

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

SCRUTINY REPORT 26

5 FEBRUARY 2019

---

# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)  
Ms Bec Cody MLA (Deputy Chair)  
Mr Michael Pettersson MLA

## SECRETARIAT

Ms Julia Agostino (Secretary)  
Ms Anne Shannon (Assistant Secretary)  
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)  
Mr Daniel Stewart (Legal Adviser—Bills)

## CONTACT INFORMATION

Telephone 02 6205 0173  
Facsimile 02 6205 3109  
Post GPO Box 1020, CANBERRA ACT 2601  
Email [scrutiny@parliament.act.gov.au](mailto:scrutiny@parliament.act.gov.au)  
Website [www.parliament.act.gov.au](http://www.parliament.act.gov.au)

## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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

# TABLE OF CONTENTS

<b>BILLS</b> .....	<b>1</b>
<b>Bills—No Comment</b> .....	<b>1</b>
CANBERRA INSTITUTE OF TECHNOLOGY AMENDMENT BILL 2018 .....	<b>1</b>
DOMESTIC ANIMALS (DANGEROUS DOGS) AMENDMENT BILL 2018 .....	<b>1</b>
INTEGRITY COMMISSION BILL 2018 .....	<b>1</b>
<b>Bills—Comment</b> .....	<b>1</b>
BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018.....	<b>1</b>
CONSUMER PROTECTION LEGISLATION AMENDMENT BILL 2018 .....	<b>2</b>
CONTROLLED SPORTS BILL 2018 .....	<b>3</b>
DRUGS OF DEPENDENCE (PERSONAL CANNABIS USE) AMENDMENT BILL 2018.....	<b>6</b>
EDUCATION (CHILD SAFETY IN SCHOOLS) LEGISLATION AMENDMENT BILL 2018.....	<b>6</b>
ELECTORAL AMENDMENT BILL 2018 .....	<b>7</b>
FUELS RATIONING BILL 2018 .....	<b>10</b>
RETIREMENT VILLAGES LEGISLATION AMENDMENT BILL 2018.....	<b>11</b>
<b>Proposed amendments</b> .....	<b>13</b>
<b>SUBORDINATE LEGISLATION</b> .....	<b>13</b>
<b>Disallowable Instruments—No comment</b> .....	<b>13</b>
<b>Disallowable Instruments—Comment</b> .....	<b>14</b>
<b>Subordinate Laws—No comment</b> .....	<b>16</b>
<b>National regulations—Comment</b> .....	<b>17</b>
<b>Regulatory impact statements—Comment</b> .....	<b>19</b>
<b>RESPONSES</b> .....	<b>19</b>
<b>Government responses</b> .....	<b>19</b>
<b>Private Member’s response</b> .....	<b>20</b>
<b>Government response—Comment</b> .....	<b>21</b>
<b>OUTSTANDING RESPONSES</b> .....	<b>23</b>

## BILLS

### BILLS—NO COMMENT

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

#### **CANBERRA INSTITUTE OF TECHNOLOGY AMENDMENT BILL 2018**

---

This Bill will amend the *Canberra Institute of Technology Act 1987* to implement changes identified in a review of CIT governance arrangements undertaken in 2016-17 and other amendments.

#### **DOMESTIC ANIMALS (DANGEROUS DOGS) AMENDMENT BILL 2018**

---

This Private Member's Bill will amend the *Domestic Animals Act 2000* to waive the registration fee for non-dangerous dogs that have attended an approved dog obedience training course, double the registration fees for dangerous dogs, and provide for dogs to be surrendered to the Registrar without fees.

#### **INTEGRITY COMMISSION BILL 2018**

---

This Bill will establish the ACT Integrity Commission. A draft of this Bill was considered by the Committee in its *Report 25*, 23 November 2018. The Committee made a number of comments on the draft Bill, including recommendations for amendment relating to the preliminary inquiry notice process, the need to exercise discretion in a manner consistent with human rights obligations, and various natural justice requirements. Amendments were incorporated into the Bill to respond to these recommendations. There were also various other amendments, generally of a technical nature, made to the draft Bill. The Committee has considered these amendments and has no further comments to make in relation to the Bill.

### BILLS—COMMENT

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

#### **BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018**

---

This Bill will amend the *Births, Deaths and Marriages Registration Act 1997* and the *Births, Deaths and Marriages Registration Regulation 1998* to give the birth parent the option of not registering or listing (in the case of multiple births) the birth of their stillborn child where the child showed no sign of a heartbeat before 20 weeks gestation, and amend the definition of a stillborn child.

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

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

##### RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

Currently, both parents generally have an obligation to register or list the birth of their stillborn child. The Bill will give the birth parent the option of whether to register or list their stillborn child. The birth parent will have to consult with the other parent before making the decision unless it is

not reasonably practicable or appropriate in the circumstances to do so. If the birth parent chooses to register a stillborn child both parents will have to sign the registration statement, again unless it is not practicable to obtain both signatures. By giving the choice of whether to register or list their stillborn child to the birth parent and not to the other parent the Bill potentially limits the right to equality before the law protected by section 8 of the HRA.

The explanatory statement accompanying the Bill sets out a justification for the discrimination in the Bill between birth and non-birth parents using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that statement. In particular, the Committee notes the difficulties of changing the birth registration process to allow either parent to elect to register the birth of a stillborn child.

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

### **CONSUMER PROTECTION LEGISLATION AMENDMENT BILL 2018**

---

This Bill will amend the *Eggs (Labelling and Sale) Act 2001*, the *Fair Trading (Fuel Prices) Act 1993* and the *Animal Welfare Act 2001* and creates the *Eggs (Labelling and Sale) Regulation 2018*.

***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 FREEDOM OF EXPRESSION (SECTION 16 HRA)

The Bill will require the stocking density of free range eggs to be displayed on any packaging, and retailers of free range eggs must display a sign near such eggs which states 'THESE ARE FREE-RANGE EGGS. The ACT Government supports a free-range stocking density of 1500 hens or less per hectare.' The Bill will also prevent fuel retailers from displaying discounted fuel prices on price boards visible to a person passing the service station. Both of these measures limit the freedom of expression enjoyed by those selling the respective products under section 16 of the HRA.

A statement justifying the limitations is set out in the explanatory statement accompanying the Bill, using the framework provided in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

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

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

##### ADOPTION OF MODEL CODE AND DISPLACEMENT OF SECTION 47(6) OF THE LEGISLATION ACT 2001

The Bill will create the *Eggs (Labelling and Sale) Regulation*. This will largely replicate requirements currently set out in schedule 1 of the *Eggs (Labelling and Sale) Act 2001*, with amendments to reflect the recently introduced *Australian Consumer Standard (Free Range Egg Labelling) Information*

*Standard 2018* (Cwlth). The explanatory statement provides that this shift to regulations is due to the “technical nature of definitions relating to egg types, and to ensure that the Eggs Act is able to keep pace with the transient nature of Commonwealth regulation in this area”.

The new regulation will continue the current approach in the Eggs (Labelling and Sale) Act of defining egg types by reference to “the *Model Code of Practice for the Welfare of Animals: Domestic Poultry*, made by the Animal Welfare Committee of the Standing Committee on Agriculture and Resource Management, as in force from time to time” (“the Model Code”). The new regulation will also contain a provision displacing the requirements of section 47(6) of the *Legislation Act 2001*, meaning that any changes to the Model Code do not have to be notified on the legislation register or otherwise subject to scrutiny by the Assembly.

The Committee draws this displacement of the requirements of section 47(6) to the attention of the Assembly, but notes that the new Regulation will continue the current reliance on the Model Code in regulation of sale of eggs, that the new Regulation contains a note indicating where the Model Code is available on the CSIRO web site, that the code is currently available free of charge, and that the explanatory statement accompanying the Bill includes reference to the displacement due to copyright reasons.

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

## **CONTROLLED SPORTS BILL 2018**

This Bill will provide for the regulation of promoters, officials and contestants in combat and other controlled sports, replacing the *Boxing Control Act 1993* and associated instruments.

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

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

#### RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill will impose registration or approval requirements on controlled sporting events. Registration of officials, contestants and promoters will involve a decision by the controlled sports registrar of whether registration is in the public interest. This will include considering whether the applicant has been convicted of certain listed offences and other relevant matters (including potentially association with criminal activity). The Bill will also provide for regulations to prescribe minimum age requirements for registration or participation in controlled sports and other age-related technique or rule modifications. The Bill also provides for having to comply with approved codes of practice relating to medical conditions and clearance by medical practitioners which could lead to exclusion of individuals based on their medical conditions or disability.

The Bill therefore limits participation in certain lawful sporting events based on distinctions including criminal history, age or medical condition, and therefore potentially limits the right to equality before the law as protected under section 8 of the HRA. These limitations are recognised in the explanatory statement accompanying the Bill along with a statement as to why they are reasonable under the framework provided by section 28 of the HRA. The Committee refers the Assembly to that statement.

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

In order to make public interest assessments relating to registering officials or participants, the Bill will provide for private information to be provided to the controlled sports registrar, including criminal and medical histories. The Bill will also provide for sensitive security information to be provided to the ACT Administrative and Civil Appeals Tribunal or a court in considering whether that information can be disclosed to the applicant for review. The Bill will therefore potentially limit the protection against undue interference with privacy provided by section 12 of the HRA. The Bill recognises this potential limitation in the explanatory statement accompanying the Bill along with a statement as to why they are reasonable under the framework provided by section 28 of the HRA. The Committee refers the Assembly to that statement.

**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 enforcement powers including entry search and seizure powers for public officials. These include powers to enter non-residential parts of premises without the occupier's consent, the ability to inspect or examine, make recordings, or require anyone at the premises to give information reasonably needed to exercise the inspector's functions, and require name and address to be provided. They include strict liability offences for not providing information when required. While the committee recognises that these provisions may provide a lawful and reasonable basis on which to potentially interfere with a person's privacy, consideration of this potential limitation of the right to privacy protected under section 12 of the HRA should have been provided in the explanatory statement.

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

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Part 6 of the Bill provides for notification and review of decisions. Where a decision has been made not to register a controlled sports official or contestant, then under proposed sections 18(5) and 27(5) the registrar is not required to give reasons which would disclose security sensitive information, ie information held by a law enforcement agency relating to criminal activity which, if disclosed, could prejudice an investigation, confidential source or endanger someone. If a person who has been refused registration reviews the decision to the ACT Civil and Administrative Tribunal (ACAT), the Registrar must apply to ACAT or a court for a decision about whether the reasons disclose security sensitive information and, if so, evidence and submissions which would disclose that information must be received in private in the absence of the applicant for review and their representative (see proposed sections 84 and 85).

These provisions affect the obligations of procedural fairness provided in making a decision and hence the right to a fair trial protected by section 21 of the HRA. In discussing the Bill's limit of the right to privacy, the explanatory statement accompanying the Bill states that limiting the access of an applicant to security sensitive information is "necessary to protect the integrity of police intelligence and not impact on larger intelligence operations and is therefore considered a necessary limitation on human rights." However, in the Committee's view a separate discussion of the effect of these provisions on procedural fairness obligations otherwise imposed on the Registrar and ACAT or the courts and the right to a fair trial protected by section 21 of the HRA should have been provided.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

There are a number of strict liability offences included in the Bill which, due to the reversal of the burden of proof in relation to the mental element of these offences, potentially limits the presumption of innocence protected by section 22 of the HRA. These offences are set out in the explanatory statement on pages 6 and 7, along with a discussion of their general nature as applying to participants in a regulated activity for which notice is either necessarily or in practice will be provided. Further information is also provided in the outline of each offence on why strict liability was considered appropriate. The explanatory statement therefore provides a justification for the reasonableness of these offences using the framework set out in section 28 of the HRA and the Committee draws these statements to the attention of the Assembly. The Committee notes that there remain a number of defences available for strict liability offences, including mistake of fact, under section 23 of the Criminal Code, and recommends that reference to these defences be included in explanatory statement.

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

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

CREATION OF OFFENCES BY REGULATION

The Bill includes a power to make regulations which may create offences and fix maximum penalties of not more than 20 penalty units for the offences. The Committee acknowledges that the maximum penalty indicates that these offences will generally be minor in nature. However, no justification is provided in the explanatory statement accompanying the Bill for why it is considered appropriate to allow offences to be created by regulation.

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

HENRY VIII CLAUSE

Proposed section 153 provides for regulations dealing with transitional matters to be made which may modify Part 15 of the proposed Act. As the Committee has noted previously, the ability to make regulations, even transitory regulations, which have the effect of modifying primary legislation should be justified. Here, the explanatory statement describes this provision as:

... an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

The explanatory statement also notes, any effect of regulations which modify Part 15 of the proposed Act will not apply to future enactments of the Assembly, and will expire along with Part 15 of the proposed Act 12 months following commencement of the proposed Act. In the Committee's view, these statements describe the effect of the provisions rather than provide a justification. As the explanatory statement accompanying the Bill sets out, the intention to develop a new legislative framework to regulate combat sports in the ACT has announced in September 2016 and undertaken with extensive consultation. It is not clear to the Committee why further amendment to primary legislation by regulation is needed.

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

## **DRUGS OF DEPENDENCE (PERSONAL CANNABIS USE) AMENDMENT BILL 2018**

---

This Private Member's bill amends the *Drugs of Dependence Act 1989* and the *Criminal Code (ACT) 2002* to legalise cultivation of up to four cannabis plants and possession of up to 50g of cannabis, and to make it an offence to smoke cannabis within 20 metres of a child.

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

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

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill will draw a distinction between the treatment of adults and children in relation to cannabis offences and therefore potentially limit equality before the law protected by section 8 of the HRA. Generally it will remain an offence for persons under the age of 18 to cultivate or possess otherwise legal amounts of cannabis, with a maximum penalty of one penalty unit. This will allow children to be subject to a small fine and dealt with under the existing simple cannabis offence diversionary scheme provided in section 171A of the *Drugs of Dependence Act*. The explanatory statement recognises this potential limit and includes why any limitation should be considered reasonable consistently with the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement.

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

## **EDUCATION (CHILD SAFETY IN SCHOOLS) LEGISLATION AMENDMENT BILL 2018**

---

This Bill amends the *ACT Teacher Quality Institute Act 2010*, *Education Act 2004* and the *Education Regulation 2005* to increase information sharing relating to child safety and welfare and to require non-government schools to work with the Minister to implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

***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 increase the information that can or must be shared in relation to protecting child safety and welfare, including private information or information that may affect a person's reputation. The Bill therefore may impact on the right against undue interference with privacy and reputation protected by section 12 of the HRA.

The Bill will make it a condition of a teacher's registration or permit to teach that the teacher inform the Teacher Quality Institute (TQI) if their registration under the *Working with Vulnerable People (Background Checking) Act 2011* is changed or they are given a negative notice under that Act. It will also require the teacher's employer to inform the institute of such an event or if the teacher has become mentally or physically incapable of performing an inherent requirement of their job as a teacher. A teacher's employer must also inform the TQI of a notification event, namely if they commence a formal investigation of the teacher, take disciplinary action against the teacher, the teacher ceases casual employment or the teacher resigns. The TQI may also request further information relevant to considering a teacher's registration or permit to teach, or in relation to a notification event.

Failure to inform the TQI of a notification event is a strict liability offence with a maximum penalty of 50 penalty units. The requirement to disclose information will apply despite other territory law to the contrary, and any disclosure is protected from civil liability when done honestly and without recklessness in reasonably complying with the requirements.

The Bill will also allow the director-general, under the Education Act, to provide information to corresponding officers in other states and the Northern Territory about the enrolment status of a child or young person. The director-general can also ask a corresponding officer for information about a child or young person who is or was enrolled or registered in the ACT. The director-general will require the consent of the child or young person or their parent before making such a request unless they are satisfied on reasonable grounds that it is not in the best interests of the child or young person to seek consent or seeking consent is not reasonably practicable in the circumstances. In considering the best interests of the child or young person, the director-general has to consider various matters, including ensuring the child is not at risk of abuse or neglect, and the young person's views or wishes.

The explanatory statement accompanying the Bill recognises the Bill's potential impact on the protection of privacy and reputation provided by section 12 of the HRA, and provides a statement of the reasonableness and non-arbitrariness of any limitation using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly. In particular, the Committee notes the importance of information relevant to child safety and welfare to decisions about teacher registration or permission to teach, and the various limitations and offences relating to improper use and handling of information by the TQI and director-general.

**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)

As mentioned above, the Bill will introduce a strict liability offence relating to a failure of an employer to notify the TQI of a notification event. As a strict liability offence reduces the elements required to be established in any prosecution it potentially limits the presumption of innocence protected by section 22 of the HRA. The explanatory statement acknowledges this potential limit in the context of discussing the impact on privacy and reputation of the proposed offence. The use of a strict liability offence is justified by the need for a strong deterrent to safeguard the welfare of children and their right to a quality education, the penalty is limited to 50 penalty units, and that it is reasonable to expect the employer of a teacher to know their legal obligations. Reference is also made to the various defences still available under the Criminal Code. The Committee refers the Assembly to these statements.

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

#### **ELECTORAL AMENDMENT BILL 2018**

This Bill amends the Electoral Act to prohibit property developers and their close associates giving gifts to political entities, and a prohibition on political entities accepting such gifts.

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

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

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO FREEDOM OF EXPRESSION (SECTION 16 HRA)

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

The Bill will introduce several offences intended to prohibit gifts to political entities by for-profit property developers. By distinguishing between property developers and other persons who might be interested in making a political donation, the Bill potentially limits the right to equality before the law protected by section 8 of the HRA. The Bill also potentially limits the freedom of expression protected by section 16 of the HRA by reducing the donations to political entities and indirectly limiting the capacity of those entities to participate in public debate. Making a donation to a political entity may also be considered a form of expression.<sup>1</sup> The Bill will also prevent one way for individuals to support political entities and hence potentially limits the right to take part in the conduct of public affairs and free elections protected by section 17 of the HRA.

The explanatory statement accompanying the Bill sets out in commendable detail why these potential limits are reasonable and justified in a free and democratic society using the framework in section 28. The Committee refers this statement to the Assembly. In particular, the Committee notes:

- the evidence referred to in the explanatory statement of property developers having potentially corrupting influence on and access to local and state officials involved in planning decisions in NSW and Queensland and the risk of similar concerns arising in the ACT;
- the Bill does not regulate non-profit or own-use developments;
- the offences are limited to circumstances where the property developer or their close associates has made a gift while applying for some form of planning approval, or have in the last seven years made 3 or more such applications; and
- political entities are able to accept gifts where they make reasonable steps to ensure that any gifts they receive are not from a prohibited donor.

The Bill also attempts to restrict donations from persons who, while not within the definition of property developer at the time of making the gift, within 12 months become a property developer and they or a close associate make a relevant planning application. In those circumstances, proposed section 222H (headed “Repayment of other gifts from property developers”) will require the giver of

---

<sup>1</sup> The Committee notes the opinion in *McCloy v New South Wales* [2015] HCA 34 that similar restrictions on political donations imposed in NSW was held by the High Court to only have an indirect impact on the freedom of political communication protected under the Australian Constitution. In the Committee’s view the freedom of expression protected under section 16 of the HRA is distinct from the protection of political communication under the Constitution, both in being an individual right rather than a constitutional restriction on legislative power, and extending beyond political communication and the purpose of ensuring free and informed elections. As the explanatory statement accompanying the Bill accepts the Bill’s potential limitation of the freedom of expression it is not necessary to detail the differences between section 16 and the constitutional limitation at this time.

the gift to pay to Treasury an amount equal to the amount of the gift as a debt payable to the Territory. The explanatory statement, in its outline of the individual provisions in the Bill, states that this provision is intended to prevent corporations or close associates from being able to avoid the prohibition by giving a gift immediately prior to becoming a property developer. However, it is not clear to the Committee that this provision will have this effect. The provision merely doubles the cost of making a gift in those circumstances. Any discouragement offered by the provision will vary depending on the amount the giver is able or willing to pay. There is also no requirement that the gift be repaid by the political entity who receives it, contrary to the apparent intention of the provision as provided in its heading. The Committee therefore requests further information on the intended operation of this provision and its impact on rights protected under the HRA.

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

#### TRANSITIONAL PROVISIONS

The Bill also includes proposed section 517, a transitional provision applying the ban on gifts from property developers or their close associates who have made a relevant planning application between the time the Bill is presented to the Assembly and its commencement. In those circumstances a financial representative of the political entity must pay an equal amount as a debt owed to the Territory. While the Committee accepts that this provision does not retrospectively criminalise or impose a penalty on the making of a gift, it may discourage the use by political entities of lawful gifts prior to the passage or commencement of the Bill, and hence may to some extent limit the various rights set out above. Consideration could be given to including reference to this provision when discussing the human rights implications of the Bill.

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

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

#### HENRY VIII CLAUSE

Proposed section 518 provides for regulations which deal with transitional matters, including modification of the existing transitional provisions included in the Bill and in relation to the operation of other territory laws. These transitional regulations can provide for anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in the provisions included in the Bill.

As the Committee has noted previously, a justification should be provided for why a power is included to make regulations, even transitory regulations, which have the effect of modifying primary legislation. Here, the explanatory statement describes this provision as allowing “... for any additional details relevant to the retrospective commencement of the prohibition to be settled without the need for further amending legislation to be passed by the Assembly”. In the Committee’s view this is a statement of the effect of the provision rather than a justification. The Committee notes the limited subject matter of the Bill and the expiry of the transition provisions after only three months. However, the Committee requests a justification to be provided for why a power is included to make regulations which have the effect of modifying primary legislation.

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

## FUELS RATIONING BILL 2018

---

This Bill establishes a framework for approving, implementing and enforcing fuel rationing measures in the event of a fuel shortage.

***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 10 of the Bill will require a fuel retailer to provide the director-general with their name, email address and business location details. The Bill will also provide inspectors with the power to enter premises, including residential premises used as a business subject to the fuel restriction (clause 25(2)(b)). Inspectors will also have the power to require a person provide their name and address (clause 30). The explanatory statement includes a detailed discussion of these clauses and why they can be considered reasonable and justifiable using the framework under section 28 of the HRA. This includes discussion of the various safeguards included in the Bill to preserve privacy where possible. The Committee refers this discussion to the Assembly.

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

#### RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The Bill will provide inspectors with the power to seize things without the supervision of a court process. The possibility for this to potentially interfere with the right to a fair trial protected by section 21 of the HRA is recognised in the explanatory statement and a justification is provided using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.

The Bill will also require any court challenges to a decision of the Minister to approve a fuel restriction scheme, declare fuel restrictions are in place, or extend fuel restrictions, to be brought within 30 days of the decision. Where challenges are brought within the 30 days, the proceeding is not subject to an interlocutory injunction in any court. The Committee notes that there may be Constitutional or other restrictions on the ability of the Assembly to fully exclude the jurisdiction of a court to issue an interlocutory injunction in the event of a challenge to the Minister's decisions. In any event, any limitation on the access to the courts to challenge the decision is justified in the explanatory statement accompanying the Bill using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that justification.

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

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

The Bill will introduce several strict liability offences. These are described in the explanatory statement along with a detailed justification using the framework under section 28 of the HRA. The Committee notes in particular the requirements to provide notice ensuring that a person subject to the offences is or should be aware of the prohibition in question. The Committee refers the Assembly to the discussion in the explanatory statement and commends the Minister for the detail included in relation to each of the offences.

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

#### PRIOR COMMENCEMENT OF FUEL RESTRICTION DECLARATION

Clause 11 of the Bill provides for the Minister to make a declaration that fuel restrictions under an approved fuel restriction scheme is in force. The declaration is a notifiable instrument. Under section 73 of the *Legislation Act 2001*, a legislative instrument, which includes notifiable instruments, generally commences on the day after it is notified in the ACT legislation register. However, an Act may authorise an instrument to provide for its earlier commencement (paragraph 73(2)(d) *Legislation Act*). This is the intended effect of subclause 11(6) of the Bill which will allow a fuel restriction declaration to commence before it is notified. The declaration will therefore have legal effect prior to its notification.

Under subclause 11(7) of the Bill, the fuel restriction declaration cannot commence prior to it being made, and the Minister must be satisfied that the circumstances are of such seriousness and urgency that commencement before notification is necessary. The Committee also notes that enforcement of the fuel restrictions, including various offences introduced in the Bill, is generally conditioned on publication of the fuel restrictions, which must be as soon as possible after making the declaration regardless of its commencement date.

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

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

#### HENRY VIII CLAUSE

Clause 103 will authorise transitional regulations which may modify the transitional provisions in the Bill, including in relation to another territory law, which will have effect despite anything elsewhere in the Bill or another territory law. As the Committee has noted previously, a justification should be provided for why a power is included to make regulations, even transitory regulations, which have the effect of modifying primary legislation. There is no explanation for the effect of clause 103 given in the explanatory statement accompanying the Bill. The Committee requests the Minister provide reasons for why this clause has been included in the Bill, and consider amending the explanatory statement to include reference to that explanation.

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

#### **RETIREMENT VILLAGES LEGISLATION AMENDMENT BILL 2018**

This Bill will amend the contract of sale requirements relating to the sale of units in retirement villages in the *Civil Law (Sale of Residential Property) Act 2003*, amend the *Human Rights Commission Act 2005* and *Retirement Villages Act 2012* to introduce an optional conciliation process for residents of retirement villages, and makes other amendments to the *Retirement Villages Act*, the *Retirement Villages Regulation 2013*, and the *Unit Titles (Management) Act 2011* to streamline administrative and budget processes for unit-titled retirement villages.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill requires the Human Rights Commission to provide to the ACT Civil and Administrative Tribunal (ACAT), upon request, any information or copies of documents in relation to certain complaints referred to ACAT. The Human Rights Commission may therefore be required to provide information to ACAT referring to a complaint of discrimination, which may include private information or information relating to a person's reputation. This may therefore limit the right against undue interference with privacy protected by section 12 of the HRA.

The explanatory statement accompanying the Bill describes the changes to be introduced by the Bill and provides a justification for any limitation on the right to privacy and reputation through the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement. In particular the Committee notes the protections in place relating to the handling of the information and the alternative means by which ACAT could lawfully obtain the information in question.

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

RIGHT TO EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill will amend the basis on which individual's participate in certain voting processes within retirement villages. Under the Bill, the default position will be that any vote will be based on residences rather than residents. This may limit the right to equality before the law protected by section 8 of the HRA. The explanatory statement accompanying the Bill describes the change to be introduced by the Bill and provides a justification for any limitation on the right to equal protection through the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement. In particular, the Committee notes that the Bill will only establish the default position which retirement villages can change through passing a special resolution.

The Bill will also introduce an optional conciliation process to address disputes between residents and operators of a retirement village. This process will only be available to residents of a retirement-village and is not available to older-persons who may confront similar circumstances in resolving disputes with accommodation providers. The explanatory statement accompanying the Bill recognises this potential limit on the right to equal protection under section 8 of the HRA and provides a justification through the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement.

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

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

The Bill introduces two strict liability offences which may limit the presumption of innocence protected in section 22 of the HRA. The offences require sellers of units in unit-titled retirement villages to provide documents within particular timeframes during the selling of a unit. The explanatory statement accompanying the Bill sets out the justification for the use of strict liability offences using the framework set out in section 28 of the HRA, and the Committee refers the Assembly to that statement.

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

## PROPOSED AMENDMENTS

The Committee has considered amendments to the Controlled Sports Bill 2018 to be moved by James Milligan MLA. These amendments include inserting a new clause 35(7). This proposed new subsection relates to registration of a controlled sporting event. Like proposed subsections 18(5) and 27(5) in the original Bill, this subsection will not require the registrar to give reasons which would disclose security sensitive information. In its comments on the Bill, the Committee raised procedural fairness concerns over the impact of withholding security sensitive information in any review of the registrar's decisions. These comments would also apply to the proposed amendment to clause 37. The Committee has no further comments on the proposed amendments.

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

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-263 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2018 (No 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* determines specified Tabcorp ACT Pty Ltd locations to be sports bookmaking venues for the purposes of the Act.**
- **Disallowable Instrument DI2018-264 being the Territory Records (Advisory Council) Appointment 2018 (No 1) made under section 44 of the *Territory Records Act 2002* appoints a specified person as a member of the Territory Records Advisory Council as a person who represents community associations interested in historical or heritage issues.**
- **Disallowable Instrument DI2018-265 being the Territory Records (Advisory Council) Appointment 2018 (No 2) made under section 44 of the *Territory Records Act 2002* appoints a specified person as a member of the Territory Records Advisory Council as a person who represents professional organisations interested in records management and archives.**

- **Disallowable Instrument DI2018-267 being the Adoption (Fees) Determination 2018 (No 2) made under section 118 of the *Adoption Act 1993* repeals DI2018-182 and determines fees payable by intercountry and step-parent adoption applicants to Child and Youth Protection Services.**
- **Disallowable Instrument DI2018-268 being the Civil Law (Wrongs) The Institute of Public Accountants Professional Standards Scheme 2018 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of Victoria's approval of the Institute of Public Accountants Professional Standards Scheme.**
- **Disallowable Instrument DI2018-270 being the Housing Assistance Rental Bond Program 2018 (No 1) made under subsection 19(1) of the *Housing Assistance Act 2007* revokes DI2017-15 and provides rental bond assistance to eligible applicants.**
- **Disallowable Instrument DI2018-271 being the Safer Families Assistance Program 2018 (No 1) made under subsection 19(1) of the *Housing Assistance Act 2007* provides for the establishment of a housing assistance program to support victims of family violence.**
- **Disallowable Instrument DI2018-272 being the University of Canberra Council Appointment 2018 (No 1) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**
- **Disallowable Instrument DI2018-273 being the University of Canberra Council Appointment 2018 (No 2) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**
- **Disallowable Instrument DI2018-274 being the University of Canberra Council Appointment 2018 (No 3) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**
- **Disallowable Instrument DI2018-280 being the Major Events (Domain Cricket Test Match) Declaration 2018 (No 1) made under section 6 of the *Major Events Act 2014* applies the provision of the Act to the Cricket Test Match to be held at Manuka Oval from 1 to 5 February 2019.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### WHY ARE THESE FEES BEING INCREASED?

- **Disallowable Instrument DI2018-259 being the Radiation Protection (Fees) Determination 2018 (No 1) made under section 120 of the *Radiation Protection Act 2006* revokes DI2017-275 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-260 being the Public Health (Fees) Determination 2018 (No 1) made under section 137 of the *Public Health Act 1997* revokes DI2017-274 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2018-261 being the Food (Fees) Determination 2018 (No 1) made under section 150 of the *Food Act 2001* revokes DI2017-272 and determines fees payable for the purposes of the Act.**

- **Disallowable Instrument DI2018-262 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2018 (No 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* revokes DI2017-273 and determines fees payable for the purposes of the Act.**

Each of the instruments mentioned above determines fees for a relevant Act. The explanatory statement for the first instrument states:

This instrument comes into effect on 1 January 2019 and increases the fees by 4.0% (rounded to the nearest dollar), as set out below .....

The explanatory statement then lists two new fees, and also sets out (in each case) the “old” fee. A similar approach is adopted in the explanatory statements for the remaining three instruments mentioned above. This (and the identification of the percentage increase) is in accordance with the Committee’s expectations, in relation to fees determinations (and other matters) are set out in the Committee’s document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*.<sup>2</sup> In that document, the Committee states:

#### **FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:

- by whom the fee is payable; and
- to whom the fee is to be paid

However, the explanatory statements do not indicate the reason for the 4% increase. In making this comment, the Committee notes that it identified a similar issue in relation to various explanatory statements for fees instruments considered by the Committee for *Scrutiny Report 20* of the 9<sup>th</sup> Assembly (7 August 2018). In that Scrutiny Report, the Committee noted that other explanatory statements considered for that Scrutiny Report indicated that a 4% increase in fees was “in accordance with Government policy regarding regulatory fees increases for 2018-2019” (see, eg, the Lotteries (Fees) Determination 2018 (No 1) [DI2018-115]). The Committee assumes that the same is the case for this instrument. However, the Committee would prefer that the reason for the fees increase is stated, either in the instrument itself or in the explanatory statement for the instrument.

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

<sup>2</sup> [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf).

**The Committee requests the Minister’s advice as to the reasons for the increase in the fees determined by the instruments.**

**This comment requires a response from the Minister.**

#### INSTRUMENTS MADE BEFORE COMMENCEMENT OF EMPOWERING PROVISION

- **Disallowable Instrument DI2018-282 being the Government Procurement (Secure Local Jobs Model Contract Terms) Determination 2018, including a regulatory impact statement, made under subsection 22G(4) of the *Government Procurement Act 2001* determines the secure local jobs model contract terms.**
- **Disallowable Instrument DI2018-283 being the Government Procurement (Secure Local Jobs) Code 2018, including a regulatory impact statement, made under subsection 22M(1) of the *Government Procurement Act 2001* makes the Secure Local Jobs Code.**

Each of the instruments mentioned above makes a “code”, for the *Government Procurement Act 2001*. The first instrument is made under section 22G of the *Government Procurement Act*. The second instrument is made under section 22M of that Act.

The Committee notes that sections 22G and 22M are inserted by section 4 of the *Government Procurement (Secure Local Jobs) Amendment Act 2018*. The relevant provisions of that Amendment Act do not commence until 15 January 2019, which is also the date that the instruments commence. However, both the instruments were *made* on 22 November 2018, prior to the commencement of the empowering provisions. This means that the instruments rely on section 81 of the *Legislation Act 2001*, which allows the exercise of powers prior to the commencement of the empowering provision, as long as the relevant amending law has been notified (ie of the ACT Legislation Register). The Committee notes that, in this case, the Amendment Act was notified on 7 November 2018.

The Committee notes with approval that the regulatory impact statement that accompanies the two instruments mentioned above (and also the *Government Procurement (Secure Local Jobs) Amendment Regulation 2018 (No 1)*, SL2018-20, to which the same comment applies) notes the reliance on section 81 of the *Legislation Act*.

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

#### SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2018-20 being the Victims of Crime (Financial Assistance) Amendment Regulation 2018 (No 1) made under the *Victims of Crime (Financial Assistance) Act 2016* amends payment amounts provided to victims under specified sections to align the payments with the Consumer Price Index.**
- **Subordinate Law SL2018-22 being the Government Procurement (Secure Local Jobs) Amendment Regulation 2018 (No 1), including a regulatory impact statement, made under the *Government Procurement Act 2001* amends the *Government Procurement Regulation 2007* to provide more information about requirements inserted into the *Government Procurement Act 2001* by the *Government Procurement (Secure Local Jobs) Amendment Act 2018*.**

## NATIONAL REGULATIONS—COMMENT

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

### EFFECT OF AMENDMENTS MADE TO VARIOUS NATIONAL LAWS ON ISSUES PREVIOUSLY RAISED BY THE COMMITTEE

- **Heavy Vehicle National Law as applied by the law of States and Territories—Heavy Vehicle (Registration) National Regulation (2018 No 298), together with an explanatory statement.**
- **Heavy Vehicle National Law as applied by the law of States and Territories—Heavy Vehicle National Legislation Amendment Regulation 2018 (2018 No 299), together with an explanatory statement.**
- **Health Practitioner Regulation National Law—Health Practitioner Regulation National Law Regulation 2018 (No 166/2018), dated 12 October 2018, together with a general outline.**

The Committee notes that, in the past 12 months or so, it has raised numerous issues in relation to various national regulations that it has scrutinised. A recurring issue has been the failure to provide an explanatory statement for national regulations. The Committee notes with approval that each of the national regulations mentioned above is accompanied by an explanatory statement.

Another recurring issue has been the failure to table previous national regulations within the number of sitting days of the Legislative Assembly required by the relevant enabling legislation. In the past, this has resulted in various national regulations being invalid. The Committee notes, in the context of the first two national regulations mentioned above, the *Justice and Community Safety Legislation Amendment Act 2018* and the *National Road Transport Reform (Light Rail) Legislation Amendment Act 2018*, both of which are discussed in *Scrutiny Report 16* of the 9<sup>th</sup> Assembly (3 April 2018), made amendments to the relevant enabling legislation that addressed the issues raised by the Committee (albeit not in a way that the Committee would have preferred).

For the third national regulation mentioned above, a similar outcome was achieved, through amendments made by the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (Qld), with operation in the ACT, under the enabling legislation. The effect of the amendments is that section 246 of the Health Practitioner National Law, which deals with parliamentary scrutiny of national regulations, now provided (in part):

#### **246 Parliamentary scrutiny of national regulations**

- (1) A regulation made under this Law must be tabled in, or notice of its making given to, the Parliament of each participating jurisdiction—
  - (a) if a regulation made under an Act of that jurisdiction must be tabled in the Parliament of that jurisdiction—in the same way a regulation must be tabled in that jurisdiction; or
  - (b) if notice of the making of a regulation made under an Act of that jurisdiction must be given to the Parliament of that jurisdiction—in the same way notice must be given in that jurisdiction.
- (1A) However, failure to comply with subsection (1) does not affect the validity of the regulation.

- (1B) The regulation may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction in the same way that a regulation made under an Act of that jurisdiction may be disallowed.
- (1C) However, subsection (1D) applies if—
  - (a) a regulation is not tabled in accordance with the law of a participating jurisdiction; and
  - (b) under the law of that jurisdiction a regulation may be disallowed only after its tabling.
- (1D) The regulation is taken to be have been tabled in the Parliament of that jurisdiction on the first sitting day after the regulation was required to be tabled under the law of the jurisdiction.

The effect of subsection 246(1A) above is that a failure to table a national regulation in the Legislative Assembly (or in any other jurisdiction) cannot invalidate the national regulation. Further, the effect of subsection 246(1D) is that if a national regulation is *not* tabled then it is *taken to have been tabled* “on the first sitting day [it] was required to be tabled”. This means, in effect, that the disallowance power of the Legislative Assembly (and the scrutiny power of the Committee) can be avoided. The Committee’s scrutiny power operates in relation to subordinate legislation that is tabled. In the case of national regulations made under the Health Practitioner National Law, the Committee (and the Legislative Assembly) need never actually know about the making of such national regulations, which are (in effect) deemed to be tabled.

**The Committee seeks the Minister’s views on the issues discussed immediately above and, in particular, seeks the Minister’s advice on the justification for the approach taken in section 246 of the Health Practitioner National Law (as amended) and how this approach is consistent with proper and effective scrutiny of subordinate legislation, by the Legislative Assembly.**

**This comment requires a response from the relevant Minister.**

#### *Retrospective operation*

The Committee notes that the first national regulation mentioned above (ie the Heavy Vehicle (Registration) National Regulation (2018 No 298)) commenced on 1 July 2018. This means that it has a retrospective operation. While the Committee notes that the operation of the *Legislation Act 2001* (including the prohibition on prejudicial retrospectivity, set out in section 76) is disapplied by section 8 of the *Heavy Vehicle National Law (ACT) Act 2013*, this does not exclude the scrutiny of the Committee or the operation of the Committee’s terms of reference. Retrospective operation of subordinate legislation has always sat squarely within principle (1)(b) of the Committee’s terms of reference, in that, on its face, it may unduly trespass on rights previously established by law. This issue is not addressed in the explanatory statement for the National Regulation.

For the second national regulation mentioned above (ie the Heavy Vehicle National Legislation Amendment Regulation 2018 (2018 No 299)), according to the explanatory statement, it also commenced on 1 July 2018. This means that it also has a retrospective operation. Again, while section 8 of the *Heavy Vehicle National Law (ACT) Act 2013* disapplies the Legislation Act, this does not exclude the jurisdiction of the Committee. Again, the retrospectivity issue is not addressed in the explanatory statement to the National Regulation.

For the third national regulation mentioned above (ie the Health Practitioner Regulation National Law Regulation 2018 (No 166/2018)), the operative date appears to be 1 December 2018. As the formal parts of the National Regulation indicate that it was made on 12 October 2018, it may reasonably be argued that this means that it did not have a retrospective operation.

**The Committee draws the attention of the Legislative Assembly to the first two national regulations mentioned above, on the basis that they may unduly trespass on rights previously established by law, contrary to principle (1)(b) of the Committee’s terms of reference.**

**The Committee also draws the attention of the Legislative Assembly to the explanatory statements for the first two national regulations mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements do not meet the technical or stylistic standards expected by the Committee.**

**This comment requires a response from the relevant Minister.**

## REGULATORY IMPACT STATEMENTS—COMMENT

The Committee has examined the regulatory impact statement for the following subordinate laws and offers these comments on it:

### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2018-282 being the Government Procurement (Secure Local Jobs Model Contract Terms) Determination 2018.**
- **Disallowable Instrument DI2018-283 being the Government Procurement (Secure Local Jobs) Code 2018.**
- **Subordinate Law SL2018-22 being the Government Procurement (Secure Local Jobs) Amendment Regulation 2018 (No 1).**

The Committee notes that the two instruments and the subordinate law mentioned above are accompanied by a shared regulatory impact statement. The Committee notes that, as part of the “brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency” that is required by paragraph 35(h) of the *Legislation Act 2001*, the human rights implications of the various pieces of legislation are discussed.

The Committee draws the attention of the Legislative Assembly to this human rights discussion.

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

## RESPONSES

### GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Police and Emergency Services, dated 26 November 2018, in relation to comments made in Scrutiny Report 25 concerning the Emergencies Amendment Bill 2018.

- The Attorney-General, dated 27 November 2018, in relation to comments made in Scrutiny Report 24 concerning the Royal Commission Criminal Justice Legislation Amendment Bill 2018.
- The Chief Minister, dated 29 November 2018, in relation to comments made in Scrutiny Report 25 concerning the draft Integrity Commission Bill 2018.

[These responses](#)<sup>3</sup> *can be viewed online.*

- The Minister for Health and Wellbeing, dated 3 December 2018, in relation to comments made in Scrutiny Report 23 concerning Disallowable Instruments:
  - DI2018-239—Tobacco and Other Smoking Products (Fees) Determination 2018 (No 1); and
  - DI2018-250—Radiation Protection (Council Member, Chair and Deputy Chair) Appointment 2018 (No 1).
- The Minister for Justice, Consumer Affairs and Road Safety, dated 24 January 2019, in relation comments made in Scrutiny Report 20 concerning Disallowable Instruments:
  - DI2018-138—Agents (Fees) Determination 2018;
  - DI2018-140—Births, Deaths and Marriages Registration (Fees) Determination 2018;
  - DI2018-142—Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2018;
  - DI2018-143—Co-operatives National Law (ACT) (Fees) Determination 2018;
  - DI2018-144—Prostitution (Fees) Determination 2018;
  - DI2018-145—Registration of Deeds (Fees) Determination 2018;
  - DI2018-146—Retirement Villages (Fees) Determination 2018; and
  - DI2018-147—Traders (Licensing) (Fees) Determination 2018.

[These responses](#)<sup>4</sup> *can be viewed online.*

## PRIVATE MEMBER'S RESPONSE

The Committee has received a response from Ms Lawder, dated 19 December 2018, in relation to comments made in Scrutiny Report 24 concerning the Domestic Animals (Dangerous Dogs) Legislation Amendment Bill 2018.

The Committee wishes to thank the Chief Minister, the Minister for Health and Wellbeing, the Minister for Police and Emergency Services, the Attorney-General, the Minister for Justice, Consumer Affairs and Road Safety, and Ms Lawder MLA for their helpful responses.

---

<sup>3</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

<sup>4</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

## GOVERNMENT RESPONSE—COMMENT

**Disallowable Instrument DI2018-239 being the Tobacco and Other Smoking Products (Fees) Determination 2018 (No 1) made under section 70 of the Tobacco and Other Smoking Products Act 1927 revokes DI2017-113 and determines fees payable for the purposes of the Act.**

The Committee commented on the instrument mentioned above in *Scrutiny Report 23* of the 9<sup>th</sup> Assembly (29 October 2018). In that Scrutiny Report, the Committee noted that the instrument increased 10 fees, provided for by the *Tobacco and Other Smoking Products Act 1927*, by 4%, but did not give a reason for the increase. The Committee noted its oft-stated expectations in this regard as set out in the Committee’s document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#).<sup>5</sup>

In making this comment, the Committee noted that it had identified a similar issue in relation to various explanatory statements for fees instruments considered by the Committee for *Scrutiny Report 20* of the 9<sup>th</sup> Assembly (7 August 2018). In that Scrutiny Report, the Committee noted that other explanatory statements considered for that Scrutiny Report indicated that a 4% increase in fees was “in accordance with Government policy regarding regulatory fees increases for 2018-2019” (see, eg, the Lotteries (Fees) Determination 2018 (No 1) [DI2018-115]). The Committee assumed that the same was the case for this instrument. However, the Committee indicated that it would prefer that the reason for the fees increase is stated, either in the instrument itself or in the explanatory statement for the instrument.

The Committee drew the attention of the Legislative Assembly to the instrument, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument did not meet the technical or stylistic standards expected by the Committee.

The Committee requested the Minister’s advice as to the reasons for the increase in the fees determined by this instrument and asked the Minister to respond.

The Minister for Health and Wellbeing, in her response, states:

All regulatory service fees, including licence fees to sell tobacco and other smoking products, are increased by 4 per cent each year in accordance with the ACT Government’s Fees and Charges Policy and Guidelines. As far as practical, all other fees and charges are annually indexed using the Wage Price Index. The ACT Government aims to ensure that the dollar and percentage increases for any fee or service charge is clearly identified in accompanying Explanatory Statements.

The Minister goes on to state:

In respect of the *Legislation Act 2001*, I note that providing a reason for the increase of fees in a Disallowable Instrument is not listed in the mandatory requirements of section 56(5).

The Committee is aware that its requirement to provide a reason for fees increases is not contained in the *Legislation Act 2001*. The Committee has never suggested that it was. The Committee has always cited principle (2) of the Committee’s terms of reference as the authority for the requirement. That principle requires the Committee to:

<sup>5</sup> [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf).

... 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.

The Committee has (since the early days of its operation) consistently stated its preference that explanatory statements for fees determinations indicate (if it is not done in the instrument itself):

- the amount of the “old” fee;
- the amount of the new fee;
- any percentage increase; and
- the reason for any increase (eg an adjustment based on the CPI).

These preferences are set out in the Committee’s “Tips/Traps” document. While the Committee notes that the “Tips/Traps” document also refers to the requirements of subsection 65(5) of the Legislation Act, that provision is not relied upon, by the Committee, in maintaining that an explanatory statement for a fees instrument provide the reasons for any fees increases. As already stated, the Committee relies on principle (2) of its terms of reference.

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

Giulia Jones MLA  
Chair

5 February 2019

# OUTSTANDING RESPONSES

## BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
  - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
- **Report 8, dated 8 August 2017**
  - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
- **Report 12, dated 21 November 2017**
  - Crimes (Criminal Organisation Control) Bill 2017 (PMB).
- **Report 17, dated 4 May 2018**
  - Crimes (Consent) Amendment Bill 2018 (PMB).
- **Report 19, dated 24 July 2018**
  - Anti-corruption and Integrity Commission Bill 2018 (PMB).
- **Report 24, dated 20 November 2018**
  - Residential Tenancies Amendment Bill 2018 (No 2).