

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

SCRUTINY REPORT 5

27 April 2017

COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)

Ms Bec Cody MLA (Deputy Chair)

Ms Elizabeth Lee MLA

Mr Chris Steel MLA

SECRETARIAT

Mr Max Kiermaier (Acting Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Daniel Stewart (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone 02 6205 0173

Facsimile 02 6205 3109

Post GPO Box 1020, CANBERRA ACT 2601

Email scrutiny@parliament.act.gov.au

Website www.parliament.act.gov.au

ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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BILLS

BILLS—NO COMMENT

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

FIREARMS AMENDMENT BILL 2017

This Bill amends the *Firearms Act 1996* to extend the licencing requirements for certain types of lever action shotguns.

REVENUE LEGISLATION AMENDMENT BILL 2017

This Bill amends the Duties Act, Land Tax Act and Rates Act to give effect to decisions arising from the 2015-2016 budget.

BILLS—COMMENT

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

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY AMENDMENT BILL 2017

This Bill amends the *Aboriginal and Torres Strait Islander Elected Body Act 2008* to clarify the functions of the Aboriginal and Torres Strait Islander Elected Body in consulting with the local community and clarifies its responsibilities in respect of Aboriginal and Torres Strait Islander policy and service provision.

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—Committee terms of reference paragraph 2

The Committee notes that there is no statement on the human rights considerations, if any, raised by the Bill included in the explanatory statement. As the Committee has noted,¹ the explanatory statement is an important element in the dialog between the promoter of a Bill and the Assembly which helps ensure that human rights implications of proposed legislation are considered. Explanatory statements should therefore include reference to whether the Bill gives rise to any human rights issues. For example, the explanatory statement may state “The Bill does not engage or limit rights under the *Human Rights Act 2004*”.

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

CITY RENEWAL AUTHORITY AND SUBURBAN LAND AGENCY BILL 2017

This Bill creates two Territory authorities to take on the work of the Land Development Agency in managing urban renewal in Canberra. The City Renewal Authority will seek to facilitate development projects and otherwise manage renewal in declared precincts in Civic and the Northbourne Avenue corridor. The Suburban Land Agency will undertake other government land sales and estate development works. The Bill also provides for governance arrangements for the two entities including the relationship with the Government.

¹ See the Committee’s *Guide to writing an explanatory statement* para 3.9
http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf.

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 (S 12 HRA)*

The explanatory statement includes a statement that the provisions of the Bill do not engage or affect human rights. However, in the Committee's view, the Bill potentially engages with the right to privacy and reputation protected by section 12 of the HRA. Clause 56 of the Bill provides for the sharing of protected information. "Protected information" is defined to mean information disclosed to, or obtained by, specified persons because of the exercise of a function under the Act. Those functions include working with entities, including individuals, that have an interest in land² and to buy and sell leases of land on behalf of the Territory.³ Exercising those functions may therefore involve obtaining personal or other private information of private individuals. The effect of clause 56 is to require that information to be provided to others. Given the section is also stated to apply despite any other Territory law it is uncertain whether the information disclosed will be protected against further disclosure by, for example, the *Information Privacy Act 2014*. If this is not the intended operation of the Bill, then this should be made clear in the explanatory statement and amendments to the Bill may be required.

The explanatory statement states that the purposes of the clause include ensuring that information about the performance and activities of the two Territory authorities to be created by the Bill is available for performance monitoring and oversight functions, as well as providing advice to the Minister to support holding Board chairs to account. The Committee acknowledges that the range of persons to whom information can be disclosed is limited. However, the information which may be disclosed is not limited to that relating to the performance of the new authorities and associated personnel. As such the explanatory statement should consider whether the clause unreasonably limits the right to privacy and reputation under section 12 of the HRA or otherwise potentially interferes with rights to privacy and protection of confidential information.

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

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

Clause 57 provides that the Executive may make regulations for this Act, and that a regulation may create offences and fix maximum penalties of not more than 20 penalty units for the offences. While the limitation to 20 penalty units indicates that the offences will generally be minor in character, there is no express limitation on the nature and subject matter of the offence other than that provided by the context of the Bill as a whole. There is also no justification provided for why the power to make regulations should extend to creating offences. In the Committee's view the scope and justification for including offences in regulations should be made clear.

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

² Eg clauses 10 and 39.

³ Clauses 9 and 38.

HENRY VIII CLAUSE

Clause 200 states:

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make a provision in relation to anything that, in the Executive's opinion, is not, or is not adequately dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

By enabling a regulation to amend Part 10 of the Act, including in relation to another Territory law, this clause is a "Henry VIII" clause.⁴ The explanatory statement provides a justification for this clause at page 21 in the following terms:

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.

The Committee notes that, under clause 201, the clause can only have an effect for 12 months from the commencement of the Act.

The Committee also notes that the explanatory statement suggests that subclause 200(3) is not intended to authorise the making of a regulation limiting future enactments of the Legislative Assembly.⁵

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

GENE TECHNOLOGY AMENDMENT BILL 2017

This Bill amends the *Gene Technology Act 2003* to retain consistency with the *Gene Technology Act 2000* (Cwlth) following amendments introduced by the *Gene Technology Amendment Act 2015* (Cwlth).

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—Committee terms of reference paragraph 2

The explanatory statement for this Bill includes a very brief description of the changes to be introduced, relying instead on the Commonwealth Gene Technology Amendment Bill 2015 Explanatory Memorandum. In attempting to achieve consistency with national regulation of gene technology, the Bill presents similar scrutiny concerns as other national scheme bills. As the Committee has noted,⁶ an explanatory statement may rely on, as in this case, a source prepared by a

⁴ See the Committee's guide to this topic: Henry VIII clauses Fact sheet
http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

⁵ See previous discussion of the issue of whether any such effect would be beyond the legislative capacity of the Assembly in, for example, *Scrutiny Report No 2 of the 9th Assembly* at pp 3-4.

⁶ See the Committee's *Guide to writing an explanatory statement* paras 3.5-3.7
http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf.

Commonwealth or state body. However, the explanatory statement should still deal with any issues relating to the HRA, particularly where the jurisdiction from which the explanatory statement borrows does not explicitly provide for human rights protection.

The Committee notes that there is no statement on the human rights considerations, if any, raised by the Bill included in the explanatory statement. As the Committee has noted,⁷ the explanatory statement is an important element in the dialog between the promoter of a Bill and the Assembly which helps ensure that human rights implications of proposed legislation are considered. Explanatory statements should therefore include reference to whether the Bill gives rise to any human rights issues. For example, the explanatory statement may state “The Bill does not engage or limit rights under the *Human Rights Act 2004*”.

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT 2017

This Bill amends 17 Acts and one regulation in the Justice and Community Safety Portfolio and repeals two Directions. The explanatory statement states that the “amendments are intended to improve the operation of each amended law without amounting to a major change in policy”.

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 A FAIR TRIAL (S 21 HRA)

The Bill amends the *Civil Law (Wrongs) Act 2002* and the *Limitation Act 1985* to remove limitations periods that apply to claims for damages brought by survivors of child sex abuse. In this way, the Bill follows on from the *Justice and Community Safety Legislation Amendment Act 2016 (No 2)* which removed limitations periods as they applied in an institutional context.⁸

The explanatory statement acknowledges that the right to a fair trial under section 21 of the HRA is engaged by these provisions and offers a justification for limiting that rights according to the framework set out in section 28 of the HRA The Committee refers the Assembly to this analysis. It is important to note the comment in the explanatory statement that:

the defendant will be protected from unfair proceedings by two factors. Firstly, the claimant will still need to prove their case through admissible evidence. Secondly, the courts’ relevant existing jurisdictions and powers to stay proceedings, for example where the defendant is unable to obtain a fair trial, are unaffected by this Bill.⁹

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

⁷ See the Committee’s *Guide to writing an explanatory statement* para 3.9
http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf.

⁸ The Committee made various comments when that Act was before the Assembly, including to question whether there may be a concern with equal protection of the law in drawing a distinction between institutional and non-institutional contexts, and the possible interference with rights and liberties associated with the retrospective operation of the Act: See *Scrutiny Report No 47* of the 8th Assembly at pp 2-4.

⁹ At p 5.

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

The Bill amends various Acts to refer to what the explanatory statement refers to as the “upcoming” *Road Transport (Road Rules) Regulation 2017* (Road Rules Regulation). The Road Rules Regulation is intended to align ACT road rules with the newly amended national road rules. The various amendments introduced in this Bill involve changes to definitions sections, either by replacing defined terms with a definition to be provided by the Road Rules Regulation or removing terms which will no longer be defined when the Road Rules Regulations come into effect.

There is no explanation provided in the explanatory statement for why it remains or has become preferable for legislation to incorporate definitions relating to regulation of road safety through a regulation, particularly one made under other legislation, rather than directly in the legislation itself. The Committee suggests that it would be appropriate in those circumstances for more information on the Road Rules Regulation to be provided in the explanatory statement, eg a draft of the regulations.

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

LIQUOR AMENDMENT BILL 2017

This Bill amends the *Liquor Act 2010* and the *Liquor Regulation 2010* to, among other things, seek to reduce alcohol-related harm through enhancing a licensee’s powers to evict or refuse entry to people intoxicated, violent, quarrelsome or disorderly. The Bill also provides for security cameras to be fitted as a condition of a licence, and provides for the use of children to attempt to purchase liquor to test licensee compliance. There are also a range of offences and other regulatory powers introduced.

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 EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (S 8 HRA)

The Bill provides for licensees and other authorised persons including employees and agents, to refuse entry to, or evict from, licenced or permitted premises any person who is intoxicated, violent, quarrelsome or disorderly. As the explanatory statement recognises, by discriminating based on intoxication or other behaviour this potentially engages the right to equal protection of the law. The explanatory statement sets out the basis on which any limitation of the right to equal protection can be considered reasonable under the framework required by s 28 of the HRA and the Committee draws this analysis to the attention of the Assembly.

It should be noted that licensees generally enjoy a common law right of eviction or refusal of entry, that Guidelines developed by the Commissioner under s 223 of the *Liquor Act* recognise that signs of intoxication may be mirrored by some medical conditions, and that the definition of intoxication in the *Liquor Act* requires consideration of whether the signs of intoxication are a result of consumption of alcohol or drugs.

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

RIGHT TO FREEDOM OF MOVEMENT (S 13 HRA)

The Bill will create an offence to remain in the vicinity or attempt to re-enter a licensed venue within six hours after having been evicted or refused entry due to intoxication or other inappropriate behaviour. As the explanatory statement recognises, this interferes with the right to freedom of movement in s 13 of the HRA.

The explanatory statement provides a justification for any limitation on the freedom of movement using the framework set out in s 28 of the HRA. The Committee refers this analysis to the Assembly, noting that there are various defences to the proposed offence available, including that the person reasonably fears for their safety, they are attempting to get transport or they live near the premises.

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

FREEDOM OF EXPRESSION (S 16 HRA)

The Liquor Act already makes it an offence for a licensee or employee to conduct a prohibited promotional activity—that is an activity that encourages excessive or rapid consumption of liquor or is otherwise prescribed by regulation, including due to the use of degrading, sexist or offensive images. The Bill adds an example to s 144(2) of the Liquor Act making it clear that the Commissioner may also direct a person to remove or discontinue the prohibited promotional activity.

As the explanatory statement recognises, the existing offence and new example each act to limit the freedom of expression provided for in s 16 of the HRA. The explanatory statement justifies these limitations using the framework in s 28 of the HRA and the Committee refers the Assembly to this analysis. In particular, the explanatory statement notes that the limitation applies only to individual licensees who engage in prohibited promotional activity on licensed premises and does not otherwise limit their ability to promote a particular product or service or otherwise express their views in other forums.

The Bill also adds to existing powers of the Minister to declare a thing containing liquor to be a prohibited liquor product. Names or packaging that are indecent or offensive, or encourage irresponsible, rapid or excessive consumption will be able to be declared a prohibited liquor product, as will any other liquor product where it is otherwise in the public interest to do so. The justification of this limitation on freedom of speech is set out in the explanatory statement using the framework set out in s 28 of the HRA and the Committee refers the Assembly to this analysis.

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

RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN (S 11 HRA)

The Bill introduces a controlled purchase operation scheme, or compliance testing scheme, where children try to purchase liquor from licensed premises to test compliance with laws relating to supply of liquor to children. As the explanatory statement recognises, this engages the right to protection of children. The explanatory statement sets out the justification for any limitation of this right using the framework set out in s 28 of the HRA and the Committee refers the Assembly to this

analysis. In particular, the explanatory statement sets out the various safeguards in place to limit the risks to children involved with the scheme, including by requiring procedures be put in place to protect their welfare, health and safety, and providing protection from most forms of liability that might arise through participation in the scheme.

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 (S 21 HRA)

The compliance testing scheme provided for by the Bill also engages the right to a fair trial set out in s 21 of the HRA. The explanatory statement provides that this right is not limited by the operation of the scheme itself, but may be engaged when a licensee sells liquor to a child and is prosecuted for an offence under the Act. In those circumstances the trial of the offence could involve evidence gathered through the compliance testing scheme. The explanatory statement recognises the potential impact of the scheme on the right to a fair trial but suggests that the right is preserved through existing criminal procedures. The Committee also notes that any controlled purchase operation scheme can only be approved by the Minister if satisfied that persons involved in the test will be indistinguishable from other purchasers, will not lie to anyone about their age and will take place during normal business hours.¹⁰

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

RIGHT TO PRIVACY (S 12 HRA)

The Bill allows the Commissioner to impose a condition on a licensee that security cameras be fitted on or around licensed premises. Images recorded by such a security camera may be required to be given to the Commissioner or senior police officer where a contravention of the Liquor Act or breach of a licence condition is believed to have occurred.¹¹ These provisions allow for the reasonable expectations of privacy of individuals, including members of the public, using licensed premises.

The explanatory statement sets out the reasons why this interference cannot be considered unlawful or unreasonable in the circumstances using the framework set out in s 28 of the HRA and the Committee refers the Assembly to this analysis.

As the explanatory statement points out, the *Crimes Act 1900* (Cwlth) and the *Privacy Act 1988* (Cwlth) provide additional privacy protection. However, the Committee notes that this protection does not apply to all forms of interference with privacy. Some businesses with an annual turnover of less than \$3 million do not have to comply with the requirements of the Privacy Act, for example. The relationship between the Liquor Act and the *Workplace Privacy Act 2011* (ACT), including requirements relating to consultation and notice of the use of surveillance devices, is also not discussed in the explanatory statement.¹²

¹⁰ See clause 187D(2). These are some of the factors considered relevant to the fairness of adducing evidence obtained where an agent of the state induces the commission of an offence: see for example *R v Loosely* [2001] UKHL 53.

¹¹ See proposed s 145A.

¹² For a discussion of the use of surveillance devices in the ACT see Daniel Stewart, *Review of ACT Civil Surveillance Regulation Report - released for public comment in June, 2016*. See calls for submissions available at <http://justice.act.gov.au/review/view/45/title/review-of-civil-surveillance-in> (last accessed 20 April 2017).

The Committee notes that the Bill allows for regulations to prescribe requirements in relation to security cameras. However, there is no requirement that any regulations seek to provide additional privacy protection. In the Committee's view, additional regulation of the use of security cameras such as compliance with the Australian Privacy Principles would have involved a less restrictive interference with privacy while achieving the purposes of the Bill.

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

The right to privacy is also engaged by the provisions in the Bill requiring reports be provided to the Commissioner of any incidents involving various forms of violent, unlawful or anti-social behaviour at or in the immediate vicinity of licensed premises. The report must include the name, address and contact details of each person connected with the incident. This requirement replaces a previous requirement to maintain a register of incidents. The explanatory statement justifies this limitation of the right to privacy using the framework set out in s 28 of the HRA and the Committee refers this 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 (S 22 HRA)

The Bill provides for several new strict liability offences.¹³ A strict liability offence allows criminal liability to be established without establishing fault such as intention or recklessness. There are defences available to strict liability offences, including mistake of fact¹⁴ and an intervening conduct or event.¹⁵ However, the burden of raising these defences is placed on the defendant. Strict liability offences therefore limit the presumption of innocence protected in s 22 of the HRA.

The explanatory statement does not justify the removal of the fault element or otherwise recognise the limitation of the right to the presumption of innocence. The discussion in the explanatory statement of clause 72 recognises that the offence is one of strict liability but provides a general justification for the amendment. The discussion of the other clauses either does not provide even a general justification (clause 74) or fails to mention that the offence is one of strict liability at all (clause 73).

The Committee notes that the penalties of 10 and 20 penalty units involved with these new offences are within the range associated with strict liability offences.¹⁶ However, it is not clear whether strict liability is appropriate for all the new offences. The Justice and Community Safety Directorate, *Guide to Framing Offences* states that:

It is essential that strict liability offences are crafted to address unlawful behaviour in a context where the person knows, or ought to know, their legal obligations. A common sense rule of thumb is that strict liability is used only for 'regulatory' offences. Strict liability offences should not be framed to catch the general public for inadvertent breaches of the law.

¹³ See proposed s 138 (clause 72), s 139A (clause 73) and 143A (clause 74).

¹⁴ Criminal Code s 36 (and see s 23(1)(b)).

¹⁵ Criminal Code s 39 (and see s 23(3)).

¹⁶ See Justice and Community Safety Directorate, *Guide to Framing Offences*, available at http://www.justice.act.gov.au/resources/attachments/report_GuideforFramingOffences_LPB_2010.pdf.

The Committee recognises that proposed s 143A will only apply to licensees and permit holders who fail to display a sign having been directed by the Commission. It can therefore be considered regulatory in nature. However, proposed s 138 will make it an offence for a person to remain or re-enter the vicinity of premises after they had been refused admission or evicted from that premises under proposed s 143B. This is not a regulatory offence applying to a person who voluntarily accepts the potential for criminal liability in exchange for a licence or benefit. There is no obligation in s 143B or elsewhere for a person who is evicted or refused admission to be told that they might commit a criminal offence if they remain in the vicinity or attempt to re-enter the premises. The state of intoxication does not in itself prevent a fault element being established.¹⁷

Proposed s 139A will create a strict liability offence where a person takes liquor away after buying it at on licensed premises. While a licensee may be expected to know that they are subject to this offence and will therefore have to take steps to prevent purchasers from leaving the premises with liquor, individuals may not be aware of the potential criminal liability involved.

In the Committee's view, the limitation of the presumption of innocence involved with the use of strict liability offences requires justification in the explanatory statement using the framework set out in s 28 of the HRA. That justification should engage with the issues of whether the offence is suitable as a strict liability offence and not merely attempt to justify the offence generally.

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

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2017

This Bill amends various Acts and Regulations relating to planning, building and the environment. It proposes technical and editorial amendments, but includes amendments to the *Energy Efficiency (Cost of Living) Improvement Act 2012* which expands the range of bodies who can be provided with compliance information gathered under that Act.

***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 (S 12 HRA)

Currently the *Energy Efficiency (Cost of Living) Improvement Act 2012* allows the administrator of that Act to share information with non-territory agencies where that information relates to compliance with a law that has been adopted, applied, or incorporated through a determination made, or code of practice approved, under that Act. Clause 12 of the Bill allows information relating to a broader range of laws that relate to energy efficiency or greenhouse gas abatement to be shared. This will increase scrutiny of compliance with those laws and prevent double dipping by claiming benefits under multiple schemes.

¹⁷ See Division 2.3.3 of the Criminal Code.

Because the information able to be shared includes addresses, phone numbers and other forms of personal and private information, the right to privacy under s 12 of the HRA is engaged. The explanatory statement sets out why the release of personal information in these circumstances is appropriate, proportionate and justified and the Committee refers the Assembly to that analysis. In particular, the explanatory statement states:

The additional powers to release information introduced by this amendment are limited to the purposes of compliance with the EEI Act and energy efficiency or greenhouse gas abatement schemes in other jurisdictions. There are also limitations within the provision on the purposes for which information can be released and allows for the administrator to impose conditions on non-territory agencies on the use, storage and sharing of the information. These safeguards, combined with the protections in the Information Privacy Act 2014, ensure that appropriate checks remain in place for the release and use of this information.¹⁸

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

RED TAPE REDUCTION LEGISLATION AMENDMENT BILL 2017

This Bill amends various Acts and Regulations to, as set out in the explanatory statement, “address regulatory requirements that add unnecessary administrative and compliance costs for business, the community and government”.

***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 (S 22 HRA)

The Bill proposes two new strict liability offences: the *Agents Act 2003* will be amended to make it an offence for current licensed agents to fail to meet requirements to have trust money audited; and the *Environmental Protection Regulation 2005* will make it an offence to not comply with conditions for the preparation, sale or supply of firewood set out in proposed subregulation 14(2).

The explanatory statement recognises that the use of strict liability offences limits the presumption of innocence protected by s 22 of the HRA. It justifies the offences as a reasonable limit on that right using the framework provided by s 28 of the HRA. The Committee notes that the analysis includes discussion of: the regulatory nature of the offences and the importance of licensed agents and firewood merchants knowing their obligations; the penalties involved being (just) within the normal range (50 penalty units for licensed agents, 10 penalty units for firewood merchants); and the availability of various defences under the Criminal Code and common law for strict liability offences. 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.

¹⁸ At p 10.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2017-20 being the Court Procedures (Fees) Determination 2017 (No 1) made under section 13 of the *Court Procedures Act 2004* revokes DI2016-294 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-21 being the Public Place Names (Denman Prospect) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the names of 14 roads in the Division of Denman Prospect.

Disallowable Instrument DI2017-22 being the Electoral Commission (Chairperson) Appointment 2017 (No 1) made under section 12 of the *Electoral Act 1992* appoints a specified person as chairperson of the ACT Electoral Commission.

Disallowable Instrument DI2017-24 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 2) made under section 12 of the *Road Transport (General) Act 1999* declares that Australian Road Rule 2015 does not apply to a specified area, where time limited permissive parking signs apply, to support parking arrangements for AFL fixtures at Manuka Oval.

Disallowable Instrument DI2017-25 being the Official Visitor (Housing Assistance) Appointment 2017 made under section 10 of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the Housing Assistance Act 2007.

Disallowable Instrument DI2017-26 being the ACT Teacher Quality Institute Board Appointment 2017 (No 1) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* re-appoints a specified person as chair of the ACT Teacher Quality Institute Board.

Disallowable Instrument DI2017-27 being the ACT Teacher Quality Institute Board Appointment 2017 (No 2) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* re-appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing the Association of Independent Schools of the ACT.

Disallowable Instrument DI2017-28 being the ACT Teacher Quality Institute Board Appointment 2017 (No 3) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* revokes DI2016-220 and appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing the Archdiocese of Canberra and the Goulburn Catholic Education Office.

DISALLOWABLE INSTRUMENTS—COMMENT

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

MATTERS MORE APPROPRIATE FOR LEGISLATIVE ENACTMENT OR OTHER MORE SUBSTANTIVE ACTION?

Disallowable Instrument DI2017-18 being the Firearms (Use of Noise Suppression Devices) Declaration 2017 (No 1) made under section 31 of the *Firearms Act 1996* revokes DI2016-295 and declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.

Disallowable Instrument DI2017-19 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2017 (No 1) made under section 4L of the *Prohibited Weapons Act 1996* revokes DI2016-296 and determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.

These instruments revoke and re-make previous instruments that exempt the use of “noise suppression devices” (ie silencers) from prohibitions that would otherwise apply under the *Firearms Act 1996* and the *Prohibited Weapons Act 1996*. The instruments revoked (which were part of a series of instruments, revoked and re-made every 3 months) were the subject of a comment by the Committee in *Scrutiny Report 3* of the *9th Assembly* (14 March 2017). The basis of the Committee’s earlier comment (under principle (1)(d) of the Committee’s terms of reference) was whether the instruments may contain material that should properly be dealt with in an Act of the Legislative Assembly.

The Committee notes that the Minister for Police and Emergency Services responded to the earlier comment, in a letter dated 23 March 2017. The Committee notes that, in that response, the Minister advised that he intended “to introduce amendments to give legislative effect to the declarations in the Spring 2017 sittings of the Legislative Assembly”.

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

MINOR DRAFTING ISSUE

Disallowable Instrument DI2017-23 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2017 (No 1) 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 chair, and a specified person as a member, nominated by the Australian Medical Association, of the Medicines Advisory Committee.

This instrument appoints two specified persons to the Medicines Advisory Committee. The appointments are made under section 194 of the *Medicines, Poisons and Therapeutic Goods Act 2008*, which establishes the Medicines Advisory Committee, and section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, which sets out requirements for the membership of that committee. Section 635 provides:

635 Medicines advisory committee—membership

- (1) The medicines advisory committee consists of the following members appointed by the Minister:
 - (a) a chair;
 - (b) 6 other members.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

- (2) A person (other than a person mentioned in subsection (3) (d) or (e)) is not eligible for appointment to the medicines advisory committee unless the person is a doctor.

Note **Doctor** does not include an intern doctor (see dict).

- (3) The medicines advisory committee must include—

- (a) at least 1 member who has had experience in the teaching or practice of psychiatry; and
- (b) at least 1 member who has had experience in the teaching or practice of pain or addiction medicine; and
- (c) at least 1 member who is a general practitioner; and
- (d) 1 member who is a pharmacist; and

Note **Pharmacist** does not include an intern pharmacist (see dict).

- (e) 1 member who represents consumers; and
- (f) 1 member nominated by the Australian Capital Territory Branch of the Australian Medical Association.

- (4) However, for subsection (3) only, if the appointment of a member (a former member) is ended before the last day of the period for which the former member was appointed, the medicines advisory committee is taken to still include the former member until the earlier of—

- (a) 4 months from the day the former member's appointment ended; or
- (b) a member is appointed to replace the former member.

- (5) The instrument appointing, or evidencing the appointment of, a medicines advisory committee member must state whether the person is appointed as the chair, or as another member, of the committee.

One of the specified person is appointed under paragraph 635(1)(a) and the other is appointed under paragraph 635(1)(f). This means that, given the requirement in subsection 635(2), both of these specified persons must be doctors. The Committee notes that the person appointed under paragraph 635(1)(f) is referred to, in the explanatory statement for the instrument, as both “Dr” and “Mr”. However, the person is referred to as “Dr” in the instrument itself. The Committee assumes that this is the person’s correct designation.

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

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

Subordinate Law SL2017-4 being the Information Privacy Amendment Regulation 2017 (No 1) made under the *Information Privacy Act 2014* prescribes specified laws from New South Wales and Victoria as corresponding privacy laws.

This subordinate law amends the *Information Privacy Regulation 2014*, by inserting a new section 5A, that prescribes each of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Privacy and Data Protection Act 2014* (Vic) as a **corresponding privacy law**, for subsection 21(4) of the *Information Privacy Act 2014*. The effect of the amendment is to allow a public sector agency to enter into a government contract if the contract contains appropriate contractual provisions requiring the contracted service provider, and any subcontractor for the contract, to comply with a **corresponding privacy law**, rather than the Territory Privacy Principles (TPPs) or a Territory Privacy Principle code that applies to the public sector agency. The explanatory statement for the subordinate law states:

This will allow the ACT to engage sub-contractors operating in NSW and Victoria who are required to comply with the applicable legislation in those jurisdictions without requiring those sub-contractors to comply with another set of privacy legislation.

After discussing relevant features of the NSW and Victorian Acts in question, the explanatory statement then sets out the following discussion in relation to the human rights issues raised by the subordinate law:

Human rights implications

The regulation prescribes the privacy laws of Victoria and NSW as corresponding privacy laws within the meaning of the Act. The regulation engages the right to privacy (s 12, *Human Rights Act 2004*) and may be argued to limit that right.

The limitation on the right is justifiable given consideration of the following factors:

a) *the nature of the right affected*: the right to privacy is a fundamental right, but is not absolute and can be limited by clear legislative provision. In this case the legislative provision is in the *Information Privacy Regulation*, which clearly prescribes the Victorian and NSW privacy laws as corresponding privacy law for section 21 of the Act.

b) *the purpose of the limitation*: the purpose of prescribing the NSW and Victorian laws is to recognise privacy laws other than those of the ACT, increasing the flexibility of government agencies to contract with a broader range of service providers which comply corresponding privacy laws.

This enhances the ability of the ACT to deliver services to the community in a more efficient and economical way by drawing on existing service models delivered by subcontractors.

c) *the nature and extent of the limitation*: requiring service providers to comply with these laws, rather than the Act, will not substantially change the level of protection provided to personal information disclosed by ACT agencies for the purpose of the contracted service. The Act will continue to provide an avenue for complaints about interference with privacy done by the sub-contractor.

d) *the relationship between the limitation and its purpose*: the laws offer similar frameworks to that operating in the ACT for the protection of personal information. Referring to these laws will improve the flexibility of section 21 of the Act while ensuring that the privacy protections remain.

e) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*: the similarity to the ACT privacy laws, in operation and framework to these other jurisdictions means that an individual's privacy continues to be protected to the same extent.

The Committee draws the attention of the Legislative Assembly to the above explanation.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 6 April 2017, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instrument DI2016-294—Court Procedures (Fees) Determination 2016 (No 3).
- The Minister for Health, dated 18 April 2017, in relation to comments made in Scrutiny Report 3 concerning Disallowable Instruments:
 - DI2016-285—Public Health (Fees) Determination 2016 (No 1).
 - DI2016-286—Medicines, Poisons and Therapeutic Goods (Fees) Determination 2016 (No 1).
 - DI2016-287—Health Records (Privacy and Access) (Fees) Determination 2016 (No 1).
 - DI2016-288—Food (Fees) Determination 2016 (No 1).
 - DI2016-289—Radiation Protection (Fees) Determination 2016 (No 1).

A copy of these responses can be viewed online at <http://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

The Committee would like to thank the Attorney-General and the Minister for Health for their helpful responses.

Giulia Jones MLA
Chair

27 April 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 14 March 2017

Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2016 (No. 126/2016, dated 10 October 2016)