

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

SCRUTINY REPORT 19

24 JULY 2018



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# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Ms Elizabeth Lee MLA (Chair)  
Ms Bec Cody MLA (Deputy Chair)  
Ms Nicole Lawder MLA  
Mr Chris Steel 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](mailto:scrutiny@parliament.act.gov.au)  
Website [www.parliament.act.gov.au](http://www.parliament.act.gov.au)

## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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

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# BILLS

## BILLS—NO COMMENT

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

### APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2018-2019

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This Bill will appropriate money for expenditure for the Office of the Legislative Assembly and officers of the Assembly, including the Auditor-General and Electoral Commissioner, for the financial year beginning on 1 July 2018.

### APPROPRIATION BILL 2018-2019

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This Bill will appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2018, and for other purposes.

## BILLS—COMMENT

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

### ANIMAL DISEASES AMENDMENT BILL 2018

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This Bill amends the *Animal Diseases Act 2005* and the *Animal Diseases Regulation 2006* to extend the use of the National Livestock Identification System (NLIS) to a broader range of animals.

***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 requires anyone who keeps animals—including cattle, pigs, goats, sheep, camelids (such as camels and alpacas), equines, 10 or more large poultry or 100 or more small poultry—as well as abattoirs, saleyards and agricultural shows to have a property identification code. These codes are issued by the chief veterinary officer after an application including the name, address, description of the property or premises and identification details of the responsible person. Stock and station agents require an agent identification code after similar information is provided. Each kept animal must generally have a permanent identifier attached according to the relevant NLIS standard before they are moved, kept at a saleyard or abattoir, sold or slaughtered. Details of the transfer, movement, export of those animals, or death of cattle, must be provided to the NLIS Administrator.

The Director-General will maintain a register of all property identification codes and agent identification codes. Information, including identifying details of the responsible individuals, must be provided to the NLIS administrator upon request, or to a person in another jurisdiction if the information is to be used for administration of a related NLIS law. The NLIS administrator must maintain a register of all information provided to it under the Act. The NLIS administrator must also give any information in the register upon request to a person authorised under the Act, including public servants or police officers and certain employees of state and commonwealth agencies.

This requirement for the provision, use and disclosure of personal information and information relating to the movement and transfer of livestock potentially limits the right against undue interference with privacy protected by section 12 of the HRA. The explanatory statement accompanying the bill sets out a justification for this potential limit on the right to privacy using the framework set out in section 28 of the HRA and the Committee refers the assembly to that analysis.

The Committee recognises the information provided is generally limited to that which is necessary to allow a biosecurity response in relation to animal diseases. The chief veterinary officer and director-general are also subject to the requirements of the *Information Privacy Act 2014* and Territory Privacy Principles. However, proposed section 52V lists a wide range of purposes for the registers maintained by the director-general and the NLIS administrator, including:

- (h) to facilitate the dissemination of information in relation to the production and marketing of stock or related animal products;
- (i) to assist in the assessment and management of the welfare of animals;
- (j) to assist with the management of land used by stock.

The reason for listing these purposes is not clear. The provisions requiring a register to be maintained refer to only limited persons who must or may be given information (namely the NLIS Administrator and persons in other jurisdictions administering a related NLIS law (proposed subsections 53W(3) and (4), or authorised persons (proposed subsection 52X(2))). It is not clear whether the listed purposes limit how they can use the information provided, or whether they allow other persons to use or disclose the information provided they are for the listed purposes. The Committee requests further information on whether the listed purposes in proposed section 52V might be used to expand the range of persons who might be able to gain access to the information held on the registers in question or the purposes for which the information might be used.

The NLIS administrator will be defined in the Act as Integrity Systems Company Limited (ACN 134 745 038). This company is a wholly owned subsidiary of the Meat and Livestock Authority (ACN 081 678 364), which is in turn a private company limited by guarantee. It is not clear to the Committee what obligations, if any, will be placed on the NLIS administrator in terms of the collection, use and disclosure of personal or private information. The Committee recognises that the administration of the NLIS is the subject of a national agreement and that the Meat and Livestock Authority has a privacy policy in place which proposes to relevantly limit use of the information to administration of the NLIS.<sup>1</sup> However, it is concerned that there may not be directly enforceable limits placed on the NLIS Administrator regarding use and disclosure of the information to be provided under the Bill.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (S 22 HRA)

The Bill will introduce several strict liability offences, or offences with one or more strict liability elements, which will limit the right to the presumption of innocence protected by section 22 of the HRA. The explanatory statement accompanying the Bill sets out a justification for any limit to this right using the framework set out in section 28 of the HRA, and the Committee commends this analysis to the Assembly. In particular, the Committee notes that the strict liability offences or elements only involve penalties of up to 50 penalty units consistent with the Justice and Community Services Directorate Guide to Framing Offences, they are regulatory in nature and involve requirements which should be known by those affected.

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<sup>1</sup> See <https://www.mla.com.au/general/privacy/> (accessed 28/6/2018).



**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)**

Proposed section 47 of the Bill requires that animals be identified by attaching a permanent identifier according to the relevant NLIS standard. The section defines the relevant NLIS standard to mean “the standard as published from time to time by the NLIS administrator for the animal”, and a note adds that the “NLIS administrator publishes standards for animals at [www.nlis.com.au](http://www.nlis.com.au)”. The Committee notes that there will be no formal obligation in the proposed Act or regulations on the NLIS administrator to publish the standards and the terms on which it is available. The Committee requests that consideration be given to the relevant standards being declared as notifiable instruments made under the Act by the NLIS administrator and published on the ACT Legislation Register.

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

## **ANTI-CORRUPTION AND INTEGRITY COMMISSION BILL 2018**

This Bill will establish an Anti-corruption and Integrity Commission to investigate and report on corruption.

The Committee notes that this Bill has been referred to the Select Committee on an Independent Integrity Commission 2018. This report therefore does not set out in detail the various provisions of the Act that may impact on the rights and liberties identified below. The Committee also notes that the Bill follows a report of the Select Committee on an Independent Integrity Commission, presented to the Assembly on 31 October 2017. Many of the issues identified below are addressed to some extent in that report. However, the comments below relate to the Bill as presented to the Assembly and the accompanying explanatory statement.

***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 confer extensive investigation powers on the Commission, enabling the Commission to compel any person to provide information, documents or other things, to give evidence at an examination which will generally be in public, and to enter premises with and, in some circumstances, without, a warrant. It is an offence subject to 100 penalty units and imprisonment for up to one year to fail to comply with these requirements. Privileges against self-incrimination and client legal privilege, some duties of secrecy or other restriction on disclosure and any other rule of evidence that would ordinarily entitle a person to refuse to disclose information in a court are all not available (see proposed section 46). The Commission also generally has an obligation to report publicly after completion of an investigation, and can also report during an investigation or refer a matter to another body. The Commission therefore has considerable authority to affect the privacy and reputation of an individual, engaging the right against unlawful or arbitrary interference with privacy and reputation protected by section 12 of the HRA.

The explanatory statement recognises the potential impact of the Bill on the right to privacy and reputation, and sets out a justification using the framework set out in section 28 of the HRA. The statement refers to the importance of “ensuring corrupt conduct within government is independently and appropriately dealt with”. Limitations on an individual’s right to privacy is limited to allow for a “thorough and full inquiry”, and examinations in public are “essential in exposing corrupt practices and are necessary to ensure the Commission upholds the highest standards of integrity” and maintain public confidence. The risks of interference with privacy and reputation are:

mitigated by the Commission’s ability to decline to publish reports or information. This is paired with public interest tests throughout the Bill to add an additional layer of protection for information. Secrecy provisions have been incorporated into the Bill, along with penalties for divulging information which should have been protected. Finally, a reputational repair protocol has been included in addition to creating an offence and penalties in relation to taking detrimental action.

The Committee is concerned that this statement is expressed at a high level of generality that does not engage in detail with the potential interference with privacy and reputation presented by the Bill. Given the breadth of the powers of investigation and examination, the Committee considers that a more detailed explanation of the various limitations and safeguards is required in order to demonstrate the reasonableness of the Bill’s limitations on privacy and reputation. Some particular concerns not addressed directly in the explanatory statement are discussed further below.

#### *Preliminary investigations*

The Commission will be able to investigate potential corrupt conduct where it receives a complaint, the principal officer of a public authority or a Minister reports their reasonable suspicion of corrupt conduct, or on the Commission’s own motion, but only where the Commission “suspects on reasonable grounds that the conduct constitutes corrupt conduct” (proposed subsection 29(3)). The Commission must also investigate a referral from the Assembly. The investigation can occur regardless of when the alleged corrupt conduct occurred. Once an investigation is started, the various powers of the Commission to compel provision and access to information are available.

However, except where investigating an Assembly referral, the Commission is also able to conduct a preliminary investigation to decide whether to dismiss the matter, refer it to another entity or conduct an investigation. In conducting this preliminary investigation, the Commission is able to require public officials or public authorities to provide information, documents or other things under proposed sections 30 and 31. There is no requirement that the Commission form a view as to the reasonableness of any suspicion of corrupt conduct before exercising those powers, and the information, documents or other things provided can then be used by the Commission in the same way as other evidence obtained during an investigation or examination.

The Committee recognises that the powers in a preliminary investigation will be limited to requirements made of public officials and public authorities, but it is not clear whether this requirement is limited to information relating to their official or public functions. Proposed parts 4 and 5 of the Bill will also not apply to a preliminary investigation, which includes the abrogation of privileges and secrecy obligations and ability to enter premises and request a warrant. It is not clear, however, whether the offences for breach of sections 30 and 31 provided in section 70 (which is contained in Part 4 of the Bill) are intended to apply.

The Committee therefore requests that further information be provided on the extent preliminary investigations may impact privacy and reputation and a justification for that impact be provided in the explanatory statement.

*Direction to give name and address*

Proposed section 78 authorises an investigator, if they believe on reasonable grounds that a person may be able to assist in an investigation, to direct the person to provide their name and home address. If, on reasonable grounds, they believe that the person has provided false or misleading information, the investigator can also require proof of those details be provided immediately. Failure to comply with these directions is a strict liability offence under proposed section 71. While the Committee recognises the potential need for this provision, it considers that a justification should be set out in the explanatory statement accompanying the Bill.

*Authority to inspect premises*

Proposed section 73 authorises an investigator to enter premises occupied or used by a public authority, or public official in their capacity as a public official, at any time. This does not include any part of the premises used for residential purposes, or premises only partly occupied by a non-public sector entity performing a public function using public property.<sup>2</sup> Proposed section 74 authorises an investigator, where they believe on reasonable grounds that there may be evidence of corrupt conduct, to enter premises, including parts used for residential purposes, without a search warrant. This includes entry with consent, or where “the investigator believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary”.

Once they have access to the premises, the investigator is then able to inspect the premises, inspect, take copies or make extracts or documents, require reasonable assistance from anyone on the premises and ask questions relating to the inspection (proposed section 77). This is not expressly limited to evidence of corrupt conduct that was the basis of the authority to enter under section 74. While the power to seize objects while inspecting premises requires a search warrant (compare proposed sections 82 and 83), the provision doesn’t limit the information that may be copied from public premises or, in some circumstances, residential premises. Further justification of the scope of this authority should be provided in the explanatory statement.

*Exemption from the Privacy Act*

The Bill will amend the *Information Privacy Act 2014* to exempt the Commission from the operation of that Act (see clause [1.35]). Under proposed section 149, the Bill will require the Commission to develop guidelines for handling information obtained by the Commission in performing its functions, having consulted with the Information Privacy Commission in doing so. The guidelines will have to be published on the Commission’s website, but there is no direct enforcement provided in the Bill, and no requirement that the guidelines cover the range of protection offered by the Information Privacy Act such as relating to the security, correction and destruction of personal information. Justification for the exemption from the Information Privacy Act should therefore be provided in the explanatory statement.

*Authority to disclose information to other bodies*

Proposed Part 9 provides for cooperation and referral between the Commission and other entities. It provides for cooperation between the Commission and persons exercising functions under the *Auditor-General Act 1996*, the *Ombudsman Act 1989*, the public service standards commissioner and a police officer investigating fraud or other criminal matter (proposed section 151). Public authorities are required to cooperate with the Commission to avoid delay and unnecessary

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<sup>2</sup> The Committee notes that the drafting of proposed section 73 may support an interpretation that it applies only to non-residential parts of premises solely occupied by non-public sector entities performing public functions within the meaning of paragraph 9(1)(b).

duplication, and may refer matters more appropriately dealt with by the Commission. Provision is made for arrangements between the Commission and public authorities to be entered into, including to assist with efficiently managing the interaction of statutory functions. Under proposed section 154, public authorities and the Commission are able to share information “to the extent that it is reasonably necessary” for the other elements of Part 9. This therefore authorises public authorities to provide information, including potentially private information, to the Commission, and for the Commission to provide such information to other public bodies.

It is not clear to the Committee when it will be “reasonably necessary” to share information for Part 9 given the general and largely discretionary provisions provided for in that Part. The potential impact on privacy and reputation of information sharing provided for in proposed section 154 requires further justification.

Proposed section 155 provides for agreements with Commonwealth or State integrity entities, including incidental or supplementary provisions considered necessary. It is not clear to the Committee whether this is intended that such agreements will include provision for information sharing. This should be clarified, and any impact on privacy and reputation justified.

#### *Powers of the Inspector*

The Bill establishes the role of Inspector to review and report on the Commission’s performance, deal with complaints about the Commission, make recommendations about practices and procedures in exercising functions under the proposed Act, and various other functions. Under proposed section 129, in a review or in dealing with a complaint, the Inspector has access to Commission premises and anything in the possession or control of the Commission. Under proposed section 131, in a report on a review or in dealing with a complaint, the Inspector can disclose information obtained in the exercise of the Inspector’s functions only to the extent necessary for the effective exercise of those functions. It has to consider, but is not bound to protect, an individual’s reputation.

In exercising their functions under the Act, the Inspector may therefore impact on an individual’s privacy or reputation. A justification for this potential impact should be provided.

#### *Amendments to the Crimes (Surveillance Devices) Act*

The Bill will also amend the *Crimes (Surveillance Devices) Act 2010* to allow Commission officers (and possibly other law enforcement officers) to apply for the issue of surveillance device warrants if they suspect or believe on reasonable grounds that a person is, or is likely, to be involved in corrupt conduct under investigation by the Commission, an investigation is likely to be conducted in the ACT, and using the device in the ACT is necessary to obtain evidence or information of corrupt conduct to be obtained. The impact on privacy and reputation, as well as potentially the rights to protection of family and children protected by section 11 of the HRA, should be set out and justified.

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

#### RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Proposed sections 71 (failing to comply with a direction to provide name and address) and 116 (failing to return identity card after you stop being an investigator) provide for strict liability offences. These engage the right to presumption of innocence protected under section 22 of the HRA and a justification should be provided for in the explanatory statement. The Committee notes the minor nature of the offence (with penalties of 5 and 1 penalty unit respectively) and objective basis on which the offence are established.

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

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 RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Under proposed section 45, the Commission is not bound by the rules of evidence and may inform itself in any way that it considers appropriate. It is to exercise its functions with as little formality and technicality as possible. However, the Commission remains expressly bound to comply with the obligations of natural justice and must consider the potential subsequent use of information it obtains (proposed section 45). The Commission is also not able to make findings of guilt or recommend that a person be prosecuted for a criminal offence (proposed subsection 59(3)). However, the Commission can refer matters to any person or body for investigation or other action (proposed section 65). It can also direct how that body or person is to deal with the matter, provided the direction is within the bodies relevant authority (proposed section 66).<sup>3</sup> The Commission can also provide a brief of evidence to a law enforcement agency to investigate or prosecute a person for an offence or to a public authority to take disciplinary action against a public officer. An investigation by the Commission therefore can have significant consequences.

The explanatory statement accompanying the Bill provides a justification for any limitation on the right to fair trial protected by section 21 of the HRA. The explanatory statement notes the forms of notice and rights to appearance of anyone substantially and directly interested in a matter that is the subject of an examination, representation by a legal practitioner, and examination and cross-examination of witnesses during an examination proposed in the Bill. The Committee refers the analysis presented in the explanatory statement to the Assembly. Particular concerns relating to the right to a fair trial and associated rights are discussed further below.

*Abrogation of privileges, obligations of secrecy and other related rules of evidence*

As noted above, the Bill includes broad provisions requiring statements of information and documents or other things be provided to the proposed Commission as part of an investigation, including a preliminary investigation. Evidence, documents and answers may also be required after entry to premises without a warrant under proposed section 77 or as part of an examination under proposed Division 4.2. Proposed section 46 will prevent a person relying on the common law privilege against self-incrimination and exposure to a civil penalty. Such a limitation impacts on the right for a person not to be compelled to testify against themselves, engaging the right to a fair hearing protected by section 21 of the HRA as well as the common law privilege against self-incrimination.<sup>4</sup> The explanatory statement needs to provide a justification for this provision using the framework set out in section 28 of the HRA.

The Committee notes that proposed subsection 46(3) will prevent evidence obtained without the protection of the privilege against self-incrimination being used in evidence against the person in a civil or criminal proceeding. The only exceptions are offences relating to the falsity or misleading nature of the information compulsorily obtained, or an offence against chapter 7 of the Criminal Code (which relates to interference with the justice process such as perjury, falsifying evidence, failing to attend and refusing to be sworn). Chapter 7 of the Criminal Code will apply to the Commission under proposed section 50.

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<sup>3</sup> The Committee notes that under proposed section 68, where the Committee is not satisfied that the relevant authority has taken appropriate action on its referral under section 65, it can, after inviting comments, report to the relevant Minister to comment. The relevant Minister is defined for that section as the Minister responsible for the public authority. However, the ability to make a referral under proposed section 65 is not limited to public authorities. While it may be assumed that any referral will generally be to a public authority, this should perhaps be made explicit in the Bill.

<sup>4</sup> Noting that in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, Warren CJ stated that the Victorian “Charter’s protection of the right against self-incrimination is at least as broad as the traditional common law right not to have an unfair trial and the right not to incriminate oneself” (at [80]).

### *Concurrent court proceedings*

Under proposed section 49, the Commission can commence, continue and complete an investigation and provide a report on an investigation in relation to a matter that is concurrently before a court or tribunal. Where the court proceedings are for an indictable offence, the Commission must, where practicable, conduct the investigation in private, limit the persons who can be present and defer making a report to the Assembly until the proceedings are completed. However, this is only available where considered by the Commission as necessary to ensure that an accused person's right to a fair trial is not prejudiced. It is not clear to the Committee that this provision is the least restrictive possible, and further justification should be provided.

### *Natural justice requirements*

As noted above, the Commission has an obligation to comply with natural justice requirements. This is also reflected in the proposed notice requirements before any person can be required to appear before the Commission as part of an examination (proposed section 37). However, the person need not be informed about the nature of the matter about which the person will be questioned if the Commission considers on reasonable grounds that this would be likely to prejudice the conduct of the investigation or would be contrary to the public interest. By restricting the notice provided to persons in circumstances that may be considered unfair, the Bill potentially limits natural justice protections otherwise available, and therefore limits the fair hearing protections in section 21 of the HRA. A justification for this possibility should be provided in the explanatory statement.

### *Information provided to courts*

Proposed section 147 requires that information obtained in exercising a function under the Act only be divulged under authority of the Act or another territory law. Proposed section 148 allows a court to authorise disclosure to the court and, if the interests of justice so require, the accused, where a person is being prosecuted for an offence. However, under proposed subsection 147(5), protected information need not be divulged to a court unless it is necessary to do so for the Act or another territory law. This potentially limits natural justice requirements and other means by which a decision of the Commission may be subject to challenge.<sup>5</sup> A justification for this limitation should be provided.

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

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

The Bill will place significant restrictions on who is able to be appointed to the positions of Commissioner and Inspector. These restrictions may be considered inconsistent with the right of every citizen to have access, on general terms of equality, for appointment to public office protected by section 17 of the HRA. The explanatory statement provides a justification for the restrictions using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that analysis.

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

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<sup>5</sup> See, for example, the restriction on information provided to a court ruled invalid in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33.

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 RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE (SECTION 24 HRA)

The Commission is able to investigate matters that have been the subject of a past criminal conviction. To the extent this might constitute punishment or otherwise limits the right not to be tried or punished more than once, protected by section 24 of the HRA, the explanatory statement sets out a justification for that limitation using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.

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

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

## CREATION OF OFFENCES BY REGULATION

Proposed section 158 enables Regulations to create offences and fix maximum penalties of not more than 30 penalty units for the offences. The Bill is to be commended for modifying the usual approach to parliamentary scrutiny of regulations by providing that the regulation will not commence until the end of the opportunity for discontinuance by the Assembly (see proposed subsection 158(4)). The penalties associated with any offences are also limited. However, a justification should be provided for why this power to create offences by regulation is likely to be needed.

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

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 PROSTITUTION AMENDMENT BILL 2018

This Bill will amend the *Prostitution Act 1992* to: rename it the “Sex Work Act 1992” and remove other pejorative language; amend offences relating to allowing children to work as sex workers to apply absolute liability to the age of the child; repeal offences relating to infection with sexually transmissible diseases (STIs); insert new offences relating to providing safety equipment; and removing requirements for sole operators to be registered. The Bill will also establish the *Sex Work Regulation 2018* and make other consequential amendments.

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

**Report under section 38 of the *Human Rights Act 2004* (HRA)**

## RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Section 20 of the Prostitution Act currently makes it an offence to cause, permit, offer or procure a child to provide commercial sexual services. A child is defined in the *Legislation Act 2001* as under 18. If the child is under 12 years old, the maximum penalty is 1500 penalty units, 15 years imprisonment or both; if over 12, 1000 penalty units, 10 years imprisonment, or both. Absolute liability applies to the age of a child under 12, but only strict liability if over 12. The Bill proposes to make the age of children over 12 a matter of absolute liability.

Applying strict liability to the age of a child means that there are no fault elements applied, but that a mistake of fact is available. This means that it does not matter whether the person alleged to have committed the offence knows the age of the child as long as they considered the age of the child and reasonably believed the child was over 18. The defendant has only an evidential burden to establish that there is a reasonable possibility that they had such a belief.

The shift to absolute liability will mean that the mistake of fact defence is not available. The offence is committed even if the alleged perpetrator had a reasonable but mistaken belief that the child was over 18. However, section 22 of the Prostitution Act provides a defence to a prosecution if the defendant took reasonable steps to ascertain the age of the child and believed on reasonable grounds that they were over 18. The defendant has a legal burden, on the balance of probabilities, to prove this defence exists. The shift from strict to absolute liability therefore increases the burden on the defendant in establishing they reasonably but mistakenly believed the child to be over 18.

By increasing the burden on the defendant, the Bill limits the right to the presumption of innocence protected by section 22 of the HRA. The explanatory statement sets out a justification for the limitation using the framework set out in section 28 of the HRA, and the Committee refers the Assembly to that analysis. In particular, the Committee notes that the purpose of the limitation is to:

help to better prevent brothel owners from allowing children and young people to work as sex workers by requiring them to take more proactive steps to ascertain the age of their sex workers and ensure that they are not below 18 years of age. This in turn will help to support the right of children to be protected without distinction or discrimination of any kind.<sup>6</sup>

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

## SENIOR PRACTITIONER BILL 2018

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This Bill establishes the role of the senior practitioner to regulate use of restrictive practices by providers of education, disability, care and protection of children and other services within the Territory.

***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 includes authorisation for the senior practitioner to enter premises, and request and disclose personal and other private information. The Bill will therefore engage the right to protection against undue interference with privacy protected by section 12 of the HRA.

Proposed section 33 enables the senior practitioner to enter a place to carry out an investigation, including inspections, interview persons who may be subject to restrictive practices, copy or remove documents relating to a person, or use cameras or recording devices. The senior practitioner can carry out the inspection where they believe on reasonable grounds that a provider is using a restrictive practice, or they receive a complaint about a restrictive practice being used, at a particular place. The senior practitioner can enter a person's private residence where that is the place where restrictive practices may be being used.

Proposed section 34 allows the senior practitioner to require information, a document or "something else" relevant to an investigation be provided. Proposed section 35 requires a provider give any reasonable assistance the senior practitioner asks for, including production of a document or thing or an answer to a question. Under proposed section 36, the senior practitioner can keep,

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<sup>6</sup> Prostitution Amendment Bill, Explanatory Statement, page 6.



copy or take extracts from any document or thing they obtain for as long as it is relevant to their functions. Proposed section 42 allows any information obtained in the exercise of the senior practitioner's functions to be given to a range of entities, including the directors-general responsible for legislation relating to education, health and children and young people. The senior practitioner must be satisfied on reasonable grounds that the information is necessary for "the exercise of the senior practitioner's or entities functions".

The explanatory statement accompanying the Bill acknowledges that these provisions limit the right to protection against undue interference with privacy protected by section 12 of the HRA. The statement asserts that a proactive inspection regime is required to protect against harm occurring from improper or unjustified use of restrictive practices as it is "more effective" than reacting to allegations of past harm. The role of the senior practitioner requires the level of access to places and information to effectively carry out its role. It is also "appropriate and necessary that the senior practitioner may give protected information to a range of necessary entities".

The Committee is concerned about the level of justification provided for what it considers broad powers of investigation. As the explanatory statement acknowledges, the protection in section 12 of the HRA generally requires that the authority to interfere with a person's privacy be precise and circumscribed by clear and necessary criteria. The Bill provides for the senior practitioner to enter private residences based only on a complaint being received, noting that the senior practitioner is under an obligation to investigate every complaint (proposed section 31). The senior practitioner is also under an obligation to inform a provider subject to a complaint that a complaint has been made (proposed section 31),<sup>7</sup> but it is not clear what warning, if any, must be provided before an inspection takes place. The senior practitioner can also investigate without having received a complaint (proposed section 32). Any information "relevant to an investigation" can be required, and is not limited to information held by those responsible for any restrictive practices being investigated. A person cannot rely on the privilege against self-incrimination or exposure to a civil penalty to refuse to comply (proposed section 37).

It is not clear to the Committee how a requirement to provide information will be enforced, particularly when not required from a provider. There is no provision for an offence or civil penalty directly associated with failing to provide information as required under the Act. However, the senior practitioner may give further directions to a provider under proposed section 39, where they consider that "action needs to be taken" in relation to a support plan or use of a restrictive practice. The senior practitioner may also cancel registration of a positive behaviour support plan where a provider fails to comply with a direction (proposed section 40). Both decisions are reviewable by ACAT. Under the Bill it will be an offence to fail to comply with a direction or to use a restrictive practice not permitted under a registered positive behaviour support plan (proposed sections 46 and 47). The application of these offences to providers may limit the ability to enforce the powers to investigate and require production of information.

The explanatory statement also does not acknowledge the role of the senior practitioner in keeping a register of positive behaviour support plans under which restrictive practices under proposed section 19. A person's support plan includes a description of the behaviour that is causing harm to them or others, including triggering events and proposed restrictive practices. Highly personal information may therefore be included. If registered, the plan must be provided to the person's guardian, and, if the person is a child, each person with parental responsibility and the public advocate. The content of the support plan, like other information obtained in the exercise of functions under the Act, can be provided to particular entities under proposed section 42.

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<sup>7</sup> The Committee notes that under proposed amendments to the Bill to be moved by the Minister, details of the complainant or a person subject to a positive behaviour support plan or restrictive practice may be withheld from any disclosure to the provider the subject of the complaint, where disclosure may have an adverse impact on that person.

The Bill also provides protection against civil and criminal liability, including breach of confidence, for honest and non-reckless making of a complaint, or providing a document or information, to the senior practitioner. The explanatory statement does not acknowledge the potential for this to limit the protection against interference with a person's privacy.

The Committee therefore requests further justification for the senior practitioner's broad investigatory powers be set out in the explanatory statement using the framework set out in section 28 of the HRA. This should include a discussion of how the investigatory powers will be enforced against persons who are not considered a provider under the Bill. The explanatory statement should also acknowledge the potential limit of the protection against undue interference with privacy by the maintenance and use of a register of positive behaviour support plans and the protection against civil liability for breach of confidence, and provide a justification for that limit.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

RIGHT TO THE PRIVILEGE AGAINST SELF-INCRIMINATION (SECTION 22 HRA)

As noted above, under proposed section 37 a person cannot rely on the common law privileges against self-incrimination and exposure to a civil penalty to refuse to produce documents or other things or answer a question in response to a notice issued by the senior practitioner. Such a limitation engages the right for a person not to be compelled to testify against themselves protected by paragraph 22(2)(i) of the HRA, the right to a fair trial protected by section 21 of the HRA and the common law privilege against self-incrimination.<sup>8</sup>

The Committee notes that the abrogation of the right against self-incrimination does not extend to information obtained being, directly or indirectly, "admissible in evidence against the person in a criminal or civil proceeding, other than a proceeding for an offence in relation to the falsity of the information, document, other thing or answer" (proposed subsection 37(3)). This limitation on the use and derivative use of the information obtained will be relevant to any justification of the abrogation of the privilege using the framework set out in section 28 of the HRA. However, in the Committee's view a justification for the abrogation should have been provided.

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

Proposed section 47 creates a strict liability offence of failing to comply with a direction issued under proposed section 39. This engages the right to the presumption of innocence protected by section 22 of the HRA. The explanatory statement provides an analysis of the reasonableness of the limitation, in both discussing the human rights implications of the Bill and in describing clause 47, and the Committee refers the Assembly to that analysis. The Committee notes that the requirement to comply with directions only applies to providers, and will commence nine months after the commencement of other parts of the Bill to provide time to educate providers.

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

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<sup>8</sup> Noting that in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, Warren CJ stated that the Victorian "Charter's protection of the right against self-incrimination is at least as broad as the traditional common law right not to have an unfair trial and the right not to incriminate oneself" (at [80]).

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

INCORPORATION OF INSTRUMENT FROM TIME TO TIME

Proposed section 27 provides for the senior practitioner to make guidelines, including guidelines in relation to the use of restrictive practices. Proposed subsection 27(3) will provide that a “guideline may apply, adopt or incorporate an instrument, as in force from time to time.” There is no limit on the source or nature of the instrument, other than the general requirement that any guidelines be consistent with the objects of the proposed Act.

The Committee notes that any instrument incorporated into guidelines made under proposed section 27 is taken to be a notifiable instrument under subsection 47(5) of the *Legislation Act 2001*. The Committee also recognises that, unlike guidelines made under proposed section 12 which are used in the approval and registration of positive behaviour support plans and notifications to the senior practitioner on use of restrictive practices, guidelines issued under proposed section 27 have limited legal effect. However, the Committee considers that an explanation should be provided in the explanatory statement for why it is considered appropriate to allow instruments developed by others to be incorporated into guidelines issued by the senior practitioner.

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

**STOCK AMENDMENT BILL 2018**

This Bill amends the *Stock Act 2005* to increase the circumstances in which stock impounded under that Act can be disposed of, and to require a permit from the Director-General to travel stock on foot from where the stock is normally kept.

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

**Report under section 38 of the *Human Rights Act 2004* (HRA)**

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill amends several strict liability offences currently provided in the Stock Act. Currently someone moving stock can have a permit issued by the owner of the stock. The Bill will remove this possibility leaving only the Director-General with the ability to issue permits. The Bill omits the offence in section 28, and amends section 29, to reflect this change. The Committee notes that there is also clarification of the offence in section 30. The explanatory statement recognises that strict liability offences limit the right to the presumption of innocence protected by section 22 of the HRA and provides a justification using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.

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

## WORK HEALTH AND SAFETY AMENDMENT BILL 2018

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This Bill will amend the Work Health and Safety Act 2011 and Work Safety Regulation 2011 to require major construction projects to consult with eligible unions on work groups to be represented by health and safety representatives, facilitate election and ensure training of health and safety representatives, and facilitate formation and ensure training of health and safety committee members.

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

**Report under section 38 of the *Human Rights Act 2004* (HRA)**

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill will introduce or amend several offences. It will be an offence for the principal contractor not to consult with each eligible union for major construction projects about the number and composition of work groups and health and safety representatives of each work group. This will augment current requirements to negotiate after a request by workers. There will also be offences relating to a failure to ensure and pay for health and safety representatives and committee members to attend a relevant course. These offences become available after a health and safety inspector has determined the appropriate course and costs to be paid. Each offence carries a penalty of \$10 000 for an individual and \$50 000 for corporations, which is in line with penalties for similar offences currently in the Act.

Under section 12A of the Act, strict liability applies to each physical element of these offences. The Bill therefore limits the right to the presumption of innocence protected by section 22 of the HRA. The explanatory statement accompanying the Bill acknowledges this limitation and sets out a detailed analysis using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.

The Committee notes that the penalty involved with the offences is higher than that usually recognised under the Justice and Community Services Guide to Framing Offences. However, the offences apply to principal contractors of major construction projects in circumstances where they should have known the nature of the obligations placed on them (the offences relating to training, for example, only apply where an inspector has informed the contractor of their obligations).

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

## PROPOSED GOVERNMENT AMENDMENTS

The committee has examined proposed amendments to the Senior Practitioner Bill 2018. The proposed amendments will amend clauses 31(5) and 31(6) to extend the persons whose details can be withheld when informing a complainant about a complaint, and Schedule 1 of the Bill to expand the range of reviewable decisions. The Committee has no comment to make in relation to these proposed amendments.

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-69 being the Independent Competition and Regulatory Commission (Inquiry into beverage price impacts relating to the ACT Container Deposit Scheme) Terms of Reference Determination 2018** made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* refers to the Independent Competition and Regulatory Commission the task of investigating the impact on beverage prices and competition in the beverage industry of the ACT Container Deposit Scheme to be established pursuant to the Act.
- **Disallowable Instrument DI2018-70 being the Road Transport (General) Withdrawal of Infringement Notices Guidelines 2018 (No 1)** made under subsection 38(1) of the *Road Transport (General) Act 1999* repeals DI2012-246 and determines the guidelines that apply when considering applications for the withdrawal of an infringement notice issued under the road transport legislation.
- **Disallowable Instrument DI2018-71 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2018 (No 2)** made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2018-37 and determines Tabcorp ACT Pty Ltd sub-agencies as sports bookmaking venues by approving areas within a one-metre radius of any selling terminal owned and operated by Tabcorp ACT Pty Ltd and other specified sub-agencies within the venues for the purposes of the Act.
- **Disallowable Instrument DI2018-72 being the Road Transport (General) Application of Road Transport Legislation—Stopping in Permit Zone Declaration 2018** made under section 13 of the *Road Transport (General) Act 1999* revokes DI2000-359 and declares that certain parts of the road transport legislation do not apply to a specified driver of a declared vehicle stopped in a specified declared permit zone.
- **Disallowable Instrument DI2018-73 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 5)** made under section 12 of the *Road Transport (General) Act 1999* revokes DI2017-270 and declares that certain parts of the road transport legislation do not apply to a road or related area where time limited permissive parking signs apply within the specified area identified.
- **Disallowable Instrument DI2018-74 being the Road Transport (General) (Pay Parking Area Fees) Determination 2018 (No 1)** made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-166 and determines relevant parking fees for Territory-operated pay parking areas.
- **Disallowable Instrument DI2018-75 being the Road Transport (General) (Parking Permit Fees) Determination 2018 (No 1)** made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-164 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2018-76 being the Animal Welfare (Keeping and Breeding of Racing Greyhounds in the ACT) Mandatory Code of Practice 2018 (No 1)** made under section 23 of the *Animal Welfare Act 1992* approves the Code of Practice for the Keeping and Breeding of Racing Greyhounds in the ACT.

- **Disallowable Instrument DI2018-77 being the Domestic Animals (Fees) Determination 2018 (No 1) made under section 144 of the *Domestic Animals Act 2000* revokes DI2017-177 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-78 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2018 (No 2) made under section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* and section 194 of the *Medicines, Poisons and Therapeutic Goods Act 2008* appoints a specified person as a member of the Medicines Advisory Committee.**
- **Disallowable Instrument DI2018-79 being the Road Transport (General) Application of Road Transport Legislation—Securing Coles Refrigerated Delivery Vehicles Declaration 2018 made under section 13 of the *Road Transport (General) Act 1999* revokes DI2015-280 and declares that certain parts of the road transport legislation which require a motor vehicle to be made secure by switching off the engine and removing the ignition key do not apply to a Coles Supermarkets Australia Pty Ltd refrigerated delivery vehicle.**
- **Disallowable Instrument DI2018-80 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2018 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-132 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-81 being the Road Transport (General) Numberplate Fees Determination 2018 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-260 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-83 being the Public Place Names (Coombs) Determination 2018 made under section 3 of the *Public Place Names Act 1989* determines the names of eight roads in the Division of Coombs.**
- **Disallowable Instrument DI2018-84 being the Public Place Names (Taylor) Determination 2018 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of 18 roads in the Division of Taylor.**
- **Disallowable Instrument DI2018-85 being the ACT Teacher Quality Institute Board Appointment 2018 (No 1) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* revokes DI2017-215 and appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2018-86 being the Plant Diseases (Importation Restriction Area) Declaration 2018 (No 1), including a regulatory impact statement made under section 12 of the *Plant Diseases Act 2002* declares specified parts of Northern Territory subject to an importation restriction.**
- **Disallowable Instrument DI2018-87 being the Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2018 (No 2) made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.**
- **Disallowable Instrument DI2018-88 being the Planning and Development (Lease Variation Charge Deferred Payment Scheme) Determination 2018 made under paragraphs 279AA(1)(b) and (c) and subsection 279AC(2) of the *Planning and Development Act 2007* determines the criteria for lease variation charges to be deferred for the purposes of the Act.**

- **Disallowable Instrument DI2018-89 being the Planning and Development (Remission of Lease Variation Charges—Environmental Sustainability) Determination 2018 (No 2) made under section 278 of the *Planning and Development Act 2007* revokes DI2018-40 and determines the circumstances for which an amount of a lease variation charge for a chargeable variation of a nominal rent lease must be remitted.**
- **Disallowable Instrument DI2018-90 being the Animal Welfare (Land Transport of Livestock) Mandatory Code of Practice 2018 (No 1) made under section 23 of the *Animal Welfare Act 1992* approves the Australian Animal Welfare Standards and Guidelines, Land Transport of Livestock as a mandatory code of practice.**
- **Disallowable Instrument DI2018-91 being the Veterinary Surgeons (Fees) Determination 2018 (No 1) made under section 136 of the *Veterinary Surgeons Act 2015* determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-92 being the Planning and Development (Remission of Lease Variation Charges for Environmental Remediation) Determination 2018 made under section 278 of the *Planning and Development Act 2007* determines the circumstances in which an amount of a lease variation charge for a chargeable variation of a nominal rent lease must be remitted.**
- **Disallowable Instrument DI2018-93 being the Planning and Development (Remission of Lease Variation Charges for the Housing Commissioner) Determination 2018 made under section 278 of the *Planning and Development Act 2007* provides remissions for two types of lease variation charges made under the Act to remit or reduce the lease variation charge for certain lease variations where the purpose of the variation is for housing commissioner purposes.**
- **Disallowable Instrument DI2018-94 being the Planning and Development (Remission of Lease Variation Charges) Determination 2018 (No 1) made under section 278 of the *Planning and Development Act 2007* determines the amount to be remitted for each lease variation charge to which the determined circumstances apply.**
- **Disallowable Instrument DI2018-95 being the Children and Young People (Care and Protection Organisations and Responsible Persons—Suitability Approval Application) Guidelines 2018 (No 1) made under section 62 of the *Children and Young People Act 2008* approves the Children and Young People (Care and Protection Organisations and Responsible Person—Suitability Approval Application) Guidelines.**
- **Disallowable Instrument DI2018-96 being the Children and Young People (Approved Care and Protection Organisations—Monitoring) Guidelines 2018 (No 1) made under section 352F of the *Children and Young People Act 2008* approves the Children and Young People (Approved Care and Protection Organisations—Monitoring) Guidelines.**
- **Disallowable Instrument DI2018-97 being the Children and Young People (Approved Care and Protection Organisations—Intervention) Guidelines 2018 (No 1) made under section 352T of the *Children and Young People Act 2008* approves the Children and Young People (Approved Care and Protection Organisations—Intervention) Guidelines.**
- **Disallowable Instrument DI2018-108 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2018 made under section 20 of the *Remuneration Tribunal Act 1995* revokes DI2016-301 and determines fees and allowances for members of the Remuneration Tribunal.**

## SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2018-5 being the Residential Tenancies Amendment Regulation 2018 (No 1) made under the *Residential Tenancies Act 1997* amends the Residential Tenancies Regulation by inserting a new regulation that allows the Commissioner for Fair Trading to mandatorily refuse to register a standard guarantee contract for the purposes of the Act.**
- **Subordinate Law SL2018-6 being the Road Transport (Offences) Amendment Regulation 2018 (No 1) made under the *Road Transport (General) Act 1999* determines Reconciliation Day as an excluded public holiday for the purpose of applying double demerit points for the purposes of the Act.**

## SUBORDINATE LAW—COMMENT

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

### STRICT LIABILITY OFFENCES—POSITIVE COMMENT

- **Subordinate Law SL2018-7 being the Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2018 (No 1) made under the *Magistrates Court Act 1930* amends the Magistrates Court (Work Health and Safety Infringement Notices) Regulation by inserting additional offences for which infringement notices can be issued.**

While it is not evident from the face of the subordinate law, this subordinate law creates various new strict liability offences, for the work health and safety legislation. The explanatory statement for the subordinate law helpfully states:

Section 6A of the [Work Health and Safety Regulation 2011] provides that, unless otherwise specified, the physical elements of an offence are strict liability. For the offences in the Regulation, the prosecution is required to prove only the conduct of the accused. However, where the accused produces evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made the conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

The rationale for these strict liability offences is that people who owe work health and safety duties can be expected to be aware of their duties and obligations to the wider public. Breaches should be apparent without the need for further inquiry, or the need to weigh up competing or contradictory evidence.

Failure to comply with any requirement in the Regulation is an offence. As these offences arise in the regulatory context where public safety is paramount, there is an interest in ensuring regulatory schemes are observed, and in this context the sanction of criminal penalties is justified.

All offences have been set consistent with the existing penalties applied under the WHS Infringement Notice Regulation and are less than 20% of the maximum penalty for the offence. This is consistent with ACT Government policy. As a result infringement notices penalties range from \$144 to \$720 for an individual and \$720 to \$3600 for a body corporate.



The Committee notes that this discussion addresses the view that the Committee has consistently taken, that strict liability offences need to be justified. In its document, titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#)<sup>9</sup>, the Committee states:

#### STRICT AND ABSOLUTE LIABILITY OFFENCES

As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the Explanatory Statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes with approval that the explanatory statement for this subordinate law addresses these requirements.

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

#### REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the regulatory impact statement for the following disallowable instrument and has no comment on it:

- **Disallowable Instrument DI2018-86 being the Plant Diseases (Importation Restriction Area) Declaration 2018 (No 1).**

## GOVERNMENT RESPONSES

- The Minister for Education and Early Childhood Development, dated 8 June 2018, in relation to comments made in Scrutiny Report 14 concerning the Education and Care Services National Further Amendment Regulations 2017.
- The Minister or the Prevention of Domestic and Family Violence, dated 20 June 2018, in relation to comments made in Scrutiny Report 18 concerning Disallowable Instrument DI2018-53—Domestic Violence Agencies (Council) Appointment 2018 (No 1).
- The Minister for Workplace Safety and Industrial Relations, dated 18 July 2018, in relation to comments made in Scrutiny Report 18 concerning Subordinate Law SL2018-2—Work Health and Safety Amendment Regulation 2018 (No 1).

[These responses](#)<sup>10</sup> can be viewed online.

<sup>9</sup> [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf)

<sup>10</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

- The Attorney-General, dated 4 June 2018, in relation to comments made in Scrutiny Report 18 concerning the Casino and Other Gaming Legislation Amendment Bill 2018 and Disallowable Instruments—
  - DI2018-57—Racing Appeals Tribunal Appointment 2018 (No 1);
  - DI2018-58—Racing Appeals Tribunal (Assessor) Appointment 2018 (No 1);
  - DI2018-59—Racing Appeals Tribunal Appointment 2018 (No 2);
  - DI2018-60—Racing Appeals Tribunal Appointment 2018 (No 3); and
  - DI2018-61—Racing Appeals Tribunal Appointment 2018 (No 4).
- The Minister for Health and Wellbeing, dated 6 June 2018, in relation to comments made in Scrutiny Report 18 concerning Medicines, Poisons and Therapeutic Goods Amendment Bill 2018.
- The Chief Minister, dated 6 June 2018, in relation to comments made in Scrutiny Report 18 concerning the Ombudsman Amendment Bill 2018.

[These responses](#) <sup>11</sup> *can be viewed online.*

The Committee wishes to thank the Chief Minister, the Minister for Education and Early Childhood Development, the Minister for the Prevention of Domestic and Family Violence, the Minister for Health and Wellbeing, the Attorney-General, and the Minister for Workplace Safety and Industrial Relations for their helpful responses.

Elizabeth Lee MLA  
Chair

24 July 2018

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<sup>11</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

# 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 18, dated 29 May 2018**
  - Veterinary Practice Bill 2018