

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

SCRUTINY REPORT 31

28 MAY 2019

THE COMMITTEE

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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—NO COMMENT

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CLIMATE CHANGE AND GREENHOUSE GAS REDUCTION (RENEWABLE ELECTRICITY TARGET) AMENDMENT BILL 2019

This Bill amends the *Climate Change and Greenhouse Gas Reduction Act 2010* to legislate an ongoing 100 percent renewable energy electricity target after 2020 and requires the Minister to determine a method for measuring progress towards that target and use that method in reporting on progress in annual reports.

INTEGRITY COMMISSION AMENDMENT BILL 2019

This Bill amends the *Integrity Commission Act 2018* to provide for split commencement dates, the date of review of the Act and some minor corrections to cross-referencing errors in the Act.

BILLS—COMMENT

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

ANIMAL WELFARE LEGISLATION AMENDMENT BILL 2019

This Bill will amend the *Animal Welfare Act 1992* and other associated animal welfare legislation, including the framework for regulating pet businesses, training and acceptance of assistance animals, and the powers and powers of the Animal Welfare Authority, and introduce or amend a range of duty-of-care or cruelty offences.

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)

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? – Committee Terms of reference paragraph 3(b)

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

The Bill will introduce or amend a large number of strict liability offences associated with the care and treatment of animals. These include reducing the time to report an injury to an animal from the current 24 hours to two hours, and a number of minor offences relating to failing to care for a domestic animal such as not providing access to water or shelter. The explanatory statement acknowledges the potential of these provisions to limit the right to the presumption of innocence set out in section 22 of the HRA and sets out why the use of strict liability is reasonable using the framework set out in section 28 of the HRA. The Committee refers that justification to the Assembly.

The Committee notes, in particular, the role of strict liability offences as part of an escalating enforcement framework, including the use of infringement notices issued under Part 3.8 of the *Magistrates Court Act 1930* as listed in the *Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014* and *Magistrates Court (Domestic Animals Infringement Notices) Regulation 2005*.

The Committee is concerned, however, with the broad power of delegation conferred on the Animal Welfare Authority and the extent to which this may extend the range of bodies able to exercise administrative powers under the Act, which may have a prejudicial impact on rights, liberties and obligations. Section 6 of the Animal Welfare Act currently allows the Authority to delegate any of its functions under that Act to a public servant. Clause 5 of the Bill will extend that power of delegation to include any person who is not a public servant provided the Authority is satisfied that the function needs to be exercised by a person who is not a public servant.

The Authority has a broad range of functions under the Act, including issuing regulatory notices and dealing with claims for compensation. The Authority will also be conferred additional powers by the Bill including the power to destroy seized animals, temporarily prohibiting or applying to the court for an order prohibiting a person from acquiring, keeping or caring for an animal and licensing pet businesses. The authority may also exercise the functions of being an Inspector (see section 76 of the Animal Welfare Act) and, when accompanied by or following the written advice of a veterinary practitioner, an authorised officer. Inspectors and authorised officers are given extensive powers under the Animal Welfare Act, including powers of entry and seizure and requiring evidence of name and address (see Divisions 7.3 and 7.4), and will be authorised to seize animals (see proposed sections 81A and 83A).

The explanatory statement accompanying the Bill states that the delegation to non-public servants will allow for an organisation, such as the RSPCA ACT, to be delegated to undertake certain functions where necessary and appropriate, for example in rehoming animals. The Committee notes, however, that the Bill will make explicit provision for the RSPCA ACT to be an animal welfare entity able to deal with seized animals under the proposed new Division 7.6A. Other entities can be similarly declared by the Minister through issue of a notifiable instrument.

The Committee is concerned with the breadth of the delegation power and requests further information on whether consideration was given to a more limited delegation power or otherwise providing for a more formal process of notification of any delegation similar to that provided in the Bill for animal welfare entities.

The Committee draws this matter 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 RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The Bill will allow temporary, interim and permanent prohibitions on the ownership or caring for animals which, at least to the extent they deny access to assistance animals and have a disproportionate impact on persons with a disability, may limit the right to equality before the law

protected by section 8 of the HRA. To the extent these prohibitions will restrict property rights through an administrative decision, they may also potentially limit the right to a fair trial protected by section 21 of the HRA. These prohibitions may also restrict where a person is able to reside where they would be jointly responsible for caring for or controlling an animal, potentially limiting the right to freedom of movement protected by section 13 of the HRA. The explanatory statement acknowledges these potential limits and provides a justification using the framework set out in section 28 of the HRA. The Committee refers that justification to the Assembly. However, the Committee has some concerns over the operation of the Bill.

Where a domestic animal has been seized but offence proceedings have not commenced, and the Authority reasonably believes that an animal's welfare is, or would be, at serious risk, then the Authority may prohibit the person from purchasing or acquiring, keeping, caring for or controlling an animal for up to six months. In making a prohibition order the Authority must consider the welfare of animals involved, the likelihood the person subject to the order has or will commit an offence against the Animal Welfare Act, and any other convictions in relation to animal welfare. A temporary prohibition order is reviewable in the ACT Civil and Administrative Tribunal.

The Bill will also amend the powers of the court to make interim prohibition orders when an animal has been seized and proceedings have commenced. Interim court orders can prohibit acquiring, keeping, caring for or controlling an animal for up to 12 months. As with temporary prohibition orders issued by the Authority, the court must consider the welfare of the animals involved, likelihood of having committed an offence against the Animal Welfare Act and any other convictions relating to animal welfare. The court will also be able to make permanent prohibition orders where a person has been found guilty of an aggravated animal cruelty offence and is reasonably likely to contravene other animal welfare offences in the future.

As the explanatory statement accompanying the Bill notes, the Authority or the court can take into account other relevant matters, including whether the person relies upon an assistance animal or would otherwise be disproportionately affected by a prohibition order. The explanatory statement suggests that even in such cases "the welfare of an animal or animals involved in serious animal welfare abuses should be paramount" (see p 35). The Committee is concerned that the justification for the Bills limit on the HRA's right to equality does not extend to the welfare of animals being of paramount concern in any temporary or interim prohibition orders. If it is intended that animal welfare be given paramount consideration then that should be made explicit in the Bill and a justification for the human rights implications given. Otherwise, the Committee requests further consideration be given to explicitly requiring the Authority or the Court to take into account whether persons subject to the order make use of assistance animals or would otherwise be disproportionately affected by the proposed prohibition order. Consideration should also be given to making it explicit in the Bill that, prior to any temporary prohibition order being made, the Authority must provide notice and enable submissions from persons potentially affected.

Interim and permanent prohibition orders will enable the Court to make an order that a person "must not, either individually or jointly with another person" purchase or acquire, keep, care for or control an animal. In justifying the potential limit by these provisions of the right to freedom of movement protected by section 13 of the HRA, the explanatory statement suggests the Bill "would potentially enable a court to order that a person not reside at a place where animals are kept by another person. This could engage and limit an individual's right to choose his or her residence in the ACT". The Committee notes, however, that there is no power given to the court to directly require a person to change their place of residence. Having to change their place of residence could be an indirect consequence of a prohibition order being made by the Court if the person chooses to move rather than removing any animal that might otherwise be in their care or control.

A prohibition order issued by the Court can only be directed against the person against whom proceedings have been brought (for interim orders) or has been found guilty of an aggravated animal cruelty offence (for permanent orders). The reference to “either individually or jointly with another person” therefore makes it clear that the order can apply to prevent the person subject to the order jointly caring for or controlling animals. Temporary prohibition orders issued by the Authority, however, can be issued against a person who is in charge of a seized animal and an animal’s welfare is at serious risk if that person were to own, keep, care for or control it. It is therefore not clear to the Committee that temporary prohibition orders can apply only to persons against whom proceedings for breach of animal welfare offences are in contemplation. Similarly, it is not clear that temporary prohibition orders will apply only where the person is the sole carer or controller of an animal whose welfare is at risk. In the Committee’s view, if it is intended that temporary prohibition orders are not available where a domestic animal is owned, cared for or controlled jointly by two or more people then this should be made clear in the Bill.

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

CRIMES LEGISLATION AMENDMENT BILL 2019

This Bill amends the *Bail Act 1992*, *Firearms Act 1996*, the *Road Transport (Alcohol and Drugs) Act 1977* and other crimes-related legislation.

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 amend the Bail Act to allow police to enter private premises to arrest a person for a breach of bail. This potentially limits the protection against arbitrary or unlawful interference with privacy, family, home or correspondence provided by section 12 of the HRA. The explanatory statement accompanying the Bill sets out a detailed analysis of any such limitation using the framework provided in section 28 of the HRA. The Committee refers that analysis to the Assembly. In particular, the Committee notes the power of entry is only available where the police officer has the power to arrest without a warrant due to a failure to comply with a bail condition, the bail relates to certain specified offences, and there are reasonable grounds to believe that the person is on private premises. To enter a residential home the officer must believe, on reasonable grounds, that entry is necessary in the circumstances and it would not be reasonable to arrest the person somewhere else. Entry between 6pm and 9am is further restricted.

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 remove the requirement for the prosecution to prove that the defendant in various firearms offences did not hold a licence or permit in any other state or territory. The defendant will instead have the legal burden of proving as a defence that they had such an interstate licence or permit. As the explanatory statement acknowledges, this imposition of the legal burden on the defendant potentially limits the presumption of innocence protected by section 22 of the HRA. The explanatory statement sets out why this potential limit is reasonable using the framework set out in

section 28 of the HRA and the Committee refers the Assembly to that analysis. The Committee notes the statement's reliance on the difficulties and delays associated with having to disprove holding a licence or permit in any other state or territory and requirements for firearms users to carry their licence or permit unless they have a reasonable excuse not to.

The Bill will also remove the defence of mistake of fact for the strict liability offence in section 20 of the *Road Transport (Alcohol and Drugs) Act 1977* (driving with a prescribed drug in oral fluid or blood). The explanatory statement accompanying the Bill recognises this potentially limits the presumption of innocence in criminal proceedings protected by section 22 of the HRA and sets out why this limit is reasonable using the framework set out in section 28 of the HRA. The statement asserts there is strong scientific evidence that eating hemp food does not carry a significant possibility of a positive roadside drug test. The amendment therefore removes the defence in circumstances where such a claim would not be honest or reasonable and without having to call expert witnesses. 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.

FISHERIES LEGISLATION AMENDMENT BILL 2019

This Bill amends the *Fisheries Act 2000*, *Fisheries Regulation 2001* and the *Nature Conservation Act 2014* in relation to the use of prohibited gear in private waters, changes to offences and penalties, compliance and enforcement, aquatic pest management, licensing and aquaculture and aquaponics, as well as cultural resource use and trade in protected species.

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)

The explanatory statement accompanying the Bill recognises the following rights protected under the HRA may be limited by the Bill and includes a statement on the reasonableness of those limits using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement.

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

The Bill will require a keeper of fish or an occupier of land that has an aquatic habitat to carry out treatment activities, at that person's expense, when directed by an authorised person. This may have a disproportionate effect on people from a low socio-economic background and hence limit the right to equality protected by section 8 of the HRA.

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill extends the powers under the Fisheries Act to enter premises (including land, a vehicle or a vessel, and in some circumstances residential premises). Authorised officers also will have the power to stop and search a vehicle where they believe it contains fish or aquatic matter in contravention of the Act. The Bill will also allow authorised persons to require information to be provided which may include personal or otherwise private information. These provisions may limit the protection against unlawful or arbitrary interference with privacy or reputation protected by section 12 of the HRA.

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

The Bill amends provisions prohibiting the release of fish into waterways in certain circumstances. The explanatory statement provides that this may limit the religious practices of certain cultural groups to undertake karma release of fish and hence limit the right to freedom of religion or belief protected by section 14 of the HRA.

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill will amend or introduce various strict liability offences which limit the right to the presumption of innocence protected under section 22 of the HRA. The offences are regulatory in nature and generally involve breach of conditions of which those affected should be aware.

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

PLANNING AND DEVELOPMENT (DESIGN REVIEW PANEL) AMENDMENT BILL 2019

This Bill will establish the National Capital Design Review Panel to provide design advice to proponents of development proposals as part of the development approval process.

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 SECTION 47(6) OF THE LEGISLATION ACT 2001

The Bill provides for the Minister to make design review panel rules about the operation of the panel and processes and procedures for assessing development proposals. Any consultation with the panel about a proposed development must be carried out in accordance with those rules. Where the panel has been consulted and provides design advice on a proposal, then generally that proposal cannot be approved unless the proponent has satisfactorily responded to the design advice.

There is no provision for the design review panel rules to be notifiable instruments or otherwise required to be published on the ACT Legislation Register. The design review panel rules may also apply, adopt or incorporate an instrument as in force from time to time (proposed subsection 138AJ(2)). However, subsection 47(6) of the *Legislation Act 2001* is displaced (proposed subsection 138AJ(3)) so that any instrument so applied, adopted or incorporated does not have to be notified on the ACT Legislation Register. The Bill provides for the design panel rules to be published on the Land and Planning Authority's website. However, it is not clear whether any instrument applied, adopted or incorporated would also have to be published.

The explanatory statement gives no explanation for why the review panel design rules are not notifiable instruments and why requirements for notification under the Legislation Act of any instrument incorporated in those rules have been displaced. As the Committee has requested in the past where provision is made for the incorporation of instruments without notification, a justification for the displacement of subsection 47(6) of the Legislation Act should be provided, and clear provision made in the Bill or explanatory statement for how affected persons can get access to the instruments in questions.

The Bill also provides for the Minister to make design principles to be used by the design review panel in providing advice on development proposals (proposed subsection 138AK). Those principles have to be published on the Land and Planning Authority's website. However, there is no provision for the design principles to be notifiable instruments or otherwise made available on the ACT Legislation Register. The Committee requests further information on why requirements for notification were not considered appropriate.

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

PLANNING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2019

This Bill makes various minor policy and technical amendments to legislation administered by the Environment, Planning and Sustainable Development Directorate.

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

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill will substitute a new section 66C of the *Environment Protection Regulation 2005*. It is currently an offence under regulation 66C for a person in charge of a development on a development site less than 0.3ha to not install and maintain erosion and sediment control measures (that is, measures to prevent or limit pollution on the development site) approved by a building certifier. The Bill will extend the offence to include a failure to install and maintain erosion and sediment control measures in accordance with any condition of a development approval. The offence will also be made into a strict liability offence. The penalty will remain a maximum of 10 penalty units.

A strict liability offence limits the presumption against self-incrimination protected by section 22 of the HRA. The explanatory statement accompanying the Bill sets out why that limitation should be considered reasonable 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.

SENIOR PRACTITIONER AMENDMENT BILL 2019

This Bill will amend the *Senior Practitioner Act 2018* to address issues that have arisen in its implementation to date.

***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 adds the NDIS Quality and Safeguards Commission to the list of entities to which the Senior Practitioner may give protected information under section 42 of the Act. As this information includes highly sensitive and personal information, the Bill will limit the protection against unlawful or arbitrary interference with privacy provided by section 12 of the HRA. The explanatory statement sets out why this limit is reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting in particular that the Senior Practitioner has to be satisfied on reasonable grounds that providing the information is necessary for the functions of the Senior Practitioner or the NDIS Quality and Safeguards Commission.

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 ETC (SECTION 10 HRA)

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

Section 10 of the Act currently limits the use of restrictive practices (that is, a restriction of the rights or freedom of movement of a person for the primary purpose of protecting the person or others from harm on a person) by providers of education, disability, care and protection of children and other prescribed services to when it is in accordance with a registered positive behaviour support plan. The Bill will amend this section to allow use of restrictive practices by the provider or relevant persons in emergency situations. The provider has to believe on reasonable grounds that the restrictive practice is necessary to avoid the imminent risk of death or serious physical harm, the practice is the least restrictive in the circumstances in terms of the kind, application and duration of the practice, and the use of the practice is authorised by the person in charge of the provider if practicable.

This amendment therefore potentially limits the right to protection from torture, inhuman or degrading treatment protected under section 10 of the HRA and, where a child is subject to the restrictive practice, the right to protection of the family and children protected by section 11 of the HRA. The explanatory statement accompanying the Bill sets out why these limits are reasonable using the framework set out in section 28 of the HRA. The explanatory statement notes the limitations on the use of restrictive practices outside of a registered positive support plan, and that the Bill will also introduce an obligation to report any emergency use of a restrictive practice to the Senior Practitioner within 5 days. The Committee refers the Assembly to those statements.

The Committee notes that the amendments to section 10 provide for the use of restrictive practices by the provider or a relevant person for a provider. A relevant person for a provider will be defined for the purposes of the Act to mean “an employee, agent, contractor or other person acting under the direction or on behalf of the provider”. The Committee also notes that the Bill will require the provider to have formed the belief that using a restrictive practice outside of a registered positive behaviour support plan is necessary to avoid the relevant risk of harm. A belief of imminent harm by the relevant person will not be sufficient to allow the use of the restrictive practice.

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 received a proposed Government amendment to the Senior Practitioner Amendment Bill 2019. This amendment will modify the amendments to section 10 of *the Senior Practitioner Act 2018*. Use of a restrictive practice will be allowed when it is not in accordance with a registered positive behaviour support plan when the provider *or relevant person for the provider* forms the belief that the use is necessary. The necessary belief has also been amended to the belief on reasonable grounds that use of the restrictive practice is necessary *to avoid imminent harm to the person or others*, where harm is defined in the Act to include physical harm, a serious risk of physical harm, or damage to property involving a serious risk of physical harm. In the Committee's view this amendment does not substantially change the nature of the human rights issues commented on above. The Committee also notes that the proposed amendment addresses the Committee's comment in relation to the need for the provider, and not the relevant person, to form the relevant belief.

The Committee has also considered proposed amendments to the Justice and Community Safety Legislation Amendment Bill 2019, to be moved by Caroline Le Couteur MLA, and offers no comment on them:

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2019-25 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 5) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to an entrant vehicle or the driver of an entrant vehicle participating in the National Capital Rally.**
- **Disallowable Instrument DI2019-28 being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2019 made under section 139 of the *Taxation Administration Act 1999* revokes DI2018-51 and determines a new rate for the calculation of Utilities Network Facilities Tax payable under the Utilities (Network Facilities Tax) Act 2006.**
- **Disallowable Instrument DI2019-29 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2019 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2018-185 and determines the conditions under which Members may employ staff and engage consultants or contractors.**
- **Disallowable Instrument DI2019-30 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2019 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2018-187 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors.**
- **Disallowable Instrument DI2019-31 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 6) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to an entrant vehicle or the driver of an entrant vehicle participating in the Innate Test Day.**

- **Disallowable Instrument DI2019-34 being the Civil Law (Wrongs) Professional Standards Council Appointment 2019 (No 3) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.**
- **Disallowable Instrument DI2019-35 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2019 (No 3) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Long Service Leave Governing Board, representing employee organisations.**
- **Disallowable Instrument DI2019-36 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2019 (No 4) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Long Service Leave Governing Board, representing employer organisations.**
- **Disallowable Instrument DI2019-38 being the Water Resources (Water Management Areas) Determination 2019 made under section 16 of the *Water Resources Act 2007* revokes DI2007-193 and determines areas for managing the water resources of the Territory.**
- **Disallowable Instrument DI2019-40 being the University of Canberra Council Appointment 2019 (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 INSTRUMENTS—COMMENT

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

MINOR DRAFTING ISSUES

- **Disallowable Instrument DI2019-26 being the Legal Aid (Commissioner—Law Society Nominee) Appointment 2019 made under section 16 of the *Legal Aid Act 1977* appoints a specified person as a part-time member and commissioner of the Board of the Legal Aid Commission.**
- **Disallowable Instrument DI2019-27 being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2019 made under section 16 of the *Legal Aid Act 1977* appoints a specified person, nominated by the executive committee of the ACT Council of Social Services, as a part-time member and commissioner of the Board of the Legal Aid Commission.**

Each of the instruments mentioned above appoints, under section 16 of the *Legal Aid Act 1977*, a specified person as a “part-time member and commissioner” of the Board of the Legal Aid Commission. The first instrument appoints the specified person under subparagraph 19(1)(c)(iii) of the *Legal Aid Act*, which allows the Minister to appoint “1 member is chosen from a panel of not less than 3 people nominated by the council of the law society”. The second instrument appoints the specified person under subparagraph 16(1)(c)(iv) of the *Legal Aid Act*, which allows the Minister to appoint “1 member is chosen from a panel of not less than 3 people nominated by the executive committee of the Australian Capital Territory Council of Social Service Inc”.

The Committee notes with approval that, in each case, the explanatory statement for the instrument correctly reflects the empowering provision, confirming that the specified person was chosen from a panel of three people nominated by the relevant entity. The Committee also notes that (in accordance with the Committee's oft-stated requirements) the explanatory statement indicates that the specified person is not a public servant. The explanatory statement for the second instrument contains a similar statement. However, the statement is precisely the same as the statement in the explanatory statement for the first instrument, ie the statement relates to the first specified person, rather than to the specified person appointed by the second instrument.

Evidently, the explanatory statement for the first instrument has been used as a "template" or "precedent" for the drafting of the explanatory statement for the second instrument, without all the necessary modifications being made. In the Committee's publication entitled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#)¹, the Committee cautions against this approach, stating:

ISSUES ARISING FROM THE USE OF TEMPLATES AND PRECEDENTS

The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only 1 person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the Explanatory Statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or Explanatory Statement is adapted to fit the new situation. The Committee accepts that instruments and Explanatory Statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

The Committee seeks the Minister's assurance that the person appointed by the second instrument mentioned above is not a public servant.

This comment requires a response from the Minister.

The Committee also notes that the Legal Aid Act does not formally provide for the appointment of a "part-time member", as such. The "part-time" element of the appointment arises from subsection 16(4) of the Legal Aid Act, which provides that "[a] person appointed as a member by the Minister is appointed on a part-time basis".

The comment immediately above does not require a response from the Minister.

DRAFTING ISSUE

- **Disallowable Instrument DI2019-32 being the Land Tax (Affordable Community Housing) Determination 2019 (No 1) made under section 13A of the *Land Tax Act 2004* determines the eligibility criteria that an owner of a parcel of land must satisfy to be eligible for an exemption under section 13A of the Act.**

¹https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

This instrument is made under paragraph 13A(5)(a) of the *Land Tax Act 2004*, which allows the Minister to determine criteria that an owner of a parcel of land must satisfy before being eligible for an exemption from land tax, in relation to land provided for affordable community housing. Subsection 13A(5) provides:

- (5) The Minister may determine—
 - (a) criteria that an owner of a parcel of land must satisfy before being eligible for an exemption under this section; and
 - (b) 1 or more of the following:
 - (i) the maximum number of parcels of land that are entitled to an exemption under this section;
 - (ii) the maximum value of land tax that may be exempted under this section;
 - (iii) the maximum number of parcels of land for which an owner is entitled to an exemption under this section.

Section 5 of the instrument exercises the power in paragraph 13A(5)(b) of the Land Tax Act. It provides:

5 Determination—maximum parcels or value

For the purposes of section 13A(5)(b) of the Act, I determine that—

- (a) The maximum number of parcels of land that are entitled to an exemption under section 13A of the *Land Tax Act 2004* is:
 - (1) 100 parcels of land in total for the period commencing from the commencement date of this instrument to 30 June 2021, inclusive; and
 - (2) For the purposes of this section, the Commissioner for ACT Revenue will, after consulting with the Director-General of the Environment Planning and Sustainable Development Directorate, allocate an exemption to an eligible parcel provided the total number of parcels would not exceed the number in section 5(a)(1).

The Committee considers that the meaning of section 5, above, is not clear. The power in the empowering provision (ie paragraph 13A(5)(b) of the Land Tax Act) is to determine maximum numbers of parcels that are entitled to an exemption, the maximum value of land that may be exempted and the maximum number of parcels in relation to which an owner may be granted exemption. It is not clear how paragraph 5(a)(2) relates to that power. It seems merely to be a statement that the Commissioner for ACT Revenue (in consultation with the Director-General of the Environment Planning and Sustainable Development Directorate) will not allocate an exemption to an eligible parcel if it would mean that the number of parcels and land specified in paragraph 5(a)(1) would be exceeded. This seems to be merely a statement that the Commissioner will comply with the law. However, the Committee may be missing something.

The Committee seeks the Minister’s advice in relation to the intended meaning of paragraph 5(a)(2) of the instrument mentioned above.

This comment requires a response from the Minister.

HAS THIS INSTRUMENT BEEN VALIDLY MADE?

- **Disallowable Instrument DI2019-33 being the Domestic Animals (Cat Containment) Declaration 2019 (No 1) made under section 81 of the *Domestic Animals Act 2000* revokes DI2018-220 and declares specified areas of land as cat containment areas.**

This instrument declares cat containment areas, for section 81 of the *Domestic Animals Act 2000*.

Section 81 provides:

81 Declaration of cat containment

(1) If the Minister is satisfied that cats in an area are a serious threat to native flora or fauna in the area, the Minister may declare the area to be an area where cats must be confined to their keeper’s or carer’s premises at all times or during stated times.

(2) A declaration under this section is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(3) Unless a declaration is disallowed by the Legislative Assembly, the declaration commences—

(a) on the day after the last day when it could have been disallowed; or

(b) if the declaration provides for a later date or time of commencement—on that date or at that time.

(4) The Minister must give additional public notice of the making of a declaration under this section.

Note **Public notice** means notice on an ACT government website or in a daily newspaper circulating in the ACT (see Legislation Act, dict, pt 1). The requirement in s (4) is in addition to the requirement for notification on the legislation register as a disallowable instrument.

The Committee notes that the explanatory statement for the instrument states:

Before declaring a cat containment area, section 81(4) of the Act requires the Minister to give additional public notice of the making of the declaration.

However, there is no indication (in the explanatory statement) that the Minister has *given* the relevant “additional public notice”.

The Committee seeks the Minister’s assurance that an “additional public notice” has been given, for the instrument mentioned above, for subsection 81(4) of the *Domestic Animals Act 2000*.

DRAFTING ISSUES

- **Disallowable Instrument DI2019-37 being the Water Resources Environmental Flow Guidelines 2019 made under section 12 of the *Water Resources Act 2007* revokes DI2013-44 and approves the environmental flow requirements needed to maintain aquatic ecosystems.**

This instrument approves “environmental flow guidelines”, for section 12 of the *Water Resources Act 2007*. The substantive guidelines are set out in Schedule 1 to the instrument. The Committee notes that Schedule 1, as approved by the Minister and published on the ACT Legislation Register, appears to contain (in addition to several apparent typographical errors) various (unresolved) drafting notes, some indicated by question-marks.

The Committee notes the following passages from Schedule 1 (by reference to the pagination on the document that appears on the ACT Legislation Register, as the hard-copy document is not paginated):

- “(or is flow from Paddy’s River sufficient?)”—page 92;
- “Riparian veg removed?”—page 109;
- “was not in feb ver”—page 109;
- “1. The rationale for ?most? why only a rationale for most of the changes to the above table since the 2013 Guidelines are outlined in Appendix 3.”—page 113.

The meaning of the passages mentioned above is not clear to the Committee, in the context of their appearance in Schedule 1.

The Committee seeks the Minister’s advice in relation to the passages mentioned above, particularly as to how those passages affect the operation of the relevant parts of Schedule 1.

This comment requires a response from the Minister.

IS THIS INSTRUMENT VALIDLY MADE?

- **Disallowable Instrument DI2019-39 being the *Water Resources (Water Available from Areas) Determination 2019* made under section 17 of the *Water Resources Act 2007* revokes DI2007-191 and determines the total amounts of surface water and ground water that are available for taking from ACT water management areas.**

This instrument, made under section 17 of the *Water Resources Act 2007*, determines the amounts of surface and ground water available from areas supplying water for the Australian Capital Territory. Section 17 provides:

17 Amounts of water available from areas

- (1) The Minister must determine—
 - (a) the total amount of surface water that is available for taking in each water management area; and
 - (b) the total amount of ground water that is available for taking in each water management area.
- (2) The amounts must be determined taking into account—
 - (a) the environmental flow guidelines; and

- (b) the total water resources of the Territory; and
- (c) any investigations undertaken by the authority to establish sustainable yields for the water management area.
- (3) The Minister may also determine, for any water management area, an amount of the water determined under subsection (1) that is to be reserved for future use.
- (4) If the Minister makes a determination reducing the amount of water reserved for future use under subsection (3), the determination may state the reason for the reduction.
- (5) A determination under this section is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

The Committee notes that, under subsection 17(1), the Minister is required to determine, it would appear, separately, the total amount of surface water that is available for taking, in each water management area and the total amount of ground water that is available for taking, in each water management area. However, the Committee notes that, in table 1 of Schedule 1 to the instrument (which operates as the substantive determination of the water available from the areas in question), in the second column, the amounts set out are stated in terms of “Total ACT controlled surface water plus ground water (ML/yr)”. That is, in that column of the table, the Minister appears to have aggregated the two totals in relation to which a determination is required. The Committee queries whether this demonstrates a proper (and valid) exercise of the power in subsection 17(1).

In making this comment, the Committee notes that the fourth and fifth columns of the table set out, respectively, the “Maximum surface water available for taking (ML/yr)” and the “Maximum ground water available for taking (ML/yr)”. However, it is not clear that determining “maximum” amounts can operate to exercise a power to determine *total* amounts, in relation to surface water and ground water, respectively.

The Committee seeks the Minister’s advice, in relation to the issues mentioned above.

This comment requires a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for the Environment and Heritage, dated 3 May 2019, in relation to comments made in Scrutiny Report 30 concerning the Water Resources Amendment Bill 2019.
- The Attorney-General, dated 9 May 2019, in relation to comments made in Scrutiny Report 29 concerning the Justice and Community Safety Legislation Amendment Bill 2019.

- The Minister for Community Services, undated, in relation to comments made in Scrutiny Report 30 concerning the Working with Vulnerable People (Background Checking) Amendment Bill 2019.

[These responses](#)² can be viewed online.

- The Minister for City Services, dated 24 May 2019, in relation to comments made in Scrutiny Report 30 concerning DI2019-24—Veterinary Practice (Board) Appointment 2019 (No 1).

[This response](#)³ can be viewed online.

The Committee wishes to thank the Minister for the Environment and Heritage, the Attorney-General, the Minister for Community Services and the Minister for City Services for their helpful responses.

Giulia Jones MLA
Chair

28 May 2019

² <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>.

³ <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>.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
 - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
 - Electoral Amendment Bill 2018 (Private Member's amendments).
- **Report 30, dated 30 April 2019**
 - Gaming Legislation Amendment Bill 2019
 - Health Practitioner Regulation National Law and Other Legislation Amendment Act 2019 (Qld Act No 3 of 2019)