to changes in the rental market more quickly than including those standards in the RTA. However, it is not clear to the Committee what changes to the rental market would require changes to these minimal standards and why they would need to be made quickly. The Committee therefore requests further information on why regulations should be able to modify the operation of the standard clauses in relation to habitation standards.

The Bill also allows the minimal standards in regulations to apply, adopt or incorporate a law or instrument as in force from time to time. The Bill displaces the operation of subsections 47(5) and 47(6) of the Legislation Act 2001, meaning any such instruments do not have to be registered on the ACT Legislation Register. The explanatory statement supports the incorporation of other laws or instruments through the likely technical nature of some of the standards, such as standards relating to sanitation and Australian Standards relating to disability access, and their use in other property-
related regulations. The displacement of notification requirements under the Legislation Act is justified due to some of the incorporated instruments not being “appropriate for publication on the notification register (such as Australian Standards)”.

The explanatory statement goes on to provide:

It is important to have a mechanism where minimum standards can be made and adapted through the incorporation of technical instruments, while still maintaining vital Legislative Assembly scrutiny. It is open for the Assembly to disallow any regulations made under the regulation-making power. The Standing Committee on Justice and Community Safety in its legislative scrutiny role would also review these regulations.

As the Committee has repeatedly commented, the incorporation of instruments including Australian Standards, especially when any notification requirements are displaced, effectively prevents any scrutiny by the Committee and significantly limits the role of the Assembly. The Committee is concerned that incorporation of instruments may lead to significant elements of the standard residential lease terms being inaccessible to landlords and tenants and subject to change without notification. In the Committee’s view, any displacement of notification requirements should depend on the nature of the instrument being incorporated and the reasons for its incorporation and the availability of alternative means of access to the instruments in question. Any regulation providing for incorporation of instruments and displacement of notification requirements could therefore be subject to scrutiny by the Committee and disallowed by the Assembly where appropriate.

The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.

**Sentencing (Parole Time Credit) Legislation Amendment Bill 2019**

This Bill will amend the *Crimes (Sentence Administration) Act 2005* and the *Crimes (Sentencing) Act 2005* to allow the period while on parole to be included in calculating the period of imprisonment already served when an offender’s parole is cancelled and they are returned to full-time imprisonment (the period of time is referred to as “parole time credit”).

*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 recognition and equality before the law (section 8 HRA)**

The Bill will provide for limited exceptions for eligibility for parole time credit: those offenders who commit a second offence within three months after they were released on parole; and those who originally committed serious or family violence offences and then recommit such offences when on parole. In those circumstances the sentencing court, in the case of second offences committed in the ACT, or the Sentence Administration Board established under the Crimes (Sentence Administration) Act, in the case of offences while on parole outside of the ACT, must make an order whether the offender will be able to credit the time on parole as time already served against the sentence for which they are on parole. In making such an order, the Court or Board can only credit time served on parole if satisfied there are special circumstances.
By drawing a distinction for eligibility for parole time credit for some offenders and not others, the Bill potentially limits the right to equality before the law under section 8 of the HRA. The explanatory statement accompanying the Bill provides a justification for the reasonableness of this limitation using the framework set out in section 28 of the HRA. The Committee commends the Minister for the detailed and considered discussion of the purposes of the parole credit scheme and how they are balanced against the purposes of accountability, punishment, deterrence, rehabilitation and denunciation involved in sentencing for the original and subsequent offences. The Committee refers that statement to the Assembly.

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

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

The Bill provides for various events that are used to calculate when a parole credit period comes to an end, including arrest for an offence while on parole, a warrant is issued, an offender fails to report under a core condition of their parole, the court determines the second serious or family violence offence was committed, or the parole order is cancelled. The parole credit period will end on the earliest of these events. That means that in some cases a person may initially have a parole period end when their parole order is cancelled, and then this is replaced by an earlier date after they are convicted of a relevant offence. As the explanatory statement suggests, in this way the Bill attempts to ensure that “as soon as an offender has been found to be in breach of their parole obligations, they are no longer receiving a benefit while administrative processes are undertaken to return them to custody”.

By using the earliest date for the purposes of determining the parole credit period and in that way reducing the amount of time credited against their parole sentence, the Bill potentially limits the right to liberty of person provided by section 18 of the HRA. The explanatory statement includes a statement justifying the reasonableness of any limitation using the framework set out in section 28 of the HRA. The Committee refers that analysis to the Assembly.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Where an offender commits a second offence outside the ACT within three months after being released on parole, or a second serious or family violence offence, it is the Sentence Administration Board rather than a court who determines whether special circumstance exist and an order should be made to include the parole time credit as time served against the offender’s parole sentence. There is the potential, in making such a determination which could extend the period of imprisonment still to be served under the parole sentence, that the Bill may limit procedural fairness and therefore the right to a fair trial under section 21 of the HRA.

However, as the explanatory statement sets out, Part 9.2 of the Crimes (Sentence Administration) Act provides for various procedural fairness protections in the exercise of any of the Board’s supervisory functions in relation to an offender, including providing notice to the offender, allowing representation by a lawyer or other advocate, and allowing submissions to be made, documents produced, and evidence given on relevant matters. The Bill also provides for an appeal to the ACT Supreme Court from an order by the Board on a question of fact or law (proposed section 161F). Therefore, any limitation on the right to a fair trial is likely to be minor. The explanatory statement
also justifies the reasonableness of any limitation as the least restrictive possible to balance the right to a fair trial against the right to equal treatment for second offences committed inside or outside the ACT. The Committee refers that analysis to the Assembly.

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)

The explanatory statement accompanying the Bill discusses the potential for the method of determining the end date of the parole credit period to limit the right to the presumption of innocence protected under section 22 of the HRA. By ending the parole credit period on the day before an offender is arrested, a warrant issued or the offender fails to report, the Bill may create the perception that the offender is being assessed as having reoffended or breached their parole conditions prior to a final determination. However, as the explanatory statement sets out, the parole credit period is only finalised after an offender’s parole is cancelled. The issue of a warrant or arrest has no effect on the parole credit period if the offender is subsequently found guilty of the offence (where the parole credit period is taken to have ended based on the earlier date of when the offence was committed) or after an inquiry the Board determines not to cancel the offender’s parole (in which case the parole credit period is effectively taken not to have ended). Any limitation on the presumption of innocence is therefore justified as reasonable under the framework set out in section 28 of the HRA. The Committee refers that analysis to the Assembly. The Committee also commends the Minister for the extensive use of examples throughout the explanatory statement to illustrate the operation of the parole time credit scheme, and in particular in describing how to work out the period of parole time credit.

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

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

HENRY VIII CLAUSE

The Bill will insert a new transitional chapter (Chapter 22) into the Crimes (Sentence Administration) Act to provide for transitional arrangements. Proposed section 1006 of Chapter 22 will authorize the making of regulations prescribing transitional matters necessary or convenient because of enactment of the Bill. These transitional regulations may modify the transitional chapter, including in relation to another ACT law, where in the Executive’s opinion the matter is not adequately or appropriately dealt with by the transitional chapter. Such a regulation will have effect despite anything elsewhere in the Act or another territory law. Proposed section 1006 is therefore a Henry VIII clause which has the effect of allowing the executive, through the making of regulations, to alter the effect of primary legislation.

The explanatory statement accompanying the Bill recognizes this effect of proposed regulations. It states:

A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.
As the Committee has commented previously in relation to the use of Henry VIII clauses, the appropriateness of the use and breadth of any Henry VIII clause should be justified in the explanatory statement accompanying the Bill. Importantly, any such justification should be made by reference to the Bill in question. The Committee recognizes that regulations dealing with transitional provisions may be needed to deal with unanticipated circumstances. However, such a justification, like that provided in explanatory statement accompanying this Bill, could potentially be used in any substantive new legislation. In the Committee’s view, an explanation for proposed section 1006 should include why it is considered important in the context of this particular Bill to include such a clause.

The Committee is also concerned at the further comment included in the explanatory statement: “any modification by regulation of Chapter 22 of the Act has no ongoing effect after the expiry of the Chapter”. The Committee notes that under proposed section 1007 the transitional chapter will expire five years after commencement. The explanatory statement does not provide an explanation for selecting what might be considered a relatively lengthy period of five years. The Committee is also concerned that transitional regulations may be able to extend the period of operation of the chapter beyond five years, and, in any event, may have a legal effect beyond the expiry of the transitional chapter. In the Committee’s view, a more detailed justification for the duration of transitional regulations should be provided, or alternatively limitations on that potential duration imposed more clearly on the grant of authority in proposed section 1006.

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

PROPOSED PRIVATE MEMBERS’ AMENDMENTS

The Committee has examined proposed amendments to the following bills:

EDUCATION AMENDMENT BILL 2017

In a letter dated 4 October 2019, Ms Elizabeth Lee MLA has proposed an amendment to the Government’s proposed amendments to the Education Amendment Bill 2017. The Government’s proposed amendments were considered by the Committee in its report number 35, dated 23 September 2019. Ms Lee’s proposed amendments provide that it is a reasonable excuse not to comply with certain requirements relating to compulsory education where the Director General is still considering an application for registration for home education. The Committee has no comments on Ms Lee’s proposed amendment.

LITTER LEGISLATION AMENDMENT BILL 2019

The Committee has received revised amendments to the Amendment Bill 2017 to be proposed by Ms Caroline Le Couteur MLA. These proposed amendments largely replicate proposed amendments considered by the Committee in its Report 35, dated 23 September 2019. In that report, the Committee commented that the proposed amendments, by requiring a support person to accompany an authorised person in entering private land, may limit the protection against interference with privacy and reputation protected by section 12 of the HRA. As the Bill may require the person subject to an abatement order to pay costs associated with the accompanying support person, the proposed amendments may also limit the right to equality before the law protected by section 8 of the HRA. The Committee commented that these potential limits should be recognised in a supplementary explanatory statement to accompany the proposed amendments.

The revised proposed amendments provided by Ms Le Couteur will not require having to pay the reasonable costs and expenses of a support person, and will not authorise a support person to remain in place if the person subject to any abatement order, who will generally be the occupier of the land in question, does not consent to the support person remaining in place. The Committee acknowledges that these revisions to the proposed amendments have the effect of ameliorating any limit on the rights identified in its previous report.

The Committee has no further comments on the revised proposed amendments.

PLANNING AND DEVELOPMENT (CONTROLLED ACTIVITIES) AMENDMENT BILL 2019

The Committee has received proposed amendments to the Planning and Development (Controlled Activities) Amendment Bill 2019 from Mr Alistair Coe MLA. These proposed amendments relate to the power, under the Planning and Development Act 2007, of the Planning and Land Authority to authorise a person to enter private property and carry out rectification work after a direction to carry out such work has not been complied with. The Bill will require such an order where the direction relates to a failure to keep the property clean. The proposed amendment will add a requirement for a support person for the occupier to be present if the Planning and Land Authority considers that the rectification work may cause distress to the occupier of the premises.

The person required to comply with a direction has to pay reasonable costs of any rectification work carried out by the authorised person. The Bill will double the amount required to be paid where the direction relates to an ongoing controlled activity order. The proposed amendment will oppose this doubling but leave the requirement to pay reasonable costs in place. The liability to pay reasonable costs can be deferred by the Planning and Land Authority on the basis of criteria developed under section 372 of the Act. Any such criteria is a notifiable instrument. The proposed amendment will make it clear that the Planning and Land Authority has an obligation to determine such criteria.

The explanatory statement provided with the proposed amendments recognises that, by requiring a support person to be present when an authorised person carries out rectification work in a private home, the amendments will limit the protection against arbitrary or unlawful interference with privacy provided by section 12 of the Human Rights Act 2004 (HRA). That statement provides that the “support person for the occupier is there to assist in reducing stress for the occupier. Any privacy implications are outweighed by the benefits of providing mental health support to the occupier”.

The statement also provides:

[a] definition for ‘support person’ has not been included in legislation to enable the needs of the occupier to be determined on a case by case basis. In some instances, a psychologist, social worker or another professional may be appropriate to act as a support person; however, in other cases a family member or a friend may be best suited.

The Committee is concerned however, that the proposed amendments do not provide any basis on which the appropriateness of the support person can be determined by the Planning and Land Authority. In particular, there is no provision for obtaining the consent of the occupier or person who has to comply with a rectification direction or for consulting with that person on who might be an appropriate support person. Consideration should be given to providing an explanation for why further elements protecting the privacy of persons subject to the direction should not be included in the proposed amendments.
The Committee is also concerned that the requirement to pay reasonable costs of any rectification work would include the costs of the presence of the support person. As the Committee commented in its Report 35 in relation to amendments to the Litter Legislation (Amendment) Bill 2019 proposed by Ms Caroline Le Couteur, such a requirement may have a disproportionate impact on persons suffering from mental illness or otherwise disadvantaged or in a vulnerable position and therefore may limit the right to equality before the law protected by section 8 of the HRA. The Committee asks that consideration be given to amending the explanatory statement to include recognition of this impact and provide a justification for the reasonableness of any such limitation using the framework set out in section 28 of the HRA.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- Disallowable Instrument DI2019-205 being the Utilities (Technical Regulation) Listed Dams Determination 2019 made under section 69 of the Utilities (Technical Regulation) Act 2014 revokes DI2018-234 and declares that specified two dams owned by Queanbeyan-Palerang Regional Council, and one proposed dam owned by the ACT Government, to be listed dams for the purposes of the Act.

- Disallowable Instrument DI2019-207 being the ACT Teacher Quality Institute Board Appointment 2019 (No 1) made under sections 14 and 15 of the ACT Teacher Quality Institute Act 2010 and sections 78 and 79 of the Financial Management Act 1996 appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing teachers and principals of non-government schools.

- Disallowable Instrument DI2019-208 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 9) made under section 13 of the Road Transport (General) Act 1999 suspends specific parking rules in specified parking areas to support the City Renewal Authority’s Dickson Experiment.

- Disallowable Instrument DI2019-209 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 10) made under section 13 of the Road Transport (General) Act 1999 suspends specific parking rules in specified parking areas to support operational arrangements for the Floriade event at Commonwealth Park.

DISALLOWABLE INSTRUMENT—COMMENT

The Committee has examined the following disallowable instrument and offers these comments on it:
HAS THIS INSTRUMENT BEEN VALIDLY MADE?


This instrument makes a “strategic bushfire management plan for the ACT” (**SBMP**), under section 72 of the *Emergencies Act 2004*. Section 72 provides:

### 72 Strategic bushfire management plan

1. The commissioner must prepare, and give the Minister, a draft strategic bushfire management plan for the ACT.

2. In preparing the draft plan, the commissioner must—
   - consult with the bushfire council; and
   - consult with the conservator; and
   - consider the impact of the plan on any—
     - land management agreement; or
     - land manager; or
     - public land management plan under the *Planning and Development Act 2007*, section 318 (What is a public land management plan for an area of public land?).

3. The commissioner must—
   - prepare a written report setting out the commissioner’s response to any matters raised by the conservator, in writing, during consultation on the draft plan; and
   - give the report to the Minister with the draft plan.

4. After considering the draft plan, the Minister must make a strategic bushfire management plan for the ACT (**the strategic bushfire management plan**).

5. The plan is a disallowable instrument.

   **Note** A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act*.

6. If the Minister received a report under subsection (3) (b) in relation to the plan, the report must be presented to the Legislative Assembly with the plan.

7. The commissioner must, in consultation with the bushfire council, monitor the scope and effectiveness of the plan.

8. The commissioner, in consultation with the bushfire council, may recommend amendments of the plan to the Minister.
The Committee notes that the explanatory statement for the instrument states:

In developing the SBMP, the Commissioner, Emergency Services Agency, consulted with the ACT Bushfire Council and the Conservator of Flora and Fauna as required by section 72 (2) of the Act.

In addition, a comprehensive community and stakeholder consultation campaign was undertaken to support the development of the draft plan. This consultation recognised the delivery of the comprehensive strategies in the SBMP over the next 5 years is contingent on the support of government, key stakeholders and the broader community. This included a public consultation period as required by section 75 of the Act.

The Committee also notes, however, that the explanatory statement does not indicate whether or not the requirements of paragraph 72(c) of the Act (ie consideration of the impact of the SBMP on land management, etc) or whether subsection 73(3) (ie preparation of a written report setting out the Commissioner’s response to any matters raised by the conservator, in writing, during consultation on the draft plan) have been complied with (as relevant).

As the Committee has consistently stated, it is preferable if the explanatory statement for an instrument address any pre-requisites for the making of the instrument. In the Committee’s document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps, the Committee stated:

**REQUIREMENTS FOR THE MAKING OF LEGISLATION**

Similar to the issue with pre-requisites for the making of appointments (discussed above) there are sometimes mandatory pre-requisites (demonstrated by the use of the word “must”) for the making of subordinate legislation. The most common one is that an entity be consulted before legislation is made or that a Minister approve the making of the legislation. Again, in these situations, it assists the Committee if the Explanatory Statement for an instrument of appointment indicate that the relevant requirements have been met. The point is that the Committee (and the Legislative Assembly) is assisted if the Explanatory Statement correctly recites the relevant requirements and indicates that the requirements have been met.

The Committee seeks the Minister’s advice in relation to the issues raised above.

This comment requires a response from the Minister.

**SUBORDINATE LAWS—NO COMMENT**

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

- **Subordinate Law SL2019-23 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2019 (No 1) made under the Medicines, Poisons and Therapeutic Goods Act 2008** clarifies the ACT’s adoption of the Commonwealth Poisons Standard Appendix D medicine controls, and the circumstances and by whom the medicines may be dealt with, through the introduction of the new term of "ACT listed Appendix D medicine".

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

- **Subordinate Law SL2019-24 being the Government Procurement (Secure Local Jobs) Amendment Regulation 2019 (No 1) made under the Government Procurement Act 2001 amends the Government Procurement Regulation 2007 to provide for an additional category of excluded services or works.**

**RESPONSES**

**GOVERNMENT RESPONSE**

The Committee has received a response from:


  **This response** can be viewed online.

**PRIVATE MEMBER’S RESPONSE**

The Committee has received a response from:


  **This response** can be viewed online.

**GOVERNMENT RESPONSE—COMMENT**

- **Disallowable Instrument DI2019-182 being the Road Transport (General) (Pay Parking Area Fees) Determination 2019 made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-183 and determines fees payable for the purposes of the Act.**

The Committee commented on the instrument mentioned above in Scrutiny Report 34 of the 9th Assembly (10 September 2019). The instrument determines fees, for section 96 of the Road Transport (General) Act 1999. In the Scrutiny Report, the Committee identified an issue with the fact that the instrument raised various parking fees by a wage price increase (WPI) of 3%, when over 60 other fees determinations, recently considered by the Committee, relied on a WPI increase of 2.5%. The Committee sought the Minister’s advice as to why a different WPI increase was relied upon, for this instrument.

The Minister for Planning and Land Management responded to the Committee’s comments, in a letter dated 17 September 2019. The response states:

I understand that fees in this instrument were calculated using a WPI figure of 3% for 2019-20 based on advice provided by Treasury. Fees payable under the Determination are the same whether an increase of 2.5% or 3% is applied, due to rounding to the nearest whole dollar, as shown in Attachment A. There is therefore nil community impact from a WPI figure of 3% being applied.

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Future financial years will use the relevant WPI as advised by Treasury at the time of
determination.

The Committee thanks the Minister for his demonstrating that there was “nil community impact”
from the use of the 3% figure rather than the 2.5% figure used for other fees instruments. The
Committee also notes the Minister’s advice that fees determinations for future financial years “will
use the relevant WPI as advised by Treasury at the time of determination”. However, given that the
fees for this instrument were also calculated on the basis of a WPI “as advised by Treasury”, the

Committee seeks the Minister’s confirmation that, for future financial years, fees determinations
will use a WPI figure that is consistent with the WPI figure used by other agencies, for similar fees
determinations.

This comment requires a response from the Minister.

Giulia Jones MLA
Chair

October 2019
OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

• Report 27, dated 18 February 2019
  – Electoral Amendment Bill 2018 (Government Response).

• Report 28, dated 12 March 2019
  – Electoral Amendment Bill 2018 (Private Member’s amendments).

• Report 34, dated 10 September 2019
  – Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s bill).

• Report 35, dated 23 September 2019
  – Education Amendment Bill 2017 (Government amendments).