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

SCRUTINY REPORT 18

29 MAY 2018

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
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 comments on them:

MAGISTRATES COURT (RETIREMENT AGE OF MAGISTRATES) AMENDMENT BILL 2018

This Bill will increase the mandatory retirement age for Magistrates from 65 to 70 years of age.

RESIDENTIAL TENANCIES AMENDMENT BILL 2018

This Bill amends the *Residential Tenancies Act 1997* to provide an improved framework for residential tenancy agreements. The Bill amends and clarifies provisions which disproportionately affect vulnerable tenants, including social housing tenants.

BILLS—COMMENT

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

CASINO AND OTHER GAMING LEGISLATION AMENDMENT BILL 2018

This Bill amends various legislation relating to the regulation of the casino and electronic gaming in the Territory, including: the establishment of a panel to make recommendations to the Minister relating to the casino; placing restrictions on gaming machines operated in close proximity to the casino; and extending the commencement of the new gaming machine trading scheme to be introduced by the *Gaming Machine (Reform) Amendment Act 2015*.

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)

Clause 9 of the Bill will amend the *Casino Control Act 2006* to establish a new Casino Advisory Panel. Panel members will be appointed by the Minister. New subsection 136E(3) sets out various circumstances which would prevent the Minister from appointing a person to the panel, including that the person or their partner has an interest in a business subject to trading law, has an association with another person which would affect their ability to function as a panel member, or been convicted of various offences. New section 136G will require panel members to disclose financial, personal or other interests that might conflict with their functions as panel members. These provisions therefore require the Minister to collect and use information relating to the personal affairs of potential panel members and their associates, limiting the protection against interference with privacy provided by section 12 of the HRA.

The explanatory statement sets out, using the framework provided in section 28 of the HRA, why the limitation on the right to privacy is a reasonable one that can be demonstrably justified in a free and democratic society. In particular, the explanatory statement provides:

> The provision of Panel members' personal information, including criminal history, is considered necessary and reasonable to ensure the integrity of the gambling industry in the Territory is maintained, and to minimise the risk of criminal and unethical behaviour influencing key decisions about the casino.

The Minister also faces various restrictions on the handling and disclosure of information obtained under these proposed provisions, including under Division 4.4 (Secrecy) of the *Gambling and Racing Control Act 1999*.

The Committee agrees with the assessment in the explanatory statement that the limitation of the right to privacy in the proposed provisions relating to the appointment of panel members is reasonable and refers the Assembly to that assessment.

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

The Bill also provides for the Panel to collect, and report on, information provided to assist the Panel in making recommendations to the Minister. The Minister must establish the Panel prior to making any of the decisions set out in the proposed section 136A, including approval or amendment of a casino lease, to grant or transfer a casino licence, or the conversion of restricted authorisations relating to gaming machines. The Panel can ask the Gaming and Racing Commission, the Planning and Land Authority, Chief Police Officer, a Commonwealth, State or Territory authority, or anyone else prescribed in legislation, for information to assist it to make a recommendation about the decision in question (proposed section 136B). Of those requested, the Commission, the Planning and Land Authority, Territory authorities and anyone else prescribed by regulation, is required, as far as practicable, to comply with the request (proposed section 136C), and are protected in doing so from any obligation of confidence and despite anything to the contrary in the law or agreement. Under proposed section 136I the Panel's report to the Minister will be tabled in the Legislative Assembly. However, any tabled report must not include information whose disclosure would be contrary to the public interest, as provided for in section 16 of the *Freedom of Information Act 2016*.

The Bill will therefore allow, and in some cases require, the disclosure of information to the Panel to assist it to make a recommendation to the Minister, and the tabling of some of that information to the Assembly. That information can include information relating to executive officers and other persons of influence of proposed casino licensees, including whether they have committed certain offences or been bankrupt or insolvent. The Bill will therefore limit the right against interference with privacy and reputation protected by section 12 of the HRA.

As the explanatory statement sets out, the ability to request or require information only applies to information relevant to making of a recommendation to the Minister and is not a general power to collect information. Unauthorised disclosure of information obtained by Panel members in their role will be restricted, including offences with maximum penalties of up to six months (under Division 4.4 of the Gambling and Racing Control Act). Sensitive personal information and, depending on whether on balance it may be disclosed, other personal information will not be included in any publicly available report.

Subject to the issue of allowing regulations to extend the range of bodies required to disclose information discussed below, the Committee therefore agrees with the assessment in the explanatory statement of the limitation on the right against interference with privacy, and refers the Assembly to that assessment.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Clause 29 of the Bill will introduce a new section 52A into the *Gaming Machine Act 2004*. This adds a condition to a licence relating to gaming machines that the licensee can't operate a gaming machine within 200m of the casino if they are related to the casino licensee. Breach of such a condition is a strict liability offence under section 39 of the Gaming Machine Act, which carries with it a maximum penalty of 100 penalty units. Clause 29 of the Bill therefore engages the right to the presumption of innocence protected under section 22 of the HRA.

As the explanatory statement sets out, the operation of gaming machines is a highly regulated activity. The added condition will generally apply to corporate entities, the subject of the offence can be expected to be within the knowledge of the licence holder, and the penalty of 100 penalty units, although higher than that normally accepted for strict liability offences,[1] reflects the potential impact of a breach of the condition and potential profits in the gaming industry. The Committee therefore agrees with the assessment in the explanatory statement that the imposition of a strict liability offence is a reasonable limitation on the right to the presumption of innocence and refers the Assembly to that assessment.

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

As discussed above, proposed section 136C requires various people or bodies to provide information to the Panel to assist it to make a recommendation. This includes (in proposed paragraph 136C(1)(d)) anyone else prescribed by regulation. The explanatory statement includes the following comment on this provision:

> While new section 136C(1)(d) provides for a Panel to request information from anyone else by regulation, the power in section 136C is also limited to requesting information from information holders that will assist the Panel to make a recommendation to the Minister about the relevant Ministerial decision under consideration—it is not a general power to request any information from anyone.
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> In addition, for the purpose of section 136C(1)(d), the Executive must make a regulation where information may be requested from someone else. As such, the regulation will be tabled and should the Legislative Assembly consider that it would be unreasonable for a Casino Advisory Panel to ask for information from the person set out in the regulation, the regulation could be disallowed.

While the Committee notes that any regulation will be subject to disallowance by the Assembly, any disallowance may not take effect until after the information in question has been required and provided. There is no stated restriction on who may be required to provide information—the explanatory statement, in discussing the human rights implications of this clause, refers to the information as "most likely held by the Gambling and Racing Commission and other Territory authorities" but does not suggest why it may be necessary for a broader range of informants to be prescribed. As this provision limits the right to protection against interference of privacy, and also

[1] The Justice and Community Safety Directorate's *Guide for Framing Offences*, 2010 provides for strict liability offences to generally carry a maximum 50 penalty units.

limits any duty of confidentiality imposed on the holder of the information, further justification is needed for providing the ability through regulations to extend the range of persons who may be required to provide information to the Panel.

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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2018

This Bill amends the *Children and Young People Act 2008* to allow a care and protection appraisal to be carried out without agreement from a parent or person with daily care responsibilities, to enable sub-delegation of functions of responsible persons, and other technical and 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 PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The Children and Young People Act provides for the voluntary and mandatory reporting of beliefs relating to abuse and neglect of children or young people (Division 11.1.2). If, after considering the report, the Director-General suspects on reasonable grounds that a child or young person may need care and protection (due to the child or young person being, having been or at risk of abuse or neglect) then they must take appropriate action (section 360(5)). In those circumstances the Director-General can carry out a care and protection appraisal of the child or young person's circumstances. An appraisal can include a visual examination, interview, giving or requesting information, making inquiries, and arranging for a professional assessment of a person, including the child or the parent.

Currently, an appraisal can only be carried out after the Director-General has taken reasonable steps to obtain the agreement to the appraisal of each parent or each other person with daily care responsibilities, unless it is not practicable or not in the interests of the child or young person to do so, and has obtained the agreement of at least one of them. Otherwise the Director-General needs to seek an appraisal order from the Childrens Court. The Director-General can also conduct a visual examination and interview the child or young person without the agreement of a parent or carer if the Director-General suspects on reasonable grounds that seeking agreement would be likely to put the child or young person at significant risk of abuse or neglect or jeopardise a criminal investigation (sections 370 and 371). There is also provision under the Children and Young People Act to transfer daily care and responsibility for the child to the Director-General, which would enable an appraisal to be carried out, in emergency situations where there is immediate need for care and protection, or to apply to the Childrens Court for a care and protection order.

The Bill proposes to amend the requirements relating to seeking agreement by removing the requirement to take reasonable steps to obtain agreement to the appraisal from each parent or carer. In the absence of an appraisal order, the Director-General must generally obtain the agreement of at least one parent or carer, and provide notice to the other parents or carers of the

appraisal. Notice to a remaining parent or carer is not required where it would not be in the best interest of the child or young person or not reasonably practicable to in the circumstances. The Director-General can conduct a visual examination and interview without the consent of any parent or carer whey they suspect obtaining agreement is not in the best interests of the child or young person or would be likely to jeopardise a criminal investigation. The changes mean that the Director-General no longer needs to try to obtain consent from each parent or carer before conducting an appraisal, and does not need to suspect that the child or young person is at significant risk of abuse or neglect before the Director-General could conduct a limited appraisal without agreement of any parent or carer.

By removing the need to seek consent from each parent or carer before conducting an appraisal and lowering the restriction on when an appraisal can be conducted without consent, the Bill limits the protection of the family provided by section 11 of the HRA. An appraisal also potentially interferes with a person's privacy, family and home protected under section 12 of the HRA. To the extent the Bill increases the circumstances in which an appraisal may be carried out without notice being provided to a parent or carer the Bill also limits procedural fairness requirements and the right to a fair hearing protected by section 21 of the HRA.

The explanatory statement accompanying the Bill sets out, using the framework provided by section 28 of the HRA, an assessment of the limitation of each of these rights by the Bill. The limitations are considered reasonable given the importance of the rights of children and young people to protection, the need to generally provide notice to all parents or carers, and the limited nature of the appraisal where agreement by at least one parent or carer was not available. The Committee generally agrees with that assessment and refers it to the Assembly. The Committee also notes that an appraisal is generally one step in identifying the need for care and protection of children and that other requirements must be met before coercive orders, whether through appraisal orders or taking emergency action, can be taken. Information gained during an appraisal is also protected against unauthorised use or disclosure under Chapter 25 of the Children and Young People Act.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The Committee notes that clause 18 of the Bill will insert a new section 514EA which will provide for the Director-General to revoke a person's approval as an approved carer after written notice of such an intention, an opportunity to make submissions, and consideration of any submissions, is provided. This provision therefore provides procedural fairness and fair hearing requirements as protected by section 21 of the HRA.

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

MEDICINES, POISONS AND THERAPEUTIC GOODS AMENDMENT BILL 2018

This Bill amends the *Medicines, Poisons and Therapeutic Goods Act 2008* and *Medicines, Poisons and Therapeutic Goods Regulation 2008* to establish a monitored medicines database.

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)

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

Schedule 8 of the medicines and poisons standard, established under the *Therapeutic Goods Act 1989* (Cwlth), lists various prescription only medicines which have additional restrictions placed on them to reduce misuse and dependence. The Medicines, Poisons and Therapeutic Goods Act and Regulations place various restrictions on who is authorised to prescribe, requisition, or order, supply, or conduct research involving these controlled medicines. The Chief Health Officer must be notified whenever a controlled medicine is supplied (Act, section 31), including providing details of who has prescribed or requested the supply of the medicine, and to whom it will be supplied (Regulations, sections 81 and 164).

The Bill will allow information relating to these controlled medicines, and other medicines declared by the Minister, to be maintained in a monitored medicines database. That information will be available to relevant health practitioners who are authorised to prescribe or supply controlled medicines, and other persons who are given access authority. The Bill will also require the date of birth of the person being supplied with controlled medicines to be reported and available on the database. By providing access to information relating to the ordering or supply of controlled medicines, including sensitive information of people being prescribed or supplied with controlled medicines, the Bill will limit the protection of privacy protected under section 12 of the HRA.

As set out in the explanatory statement, the Bill is an attempt to reduce the harmful effects of overuse of controlled medicines through increasing the information available to health authorities and others when prescribing or supplying such medicines, and to facilitate research into the provision of healthcare. There will be restrictions on who can access the information in the database and the purposes for which they can access it, and a range of offences introduced to enforce these restrictions. Inclusion of the date of birth will improve the ability to identify the persons involved to ensure the information is accurate and comprehensive. There are also various restrictions on who can access and use health records under the *Health Records (Privacy and Access) Act 1997,* and the Chief Health Officer is also subject to the *Information Privacy Act 2014*.

The explanatory statement also suggests that there will be various practical steps taken to limit the effect of the Bill's interference with privacy. These include use of an online disclaimer which must be acknowledged prior to accessing any information from the database, and limiting access to authorized individuals through use of unique usernames and passwords. Online forms will also be amended to ensure patients are informed by their treating health practitioner of the availability of their personal information on the database. However, the Committee is concerned that these important practical steps are not expressly provided for in the Bill.

The main purpose of the database, as set out in proposed section 97C, is to promote and protect public health and safety by ensuring that information is available to monitor and evaluate the supply of controlled medicines to a person and support the exercise of the Chief Health Officer's functions. However, the Bill will also allow regulations to prescribe additional purposes for the database. While any regulations would generally have to be consistent with the overall objective of the Act—to promote public health and safety relating to the use of regulated substances—the Committee is concerned with the lack of restrictions on adding to the purposes of the database.

The concern over additional purposes being added is enhanced by the role those purposes may play in other elements proposed by the Bill. The Bill allows for the Chief Health Officer to authorise access and use of information on the database by persons other than relevant health practitioners. An access authority, including conditions on access, can be issued when the Chief Health Officer is satisfied that it is consistent with a purpose of the monitored medicines database and otherwise in the public interest (proposed section 97G). Regulations can also prescribe information to be included in the database (proposed paragraph 97D(4)(e)) which would have to be consistent with the purposes of the database.

The Bill will also provide for the Chief Health Officer to enter into an arrangement with another jurisdiction or an "approved data source entity" to collect and store information for the database, allow access to information on the database, and allow the use and disclosure of information on the database. An approved data source entity is defined as an entity engaged by another jurisdiction to collect, store, access or otherwise deal with information about controlled medicines. The Committee acknowledges that in practice the collection and handing of personal information by any approved data source entity is likely to be regulated in some form, and that the chief information officer, in performing their functions, is also required under the Information Privacy Act and the HRA to take steps to protect against misuse of personal information and otherwise limit restrictions on privacy. However, the conditions on which personal information in the database will be added to and shared, including the possible purposes for such sharing, should be made clear.

The Committee, therefore, requests further information on how the practical steps set out in the explanatory statement to further protect the privacy of persons whose information is stored on the database will be enforced, why it is considered necessary to allow additional purposes of the database to be prescribed by regulation, and what restrictions, if any, will be required in any arrangement with approved data source entities to share information.

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

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 introduces three offences relating to access, use and disclosure of information on the database (proposed section 97H). In each of these offences strict liability will apply to whether a person accesses information from the database. As the imposition of strict liability displaces the onus on any prosecution to establish a mental element of the offence it engages the right to the presumption of innocence protected by section 22 of the HRA.

As the explanatory statement sets out, strict liability applies only to the element of the offences relating to access to information on the database. Awareness of the lack of authorisation to access information, or that the person has used or disclosed accessed information without authorisation, is still required. Access to the database would be able to be demonstrated through data logs of the database or other technical means. Defences for mistake of fact or intervening conduct or event would also be available under the Criminal Code.

The Committee agrees that health professionals should be aware of the restrictions placed on access to the information on the database. However, the Committee also notes that it is intended that information on the database will be protected through the need to acknowledge a disclaimer and through limiting access to authorized individuals through use of unique usernames and passwords. As discussed above in relation to protection of privacy, the Committee is concerned that these protections are not provided for in the Bill and requests further information on how these steps will be enforced.

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

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

Clause 14 of the Bill amends section 164 of the Regulation relating to information to be provided to the Chief Health Officer about controlled medicines supplied, but not administered, during a consultation. The clause is similar to the requirements relating to the information to be provided when controlled medicines are supplied in other circumstances as set out in section 81 of the Regulations and amended by clause 13 of the Bill. However, the explanatory statement does not include a description of clause 14.

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

OMBUDSMAN AMENDMENT BILL 2018

This Bill amends the *Ombudsman Act 1989* to extend mandatory reporting requirements to religious bodies, excluding conduct divulged in religious confession until 31 March 2019.

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)

Division 2.2A of the Ombudsman Act imposes obligations on various designated entities relating to reportable conduct (ie conduct engaged in by their employees that results in various forms of harm to children or offences relating to children). Entities must establish practices and procedures to deal with reportable conduct, and report to the ombudsman on allegations of reportable conduct and steps taken in response. The Ombudsman can monitor the practices and procedures of an entity and any investigation into reportable conduct, and can conduct their own investigation.

The Bill will amend the Ombudsman Act by adding religious bodies to the range of entities subject to reportable conduct requirements. Religious bodies means bodies established or operated for a religious purpose, operating under religious denominations or faiths, and which provide or provided activities, facilities, programs or services that are a means for people to have contact with children. Employees of religious bodies will include ministers or leaders of religion or officers of the body, persons engaged under a contract of employment, and other persons engaged to provide services.

The Bill will therefore require religious bodies to investigate and report on reportable conduct engaged in by its employees, including what may be highly personal details of its employees and children allegedly affected by the conduct. The Ombudsman is also authorised under the Ombudsman Act to disclose information relating to the safety, health or wellbeing of children to various bodies concerned with the protection of children (see section 34A). The amendments proposed in the Bill will also engage various provisions of the *Child and Young Persons Act 2008* which allow designated entities under the Ombudsman Act to request and share information with other designated entities and certain bodies concerned with protection of children. The Bill therefore limits the protection of privacy protected under section 12 of the HRA.

As the explanatory statement set out, the right to privacy is limited in the interests of protecting children from abuse and mistreatment. The explanatory statement includes reference to the findings of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse[2] and its recommendations relating to the extension of reporting requirements to religious bodies. The Committee accepts the assessment in the explanatory statement of the reasonableness of the limitation on the right to privacy by the Bill and refers the Assembly to that assessment.

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

RIGHT TO PROTECTION FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT (SECTION 10 HRA)

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

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

The Bill will impose obligations on religious bodies to comply with reportable conduct requirements under the Ombudsman's Act. That may involve disclosure of personal details of persons engaged by those bodies, including volunteers. The Act therefore imposes obligations, in part at least, based on religious denomination or belief, limiting the right to freedom of religion and belief protected by section 14 of the HRA.

From 31 March 2019, the Bill will also impose a requirement that religious bodies disclose information otherwise protected by the tradition of religious confession—relevant, as stated in the explanatory statement:

> to the adherents of Judaism, and other Christian churches including the Catholic, Anglican, Orthodox and Lutheran Churches. In particular, Catholic Canon Law forbids the disclosure, by word or manner and for any reason, that which is disclosed in religious confession.

The Bill will insert a new section 52 into the Ombudsman Act as a transitional provision. Subsection 52(1) will state:

> An express assertion that reportable conduct has happened is not a reportable allegation for division 2.2A (Reportable conduct) if the assertion was made as a religious confession.

A religious confession is defined in the same way as in section 127 of the Evidence Act. The provision will expire on 31 March 2019. The effect of this provision is that religious organisations are not under any obligation to report allegations of reportable conduct if it was made as part of a religious confession.

[2] The report is available at https://www.childabuseroyalcommission.gov.au/final-report (accessed 23/5/2018).

The explanatory statement recognises the competing rights involved in extending the reportable conduct scheme to religious organisations to include information divulged during religious confessions. The Bill is primarily intended to address recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission commented on the contribution of the tradition of religious confession, in several institutions, to the occurrence of child sexual abuse and inadequate institutional responses (in volume 16). They recommended:

> that there should be no exemption to obligations to report under mandatory reporting laws or the proposed 'failure to report' offence in circumstances where knowledge or suspicions of child sexual abuse are formed on the basis of information received in or in connection with a religious confession (Recommendation 7.4 and Recommendation 35).

As set out in the explanatory statement, it is this need to protect the safety, welfare or wellbeing of children that justifies the limitation of religious freedom imposed by the Bill.

However, the explanatory statement includes the following description of the importance of confidentiality of information disclosed in religious confession in justifying excluding allegations made in confessions from the reportable conduct scheme until 31 March 2019:

> Religious confidentiality is vitally important to the maintenance of religious organisations as well as to their individual members. An atmosphere of trust, made possible by the knowledge that communications made in secret will remain secret, is the keystone of strong clergy-communicant relationships which are in turn the cement that holds many religious organisations together. In a very real sense, then, the value of religious confidentiality is the value to society of religion and religious organisations generally.
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> These societal interests are intuitively compelling, if they acknowledge a privilege in those uncommon situations where the confidentiality of a relationship is so fundamental that breaching it would do more harm than good to society. In those circumstances, public policy would be promoted at the cost of the search for truth.

The explanatory statement also suggests there is evidence that other elements of religious institutions, such as governance and legal structures, also contributed to the heightened risk of child abuse, and that measures to address these and other elements of the Royal Commissions findings were being taken by local institutions. However, the explanatory statement recognises that exclusion of religious confessions from the reportable conduct scheme will still potentially put children and young people at risk. The Bill therefore limits the rights to protection from torture and cruel, inhuman or degrading treatment in section 10 of the HRA, and protection of the family and children in section 11 of the HRA.

It is not clear to all members of the Committee why excluding religious confessions should be considered a reasonable limitation of rights and interests relating to the care and wellbeing of children until 31 March 2019, but not thereafter. The explanatory statement provides that excluding religious confessions from the scheme will allow "time for further discussions in a national context and ongoing consultation with key local stakeholders" and "to ensure that public consultation and further policy development is conducted, prior to introducing statutory provisions that will have a profound and lasting impact on the free exercise of religion". "[F]urther policy development and consultation is necessary in order to inform possible changes that would see religious confession subject to the scope of the Scheme". If that is the case, then the Committee is concerned that including religious confessions within the scope of the reportable conduct scheme should be delayed until that policy development and consultation is concluded. The Bill instead proposes a default position of excluding religious confession at an arbitrary future date subject to introduction of future

amending legislation. The Committee therefore requests further information be provided for why religious confessions have been excluded from the scope of the scheme only until 31 March 2019.

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

The explanatory statement for the Bill states that the purpose of extending the protection of confidentiality of religious confessions is, in part, to "address the tension between section 11 of the Ombudsman Act and section 127 of the Evidence Act …".

Information disclosed during a religious confession is currently protected from being disclosed under section 127 of the *Evidence Act 2011*.[3] That section applies even where rules of evidence are stated as not applicable, or where a person is excused from providing information on the ground of privilege "or any other ground". It has also been generally accepted that very clear intention would have to be evident in legislation before it will be interpreted as interfering with religious equality.[4]

However, once subject to reportable conduct requirements, religious bodies will be subject to investigation by the Ombudsman, and may be required under section 11 of the Ombudsman Act to produce information believed by the Ombudsman to be relevant to an investigation. Section 11 is expressed as applying "notwithstanding the provisions of any enactment" (subsection 11(5)). Information must be provided even if it would contravene the provisions of any other enactment but would not be admissible in evidence against the person except in very limited proceedings.[5] The Ombudsman is also able to disclose information to a child, parent or carer (section 17L), a provision which is also expressed as applying "despite any territory law to the contrary." There is therefore some uncertainty over whether the Ombudsman's powers of investigation would include the ability to compel a minister of religion to divulge information obtained during a religious confession and to disclose that information as part of the investigation.

The proposed section 52 will exclude allegations made during religious confessions from being a reportable allegation. That means that the various obligations to be imposed on religious organisations relating to reportable allegations—including establishing practices and procedures to deal with reportable conduct, and reporting to the ombudsman on allegations of reportable conduct and steps taken in response—do not have to be taken if the only allegation of reportable conduct arises during religious confession. Similarly, the Ombudsman's power to conduct an investigation does not arise until there has been a reportable allegation (section 17K). However, once an allegation of reportable conduct has been made outside of confession, the obligations and powers under the Ombudsman's Act apply, including the power under section 11 of the Ombudsman Act to require information be provided.

Therefore, it is not clear how the proposed section 52 will resolve the tension between section 11 of the Ombudsman Act and the confidentiality of information divulged during religious confession when allegations of reportable conduct have been made outside of that context. The Committee requests that the Minister clarify whether the Bill is intended to entirely exclude religious confessions from the scope of section 11 of the Ombudsman Act as suggested by the explanatory statement.

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

[3] Which replicates the provision in the *Evidence Act 1995* (Cwlth)
[4] *Canterbury Municipal Council v Moslem Alawy Society Ltd* [1985] 1 NSWLR 525.
[5] The information would only be admissible in proceedings to compel the provision of the information or in proceedings for providing false or misleading information.

VETERINARY PRACTICE BILL 2018

This Bill repeals the *Veterinary Surgeons Act 2015* and replaces it with a new scheme of occupational regulation for veterinary surgeons.

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 provide for inspectors to be appointed with various powers, including entering premises without consent at any time if the inspector believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises without authority of a search warrant is necessary (clause 112), to take copies of documents, videotape the premises, seize property, and require assistance or answers to questions as is reasonable (clause 115), and require name and address details (clause 116). These powers of inspection therefore limit the protection against interference with privacy protected by section 12 of the HRA.

The explanatory statement, in both a general statement on human rights implications of the Bill and a more specific discussion of clause 112, provides a justification for the Bill's limits on privacy, including the regulatory nature of the inspections, the need to enforce obligations intended to protect public health and animal health and welfare, and the protections built into[6] or not affected by[7] the Act. The Committee refers the Assembly to that assessment.

The Committee notes that generally any assessment of the human rights compatibility of proposed legislation, particularly when setting out the elements of the framework provided in section 28 of the HRA, should be provided in a separate section of the Bill rather than included in discussion of individual clauses to improve access to and understanding of that assessment.

The Committee also notes that several other aspects of the Bill may limit the protection against interference with privacy. Proposed Division 9.1 will establish a publicly accessible register which will include name, address, qualifications and other prescribed details of veterinary practitioners (see clause 124). Division 5.3 provides for dealing with complaints about the misconduct of veterinary practitioners, and provides the Board with powers to require a person to appear to give evidence, answer any relevant question, or produce documents. Information in relation to a complaint can be provided by the Board to the Chief Police Officer (clause 62). The explanatory statement should acknowledge these potential limitations on the right to protection of privacy, particularly the publication of residential addresses, and provide an assessment of why they are compatible with the HRA.

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

[6] For example the protection against unauthorised use of protected information under section 135.
[7] For example, the privilege against self-incrimination reflected in section 170 of the *Legislation Act 2001*

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

CREATION OF OFFENCES BY REGULATION

Clause 146 will enable regulations to prescribe offences for contraventions of a regulation and prescribe maximum penalties of not more than 30 penalty units. The Committee is concerned that there is no justification provided for why offences, even where subject to maximum penalties of only 30 penalty units, can be created through regulations rather than provided for in the Act itself.

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

HENRY VIII CLAUSE

Clause 211 provides for transitional regulations. It 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 provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

This clause enables the executive, through regulation, to modify both the proposed legislation but also other territory legislation for the transition period (ie two years—clause 212).

The explanatory statement provides that this clause:

> allows provision for anything that in the Executive's opinion is not or is not adequately or appropriately dealt with in this part of the bill. This allows for a legislative solution to unforeseen consequences in transitioning to the new Act.

The Committee recognises that unforeseen consequences may arise in transitioning to a new Act, particularly where, as in this case, a new regulatory regime is being introduced. However, the Committee notes that the Bill has gone through extensive periods of development and consultation and adopts template regulatory provisions from other similar regulatory schemes. Broad delegations of legislative power, including the power to amend other territory legislation, such as this should be justified through more than just general references to the need to address unforeseen consequences.

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

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

DISPLACEMENT OF S 47(6) OF THE LEGISLATION ACT 2001

Clause 42 requires the Veterinary Practitioners Board established by the Bill to establish a code of conduct for veterinary practitioners. Non-compliance with that code can lead to disciplinary action being taken, including suspension or cancellation of registration as a veterinary practitioner. The

code is a notifiable instrument, meaning that it is subject to the notification requirements under the *Legislation Act 2001.* Under subclause 42(2), the code of conduct may "apply, adopt or incorporate an instrument as in force from time to time". However, under subclause 42(5), subsection 47(6) of the Legislation Act does not apply to any such instrument. This has the effect of not requiring notification, and hence publication on the ACT Legislation Register, of any instrument applied, adopted or incorporated into the code of conduct.

The Committee is concerned that instruments which potentially can affect an individual's rights and obligations should be publicly available. The Committee recognises that the incorporation of instruments will primarily affect veterinary practitioners who are subject to the requirements of the code of conduct. However, those practitioners and members of the public who can expect, and complain about, compliance with the code, should have ready access to the standards required. Further justification is needed for why it is necessary to incorporate other instruments, particularly as they apply from time to time, and how appropriate access to those instruments will be provided.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-52 being the Public Pools (Active Leisure Centre Fees) Revocation 2018 made under section 54 of the** *Public Pools Act 2015* **revokes DI2017-175.**
- **Disallowable Instrument DI2018-54 being the Children and Young People (Death Review Committee) Deputy Chair Appointment 2018 (No 1) made under section 727EA of the** *Children and Young People Act 2008* **appoints a specified person as deputy chair of the Children and Young People Death Review Committee.**
- **Disallowable Instrument DI2018-55 being the Children and Young People (Death Review Committee) Appointment 2018 (No 2) made under section 727D of the** *Children and Young People Act 2008* **appoints a specified person as a member of the Children and Young People Death Review Committee.**
- **Disallowable Instrument DI2018-56 being the Utilities (Water and Sewerage Network Boundary Code) Revocation 2018 made under section 59 of the** *Utilities Act 2000* **and section 46 of the** *Legislation Act 2001* **revokes DI2013-73.**
- **Disallowable Instrument DI2018-62 being the Utilities (Technical Regulation) (Water and Sewerage Network Boundary Code) Approval 2018 made under section 14 of the** *Utilities (Technical Regulation) Act 2014* **approves the Water and Sewerage Network Boundary Code, March 2018.**
- **Disallowable Instrument DI2018-63 being the Public Place Names (Wright) Determination 2018 made under section 3 of the** *Public Place Names Act 1989* **determines the names of 11 roads in the Division of Wright.**
- **Disallowable Instrument DI2018-65 being the Road Transport (Public Passenger Services) Rideshare Services—Service Standards 2018 (No 1) made under section 20B of the** *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2016-202 and sets the Service Standards for Rideshare Services.**

- **Disallowable Instrument DI2018-67 being the Road Transport (Public Passenger Services) Taxi Services—Service Standards 2018 (No 1) made under section 20B of the** *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2016-204 and sets the Service Standards for Taxi Services.**
- **Disallowable Instrument DI2018-68 being the Road Transport (Public Passenger Services) Hire Car Services—Service Standards 2018 (No 1) made under section 20B of the** *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2016-208 and sets the Service Standards for Hire Car Services (including restricted hire car services).**
- **Disallowable Instrument DI2018-82 being the Financial Management (Transfer of Funds from Capital Injection Appropriation to Other Appropriations) Approval 2018 (No 1) made under paragraph 14A(2)(b) of the** *Financial Management Act 1996* **transfers Capital Injection (Territorial) appropriation to Payments on Behalf of the Territory appropriation.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

ON WHAT BASIS IS THIS PERSON APPOINTED?

Disallowable Instrument DI2018-53 being the Domestic Violence Agencies (Council) Appointment 2018 (No 1) made under section 6 of the *Domestic Violence Agencies Act 1986* **appoints a specified person as a community member of the Domestic Violence Prevention Council.**

This instrument appoints a specified person as a community member of the Domestic Violence Prevention Council. The appointment is made under section 6 of the *Domestic Violence Agencies Act 1986*, which provides:

6 Membership of council

(1) The council consists of—

(a) the coordinator; and

(b) 12 other members (each of whom is an appointed member) appointed by the Minister.

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

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act s 207).

Note 3 Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) The appointed members must consist of—

(a) at least 6 people as community members, including—

(i) at least 1 person who the Minister considers is capable of representing the views and interests of people of Aboriginal and Torres Strait Islands descent; and

(ii) at least 1 person who the Minister considers is capable of representing the views and interests of people of non-English speaking background; and

(iii) at least 1 representative of the Domestic Violence Crisis Service Incorporated; and

(b) other people who are—

(i) statutory office holders; or

(ii) public servants; or

(iii) police officers.

(3) The instrument making or evidencing the appointment of a person as an appointed member must state the capacity in which the person is appointed.

(4) The Minister may appoint a person to the council as a community member only if the Minister considers that the person is familiar with the views and interests of the community on matters relating to family violence and is capable of representing those views and interests.

(5) The Minister may appoint a statutory office holder to the council only if satisfied that the exercise of the functions of the office requires its holder to have experience and expertise that would assist the council to exercise its functions.

(6) The Minister may appoint a public servant or police officer to the council only if—

(a) the person has a position the functions of which involve dealing with matters that are relevant to a function of the council; and

(b) the Minister considers that the person has the experience and expertise that would assist the council to exercise its functions.

The explanatory statement for the instrument states:

> In accordance with section 6(3) of the Act, this instrument states the capacity in which the person is appointed. The Minister is satisfied that the appointee is familiar with the views and interests of the community on matters relating to domestic violence and is capable of representing those views and interests.

However, the Committee notes that the instrument merely states that the specified person is appointed as a "community member". It does not indicate that the Minister considers that the person is familiar with the views and interests of the community on matters related to family violence and is capable of representing those views and interests for subsection 6(3). For example, is the specified person "capable of representing the views and interests of people of Aboriginal and Torres Strait Islands descent" or "capable of representing the views and interests of people of non-English speaking background" for paragraphs 6(2)(a)(i) or (ii). The explanatory statement does indicate that the person is not a public servant, meaning that paragraph 6(2)(b)(ii) would not apply.

The Committee draws the attention of the Legislative Assembly to this instrument, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee, contrary to principle (2) of the Committee's terms of reference, and asks the Minister to respond.

This comment requires a response from the Minister.

ARE THESE DISALLOWABLE INSTRUMENTS?

- **Disallowable Instrument DI2018-57 being the Racing Appeals Tribunal Appointment 2018 (No 1) made under section 40 and Schedule 1, section 1.1 of the** *Racing Act 1999* **appoints a specified person as the President of the Racing Appeals Tribunal.**
- **Disallowable Instrument DI2018-58 being the Racing Appeals Tribunal (Assessor) Appointment 2018 (No 1) made under section 42 and Schedule 2, section 2.1 of the** *Racing Act 1999* **appoints a specified person as an Assessor of the Racing Appeals Tribunal.**
- **Disallowable Instrument DI2018-59 being the Racing Appeals Tribunal Appointment 2018 (No 2) made under section 40 and Schedule 1, section 1.1 of the** *Racing Act 1999* **appoints a specified person as the Deputy President of the Racing Appeals Tribunal.**
- **Disallowable Instrument DI2018-60 being the Racing Appeals Tribunal Appointment 2018 (No 3) made under section 40 and Schedule 1, section 1.1 of the** *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**
- **Disallowable Instrument DI2018-61 being the Racing Appeals Tribunal Appointment 2018 (No 4) made under section 40 and Schedule 1, section 1.1 of the** *Racing Act 1999* **appoints a specified person as a member of the Racing Appeals Tribunal.**

The first instrument mentioned above appoints a specified person as the President of the Racing Appeals Tribunal. The appointment is made under section 40 and section 1.1 of Schedule 1 to the *Racing Act 1999*.

The explanatory statement for the instrument states

> Section 229 of the *Legislation Act 2001* provides that the instrument is a disallowable instrument.

However, the explanatory statement does not address the issue as to whether or not the *Legislation Act 2001* does not apply to the appointment of the specified person, because of the operation of paragraph 227(2)(a) of the Legislation Act, which excludes the appointment of public servants to statutory positions from the requirements of Division 19.3.3 of the Legislation Act (including the requirement that appointments be made by disallowable instrument). It is for this reason that the Committee has consistently requested that explanatory statements relating to statutory appointments include a statement to the effect that "this is not a public servant appointment".

The second instrument mentioned above appoints a specified person as an "assessor", under section 42 and section 2.1 of Schedule 2 to the Racing Act. The third, fourth and fifth instruments mentioned above appoint specified persons as Members of the Racing Appeals Tribunal, under section 40 and section 1.1 of Schedule 1 to the Racing Act. The explanatory statements for the instruments contain the same statement quoted above, in relation to the first instrument. In each case, neither the instrument nor the explanatory statement for the instrument addresses the issue of whether or not the specified person is a public servant.

The Committee draws the attention of the Legislative Assembly to the instruments mentioned above, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee, contrary to principle (2) of the Committee's terms of reference.

The Committee seeks the Minister's confirmation that, for each instrument mentioned above, the specified person is <u>not</u> a public servant, for the purposes of paragraph 227(2)(a) of the *Legislation Act 2001*.

This comment requires a response from the Minister.

MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2018-64 being the Road Transport (Public Passenger Services) Demand Responsive Services—Service Standards 2018 (No 1) made under section 20B of the** *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2016-207 and sets the Service Standards for Demand Responsive Services.**
- **Disallowable Instrument DI2018-66 being the Road Transport (Public Passenger Services) Bus Services—Service Standards 2018 (No 1) made under section 20B of the** *Road Transport (Public Passenger Services) Regulation 2002* **revokes DI2016-268 and sets the Service Standards for Bus Services.**

The two instruments mentioned above are a part of a suite of instruments that the Committee has considered for this Scrutiny Report that make new service standards for services regulated under the ACT's road transport legislation. In each case, the instrument is made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002*.

The first instrument mentioned above applies to "Demand Responsive Services" (DRS), defined in section 81 of the *Road Transport (Public Passenger Services) Act 2001* as "a public passenger service that a person may operate under an authorisation given for [Part 8 of that Act]". Part 8 of the instrument sets minimum service standards for driving hours and rest periods for bus drivers. Section 8.1 provides (in part):

> 8.1 If a vehicle to be used for the DRS is a bus, the Operator of a DRS must:
>
> (1) develop rosters that allow DRS vehicle drivers employed or otherwise utilised to comply with the following driving and rest hours:
>
> (a) time period of **5 &½** hours – a minimum of 30 minutes rest, either in one period of 30 minutes or two 15 minute periods;
>
> (b) time period of 24 hours – a maximum of 12 total driving hours with a minimum of 12 total rest hours which must include one continuous period of 8 hours rest;
>
> (c) time period of 168 hours (1 week) – a maximum of 72 total driving hours;
>
> (d) time period of 672 hours (4 weeks) – a minimum of 384 rest hours which must include continuous rest periods of:
>
> - 4 X 24 hours, or
> - 1 X 72 plus 1 X 24 hours, or
> - 2 X 48 hours, or
> - 1 X 96 hours;

The reference to "5 &½ hours", in paragraph 8.1(1)(a) above, presumably refers to 5½ hours. If that is correct, the Committee suggests that the use of "5 &½ hours" is less-than-ideal drafting.

The Committee notes that the same issue arises in paragraph 5.1(1)(a) of the second instrument mentioned above.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—COMMENT

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

STRICT LIABILITY OFFENCES

Subordinate Law SL2018-2 being the Work Health and Safety Amendment Regulation 2018 (No 1) made under the *Work Health and Safety Act 2011* **adopts chapters 7 and 9 of the national model Work Health and Safety Regulation, which govern the use, storage and handling of hazardous chemicals.**

This subordinate law amends the *Work Health and Safety Regulation 2011*, to insert into that subordinate law (among other things) a new Chapter 7, dealing with hazardous chemicals, and a new Chapter 9, dealing with "major hazard activities". The explanatory statement for the subordinate law states:

> The purpose of this Amendment Regulation is to adopt chapter 7 and chapter 9 of the national model Work Health and Safety Regulation (the model regulation), which govern the use, storage and handling of hazardous chemicals.
>
> The importance of harmonisation of work safety legislation has long been recognised as a critical area of regulatory reform, and is a key priority of the Council of Australian Governments' national reform agenda.
>
> In July 2008, the Commonwealth and each of the states and territories signed the Inter-Governmental Agreement for Regulatory and Operational Reform in OHS (IGA), which commits jurisdictions to implement model laws which comprise a national model Work Health and Safety Act, model Regulations and model Codes of Practice.
>
> On 29 September 2011, the Legislative Assembly passed the Work Health and Safety Act 2011 (the WHS Act), which gave effect to the Territory's commitment under the IGA. On 1 January 2012, the WHS Act and the supporting Work Health and Safety Regulation 2011 (the WHS Regulations) came into effect in the Territory.
>
> At that time, the WHS Regulation did not adopt chapter 7 (Hazardous Chemicals), chapter 8 (Asbestos) or chapter 9 (Major Hazard Facilities) of the model regulation, and these matters continued to be regulated under the Territory's dangerous substances legislation.
>
> Subsequently the Territory has incorporated the national model asbestos regulations into its work health and safety framework – this came into effect on 1 January 2015.
>
> This Regulation will now adopt remaining chapters of the model regulations into the Territory's WHS Regulations.

The explanatory statement then sets out over two pages of discussion in relation to "human rights considerations" relevant to the subordinate law. The only human right discussed is the right to privacy and reputation, protected by section 12 of the *Human Rights Act 2004*.

The subordinate law contains over 100 offences to which strict liability applies. An example is new section 329 of the Work Health and Safety Regulations, which provides:

329 Classification of hazardous chemicals

The manufacturer or importer of a substance, mixture or article must, before first supplying it to a workplace—

(a) determine whether the substance, mixture or article is a hazardous chemical; and

(b) if the substance, mixture or article is a hazardous chemical—ensure that the hazardous chemical is correctly classified in accordance with schedule 9, part 9.1 (Correct classification).

Maximum penalty:

(a) in the case of an individual—$6 000; or

(b) in the case of a body corporate—$30 000.

Note Strict liability applies to each physical element of each offence under this regulation, unless otherwise stated (see s 6A).

The Committee has consistently taken the view that strict liability offences need to be justified. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*[8], 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 that the explanatory statement for this subordinate law contains no justification for the various new offences created by the subordinate law needing to be offences of strict liability. In addition, the Committee notes that, under the "Human Rights Considerations" heading, there is no discussion of the implications of the new strict liability offences for the right to be presumed innocent in criminal proceedings, contained in subsection 22(1) of the Human Rights Act.

The Committee draws the attention of the Legislative Assembly to this subordinate law, on the basis that it may unduly trespass on rights previously established by law, contrary to principle (1)(b) of the Committee's terms of reference.

[8] https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

The Committee also draws the attention of the Legislative Assembly to this subordinate law, on the basis that the explanatory statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee, contrary to principle (2) of the Committee's terms of reference.

This comment requires a response from the Minister.

STRICT LIABILITY OFFENCES—POSITIVE COMMENT

Subordinate Law SL2018-3 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2017 (No 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* **and** *Road Transport (General) Act 1999* **creates a new requirement for drivers approaching and passing stationary or slow moving police or emergency vehicles displaying flashing red or blue lights a roadside incident.**

While it is not evident from the face of the subordinate law, this subordinate law creates a new strict liability offence for failing to slow down while passing an emergency or police vehicle. The explanatory statement helpfully states:

> The regulation creates a new offence of failing to slow down while passing an emergency or police vehicle. While the regulation itself does not prescribe the offence to be a strict liability offence, section 4B of the Principal Regulation provides that all offences in the Principal Regulation are strict liability offences. This results in the offence in new section 59 being a strict liability offence. An assessment of the regulation against section 28 is provided below.

The explanatory statement then contains a page of discussion of the use of strict liability offences, by reference to the right to be presumed innocent in criminal proceedings, contained in subsection 22(1) of the *Human Rights Act 2004*. The discussion also 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*[9], 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.

[9] https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

GOVERNMENT RESPONSES

- The Minister for the Environment and Heritage, dated 3 May 2018, in relation to comments made in Scrutiny Report 16 concerning Disallowable Instrument DI2018-20—Nature Conservation (Lower Cotter Catchment) Reserve Management Plan 2018 (No 1).

  This response[10] *can be viewed online.*

- The Minister for Justice, Consumer Affairs and Road Safety, dated 9 May 2018, in relation to comments made in Scrutiny Report 17 concerning the Road Transport Reform (Light Rail) Legislation Amendment Bill 2018 and the Justice and Community Safety Legislation Amendment Bill 2018.

- The Treasurer, dated 11 May 2018, in relation to comments made in Scrutiny Report 17 concerning the Land Tax Amendment Bill 2018.

  These responses [11]*can be viewed online.*

The Committee wishes to thank the Minister for the Environment and Heritage, the Minister for Justice, Consumer Affairs and Road Safety and the Treasurer for their helpful responses.

GOVERNMENT RESPONSE—COMMENT

LAND TAX AMENDMENT BILL 2018

In its Report 17, the Committee commented on two aspects of the Land Tax Amendment Bill: the Bill's proposed effect on the right to privacy and reputation, and its proposed effect on the right to equal protection of the law without discrimination.

The Land Tax Amendment Bill changes the basis on which an owner of residential land may be liable for land tax, replacing the present emphasis on rented residential land or residential land owned by a corporation or trustee with a primary test of whether the residential land is the owner's principal place of residence. In its comment on this Bill, the Committee noted that the Bill will require the Commissioner for Revenue to require or collect a range of personal information to administer the changes, including where there is a change to the principal place of residence, rent paid by the occupier, or whether two people in a domestic relationship have separated without reasonable likelihood of cohabitation being resumed. In the Committee's view, this had the potential to limit the right against interference with privacy or family life protected by section 12 of the *Human Rights Act 2004* (HRA), and should have been addressed in the explanatory statement.

The Treasurer, in his response received by the Committee on 11 May 2018, claims that "there is no unlawful or arbitrary interference with a person's privacy and the Government does not consider that there is any limitation on human rights imposed by this aspect of the Bill." The response goes on to point out that the Commissioner has responsibility under the *Taxation Administration Act 1999* to assess tax liabilities, and that requires collecting information affecting a person's tax liability.

[10] 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.
[11] 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.

The Committee has consistently taken the view that, where proposed legislation has the potential to interfere with a person's privacy or family life, the explanatory statement should set out why that interference will not be unlawful or arbitrary. That statement should include why any interference will not be unrelated, unnecessary or disproportionate to the legitimate aim of the legislation in the same way as any assessment of a limit on a human right using the framework set out in section 28 of the HRA. It is not sufficient to merely point out that the proposed legislation authorises the collection of personal information, or that the collection of personal information is necessary to determine whether a person incurs a taxation liability. The potential impact on privacy should be acknowledged, and a justification given.

The Committee acknowledges that, as the Treasurer points out in his response, there are "strong protections under the Taxation Administration Act on the confidentiality of information required under tax laws, which limit disclosure to other entities". This, along with the wide range of legitimate objectives which justify imposing taxation liability based on personal circumstances, means that any interference with privacy imposed by taxation laws may only rarely be arbitrary for the purposes of section 12 of the HRA. However, where, as in the Land Tax Amendment Bill, the proposed change to the basis on which a tax liability is incurred involves an extension of the personal information to be provided to the Commissioner, that extension should be acknowledged and a justification provided.

The Committee, in Report 17, also commented on the discriminatory effect of the Land Tax Amendment Bill's introduction of a foreign ownership surcharge. The Committee stated:

> The Committee, based on the information provided in the explanatory statement, is not able to assess the extent to which imposing a surcharge on only foreign owners will reduce overall demand for housing in the ACT or otherwise achieve the Bill's purported objective of improving housing affordability for local residents. The Bill will not impose the surcharge on Australian citizens resident overseas, or Australian residents who do not live locally, and who may also be likely to be purchasing the home as an investment property. The surcharge will also apply to all residential property and not just new residential property for which figures of foreign ownership are given. A comparison between numbers of foreign and other non-local ownership is also not provided. The Committee asks the Minister to provide a further justification for the proposed discriminatory effect of the Bill.

In his response to the Committee, the Treasurer stated that the "anticipated impact of the surcharge on the ownership composition of the ACT housing stock is … based on an application of supply and demand principles, rather than empirical modelling". The surcharge is anticipated to increase the price for residential housing faced by foreign owners, reducing the quantity of residential housing foreign owners purchase or continue to own, and, other things being equal, reducing residential property prices for other owners, including local residents.

The Committee notes that this response provides a justification for discriminating against non-local residents, but not for discriminating against only foreign owners. Any basis, even arbitrary, on which to increase the price faced by some non-local residents may have the same or greater effect than that claimed as justification for discriminating against foreign owners. As the numbers of foreign owners, and the extent they will be affected by the proposed surcharge, has not been modelled, the degree to which housing affordability for local residents will be affected is not known. In the Committee's view, therefore, in the absence of any justification for why discrimination against foreign owners is the least restrictive means reasonably available to achieve the purpose of increasing housing affordability, the Committee cannot be satisfied that the foreign owner surcharge

is a reasonable limitation on the right to equal protection of the law without discrimination protected by section 8 of the HRA.

The Committee draws these matters to the attention of the Assembly.

Elizabeth Lee MLA
Chair

29 May 2018

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
  - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
- **Report 8, dated 8 August 2017**
  - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
- **Report 12, dated 21 November 2017**
  - Crimes (Criminal Organisation Control) Bill 2017 (PMB).
- **Report 14, dated 19 February 2018**
  - Education and Care Services National Further Amendment Regulations 2017.
- **Report 17, dated 4 May 2018**
  - Crimes (Consent) Amendment Bill 2018 (PMB).