

To: Mr Gordon Ramsay MLA, Attorney-General

Subject: Draft of the COVID-19 Emergency Response Legislation Amendment Bill 2020



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

***Draft of the COVID-19 Emergency Response Legislation Amendment Bill 2020***  
***Scrutiny of Bills Committee Assistance in this matter before the Assembly tomorrow***

Reference is made to the attachments and the request in the email under relating to the above draft bill.

The Committee has directed I write in response to the matters raised in that email and attached materials. The response is to matters raised in the Attorney-General's letter to the Committee Chair of 1 May 2020.

The Committee has today resolved to respond to the Attorney-General's letter of 1 May 2020. The Committee resolved to provide the Attorney-General – and the Government – on this occasion with a copy of the advice on the draft bill provided to it by its legal adviser. This advice has also been copied to all members of the Assembly for information and consideration.

That advice is attached.

The Committee also wishes to highlight several matters for the Attorney-General's and the Government's attention –

- It is currently beyond the Committee's scope and predetermined role to comment on draft bills, or any other documents that may arise during the legislative process which is conducted prior to a bill's introduction – however administratively convenient that may be.
- The Committee's role is to scrutinise Bills as introduced after their introduction in the Assembly, and to report on them prior to debate so that Government may respond to considered comment on proposed legislation which contain effects, burdens or unintended consequences which need a public response and an explanation, bearing in mind Committee criteria.

- However, in the interests of achieving the best possible legislative outcome, the Committee agreed yesterday to release to the Attorney-General and members of the Assembly advice prepared for it by our legal adviser. If the Attorney-General or the Government choose to amend the Bill further, based on this advice, we have asked that the Committee be notified of such changes in order that the Committee's next report can take that into account.
- The COVID-19 Emergency Response Legislation Amendment Bill 2020 will be reported on in the Committee's next report to the Assembly, which may recommend that further consideration be given to amending the Bill or explanatory statement.

The Committee Chair, Mrs Jones MLA, is to make a statement to the Assembly pursuant to Standing Order 246A tomorrow, 7 May 2020, on this matter.

Please call or email me with any queries arising from this email.

6 May 2020

regards,

**Andrew Snedden**

Committee Secretary

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## COVID-19 EMERGENCY RESPONSE LEGISLATION AMENDMENT BILL 2020

### LEGAL ADVISER'S ADVICE

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On 1 May 2020 the Committee received a draft of the COVID-19 Emergency Response Legislation Amendment Bill 2020 and explanatory statement with the intention that it will be presented and debated on 7 May 2020. The Committee has considered the draft Bill on the basis that it substantially represents the Bill to be introduced to the Assembly, and offers the following comments in response.

#### DIFFERENT PERIODS OF OPERATION AND EXPIRY

The Bill will amend the operation of various Acts and Regulations in response to the COVID-19 public health emergency. The Bill builds on, and in some cases amends, the *COVID-19 Emergency Response Act 2020*, which was notified on the 7 April 2020. In its comments on the Emergency Response Bill, the Committee was concerned with the diverse periods provided in the Bill for the operation of the amendments. This draft Bill will address part of those concerns by amending provisions in the Emergency Response Bill which referred to the emergency period as the period during which the Public Health (Emergency) Declaration 2020 (No1) (NI2020-153), as extended or further extended, is in force. These references will generally be replaced under the draft Bill by reference to an emergency declared because of COVID-19 under either the *Emergencies Act 2004* or *Public Health Act 1997*.

However, the draft Bill, like the Emergency Response Bill, extends the period of operation of the amendments beyond such a declared emergency period for a different amount of time depending on the legislation being amended, and in some cases different periods are provided for within the same Act. The explanatory statement accompanying the draft Bill provides that the amendments will generally end after the emergency period or 12 months after the commencement of the Emergency Response Act (the Emergency response Act relevantly commenced on 8 April 2021). However, amendments to the *Children and Young People Act 2008* for example will operate variously for seven days, three months, or six months after the end of any COVID-19 emergency period. Amendments to the *Gaming Machine Act 2004* and the *Taxation Administration Act 1999* expire two years after the last emergency period.

While the explanatory statement provides a justification for the lengthy period of operation of amendments to the Gaming Machine Act, the length of other expiry periods are generally not justified. While the Committee recognises that different expiry periods may be justified given the nature of the amendments in question and the need for them to continue to operate after the emergency period, it would be preferable to have that justification provided in the explanatory statement.

#### *Long Service Leave Act 1976*

Justifying the period of expiry may also clarify the intended operation of the amendments. For example, it is currently a strict liability offence under section 6 of the *Long Service Leave Act 1976* for an employer to provide less than 60 days' notice to an employee of when they have to take long service leave. Amendments in the Emergency Response Act created an exception for leave taken during the COVID-19 emergency where agreed between the employer and employee. The draft Bill

will further amend this section to provide for the expiry of the exception on the first day no COVID-19 emergency is in place. It is not clear to the Committee how this exception is intended to operate if the emergency period ends prior to leave being taken or the leave period comes to an end. Given the draft Bill will also reinstate the exception allowing less than 60 days' notice where the employee agrees, it is not clear to the Committee why an agreement to take leave with less than 60 days' notice where, when agreed, the leave will be during the COVID-19 emergency, is not sufficient to fulfil the objectives of the amendment. The explanatory statement does not identify the substantive element of the amendment provided by the draft Bill nor justify immediate expiry of the COVID-19 exception provisions.

**The Committee therefore recommends that the explanatory statement be amended to justify the various expiry periods provided for in the Bill, and in particular to clarify the intended operation of clause [1.96] amending the Long Service Leave Act.**

#### NOTIFIABLE INSTRUMENTS

Many of the amendments in the draft Bill provide a framework, often quite broadly described, authorizing further instruments in which substantive as well as technical detail will be provided. In general, the amendments provide for the instrument to be disallowable and hence subject to scrutiny by this Committee and the Assembly. The Committee recognizes the need to provide for often-extensive delegations of legislative and substantial authority to respond quickly to the COVID-19 emergency, and it commends the Government for providing for scrutiny of these delegations.

However, the Committee is concerned that some important instruments are designated as notifiable rather than disallowable, with the result that while they are notified on the legislation register and available to the public, they are not subject to scrutiny and possible disallowance by the Assembly.

#### *Taxation Administration Act 1999*

In particular, amendments to the *Taxation Administration Act 1999* will provide for deferrals, exemptions or rebates relating to tax liabilities under a tax law. Generally, the Minister is able to determine a scheme setting out operational elements such as eligibility, the period of operation, amounts or liabilities in question. The schemes will also include details of information that the Commissioner may require to decide an application, which the explanatory statement accompanying the draft Bill recognizes as a potential limit on the protection of privacy under the Human Rights Act. In the case of deferrals and rebates, the rebate scheme may provide for any other relevant matter to be determined by the Commissioner by notifiable instrument. Through this sub-delegation to the Commissioner, important elements of the schemes will not be subject to scrutiny.

**The Committee therefore recommends consideration be given to removing this sub-delegation or designating the Commissioner's determinations as disallowable instruments.**

#### *Corrections Management Act 2007*

The draft Bill will amend the *Corrections Management Act 2007* to allow for detainees to leave a correctional centre when they are close to the end of their period of detention. This Director-General must consider whether the leave permit will support the security and good order in the correctional centre, helps reduce an outbreak or spread of COVID-19 and is otherwise appropriate. The explanatory statement accompanying the draft Bill recognizes that this may limit various rights protected under the *Human Rights Act 2004*, particularly the rights of victims of sentenced offenders

to security of person. The amendments will require the Director-General to consider the likelihood any victim or the victim's family will be subject to violence or harassment by the detainee, whether the detainee will have a suitable place to stay, and any guidelines made under proposed section 216G. These guidelines will be a notifiable instrument.

The explanatory statement recognizes the potential importance of these guidelines in protecting the human rights of both potential recipients of the leave and their victims and victims' families. They will be prepared in consultation with the ACT Human Rights Commission and made available in the correctional centre. The amendment will also require a statement in the guidelines that human rights have been considered. Public authorities are also under an obligation under section 40B of the Human Rights Act to act consistently with human rights.

The Committee recognizes that the guidelines do not determine rights and obligations under the leave scheme. However, the guidelines have to be considered in deciding any leave decision, and are important to the proportionality of any human rights impact that the amendments may have.

**The Committee recommends that consideration be given to providing for scrutiny of these guidelines through designating them as a disallowable instrument.**

#### *Crimes (Sentence Administration) Act 2005*

The draft Bill also provides for amendments to the *Crimes (Sentence Administration) Act 2005* which will enable a corrections officer to not report alleged breaches of intensive correction order obligations or parole obligations to the Sentencing Administration Board, or breaches of good behavior obligations to the sentencing court. The explanatory statement recognizes that these amendments may limit the right of victims of the breaches in question to security of person as protected under the Human Rights Act. As with the amendments to the Corrections Management Act, the likelihood of violence or harassment of victims or victims' families has to be taken into account. The Director-General will also produce guidelines, in consultation with the ACT Human Rights Commissioner and including a statement that human rights were considered, to ensure that only appropriate matters are found suitable for an administrative sanction. These guidelines will be a notifiable instrument, and will be available for inspection at correctional centres, but unlike in the Corrections Management Act there is no express legislative obligation to take the guidelines into account.

**Given the importance of the guidelines in ensuring the human rights compatibility of the amendments, the Committee recommends that consideration be given to making it explicit that they be considered in any decision to take administrative action under the amendments to the Crimes (Sentence Administration) Act, and that the guidelines be designated as disallowable instruments.**

#### *Associations Incorporation Act 1991*

The draft Bill also provides for amendments to the *Associations Incorporation Act 1991* to allow the Registrar-General, where it is appropriate because of a COVID-19 emergency, to declare a general extension of periods prescribed in that Act. This allows for general extensions of reporting and other deadlines imposed on incorporated associations or related persons without requiring a written application. Any such declaration would be a notifiable instrument. The Committee recognizes that this is largely a dispensation measure to reduce administrative burdens during the COVID-19 emergency, and that any application of the measure will have to be reported to the Assembly under the COVID-19 Emergency Response Act. However, the effect of the declaration is to amend the operation of the Act.

**The Committee recommends that consideration should be given to designating any declaration as a disallowable instrument.**

#### RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW

##### *Human Rights Commission Act 2005*

The draft Bill provides for amendments to the *Human Rights Commission Act 2005* to allow for investigation of complaints about the treatment of vulnerable people. A vulnerable person is defined as an adult who has a disability within the meaning of the *Disability Services Act 1991*, or is at least 60 years old and is affected by various disorders, illnesses, diseases or impairments or for any other reason is socially isolated or unable to participate in the life of the person's community.

It is not clear to the committee why 60 years of age was chosen in defining a vulnerable person. The explanatory statement accompanying the draft Bill includes a justification for various potential limits to human rights protected under the Human Rights Act presented by these amendments, but does not include a discussion of the potential limit to equality before the law.

**The Committee therefore recommends that a justification be provided for why vulnerability beyond a recognized disability is limited to a person at least 60 years old.**

#### STRICT LIABILITY OFFENCES AND RETROSPECTIVE OPERATION

##### *Payroll Tax Act 2011*

The explanatory statement accompanying the draft Bill includes a justification for the inclusion of a strict liability offence in inserting section 2.19B of Schedule 2 into the *Payroll Tax Act 2011* (clause [1.108]). Proposed section 2.19B will create an offence if an employer who was entitled to a jobseeker payment under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cwlth) but has that decision revoked fails to notify the Commissioner within 14 days of the revocation. While the nature and penalty (10 penalty units) of the offence may make it suitable for strict liability, in the absence of express provision in the offence strict liability will not apply.

**The Committee recommends that the explanatory statement be amended to make it clear that this provision is not a strict liability offence.**

The amendments to the Payroll Tax Act also include exempting Jobkeeper payments from payroll taxes. These provisions are taken to have commenced on 30 March 2020. They therefore have retrospective operation. The Committee recognizes that the provisions do not have a prejudicial effect.

**The Committee recommends that the fact of their retrospective operation should be recognized in the explanatory statement and a justification provided for the date of commencement.**

##### *Retirement Villages Act 2012*

The draft Bill will also amend the *Retirement Villages Act 2012* to extend the time in which an annual management meeting can be held and when an operator has to provide copies of the proposed annual budget. These amendments relate to what are currently strict liability offences. The Committee is concerned about the appropriateness of strict liability continuing to apply to those offences as amended.

Currently an annual management meeting must be held within four months of the end of the financial year. After the proposed amendments, during a COVID-19 emergency period the meeting must be held as soon as reasonably practicable after that time, having regard to any direction given in relation to the emergency and any current advice of the chief health officer. The Committee is concerned that it may be difficult to identify when it will be reasonably practicable to hold the meeting, particularly when the draft Bill also makes provision for residents committees or residents to authorize meetings be conducted by other means of communication.

Similarly, if, because of a COVID-19 emergency, it is not reasonably practicable for the residents to meet, consider and vote on the proposed annual budget, the operator need not provide the proposed annual budget as specified prior to the end of the financial year but must give the budget as soon as reasonably practicable, having regard to the same directions and advice. It is not clear to the Committee how it will be identified that it remains not reasonably practicable for the residents to meet, consider and vote on the proposed annual budget, particularly when the draft Bill also makes provision for residents committees or residents to authorize meetings of residents to be conducted by other means of communication. It is also not clear when it will be reasonably practicable to provide the budget, particularly given that there is an unclear relationship between the ability of the residents to meet and the practicalities of producing a budget for them to consider.

The Committee also notes that the amendment in relation to putting forward the annual budget refers to it not being reasonably practicable for residents to meet, consider and vote on the proposed budget under section 162(3)(a). That section provides that the operator must include a notice with the proposed budget stating that the operator must seek consent of the residents or an order from ACAT to spend the money. The Committee queries whether a reference to section 162(6)(a), which provides for residents to meet within 30 days after receiving the budget to consider and vote, was intended.

**The Committee therefore recommends reconsideration of the appropriateness of strict liability applying to the offences in the Retirement Villages Act as amended by the draft Bill, and that the explanatory statement accompanying the draft Bill be amended to recognize and justify that application of strict liability.**

#### EXPLANATORY STATEMENT

##### *Taxation Administration Act 1999*

The Committee notes that the explanatory statement accompanying the draft Bill, in describing the potential limitation of the right to privacy of amendments to the *Taxation Administration Act 1999*, refers to subsections 137B(3)(b) and 137E(d) rather than paragraphs 137D(3)(b) and 137F(3)(c).